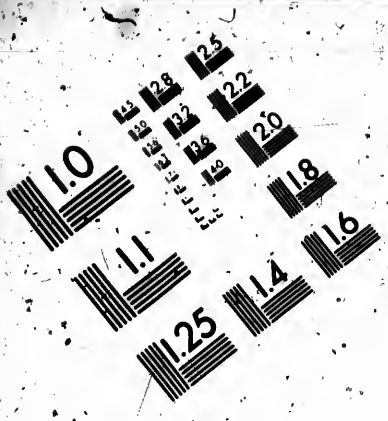


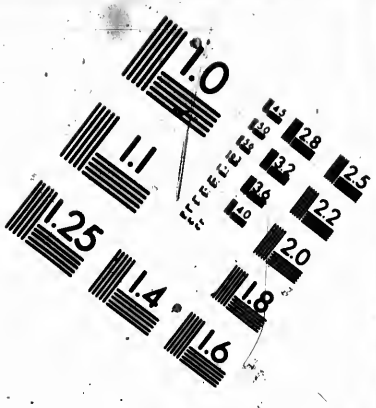
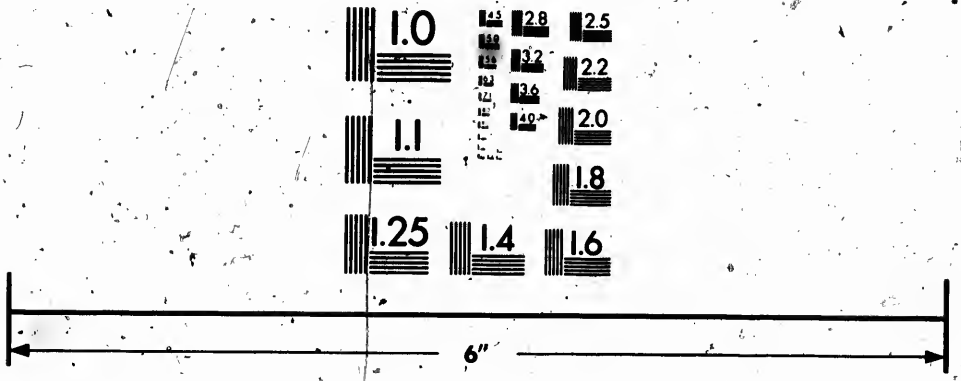
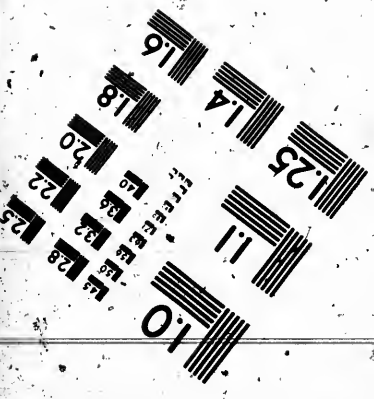
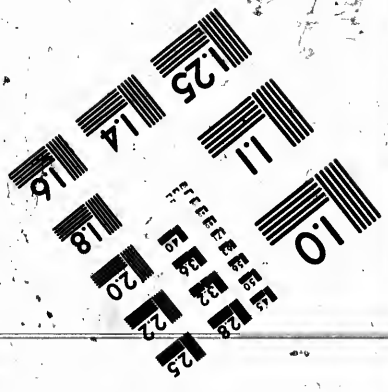


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [ ] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

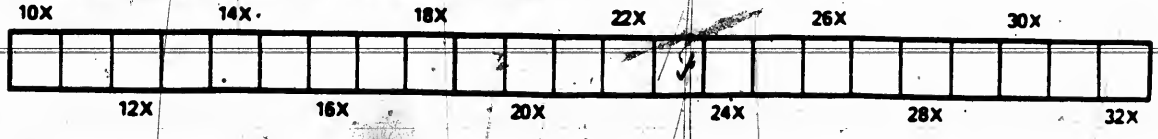
- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [ ] Quality of print varies/ Qualité inégale de l'impression
- [ ] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [x] Additional comments:/ Commentaires supplémentaires: Various pagings. There are some creases in the middle of pages. Pagination multiple. Il y a des plis dans le milieu des pages.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.



The copy filmed here has been reproduced thanks to the generosity of:

Law Library
University of Western Ontario

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

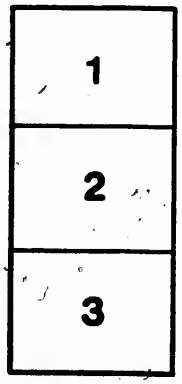
Law Library
University of Western Ontario

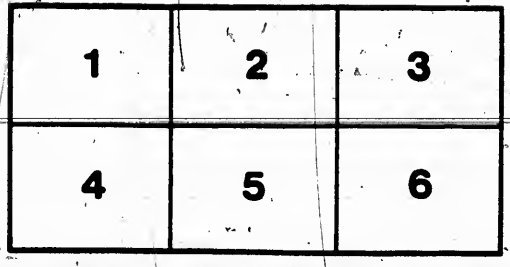
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.





32X

THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. XVIII.

Editorial Committee:

STRACHAN BETHUNE, Q.C., JOHN L. MORRIS, JAMES KIRBY, D.C.L., LL.D.

THE INDICES:

BY STRACHAN BETHUNE, Q.C.

Montreal:

LOVELL PRINTING AND PUBLISHING COMPANY.

1874.

Names
Index
Report
Index

TABLE OF CONTENTS.

	Page.
Names of Contributors	
Index to Cases	iv—vii
Report of Cases	1—336
Index to Principal Matters in Reports	i—xiii

CONTRIBUTORS TO VOL. XVIII.

STRACHAN BETHUNE, Q.C.
HOLT, IRVINE & PEMBERTON.
H. W. CHAGNON.
EDMUND BARNARD.
J. K. ELLIOTT.
JOHN L. MORRIS.
JOHN A. PERKINS.
JAMES KIRBY.
GONZALVE DOUTRE.
J. G. D'AMOUR.
I. T. WOTHERSPOON.

INDEX

TO CASES REPORTED IN THE EIGHTEENTH VOLUME

OF THE

LOWER CANADA JURIST.

	PAGE.
Aurele vs. Durocher	197
Bagg vs. The Mayor et al. of Montreal	211
Beard vs. McLennan	76, 78
Belanger vs. Collin	78
" vs. McCarthy, and The Imperial Ins. Co., T. S.	138
Benoit et al. vs. Benoit et al.	286
Bernier, Applt., and Gaumond, Respdt.	209
Bickford, Applt., and Kerr, Respdt.	169
Blain vs. The Corporation of the Village of Granby	182
Brewster et al., Applts., and Starnes et al., Respdts.	195
Brossart, Applt., and Tison et al., Respdts.	54
Brown et al., Applts., and The Mayor et al. of Montreal, Respdts.	146
Bulmer et al. vs. Browne	136
Caverhill et al., Petrs., and Ryan, Respdt.	323
Colson et al. vs. Ash, and Torrance et al., plaintiffs *par repos d'instce*	191, 281
Commercial (The) Union Ass. Co., Applts., and The Canada Iron Mining and Manufacturing Co., Respdts.	80
Cordingly vs. Nield	204
Cournoyer vs. Tranchemontagne et al., and Barthe, Int. party	335
Couturier vs. Brassard et al.	8
Cox, Applt., and Patton, Respdt.	316
Cushing vs. The School Trustees of The Municipality of Acton Vale	21
Cuvillier et al. vs. Gilbert et al.	22
Darling et al. vs. St. Julien et al.	190
De Gaspé et al. vs. Asselin, and De Gaspé et al., Oppts.	112
Douglas et al., Applts., and Ritchie et al., Respdts.	274
Downey, Doherty et al. (*In re*) and Lajoie, Petr	283
Dubuc vs. Champagne	224
Elliott vs. St. Julien, and St. Julien, Oppt.	11
Eslnhart (*In re*), Insolvent	73
Ethier vs. Homier	83
Exparte The G. T. R. Co. and Exp. Brydges	141
" Louis Hebert, for *habeas corpus*	156
" Johansen et al., for " "	61
" Blain, for writ of prohibition, and The Corporation of the Village of Granby, Respdt.	180
" Smith, for *mandamus*, and Sexton, Respdt.	193
" Brown, for *certiorari*, and Sexton, *mis en cause*	194
" Cahill, for *habeas corpus*	270

	PAGE.
Forbes et al. vs. Lewis	
Ford et al. vs. Auger et al.	74
Gauthier, Applt., and Valois, Respdt.	206
Gervais vs. Gareau	26
Gibeau vs. Dupuis	220
Goodwin, Applt., and The Lancashire Fire and Life Ins. Co., Respdt.	101
Gordon (The)	1
Grand Trunk (The) R. W. Co., Applt., and Atwater et al., Respdts.	109
Hargrave vs. Clouston et al.	53
Harold Haarfager (The)	290
Hart et al. vs. The Northern Ins. Co.	303
Hillsburgh vs. Mayer	189
Hope, Applt., and Franck, Respdt.	69
Houle vs. Godère, and Dumesnil, *mis en cause*	28
Humbert et al. vs. Mignot	151
Johnson, Applt., and O'Halloran, Respdt.	217
Johnston vs. The Minister and Trustees of St. Andrew's Church, Montreal	221
Jubinville et al., Applts., and The Bank of B. N. America, Respdt.	113
Kellond, Applt., and Reed, Respdt.	237
Kerby, Applt., and Ross et al., Respdts., and Stevenson, Petr. *par repos d'instance*	309
Labelle vs. Walker *et vir*	148
Lafond et al., Applts., and Rankin, Respdt.	117
Lamontagne vs. Webster	62
Langlois vs. Vincent	152
Latham vs. Martin	160
Latona (The)	287
Lebœuf & Viaux, and Viaux, *mis en cause* and Petr.	185
Legaré vs. The Queen Ins. Co.	214
Lewis et al. vs. Jeffrey et al.	134
Lord vs. Bazinet et al., and Bazinet et al., Oppts.	132
McCarville (*In re*) Ins. and Lajoie, Assignee, and Hudson et al., Petrs.	9
McDonald et al. vs. Prémont *et ux*, and Lague et al., Oppts.	139
McNeven vs. McAndrew	295
Marchessault vs. Gregoire	70
Marlow vs. Lajeunesse et al.	140
Mayor, &c., of Montreal, Applts., and Drummond, Respdt.	188
" " " " Applts., and Doolan, Respdt.	76
" " " " Applts., and Drummond, Respdt.	124
Miller vs. Demeule	225
Moisic (The) Iron Co., Applt., and Olsen *alias* Jacobsen, Respdt.	12
Montreal (*In re The*) Patent Guano Co., and Maude et al., Petrs.	29
Muir et al., Applts., and Muir, Respdt.	129
Nault vs. Charby et al.	96
O'Halloran vs. Kennedy	19
Paige, Petr., and Griffith, Respdt.	284
Pelletier vs. Ratelle	119
Prévost et al. vs. Ritchot	75
" " Applts., and Drolet, Respdt.	72
Prince et al., Applts., and Morin, Respdt.	300
Privett vs. Sexton et al.	208
Regina vs. Dougall et al.	192
" vs. Brydges	85
" vs. Coote	94
" vs. Chamaillard	103
" vs. Tremblay	149
" vs. Lowenbruck	158
" vs. Atkin	212
	213

	PAGE.
Regina vs. Dougall et al	242
" vs. Guay	306
Riddell vs. Reay	130
Rochon vs. Mongenais	218
Rogers et al., Applts., and Sancer et al., Respdts	57
Salvas vs. Levreau, and Gendron, Oppt., and Stewart, Assignee, Petr, and Taché, Shff	293
Schefler et ux. vs. Fauteux	216
Stark et al. (*In re*), Insolvents	73, 288
St. Charles, Appt., and Doutre, Respdt	253
Taylor vs. The Mayor et al. of Montreal	210
Urquhart vs. Moore	71
U. S. Government (In the matter of), for the extradition of Israel Rosenbaum	200
Vilbon, Applt., and Marsouin, Respdt	249
Warner vs. Huss	184
Water Works (The) Co., of Three Rivers, Applt., and Dostaler, Respdt	196
Watson, Applt., and Perkins, Respdt	261
Wurtele vs. Gauthier	154

THE

LOWER CANADA JURIST.

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 21ST JUNE, 1873.

Coram DUVAL, C. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 17.

GOODWIN,

APPELLANT;

AND

THE LANCASHIRE FIRE AND LIFE INSURANCE COMPANY,

RESPONDENTS.

HELD:—1. That upon a Fire Insurance Company's local agent, acting within the scope of his powers and according to usage with such Company, receiving the premium for an insurance and granting an interim or deposit receipt, subject to the approval of the chief officer of such Company, and the conditions of the Company's policies, the applicant is insured until he has notice that the risk is declined.

2. *Semble*, That the mailing of the notice from the chief manager of the Company, at the head office, to the local agent, before the fire occurs, but which reaches him and is communicated to the insured after the fire, declining the risk, is insufficient, and the liability of the Company continues until communication of non-acceptance of the application reaches the insured.

3. That when a party applies to one agent of an Insurance Company and is refused insurance, and afterwards applies to another agent of the same Company, and secures insurance through him in the ordinary mode and preceded by the usual inquiries, the fact that such party does not mention that he had before applied to another agent of the same Company for insurance and was refused, is not the concealment of a material fact to render the insurance void.

4. That when a Company absolutely repudiates the insurance effected by deposit receipt, and when the policy has not issued, the right of action accrues at once, and there is no necessity of giving the preliminary notices and conforming to the delay and other conditions precedent, in case of loss, indorsed upon the Company's policies.

This was an appeal from the judgment rendered by the Court of Review, at Montreal, on the 31st May, 1872, which reversed a judgment of the Superior Court at Sherbrooke, in favor of the appellant, and which is reported in the 16th vol. of the Jurist, p. 298 et seq.

Brooks, for appellant:—This is in the nature of an action of damages for refusal to execute a policy. The defendants are asked for a policy and refuse it. The plaintiff sues them to pay his loss as they have accepted his premium, and they say he cannot recover because he has not complied with the conditions endorsed on the policy, which they refuse to give him. This is not logical or reasonable.

Goodwin and The Lancashire Fire and Life Insurance Company.

The case of Perkins vs. The Washington Insurance Co., cited in Phillips on Insurance, is similar to this, except in that case the agent was only the surveyor of the Company and not entitled to take risks, and bind the Company finally, while E. P. Felton in the present case was distinctly authorized to do so, by general instructions, and specially authorized to take this particular risk. The Washington Insurance Co. in New York were in the practice of taking risks against fire in Georgia, and had taken a number, for which the premium had been forwarded by Mr. Russell. Russell having had a negotiation with Perkins respecting an insurance on his stock of goods, on the 5th January, 1820, received from Perkins the premium for the insurance of $5000 on his stock of goods, to commence from that day, for which he gave Perkins a receipt, and Perkins at the same time paid for the policy and for Russell's services in surveying the property insured. In signing the receipt Russell described himself as agent of the Company. On 11th January, and before the Insurance Company had received the premium from Russell or made out the policy, the property was consumed in the great fire that took place at Savannah, and thereupon the Company refused to make out a policy. The question accordingly arose, whether the Company had through Russell made an agreement to insure the policy. The question involved was the agency of Russell to effect the insurance without approval of the Company. Chancellor Kent thought that he could not as his agency was limited. An appeal was made from his decision to the Supreme Court and the decision reversed, on the ground that the Company had, in several instances, sanctioned insurances effected by him. Justice Woodworth said: "It cannot be contended that the Company reserved the right of arbitrarily refusing to subscribe a policy where every prerequisite which they had themselves prescribed had been fairly and honestly complied with." Colden, Justice, said, "The question is, what powers were the citizens of Savannah justified, from the acts of Russell and the Insurance Co., in presuming he possessed? It might have been very far from their intention to authorize their agent to bind them to insurance. It might have been very imprudent in them to have renounced the right of deliberating on the expediency of taking a risk; but if the directors have given heir agent, or suffered him to exercise, too large power, they must bear the consequences. If the premium had been paid at the office in New York, and the President or Secretary had signed the receipt, the insurance would have been as binding as if the policy had been executed. Receipts of this nature are in common use, they are intended to give immediate effect to the insurance, and supply the place of a policy until one can be prepared." Parsons, in his work on Contracts, says: "When the offer to insure has been accepted, and the applicant has complied with all the conditions imposed, the risk commences, although the policy has not been issued." Our Civil Code, Art. 2181, declares the same thing. Angell on Insurance says: "Where the agreement to insure is complete, equity will compel the execution of a policy, or, if a loss has occurred, decree payment." The policy is not made, and the assured is in the position of a claimant for damages, or for his loss as a general risk, subject to general rules of law regarding insurance, but not subject to particular conditions endorsed on a policy which defendants declined to issue. Defendants cannot at the same time say,

Goodwin and The Lancashire Fire and Life Insurance Company.

"we did not take your risk, and it is true we took the risk but you have sued prematurely." Respecting the *motif* of the judges in review, "that plaintiff concealed a material fact from defendants' agent, E. P. Felton, in failing to disclose to him that he, plaintiff, had already made application for insurance to defendants through their agent Hobson, which application they had rejected," it is to be observed that it appears in evidence that plaintiff not being much versed in such matters was not aware for what particular company either of these persons was agent. He merely knew them to be agents of some Insurance Company. There was, in fact, no fraudulent intent. In law, it is submitted this was not a material fact. To make this circumstance material, there must be fraudulent concealment; and, more than this, such fraudulent concealment must have been of a fact that would have increased the risk (C. C., Art. 2487.)

"In a question of concealment," says Judge Story, "the fact alleged by the insurers to have been concealed must be proved to be material to the risk. This is necessary, neither the Court nor jury can presume this." In a case, Lyon vs. Commercial Insurance Company, cited in Parsons on Contracts, where an Insurance Company objected to insure in the vicinity of gambling houses, and there being one on the premises insured, the applicant did not disclose the fact, it was held to be a question for the jury whether the risk was materially increased by such occupancy. Besides the insured is not obliged to represent facts known to the insurer—Civil Code, Article 2486. Regarding the other *motif* of the Court of Review, that the conditions of the policies requiring preliminary proofs not being complied with, and suit was commenced before the lapse of 60 days, it is submitted that these were waived by defendants' acts (Civil Code, Article 2478). Parsons says: "The policies in common use make the loss payable after proof and adjustment of loss, but if the payment is refused the want of adjustment is no defence." This is conformable to an elementary principle in contracts: where a promissor does an act which hinders or obviates necessity of a promisee's performing a condition precedent, the promisee is released from such performance. And as to the 60 days, it was held in the case of Dill vs. La Compagnie d'Assurance de Quebec, that in any case it is only minatory.

Authorities cited by appellant:—

2 Phillips on Insurance, page 5.
2 Parsons on Contracts, page 420.
Civil Code, 2481.
Angell on Insurance, Nos. 34, 35, 36.
Civil Code, 2487.
2 Phillips on Insurance, page 504.
Lyon vs. Commercial Ins. Co, Rob. La. 266.
2 Parsons on Contracts, p. 435, note.
Pothier, Assurance, No. 195.
Civil Code, 2485.
Civil Code, 2478.
2 Parsons on Contracts, 416.
Chitty on Contracts, pp, 737-8.
Collett vs. Morrison, 12 Eng. Law and Eq. Rep., page 171.
1 Revue de Juris. 113.

Borlase for respondents:—Mr. Felton states positively that plaintiff never

Goodwin and The Lancashire Fire and Life Insurance Company.

informed him that he had made any application to the defendants, through Mr. Hodgson or otherwise, for insurance in their Company, which application had been rejected; and adds, "if he had done so, I would not have accepted his application." This evidently is such a misrepresentation or concealment as is sufficient of itself to annul the contract. "The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium."—C.C. 2485. The next article declares that such fraudulent concealment renders the contract null. The plaintiff seems to have felt the force of this, for he attempted to prove that he was so ignorant and careless a man of business as not to know one Insurance Company from another. He evidently does not believe in the maxim "*ignorantia legis neminem excusat.*" The defendants contend that, taking the plaintiff's own version of his conduct, it is characterised by such gross negligence as to amount to a fraud, in law, the *lata culpa* of the jurists, which is presumptive of fraud, and undistinguishable from it, even although there may possibly have been no intention, on his part, wilfully to deceive. See Pothier, Depot No. 23. "If a material misrepresentation be made, although it be not embodied in the contract, it is considered as a constructive or legal fraud, although it be made without any intention to deceive, but merely through carelessness, mistake, or ignorance; for if a party be actually deceived by a misrepresentation, the practical result is the same, whether it were a wilful fraud or not." —Story on Contracts, No. 506. "All the authorities concerning matters of insurance concur in the position that, if the concealment is material, it will avoid the policy notwithstanding the assured did not intend to commit any fraud. A concealment which is only the effect of accident, inadvertence or mistake is equally fatal to the contract as if it were designed."—Angell on Insurance, No. 175; Pothier, Assurance, No. 196. The alleged contract upon which plaintiff proceeds was made by error, and therefore null.—C. C., Nos. 991, 992. It is further to be remarked that the printed instructions furnished to Mr. Felton, in common with other agents of defendants, provide "that applications for insurances on property where steam is used for propelling machinery must be approved by the Chief Office at Montreal before the Company will be liable for loss or damage," and thus Mr. Felton, in accepting this risk, was not merely exceeding the limits of his territory, but was acting in excess of his powers and in direct violation of his instructions. The conditions recited in the second plea of defendants are proved to be the ordinary conditions of all policies issued by the defendants, and are some of the conditions referred to in the interim receipt as "the conditions of the Company's policies." The plaintiff never, previous to the commencement of this suit, gave the defendants any notice in writing of the loss or damage sustained by him by reason of the fire, nor has he given them any account of loss, and he has sued prior to the expiration of 60 days. It is obvious that his action is premature. The *considérants* of the judges in review are well founded, and the defendants are at a loss to understand how the Court below, in the first instance, could have come to the conclusion that, in the event of "no policy being issued, the plaintiff was not obliged to comply with the conditions usually endorsed on the policies of the Company," when the receipt upon

Goodwin and The Lancashire Fire and Life Insurance Company.

which plaintiff proceeds, and which is the sole evidence of contract between the parties, states, in express terms, that the insurance thereby effected is "Subject to the conditions of the Company's policies." The plaintiff never applied for a copy of the conditions; had he done so the case might have been different. It is well settled that the performance of this and similar requirements is a condition precedent to the payment of any loss—Angell on Insurance, Nos. 224–227; 2 Greenleaf on Evidence, No. 406; Scott vs. The Phœnix Insurance Co., in appeal, Stuart's Rep. p. 354. In Racine vs. The Equitable Insurance Co. of London, 6 Jurist, p. 89, it was held that the furnishing of a certificate, as required by the condition of a policy of insurance, of three respectable persons, that they believed the loss had not occurred by fraud, is a condition precedent without compliance with which the assured cannot recover. In Western Insurance Co. vs. Atwell, 2 Jurist, p. 181, it was held that the condition usually endorsed on policies of insurance respecting double insurance is binding in law, and that its performance will not be held to be waived by the Company, if their agent, on being notified of such double insurance after the fire, makes no specific objection to the claim of the assured on that ground.

See also, as to necessity of preliminary proofs, Cinq-mars vs. The Equitable Fire Insurance Company, 15 Upper Canada Queen's Bench, p. 147. Some American authorities were cited by appellant to the effect that a total repudiation of the claim of the insured is a waiver of any imperfection in the preliminary proof and notices, but these cases do not appear to be in accordance with the laws either of England or this Province, and were examined in the case of Racine vs. The Equitable, cited above, and not adopted by the Court. In any case, they only refer to cases where the proof is informal or imperfect, not where, as in this case, there is a total absence of proof. Supposing the doctrine to be true, it would not justify the appellant in bringing the action at the time he did. It would certainly be no excuse for suing on an obligation six months before the amount payable thereunder became due, to say that the debtor had declared that he did not admit the validity of the obligation, and would not pay it at any time. The condition endorsed on the policy, that no suit or action shall be sustainable for the recovery of any claim under the policy, unless commenced within the term of twelve months next after the loss shall have occurred, is a complete bar to any such suit instituted after the lapse of that term—Cornell vs. Liverpool and London Insurance Company, 14 Jurist, p. 256.

Brooks in reply:—The authorities cited in the opening anticipated the arguments of respondents' counsel. His authorities, with reference to the necessity of complying with terms endorsed on policies, have reference to cases where policies have issued. He adduces no authority to controvert those cited which so clearly establish the position that where a company wholly repudiate an insurance these preliminary proceedings are not binding. His authorities to establish that the concealment of a material fact whether fraudulently or inadvertently is fatal, do not sustain his position in this case because he has not shewn that the fact was material. The reason why the Head Office declined the insurance when it was applied for through Hobson was, as Hobson states, because there was an engine in the building. In the second case Felton informed him of

Goodwin and The Lancashire Fire and Life Insurance Company.

this, and the fixed rate of premium. It was not a personal objection. The nature of the risk was taken into consideration in both cases, and there was no concealment of any material fact which could reasonably influence the Company to accept or decline the risk.

The judgment in appeal maintained in all particulars the judgment of the Superior Court at Sherbrooke and reversed that in review. It was pronounced as follows:—

BADGLEY, J.—On the 5th of October, 1870, the appellant applied to the respondents' agent at Sherbrooke for insurance upon his property for $2,000, and Mr. Felton, the agent, after examination of the premises, accepted the insurance, and gave the respondents the usual *interim* receipt for the premium paid of $75, and upon the conditions therein stated. (The receipt is given in 16 Jurist, 298.)

The agent transmitted the application to the Head Office at Montreal, which it is alleged was received there on Saturday, the 8th day of October, and refused there on the 10th, when the refusal was posted at Montreal and received at Sherbrooke about noon of the 11th. In the meantime the subject of the insurance had been destroyed by fire, at midnight of 10–11, or about one o'clock in the morning of the 11th, and on the same day the agent informed the Head Office at Montreal of the loss, and promptly received from head agent the following reply:

"Montreal, 12th October, 1870.

"E. P. FELTON, Esq.

"DEAR SIR,—I am astonished at the tenor of your note, which is this moment "at hand. *I cannot conceive that you have taken the Risk referred to as des-* "*troyed while the application was before us unaccepted.* I did not direct you "to take this tannery or any tannery in particular in my letter of 20th August, "to which you have referred, because you had not at that time given the name "of the person or any description of the property. Your letter and application, "dated the 5th, reached this on Saturday and was replied to on Monday, stating "that for several reasons we declined the Risk. *I do hope you have not com-* "*mitted yourself or the Company in this matter*, and further that you will not "do so.

"It is not customary for our agents to take hazardous risks before submitting "the application to us.

"Yours truly,

"WM. HOBBS."

At the time of the fire the appellant was also insured in the North British for $1,000, and immediately upon being notified of the accident, agents from the North British and the Lancashire visited the place of the fire, and after inquiry estimated the total loss at $2,500, and they considered that that loss should be shared by each company in the proportion of one-third for the North British and two-thirds for the Lancashire. The former paid their share of the loss, the latter refused, and the action followed based upon the receipt for recovery of the insurance money. The respondents pleaded that Felton's agency at Sherbrooke was local, and did not extend beyond Cookshire, the place of the fire. The

evidence proves that the agency was not so restricted, and that the Company have recognized his acts for insurances more beyond Sherbrooke than Cookshire, and indeed upon his application to know their terms for this very property at Cookshire, so mentioned in Felton's letter of application, they gave him their terms for insurance, and the respondents' witness, Hobbs, proves that Felton's agency allowed him to submit risks at a considerable distance from Sherbrooke. Cookshire is 18 miles distant. The second plea is the appellant's previous application in August for insurance on same property, and after giving the local agent, Hobson, the Company's terms, the application was then declined. This was nearly two months before the interim insurance with Mr. Felton, and there is no fact proved indicating fraud by the appellant, whilst it is manifest that his not intimating to Mr. Felton his previous application and its rejection is not a concealment of a fact material to the risk. It is proved that the appellant was an ignorant and not a business man, and, in fact, this insurance was not so much effected by himself as through a person of more experience than himself, Mr. Nixon, his creditor. The plea of insufficient agency cannot hold, because agents for Insurance offices are not otherwise considered in law than those for other commercial parties, and their acts, allowed by their principals, cannot be set aside upon the arbitrary refusal of the principal to carry them out. The second plea is unfounded; the personal concealment alleged of his previous application is not the wrongful concealment of a fact which influenced the risk, because the Company's terms for the risk settled by themselves were adopted, and in such case the Insurance Company had no right arbitrarily to refuse it from merely personal unnamed motives against the appellant. The third plea is that appellant did not comply with the conditions of the Company's policies as to notice of loss and other preliminary formalities as to preliminary proof of loss. The proof of the loss was clearly established by the two agents who settled the figure. But the Company cannot reasonably complain that appellant did not fulfil their conditions on the policy, because they would not recognize any contract between them and the appellant, and never furnished him with their policy. Hobbs, the witness, says, I have no reason to believe that plaintiff knew what was contained in our policies; we never sent him one. No other fraud is alleged against appellant except the alleged concealment. Assuming, then, that there is no fraud, it seems plain enough that the third plea cannot hold. Angell on Insurance, § 244, says, good faith and fair dealing are of the very essence of the contract of insurance, and hence an answer from insurers that they would not settle the claim in any way is a waiver of any imperfection in the preliminary proofs. So also notice that the Company decline the payment of the loss—not answerable—held to be unequivocal notification to plaintiff that his claims for indemnity would not be adjusted by the Company, and by necessary implication gives him to understand that all further offers of preliminary proof would be useless, a waiver in fact. So again at No. 246 the ground was that no obligation to insure the loss was ever entered into by the Company, the contract being incomplete at the time loss occurred. On this ground they refuse to issue the policy which would have imposed upon assured a strict compliance with its conditions, or its converse to recognize any obligation arising out of the arrange-

Goodwin and The Lancashire Fire and Life Insurance Company.

ment between the insured and their agent. The objection went to the foundation of the claim which, in connection with a refusal to issue the policy, superseded the necessity of producing the proofs, as their production would be a mere idle ceremony by the assured in further prosecution of his right. There was no reason for producing them as required by the conditions of the policy after the Company had denied the contract and refused the policy. The third plea is also untenable, and upon the whole there is no fraud imputable against the appellant and the amount of loss has been established, the appellant is entitled to hold his judgment for two-thirds of $2,500, the whole loss, say $1,666.66, awarded him by the original judgment, with costs of both Courts.

The following is the recorded judgment:—

Considering that there was no error in the original judgment rendered in this cause on the thirteenth day of September, 1871, by the Superior Court sitting at Sherbrooke upon the grounds and reasons in the said judgment mentioned; and considering that there is error in the judgment rendered on the 31st day of May, 1872, by the Court of Review sitting at Montreal, whereby the said original judgment was set aside; doth reverse and annul the said judgment of the Court of Review, and doth in all respects confirm the said original judgment of the 13th day of September, 1871, with costs, as well of the Court of Review aforesaid, as of this Court. (The Honorable Mr. Justice Monk dissenting.)

Judgment reversed.

Sanborn & Brooks, *S. W. Dorman*, } for appellant.
G. H. Borlase, for respondents.

(J.K.)

COUR DE CIRCUIT, 1873.

MURRAY BAY, 9 DECEMBRE, 1873.

Coram TASCHEREAU, H. E., J.

Couturier vs. Brassard et al.

JUGE:—Qu'une société entre un shérif, un avocat, et un marchand, pour l'exploitation d'un moulin à scie est une société commerciale.

TASCHEREAU, H. E., J.:—Les défendeurs, un shérif, un avocat, et un marchand, sont propriétaries d'un moulin à scie, pour l'exploitation duquel ils ont fait un acte de société le 26 juillet, 1872. Leurs opérations consistent uniquement à scier les billots qu'on apporte à leur moulin, et à les convertir en planches ou madriers, à tant par pied. Comme de raison, il ne font pas cela eux-mêmes, mais par des journaliers qu'ils engagent. Le demandeur réclame soixante et trois piastres pour ouvrages faits à ce moulin, et demande contre les défendeurs une condamnation solidaire.

Les défendeurs nient être sujets à cette solidarité, et prétendent que la société entre eux est une simple société civile. Je suis d'avis que cette prétention n'est pas fondée, et que leur société est une société commerciale.

L'article 1863 du Code Civil dit: "Les sociétés commerciales sont celles qui sont contractées pour quelque trafic, *fabrication*, ou autre affaire d'une nature

commerciale, soit qu'elle soit générale, ou limitée à une branche ou aventure spéciale."

Or les défendeurs se sont associés, pourquoi ? Pour la fabrication de planches et madriers. Ils ne peuvent prétendre que cette fabrication est accessoire à leurs occupations ordinaires. Ils n'achètent rien pour revendre, il est vrai, mais ils louent leurs employés pour en sous-louer ou revendre les services à ceux qui apportent à leur moulin des billots pour les faire scier, et ce, dans un but de spéculation. Les autorités françaises soumettent des opérations semblables à la juridiction de leurs tribunaux de commerce. " On ne pourrait refuser de " réputer commerciale l'opération d'un entrepreneur de filature qui convertirait " en fils la laine ou le coton qu'on lui confierait dans cette vue. Il en serait de " même d'un établissement de foulon, de blanchisseur, qui reçoivent les étoffes " ou les toiles de ceux qui les leur confient pour les préparer ou les blanchir." Pardessus, Droit Commercial, No. 35.

On voit, au Journal du palais, 1847, un arrêt de la Cour de Paris, du 9 avril, 1847, qui a jugé qu'une société formée pour la construction d'une villa sanitaire, destiné à recevoir des malades qui doivent y être traités par le magnétisme est une société commerciale.

La preuve du demandeur est complète par les admissions de Brassard, l'un des défendeurs, entendu comme témoin dans la cause: un associé lie ses co-associés par ses admissions. Les causes de Maguire *vs.* Scott, en appel, (7 L.C.R., p. 451) et de Fisher *vs.* Russell, (2 L. C. J., p. 191) Day, J., ont depuis longtemps établi cette jurisprudence.

Jugement contre les défendeurs conjointement et solidairement.

J. Perrault, pour le demandeur.

F. X. Frenette, pour les défendeurs.

(J.K.)

COUR DE CIRCUIT, 1873.

MONTREAL, 10 DECEMBRE, 1873.

Coram BERTHELOT, J.

No. 7215

Lord vs. Bazinet et al ; et Bazinet et al., Opposants,

JUGE:—1o. Qu'on ne peut se pourvoir par opposition, contre un jugement rendu en terme de la Cour de Circuit.

2o. Que l'art. 484 du C. P. C. ne donne lieu à l'opposition, que contre les jugements rendus par le greffier de la cour, en vertu des articles 89, 90, 91 & 92 du C. P. C., et non contre ceux rendus par le tribunal.

3o. Qu'une telle opposition sera rejetée sur simple motion, ce procédé étant usité en pareil cas.

La présente instance est une cause par *défaut*, dans laquelle jugement fut rendu par le tribunal, sur le serment du demandeur, le dix novembre dernier, et c'est contre ce jugement que les défendeurs se sont pourvus par opposition invoquant les arts. 91 et 484 du C. P. C.

Les Opposants allèguent pour seul et unique moyen au soutien de leur opposition que ce jugement a été rendu en conformité des dispositions de l'art. 91 du Code de Procédure Civile ; que cet article était le seul qui permit au demandeur

Lord vs. Rainet et al.

de prendre jugement sur son propre témoignage et qu'il leur était loisible de se pourvoir contre ce jugement, par voie d'opposition, en vertu de l'art. 484.

Le demandeur a répondu à cette opposition par une simple motion, alléguant que ce jugement a été rendu par le tribunal, Cour tenante, et non par le greffier, au greffe de la Cour; qu'il n'a été rendu en vertu d'aucune des dispositions des articles 89, 90, 91 et 92 du Code de Procédure Civile et ne peut être attaqué par opposition en vertu de l'art. 484, et demandant que l'opposition fût déclarée irrégulière et illégale et rejetée du dossier avec dépens.

Robidoux, pour les opposants, lors de la présentation de cette motion, fit valoir de nombreux arguments en faveur de l'opposition; il appuya surtout d'une manière toute particulière sur le prétendu fait, que le demandeur n'avait pu obtenir jugement sur son propre serment qu'en vertu de l'art. 91 du Code de Procédure Civile; cet article étant d'après ses prétentions, le seul qui permet un tel procédé. Il invoqua aussi la jurisprudence du tribunal et cita à l'appui de son opposition, deux jugements, dont l'un rendu le 7 novembre, 1872, dans la cause de Gauthier *vs.* Allard, et l'autre en date du 15 Mars, 1873, dans la cause de Vézeau *vs.* Beaupré, et termina son argumentation en soulevant une objection contre le mode employé par le demandeur pour attaquer l'opposition, prétendant, que la voie de la motion n'était pas celle qui aurait dû être adoptée: il censura le procédé, comme irrégulier, mais n'en indiqua aucun autre.

D'Amour, pour le demandeur, en réplique, dit que les arts. 91 et 484 invoqués par son adversaire n'ont aucune application aux causes jugées par le tribunal, mais seulement à celles où jugement a été rendu par le greffier de la Cour; il fit remarquer qu'avant l'existence du Code de Procédure Civile, la pratique constante de la Cour de Circuit, avait été de permettre aux demandeurs, en semblables causes, de prouver leur demandes par leur propre serment, et que rien dans le code n'indiquait aucun changement à cet égard.

Per Curiam:—Le jugement dont il s'agit, a été rendu par le tribunal, sur le serment du Demandeur, et je ne crois pas qu'il puisse être attaqué par une opposition à jugement. La seule manière de l'atteindre, serait peut-être la Requête Civile, s'il se rencontre dans l'obtention de ce jugement, quelqu'une des causes qui peuvent donner lieu à ce procédé.

Quoiqu'il en soit, l'opposition à jugement, ne peut s'appliquer au cas actuel les arts. 91 et 484 du C. P. C. invoqués par les opposants, n'ayant rapport qu'aux jugements rendus par le greffier au greffe du tribunal, et non à ceux rendus par le tribunal lui-même. Il y a plus de cinquante ans que la Cour de Circuit rend des jugements sur le serment des demandeurs. Je crois la jurisprudence depuis assez longtemps établie sur ce point, et ne suis disposé, pour ma par, à y apporter aucun changement, à moins qu'on ne me cite un article du code qui défende au tribunal de suivre cette pratique.

Pour ce qui est du procédé employé par le demandeur pour attaquer l'opposition, je le crois parfaitement admissible et très usité en pareil cas.

La Cour prit cependant la motion du demandeur en délibéré et le 10 décembre, 1873, rendit son jugement par lequel elle accorda cette motion.

Robidoux, pour les opposants.
D'Amour & Denis, faisant motion. Motion accordée.

(J. C. D.)

Lord vs. Hazinet et al.

Jugements dans le même sens : Bowie *vs.* Murray, & Murray, opposant, 1 Octobre, 1872, 4 Rev. Lég. p. 566 (Mackay, J.) ; Parisean *vs.* Grenier, & Grenier, opposant, 15 Mars, 1873, 17 L. C. J., p. 177 (Torrance, J.) ; No. 1799, C. C. Montréal, Perrault *vs.* Coutu, 1 Décembre, 1873 (Berthelot, J.) (J. C. D.)

SUPERIOR COURT, 1874.

MONTREAL, 31st JANUARY, 1874.

Coram TORRANCE, J.

No. 72.

Elliott vs. *St. Julien* ès qualité ;

AND

St. Julien ès qual., opposant.

HELD:—That a sale of goods may be validly made under an execution *de bonis* on the day fixed for the return of the Writ into Court.

PER CURIAM.—The plaintiff obtaining judgment against the defendant took out an execution which was suspended for a time, on payments being made by the defendant. Before the writ lapsed by expiry of the time for which it had force, the plaintiff gave notice that he would proceed with the sale on the 3rd June, 1873, at 11 a.m., being the return day of the writ. The defendant has fyled an opposition *á fin d'annuller* to the proceedings of plaintiff on the ground that, the proceedings under the writ having been suspended, the plaintiff could not further proceed without the issue of a new writ.

Another ground was also invoked, but not proved, that payments had been made on account of the judgment since the seizure, which had not been credited to the defendant. Of this last ground there is no proof, and the remaining ground is, as to the validity of a writ executed on the day of its return. The Court does not see the force of this objection. The writ had full force through the 3rd day of June, when the sale was to be made, although that day was also the return day of the writ.

Opposition dismissed.

D. D. Bondy, for opposant.
Cassidy & Lacoste, for plaintiff.

(J. K.)

COUR DE CIRCUIT, 1873.

MURRAY BAY, 7 JUIN, 1873.

Coram H. E. TASCHEREAU, J.

Miller vs. *Demeule.*

JUGE:—Que c'est au demandeur qui veut recouvrer de l'argent prêté à un mineur à prouver l'emploi utile de l'argent.

TASCHEREAU, H. E., J.: Le demandeur allègue, par sa déclaration, que par acte d'obligation, passé le 8 Mai, 1863, le défendeur reconnut lui devoir la somme de £22.10.0, pour autant prêté dès avant la passation du dit acte, et c'est cette somme, avec les intérêts depuis 1863, qu'il reclame du défendeur par la présente action.

Le défendeur, par exception, dit: "le 8 Mai, 1863, lorsque j'ai consenti cette "obligation, j'étais mineur; j'ai été lésé en consentant cette obligation; je n'ai "jamais touché aucune partie de l'argent porté au dit acte; je n'étais pas "assisté au dit acte tel que voulu par la loi; en conséquence je demande à être "relevé de la dite obligation, et à ce que le dit acte soit déclaré nul, et l'action "renvoyée avec dépens."

Le défendeur a établi qu'il était mineur, le 8 Mai, 1863, lors du dit acte d'obligation, mais n'a pas fait d'autre preuve.

Le demandeur n'a fait aucune preuve.

Le demandeur dit: "le défendeur a plaidé lésion, c'était à lui à la prouver: "le fait seul qu'il était mineur, lorsqu'il a consenti cette obligation en ma faveur, "n'est pas suffisant pour renvoyer l'action: l'obligation consentie par un mineur "n'est pas nulle de plein droit: le mineur ne peut être restitué que s'il a été "lésé: minor restituitur non tanquam minor, sed tanquam læsus; or, le "défendeur n'ayant pas prouvé qu'il a été lésé, je dois avoir jugement contre "lui."

A cela, le défendeur répond: "Je n'avais pas à prouver lésion; la loi la pré-"sume en ma faveur; c'était au demandeur à prouver que cet argent m'a profité "et a tourné à mon avantage, et n'ayant pas fait cette preuve, il ne peut recou-"vrer de moi cette somme, et son action doit être renvoyée."

C'est là, la cause telle que soumise à la cour.

Voyons quels sont les articles de notre code qui se rattachent à la question.

Le premier est l'article 290:

"Le tuteur prend soin de la personne du mineur et le représente dans tous "les actes civils."

Le second est l'article 984:

"Quatre choses sont nécessaires pour la validité d'un contrat: des parties "ayant la capacité légale de contracter; leur consentement donné légalement; "quelque chose qui soit l'objet du contrat; une cause ou considération licite."

Le troisième est l'article 985:

"Toute personne est capable de contracter, si elle n'en est pas expressément "déclarée incapable par la loi."

Et l'article 986:

"Sont incapables de contracter, les mineurs dans les cas et suivant les disposi-"tions contenues dans ce code."……

L'article 1002 dit : " La simple lésion est une cause de nullité, en faveur du " mineur non émancipé, contre toutes espèces d'actes lorsqu'il n'est pas assisté " de son tuteur, et lorsqu'il l'est, contre toutes espèces d'actes autres que ceux " d'administration....."

En parlant de ce dernier article, les codificateurs disent dans leur rapport, vol. I, page 13 :

" Cet article pose la règle général quant à l'effet de la lésion des mineurs : il " diffère de l'article 1305 du code français sur même sujet. Ce dernier article " donne lieu à une variété d'interprétations dont les commentateurs se sont aidés " pour soutenir des opinions très divergentes. Il n'est guère nécessaire de dire " que les commissaires ont tâché d'éviter l'ambiguité d'expressions qui a causé " tant de discussion, et ils croient avoir rendu en termes non équivoques la règle " qui prévaut dans notre droit."

J'avoue qu'il me semble cependant que notre article n'est pas très-lucide. Les commentateurs s'accordent à dire que l'article 1305, et ceux qui s'y rattachent du code Napoléon, sont très obscures, et malgré ce qu'en disent nos codificateurs les articles correspondants de notre code ne me semblent guère plus clairs. Mais comme ils nous sont donnés comme loi pré-existante, nous avons l'avantage d'avoir pour nous guider sur la question les commentateurs sous la Coutume de Paris, et la jurisprudence sous l'ancien droit français, en même temps que des commentateurs sous le code Napoléon.

Je n'ai pas à traiter ici, dans toute son étendu, la question de la capacité et de l'incapacité des mineurs. Il s'agit, dans la présente cause, d'un prêt d'argent fait à un mineur, et voici toute la question : Est-ce à celui qui a prêté à un mineur à prouver que l'argent a profité à ce mineur pour recouvrer contre lui, ou bien est-ce au mineur à prouver qu'il a été lésé pour faire renvoyer l'action ?

Je n'hésite pas à dire que c'est au demandeur à prouver l'emploi utile de l'argent.

Sous le droit romain, comme sous la Coutume de Paris, et sous le code Napoléon, le prêt fait à un mineur a toujours été mal vu. Le Sénatus-consulte Macédonien, et différents arrêts des Cours et des Parlements de France ont défendu expressément de prêter aux mineurs et aux fils de famille, et Lallier, lors des conférences sur le Code Napoléon, appelait le prêt à un mineur " ce fléau de l'inexpérience."

La loi présume en pareil cas, 1o. Que celui qui prête connait l'état de la personne qui contracte avec lui ; 2o Que le mineur est trop irréfléchi et a trop peu d'expérience pour employer utilement son argent ; 3o Que celui qui prête à un mineur, contrairement au vœu de la loi, sans exiger que celui-ci soit assisté de son tuteur, encourage le vice, la débauche et la prodigalité, ou bien veut profiter de la faiblesse de son emprunteur pour exiger des intérêts usuraires et l'amener à sa ruine.

Cependant la loi ne refuse pas entièrement au prêteur tout recours. Si le mineur a profité de cet emprunt, la règle d'équité naturelle, qui veut que personne ne s'enrichisse aux dépens d'autrui, prévaut toujours, et permet au prêteur de recouvrer, mais seulement pour autant que le mineur a profité de l'emprunt et *quatenus locupletior fecit.* Et c'est au prêteur à prouve *quatenus minor*

Miller vs. Demers.

locupletior factus est, et l'emploi utile de l'argent. Le mineur n'a pas de preuve de lésion à faire: la loi le présume lésé et c'est là, une de ces présomptions légales dont parle l'article 1239 du Code.

Et même, si le mineur a emprunté, assisté de son tuteur, sans l'autorisation du conseil de famille, c'est là la loi. Car le tuteur lui-même n'a pas le droit d'emprunter pour son pupille.

"Sans l'autorisation du juge ou du protonotaire, accordée sur avis du conseil de famille, il est interdit au tuteur *d'emprunter* pour son pupille," dit l'article 297 de notre code.

Dans la présente cause, le défendeur, alors mineur, a consenti cette obligation pour argent emprunté du demandeur, non-seulement sans autorisation de justice, sans l'avis du conseil de famille, mais même sans son tuteur. Le mineur émancipé même n'a ce droit que s'il est commerçant et alors seulement pour les fins de son commerce (art. 321).

Et si le débiteur d'un mineur paie à ce mineur seul malgré la faveur de la libération, c'est au débiteur à prouver que ce qu'il a payé a tourné au profit et à l'avantage du mineur, suivant l'article 1146:

" Le paiement fait au créancier n'est pas valable s'il était incapable de le " recevoir, à moins que le débiteur ne prouve que la chose payé a tourné au " profit de ce créancier."

Voir là-dessus, Pothier, Obligations, No. 504, et les autorités citées au Code Lahaye, sur l'article 1241 du Code Napoléon.

Et par les articles 1009 et 1011 de notre Code, si un mineur non autorisé vend un immeuble £500 et les reçoit, il pourra plus tard se faire remettre cet immeuble, et aura l'immeuble et les £500 à moins que celui qui les lui a payés prouve que cet argent a tourné au profit du mineur, même si au contrat de vente ce mineur était assisté de son tuteur, pourvû qu'il y eût absence de l'avis du conseil de famille ou de l'autorisation en justice. Et avant l'article 1010 de notre Code, qui est de droit nouveau, même quand toutes les formalités voulues avaient été remplies, il y avait encore pour le mineur lieu à la restitution, mais alors, il lui fallait prouver lésion, et c'est dans ce cas qu'il était restitué comme lésé et non comme mineur, et que s'appliquait la maxime: *Minor restituitur non tanquam minor sed tanquam laesus.*

Vide Meslé, Minorité, ch. 24, page 503.

Dans le recueil des arrêts de Louet, lettre M., ch. 19, [illegible] différentes décisions sur la question, le commentateur Brodeau [illegible]que:

" Quand un mineur vend son immeuble par contrat volontaire, sans avis de parents, sans solennité, sans décret, ni autorité de justice, *ou emprunte de l'argent* ou rente, par obligation, l'on présume que par la même facilité qu'il a été [illegible] à vendre ou à constituer la rente et à passer l'obligation, il l'a été [illegible] à reconnaître avoir reçu le prix mentionné au contrat: c'est donc [illegible] qui a acquis, ou au créancier qui a prêté frauduleusement, de [illegible] contre l'autorité des lois, à prouver que le prix est tourné au [illegible] à l'emploi duquel il a dû veiller pour sa sûreté."

Ferrière, Dict. Droit, Verbo Mineur, page 312: " De ce principe qu'un mineur ne peut être restitué que quand il a été lésé, il s'ensuit encore qu'il n'est pas

restituable contre les obligations qu'il a faites pour son utilité et à son avantage ; en sorte que s'il s'est obligé pour chose, qui ait été employée à la conservation de ses biens, quoiqu'il prouvât sa minorité, il ne peut être restitué, mais il faut que la partie adverse prouve que *in rem et utilitatem ejus versum est.*"

Ferrière, Grand-Coutumier, 3me. vol., sur art. 239, No. 34, dit: "Tout mineur est restituable contre les promesses qu'il a faites et les obligations qu'il a contractées pour prêt d'argent, à moins que le créancier ne prouve que le mineur l'a employé *in rem et utilitatem suam et quatenus versum est*, et quoique la cause du prêt soit exprimée, le créancier est tenu justifier de l'emploi."

Pratique de Lange, vol. 1, p. 496: "Quand le mineur se plaint d'être lésé, est-ce à lui à justifier la lésion ? Il faut distinguer : quand les actes contre lesquels il demande d'être restitué ont été faits dans les formes, comme s'il s'est obligé étant assisté de son tuteur ou curateur, si ses immeubles ont été vendus par avis de parents homologué en justice, c'est à lui à justifier la lésion dont il se plaint, parcequ'en ce cas, elle n'est pas présumée ; mais s'il s'est obligé sans être assisté de tuteur ni de curateur, s'il a vendu, aliéné ou hypothéqué ses immeubles sans avis de parents ou autorité de justice, en ce cas, c'est au créancier qui a prêté, ou à l'acquéreur qui a acheté de lui, à prouver que les deniers qui lui ont été baillés ont tourné à son profit."

Et Rousseau de Lacombe, Recueil de Jurisprudence, Verbo Restitution, sect. II, dit : "De même en cas d'emprunt fait par le mineur, c'est à celui qui a prêté à justifier de l'emploi utile."

Ferrière, Parfait Notaire, vol. 1er., p. 201 : "Il n'y a donc pas de sûreté à prêter à un fils de famille surtout quand il est mineur : un tel contrat peut être fort aisément annulé et cassé, si ce n'est que le prêt fut fait pour l'utilité du mineur comme pour subvenir à ses aliments, et c'est ce qu'il faut exprimer dans l'acte pour la sûreté du créancier, qui doit veiller à bien stipuler l'emploi ; *car, dans ce cas, c'est à lui à prouver que le prêt a tourné à l'utilité du mineur.*"

Prévôt de la Jannès, vol. 2, p. 336, traite la question dans le même sens.

Domat, Lois Civiles, vol. 1er., liv. 4, titr. 6, sect. 2, par. 17 ; "Ce n'est pas assez pour empêcher la restitution d'un mineur obligé par un prêt qu'il ait effectivement reçu la somme prêté, mais faut de plus qu'il en ait fait un emploi utile..... Car celui qui prête doit connaître la condition de son débiteur, s'il est majeur ou mineur, et le sachant mineur il a dû prendre soin de l'emploi des deniers qu'il voulait lui prêter."

Meale, Des Minorités, ch. 24, Nos. 50 et 51, page 533.

"Quand l'argent que le mineur a reçu à prêt est tourné à son profit, et a été, par exemple, employé au paiement de ses dettes, il n'y a pas lieu à la rescision : le mineur demeure obligé à rendre le prêt, parceque son obligation ne vient pas tant de son consentement que du profit qu'il a fait.....Quand le mineur a emprunté de l'argent pour contrat volontaire, sans avis de parens, ni décret du Juge, c'est au créancier à prouver que l'argent a tourné au profit du mineur.

Vide le même, ch. 24, No. 5, et aussi page 819 arrêt cité de 1560.

Gin, Analyse du droit François, p. 270, 379.

Pothier, sur la question, parle comme suit : (du prêt de consumption, No 21) Il est évident que le contrat de prêt de consomption, de même que tous les

Miller vs. Pelletier.

autres contrats, ne peut intervenir qu'entre des personnes capables de contracter. C'est pourquoi le prêt d'une somme d'argent qui serait fait à un fou, à un interdit, *à un mineur qui l'emprunterait sans l'autorité de son tuteur est nul.* Il est vrai que si ces personnes ont profité de la somme, elles sont tenues de la rendre jusqu'à concurrence de ce qu'elles en ont profité. Mais cette obligation ne naît pas proprement du prêt qui leur a été fait, puisque ce prêt est nul: elle naît du précepte de l'équité naturelle, qui ne permet pas de s'enrichir aux dépens d'autrui. *Jure naturæ æquum est neminem cum alterius jacturâ locupletari*

Voir aussi, Pothier des Obligations, Nos. 49 à 53.

Bourjon, Droit Commun de la France, vol. 2, p. 590. No. 35. "Le mineur est restituable contre les promesses et obligations, et tous actes portant emprunt de deniers, à moins que le créancier ne justifie que les deniers ont tourné au profit du mineur: cessant cette justification de sa part, la voie de la restitution en entier est pleinement ouverte." No. 36. "En effet, cessant cette justification tel acte porte avec lui-même la preuve de la lésion, parcequ'é, confier des deniers à un jeune homme qui les doit perdre, c'est les perdre soi-même: l'emprunt en ce cas, fait dont incontestablement ouverture à la restitution en entier: il porte avec lui-même la preuve de la lésion que la présence du tuteur ne couvre pas."

Voir aussi, Pothier, Procédure Civile, 5me. partie, ch. IV., art. 1er. Œuvres de Claude Henris, Observations par Bretonnier, vol. 2, p. 161, quest. 8. "Il y a des cas où le mineur est présumé de droit avoir été lésé, sans qu'il soit nécessaire de justifier la lésion.....Le second cas est l'emprunt fait par le mineur: il y a une présomption de droit que l'argent qu'on lui a prêté n'a pas été employé à son profit: c'est la doctrine d'Accurse, c'est aussi les sentiment de Balde. Et le Prêtre atteste que c'est à celui qui dit que son argent a tourné au profit du mineur à le prouver, sans que le mineur soit obligé à aucune preuve, parceque la présomption de son âge fait pour lui, et que son âge lui est une suffisante défense, et il assure que c'est la jurisprudence du Parlement."

Et à la page 977 du même volume, question 182, dans un de ses plaidoyers, Claude Henris dit: "Au reste nous dîmes que nous ne croyons pas que l'on voulût soutenir que c'est au débiteur à prouver que rien n'a été converti à son profit, car, outre que c'est une négative, nos lois et les arrêts chargent le créancier du mineur à vérifier l'emploi des deniers, par cette raison générale que qui contracte avec un mineur, avec une personne suspecte *debet esse curiosus de versione in rem.* Et quoiqu'en dit que *minor non restituitur qui à minor sed quià lœsus*, il suffit de répondre que de ce qu'il s'est obligé mineur, et qu'il ne parait pas qu'il en ait profité et que ce soit pour cause légitime, il est présumé lésé; et partant, qu'à défaut de prouver un juste emploi, et la minorité et la lésion présumée semblent concourir." Et l'auteur cite sentence du 24 décembre, 1657, qui l'a ainsi jugé.

Nouveau Dénizart, verbo Lésion, No 17: "En un mot, le mineur est toujours présumé lésé: c'est à ceux qui ont contracté avec lui ou avec ses tuteurs de prouver que ce qu'ils ont prêté a tour au profit du mineur."

Danty, prouve par témoins, page 490: On demande si le créancier qui a prêté de l'argent à un mineur, en l'absence et sans l'autorité de son tuteur, peut

Miller vs. Demeule.

demander en conséquence de obligation qu'il a passée avec lui, quoique nulle à prouver par témoins, que le mineur a fait un emploi utile de son argent, et qu'ainsi il est tenu de lui restituer ; on répond que cela ne doit pas être permis, parceque la loi défendant de prêter de l'argent au mineur sans l'autorité de son tuteur, celui qui ne laisse pas de le faire suit entièrement la foi du mineur, et ne doit être admis à la preuve par témoins, qui est un secours que la loi ne donne pas à celui qui a méprisé ses défenses. Outre qu'il y va de la sûreté du mineur que l'on exposerait par ce moyen à une ruine évidente par le témoignage des témoins que l'on pourrait suborner ; ainsi il est juste d'obliger le créancier à rapporter la preuve par écrit que le mineur a profité et employé utilement son argent en des choses nécessaires."

Et Toullier, vol. IX, No. 105, dit exactement la même chose.

Boileux, vol. 2, page 437, sur article 457 dit : " L'emprunt est une voie d'autant plus périlleuse qu'elle procure pour un certain temps à celui qui s'y engage le moyen de se faire illusion sur son état de gêne, tout en le conduisant à sa ruine .....Nonobstant les termes de notre article, il est certain que le défaut d'autorisation ne priverait pas le prêteur de tout recours, car nul ne doit s'enrichir aux dépens d'autrui : mais il y a cette différence entre l'emprunt autorisé et celui qui ne l'est pas, que le mineur est toujours tenu du premier, sans égard à l'emploi que le tuteur a fait des deniers : tandis qu'il n'est tenu du second que jusqu'à concurrence de la somme qui a réellement tourné à son profit : *quatenus locupletior factus est.*"

Troplong, du Prêt, No. 209 : " Passons à la capacité de l'emprunteur. De sages précautions défendent l'emprunt au mineur, même au mineur émancipé. De tous les contrats, celui qui est le plus propre à surprendre la faiblesse des esprits irréfléchis, c'est l'emprunt. Il est semé, de pièges, de dangers, de déceptions ; il précipiterait la ruine des familles et des mœurs, si le législateur ne s'était montré vigilant. Le tuteur lui-même ne peut emprunter sans l'autorisation du conseil de famille."

Vide Favarde de Langlade, Répertoire, verbo nullité, par. 1, 2, 4, et verbo tutelle, par. 9, Nos. 12, 13, 14.—Merlin, Répert. vo. Mineur, par. 1, No. 3. Bonjean, des Actions, vol. 2, note au bas de la page 452.

Bioche, Procédure, vol Aveu, No. 17.

Fréminville, des Minorités, Vol. 2, No. 713 : " A défaut de l'autorisation du conseil de famille, l'emprunt qui aurait été effectué se trouverait frappé de nullité, en ce sens qu'il ne pourrait produire aucune action en faveur du prêteur. Celui-ci ne pourrait agir contre le mineur qui ne serait tenu au remboursement de la somme empruntée que jusqu'à concurrence de ce dont il aurait profité. Dans ce cas, l'action à diriger contre le mineur ne serait pas l'action du prêt : elle ne serait fondée que sur le principe que nul ne peut s'enrichir aux dépens d'autrui : ce serait à celui qui a prêté à prouver que tout ou partie de la somme prêtée a profité au mineur. La seule réception de l'argent ne suffirait pas pour faire présumer que le mineur a été rendu plus riche."

Idem, Nos. 718, 747, 627, 21, 221, 245.

Larombière, des Obligations, vol. 1er, page 162. " Pourquoi le mineur, pourquoi l'interdit pour démence, pourquoi le prodigue sont-ils généralement inca-

Millier vs. Demeule.

pables? C'est que la loi présume d'après leur âge ou l'état de leur intelligence que leur raison n'est pas assez mûre ou est trop affaiblie pour donner un consentement éclairé et réfléchi.....si le mineur est incapable, ce n'est pas qu'en fait, il soit toujours et complètement incapable de discernement et de raison..... Mais la loi a voulu prévenir une foule de procès, en fondant une présomption d'inintelligence sur l'âge des personnes, et elle a bien fait."

Dalloz, Répertoire, verbo Minorisé, No. 35: "L'incapacité du mineur n'est que relative, il peut améliorer sa condition, et ce n'est pas tant comme mineur que comme lésé qu'il peut attaquer les actes qu'il a consentis: *minor non restitutor tanquam minor sed tanquam læsus:* d'où l'on doit conclure qu'il doit prouver, dans ce cas, que l'acte lui cause un préjudice quelconque. *Mais si l'acte était entaché de nullité, le mineur serait dispensé de prouver* qu'il a été lésé."

Idem, No. 584: "La nullité du prêt résulterait-elle de l'inobservation des formalités prescrites par l'article 457? (297 de notre code) Sans aucun doute .....Cependant si l'emprunt avait profité au mineur, il serait obligé jusqu'à concurrence du profit qu'il en aurait tiré."

Idem, Nos. 530, 531, 740, 835.

Marcadé, vol. 2, sur art. 457, No. 260, après avoir dit que la vente ou la cession d'hypothèque que le tuteur ferait sans l'avis de parents serait nulle, continue ainsi: "Il n'en serait pas absolument de même de l'emprunt: nul sous un rapport, il pourrait se trouver valable pour une autre chose. En effet, le mineur ne serait pas obligé dans le principe même de l'acte; mais si l'argent emprunté lui avait vraiment profité il se trouverait obligé par suite de gestion d'affaire, qui veut que celui dont l'affaire a été bien administrée remplisse les engagements que le gérant a contractés en son nom.

Solon, Nullités, vol. 1, Nos. 77 et seq.
" " vol. 2, No. 76.

Troplong, Priv. et Hyp: Nos. 487 à 493.

Delvincourt, Notes et Explications du 1er Vol., p. 303: "Si cependant l'emprunt avait tourné au profit du mineur, il n'est pas douteux qu'il n'en soit tenu, non par l'effet du contrat, mais d'après cette maxime de l'équité, *Memo debet cum alterius damno locupletari*.....Mais lorsqu'il n'y a pas eu d'autorisation, le prêteur ne peut agir contre le mineur qu'en prouvant que l'emprunt a tourné à son profit, *et quatenut locupletiar factus est.*

Idem, 2nd vol., p. 593.
" 3ème vol., p. 301.

Demolombe, Minorité, vol, 1er, Nos. 728, 739, 812 à 826.
" des Contrats, vol. 1er, Nos. 191, 289, et seq.

Toullier, vol. 6, No. 106.
" vol. 7, Nos. 521 à 584.

Duranton, vol. 3, Nos. 598 à 696.
" vol. 10, Nos. 279 et seq.

Bédarride—du dol et de la fraude, vol. 1, Nos. 109 à 127.

La Cour impériale de Riom, le 1er juin, 1870, a décidé: "Que l'obligation contractée en état de minorité ne peut être validée, sur le double motif d'une part que le billet souscrit par le mineur énoncerait "valeur reçue comptant,"

d'autre part que le mineur ne prouverait pas, n'alléguerait même pas que la somme à lui versée ne lui a pas profitée. Que le mineur n'a pas à faire une pareille preuve; que c'est au prêteur, au contraire, qu'incombe pour faire maintenir l'acte passé en minorité, l'obligation de prouver que l'argent prêté au profit du mineur a profité à ce dernier."

Cette décision est rapportée au 2nd Vol. de la Revue Légale, publiée à Sorel page 60.

La cause de Cartier *vs.* Pelletier (1er vol. Revue Légale, p. 46,) citée par le demandeur à l'audition me paraît certainement en sa faveur. Mais je ne puis acquiescer à cette décision. Je crois que les autorités que j'ai citées établissent clairement que pour réussir dans la présente cause, le demandeur devait alléguer et prouver que le défendeur a profité du prêt qu'il lui a fait. Sans cette preuve, le défendeur ayant établi sa minorité, lors de l'emprunt, l'action doit être renvoyée avec dépens. Action déboutée.

J. Perrault, pour demandeur.

F. X. Frenette, pour défendeur.

(J. K.)

COUR DE REVISION, 1872.

MONTREAL, 30 AVRIL 1872.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 1491.

Joseph Nault, vs. André Charby et al.

JUGE.—1. Qu'un cessionaire d'une créance, cédée apparemment par l'acte de transport pour bonne et valable considération, peut poursuivre le recouvrement de la créance ainsi cédée, quand même par convention entre le cédant et le cessionnaire non exprimée à l'acte il ne serait, quant à la perception de cette créance, que le procureur et mandataire du cédant.

2. Que dans la cause actuelle, le demandeur ne pouvait être considéré mandataire et procureur que vis-à-vis des cédants, et devait être considéré cessionnaire véritable vis-a-vis des débiteurs (les défendeurs) et avoir saisine vis-à-vis d'eux.

Par acte du 23 février 1869, un certain nombre des créanciers du défendeur Charby, tous indiqués à l'acte, déclarèrent qu'ils consentaient à tenir quitte ce dernier moyennant le paiement de 10s. dans le louis sur leurs créances, et lui donnèrent de fait quittance et décharge de leurs créances moyennant 10s. dans le louis, qu'ils transportèrent de suite par le même acte au demandeur, en stipulant que ce transport était fait *pour valable considération*, et qu'ils subrogeaient le demandeur dans tous leurs droits contre Charby pour la répétition de leurs dites créances ainsi réduites. Il fut de plus stipulé dans l'acte que cette décharge ne tiendrait qu'à la condition que Jacques Jodoin et Joseph Brodeur, les deux autres défendeurs, consentiraient conjointement et solidairement avec Charby une obligation au demandeur, qui était aux droits des dits créanciers, pour la somme totale représentant 10s dans le louis sur leurs créances respectives; et certains délais seraient alors donnés aux défendeurs pour le paiement de cette obligation.

La condition fut remplie, et dans l'acte d'obligation, les défendeurs reconnurent devoir au demandeur *en sa qualité ci-après mentionnée* la somme de 900 dollars qu'ils promirent payer au demandeur *en qualité* dans les délais mentionnés à l'acte.

Nault vs. Charby et al.

Il fut ensuite mentionné au dit act d'obligation que ce dernier acte "était consenti et accepté en conformité à une convention intervenue entre Charby et ses créanciers en vertu d'un acte passé le 25 février 1860 devant Mtre Bernier, notaire," ce dernier acte n'étant autre que celui sus-indiqué.

Un paiement est devenu échu par l'acte d'obligation, et le demandeur en sa qualité de créancier en vertu de cet acte, et de cessionnaire en vertu du transport du 25 février 1869, fit la poursuite pour le recouvrement de cet instalment.

Les défendeurs ont plaidé en substance que tant dans l'acte de transport que dans l'acte d'obligation, le demandeur n'était en réalité que le procureur et le mandataire des créanciers assujetti à leur rendre compte des deniers qu'il percevrait des défendeurs, et qu'il n'avait jamais donné aucune considération ni valeur pour ce transport, et qu'en conséquence, le procureur ne pouvant jamais poursuivre en son nom privée, la poursuite était mal fondée.

Le demandeur prétendit qu'en supposant qu'il ne fût vis-à-vis des créanciers que leur mandataire, assujetti à leur rendre compte, il n'en était pas moins vis-à-vis des défendeurs le véritable cessionnaire de la créance et avait seul le droit d'en poursuivre le recouvrement.

A l'enquête le demandeur, interrogé, déclara qu'en effet il n'avait pas donné valeur et considération pour le transport, qu'il était obligé de rendre compte aux créanciers et qu'il n'était en réalité que leur mandataire, mais que les creanciers ne lui avaient fait ce transport en la manière dont il avait été fait que pour éviter la multiplicité des poursuites, dans le cas où il aurait fallu poursuivre les défendeurs.

La Cour de Circuit, à St Hyacinthe, présidée par le Juge Sicotte, rendit le jugement suivant, déboutant l'action du demandeur, savoir: "La Cour, etc., etc., attendu en fait que le demandeur n'a parlé et agi dans les actes invoqués, que pour faire les affaires des créanciers nommés dans l'acte, du vingt-cinq février, mil huit cent soixante-et-neuf; que cela découle évidemment de ces actes et qu'il le reconnait lui-même dans son témoignage; qu'il n'a pas été fait autre chose par l'acte susdit qu'une indication par les créanciers du débiteur, de la personne du demandeur pour recevoir l'obligation convenue et promise pour assurer le paiement dû à ces créanciers, et les argents qu'il aurait à payer; considérant que le demandeur a accepté l'obligation du douze mars, mil huit cent soixante-et-neuf, dont l'exécution et le paiement sont demandées par l'action pour les créanciers en question et comme leur mandataire, et que les débiteurs n'ont pas traité avec lui comme étant leur créancier, mais bien comme le mandataire de leurs véritables créanciers; considérant que les défendeurs sont bien fondés à s'opposer à l'action prise par le demandeur en son propre nom, comme ils l'ont fait par leurs défenses, déclare le demandeur non recevable et sans qualité pour exercer la présente action, et réclamer condamnation en son nom et pour son profit contre les défendeurs pour la somme que les défendeurs ont reconnu devoir par l'acte du douze mars, mil huit cent soixante-et-neuf relaté dans la demande, et le déboute de son action."

Ce jugement ayant été porté en révision, fut renversé par la Cour de Révision qui rendit jugement en faveur du demandeur comme suit:

"The Court, &c., &c. Considering there is error in the said judgment, to wit,

Nault. vs. Charby et al.

in holding the *défenses* of defendants well founded, and in dismissing plaintiff's action, for the reasons set forth in said judgment, doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises; Considering that plaintiff has sufficiently proved his allegations material against defendants to entitle him to a judgment against them as prayed by him;

Considering that, as against the defendants, the plaintiff was and is such a *commissaire*, and had and has such a *saisine*, as that he can give good receipt to defendants for the amount he sues for, and is entitled to have the amount sought to be recovered by him in and by this action for the reason set forth in his declaration, and as therein and hereby claimed; and this notwithstanding anything pleaded by defendants;

Considering, also, that defendants are without interest to oppose to plaintiff want of right of action as they do:

Doth condemn defendants to pay plaintiff $158.85, with interest thereon from the 1st November, 1869, till perfect payment, with costs in said Circuit Court against said defendants in favor of said plaintiff, and with costs of this Court of Revision against said defendants in favor of said plaintiff."

Jugement renversé.

Chagnon & Sicotte, } for plaintiff.
Dorion, Dorion & Geoffrion, }
Fontaine, Mercier & Décazes, for defendants.
(H. W. C.)

COUR SUPERIOR, 1872.

ST. HYACINTHE, 29 AVRIL, 1873.

Coram SICOTTE, J.

No. 1513.

J. A. Cushing vs. Les Syndics d'Ecoles pour la Municipalité d'Acton Vale.

JUGE.—1o. Que quoique le statut relatif aux Ecoles communes ne confère pas spécialement aux syndics des Ecoles dissidents un titre corporatif quelconque, ils sont néamoins constitutés en corporation par le statut, et doivent avoir et ont un titre corporatif, virtuellement énoncé dans le statut, étant, par implication, celui donné aux commissaires d'écoles, savoir: "Les Syndics d'Ecoles pour la municipalitée de dans le comté de

2o. Qu'il ne peut y avoir dans une municipalité qu'une école dissidente ou de la minorité sous la régie de Syndics d'Ecoles, et que le statut ne peut être interprété de manière à permettre aux diverses dénominations religieuses d'avoir dans une municipalité chacune leur propre écoles dissidente sous la régie de syndics particuliers.

Les défendeurs sont poursuivis sous le titre corporatif de "Les Syndics d'Ecoles pour la municipalité du village d'Acton-Vale, dans le Comté de Bagot, corps politique et incorporé, ayant son bureau d'affaires en le village d'Acton-Vale, dans le Comté de Bagot, dans le district de St. Hyacinthe."

Les défendeur ont prétendu qu'ils n'étaient pas assignés sous leur nom véritable; que par le atatut relatif aux écoles communes, ils n'avaient pas de nom ou titre corporatif; et que d'ailleurs les diverses dénominations religieuses pouvant avoir leurs propres écoles dissidentes avec leurs syndics particuliers,

Cushing vs. Les Syndics d'Ecoles pour la Municipalité d'Acton Vale.

il appert évidement que le titre corporatif générique de syndics d'écoles pour *telle* municipalité ne pouvait leur être donné, et que cela était problement la raison pour laquelle le législateur ne leur avait pas donné de titre corporatif.

Le demandeur répondit qu'il ne pouvait y avoir qu'une école dissidente ou de la minorité, sous la régie de Syndics d'Ecoles, dans chaque municipalité; et que dans tous les cas, le titre corporatif donné était le véritable titre de la corporation des syndics, étant par implication le même titre que celui donnée aux Commissaires d'Ecoles.

La Cour, rendant jugement suivant les principes de droit énoncés dans le JUGE ci-dessus, renvoie l'Exception à la forme.

Bourgeois, Buchand & Richer, avocats du demandeur.

Chagnon & Sicotte, avocats de défendeurs

(H.W.C.)

SUPERIOR COURT, 1873.

MONTREAL, 29th NOVEMBER, 1873.

Coram MONDELET, J., TORRANCE, J., BEAUDRY, J.

No 473.

Cuvillier et. al. vs. Gilbert et al.

HELD:—That an agreement between partners, carrying on business as iron founders, that no contract for the purchase or sale of material exceeding $100 was to be made without the consent of both, did not exempt the partnership from liability to a third party under a contract of sale of pig iron exceeding $100 made by one partner in the firm's name, such sale being within the scope of the partnership business, and the purchaser buying in good faith.

MONDELET, J., *dissentiens*.—The judgment appealed from was rendered on the 17th December, 1872, by the Superior Court at Montreal, (MACKAY, J.) The question which that judgment appears to have decided is one of considerable interest, so far as commercial transactions are concerned. Let us precisely state the facts, and then we shall enquire how the law is to be declared to exist with respect to this case in particular.

The defendants are alleged by plaintiffs to be "iron and brass founders, heretofore co-partners, doing business as such together at Montreal, under the name and firm of Gilbert & Mitchell."

It is in evidence, as alleged, that on the 20th December, 1871, a sale was made to plaintiff, by Dawes, a broker, of 125 tons of pig irom, at $24 per ton, payable in cash, less six per cent., as per broker's note delivered to plaintiff. That sale is alleged to have been made by the defendants, but it is in fact Mitchell who caused it to be made without the participation of Gilbert.

The plaintiffs not having had delivery of the iron, have brought the present action. They claim $680 damage. They, previous to the institution of the action, offered to defendants $2820, *à bourse déliée*, being the price of said sale.

The defendant Mitchell is proceeded against by default. Gilbert, the other defendant, pleads that he had been in co-partnership with Mitchell, the other defendant, since the 11th April, 1871, but the partnership ceased before the institution of this action, and that as to the sale in question, the said Gilbert was

wholly ignorant thereof, nor had the said Mitchell any authority or power whatever to enter into such sale, which was beyond the scope of the co-partnership.

The defendant alleges other matters which it seems to me may, for the present, be passed over.

To simplify this case, it is sufficient to inquire as to what the nature of the above co-partnership was. The answer is at hand. Defendants were "*iron and brass founders, doing business as such together;*" they were that, and nothing else; they were not traders, by any means, in iron; consequently it was their business as well as their duty to confine themselves to what the article of co-partnership had laid down for their guidance. Such sale as the one now in question is beyond the scope of the co-partnership. It is important not to lose sight of this, in the solution of the question, because if Mitchell did what he was not authorized to do, Gilbert is not bound, and if he is not bound, the action cannot stand against him.

Now, whatever obligation there was in the plaintiffs, before entering into such a transaction as this sale is pretended to be, to inquire or not as to what were the limits of the co-partnership, one thing is, I think, so certain that it can't be gainsaid, every one, and especially the plaintiffs, were bound to know and remember, and they well knew, what kind of business the defendants carried on; they as well as the public knew it, and could not ignore it.

That point once made out, it of course follows that they bought, at their own risk, and it must be to their own loss, the 125 tons of iron, for the sale of which Gilbert is not to be held responsible. The plaintiffs are not to be presumed in bad faith, quite the contrary; but they no more than any other party have a right to claim the enforcement of a sale which one of the defendants had no right to make, and which the other defendant repudiated as soon as he knew of it, and, as a necessary sequence, plaintiffs have no right to claim damages for the non-execution of the sale as far as Gilbert is concerned.

No confusion in commercial matters and business need be feared from a decision in view of the above. One only requires to consider whom one deals with, and abstain from purchasing from a party who has no right to sell. This applies to all transactions whatever they are or may be. In other words, if there is a deed of co-partnership, and if it be, as it ought to be duly registered, it should be examined before any transaction is entered into with the firm. If there be no articles of partnership, or if such deed or articles be not registered, then parties and the public are supposed to know what kind of business is carried on, it being a business openly carried on *au su et vu de tout le monde.* Therefore if any of the partners do anything which is within the scope of the co-partnership and its nature, all parties thereto become bound, whether they authorized the transaction or not. But if any partner transcend the limit of the co-partnership, whether stipulated in writing, or of its nature or character, ostensible and known to the public, no obligation is thereby fastened on the other partners. That is law I believe, and if so, it must be, and it is right and just therefore.

The above enunciated principles must, in my opinion, govern this case. The conclusion which their application justifies is, that Gilbert is not bound by the sale effected by Mitchell in the name of the firm, the action cannot stand against

Cuvillier et al. vs. Gilbert et al.

him, but should be dismissed. The judgment rendered against Mitchell could not be reversed because he does not complain of it.

Either way, the judgment now appealed from must be reversed, *quant à* Gilbert with costs.

TORRANCE, J., giving the judgment of the Court:—The plaintiffs in their declaration set out a sale by the defendants to them through Robert Dawes, a broker, on the 20th December, 1871, of about 125 tons of pig iron for the price of $24 per ton; that defendants never delivered, though duly put *en demeure* to do so, to the damage of plaintiffs of $680.

Only one of the defendants, Frank Gilbert, contests the demand, and pleads that he was ignorant of such sale, and that his co-partner, Alexander Mitchell, had no authority to make said sale, and was debarred therefrom by their articles of partnership; that it was not in the scope of their business to sell pig iron in the quantities mentioned in the declaration, or to sell pig iron at all; that Mitchell had no power to bind him by such sale, and if plaintiffs contracted for the purchase of said iron, they did so without inquiry, and without due care, and must have known the course of trade of said firm; and Gilbert notified plaintiffs so soon as aware of the sale that he would not carry it out.

Judgment went against the co-partnership for $206.25,* and is appealed from by Gilbert. The evidence shows that the defendants, Gilbert and Mitchell, by an agreement made before a notary on the 11th April, 1871, entered into a partnership as founders. This agreement provided that Gilbert should attend to the general management, to the keeping and collecting of the accounts, and to the looking up of business; it being understood that he was not bound to give the whole of his time or attention to the business. Mitchell, on the other hand, was to attend to the carrying on the business in the shop, the personal superintendence of the men, and the practical and mechanical working of the business, and was to give the whole of his time to it. All signatures of the firm were to be affixed by Gilbert alone. "No contracts or agreements either for the sale or "purchase, or for material or goods exceeding the value of $100 shall be made "by either party without the consent of the other, such consent being considered "as given if no objections in writing are given to the other party within 24 "hours of his being personally notified of such sale or purchase having been made."

On the 4th of January, 1872, 65 days after the sale to the plaintiffs, the defendants dissolved their partnership, and by the dissolution, the assets were transferred to Gilbert, who paid to Mitchell a considerable sum of money for his interest, and undertook to pay the debts of the firm.

What is the authority of co-partners to bind their firm?

Lindley, Partnership, pp. [192, 3] * * "each partner is *prepositus negociis societatis*, and each partner '*virtute officii*,' possesses an equal and general power and authority in behalf of the firm, to transfer, pledge, exchange, or apply, or otherwise dispose of the partnership property and effects, for any and all purposes within the scope and objects of the partnership, and in the course of its trade

* Mackay, J.

and business. * * Any restriction, which by agreement among the partners is attempted to be imposed upon the authority which one possesses as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made."

Story, Partnership, § 101. The principle extends so as to bind the firm for the frauds committed by one partner without the knowledge of the others, &c.—§ 108.

The French law has adopted a rule essentially the same—§ 109.

§ 111.—The authority must be exercised in cases within the scope of the ordinary business. It would not bind if not the ordinary course of business.

§112.—"If one partner should in the name of the firm make purchases of goods not connected with the known business of the firm, such purchases would not bind the partnership."

* * * * But if the articles were such as might be applied or called for in the ordinary course of their business, the purchase of such articles would bind the firm, even though they were unnecessary at the time, or were bought contrary to the private stipulations between the partners, or were not designed to be used in the partnership at all, if the vendor were not acquainted with the facts."

Collyer, Partnership, says, § 384: "It may be laid down as a general rule that partners are bound universally by what is done by each other in the course of the partnership business."

1 Parsons, Contracts, p. 155: "Among the questions which have arisen as to the limitations to the general power of a partner over the partnership property, one not yet perhaps perfectly settled is as to the power of one partner to make an assignment of the whole property to pay the partnership debts. We think the weight of authority and of reason is in favor of this power, and that such assignment, being entirely in good faith, would be held valid. He may sell the whole stock in trade by a single contract, * * p. 160. The act of each partner is considered as the act of the whole partnership or of all the partners, only so far as that act was within the scope of the business of the firm; but one co-partner may bind the firm in matters out of their usual course of business, if they arose out of and were connected with their usual business." See Sandilands vs. Marsh, 2 B. & Ald. 673.

Applying these rules here, it is impossible to say that the purchase of pig iron is not connected with the business of founders, which was that of the defendants, and if the purchase, why not the sale? No case of fraud is charged against the plaintiffs who were in perfect good faith, and who were in entire ignorance of the precise relations of the two partners to one another, or of their articles of partnership. And looking at these articles, the plaintiffs' counsel has well called attention to the stipulation of the articles, that purchases and sales for a greater amount than $100 shall not be made without the joint consent of the partners, but the consent may be considered as given if no objections in writing are made within 24 hours to the other partner making the contract. As between the partners no objection has been proved in writing within 24 hours, though at any

Cuvillier et al. vs. Gilbert et al.

rate, if it had been proved, it could not effect the right of third parties in good faith like the plaintiffs.

Judgment confirmed, MONDELET, J., dissenting.

W. H. Kerr, Q.C., for plaintiffs.
W. W. Robertson, for defendants.
(J. K.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 23RD JUNE, 1873.

Coram DUVAL, C. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 78.

GAUTHIER, APPELLANT;

AND

VALOIS, RESPONDENT.

HELD:—That the unpaid vendor of an immoveable, who has instituted an action *résolutoire* for non payment of the price *before* the *décret* of the property (although the judgment be not rendered until some months after), has a right to be paid by preference even to a mortgagee, whose hypothec has been registered two years before the registration of the deed of sale by the vendor.

This was an appeal from a judgment rendered by the S. C., at Montreal, (BEAUDRY, J.) on the 28th of February, 1871.

The facts and circumstances of the case are fully explained in the following remarks of TASCHEREAU, J., who pronounced the judgment in appeal:—

TASCHEREAU, J.,—Appel par Séraphin Gauthier, demandeur en Cour Inférieur, d'un Jugement renvoyant sa contestation de l'opposition de l'intimé, et maintenant la collocation du même à l'ordre de distribution, et ce sous les circonstances suivantes.

L'intimé avait vendu un huitième indivis dans une terre (saisie en cette cause) au défendeur, Pierre Charles Valois, un des défendeurs en cette cause, pour 2126 livres de vingt sols, et ce par acte du 13 Juin, 1864—le 13 Mars 1865, Dame Marie Louise Valois, avait transportée à l'intimé une somme de 1667 livres de vingt sols qui lui était due par le même défendeur sur vente d'un autre huitième de la même terre par la dite Marie Louise Valois au dit Pierre Charles Valois suivant actes notariés de Vente et Transport.

Le demandeur comme créancier des défendeurs avait fait saisir les $\frac{1}{4}=\frac{1}{8}$ de cette terre et avait fait annoncer la vente comme devant avoir lieu le 28 Juin, 1870.

Le 20 Juin même année, l'intimé et son frère, Léon Valois, produisent une opposition afin de distraire par laquelle Léon réclamait $\frac{1}{8}$ et l'intim $\frac{1}{8}$ de cette terre. Sur refus d'un des juges de la Cour Supérieure de permettre l'enfilure de cette opposition dans le but de suspendre la vente annoncée sur Venditioni Exponas, mais dans l'interval savoir le 25 Juin, l'intimé et le dit Léon Valois intentent contre le défendeur Pierre Charles Valois une action en résiliation de vente et ce à raison de non paiement de prix de vente, et l'action fut signifiée au défendeur, et sur ce l'intimé et le dit Léon Valois, présentent de nouveau une opposition afin de distraire avec demande de suspendre la vente, alléguant défaut de paiement et institution de leur action en résiliation. Le Sheriff reçut ordre de recevoir cette opposition non comme opposition afin de distraire, mais comme opposition afin de conserver, et la vente eut lieu le 28, le lendemain de la production de l'opposition.

Les intimés ont continué leur procédure en résolution de vente et obtinrent jugement contre le défendeur le 31 Octobre, 1870. Et le 25 Novembre 1870, les intimés produisaient une dernière opposition afin de conserver, alléguant tous les faits ci-dessus, et concluaient à être colloqués pour chacun leurs droits respectifs sur le prix d'adjudication. Gauthier and Valois.

La question pure et simple s'élevant en cette cause est celle de savoir si, sous ces circonstances les opposants ou leurs représentants n'ayant fait enrégistrer leur titre de vente que longtemps après celui du demandeur qui contestait leur réclamation, pouvait primer ce dernier présent appelant et avoir droit à une collocation privilégiée sur les deniers.

Les Tribunaux de ce pays par divers jugements tant en Cour Supérieure qu'en Appel ont invariablement reconnu le droit du vendeur non payé et qui n'avait pas enregistré son titre, de se pourvoir pour faire résoudre cette vente même après que l'immeuble vendu fût passé entre les mains d'un tiers détenteur ou qu'il eut été hypothéqué à des créanciers subséquents dont les titres avaient été enregistrés. Ces décisions étaient fondées évidemment sur le principe que le vendeur en ces cas avait non pas un simple droit ou privilège de bailleur de fonds, mais avait conservé un droit de propriété dans l'immeuble à défaut par l'acheteur de payer le prix de vente; en un mot, on a voulu dire que le vendeur n'était censé consentir à la vente que sous la condition résolutoire en cas de non paiement. Si tel n'était pas le cas, je ne vois pas comment le vendeur dont l'hypothèque ou le privilège requérait enregistrement à peine de déchéance suivant la 4 Vic. chap. 20 (l'acte d'enregistrement) aurait pu conserver un semblant de ce privilège. Cette même question qui doit être décidée suivant nos lois existant avant le Code s'élève en cette cause avec la modification suivante savoir que lors de la résolution de la vente, obtenue par les intimés, la propriété était irrévocablement passée entre les mains de l'adjudicataire à la vente du Shérif. Le demandeur profite de cette circonstance pour dire, et avec quelque apparence de raison, que les intimés ne pourraient plus espérer faire résillier la vente de manière à les rendre propriétaires et à se présenter devant cette Cour non comme simple créanciers, hypothécaire ou privilégiés requérant enregistrement, mais comme encore revêtus de tous les droits d'un propriétaire dont le bien est vendu et qui comme tel a droit d'en toucher le prix, en préférence à tout autre créancier duement enregistré. Il me semble que la position des intimés n'est pas changée ni matériellement affectée par cette circonstance. En effet, ils ont institué leur action en temps utile, à une époque il est vrai où l'immeuble était sous-saisie, mais sans que pour cela le défendeur en fut dépossédé ni les droits de l'intimé à la résiliation affectés ou détruits. L'époque de l'institution de l'action et non celle de son résultat final au moyen du jugement qui prononçait la résolution de la vente doit seul être prise en considération; j'argumente ici comme si cette résolution de la vente était nécessaire; mais je ne le crois pas: au contraire, sur le principe que j'ai plus haut énoncé, je suis porté à dire que l'intimé a fait une procédure de surérogation en demandant cette résolution et qu'il lui suffisait d'alléguer que comme valeur non payé il aurait sur cette propriété non seulement son droit de privilège de bailleur de fonds, mais un privilége d'une autre nature beaucoup plus effectif, celui de se pouvoir dire possesseur d'un droit de propriété sur le même immeuble que le payement seul pouvait

Gauthier and Valois.

éteindre. Ce privilége consiste dans le droit de réclamer la propriété même ou la valeur qui la représente comme dans un cas de vente judiciaire. Voyez art. 729 C. P. C., relatif au privilége du vendeur non payé.

Cette Cour semble avoir confirmé l'interprétation que je donne au droit du vendeur non payé, par le jugement qu'elle a rendu le 21 Mars, 1872, dans la cause de Thomas *vs* Aylen, au rapport de laquelle cause qui se trouve au 16 Jurist, page 309, je réfère avec confiance.

Pour cette raison, je crois que le jugement dont est appel devrait être confirmé.

Judgment of Court below confirmed.

Loranger & Loranger, for appellant.
Dorion, Dorion & Geoffrion, for respondent.
(S. B.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 24TH JUNE, 1873.

Coram DUVAL, CH. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 23.

HOPE, APPELLANT;

AND

FRANK, RESPONDENT.

HELD:—That the notice required by the 105th sec. of the Insolvent Act of 1869 cannot be given by advertisement in the *weekly* edition of a *daily* newspaper.

This was an appeal from a judgment of the Superior Court at Montreal rendered on the 25th of June, 1870, granting the respondent's petition for discharge under the 105th sec. of the Insolvent Act of 1869.

In appeal, it was held that the notice of the application for discharge, which had been given by advertisement (besides in the Quebec Gazette) in the *weekly* edition of a *daily* newspaper was insufficient, and the judgment of the Court below was consequently reversed.

DUVAL, Ch. J., remarked that the notices given in the weekly editions were not sufficient. Business men did not see these editions. The consequence would be that the judgment would be reversed and the discharge set aside.

The following were the reasons assigned in the written judgment:

"The Court * * *. Considering that the respondent John Charles Frank has not observed the requirements of the law to entitle him to the prayer contained in the petition presented by him to the Superior Court in and for the District of Montreal, on the twenty-third day of June, eighteen hundred and seventy, praying the said Court to grant him a discharge under the provisions of the Insolvent Acts of eighteen hundred and sixty-four and eighteen hundred and sixty-nine, and considering that the said respondent did not give notice of his said application to the said Court, as required by the Insolvent Act of eighteen hundred and sixty-nine."

Judgment of Court below reversed.

Abbott, Tait & Wotherspoon, for appellant.
L. N. Benjamin, for respondent.
(S. B.)

COURT OF QUEEN'S BENCH, 1873.

QUEBEC, 6TH DECEMBER, 1873.

Coram BADGLEY, J., MONK, J., TASCHEREAU, J., RAMSAY, J.

No. 21.

THE MOISIC IRON COMPANY, APPELLANT,

AND

OLSEN *alias* JACOBSEN, RESPONDENT.

HELD:—1. That the president of an incorporated company is competent to make the affidavit for a *capias* under Art. 798, C. P.

2. That the affidavit may be sworn before the Deputy Prothonotary.

3. That the following form of the Judge's Order required by Art. 801 C. P., is sufficient: "Seeing the foregoing affidavit, the amount of bail to be given under Article 801 of the Code of Civil Procedure is hereby fixed at——."

4. That the writ of capias, as to its execution on a Sunday, is not governed by Art. 786 C. P.

5. That the affidavit is not bad because it states that the debtor is about to leave the "Dominion of Canada," when it can be gathered from the other allegations of the affidavit that the departure is really from a point within the limits of the former Province of Canada.

6. That it is not necessary that it should be positively sworn that at the time of the making of the affidavit the debtor is actually within the limits of the former Province of Canada.

7. That damages claimed for the breach of a contract made in Norway, but to be executed in the Province of Quebec, do not constitute "a debt created out of the Province of Canada." (Art. 806 C. P.)

This was an appeal from a judgment rendered by the Court of Review, at Quebec (MEREDITH, CH. J., and CASAULT, J., TESSIER, J., *dissentiens*) confirming a judgment rendered by the S. C. at Quebec the 2nd of July, 1873, (STUART, J.) which granted a motion to quash a *capias ad respondendum* issued by the appellant against the respondent.

The questions raised in the different courts sufficiently appear in the remarks of the judges in each court.

STUART, J:—(In the S. C.) In this, and in sixteen other cases identically situated, motions are made by the defendants to be liberated from custody and to quash the writs of capias.

Before entering upon the objections so well put by the counsel of the defendants I shall refer to the conditions upon which the remedy of a *capias ad respondendum* is allowed by law to a plaintiff.

The Code of Civil Procedure enacts—Art. 798: This writ is obtained upon an affidavit of the plaintiff, his book-keeper, clerk or legal attorney, declaring that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding $40, and that the deponent has reason to believe and verily believes, for reasons specially stated in the affidavit, that the defendant is about to leave immediately the Province of Canada, with intent to defraud his creditors in general or the plaintiff in particular, and that such departure will deprive the plaintiff of his recourse against the defendant.

Art. 806. A writ of capias *cannot issue* for any debt created *out* of the Province of Canada, nor for any debt under $40.

Having given the text of the law, I shall now give the substance of the affidavit impugned, that non-professional equally with professional gentlemen may

The Moisic Iron Company, and Olsen alias Jacobsen.

understand the question at issue, on a subject of such general interest as that of the remedy of imprisonment conferred on the creditor in certain exceptional cases against his debtor. The affidavit is made by Mr. Molson, who takes as his addition President of the Moisic Iron Company, a body politic and corporate, having its principal place of business at the City of Montreal—he makes oath that "K. Olsen is personally indebted to the said Moisic Iron Company in the sum of $293 for that, whereas at Christiana, in Norway, on the April last, it was agreed between K. Olsen and the said Company that the said K. Olsen should serve the said Company in such capacity as the Manager of the same might deem expedient, at the current rate of wages, for the term of one year from the date of his arrival at the works, to wit, at Moisic aforesaid; and the said K. Olsen, then and there acknowledged that he was indebted to the said Company in the sum of $93.69, advanced to him for the payment of his passage with his family, and for the purchase of provisions for the voyage;" that he entered the service, and subsequently left it without cause and against the directions and orders of the managers and officers of the Company to their damage of $293. The affidavit then proceeds: "This deponent further states that he has reason to believe and verily believes that the said K. Olsen is about immediately to leave the Dominion of Canada with intent to defraud the said Moisic Iron Company, and for reasons of his said belief this deponent saith that the said K. Olsen joined with others at Moisic aforesaid in resisting the lawful commands of the manager and officers of the Company, and with menaces demanded his discharge and struck work, and afterwards left Moisic in a schooner with a great number of others, the said party leaving declaring that they were going to join their friends in Chicago, in the United States; that the said K. Olsen by so leaving the service of the Company with the others aforesaid to the number of fifty or thereabouts, has caused a stoppage of the works of the Company.

The Defendant's objections to this affidavit are numerous, and may be classified into substantial and technical objections.

I shall first consider the substantial objections.

The affidavit on its face, does not appear to have been made by any of that category of persons which the law requires should make it; it is not made by the plaintiff's book-keeper, clerk, or legal attorney. Mr. Molson does not say that he bears any of these relations to the Company, he does not even swear that he is president of this Company, though that would not better matters, but simply assumes that addition. A man does not swear to the truth of his addition, and perjury could not therefore be assigned if such addition were false. The business of every Corporation is transacted by a special body or board of directors, and the acts of such body or board evidenced by a legal vote are as completely binding upon the Corporation and as complete authority to their agents as the most solemn acts done under the Corporate seal; individually the directors in no sense represent or bind the Company; if there be a vote of the board of direction of the Moisic Iron Company, naming Mr. Molson the legal attorney of the Company, then he would have been authorized to take this affidavit, and it is to be regretted that he did not assume a quality he possessed and comply with the law,

but if he has no other authority than that derived from being president to justify his making it, then he had no more power than any other director, and a director has no more power than the merest stranger, that is, no power at all; and the arrest in this case is not shewn to be the act of the plaintiff. I have been thus explicit in expressing my opinion, because the objection is a substantial one, and I should regret if it were looked upon as a technical one. But quite irrespective of the powers of a president, the law directing that the affidavit shall be taken by certain persons only, excludes all other persons from the right of doing so, and the person taking the affidavit in this and all like cases should be the book-keeper, clerk, or legal attorney of the plaintiff, and should assume the quality on the face of it. Where an act authorizing a creditor to redeem, required an affidavit of the amount due to be made by the creditor or his agent, it was held the affidavit must state, in express terms, that the deponent was agent, and merely naming him as such in the affidavit would not answer. It would be easy to refer to authorities to show that Judges have no power of extending the meaning of a Statute beyond its words, and deciding by the equity and not the language; but there is enough in the law itself to show that the Legislature wisely intended to leave nothing to interpretation, nothing to the discretion of Judges. It names all the category of persons who shall give the evidence upon which this extraordinary remedy shall rest: thus, in designating the book-keeper it did not conceive that that would include another description of clerk, and hence it confers the power on the clerk, nor that these designations could be held to include a legal attorney. All latitude of interpretation appears to me to be guarded against in the law itself—and in the whole course of my experience, dating back to a time when our Courts were presided over by very eminent men, I know of no case in which the language of the law was not insisted upon by our Courts, as essential to the validity of affidavits of this nature, except the case of affidavits taken by cashiers of banks, in which it was held that a cashier is by law the legal attorney of his bank—this is the only exception. It would be extraordinary if at this late day, I were to hold that the bar, with the law under their eyes, were not bound to adopt its language. Could anything else be expected to follow from my doing so, than confusion and distrust of the Courts? There is nothing but what is right and legal in saying that the language of the law shall be used, and that no equivalents and still less terms broader or more limited shall be admitted. As long as I have the honor of occupying a seat on this Bench, I shall obey the law by requiring in such affidavits that the terms it prescribes and no others shall be used.

The next question is of the same nature as the last. After mentioning who shall take such affidavits, the law plainly and explicitly prescribes that the deponent shall swear that the person proceeded against is about to leave immediately the Province of Canada with a fraudulent intent. The deponent swears that the party is about immediately to leave the Dominion of Canada; this again is a departure from the language prescribed and that is enough, and it is as wide a departure from its meaning. There is no law that justifies this affidavit.

It is further objected to this affidavit that no sufficient reason is given for believing that the defendant was immediately about to leave the Dominion of

The Moisie Iron Company, and Olsen alias Jacobsen.

Canada—"and for reasons for his belief this deponent saith that K. Olsen joined with others at Moisie aforesaid in resisting the lawful commands of the manager and officer of the company, and with menaces demanded his discharge and struck work." So far the affidavit swears to the resistance of lawful commands without specifying what these commands were. If this allegation is material it ought to have stated the commands that the Court might judge of their lawfulness, but in truth neither this fact nor that of their leaving Moisie have any bearing upon the objection taken; whether the defendant's departure gives the plaintiff any recourse against him will depend upon the legality of his hiring according to the laws of Norway, and perhaps upon the manner in which the company fulfilled towards him the obligations they have contracted; but there is nothing so far to justify the conclusion, that when leaving Moisie the defendant intended to go beyond the limits of the Dominion of Canada. The affidavit proceeds, "and afterwards left Moisie in a schooner with a great number of others, the said party leaving declaring that they were going to join their friends in Chicago, in the United States." This then is the reason. That the defendant should be held responsible for what he said himself is quite intelligible, but that the defendant, by entering a schooner to come to Quebec, should be liable to imprisonment here because a party on board said they were going to join their friends in Chicago seems to me no reason at all. Either the defendant was one of the party who said they were going to Chicago, and then the affidavit should have boldly and frankly stated the fact, or it was the others who said so. As identically the same affidavit is made in all the cases before me, it follows that not one of them said he was going to Chicago, or rather is sworn to have said so. As the schooner is represented as containing some fifty persons, there were thirty-three persons who may have said they were going to Chicago, and who, in so far as it appears, were permitted to go unmolested by the plaintiff. This loose, elastic assertion seems to me wholly insufficient to ground an arrest of the defendant.

According to law a *capias* can only issue for a debt created in the Province of Canada, or rather the law says that no *capias* shall issue for a debt created outside of the Province of Canada. Does the affidavit in this case show a debt upon which the *capias* can issue? It alleges an agreement between the plaintiff and defendant, without saying how and by means of whom the plaintiff bound himself in this agreement, by which the defendant was to serve the Company at the current rate of wages, for the term of one year from the date of his arrival at Moisie; and that the defendant then and there, that is in April, and in Norway, acknowledged he was indebted to the said Company in a sum of $93.69, advanced to him for the payment of his passage and for the purchase of provisions for the voyage. It is not stated whether such contracts were in writing or verbal, nor in any form binding on the defendant by the laws of Norway. Two contracts are sworn to have taken place—one a contract of hiring for a year, the other a loan of money. The object or motive for the loan in no way affects its nature. As to the loan, the money was advanced in Norway, and the acknowledgment was given there—no promise of repayment anywhere or at any time is alleged to have been made by the defendant. The effect or value of

said acknowledgment will be regulated by the laws of Norway, all the legal consequences attach to it according to that law, thus with reference to $93.69 it is a claim to recover back so much money lent to the defendant in Norway, and for this sum as well as the damages the defendant is now detained by *capias*. I cannot believe that there can be any two opinions that for the recovery of this amount the law expressly denies the plaintiff the right to issue a *capias* at all.

As to the damage claimed by the plaintiff for breach of the alleged contract of hiring, and which the Judge fixed for the purposes of the arrest in the cause at $50, where was that created? It may as well be stated emphatically there can be no conflict of laws in the present case, because the question is as to the remedy, and that is regulated by the laws of the country where it is resorted to. So that the question is, do the laws of the Province of Quebec admit of a *capias* issuing in an action for breach of a contract entered into in Norway? The right of the plaintiff to damages rests upon a legal contract, according to the laws of Norway. If the contract is not binding on the defendant by those laws, this action must fail from want of foundation. An action for breach of contract is an action to enforce a contract. This, then, is an action to enforce a foreign contract. Such an action lies in the Courts of this country; but our law says that in such an action no *capias* shall issue. The plaintiff's right of action was not created in this country, though he seeks to enforce it here.*

Whenever this case comes up on the merits, this Court will be called upon to say whether by the laws of Norway the defendant did or did not bind himself to serve the plaintiff for the space of a year. Can that be an action created in the Province of Canada? If it should be found that the defendant is bound, then the foreign contract is vindicated by awarding damages. I think that the present action is to enforce a foreign contract, and that no *capias* can issue in such.

Reference has been made to the decisions of our Courts on the question of cause of action, and they are uniform that cause of action is combined of the promise and of the breach, hence when the promise was in one district and the breach in another the Court has been held to be without jurisdiction in either district, and the plaintiff was referred to the domicile of the defendant. Applying these decisions as far as they have any application to the present case, was not the promise and undertaking to serve made in Norway, and did not the breach occur here? Then the cause of action has not arisen in this Province if the decisions adverted to are based on reason and law.

I am irresistibly drawn to the conclusion that not in one essential particular only but in every essential particular the affidavit in this case is faulty and

---

* Fœlix Droit International. "La question de la légitimité de l'engagement, celle de savoir s'il y a lieu d'accorder où de refuser l'action résultant d'un contrat doivent être également apprecié suivant la loi du lieu où le contrat a été passé. . . . . Le principe général en cette matiere est que les parties contractantes ont eu l'intention de se conformer dans leurs conventions à la loi du lieu ou celles-ci ont été consenties et sont devenus parque, la substance du lien (*vinculum juris*) des conventions, dépend de la loi du lieu où elles ont reçu leur perfection, l'acte valable ou nul d'après cette loi, également partout."

The Moisic Iron Company, and Olsen alias Jacobsen.

insufficient—it was not made by the book-keeper, clerk or legal attorney of the plaintiff—it does not swear that the defendant is about immediately to leave the Province of Canada—it does not contain sufficient reasons for swearing that the defendant was about leaving—and lastly it shows clearly that the debt sought to be recovered was not created in the Province of Canada, but was created in Norway.

The principal technical objections are:—

That the Prothonotary had no authority to issue the writ;

That the arrest was made on a Sunday, without there appearing any authority to justify this;

That no order for the issuing of the writ was ever granted by any Judge, and without such the writ could not legally issue.

I am far from thinking all of these objections without any foundation, but as I am with the defendant upon other grounds, I shall not express an opinion upon these.

The questions submitted are, in my apprehension, neither complicated nor difficult of solution. The law governing the matter is one prescribing forms of procedure, and in regard to these the maxim is *non observata forma infertur adnullatio actus*—the procedure, whatever it is, required by law, it is our duty rigidly to exact, the restriction strictly to insist on, without regard to the facts or the hardship of the case. The intention of the Legislature controls absolutely the action of the judiciary, and if such intention is clearly shown, as in this case, the Courts have no other duty to perform than to execute the Legislative will. No rule is more firmly established and acted upon than that which declares when a law is plain and unambiguous, whether it is expressed in general or limited terms, the Legislature shall be intended to mean what they have plainly expressed, and the Judges should not arrogate to themselves a dispensing power where the Legislature has spoken. Assuming the power of extending the meaning of a statute beyond its words, and deciding by the equity and not by the language, is exercising legislative functions, it is virtually repealing the law and enacting another. There exists no such power in the judiciary. I am called upon, with a law before me prescribing who shall make oath and what shall be sworn to, to say whether the affidavit in this cause contains these requirements. I find it impossible to say that it does, and I must, as a necessary consequence, order the enlargement of the defendant.

The following was the written judgment in the Superior Court:—

"The Court, having heard the parties by their Counsel respectively upon the defendant's motion of the thirtieth day of June last, for that the writ of *capias ad respondendum* in this cause issued be declared null and void, and set aside with costs *distraits*; doth grant the said motion, and, thereupon, the said writ of *capias ad respondendum* is declared illegal, irregular, null and void, and set aside and quashed, with costs *distraits* in favor of the defendant's attorney."

The judgment in Review was as follows:—

"La Cour, siégeant en révision, ayant examiné la procédure de record, et entendu les parties par leurs avocats respectifs, sur le mérite du jugement dont se plaint la demanderesse, rendu en la présente cause par la Cour Supérieure,

siégeant dans le District de Québec, le second jour de juillet, mil huit cent soixante-treize, et sur le tout murement délibéré :—

Considérant que la déposition sous serment, sur la production de laquelle a été obtenu le bref de *capias ad respondendum* en cette cause, ne contient pas l'énonciation que le défendeur était sur le point de quitter immédiatement la partie de la Puissance du Canada formant ci-devant la Province du Canada, et que les termes dont on s'y est servi ne comportent pas l'affirmation de ce fait, le jugement en première instance, savoir, le jugement susdit, rendu par la Cour Supérieure siégeant à Québec, annulant le bref de *capias ad respondendum* émané en cette cause, est confirmé, avec dépens distraits en faveur du procureur du défendeur.

Dissentiente, l'Honorable Juge Tessier."

TESSIER, J.:—(In Review)—*dissentiens*—

A writ of *capias ad respondendum* was issued in this cause at the instance of the plaintiff, against the defendant, described as lately residing at Moisic, District of Saguenay. This writ has been quashed by the Superior Court; this judgment is now brought under review of this Court.

The facts disclosed by the affidavit of William Markland Molson, Esquire, President of this Company, a body politic and corporate, are: that on the 15th April last, at Christiana, in Norway, it was agreed between the defendant and the said Company, that the defendant should serve the said Company for the term of one year from the date of his arrival at the works, to wit, at "Moisic aforesaid; that the defendant then and there acknowledged that "he was indebted to the said Company for the sum of $133.00 advanced "him for the payment of his passage, and for the purchase of provisions for the "voyage."

It is further stated in the affidavit, "that the defendant proceeded to Moisic "and *there entered* the service of the said Company, on or about the 29th May "last, in the capacity of workman, and that the defendant did not nor would on "his part perform the said agreement, or continue his services to the said Com-"pany but, without reasonable cause, left the service of the said Company on or "about the 9th June then instant, to the damage of the said Company of $333."

The deponent further stated that he had reason to believe, and verily believed, that the defendant "is about to leave immediately the Dominion of Canada, with "intent to defraud the said Company. That he joined with others at Moisic "aforesaid, in resisting the lawful commands of the manager and officers of the "said Company, and with menaces demanded his discharge, and struck work, and "afterwards left Moisic in a schooner with a great number of others, the said "party so leaving declaring that they were going to join their friends in Chicago, "in the United States; that by so leaving with the others the defendant has "caused a stoppage of the works of the Company."

The defendant has moved to quash this writ of *capias* for several reasons.

1st. That the debt upon which the *capias* is issued is a foreign debt, and, if it is so, by article 806 of our Code of Procedure, the writ of *capias* does not lie.

To decide this question, it is necessary for the defendant to establish that

The Moisie Iron Company and Olsen alias Jacobsen.

the *whole cause of action* has originated in a foreign country, or that the debt which is claimed has *been created* in a foreign country; because the principle laid down in this article is an exception to the general rule. The performance of the contract was to be in Canada, and it must be presumed that for this purpose the parties intended to submit themselves to the laws of the country where the performance of the contract was to take place. The defendant has fulfilled that part of the contract by which he was to leave Norway and come to Canada; once in Canada, he began to perform the essential part of the contract, which was to work at Moisie for the Moisie Iron Company; and it is the performance, or non-performance, or bad performance, of this contract in Canada, that has given rise to the claim of the plaintiff, for which he seeks a remedy allowed by the laws of this country where the contract had to be performed. The passage money and purchase of provisions was not money lent, but money advanced to be credited on account of the work to be performed by the defendant; the affidavit states, "that the defendant then and there acknowledged to owe that sum;" the other sum is for direct damages on account of leaving the works, but the whole is claimed in this affidavit as of damage to the plaintiffs to the amount of $333.00. By order of the Judge, the amount for which bail could be given by the defendant was reduced to $183.00.

This rule, that the debt is created in the country where the performance of a contract is to take place, and that the remedy is governed by the laws of that country, appears to be generally admitted.

Bonjean, Traité des actions, vol. 1, page 6, "Toute action suppose la violation consommée ou imminente d'un droit."

Idem, page 12. Le droit, etc.

Story, "Conflict of laws, No. 280." The rules already considered suppose "that the performance of the contract is to be in the place where it is made, "either expressly or by tacit implication. But when the contract is either ex- "pressly or tacitly to be performed in any other place, then the general rule is "in conformity with the presumed intention of the parties that the contract as "to its validity, nature, obligation and interpretation, is to be governed by the "law of the place of performance. This would seem to be a result of natural "justice, and the Roman law has adopted it as a maxim: '*Contraxisse unus- "quisque in eo loco intelligitur, in quo ut solveret, se obligavit,*' and again in "the law, '*aut ubiquisque contraxerit contractum autem non utique eo loco in- "telligitur quo negotium gestum sit, sed quo solvenda est pecunia.*' The rule "was fully recognized and acted on in a recent case by the Supreme Court of "the United States, where the Court said that the general principle in relation "to contracts made in one place to be executed in another was well settled; that "they are to be governed by the laws of the place of performance."

Pothier, Traité du change, No. 155.

This principle has been recognized in our jurisprudence. In the Superior Court at Montreal, Macdougall vs. Torrance, L.C. Jurist, 5th vol., p. 148. Held by Mr. Justice Monk:—That a debt arising out of a contract made in Scotland to deliver passengers' luggage in the port of Montreal, and where delivery failed to be made, is not a cause of civil action which has arisen in a

foreign country, and in this case a *capias ad respondendum* issued against the body of the Defendant was maintained. The other rule is that the whole cause of action must have been created in Norway.

In the case of Warren vs. Kay, 6 L. C. Reports, page 492, it has been held, (Justices Meredith and Badgley,) that cause of action means the *whole cause* of action.

And in Rousseau vs. Hughes, 8 L. C. Reports, page 187, the same rule was maintained by Judges Meredith, Morin and Badgley. In that case the learned Chief Justice Meredith cited an English case, 29 Eng. Law and Equity Reports, 269, in which Judge Maule observed "*Everything that is requisite to show the action to be maintainable is part of the cause of action.*"

Although the question mooted in these cases was in reference to the jurisdiction of the County Court in England, it bears analogy to the present rule, which is also an exception to the common law; therefore the whole cause of action, or the whole debt, must be created in a foreign country, to give the benefit of the exception to the defendant; it appears to me clear that the whole debt was not in the present case created in Norway.

2. The other objections are more technical than substantial; among them is the objection that the affidavit is made by Wm. M. Molson, President of the Company; it is admitted that a single clerk of the plaintiff could make legally this affidavit; *a fortiori*, the President who is one of the Members and Directors of this Incorporated Company.

3. Upon the other technical objections, I believe the members of the Court are unanimously of opinion to reject them; I will, therefore, now limit myself to one upon which I differ from the other learned members of the Court.

The objection is that the deponent swears that the defendant is about to leave the *Dominion of Canada*, instead of swearing that the defendant is about to leave the Province of Canada, or what formerly constituted that Province, Lower and Upper Canada.

This objection appears to me to be purely technical, and unless the words "Province of Canada" are essential (*sacramentels*) the term "Dominion of Canada," clearly comprises the old Province of Canada, and the writ issued cannot be executed but within the limits of the Province of Quebec.

How can the defendant complain if the plaintiff alleges on his oath *more* than is necessary? How is it prejudicial to the defendant?

The whole context of the affidavit must be considered, and is it not a necessary conclusion from the facts therein sworn to, that the defendant is about to leave that part of the Dominion of Canada, formerly known as the Province of Canada? It is stated in this affidavit: 1. That the defendant was lately residing at *Moisic, District of Saguenay*, (judicially known as being within the the old Province of Canada. 2. That on the 29th May last the defendant entered the service of the plaintiff *at Moisic*. 3. That on the 9th June, without reasonable cause, he left the service of the Company, joined with others "at Moisic, struck work, *and afterwards* left *Moisic* in a schooner with a great "number of others, the said party so leaving declaring that they were going to "join their friends in Chicago, in the United States;" this affidavit is sworn

The Moisic Iron Company and Olsen alias Jacobsen.

to on the 21st June, that is to say, 12 days after the departure of the defendant from Moisic in a schooner. Can there be any doubt that he was leaving the old Province of Canada, and even the Dominion of Canada, to go to the United States? What other idea can be conveyed to the mind of any one than that there he intended to go?

But it may be said that swearing that the defendant was about to leave the "Continent of America" would be insufficient; this may be, but it would then be so only because the Continent of America, although well known to us historically, is not judicially known to us, while "Dominion of Canada" are the words used in our laws; and in the same way as the old Province of Canada was substituted to the United Provinces of Lower Canada and Upper Canada, in matters of *capias*, and almost everything else, the Dominion of Canada is now substituted to all the Provinces included in the Confederation.

The principle of law which ought to guide in this case is a general principle found in our own code, that a nullity is not presumed, "les nullités ne se présument pas." There is no positive rule existing to the effect that it is necessary to swear that at the specific time when the affidavit is made, the defendant is still within the limits of the old Province of Canada; it would even be very often impossible, because, with our easy means of communication, a fraudulent debtor may reach the frontier line in a few hours. Supposing even that the defendant in the present case should have gone from Moisic to New Brunswick, with the intent of passing through Canada to reach the United States, and that he was in New Brunswick on the day the affidavit was made; I maintain that the affidavit would still hold good, and the defendant subsequently arrested in Lower Canada, *en route* to the United States, would be well and legally arrested.

Our Code of Procedure, article 20, is clear as to technical formalities.

"In any judicial proceeding it is sufficient that the facts and conclusions be "distinctly and fairly stated without any particular form being necessary, and "such statements are interpreted according to the meaning of words in ordinary "language."

It appears to me to be the more conclusive that the quashing of a *writ of capias* ought to be pronounced only because of positive infringement of our laws of procedure, since these laws indicate a summary and clear mode of contesting the facts sworn in the affidavit, which mode could have been easily followed during the three months which have nearly elapsed since the arrest of the defendant; and it applies in the words of article 819 of Code of Procedure, "If the essential allegations of the affidavit upon which the *capias* is founded are false or insufficient;" with this enactment of our Code, technical objections ought to have less weight than they might have had formerly here and in England.

Every protection must be given to the liberty of the subject, but protection must also be given to our own subjects against the fraudulent intentions of emigrants who have their passage-money paid from their own country, and, once in Canada, after eight days' work, combine to strike work, pocket the advances made, and move off to the United States, to the great prejudice of Canadian industry, without even alluding to the risk of exposing the plaintiff to considerable damage in the present case.

For these reasons, although with great reluctance, I must conscientiously dissent from the judgment to be pronounced quashing the *capias* in the present case.

CASAULT, J.:—Cette cause et seizes autres des mêmes demandeurs contre divers autres défendeurs sont en révision d'un jugement de la Cour Supérieure à Québec, annulant (quashing) le bref de capias.

Le 1er moyen invoqué par les défendeurs est que la déposition pour l'obtention du bref a été assermenté devant le Député Protonotaire et le bref signé par lui, tandis qu'aux termes de l'article 807 C. P., la déposition ne pouvait être assermentée que devant un Juge, ou Commissaire, ou le Protonotaire, et le bref doit être certifié par ce dernier.

S. R. B. C., ch. 93, sec. 12, impose au Protonotaire de la Cour Supérieure à Québec l'obligation de nommer un député. C. C., art. 17, no. 18, étend à son député *les devoirs imposés et les pouvoirs conférés à un officier ou fonctionnaire public*, et l'article 26 du C. P. applique à ce dernier Code toutes les dispositions de l'Article 17 du C. C. L'autorité du Député Protonotaire de recevoir et d'assermenter la déposition et de certifier le bref, ne peut par conséquent être l'objet d'un doute.

2e. Le second moyen est que l'ordre du juge au bas de la déposition est insuffisant. Il n'ordonne point spécialement l'émanation du *capias*; il ne fait que fixer le montant du cautionnement au moyen duquel le défendeur pourra obtenir son élargissement.

Par C. P. 801, lorsque la créance repose sur une demande de dommages-intérêts non liquidés, le *capias* ne peut émaner que sur l'ordre d'un juge après examen de la suffisance ou de l'insuffisance de la déposition sous serment, qui doit contenir certaines énonciations spéciales, et y est-il dit: "il est à la discretion du juge d'accorder ou de refuser le *capias* et de fixer le montant du cautionnement au moyen duquel le défendeur pourra obtenir son élargissement." Le juge a, dans le cas présent, fixé le montant du cautionnement; il a, par là même, exercé la discretion que lui confère la loi, et permis l'émanation du *capias*. Car, sans le *capias*, le défendeur ne pouvait pas être arrêté et n'avait pas besoin de fournir caution pour obtenir son élargissement.

3e. Troisième moyen. Le *capias* a été exécuté le Dimanche, sans déposition sous serment en établissant la nécessité, et l'ordre du juge n'est pas au dossier; on n'y trouve que le retour spécial du Shérif énonçant que l'arrestation a été faite le Dimanche sur l'ordre du juge mis au dos du mandat (warrant) resté entre les mains du géolier. Le défendeur soutient que le juge n'a pas le pouvoir d'ordonner une arrestation sur *capias* le Dimanche, et il cite les Arts. 785, 786, C. P., pour montrer que le juge ne peut permettre l'arrestation sur contrainte par corps d'un défendeur le Dimanche, que lorsqu'il est établi que le débiteur agit de manière à se soustraire à la contrainte; le défendeur cite aussi Pothier, Proc. Civile, No. 259, 260.

Ce moyen ne peut pas être invoqué dans les causes 487 Olsen défendeur, et 468 Foss défendeur, où l'arrestation a eu lieu le Lundi.

La contrainte par corps est l'exécution d'un jugement, le *capias ad respondendum* une assignation. C. P., 54, dit bien que l'assignation ne peut pas être

Moisie Iron Company and Olsen alias Jacobsen.

donnée le Dimanche, *sans la permission expresse du juge*; mais il ne dit rien de plus, et ne met pas à l'octroi de cette permission la condition mentionnée à l'Art. 786 pour la contrainte. Cette condition se trouve néanmoins satisfaite dans le cas présent. Le juge ordonnait, le Samedi, l'émanation d'un *capias* pour arrêter le défendeur que, dans la déposition pour *capias*, on jurait être immédiatement sur le point de laisser la Puissance avec l'intention de frauder les demandeurs. Cette déposition et le jour où on demandait l'ordre pour *capias* n'établissaient ils pas la nécessité de l'arrestation le Dimanche? Les demandeurs, pour en obtenir la permission devaient-ils invoquer d'autres circonstances? En pouvait-ils invoquer de plus spéciales et de plus fortes? Cette permission doit être au dossier, le Shérif devait-la rapporter avec le bref et non la laisser au géolier. Mais si le défendeur, qui avait obtenu que le Shérif fit un rapport immédiat et anticipé du bref et des procédés sur icelui, n'était pas satisfait de l'existence de cette ordre, il devait, en se plaignant que le rapport était incomplet, en demander la production. Le tribunal l'eut ordonné.

4e. Quatrième moyen (plus bas).

5e. Cinquième moyen. La déposition requise n'a été faite par une personne ayant qualité. Le déposant, William Markland Molson, s'y intitule président du Moisie Iron Co., et il n'est pas à ce titre une des personnes dont la loi réquiert la déposition pour l'obtention du bref de capias.

C. P., 798, dit que ce bref est obtenu sur production de la déposition sous serment du demandeur, de son teneur de livre, de son commis, ou de son procureur légal. Il n'exige pas l'emploi rigoureux des termes dont il se sert pour qualifier les personnes dont la déposition est requise pour l'émanation du bref. Toute autre expression montrant que le déposant est, ou le demandeur, ou son teneur de livres, ou son commis, ou son procureur légal, suffit. Le demandeur, lorsque c'est lui qui dépose, n'est pas obligé de jurer qu'il est le demandeur : il lui suffit de dire que c'est à lui que la dette est due. Il en est de même du commis et du procureur légal. Dans la cause de la Banque de Montréal vs. Coates, rapportée au 2ème vol. Revue de Législation, p. 328, la Cour a jugé que le caissier de la banque, en ne prennant que cette qualité, avait satisfait aux exigences de la loi. La sagesse de cette décision n'a jamais, que je sache, été révoquée en doute. Mais le défendeur prétend trouver une différence sous ce rapport entre le caissier d'une banque et le président d'une corporation privée. Le premier, dit-il, est le procureur légal de la banque, le second n'est pas celui de la corporation. Je ne puis me rendre à cette distinction. Le président et les directeurs d'une corporation sont ses procureurs légaux chargés de l'administration de ses affaires. Il ne peuvent pas agir isolément et séparément, mais ils n'en sont pas moins les procureurs légaux, les agents de la corporation. C. C., 358, 359, 360. Les officiers choisis parmi les membres de la corporation la représentent dans tous les actes, contrats, ou poursuites. C. P., 61, fait le président de la société par actions un des procureurs ou réprésentants de la société auxquels doit être donné l'assignation. Donné à lui, n'importe en quel endroit, elle équivaut à celle donné au bureau d'affaires de la société en parlant à un employé de tel bureau. L'objet de la loi est que la déposition soit donnée par

une personne qui ait la connaissance des faits qu'elle jure. Qui plus que le président d'une corporation privée doit mieux connaître ses affaires?

6e. Sixième moyen. La cause de la dette n'est pas suffisamment énoncée dans la déposition. On eut dû y dire si le contrat qu'on y allègue était verbal ou écrit, et le nom de l'agent par l'entremise duquel la corporation avait contracté.

Le défendeur paraît exiger plus de détails minutieux dans la déposition que dans la déclaration ou demande libellée, car celle en la présente cause n'est pas plus explicite que la déposition, elle est absolument dans les mêmes termes et ne contient rien de plus; néanmoins il ne l'a pas attaquée. Le contrat est réputé oral à moins d'allégation contraire. C. P., 801, exige l'énonciation dans la déposition de la nature et du montant des dommages réclamés et des faits qui y ont donné lieu, mais ce n'est que pour éclairer la réligion du juge et lui permettre d'exercer sa discrétion en accordant ou refusant le capias et en fixant le montant du cautionnement. Une mention succincte et sommaire suffit sans entrer dans ces particularités et les détails. Or, voici ce que dit la déposition sous ce rapport: (reads from the affidavit).

La Cour d'Appel, composée des Juges Duval, Aylwin, Drummond, et Mondelet, a, en juin 1865, dans la cause Gregory, appelant, et The Boston and Sandwich Glass Co., intimé, maintenu que la cause de la dette était suffisamment énoncée, quoiqu'il n'y fut pas dit autre chose, que le défendeur était vraiment, justement, et personnellement endetté envers la corporation, demanderesse, en la somme de $2,500, étant le prix et valeur d'une grande quantité de ver vendu par le déposant comme agent de la dite corporation au dit Gregory. 9 L. C. J., p. 134.

7e. Le septième moyen est que les raisons données dans la déposition sont insuffisantes pour faire croire au départ du défendeur. Voici cette partie de la déposition :—

"And this deponent further states that he has reason to believe and verily believes that the said Andreas Foss is about to leave immediately the Dominion of Canada with intent to defraud the said Moisie Iron Company, and that such departure will deprive the said Moisie Iron Company of its recourse against the said A. F., and for reasons of his said belief this deponent saith that the said A. F. joined with others at Moisie aforesaid in resisting the lawful commands of the Manager and Officers of the said Company, and with menaces demanded his discharge, and struck work, and afterwards left Moisie in a schooner with a great number of others, the said party so leaving declaring that they were going to join their friends in Chicago, in the United States; that the said A. F., by so leaving the service of the Company with the others as aforesaid to the number of fifty or thereabouts, has caused a stoppage of the works of the Company, and the said A. F. hath provided no means or given any security for repairing the great damages he has caused the said Company, and hath no domicile or real or personal property within the Dominion, to the knowledge or belief of this deponent."

Les raisons qui doivent être annoncées dans la déposition ne sont que celles nécessaires pour autoriser un homme raisonnable à croire véritablement que le défendeur est sur le point de quitter immédiatement la ci-devant Province du

The Moisic Iron Company, and Others alias Jacobsen.

Canada, avec intention de frauder son créancier. Or, quels sont les faits qu'affirme le déposant ? Un Norvégien a laissé son pays pour venir, non pas résider permanemment au Canada, mais seulement pour y travailler un an; en vertu d'un contrat à cette fin il a reçu de fortes avances qu'il n'a pas remboursées; après avoir travaillé quelques jours à Moisic, en exécution de ce contrat, il a refusé d'obéir, a cessé de travailler, a abandonné les ouvrages, a laissé l'endroit dans une goëlette avec plusieurs autres, et, en partant, ils ont dit qu'ils allaient joindre leurs amis à Chicago, dans les Etats-Unis. En laissant le service de la Compagnie, avec à peu près cinquante autres, il a arrêté les ouvrages, il n'a ni domicile ni biens dans la Puissance, et n'a pas pourvu aux moyens de réparer les dommages considérables qu'il a causés à la Compagnie. Sur une motion pour mettre à néant le *capias*, la vérité des allégations de la déposition ne peut pas être mise en doute. Il y est dit que le défendeur a déserté le service de la Compagnie, et qu'il lui doit une forte somme d'argent, d'où il résulte qu'il est exposé, s'il reste dans la Province, à l'emprisonnement et à l'amende, et à voir tout ce qu'il gagnera à l'avenir saisi-arrêté. Cette position qu'il s'est faite lui rend le séjour de la Province de Québec presqu'impossible, et ajoute encore aux raisons qui font croire à son départ. D'après les termes de la déposition, la déclaration que l'on partait pour Chicago fait preuve contre lui. On y dit "that he left Moisic in a schooner with a great number of others, the said party so leaving (which means himself as one of the party as well as the others) declaring" qu'ils allaient joindre leurs amis à Chicago. Que plusieurs ouvriers se réunissent, qu'ils abandonnent leur ouvrage, se rendent ensemble chez celui qui les emploie, et que là l'un d'eux lui déclare qu'ils le laissent et s'en vont à Chicago. Pourra-t-on soutenir que cette déclaration n'est pas celle de tous, et qu'elle ne peut affecter que celui qui l'a faite ? Certainement non. Or, les termes dont on se sert dans la déposition font un cas absolument identique. N'y a-t-il pas dans toutes ces circonstances, dans tous ces faits, tout ce qu'est requis pour créer, dans l'esprit d'un homme raisonnable, la conviction intime que le défendeur allait immédiatement laisser le pays avec intention de frauder son créancier et pour autoriser à le jurer ? On prétend que le déposant devait donner le nom des personnes qui lui ont fourni ses informations, et on cite des causes où l'arrestation a été mise au néant pour cette raison. Mais, dans ces causes, le déposant ne donnait pour motif de sa conviction que les rapports que lui avaient faits des tiers, sans les nommer, tandis que, dans le cas actuel, le déposant n'appuie la sienne que sur des faits dont il jure l'existence. 1 L. C. R., p. 351—Benjamin *et al.*, *vs.* Wilson, il a été jugé que lorsque le déposant jurait d'une déclaration faite à lui-même, il n'était pas nécessaire qu'il donnât le nom d'autres personnes de qui il disait tenir la même information. 4 L.C. R., 157—Wilson *vs.* Reid; 4 L. C. R., 218—Berry *vs.* Dixon; 4 L. C. R., 378—Quinn *vs.* Atcheson; 5 L. C. R., 42—Lefebvre *vs.* Tulloch; sont toutes des causes où le déposant jurait de l'existence des faits qui motivaient sa croyance, et où le tribunal n'a pas exigé plus. Il est bien vrai que dans le cas présent, le déposant ne dit pas spécialement que tout ce qu'il dit s'est passé en sa présence; mais en n'alléguant pas qu'il en a autrement obtenu la connaissance, il assume le connaître personnellement, et le tribunal ne peut pas présumer le contraire.

8e. Le huitième moyen est qu'il n'est pas allégué dans la déposition que le défendeur ait fait souffrir à la Compagnie défenderesse des dommages spéciaux, que le déposant y dit que ceux causés, sans en dire le montant, l'ont été par cinquante personnes, sans spécifier quelle part le défendeur doit en supporter, ni montrer qu'il soit responsable pour les autres. Mais le déposant dit que le défendeur a, sans causes raisonables, sans excuses, et sans le consentement de la Compagnie, laissé son service, et lui a causé des dommages au montant de $225.

C'est bien là spécifier les dommages dont on le charge et que l'on réclame de lui. Dans les raisons spéciales qui font croire au déposant que le défendeur va laisser la Puissance, le déposant met celle que le défendeur a, en laissant avec cinquante autres, interrompu les ouvrages et causé de grands dommages à la Compagnie. Cette circonstance y est alléguée comme une des raisons qui rendent le départ du défendeur probable. Seule et ainsi énoncée, elle ne serait peut-être pas d'un grand prix : mais réunie aux autres, elle contribue à établir la probabilité du départ du défendeur.

9e. Le neuvième moyen est que la dette mentionnée dans la déposition y paraît avoir été créée hors de la ci-devant Province du Canada et pour laquelle, aux termes du C. P. 806, le bref de *capias* ne pouvait pas émaner.

La déposition mentionne deux causes d'action, ou, si l'on veut, deux dettes distinctes, l'une au montant de $26.70 pour avances faites au défendeur en Norvège pour lui permettre de payer son passage au Canada, l'autre, formant la balance de la réclamation, pour dommages causés à la Compagnie par l'abandon de son service onze jours après y être entré, et l'inexécution du contrat par lequel le défendeur devait lui donner son travail pendant un an. L'obligation du défendeur, comme celle de la Compagnie, a été contractée en Norvège, mais elles devaient toutes deux être exécutées dans la Province de Québec. C'est là que le défendeur devait travailler et là que la Compagnie devait le payer. En promettant d'acquitter là son obligation, le défendeur se soumettait pour son exécution aux lois de cette Province ; il stipulait que ces lois détermineraient ses droits et ceux de la Compagnie, à laquelle il s'obligeait, qu'elles régleraient leurs recours réciproques dans le cas d'inexécution, et même, s'il se rendait dans la Province, le mode d'exercer ce recours. Pour qu'une dette ait été contractée à l'étranger et que la partie qui l'a créée puisse invoquer l'exception de l'Art. 806 C. P., il faut non seulement qu'elle se soit obligé à l'étranger mais qu'elle puisse acquitter là son obligation. On l'a formellement décidé à Montréal (Monk, Juge,) dans la cause de Macdougall & Torrance, rapportée au 5 L. C. J., p. 148 ; et je ne sache pas que l'on ait jamais révoqué en doute, dans ce district, que le capitaine de vaisseau qui, hors de la Province du Canada, recevait des marchandises à son bord et s'obligeait de les transporter à Québec, pouvait y être arrêté par *capias* s'il ne les livrait pas, ou s'il les livrait endommagées. Si on peut, dans les causes qui nous occupent, mettre en doute, parce que la déposition ne le dit pas expressément, que les avances alléguées avoir été faites en Norvège, au défendeur, étaient remboursables à Moisie, on ne peut certainement pas dire que le défendeur ne devait pas fournir là son travail. Il s'y est rendu, a commencé à travailler, y a par là même formellement ratifié le contrat ; et ce n'est qu'après plusieurs jours de travail, après un commencement d'exécution,

The Moisie Iron Company, and Olsen al'as Jacobsen.

qu'il se refuse à l'exécuter en entier, qu'il abandonne les ouvrages et cause à la Compagnie, en les laissant, les dommages qu'elle réclame en outre des avances. On ne peut certainement pas dire que ces dommages soient une dette contractée à l'étranger parce que c'est là qu'il s'est engagé. Autrement, il faudrait dire qu'un homme qui, en France, s'engagerait à un habitant de cette ville pour venir y construiré et y mettre en opération une usine, pourrait, après la construction des bâtisses, se refuser à construire et y mettre les machines, et s'en retourner tranquillement dans son pays sans qu'on put l'arrêter par *capias* pour les dommages causés par son refus. Le défendeur, en s'obligeant, à Christiana, a contracté là la dette de son travail, dette qu'il devait acquitter à Moisie; en désertant à Moisie le service de la Compagnie, il a contracté la dette des dommages qu'a causé sa desertion. Quant à cette partie de la réclamation, il ne peut pas, suivant moi, y avoir un doute.

La somme avancée pour le passage du défendeur n'est pas un prêt, comme on l'a prétendu, mais un paiement anticipé pour son travail, une avance comme on l'appelle dans la déposition. On n'y dit pas spécialement, il est vrai, où elle était remboursable mais puisqu'elle était un paiement anticipé de ses gages, elle était remboursable, par son travail, et par conséquent à Moisie. Je ne vois pas de différence entre cette dette et l'autre quant au recours par *capias*. Mais, en supposant qu'il y en ait, et qu'il ne pouvait pas émaner pour ces avances, le montant fixé par le juge pour le cautionnement que doit fournir le défendeur pour obtenir son élargissement, n'excédant pas les dommages, le *capias* ne devrait pas, pour cette raison, être annulé. Il y a eu des décisions en Angleterre maintenant qu'une déposition qui mentionnerait plusieurs dettes distinctes était insuffisante pour le tout, si elle l'était pour une partie; mais on a depuis abandonné cette opinion. Willmore, Wollaston & Hodges, Rep. p. 192, *Jones vs. Collins*. Aujourd'hui, on y décide, et avec raison, que la déposition n'est insuffisante pour le tout que lorsqu'elle ne mentionne qu'une seule et même somme pour plusieurs dettes, dont quelques-unes sont alléguées d'une manière insuffisante. On a aussi décidé la même chose ici; voir Robertson's Digest, p. 59—Patterson *et al. vs.* Bowen, King's Bench, Q. 1810. Les avocats du défendeur, tout en admettant cette distinction, dans un mémoire soumis depuis que la cause a été plaidée, soutiennent qu'on ne peut pas la faire dans cette Province, d'abord, parceque le juge n'y peut pas, comme en Angleterre, réduire le montant du cautionnement requis, et ensuite, parceque les circonstances qui font croire au déposant que le défendeur veut frauder le demandeur, peuvent n'avoir trait qu'à la partie de la dette pour laquelle le *capias* ne peut pas émaner. La première de ces deux raisons, fût elle vraie, ce que je ne puis pas admettre, n'aurait pas son application dans cette cause, où le montant du cautionnement n'égale pas celui des dommages réclamés en outre des avances, et par conséquent nous n'avons pas à réduire le cautionnement; et les énoncées de la déposition réfutent la seconde.

Revenons au 4me moyen invoqué par le défendeur, et qui est que la déposition ne dit pas qu'il était sur le point de laisser la partie de la Puissance qui constituait ci-devant la Province du Canada.

J'ai déjà dit que la loi n'exigeait pas l'emploi rigoureux des termes dont il se sert; et, depuis la Confédération, n'y ayant plus de Province du Canada, cet

emploi rigoureux serait impossible. Mais le déposant doit se servir d'expressions équivalentes et signifiant la même chose. Si la Puissance du Canada ne se composait que de ce qui formait ci-devant la Province du Canada, ou si la déposition indiquait qu'au moment où elle a été assermentée, le défendeur était dans les limites de cette ci-devant Province, ou même *qu'il devait y être*, je croirais qu'en disant qu'il allait laisser la Puissance, elle satisfaisait aux exigences de la loi; mais la déposition est assermentée le vingt-et-un à Québec; on y dit que le *neuf*, le défendeur laissait Moisie pour Chicago. Dans les onze jours qui se sont écoulée entre ces deux dates, il a bien pu laisser la Province de Québec et aller au Nouveau Brunswick, ou même dans la Puissance, partout ailleurs que dans les Provinces d'Ontario et de Québec, qui formaient toutes deux, à la date de la mise en force du Code de Procédure, la Province du Canada. La destination de la goëlette sur laquelle le défendeur s'embarquait, n'est pas mentionnée, et rien n'indique qu'elle devait venir à Québec plutôt que aller a Shédiac ou à Pictou, d'où il n'était aussi près de Quebec, et d'où il pouvait tout aussi bien rapidement se rendre à Chicago sans même passer par la Province de Québec. Le Code permet l'émanation d'un *capias* contre une personne sur le point de laisser la Province du Canada; il ne l'autorise pas contre une personne en dehors de ces limites. Il est bien vrai que le défendeur a, deux jours après, (et tous les autres défendeurs, moins un le lendemain,) été arrêté dans le District de Québec; mais sur motion pour annuler un *capias*, le droit ne doit s'occuper que de la déposition et de la suffisance de ses allégations, sans chercher dans les procédures qui l'ont suivi, le complément de ce qui y manque. Maintenir le *capias* et dire que la déposition est suffisante, serait, suivant moi, autoriser l'émanation d'un *capias* contre une personne résidant dans la Province du Nouveau Brunswick, et qui serait sur le point de partir pour les Etats-Unis. Le déposant qui aurait ainsi obtenu le *capias*, n'aurait plus, pour faire arrêter le défendeur, qu'à l'attirer sur les confins de la Province de Québec. Je crois qu'il manque dans la déposition une allégation essentielle, et que, pour cette raison, le *capias* doit être mis à néant et le jugement confirmé. C'est aussi l'opinion du Juge-en-Chef qui a, sur cette question, des notes plus étendues, et je concours dans tout ce qu'elles énoncent.

MEREDITH, C. J.—"The affidavit alleges that the defendant is about to leave immediately 'the Dominion of Canada,' instead of alleging that the defendant was about to leave immediately that part of the Dominion of Canada heretofore known as the Province of Canada.

In the present case, owing to the Province of Canada having as such ceased to exist, it was impossible for the person making the affidavit to use the words of the Code, and even if that had been possible, I would not hold it to be absolutely necessary; but where words are substituted for those to be found in a law, and more particularly in a case involving the liberty of the subject, I do hold it to be absolutely necessary that the words substituted be beyond doubt equivalent to those for which they are substituted.

It is plain that if at the time of the making of the affidavit, the defendant, to the knowledge of the deponent, had been in Nova Scotia, or in British Columbia, and about to go to the United States, he could have sworn as he did, 'that the

The Moisic Iron Company, and Olsen alias Jacobsen.

defendant is immediately about to leave the Dominion of Canada;' and yet it is equally plain that in the case supposed, the plaintiffs would not have had a right to sue out a writ of *capias ad respondendum*. If, in addition to the allegation 'that the defendant is immediately about 'to leave the Dominion of Canada,' it clearly appeared upon the face of the affidavit that at the time it was made, the defendant was in the Province of Quebec, I would deem that sufficient, because in that case the defendant could not leave the Dominion of Canada without leaving the late Province of Canada; and these allegations would justify the further statement 'that such departure will deprive the plaintiff of his recourse.' But it does not appear by the affidavit, that when it was made, the defendant was in the Province of Quebec, or even in the late Province of Canada; on the contrary, the affidavit was made on the 21st June, and all we know from the affidavit about the defendant, in this respect, is that some time after the 9th of June, the defendant 'left Moisic in a schooner with a great number of others, the said party so leaving declaring that they were going to join their friends in Chicago, in the United States.'

Indeed, if the allegation that a defendant is about to leave immediately 'the Dominion of Canada,' be declared to be good, I do not see how the allegation, 'the defendant is about to leave immediately the Continent of America,' could be held to be bad. The Dominion of Canada, it is true, includes the late Province of Canada; but so does the Continent of America. Either of the two allegations already mentioned would, in this respect, probably suffice if accompanied by the statement that, at the time of the making of the affidavit, the defendant was within the limits of the Province of Quebec; but without that statement, it appears to me that the two allegations would be equally insufficient.

It has been contended that if the defendant had not been in the Province of Quebec, he could not have suffered from the issuing of the writ, but that contention admits of two answers: Firstly: We are not now called upon to decide whether the defendant was or was not exposed to be arrested under the writ—what we have to determine is simply whether under the affidavit in question the plaintiff was entitled to the writ sued out.

The second answer that may be given to the contention now being considered, is that, if at the time of the making of the affidavit, the defendant had been in Manitoba, and had immediately returned to this Province, with the intention to remain, he would have been liable to be arrested under a writ, which in the case supposed certainly ought not to have issued.

The rule by which we ought to be guided in cases such as the present, was laid down by Lord Ellenborough, in the words: 'The strictness required in these affidavits is not only to guard the defendant against perjury, but also against any misconception of the law by those who make the affidavit,' and the learned Chief Justice added: 'The leaning of my mind is always to great strictness of construction where one party is to be deprived of his liberty by the act of another.' 11 East 316.

This rule has been frequently acted upon by our Courts, but I can hardly say I deem its application necessary in the present instance; because it appears to me that, even according to the ordinary rules of construction, it is impossible to

say that an affidavit that a defendant is about to leave 'the Dominion of Canada,' which *would be true* if the defendant were about to leave Nova Scotia, New Brunswick, Prince Edward Island, Manitoba or British Columbia, in order to go to the United States, is of itself equivalent to an affidavit that the defendant is about to leave the late Province of Canada, which *would not be true* if the defendant was about to leave any of the said five Provinces."

RAMSAY, J., *dissentiens* (In appeal):

This case comes before us on a motion to quash a writ of *capias ad respondendum*.

There are a variety of grounds alleged on which it is sought to have the *capias* set aside. On all of these save one I believe the Court is agreed, and that they are deemed to be insufficient, I shall therefore only allude to the one reason in which I, with my brother Monk, dissent from the majority of the Court. The ground to which I refer is the absence of any substantial allegation that the defendant was about to leave that part of the Dominion of Canada heretofore representing the Province of Canada.

Before explaining my views on the merits of this question I must dispose of two preliminary objections raised by the Counsel for the appellant.

He says that the writ was issued on the authority of a judge, and that consequently we cannot look behind his order. It is said that he had a discretion to exercise, that he has exercised it, and that there is an end of the matter.

I think this is a misapprehension which will be cleared away if we look at the history of the law. Originally in cases of unliquidated damages the plaintiff got his writ on affidavit exactly as in ordinary cases of debt. It was felt that this was a hardship, and that it put parties, whose affairs led them to leave the country, at the mercy of unscrupulous claimants, and the law was modified so as to render it necessary, before issuing the writ for a debt arising out of damages, then unliquidated, to obtain the order of a judge. This was an amendment of the law clearly in favor of the defendant; but if we were to hold that this order, obtained *exparte*, were to preclude a contradictory revision then we should be converting what was intended to be an advantage into a disadvantage. The discretion of the judge who gives the order is as to the expediency of allowing the writ to issue at all; it does not extend to absolving the plaintiff from making the necessary affidavit.

The other preliminary question is that the motion does not sufficiently set forth the objection taken to the affidavit. I am of opinion that the grounds are sufficiently assigned 15thly and 17thly. The latter of these grounds distinctly says that the allegations required by law are not to be found in the affidavit. This covers very amply the defect insisted upon now.

These preliminary questions being disposed of, it appears to me that the whole question is in a nutshell. If there is any principle consecrated by a constant and unvarying jurisprudence it is this, that the affidavit for a capias must be precise, and that everything required by the Statute must be formally alleged —i.e., sworn to—leaving nothing to be inferred. I remember that this was distinctly laid down in Nye vs. Macalister nearly twenty years ago. I never heard of this doctrine being overruled, and I do not think even now the ruling will be called in question.

The Moisic Iron Company, and Olsen alias Jacobsen.

Let us then look at the precise case. The Code requires that the plaintiff should allege that defendant "is about to leave immediately the Province of Canada." Of course these words cannot now be used, and consequently plaintiff was obliged to substitute other words of a similar meaning. The words he has chosen are that defendant "is about to leave immediately the Dominion of Canada." It will not be seriously contended that these words are equivalent. The former Province of Canada is not co-extensive with the Dominion of Canada; and it is a mere fallacy to say that the Dominion of Canada being greater includes the Province of Canada, as the greater includes the less. It is precisely because the Dominion includes the Province and something more that it is a bad definition of the defendant's movements, which it was necessary to circumscribe. But the real test is this—the plaintiff might have sworn all he did, with truth and not be entitled to his writ.

It is not, however, squarely maintained that this allegation of itself is enough, and stress is laid upon the fact that the defendant left the District of Saguenay on the 9th June, and that he or some one or more of his associates said they were going to Chicago in the United States. This it is said helps the allegation and narrows the Dominion of Canada to the size of the late Province of Canada. If this is not the pretention, then it must be said that it was unnecessary to mention the Dominion of Canada at all in the affidavit, and that it would have been sufficient for plaintiff to say that defendant left the District of Saguenay on the 9th June saying he was going to Chicago in the United States. But the answer to this sort of reasoning is that the conclusion arrived at by the Court is an inference from facts sworn to and not a fact absolutely sworn to. What plaintiff had to do was to swear his belief and not to swear to facts which might induce others to believe what he ought to have sworn to.

I am therefore of opinion that the affidavit is insufficient, and that the judgment of the Court of Review should be confirmed.

MONK, J., also *dissentiens*, relied on the reasoning of his brother Ramsay and the Chief Justice in the Court below.

TASCHEREAU, J.—The only question which should seriously engage our attention is this: Had the plaintiffs the right of issuing a capias against the defendants by virtue of the affidavit made by the President of the Company, in which affidavit the President has not sworn that the defendants were immediately about to leave that part of the Dominion of Canada heretofore known as the Province of Canada, but has contented himself with swearing that they were about to leave the Dominion of Canada? A number of objections have been taken against the affidavit, and to the Judge's order, but as all these objections appear to have been set aside by the honorable Judges of the Superior Court, who, in the Court of Review, pronounced the judgment from which the present appeal has been instituted, viz., the judgment quashing the writ of capias, and as I do not attach any importance to these first objections, I shall confine myself to the discussion of the single question to which I have adverted. The respondents say that the affidavit of the President of the Company is insufficient, and does not set forth sufficient facts to warrant the Company in issuing a capias; that there is nothing to shew that at the time when the affidavit was made the defendants

were in the heretofore Province of Canada. I admit that, from the first moment that objection was submitted to us, I found no real weight in it. In fact, if that strictness be exacted, an affidavit made by an inhabitant of the city of Quebec against one of his townsmen living in the same city, without saying that at the moment when the affidavit is made the latter is still in the Province of Canada, but is upon the point of leaving for Europe, or of leaving the Dominion of Canada, would be null, and the capias, even if executed at Quebec an instant after the making of the affidavit, would be well and duly set aside! I think that such a capias would be unassailable. But if one reads attentively the affidavits made in the present cases, it is seen that it is there positively sworn, on the 21st of June, that the defendants had left the service of the plaintiffs on the 9th of June, and had then embarked on board of a schooner at Moisie, were they then were, in order, with others, to proceed to Chicago, in the American Union; and, in fact, they arrive at Point Levi about the 21st and are arrested on the 22nd and 23rd of June. Doubtless the affidavit might have been more explicit, but it seems to me sufficient for all the requirements of law, and establishes a legal presumption of the presence of the defendants within the limits of the former Province of Canada, at the time when Mr. Molson made his affidavit. He swears that the defendants were, on the 9th of June, at the place called Moisie, that they embarked there, on or after the 9th June, with the intention of leaving the Dominion of Canada, and, in fact, without leaving the Province of Quebec, they proceeded from Moisie direct to Quebec, where they were arrested. I accede to the proposition of the respondents that the affidavit should show, upon its face, the right of capias, and if I cite the patent fact that these defendants have not for one instant left the Province of Canada, it is not to help the plaintiffs, but in order to show that if the President, in his affidavit, has given a narration of the facts to obtain a capias, not only he is not contradicted by the subsequent events, but he is entirely corroborated. His language is not the verbose language of an old *Procureur du Chatelet*, but that of a business man, who only says what is necessary and nothing more. He has complied with the requirements of Art. 20 and 21 of the Code of Procedure, which declares that:—"In any judicial proceeding it is sufficient that the facts and conclusions be distinctly and fairly stated, without any particular form." His affidavit is simply this:—These men whom I left at Moisie, about the 9th of June, embarked on a schooner for the purpose of going to Chicago, and on the 22nd of June they are arrested on their way from Quebec to Chicago. Unless we return to those ancient formalities, which ridicule has driven out of the courts of justice, I do not see how, taking altogether all the circumstances of the case, we can come to any other conclusion than to say that the affidavit, without stating it *ipsissimis verbis*, sets out in a sufficient manner the presence of the defendants within the limits of the former Province of Canada at the time of the affidavit. In fact, the affidavit is made on the 21st of June, and they are arrested on the 22nd, at Levis. Would they have had the time to go to the United States and between the 21st and 22nd return to Canada, in a sailing schooner, on which they had embarked? Evidently not, and on the 21st they were, therefore, in the former Province of Canada.

The Moisic Iron Company, and Olsen alias Jacobsen.

I have reasoned, so far, as if it were indispensably necessary, for the validity of the affidavit, that the defendants should be within the limits of the Province of Canada at the time of the making of the affidavit. I deny any such necessity. For, suppose the case of a plaintiff, ignorant of his debtor being for a moment beyond the frontier of the Province of Canada, and swearing that the latter was upon the point of leaving Canada. It would require, in my opinion, a large amount of argument to convince any one of the illegality of a capias executed after the return of the debtor to Canada. Now, that would be the consequence of the judgment which the Court below has rendered, and, in future, it would be a matter of absolute necessity to ascertain, before taking out a capias, whether the defendant is concealing himself in Canada, or out of the country. It seems to me that good faith in an affidavit, with a narrative not clothed in the verbose language of the *palais*, but giving a faithful exposition of the thought of the person who swears, is all that the law requires in such case. I remark that since the origination of our judicial reports of Canada, we have got rid, with great advantage, of all these technical objections. To cite but one example: it will be recollected that the Courts formerly exacted, on pain of nullity, that an affidavit to hold to bail should use the words "personally indebted," and many a capias has been quashed by reason of the omission of these words, the signification of which many persons did not understand, and yet we have come to the adoption of a form, from which the *sacramentel* word "personally" has been entirely omitted, and writs of capias have been maintained, provided the statement of the cause of debt disclosed the existence of a personal contract between the plaintiff and the defendant, and that, without using the word "personal" or "personally." It was not without an arduous struggle that this first victory of ordinary language intelligible as well by the educated as by the ignorant, over the verbose and supposed *sacramentel* language of bygone years, was obtained. It will be so in future as to the objection of the respondent in relation to the necessity of the plaintiff's swearing to the actual presence of the defendant in Canada, at the very moment of the making of the affidavit, provided that, according to the language employed and the circumstances attending the issue of the writ and its execution, as in the present case, the conclusion may be reasonably arrived at that the defendant is in a position to be arrested.

I will cite the opinion of Lord Mansfield, in the case of Bristow vs. Wright, 2 Douglas Rep., p. 666, and that of Taylor (on Evid.) as to the choice to make between a rigid and restricted interpretation and the liberality with which Courts of Justice should interpret language, and he expresses himself by saying that Judges are beginning to discover that substantial justice is of much greater importance than technical precision.

1 Taylor, § 207.—"Lord Campbell's act has been in operation for too short a time to justify the expression of any confident opinion as to the amount of liberality with which its language will eventually be construed by the Courts.

"The narrow rules of interpretation which have been promulgated by one or two of the Judges with reference to the prior statute, 9 G. 4, c. 15, are calculated to excite a rational fear lest an equally strict construction should be applied to the amendment clauses of this act; but, on the other hand, it cannot be

denied that the subject is now far better understood than it formerly was, and that even Judges are beginning to discover that substantial justice is of more real importance than mere technical precision. Wise men should ever bear in mind that the object of the acts which authorize amendments in criminal proceedings is to render punishment more certain by neutralizing the effect of trivial variances, which have constantly protected the wrong-doer. So long as the least rational doubt exists respecting the guilt of a prisoner, it is only fair that the ample shield of justice should screen him from injury; that juries should weigh with jealousy the evidence against him, and that Judges should see most clearly that the act with which he is charged is an offence against the law.

"But when courts of justice go further than this, and permit the law to be defeated by technical errors, which cannot by any possibility mislead a defendant, and which have nothing to do with the substantial merits of the case, they take the most effectual means of rendering the administration of the criminal law a fitting subject for contempt and ridicule." * * *

The language of Lord Mansfield, in Bristow vs. Wright, 2 Doug. 666, should never be forgotten. "I am very free to own," said his Lordship, "that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because *it is extremely hard on the party to be turned round and put to expense from such mistakes of the counsel or attorney he employs. It is hard also on the profession.*"

In conclusion, I find that the plaintiffs have produced, to obtain their different writs of capias, sufficient affidavits, justifying the Honorable Judge before whom they were presented, and who ordered the issuing of the writ of capias in question, to act as he did.

I am for reversing the judgments pronounced in the Superior Court and in Review.

But another question is presented, which seems to have had no weight with the Judges of the Superior Court, but which appears to me to be important enough. Although at first sight, it may be regarded as an exception to the form, it is not the less substantial, inasmuch as it has the express sanction of the Rule of Practice, No. 57, which imperatively requires that "every motion founded on special matters shall contain the grounds on which such motion is made, and no party shall be permitted to urge any grounds in support of a motion not set forth in such motion." Now, the defendants complained at the arguments that the plaintiffs have not shewn by their affidavit that they were in the heretofore Province of Canada or that they were immediately upon the point of leaving the heretofore Province of Canada; and on reading their twenty-one objections, or grounds, invoked in support of their motion to quash the *capias*, one looks in vain for any such special ground. There are many generalities, *banales* expressions of irregularities and nullities, but nothing special in relation to the ground which they have invoked in their oral pleading. The object of the rule adverted to is to particularize the ground of objection, and to restrict the discussion to such ground or grounds; and this object is not attained in losing one's self in an interminable *kyrielle* of objections (to the number of twenty-

The Moisie Iron Company, and Olsen alias Jacobsen.

one) of a general character, and not special. The defendants have drawn attention to ground No. 15, as coming to their rescue; but far from producing the effect which they desire, this very ground, No. 15, establishes the position taken by the plaintiffs, inasmuch as they, the defendants, by this ground of objection, cause it to be understood that they have interpreted the allegation in the affidavit, "Dominion of Canada," as a substitute for, and signifying for all legal purposes, the heretofore Province of Canada, and that their only objection on this score is that the plaintiffs do not give sufficient reasons to justify their belief in the immediate departure of the defendants from this Province. Now, all the judges before whom this objection has been presented, have come, or at least appear to have come, to the conclusion that the plaintiffs have stated in their affidavit sufficient reasons to justify their belief in the immediate departure of the defendants. In a case of *capias*, where the liberty of the subject is at stake, a doubt should be interpreted in favor of the prisoner, but when the prisoner, with a knowledge of what he has wished to do, and actually does, will not, within the time specified by the Rules of Procedure, take advantage of a pretended irregularity, and more, seems to waive or renounce it, he should not be permitted to complain, at the last moment, of an omission which, at the outset, he did not deem worthy of notice. If, in reality, the defendants were not about to leave the former Province of Canada, they had, under Art. 819 of the Code of Procedure, the right to be discharged from custody, and that without delay, long before they could make their motion before the Superior Court. They did not consider it their interest to do so, and if they have in consequence suffered a long imprisonment, they have themselves to blame for it. This last observation is not made to justify my judgment on the merits of the motion of the defendants to set aside the *capias*, but merely to show that defendants have only themselves to blame if they have suffered a long incarceration.

The following was the written judgment in appeal:—

"The Court * * * considering that there is error in the judgments appealed from, * * * and that the motion made by the defendant in the Court below on the thirtieth day of June last to quash the writ of *capias ad respondendum* in the said cause issued, should have been rejected with costs; the affidavit upon which the said writ issued and the proceedings thereupon had being in all things regular and sufficient: This Court, proceeding to render the judgment which the said Superior Court should have pronounced upon the said motion, annuls and makes void the said two judgments of the second day of July and of the nineteenth day of September, one thousand eight hundred and seventy-three, and rejects and overrules the said motion to quash, with costs against the said respondent in favor of the said appellant as well in this Court as in the Court below; and it is further ordered that the record be remitted to the said Superior Court at Quebec.

The Honorable Jean François Joseph Duval, Chief Justice of this Court, one of the Judges before whom this appeal was argued on the merits, being prevented by illness from taking his seat on the Bench, has transmitted the following opinion in writing, viz: "I am of opinion to reverse the judgments appealed

from and to reject the motion to quash, with costs in this Court and in the Court below."

The Grand Trunk Railway Company of Canada, and Atwater et al.

Judgments of Courts below reversed.

Holt, Irvine & Pemberton, for appellant.

Wm. Cook, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 23RD JUNE, 1873.

Coram DUVAL, C. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 47.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(*Defendants in Court below,*)

APPELLANTS;

AND

EDWIN ATWATER, ET AL.,

(*Plaintiffs in Court below,*)

RESPONDENTS.

An Ocean Steamship Company, by its bill of lading, having undertaken to carry goods from Liverpool to Portland, and there deliver them to the Grand Trunk Railway Company, to be by them carried to Montreal, and the latter Company having received and carried the goods;

HELD:—1st. The said Grand Trunk Railway Company are responsible for damage to the goods caused by their negligence, and cannot invoke the conditions of the Ocean Steamship Company's bill of lading.

2nd.—To establish that goods were damaged when in a carrier's custody it is sufficient to shew that the Company received the goods in apparent good order and delivered them in bad order.

3rd.—Negligence on the part of the carrier will be held proved if it be established in evidence that the goods carried could not have been broken in the way that they were by any ordinary handling in the usual course of transportation.

The facts of this case will be found fully reported at page 1, vol. XVII, of the L.C. Jurist.

DUVAL, C. J., said that the respondents sued the Grand Trunk for the value of some plate glass which was carried upon the Grand Trunk cars from Portland to Montreal. It was alleged that in the course of the journey this glass was broken, and the present action was brought to recover the value. The Grand Trunk by their first plea said the plaintiffs had no action against the Company, because there was no privity of contract between them and the Company; that the contract for the conveyance of the goods was made with the Allans in England. The second plea was that the glass was not broken while on the defendants' cars. The Court was of opinion that there was privity of contract. It was quite clear that the fact of the Grand Trunk receiving the glass at Portland from the Steamship Company, constituted a privity of contract between them and Atwater, without any special contract being necessary. The fact of the Company receiving goods on board of their cars, constituted a privity of contract with the owners. The first ground, therefore, must fail. In the next place, it was said there was no proof that the glass was broken while on

Brossard and Tison et al.

the car. His Honour found the proof of this fact most conclusive. If the glass was broken when the Company received it at Portland, why did not the officers of the Company observe it? The damage noticed at Montreal was plainly observable on the outside of the cases. On both grounds, he was of the opinion that the judgment condemning the Company was right and must be confirmed.

MONK, J., remarked that the Company by the bill of lading acknowledged that they received the goods on board their cars at Portland in good order. The injury to the cases was external, and would have been visible at once; so that the presumption was that the injury was sustained on the road between Portland and Montreal.

DRUMMOND, J., dissented upon the ground, first, that there was no privity of contract; and secondly, that there was no proof that the injury occurred on the Grand Trunk line. There being a strong doubt, he felt bound to give it in favour of the party sued.

The following is the judgment rendered in appeal, confirming the judgment of the Court of Review.

The Court * * * Considering that there is no error in the judgment appealed from, to wit, the judgment rendered by the Superior Court for Lower Canada sitting in Review at Montreal in the District of Montreal on the 31st May, 1872, doth affirm the same with costs to the respondents against the said appellants.

The Hon. Mr. Justice Drummond dissenting.

Judgment of Court of Review confirmed.

Cartier & Pominville, for appellants.

S. W. Dorman, for respondents.

(J. L. M.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 24th JUNE, 1873.

Coram DUVAL, Ch. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 100.

BROSSARD, APPELLANT;

AND

TISON ET AL., RESPONDENTS.

HELD:—That a seizure effected in the hands of a third party, *who does not object*, is valid, and that the actual *consent* of such third party to the seizure is unnecessary; his failure to *object* being of itself sufficient.

This was an appeal from a judgment rendered by the Court of Review at Montreal, on the 28th of June, 1872, confirming a judgment of the S. C. at Montreal, rendered on the 26th of April, 1872, by which a seizure in the hands of a third party was declared to be illegal, because it had not been proved that such third party had *consented* to the seizure.

The Court of Appeal, (DUVAL, CH. J. and DRUMMOND, J., *dissentientibus* on the ground that no fraud had been proved) held, that art. 553 of the Code of C. P. rendered such a seizure valid, if the party on whom the seizure was made *did not object*, and that no proof of actual *consent* to the seizure was necessary,

and further held that the title of the respondent was moreover fraudulent, and reversed both judgments.

Brossard and Tison et al.

TASCHEREAU, J., who delivered the judgment of the Court, spoke as follows:

Il s'agit d'un appel d'un jugement de la Cour de Révision confirmant celui de la Cour Supérieure qui avait maintenu l'intervention des opposants produite sous les circonstances suivantes:

Le dix octobre, 1870, le défendeur vendit aux intimés un fonds de magasin d'épiceries dont ils prirent possession, ainsi que du magasin lui-même et le 12 du même mois un acte de vente fut exécuté pour constater cette vente à raison de 17 s. 6d. dans le louis, mais le 13 le demandeur, au moyen d'un bref de saisie arrêt avant jugement, fit saisir tous les effets en question comme appartenant au nommé Poupart et cela sans opposition de la part des intimés. Delà intervention de la part des intimés réclamant la main levée de la saisie comme illégale et comme propriétaire des effets saisis?

Il s'élève deux questions, dont une de savoir si la saisie était nulle *de plano par le fait* seul qu'elle avait eu lieu d'effets en possession des intimés, et l'autre de savoir si les intimés avaient de bonne foi fait l'acquisition des effets ci-dessus mentionnés. Le jugement dont est appel n'exprime pour motif que celui-ci savoir: que lors de la saisie, les intimés étaient en possession des effets et que la saisie a été pratiquée sans leur consentement, et il n'a été nullement question de savoir si l'acquisition des intimés était ou non entachée de mauvaise foi.

Le jugement assume donc que pour *autoriser* une saisie d'effets comme appartenant à un défendeur, mais en la possession *de facto* d'un tiers, il faut que ce tiers ait donné un consentement formel à cette saisie. Ce motivé est contraire à l'article 553 qui permet de saisir les effets d'un débiteur en la possession actuelle d'un tiers si ce dernier n'y objecte pas, autrement le créancier n'a que la voie de saisie arrêt en mains tierces.

Les intimés prétendent que leur silence seul sans leur consentement formel ne suffit pas pour légaliser la saisie et soulever la question de propriété. Je crois qu'ils ont tort, car l'article est clair et positif, non susceptible d'une double interprétation, et il suffit de prouver leur manque d'objection, ce qui est le cas en la présente cause, d'ailleurs la saisie a eu lieu au domicile du défendeur qu'il n'avait quitté que depuis un instant. J'avoue que la pratique jusqu'ici a été contraire, mais nous voici avec un texte du Code de Procédure positif qui suivant moi indique la non nécessité de ce consentement formel, et que l'absence d'objection est et doit être considéré comme acquiescement. L'appelant a appuyé sa prétention dans ce sens d'autorités des plus respectables tirées de Roger, Dalloz, Carré, qui toutes ne font pas question de l'affirmative surtout lors qu'il y a fraude. Je ne vois pas en thèse générale que la position du tiers soit empirée par la saisie des effets et je n'aperçois qu'une légère différence entre la position que lui fait la saisie-arrêt et celle que lui fait une saisie exécution pure et simple. En l'un et l'autre cas la question de propriété s'élèvera sur la *contestation* de la déclaration du tiers-saisi, si le demandeur après la voie de la saisie-arrêt, comme elle s'élèvera sur la saisie exécution, et si le tiers ne s'y objecte pas. Pourquoi forcerions-nous le texte de l'article 553 du C. P. C. pour dire qu'il faut un consentement formel?

Brossard, and Tison et al.

La 2d question qui est celle du titre de propriété des intervenants, et sur laquelle la Cour Supérieure et la Cour de Révision se sont abstenues de se prononcer, présente guère plus de difficulté. En effet la vente de ce fonds de magasin a eu lieu sous des circonstances tellement suspicieuses qu'elles la rendent nulle comme entachée de fraude. Lors de cette vente le défendeur était insolvable, poursuivi et sous le coup du jugement et à la connaissance personnelle de l'un des intimés. Cependant c'est à la faveur des ténèbres de la nuit que l'on procède d'abord à un inventaire des effets que l'on vend; et sur lesquels on paye de suite $200 qui passent entre les mains du père du défendeur, et on enlève tous les autres de suite pour les transporter ailleurs. Tous ces fait sont prouvés par l'un des intervenants qui avoue assez naïvement qu'il a pris le conseil d'un avocat avant de faire cette acquisition, mais que ce conseil était contraire à ce qu'il voulait faire, que néanmoins il n'a pas suivi les avis de cet avocat, et a fait la transaction dont il s'agit. Il y a plus. L'intervenant Tison, dans un but que je ne puis bien apprécier, ayant rencontré ce même avocat dans l'après-midi du jour de la transaction, a fait usage de mensonge et a déclaré avoir renoncé au marché, lors qu'il venait de le conclure le matin même. Sur ce fait comme sur les autres nous avons ce que j'appellerai *confitentum reum*.

Maintenant il suffit de référer à l'acte de faillite de 1869 pour se convaincre de l'illégalité et nullité d'une vente de l'espèce de celle qui a eu lieu en cette cause. Les sections 86, 88, 89 et suivantes de cet acte peuvent être lues avec avantage. La section 87 prononce formellement la nullité d'une telle vente. J'opine pour l'infirmation du jugement.

The reasons assigned in the written judgment were as follows:—

The Court * * * * Considering that the purchase by the respondents, *intervenants* below, from the said defendant, under and by virtue of the deed of sale between them, dated the twelfth day of October, eighteen hundred and seventy, passed before Montpetit, public notary, of the goods, chattels and effects seized and attached in this cause, under and by virtue of the writ of *saisie arrêt* in this cause issued at the suit of the said appellant, plaintiff, contestant below, was made at a time when the said defendant was insolvent and unable to meet his liabilities, to the knowledge of the said *intervenants*, and that the said deed of sale and the purchase therein and thereby were fraudulent and collusive between the said parties to the said deed and purchase, and in contravention of law; considering that the said deed of sale and the purchase thereby should therefore be rescinded and annulled; and considering that the intervention fyled herein by the said respondents, *intervenants* below, is unfounded, and contrary to law, and that the said goods, chattels and effects, attached as aforesaid, did not vest in the said *intervenants* any legal right or property in the said goods, chattels or effects."

Judgments of Courts below reversed.

Jetté & Archambault, for appellant.
Trudel & Taillon, for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 24TH JUNE, 1873.

Coram DUVAL, CH. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 40.

ROGERS *et al.*, APPELLANTS;

AND

SANCER *et al.*, RESPONDENTS.

HELD:—That where the Court is satisfied that the fraud charged, in an action under the 92nd sec. of the Insolvent Act of 1869, has been proved, the insolvents will be ordered to be imprisoned in default of payment of *costs* as well as of the debt.

This was an appeal from a judgment of the Superior Court, at Montreal (TORRANCE, J.), rendered on the 28th [illegible] 1872, in an action brought by the appellants, creditors of the respondents, under the 92nd sec. of the Insolvent Act of 1869.

The demand in the action for the imprisonment of the respondents was rejected, on the ground that the fraud charged had not been proved.

The Court of Appeal thought otherwise, and reversed the judgment and ordered the imprisonment, in default of payment of the debt *and* costs. It had been urged, that inasmuch as the clause in the Act allowed the imprisonment in the case of the non payment of "the debt *or* costs," the judgment should be limited to either one or the other, and should not embrace both; but the Court considered that this word "or" must be held to mean "and."

MONK, J. (*dissentiens*), said he would scarcely have entered a dissent from the judgment, were it not that he found himself in perfect accord with the judgment of the Court below which the Court was going to reverse. The action was brought under the 92nd section of the Insolvent Act, which provides for the imprisonment of any trader purchasing goods while in a state of insolvency, knowing that he has not the means of paying for them. The conclusions of the declaration asked that the defendants be condemned to pay the debts, and further that by the judgment to be rendered, the defendants be adjudged to have been guilty of fraud and to be imprisoned in the common jail for such time, not exceeding two years, as the Court might order, unless the debt and costs be sooner paid. The judgment appealed from held the defendants liable for the debt, but considering that there was no intention to defraud, dismissed the conclusions for imprisonment. His Honour agreed with this decision, and did not think that the money condemnation and imprisonment must necessarily go together.

DRUMMOND, J. (also *dissentiens*), held that the judgment was wrong even in condemning the defendants to pay the debt, as that would be interfering with the province of the Insolvent Court before which the case was for the winding up of the Insolvents' estate. The defendants had, perhaps, brought themselves within the letter of the law, but not within the intent and spirit. They were not lavish in their expenditure, and no doubt at the time they purchased the goods had hopes of being able to pay for them.

Rogers et al, and Sancer et a'.

BADGLEY, J., said the creditors had appealed from the judgment of the Court below, and called upon this Court to sustain the judgment of the Superior Court as to the money condemnation, and at the same time to add to the judgment the imprisonment which had been admitted. The Court found that the conduct of the respondents had been so flagrantly illegal that they could not escape the penalty of the insolvent law. The judgment would, therefore, be corrected, and imprisonment ordered. The cross appeals of the defendant would be dismissed.

TASCHEREAU, J.—Les appelants, demandeurs en Cour Supérieure, ont poursuivi les défendeurs Edmond Sancer et Guillaume Sancer pour $2320.37 pour marchandises vendues et livrées et pour lequel montant les intimés avaient donné leur billet promissoire, et en outre des conclusions ordinaires à l'effet d'obtenir une condamnation pour ce montant contre les défendeurs Sancer, ils demandèrent qu'ils fussent déclarés coupables de fraude et passibles d'un emprisonnement de deux ans sur le principe qu'à l'époque où ils avaient contracté la dette susdite, ils étaient insolvables, savaient qu'ils étaient insolvables et que c'était avec intention de frauder les appelants qu'ils en avaient acheté les effets et marchandises susdites à termé.

Les défendeurs ont nié toutes les allégations de la demande, et le jugement dont est appel comme rendu le 20 septembre 1872, les a condamné simplement à payer les $2320.37 avec intérêt et dépens, et a renvoyé les conclusions de la déclaration des demandeurs relatives à la contrainte par corps; les motifs sont que les allégations des demandeurs à cet égard n'avaient pas été prouvées. C'est de cette dernière partie naturellement dont les appelant se plaignent.

Ils allèguent qu'en vertu de la section 92 de l'acte de faillite de 1869, "toute personne qui achète des effets à crédit, ou qui obtient des avances d'argent "se sachant ou croyant incapable de faire honneur à ses engagements, et cachant "ce fait à la personne devenant ainsi son créancier, dans l'intention de frauder "cette personne, ou qui sous de faux prétextes obtient crédit pour le paiement "de quelque avance ou prêt d'argent, ou du prix, ou d'une partie du prix de "certains effets ou marchandises, dans l'intention de frauder la personne devenant "ainsi son créancier, et qui n'aura pas ensuite payé la dette ou les dettes ainsi "encourues, sera réputée coupable de fraude et passible de l'emprisonnement "n'excédant pas deux ans, à moins que la dette ou les frais ne soient plutôt ac-"quittés.

Les demandeurs reprochent aux intimés d'avoir contracté leur dette à leur égard sous les circonstances ci-dessus, savoir sachant qu'ils étaient insolvables et incapables de la rencontrer, et qu'ils ont caché ce fait aux appelants leurs créanciers.

L'enquête prouve que la dette a été contractée peu de temps avant la cession de biens que les intimés ont fait à un Syndic, il est établi et admis que les intimés ne tenaient plus de livres depuis le 31 décembre 1869, dernière époque où la feuille de la balance a été établie pour la dernière fois, et alors ils se trouvaient avec un déficit de $1400. Que malgré cela, ils ont continué leur commerce, achetant et vendant, mais avec un résultat tel qu'à leur cession ils se trouvaient avec un déficit variant de $30 à $37,000, et cela sans avoir fait de pertes extraordinaires. Les intimés reconnaissent tout cela, mais disent en jus-

tification qu'ils n'ont eu aucune intention de frauder, qu'ils connaissaient bien leur situation précaire, mais qu'ils espéraient pouvoir se relever, sans pourtant assigner aucune raison pour justifier cet espoir. A la plaidoirie orale, et par les factums des parties, il a été soulevé ces questions.

1o. Les appelants, demandeurs en Cour Inférieure, pouvaient-ils en droit obtenir cette contrainte par corps, après avoir librement formulé et produit leur réclamation devant le syndic, en un mot le fait d'avoir formulé cette réclamation les prive-t-il: 1o du droit d'action pur et simple. 2o du droit de le contrainte par corps.

2o. Les demandeurs en supposant qu'ils eussent droit d'action et de contrainte par corps, ont-ils prouvé les faits de fraude pourvus par la section 92 de l'acte de faillite de 1869.

3o. En supposant que les faits de fraude ne fussent pas prouvés, de sorte que la contrainte ne pût pas être accordée, le droit d'action à l'effet d'obtenir une simple condamnation existe-t-il, ou n'était-il pas enlevé ou suspendu par suite de ce que la réclamation des appelants avait été produite devant le syndic.

La réponse à la 1ère question se trouve en toute lettre à la fin de la 92 section de l'acte de faillite de 1869, où il est dit que pour réussir dans son action pour recouvrer une dette contractée sous les circonstances ci-dessus, le demandeur devra alléguer fraude contre le demandeur et l'en convaincre. Ceci établit évidemment le droit d'action exceptionnelle. Mais les défendeurs prétendent que la section 100 du même acte prévoyant le cas où le créancier aurait déjà formulé et produit sa réclamation pour cette même dette devant le syndic, déclare que dans ce cas la décharge que le failli pourra obtenir aurait pour effet de le débarrasser du danger d'une contrainte par corps, et par un raisonnement très plausible ils en argumentent que le droit d'action et de contrainte par corps se trouve virtuellement détruit, en un mot les défendeurs prétendent que les demandeurs en produisant leur réclamation ont enlevé à leur dette le privilége qu'elle avait, savoir de sonmettre les défendeurs à la contrainte par corps, et que cette dette n'a plus que le caractère d'une dette ordinaire et qui ne les expose plus à l'emprisonnement. Quelque plausible que soit ce raisonnement, et malgré l'habileté avec laquelle il est présenté, je crois que les demandeurs n'ont pas perdu de leurs droits de contrainte par corps contre les défendeurs en formulant leur réclamation devant le syndic. En effet les demandeurs pourront obtenir leur contrainte par corps contre les défendeurs, et si ces derniers sont assez fortunés pour obtenir leur décharge, je considère qu'en vertu de la section 100 de l'acte de faillite, ils auront droit à leur libération du jugement les déclarant contraignables à compter du prononcé de leur décharge. Je crois que cette interprétation est saine et concilie ce que l'on pourrait trouver de discordant entre les sections 92 et 100 de l'acte de faillite de 1869.

La 2de question relative à la preuve des faits de fraude prévue pas la section 92 de l'acte de faillite est assez facile à résoudre.

En effet voici deux défendeurs insolvables dès le 31 déc. 1869, et qui, malgré ce fait patent, continuent leur commerce, achetant à droite et à gauche et jusqu'au jour de leur faillite reçoivent des marchandises, tiennent des livres mais craignent d'établir leur bilan, obtiennent ainsi des effets et des crédits considérables de gens

Rogers et al, and Sancer et al.

auxquels ils ne font pas connaître l'état de leurs affaires, sur lequel ils ne jugent pas à propos de s'éclairer eux-mêmes par la bonne raison qu'ils en craignaient le résultat probablement, et cependant ils viennent avouer que dès 1869 ils avaient un déficit de $1400, que dès 1870, ils étaient gênés, et qu'à leur cession en février 1872, ce déficit variait de $28 à $38,000, et ils espèrent trouver grâce devant le monde commercial sur le principe qu'ils étaient de bonne foi. La fraude n'est pas toujours facile à saisir ni à suivre, mais elle s'infère d'une suite d'actes blamables et condamnés par les lois. Or, le fait de ne pas tenir leurs livres de manière à présenter un bilan clair et évident pour eux-mêmes est une preuve de fraude, en ce qu'ils exposaient volontairement à une perte certaine les personnes qui, confiantes en leur honnêteté et les voyant toujours en bons rapports avec les banques, leur font des avances; on sait que le commerce est basé sur la bonne foi, exige des transactions rapides, ce qui ne donne pas toujours le temps de la réflexion ni celui de faire des questions chez la personne qui vend ou avance; cette dernière a sous les yeux des chalands dont il n'a pas de motifs de suspecter la bonne foi ni l'insolvabilité, et qui cependant par omission constituant une fraude légale l'induisent à se dessaisir de ses effets ou de son argent en ne leur faisant pas connaître son véritable état. Il est inutile pour les défendeurs d'alléguer qu'ils avaient l'espoir de couvrir leur déficit, et de se refaire par une année ou deux de bonnes affaires. Ils n'avaient pas ce droit, et le fait d'avoir caché cette circonstance à leurs créanciers les constitue en mauvaise foi, les convainc de fraude légale et les rend passibles de l'emprisonnement prévu par la section 92 de l'acte de faillite de 1869.

En réponse à la troisième question, je crois que le juge en 1ère instance ayant nié la fraude reprochée aux défendeurs devait renvoyer l'action purement et simplement. Le droit d'action en vertu de la 92 section ne se tire que du reproche et de l'accusation de fraude, surtout dans un cas comme celui qui nous occupe, où le créancier a formulé et produit sa réclamation devant le syndic; or si l'élément principal (qui est la fraude) disparaît, la condamnation pure et simple ne peut avoir lieu, parce que le demandeur a déjà fait sa réclamation. Elle est *sub judice* et tout autre recours contre le défendeur est suspendu pour le moment, car ne perdons pas de vue que le syndic est un tribunal qui adjuge sur l'existence de la réclamation et dont le jugement est susceptible d'appel devant le juge et devant la cour de Révision et la cour du Banc de la Reine. Il y avait donc litispendance de l'action du demandeur, et si ce n'était du fait de fraude qui tire l'action des demandeurs de l'ordre des choses ordinaires et qui rend les défendeurs passibles de la contrainte par corps, je serais disposé à dire que les demandeurs ne pouvaient pas obtenir une condamnation pure et simple, et sans contrainte. Tout considéré, je crois que les défendeurs sont passibles non seulement d'une condamnation pure et simple au montant de $2320 35 avec intérêt et dépens, mais encore d'une contrainte par corps, et je les condamnerais à trois mois de prison, etc., à moins qu'ils ne payent plutôt, la dite somme, intérêt et frais, ou à moins que les défendeurs n'obtiennent une décharge suivant l'acte de faillite de 1869.

DUVAL, C. J., said the case, in his opinion, was a very plain one. The plaintiffs, creditors, complained of their debtors, and charged them, in the very words of the statute, with having on such a day, knowing that they were not

able to pay, purchased from the plaintiffs certain goods, wares and merchandises. And in consequence they brought their action demanding not merely a condemnation for the amount of the debt due them, but also asking that the defendants be imprisoned in the discretion of the Court. In His Honour's opinion, the judge would have had no jurisdiction whatever, if there had not been a charge of fraud,—not merely an allegation of fraud in the declaration, but an allegation upon which the judge was called upon to pronounce. If he had found no fraud proved, it would have been his duty to dismiss the action altogether. And there was a very plain reason why it should be so: the case was *sub judice* —it was before a competent Court, the Insolvent Court. But that Court did not suffice when there was a demand for imprisonment, which the assignee had no power to order. The judge should, therefore, have dismissed the action if he found no fraud. The question, then, presented itself whether there was fraud in this case. It was said there was no moral fraud. His Honour did not know that it was necessary that moral fraud should be proved. The law said this: if you purchase goods when you have no reason to expect to be able to pay for them, you are guilty of fraud. It was said also that the defendants were young gentlemen in whom the organ of hope was largely developed. This was rather an argument against them. They said their insolvency was owing to the unexpected withdrawal of confidence by one of the banks, and their paper not being discounted any longer. This proved that they had not money to carry on their business, and that they were trusting to the aid of the banks. On their own showing, therefore, they were carrying on business without any funds. Then, as to their books, they were not accurately kept; but loosely kept as they were, the inability of the defendants to pay their debts was established on the face of their books. When one of the creditors said to the debtor, "You knew a year ago that you could not pay your debts," he did not deny it, but said he had hoped to have been able to pay. Credit at the bank being suddenly stopped, the defendants' insolvency at once become manifest. His Honour referred to a supposed clerical error in the 92nd section of the Insolvent Act, which said that the party should be imprisoned until payment of the debt *or* costs. This, he thought, not an error, but susceptible of reasonable explanation. Under all the circumstances, the Court found the case proved against the defendants, and there would be a judgment drawn in accordance with the Statute; the term of imprisonment to be three months in each case.

In the written judgment the order for imprisonment was as follows:—

"Doth order, that each of the said Edmond Sancer and Guillaume, Sancer be immediately taken into custody and imprisoned for three calendar months, unless the said debt, interest and costs hereinafter mentioned be sooner paid." *

Judgment of Court below reversed.

F. E. Gilman, for appellants.
Strachan Bethune, Q.C., counsel.
Robidoux & Beique, for respondents.
(S. B.)

* There were other appeals of a similar character by other creditors which were maintained and cross appeals by the respondents which were dismissed.

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 24TH JUNE, 1873.

Coram DUVAL, CH. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 3.

LAFOND *et al.*, APPELLANTS;

AND

RANKIN, RESPONDENT.

HELD:—That an assignee who sold outstanding debts due to the insolvent under the 44th section of the Ins. Act of 1869, according to a schedule exhibiting the *original* amounts of such debts, *without deduction of payments received by the assignee on account*, was bound to account for and pay over to the purchaser of such debts the *full amount of such payments*, so made to the assignee, notwithstanding that the conditions of sale declared:—that the sale is made without any guarantee whatever, or any warranty of any kind or description whatever, *so much so that no warranty is given that the debts have even* existence,"—and notwithstanding, also, that the audience were informed by the auctioneer, *that dividends had been paid*, and that the amounts in the schedule were the *original* amounts, *without deduction of such dividends*,—and notwithstanding, further, that the total amount paid for such debts was *only a few dollars*, and the *payments* in question amounted to more than $600.

This was an appeal from a judgment rendered by the Superior Court at Montreal (JUSTICES BERTHELOT, MACKAY and TORRANCE), sitting as a Court of Review, on the 31st October, 1871, confirming a judgment rendered by the HON. MR. JUSTICE MONDELET, on the 29th April, 1871, whereby the appellants' action was dismissed with costs.

The respondent was sued individually, and as assignee, under the Insolvent Act of 1864, of the Insolvent Estates of "James Hingston & Co." and "Hingston, Telfer & Co.," for $637.66, currency, which the appellants (plaintiffs in the Court below) by their declaration alleged represented the aggregate amount of several sums or debts which the said respondent, through gross negligence or deliberate fraud, or both, sold or caused to be sold to the appellants at a sale of book-debts of the said Insolvent Estates, on the 18th October, 1870, and which he had, previous to said sale, collected and received.

The appellants' demand, as detailed in their Exhibit No. 2, was made up as follows:

1.	Debt of W. Baker for $54.70, paid in full.....	$ 54.70
2.	" A. Gordon for $140.22, on which a final dividend paid of	6.90
3.	" Thos. Buck for $381.55, compounded for at 10s. in the £	190.78
4.	" Hall & Co. for $1394.00, on which 3 dividends paid.....	120.40
5.	" W. H. McCann for $393.99, on which paid.....	43.33
6.	" R. G. Robinson for $183.80, paid in full.....	183.80
7.	" Miss O'Neill for $4.35, do	4.35
8.	" P. M. Walsh for $308.28, on which paid.....	34.40
		$637.66

It was admitted that all the amounts alleged to have been paid, except the $4.35 said to have been collected from Miss O'Neill, were really paid before the day of sale, and, as there was no evidence of the collection of the $4.35, that item had to be deducted at all events, leaving only the remaining seven items, forming in the aggregate $633.31 currency, in dispute.

The sale in question was one by public auction of the outstanding debts of the Estates in question, and was made under the authority of the Insolvent Act of 1864 and 1869, and on the following express conditions of sale (Paper 10 of record):

"The sale is made without any guarantee whatever, or any warranty of any "kind or description whatever, *so much so that no warranty is given that the "debts have even existence.*"

These conditions, Mr. Barsalou, the auctioneer, attests he read in a loud voice to the audience present, and that Mr. Lafond was standing in the audience, close to him (Barsalou) and within easy hearing distance. Mr. Barsalou further attests that he explained to the audience, before selling the said debts, that in cases in which dividends had been paid to the defendant or the insolvents the amounts stated to be due by the debtor *were the amounts originally due, without deduction of dividends*, and that Mr. Lafond was present at the explanation given, and must have heard it.

As matter of fact, the appellants did not purchase item No. 1 ($54.70) by itself, nor for any specific amount. The whole of the outstanding debts, under $100, amounted in the aggregate to $2291.27 (vide Paper 21 of the Record), and Mr. Barsalou proved that the appellants purchased them *en bloc* for $140.

Mr. Barsalou also proved that during the sale he was asked whether dividends had been paid on any of the sums sold, *and that he explained that dividends had been paid.* And he added, "Mr. Lafond was near me when I made this "explanation, and must have heard it."

It was also proved by the auctioneer that the remainder of the items were adjudged to the plaintiffs for the following amounts:—

No. 2.	Debt of A. Gordon, for		$0.30
" 3.	" Thos. Buck, for		0.35
" 4.	" Hall & Co., for		0.25
" 5.	" W. H. McCann, for		3.25
" 6.	" R. G. Robinson, for		0.25
" 8.	" P. M. Walsh or		0.25
		Total	$4.65

BADGLEY, J. (*dissentiens.*)—The action was brought against Rankin individually, and as assignee, for $637.66, which the plaintiffs alleged to be the aggregate of several debts which the defendant had offered to be sold at a sale of book debts of Hingston & Co., but which he had previous to the sale collected and received. This is not a personal contract by Rankin; he was acting under the Insolvent Law as assignee for the mass of the creditors, and sold the debts as detailed on the schedules with the understanding that the figures shewed the original debts, but at the same time notified the purchasers that dividends had been paid on account. The purchaser Lafond knew all this—of which there can be no doubt—and the Insolvent Law has provided in the public interest that assignees shall not be made personally liable for their acts, where there is no fraud proved. Assignees are acting in a quasi public capacity, and are protected by the clause of Insolvent Law. See 14 sect. for sale of debts, in which the assignee is required to keep a *list of the debts to be sold* for public inspection, the debts due to the

Lafond, and. Rankin.

bankrupt—then sec. 46, and no warranty except as to the good faith of the assignee shall be created by the assignee's sale of the bankrupt's debts, not even that the debt is due, see form K. Moreover, the condition of the sale was not only without warranty even of the existence of the debts as sold, but Lafond, the auctioneer, swears that he notified purchasers that the amounts stated to be due were the original debts without deduction of dividends. I am not disposed to disturb the original judgment confirmed by the Court of Review.

DUVAL, C. J. (also *dissentiens*), wished to say, however, that he did not sanction the proceeding of the assignee in selling debts which he had already himself received. The buyer, however, did not take the proper course: he might have repudiated the contract, or claimed a deduction from what he had to pay.

MONK, J., said That the case presented itself in this form. Here was a man who sold a debt with a number of others without any guarantee except of his own acts. He sold a debt from any guarantee that the debt was due. These were actually antagonistic propositions, but the Court came to a debt which was not only not due at the time, but which the assignee had received himself. His Honor thought that, under these circumstances, the plaintiff was entitled to succeed.

DRUMMOND, J., had a very strong suspicion that the notice, as to there being no warranty, &c., was given in the most artful manner, so as to keep within the letter of the law, but perhaps in a way not strictly honest. The assignee was not answerable for the debts that were paid before he got into office, but he was bound for the debts that he received himself.

TASCHEREAU, J.:—Les faits qui ont donné lieu au présent litige sont à peu de choses près les suivants:

Les appelants achetèrent le 18 octobre 1870, à une vente publique en vertu de l'acte de faillite de 1869, plusieurs milliers de piastres de dettes actives de la faillite des nommés Hingston, Telfer et Cie., lequel achat ils payèrent $308.90, savoir: $68.96 pour les créances au-dessus de $100, lesquelles furent vendues séparément, et $140 pour dettes au-dessous de $100, et qui leur furent adjugées en bloc. Cette vente se fit à l'instance du défendeur comme syndic à la faillite susdite, et conformément aux sections 44 et 46 de l'acte de faillite de 1869.

Les appelants s'étant mis en frais de collecter ces diverses sommes qui leur ont été vendues, il y en a dont les montants réunis formant un total de $637.66 avaient été reçus par le défendeur lui-même comme syndic. Les appelants ont intenté contre le défendeur tant en son nom et qualité individuelle qu'en sa qualité de syndic une action par laquelle ils lui demandent ces [illegible] sommes qu'il avait retirées et que cependant il leur avait vendues. Le défendeur prétend se soustraire à cette obligation en disant: "Que la vente aux [illegible]demandeurs par "le défendeur fut faite sans aucune garantie quelconque [illegible] sans aucune "garantie de l'existence de ces dettes, que ces conditions [illegible]dues à l'assem- "blée à laquelle eût lieu la vente en question, que l'un [illegible]demandeurs était "présent et a dû entendre ces conditions, que M. Barsalou, [illegible] en cette "occasion, avait expliqué que dans les cas dans lesquels des dividendes avaient été "payés au défendeur Rankin ou aux faillis, les montants [illegible]mme dûs

"étaient ceux originairement dus et sans déduction des dividendes, et que M. "Lafond a dû entendre ces explications."

En effet l'intimé à son enquête a produit le texte de l'annonce lue par l'encanteur et qui est en ces mots en langue anglaise: "The sale is made without any "guarantee whatever or any warranty of any kind or description whatever, so "much so that no warranty is given that the debts have even existence."

L'enquête établit que les demandeurs ont prouvé sept des huit items qu'ils reprochent au défendeur de leur avoir vendu, sachant qu'ils n'étaient pas dus, pour la bonne raison qu'il les avait collectés lui-même comme syndic, ce qui laisse une balance de $633.31.

Maintenant s'élève la question de savoir si une telle vente avec de si extraordinaires conditions est valable ou non, et, si elle n'est pas valable, quel recours ont les demandeurs contre le défendeur pour leur indemnité. Prenant d'abord les deux clauses 44 et 46 de l'acte de faillite de 1869, on y voit en toutes lettres que le syndic après avoir opéré avec diligence la perception des créances du failli, s'il trouve qu'il en reste encore dont la perception serait plus onéreuse que profitable à la masse, pourra sur ordre du juge les vendre, après avoir dressé une liste des créances à vendre, celles excédant $100 devant être vendus séparément, et nulle garantie, excepté quant à la bonne foi du syndic, ne sera créée par la vente, pas même la garantie que la créance est due.

Ces pouvoirs avec de telles conditions sont exorbitants sans aucun doute, et pour nous les faire respecter, il faut bien toute l'omnipotence d'une législation. Mais enfin, telle est la loi; et il nous la faut interprêter pour lui donner effet, sans blesser la justice, l'équité et peut-être quelqu'autre texte de notre droit Canadien. Si le défendeur a fait son devoir comme syndic il a dû s'occuper avec diligence (ce sont les mots du texte) de la perception de l'actif de la faillite, et se mettre au fait du montant restant dû. Il n'a pas dû agir en aveugle ni avec une précipitation fiévreuse, ni encore moins oublier ou perdre de vue les montants perçus par lui-même. S'il a fait tout cela, et que cependant il ait annoncé en vente des créances dont il avait reçu le montant entier, ou pour une grande partie, peut-il prétendre que sa bonne foi le protégera contre tout recours comme celui qu'exercent les demandeurs? J'en doute fort; ou plutôt je n'ai aucun doute qu'il ne peut se retrancher derrière cette bonne foi, car ou il a tenu des comptes ou il n'en a pas tenu: s'il en a tenu il ne pouvait de bonne foi ignorer avoir déjà reçu ce qu'il offrait en vente. S'il n'en a pas tenu, il est coupable d'une négligence que je ne puis qualifier et qui le rend responsable de ses actes.

Il y a dans cette section 46 l'exception à la non-garantie, c'est celle de la bonne foi du syndic, qui pour une raison ou pour une autre ne peut constater l'existence de la créance, soit qu'elle ait été payée au failli qui aurait omis d'en faire l'entrée en ses livres, soit qu'elle n'existe pas par suite de quelque erreur ou prétention mal fondée du failli; or dans ces cas, je comprends que la Législature dans le but d'arriver à un prompt règlement d'une faillite et de permettre à un failli de reprendre sa place dans le monde commercial, sanctionne ce mode de vente de telles créances, mais l'idée qu'un syndic puisse avec les yeux ouverts et en connaissance de cause vendre ce qu'il a déjà reçu, me serait à mon sens une monstruosité que de prêter à la législature une telle intention et une telle

Lafond, and Rankin.

législation, ce ne serait ni plus ni moins que de permettre au syndic de tirer double mouture du même sac ; ce serait lui dire, collectez tout et vendez tout ce que vous aurez collecté. En effet si c'est légal pour un item, je ne vois pas pourquoi le syndic ne pourrait pas logiquement réclamer tous les autres items.

Ainsi donc l'acte de faillite de 1869, invoqué par le défendeur lui-même, milite contre lui, en soumettant à la garantie les actes du syndic dans lesquels sa bonne-foi serait compromise.

Notre Code Canadien en son article 1509, répudie toute convention par laquelle le vendeur voudrait se soustraire à la garantie de ses faits personnels, et toute convention dans ce sens y est déclarée nulle, comme contraire, j'imagine, à la morale, ou à l'ordre publique.

La section 46 de l'acte de faillite de 1869 n'est donc pas incompatible avec l'art. 1509 du code avec au moins la distinction que j'ai indiquée, savoir lorsque la garantie est alléguée contre le syndic lui-même pour cause de fraude légale, ou de négligence approchant la fraude. Si une telle conduite de la part d'un syndic était tolérée comme légale, les intérêts des malheureux faillis ou plutôt de leur créanciers seraient bien compromis : en effet si on permet de vendre $633.31 qui ont été collectés sur $2390 de créances actives, je ne vois pas pourquoi un syndic dans le prétendu intérêt de ses commettants ne vendrait pas toutes les créances par lui perçues sans craindre d'être inquiété, car une fois parti dans cette voie, il n'y a pas de raison de dire qu'il y a une limite.

Et ces pouvoirs une fois connus comme sanctionnés par les tribunaux, auront pour effet de déprécier toutes telles ventes de créances de syndics, d'abord par la crainte de l'insolvabilité des débiteurs et ensuite par celle que toutes ces créances n'aient déjà toutes été perçues par un syndic qui interprétera à sa guise, le Code Civil et la clause 46 de l'acte de faillite de 1869, et on verra ces ventes avec une telle défiance que personne bien placée ne voudrait s'y montrer ni comme simple spectateur ni comme enchérisseur. Et qui souffrirait en fin de compte de cet état de choses ? les créanciers, sans aucun doute ; et qui en profiterait ? Les spéculateurs de mauvaise foi qui au moyen de ce que nos voisins au-delà de la ligne 45 appellent un *ring*, réussiront à accaparer pour des prix fabuleusement bas des créances que personne non initié ne se risquerait à acquérir. Je suis donc contre les prétentions du défendeur que je trouve exorbitantes et contraires à tout principe de notre droit, et à la morale même. Voyons maintenant quel recours les demandeurs ont contre le défendeur. Ont-ils un recours personnel contre le défendeur, simultanément avec celui qu'ils ont contre lui en qualité de syndic ? Ont-ils ce recours pour toute la somme ou seulement pour une proportion et quelle proportion ?

Je crois que les demandeurs ont un recours contre le défendeur personnellement et en sa qualité de syndic. Ce que les demandeurs reprochent au défendeur, est la fraude dont il s'est rendu coupable à leur égard en leur vendant une créance qui n'existait plus parcequ'il l'avait retirée lui-même. Or, on sait que comme tel le défendeur est obligé de réparer le dommage qu'il leur cause, ce dommage est la privation du montant des créances en question qu'ils ne peuvent retirer des débiteurs, mais que le défendeur a lui-même retirées. Le défendeur ayant reçu ces sommes après les avoir vendues aux demandeurs, est

tenu de les remettre aux demandeurs qui ne lui demandent pas autre chose mais comme il a pu en sa qualité de syndic se dessaisir de ces sommes, il ne peut être tenu personnellement. Mais les demandeurs n'ayant payé que $140 pour les dettes au-dessous de $100 et $168.90 pour les dettes au-dessus de $100, ne serait-il pas légal de ne lui accorder le remboursement de ses acquisitions, ou d'une proportion quelconque des $633, prenant en considération son prix d'achat et le montant total de ce qui lui a été vendu ?

Je crois que la vente ayant été parfaite par le consentement des parties contractantes au moyen de l'adjudication et du contrat écrit qui l'a suivi, les demandeurs ont droit à la chose entière et qu'on ne peut ici appliquer l'article 1487 du Code Civil qui énonce que la vente de la chose qui n'appartient pas au vendeur est nulle, parce que dans le cas actuel le vendeur n'a jamais cessé d'être propriétaire de la chose vendue, qu'il l'a encore en sa possession, et qu'il est conséquemment tenu de la délivrer à celui à qui il l'a vendue.

C'est en vain que le défendeur prétend se soustraire à la responsabilité légale qu'il a contractée envers les demandeurs, de les indemniser en disant qu'il n'a payé qu'un faible montant pour les quelques milliers de piastres qu'on lui a vendues et dont il pourra peut-être recevoir une assez forte proportion. Cette défense ne vaut rien à mon point de vue, car si le syndic a fait son devoir et suivi ce que lui enjoint la section 44 de l'acte de faillite de 1869, il a dû percevoir tout ce qu'il y avait de bon dans cet actif et ne laisser que les mauvaises dettes dont le recouvrement serait plus onéreux que profitable : et peut-il prétendre qu'il reste encore des montants dont la collection soit profitable, à moins de plaider dans ce sens et de supporter son plaidoyer par la preuve ? Il n'a rien fait de tout cela. Mais d'ailleurs l'eût-il fait, il n'est pas possible au défendeur de se dégager d'une grande responsabilité par des suppositions : où pourrait-on s'arrêter pour dire que l'adjudicataire de telles créances a ou n'a pas de chances de se sauvegarder, ce serait un travail à n'en plus finir, une tâche assez difficile et qui répugne à toutes les règles du droit. Il eût été beaucoup plus simple et beaucoup plus expéditif pour le défendeur de tenir compte des dettes qu'il a vendues et qu'il avait déjà reçues ou sur lesquelles il avait déjà reçu de forts accomptes ; de cette manière tous les intérêts, ceux des créanciers, du failli et ceux du syndic lui-même, eussent été protégés d'une manière effective et sans exposer personne.

La prétention du défendeur que les conditions de la vente, savoir, qu'il y ait eu des paiements effectués sur certaines dettes, n'est pas soutenable. D'abord, il n'est pas prouvé que les demandeurs aient eu connaissance de ces conditions qui, suivant la preuve, n'eussent été exprimées que verbalement et ensuite, les eussent-ils comprises, je considère qu'elles sont illégales comme contraires à l'article du code qui répudie toute garantie contre les faits personnels, et comme contraires à la bonne foi. Puisque le défendeur a bien voulu prendre le trouble de faire mettre par écrit les conditions de la vente, il aurait dû y inclure celles relatives aux dividendes. Car leur omission était et a sans doute été de nature à tromper les demandeurs. De plus j'observe que l'acte de vente par le défendeur aux demandeurs et qui est leur fait, ne fait aucune mention de cette réserve quant aux dividendes. Tout considéré, je crois comme l'exprime bien le factum

Lafond, and Rankin.

des appelants, que la sympathie n'est pas pour le vendeur, syndic, mais bien pour l'acquéreur, et que le jugement qui a renvoyé l'action des demandeurs devait être infirmé, et le défend[illegible] personnellement et en sa qualité de syndic à payer aux deman[illegible] de $633.31 avec intérêt du jour de la signification de l'action du défendeur et les dépens devant toutes les cours.

Je suis d'opinion que les demandeurs doivent réussir pour le montant entier de leur réclamation, moins cependant la somme de $4.35, item relatif à une dame O'Neil, de laquelle somme les demandeurs n'ont pas prouvé le paiement au défendeur.

The following were the reasons assigned in the judgment of the Court, by which the judgments of the courts below were reversed, and the respondent condemned to pay the $633.31 and interest and all costs:—

"La Cour *** Considérant qu'au nombre des créances des faillis, James Hingston & Co., et Hingston, Telfer & Co., offertes en vente par encan public par le défendeur intimé, en sa qualité de syndic, le dix-huitième jour d'octobre mil-huit-cent soixante-et-dix, dont les demandeurs, appelants, se sont portés acquéreurs, se trouvaient comprises un certain nombre de dettes qui avaient déjà été perçues en totalité ou en partie par le dit défendeur sous forme de dividende ou autrement;

"Considérant qu'il résulte tant de la preuve que des admissions du défendeur, intimé, que les sommes ainsi perçues par ce dernier sur les créances par lui offertes en vente, et préalablement au dit encan, forment un total de six cent trente-trois piastres et trente-et-un centins:

"Vû qu'en vertu de l'article 1509 du Code Civil le défendeur quoiqu'il ne fût soumis à aucune autre garantie était cependant obligé à la garantie de ses faits personnels;

"Vû la section 46 de l'Acte de Faillite de 1869—considérant que le défendeur était tenu à la garantie de sa bonne foi;

"Considérant que le défendeur qui a vendu ces créances après en avoir retiré les montants ne pourrait se soustraire à l'obligation d'en payer le prix aux demandeurs, appelants, que dans le cas où il les aurait ainsi vendues par encan après en avoir déjà rendu compte à la succession des dits faillis, moyen qu'il n'a ni plaidé ni prouvé;

"Considérant que la loi (section 46 Acte de Faillite de 1869) en exemptant le syndic de la garantie que la créance est due, n'entend l'exempter que de la responsabilité d'un fait impersonnel à lui; comme serait celui de l'entrée d'une fausse créance par le failli dans ses livres de compte, et non d'un fait personnel au syndic lui-même, comme celui de la vente d'une créance ayant réellement existé mais dont il aurait perçu le montant lui-même avant de l'offrir aux enchères;

"Considérant que l'annonce verbale faite par l'encanteur du défendeur au moment de la vente à l'effet de dire que les montants originaires étaient vendus sans déduction des diviendes reçus n'était d'aucune valeur légale vu qu'elle n'était pas accompagnée d'un état indiquant en détail les sommes reçues et communiqué à tous les enchérisseurs;

"Considérant que l'annonce lue par l'encanteur lors de la vente et produite

par le défendeur sous la rubrique "*Conditions of Sale*" comme son Exhibit No. 1, quoique calquée en grande partie sur le texte même de la section 46 de l'Acte de Faillite de 1869 omet précisément la garantie de la bonne foi que la loi exige formellement de syndic après l'avoir exempté de toute autre garantie."

Judgments below reversed.

Lanctôt & Lanctôt, for appellants.
Bethune & Bethune, for respondent.
(E. B.)

SUPERIOR COURT, 1873.

MONTREAL, 30TH SEPTEMBER, 1873.

Coram MACKAY, J.

No. 291.

Hillsburgh vs. Mayer.

HELD:—That the prescription of a promissory note made in a foreign country and payable there is to be governed by the *lex fori* and not by the *lex loci contractus*.

The plaintiff, residing in the State of New York, one of the United States of America, brought this action on the 7th of December, 1872, against the defendant, living in the City of Montreal, Canada, upon a promissory note given by the defendant to the plaintiff in the City of New York on the 18th of July, 1866, and which became due and payable there on the 21st January, 1867. At the time the note became due the defendant was a resident of the City of New York, had his domicile there, and continued to have it there up to the 15th day of March, 1868.

From and after this last date the defendant had his domicile in the City of Montreal.

These facts were admitted by admissions fyled by the parties to the suit.

The defendant pleaded that the note in question matured and became due and payable more than five years before the service of the suit, and that plaintiff's action was barred and prescribed.

Plaintiff answered that the laws of the State of New York alone were applicable, and that by them such a note was only prescribed by the lapse of six years.

The following is the judgment of the Court:—

"Considering articles 2260 and 2267 of the Civil Code, and that by force of them and the facts of this case this action cannot be maintained;

"Considering that no suit or action was brought on the promissory note, basis of plaintiff's action, within five years next after the day on which said note became due and payable, and that in consequence thereof and by law it must be held to have been absolutely paid and discharged, to wit, before the institution of the present action, doth dismiss said plaintiff's action with costs.

Action dismissed.

Laflamme, Huntington & Laflamme, for plaintiff.
Kerr, Lambe & Carter, for defendant.
* (J. L. M.)

* For a similar judgment *vidè* case of Wilson vs. Demers, 10 L. C. J., 261. (J.L.M.)

SUPERIOR COURT, 1873.

MONTREAL, 30TH SEPTEMBER, 1873.

Coram TORRANCE, J.

No. 2435.

McNeven vs. *McAndrew*.

HELD:—That an attachment before judgment will be quashed and set aside upon motion, if the affidavit upon which it issued does not aver that the defendant "is secreting or is about to secrete his estate, debts and effects."

In this case the plaintiff, claiming $3000, commenced proceeding by an attachment before judgment under which he caused to be seized a raft of logs. The affidavit contained *inter alia* the following averments:—

"And the deponent saith further that, by writing *sous seing privé* made and passed at Sault au Recollet aforesaid on the twenty-fifth day of June last past, the said defendant sold to the plaintiff, and agreed to deliver to him in Tailfour's Bay in Little River a raft of logs containing many thousand feet of timber, and upon such delivery the plaintiff agreed and promised to pay to the said defendant the sum of $1500, and in ten days after said delivery the sum of $1000, and in forty days from date of delivery the sum of $1370, and in seventy days from said delivery another sum of $1370, as the balance of said price of said logs if the same on measurement should amount to so much—the whole of the last payments to be made by notes at said delays.

"That relying on the good faith of defendant, the said plaintiff paid and advanced to defendant the said sum of $2350, on account of the price of the said logs, trusting that defendant would deliver the said logs as he had agreed to do, but defendant having obtained said advance fraudulently refused and refuses to deliver any part thereof or to restore said sum or any part thereof.

"And deponent saith further that he has done all in his power and all he was bound to do to recover delivery of the said logs, and hath tendered to defendant the sums he had agreed to pay and the notes for the other different sums at the stipulated delays, and yet defendant, as deponent is informed and believes, is now immediately about to remove, sell and make away with the said logs, with intent to defraud the said plaintiff and others, his creditors, and the defendant hath himself declared that he would sell and dispose of the said logs to other parties, and would not deliver the same or any part thereof to plaintiff and would not refund the money so advanced.

"That part of the said logs have been removed and the remainder is being removed by the said defendant from the place where they now are at St. Laurent aforesaid, out of the jurisdiction of the Court, with intent to defraud plaintiff; and he saith that without the benefit of a writ of seizure, *saisie arrêt* before judgment, to seize and attach the same the said plaintiff will be deprived of his remedy, will lose his debt and sustain damage, and he hath signed."

The defendant moved the Court on the 17th of September, 1873: That the writ of attachment and all proceedings had thereunder be set aside, quashed and declared irregular and illegal, because the plaintiff did not in his affidavit "aver secretion by defendant or intention to secrete." The parties having been heard upon the motion, the following judgment was rendered:

TORRANCE, J. :—Defendant makes a motion that the writ of attachment, *saisie arrêt* before judgment, be set aside because the affidavit does not comply with the words of the Code. The charge against the defendant is that he was "making away" with his property. The words of the Code are that you must charge the defendant with "secreting" his property. The plaintiff contends that the words "making away with" and "secreting" are synonymous, but that, through some scruple, he would not use the word "secreting," but "making away with." Now, it is doubtful if there are any two words precisely synonymous. The attachment is not in the words of the Statute, and it must be set aside.

The *motifs* of judgment are as follows :—

The Court having examined the proceedings and deliberated; considering that the affidavit upon which said *saisie arrêt* is founded doth not establish that defendant is secreting or is about to secrete his estate, debts and effects, doth grant the said motion, and doth in consequence quash and set aside the said writ of attachment and all the proceedings had thereunder with costs.

Motion to quash attachment granted.

A. & W. Robertson, for plaintiff.

Perkins, Macmaster & Prefontaine, for defendant.

(J.L.M.)

SUPERIOR COURT, 1873.

MONTREAL, 31st MARCH, 1873.

Coram MACKAY, J.

No. 2156.

Urquhart vs. *Moore*.

Plaintiff claimed $334.00 for goods sold, which defendant refused, upon the ground that they were not as represented. Upon a reference to arbitrators they found for the plaintiff, less $20 for broken packages, and ordered each party to pay his own costs.

HELD:—1st. Arbitrators have no right to pass upon costs.

2nd. As the defendant had no right to refuse the goods, but should have simply claimed a reduction, the award will be homologated, except as to costs, and defendant condemned to pay all costs.

The facts of the case appear sufficiently from the Judge's remarks and the judgment.

PER CURIAM :—At a trade sale of groceries here, in October, 1870, the defendant, a Toronto merchant, bought a lot of groceries. Among the articles purchased were a lot of mixed pickles, sold for $333.06. Moore paid for the rest of the goods, but claimed that the pickles were not mixed at all, being nothing but red cabbage. On their arriving at Toronto, Moore held an *exparte* survey, and gave notice to plaintiff that they were at his risk. The matter was referred to arbitration, and the arbitrators found in favour of plaintiff, only deducting some $20 for broken bottles. They, however, ordered that each party should pay his own costs. This was altogether beyond their province; they had no power to pass upon the costs. All the equities of the case are with the plaintiff, as defendant had no right to refuse so large a quantity for so small a deficiency but should simply have asked for a reduction. The award is homologated, except as to costs, and defendant condemned to pay $313.06 and all costs.

Prevost et al, vs. Ritchot.

The following is the judgment:

The Court having heard the parties by their counsel, as well upon the motion of plaintiff, that the award of arbitrators in this cause fyled on the 13th of January last past, in so far as the arbitrators thereby find and award that plaintiff is entitled to recover from the defendant the sum of $313.06 and interest, be homologated with costs; and that that portion of said award, whereby the said arbitrators assume to adjudicate as to costs, and award "that each party do pay their own costs," be declared to be inadmissible, illegal, null and void, and be disregarded and set aside with costs for the reasons mentioned in said motion, as on the motion of said defendants, that said award be homologated and that judgment be entered up accordingly; and on the merits; having examined the proceedings, and seen and examined the said award of the said arbitrators, and on the whole duly deliberated, doth reject said defendant's motion with costs; and doth grant said plaintiff's motion that that portion of said award that adjudicated upon costs be held null, and be rejected, and that the rest of it be homologated with costs; doth homologate and confirm the said report or award of arbitration, save and except that part which adjudges as to costs; and in consequence doth condemn the defendants, jointly and severally, to pay and satisfy to plaintiff the said sum $313.06, being the balance of the price of the goods bought by the said defendants from the said plaintiff, as mentioned in the declaration, with interest thereon from the 17th of July, 1872, until paid, and costs of suit, distraits to S. W. Dorman, Esq., attorney for plaintiff.

S. W. Dorman, for plaintiff.

J. J. C. Abbott, Q. C., for defendant.

(J.L.M.)

SUPERIOR COURT, 1874.

MONTREAL, 18TH MARCH, 1874.

Coram TORRANCE, J.

No. 1425.

Prévost et al. vs. *Ritchot.*

HELD:—That in an action for $72.65, commenced by *capias ad respondendum*, the Superior Court has jurisdiction to condemn the defendant to pay the amount, notwithstanding that the writ of *capias* has been quashed.

TORRANCE, J.:—This is an action for $72.65, an amount below that for which an action can be brought in this Court. The suit however, was begun by a *capias ad respondendum*, which has been since quashed by a judgment of this Court. The question has been raised by the defendant's plea whether, under the circumstances, the Court has jurisdiction to condemn the defendant to pay the amount demanded. After due consideration, I am of opinion that it has, and I therefore, give judgment for the plaintiff accordingly.

Judgment for plaintiff.

Dorion, Dorion & Geoffrion, for plaintiffs.

S. Pagnuelo, for defendant.

(S.B.)

SUPERIOR COURT, 1874.

IN INSOLVENCY.

MONTREAL, 21ST MARCH, 1874.

Coram MACKAY, J.

Nos. 441 and 803.

In re *Esinhart*, an Insolvent, and *Tyre*, Assignee.

AND

In re *Stark et al.*, Insolvents.

HELD:—That an insolvent petitioning for his discharge under the Insolvent Act of 1869 must give notice thereof by mail to all creditors and representatives of foreign creditors within Canada, in addition to the notices required to be given by advertisement. (Insolvent Act, sec. 117.)

MACKAY, J.:—The bankrupts not having obtained the consent of their creditors to a discharge, severally petition for one, after the year, under sec. 105 of the Insolvent Act. The judgment of the Court of Appeals in Hope, appellant, vs. Franck (June, 1873), has called attention to what are the law's requirements as to the notices to be given by insolvents presenting such petitions.

Sections 101, 105 and 117 regulate the matter. The last orders that "notices of meetings of creditors, and all other notices herein required to be given by advertisement, without special designation of the nature of such notice, shall be so given by publication thereof for two weeks in the *Official Gazette*, also in the Province of Quebec, in every issue during two weeks of one newspaper in English and one in French, published at or nearest to the place where the insolvent has his chief place of business; and in any case, unless herein otherwise provided, the assignee or person giving such notice shall also address notices thereof to all creditors and to all representatives of foreign creditors within Canada and shall mail the same with the postage thereon paid, at the time of the insertion of the first advertisement."

The petitioners have not addressed, nor mailed, notices whatever to their creditors, and claim that mere advertisement in the *Gazette* and newspapers is all they were obliged to give of notice of their intention to petition for discharge. But is not the last part of sec. 117 against them? "*And in any case, unless herein otherwise provided*," &c., reads very largely and imperatively; but it has been pressed upon me that, upon like language of the Insolvency Act of 1864, Chief Justice Draper, *in re* Waddell, held that notice by mere advertisement in the papers was sufficient, and that other notices by mail were not required, absolutely. The Chief Justice held the expression, "without special designation of the nature of such notice," to be equivalent to the expression, "without special statement of the matters to which such notice relates." There is no full report of Hope vs. Franck;* from what reports we have it seems to me that the judges were of opinion that addressed notices to creditors were required from insolvents petitioning for discharge, as do those in the cases that I am now disposing of. I hold that such addressed notices are required under section 117, which I cannot read otherwise than according to its expression. "All notices shall be by advertisement," says section 117; how the advertising shall be performed is ordered, and at the time of the insertion of the first adver-

* Since this judgment was rendered, a report of Hope vs. Franck has appeared, 18 L. C. Jurist, 28. (J. K.)

Forbes et al. vs. Lewis.

tisement (whether in form of P, or any other) there shall be mailed notices addressed to all the creditors, unless specially otherwise herein provided, so says section 117; and in the law we do *not* find special provision exempting petitioners like those whose cases are now being disposed of from so mailing notices. I think the law meant that as far as possible the creditors should receive actual notice, and it is very fitting that it should be so. A bankrupt may be a fraudulent one, his creditors may have been seriously wounded by him, and his discharge refused by them. Under the law such a bankrupt need not present petition for discharge by the judge within 13, 24, or even 50 months, particularly. Under system of mere advertisement in the *Official Gazette*, and say, a weekly semi-religious paper, read by hardly anybody, the bankrupt referred to might easily arrange a surprise against his creditors, particularly by waiting a time, three or four years, until creditors were off their guard, some of them, perchance, absent from home. Under the system of mailed particular notices, creditors could not be so easily surprised. I think that the law meant them *not* to be surprised. I hold its expression to be plain. What inconvenience can result from enforcing it? None; but much convenience and equity. If there be doubt as to how such laws should be read or interpreted, I hold that the creditors ought to be favored; for the bankrupts are claiming privilege and to destroy fortunes of other people, or to wipe off large money claims of others without paying them anything. "Statutes overthrowing estates shall be strictly construed, and never have an equitable construction."—P. 729, Dwarris. "A power derogatory to private property must be construed strictly, and not enlarged by intendment."—P. 750. "Let a statute be ever so charitable (said Holt, Ch. J.), if it give away the property of the subject it ought to be construed strictly."—P. 754. "It is safer to adopt what the Legislature has actually said than to suppose what they meant to say."—P. 707, Dwarris. The petitioners, Esinhart, and Stark & Shaw, not having given the requisite notices, their petitions are rejected; each is.

Petitions rejected.

S. Pagnuelo, for Esinhart.
A. & W. Robertson, for Starke & Shaw.
(J.K.)

SUPERIOR COURT, 1874.

MONTREAL, 19TH FEBRUARY, 1874.

No. 2138.

Coram BEAUDRY, J.

Forbes et al. vs. *Lewis*,

AND

The Globe Mutual Life Insurance Company of New York, Tiers saisis.

HELD:—*Tiers saisis*, in answer to a writ of *saisie arrêt* after judgment, have no right to appear by Attorney, and an appearance fyled by an Attorney for such *tiers saisis* will be rejected from the record upon motion.

Motion to reject appearance by *tiers saisis* granted.

John L. Morris, for plaintiffs.
L. H. Davidson, for tiers saisis.
(J.L.M.)

SUPERIOR COURT, 1874.

MONTREAL, 28TH FEBRUARY, 1874.

Coram TORRANCE, J.

No. 123.

Pelletier vs. *Ratelle*.

HELD:—That the allegations of a declaration founded upon notarial deeds of sale seeking to fasten a personal liability upon defendant towards plaintiff will not be proved by a declaration made by defendant in another deed to a third party; no *lien de droit* is thereby created between plaintiff and defendant.

PER CURIAM:—The declaration of the plaintiff sets forth a deed of sale, 24 July, 1860, Hetu, notary, by which plaintiff sold to Alexis Wolf a piece of land on Beaudry street in the city of Montreal for $200 *à constitution de rente*, being an annual and perpetual rent of $12, payable to plaintiff in advance on the 24th July. That on the 9th March, 1863, Wolf sold the land to the defendant for the same rent which he undertook to pay to plaintiff, and promised to furnish to plaintiff a copy of his deed of sale duly registered. The land was mortgaged in the usual terms for the payment of the rent and capital. That defendant has never supplied the copy of said deed for which plaintiff has been obliged to pay $2, and 70 cents for the certificate of registration. That defendant has never paid to plaintiff the rent falling due on 24th July, 1872, or that due on 24th July, 1873, forming, with the cost of the registered deed, $26.70. That by deed 26th August, 1867, Mathieu, N.P., defendant sold the land to Jean Bte. Rivet and Pierre Malo for $600, and defendant declared by said deed that he had created in favor of plaintiff a *rente constituée* of $12.00, payable annually, and further, that in case of sale, exchange or other alienation of said land, plaintiff would have the right to exact in one payment the capital sum of $200, and arrears of said rent. That later, the land was sold by the Sheriff of Montreal for a nominal sum without preservation of the claim of plaintiff, for which defendant was personally responsible. That plaintiff being deprived of her right of *bailleur de fonds* by the acts and negligence of defendant, has right to claim from him the capital and arrears of said rent.

Plaintiff accordingly makes a claim against the defendant for $226.70; less $69.85 received by her from the Sheriff.

The defendant pleads the general issue; and also that there is no *lien de droit* between plaintiff and him.

The Court does not see that by the deed from defendant to Rivet and Malo, 26th August, 1867, there was established any *lien de droit* between plaintiff and defendant, allowing the Court to enter judgment against the defendant for the balance of $156.85, claimed by the action. The action is dismissed.

Action dismissed.

Rochon, for plaintiff.
Angé, for defendant.

(J. K.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 17TH MARCH, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A. J.

No. 1.

THE MAYOR, &c., OF MONTREAL, APPELLANTS;

AND

DRUMMOND, RESPONDENT.

HELD:—That an appeal, of which two Judges *ad hoc* (under Articles 1161 and 1162 of the Code of Civil Procedure) have "taken judicial cognizance," by having heard the case and ordered a re-hearing, must be re-argued before such two judges as part of the Court, notwithstanding that one of the Judges of the Court, who was replaced by one of such Judges *ad hoc*, ceased to be a Judge of the Court, and has been replaced by another permanent Judge, and notwithstanding that the other Judge, originally replaced by a Judge *ad hoc*, has been replaced by an Assistant Judge.

TASCHEREAU, J.:—When this case was called for argument, the counsel of the appellants contended that Justices MACKAY and TORRANCE, who had been appointed Judges *ad hoc* in place of Justices DRUMMOND and MONK, who were incompetent, should form part of the Court, notwithstanding that Judge DRUMMOND had ceased to be a Judge of this Court, and had been replaced by Mr. Justice RAMSAY as a permanent Judge of the Court, and notwithstanding that Mr. Justice LORANGER is now Assistant Judge of this Court in place of Judge MONK. After taking time to consider, we are all of opinion, inasmuch as Justices MACKAY and TORRANCE heard the case, and joined in the order for a re-hearing, that they have "taken judicial cognizance" of the case, and, consequently, that under the provisions of Article 1163 of the Code of Civil Procedure they must continue to form part of the Court at the present re-hearing.

RAMSAY, J.:—Called Counsel's attention to the fact that if a fifth Judge be required, he must, in terms of the Code, be a Judge of the Superior Court, and, therefore, that he would seem to be incompetent to sit in the case at all.*

Suggestion of appellant's Counsel sustained.

Rouer Roy, Q.C., for appellants.

Lacoste & Drummond, for respondent.

(S. B.)

SUPERIOR COURT, 1873.

MONTREAL, 31ST OCTOBER, 1873.

Coram TORRANCE, J.

No. 428.

Beard vs. *McLaren.*

HELD:—That proof by witnesses is inadmissible of a new sale between parties without a writing or without previous delivery.

TORRANCE, J.:—Action of damages for non-delivery of coal by defendant to plaintiff. The declaration alleges that plaintiff, on 8th July, 1871, sold and

*The Court subsequently assembled, composed of TASCHEREAU, J., RAMSAY, J., SANBORN, J., MACKAY, J., *ad. hoc*, TORRANCE, J., *ad hoc*, and ruled (RAMSAY & MACKAY, JJ. *dissenting*) that Judge RAMSAY was competent to sit. (Reporter's note.)

delivered to defendant 37 tons 430 lbs. at price of $4.75, amounting to $176.68; that delivery was made at 267 St. James Street; that on or about 20th October, 1871, defendant inquired of plaintiff at what cost he would undertake to remove said coal to Mercantile Library buildings, whereupon plaintiff offered, instead of undertaking said removal, to cancel said first sale and sell and deliver to defendant, at last-mentioned premises, other coal known as Scotch steam coal, at $5.50 per ton, which offer defendant accepted, and it was agreed between plaintiff and defendants that said first sale should be cancelled, and it was then cancelled; and that defendant should then deliver up said first mentioned coal at said premises, No. 267 St. James Street, to plaintiff, and plaintiff then sold and delivered to defendants 45 tons 820 lbs. of said Scotch steam coal, at $5.50, which were settled for by defendant. Plaintiff then alleges breach on the part of defendant to re-deliver; increase in the value of the coal, which is now $362.53; conclusions by plaintiff, that defendant re-deliver said coal or pay the value, &c. The defendant pleaded that it was true that he had ordered from the plaintiff, about 11th June, 1871, about 35 tons of coal for price of $4.50 per ton of 2240 lbs. That plaintiff fraudulently delivered coal which he pretended weighed 81,830 lbs., but which only weighed about 62,000 lbs. That afterwards plaintiff and defendant agreed to have said coal re-weighed; that afterwards it was proposed that plaintiff should take back the coal unburned, defendant having consumed a certain portion, but defendant insisted that the coal should be re-weighed and allowance made for that which had been burned, and that the actual quantity delivered by plaintiff to defendant should be established, and from the quantity so established should be deducted the quantity still on hand, which should be re-taken by plaintiff, defendant paying for what he had consumed at $4.50, but plaintiff refused, and insisted that the quantity delivered should be taken as 81,830 lbs, and that defendant should pay for the difference between that quantity and the quantity still on hand at a much higher rate, which defendant refused. The following question is put to the witness, James Leslie: After the defendant moved into these new premises in the Mercantile Library buildings, was anything said in reference to cancelling the sale of the quantity of coal which he had delivered into the cellar of the St. James Street premises, and if so, what? This question was objected to by the defendant, and the objection was maintained by the presiding judge (Johnson). The plaintiff takes the ground that the cancellation of the contract could be proved by parol. The Court is now called upon to revise this ruling. The general rule as to cancellation, as I understand it, is that parol evidence is admissible. Smith, on Contracts, uses these words: It (Statute of Frauds) does not forbid their being rescinded by parol; and there is no doubt that they may be so rescinded, p. 133. But it has been laid down by Lord Lyndhurst that although such waiver is unquestionably admissible according to the rule stated, it must be in effect a total dissolution of the contract, such as would place the parties in their original situation. Browne, p. 435. Phillips and Greenleaf both consider such evidence admissible. On the other hand, we have the weighty authority of Lord St. Leonards, who gives it as his opinion on a review of the case, that perhaps the better opinion is that it is inadmissible at law. There is another view which

Bélanger vs. Collin.

may be taken of the case. The case under consideration as raised by the pleadings is not so much a cancellation of the contract as a variation of the original contract, or a substitution of the new one for the old. The plaintiff charges that defendant refused to re-deliver to him the 37 tons of coal, the sale of which had been cancelled. The Court sees here an attempt to prove by a witness a new sale by defendant to plaintiff, without any previous delivery, and without any contract in writing, contrary to C. C. 1235. Noble v. Ward, 1 Exchcq. 115 and 2 Exchcq. 135, would sustain the doctrine that the substitution of one contract for another cannot be proved by parol. The motion is rejected.

J. Wotherspoon, for plaintiff.

W. H. Kerr, Q. C., for defendant.

(J. L. M.)

SUPERIOR COURT, 1874.

MONTREAL, 31st MARCH, 1874.

Coram TORRANCE, J.,

No. 428.

Beard vs. *McLaren.*

HELD:—That a motion to amend the declaration in a cause under C. C. P. 320 is premature during the plaintiff's *Enquete*.

Semble: such motion would be premature before final hearing on merits.

The pleadings in this case already appear in the preceding report, p. 77.

PER CURIAM:—The plaintiff has examined several witnesses, and now moves that "he may be allowed to amend his declaration so that it may agree with the facts proved by striking out from the conclusions thereof from the words "to release and deliver up" to the words "that he be ordered," &c. Plaintiff cites in support C. C. P. 320. The Court has hitherto as a general rule only applied the provisions of this article when a case has come up on the merits. At the present stage the motion is premature, and the Court will not now decide how far the plaintiff has made out his case. Motion dismi ed.

J. Wotherspoon, for plaintiff.

W. H. Kerr, Q. C., for defendant.

(J. L. M.)

SUPERIOR COURT, 1873.

MONTREAL, 30TH SEPTEMBER, 1873.

Coram JOHNSON, J.

No. 2743.

Bélanger vs. Collin.

HELD:—That no action of damages will lie against a party for having caused another to be arrested if probable cause and no malice be proved, even although the grand jury have found no bill against the party accused.

The plaintiff alleged that, on the 27th of April, 1872, the defendant having missed a sum of $35.25 immediately accused the plaintiff, who was then voluntarily in his service without any remuneration, of having stolen twenty-five cents

of the said sum, and he also accused plaintiff of having stolen another sum of $40.00 from him, and had him arrested and confined in prison until the next day, when plaintiff gave bail;

That the matter was referred by the Police Magistrate to the Court of Quarter Sessions where two indictments were laid against him, on which the grand jury found no bill, and plaintiff was discharged.

That the accusation was made without sufficient ground, and plaintiff suffered damages to the extent of $800.00, and he prayed that defendant be condemned accordingly.

Defendant pleaded that he had reasonable and probable cause for having plaintiff arrested, and that he had acted in good faith and without malice;

That, on missing the money, he told the plaintiff that he suspected him, and plaintiff seemed embarrassed and admitted that he did take the sum of twenty-five cents belonging to defendant;

That plaintiff also offered to repay to defendant the said $35.25 if he got delay, and upon defendant's refusal to give delay plaintiff went away, saying that he was going to get money from his brother-in-law to settle the affair, but he never returned;

That under these circumstances defendant caused plaintiff to be arrested, and upon such proof the Police Magistrate referred the case to the Court of Quarter Sessions, and defendant was fully justified in having plaintiff arrested.

These allegations of the defendant were fully proved, and the following judgment rendered:—

JOHNSON, J.:—Action of damages for malicious prosecution. The charge brought against the plaintiff was, or rather the charges were, for there were two, that on the 27th day of April, 1872, he had stolen $35.25 from the defendant, and on the same day another sum of 25 cents. The defence is that the charges were brought in good faith and with probable cause. I think this defence is fairly made out. The defendant's conduct justly subjected him to suspicion, and the defendant was quite justified in having him arrested. The grand jury at the Quarter Sessions threw out the bills; which, I think, is in all such cases, a fair presumption that the accusation is unfounded; but it is nothing more: it supplies nothing in the way of evidence of malice, or of want of probable cause, which are essentials of this action. There is nothing on this head, except an expression of the defendant to the effect that he had had the plaintiff arrested with the view of finding out who was the thief. The confession of the plaintiff that at all events he had stolen the 25 cents is of itself very strong against him; but all the circumstances of the case must have rendered it extremely probable, in the estimation of the defendant, that the plaintiff had taken all the money that disappeared, and, acting as he did with probable cause —not to say with confessed guilt on the part of the plaintiff, he is absolved from all consequences, and the action is dismissed with costs.

The *motifs* are as follows:

The Court, having heard the parties by their counsel upon the merits of the cause, examined the proceedings, the evidence adduced, and deliberated, considering that the defendant has proved his plea, and that the arrest and prosecution

The Commercial Union Assurance Co. and The Canada Iron-Mining and Manufacturing Co.

complained of were made and had without malice and with probable cause, doth dismiss the plaintiff's action with costs.

Action dismissed.

O. Augé, for plaintiff.
Girouard & Dugas, for defendant.
(J. L. M.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 24TH JUNE, 1873.

Coram DUVAL, C. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 7.

THE COMMERCIAL UNION ASSURANCE COMPANY,
(*Defendants in the Court below*),
APPELLANTS;

AND

THE CANADA IRON MINING AND MANUFACTURING COMPANY,
(*Plaintiffs in the Court below*,)
RESPONDENTS.

A policy of insurance contained the following condition endorsed upon it, viz., "The company will not be answerable for any loss or damage by fire occasioned by earthquakes or hurricanes, or by burning of forests; and this policy shall remain *suspended and of no effect* in respect of any loss or damage (*however caused*) which shall happen or arise, *during the existence of any of the contingencies aforesaid.*

HELD: Such a clause is legal, and in order to exempt the Company from liability it is only necessary to prove that at the time of the loss the neighboring forests were burning.

The appeal was from the following judgment of his Honor Mr. Justice Mondelet, rendered on the 30th November, 1871:

"The Court, etc.

"Considering that the plaintiffs have proved the material allegations of their declaration, and, namely, that by and in virtue of the policy of insurance in their declaration, in part recited and invoked, they have the right to recover of and from the defendants the sum by them claimed, to wit, The sum of $2,150, being the amount of the loss and damage they have suffered by the destruction by fire of their property, such as alleged in their declaration:

"Considering that the defendants have failed to substantiate their plea, and namely, that the plaintiff's said property was destroyed by burning of forests as by them pretended, the said plea is hereby dismissed with costs, and the defendants are adjudged and condemned to pay the plaintiffs the said sum of $2,150 currency, with interest thereon from the 16th of February, 1871, the day of service, and costs of suit, &c."

The principal allegations of the declaration were:

"That under policy No. 143,717, of date 18th January, 1870, appellants, subject to the conditions and stipulations endorsed on and annexed to the policy, agreed to pay to respondents all the damage and loss which they might suffer

The Commercial Union Assurance Co. and The Canada Iron-Mining and Manufacturing Co.

by fire on the property insured, to wit, on certain buildings situate at Hull, in the Province of Quebec.

"That about the 17th of August, 1870, a fire occurred without the act or knowledge of the respondents, and from some cause unknown to them, in and upon the premises insured, and the loss exceeded the amount insured.

"That the usual notices were given, and the conditions of the policy conformed to, and the respondents claimed $2,150.00, the amount of insurance."

Appellants pleaded specially:—

"That the plaintiffs cannot maintain the present action against the defendants, because in and by the said policy it was and is expressly declared and agreed that the same should be subject to the several conditions and stipulations endorsed thereon or annexed thereto, and which conditions and stipulations were thereby declared to constitute the basis of the insurance effected by said policy.

"That in and by one of such conditions and stipulations endorsed upon or annexed to the said policy, to wit, the ninth, it was and is stipulated that:—

"The Company (to wit, the defendants) will not be answerable for any loss or damage by fire occasioned by any invasion, foreign enemy, insurrection, civil commotion, riot, or any military or usurped power whatever, or which shall happen or arise after war shall have been declared against the country wherein the insured property is situate, or after the invasion of any territory of such country, or during the administration of martial law, nor for any loss or damage by fire *occasioned* by earthquakes or hurricanes, *or by burning of forests;* and this policy shall *remain suspended and of no effect* in respect of any loss or damage (*however caused*) which shall happen or arise *during the existence of any of the contingencies aforesaid.*

"That at the time of the fire and loss alleged in the plaintiffs' declaration, the forests in the neighborhood and immediate vicinity of the property described in the said policy were on fire, and *the loss and damage* to such property was *occasioned by burning of forests* and not otherwise, and *happened and arose during one of the contingencies* mentioned in the said cited *condition*, to wit, *the burning of forests*, and during which contingency the said policy was by virtue of the said condition and stipulation *suspended and of no effect.*"

Plaintiffs answered:—

"That the fire was not occasioned by the burning of forests, and the loss and damage did not happen or arise during the existence of any of the contingencies mentioned in the ninth condition, and the said policy was not, at the time of the fire, suspended and of no effect.

"That the part of the country in question was thickly settled and cultivated, and there were at the time of the fire and are no forests in the vicinity or neighborhood of the said property.

"That the fire came from a north-easterly direction, and between plaintiffs' property and the nearest bush, to wit, on the property adjoining that of the plaintiffs', there were a large number of houses, in fact a small village, called Rafting Ground, and that the fire came from said [illegible] and was not communicated from any forest."

The Commercial Union Assurance Co., and The Canada Iron-Mining and Manufacturing Co.

It was proved that a forest or growth of trees ran down the sides of a creek directly on to the respondents' property; that it and all the other woods in the surrounding country were on fire; and that the fire was communicated from these fires to a group of 18 or 20 houses named Rafting Village, and thence through the lumber on Gilmour's piling ground to respondents' property.

It also came from Donnelly's woods, three-quarters of a mile distant, and perhaps from other woods, as the whole of the neighboring forests were on fire, the wind was high, sparks and ashes were flying about in all directions, and, as one witness said, "the fire seemed to be in all the air."

The line of argument adopted by respondents' Counsel was:

1st. That by the word "forests" was meant primeval forests.

2nd. That there were no primeval forests in the neighborhood, and that the condition of the policy had no reference to this case.

BADGLEY, J., said that this was an action brought on a policy of insurance for loss by fire near Ottawa. The only contention in the case was on the clause exempting the Company from payment of loss occasioned by burning of forests. As matter of fact, fires had been burning in the forests at some distance from the scene of this loss, but there was no forest fire for two or three days before the accident, although a day or two before, some timber trees on the banks at a mile distant had been burned. There were no trees or forest on the respondents' property, but the forest was more or less connected with it by trees on the bank which in one part were near Messrs. Gilmour's lumber yard. And it is quite clearly proved that the respondents' property took fire from the lumber yard, which [illegible]rn took fire not from actual "forest fires," but from the fires from the fo[illegible] which reached to the trees on the stream. It is a rule well established [illegible] the absence of all fraud, as in this case, the proximate cause of loss only is to be looked at. The rule is a just one, because otherwise the most remote and unconnected cause of the fire would govern the insurance. But in this case tracing the cause of the fire from the appellants' buildings to their neighbors, the wooden rafting village, and from that to the Gilmours' immense lumber yard, which took fire from the burning of the trees on the stream, which trees could only have been ignited from the burning forest, it appears that the respondents' property was burnt from the cause excluded from the protection of the policy. The appellants must, therefore, be relieved from payment of the loss.

The following is the judgment of the Court of Appeals:

The Court, considering, etc.

1st. That the action was brought upon a policy of insurance bearing date the 8th Jan., 1870, by which the defendants (appellants here) agreed to pay to the plaintiffs (respondents here) all the damage and loss which they might suffer by fire on the property insured, to wit, on certain buildings, in the said policy described situate at Hull, P. Q., subject to the conditions and stipulations endorsed and annexed to said policy. 2nd. That in or about the 17th Aug. same year the buildings so insured were destroyed by fire. But considering 3rdly, that by the ninth condition to which the said policy was made subject, it was stipulated and agreed between the parties thereto that the Company, to wit, the appellants,

would not be answerable for any loss or damage by fire occasioned by burning of forest, and that the said policy should remain *suspended and of no effect* in respect of any loss or damage, however caused, which might happen or arise during the existence of any such contingency. 4thly. That as it appears in evidence, for weeks before the destruction by fire of the buildings so insured, the woods and forests surrounding the property were burning. 5thly. That the fire which consumed the buildings so insured proceeded from the burning [illegible] thing in its course until it reached the property belonging [illegible]. That under the stipulation contained in the said 9th condition [illegible] was suspended and of no effect during the time said forests [illegible] and that the fire by which the insured buildings were consumed proceeded from the said burning forests, the appellants were and are released from all legal responsibility or liability in regard of loss and damage suffered by the respondents from the destruction thereof; Considering, therefore, 7thly, that in the judgment appealed from, viz., the judgment pronounced on the 30th Nov., 1871, by the Superior Court in Montreal, there is error, this Court doth reverse and annul the same, and proceeding to pronounce the judgment which the Court below ought to have rendered, this Court doth maintain the exception of the appellants, and doth dismiss the action of the respondents, with costs against them in both Courts.

Judgment of S. C. reversed.

Ritchie, Morris & Rose, for appellants.
Abbott, Tait & Wotherspoon, for respondents.
(J. L. M.)

SUPERIOR COURT, 1873.

MONTREAL, 31ST OCTOBER, 1873.

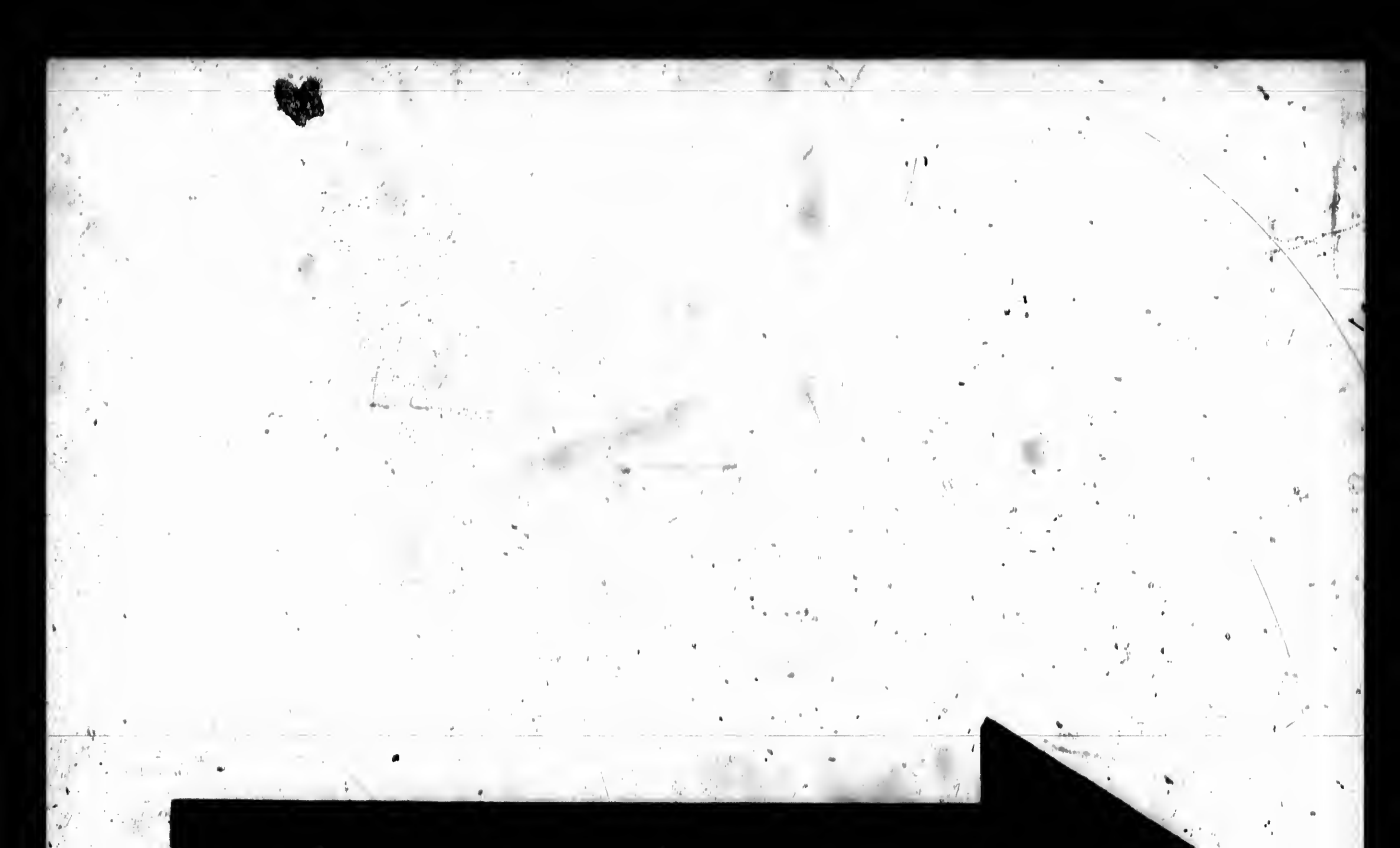
Coram TORRANCE, J.

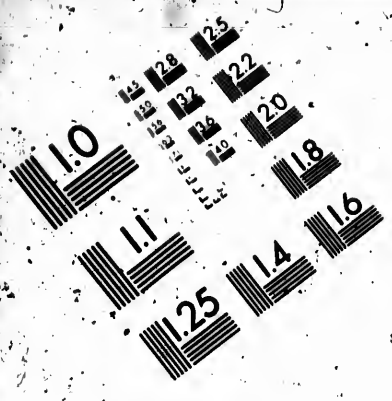
No. 170.

Ethier vs. *Homier*.

HELD:—That a professional adviser cannot refuse to answer as witness where he is a party to the transaction as well as adviser.

PER CURIAM:—This case is before the Court on a motion to revise the ruling of the Judge at *Enquête*. The action is an action of damages for *injures* in writing anonymously an offensive letter to Mr. J. L. Beaudry, reflecting upon the character and conduct of the plaintiff and those frequenting her house. On the 5th June last, F. X. Archambault, Esquire, an attorney of this Court and an attorney *ad litem* in this cause for defendant, was sworn as witness of plaintiff, and put the following question:—"Will you say whether on or about the 30th October last, *i.e.*, long before the institution of the present action, it is within your knowledge that the defendant wrote, or caused to be written, the anonymous letter produced at *Enquete* in this case? Say what you know on this subject," The witness objected to answering, pleading that all he knew of the matter was





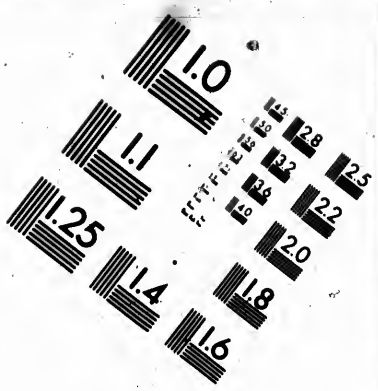
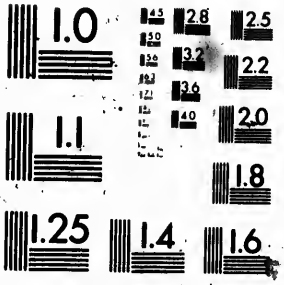
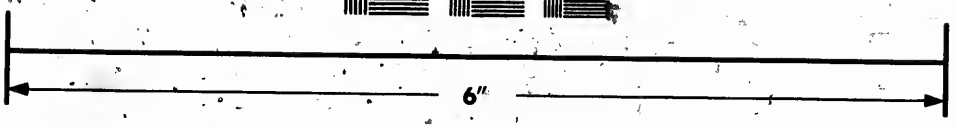
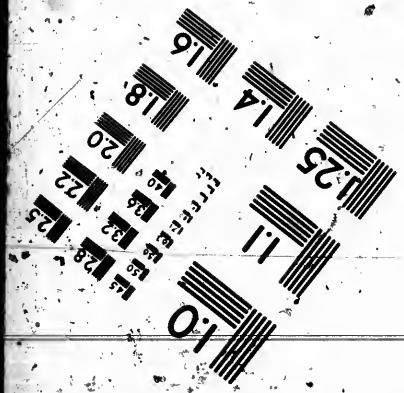
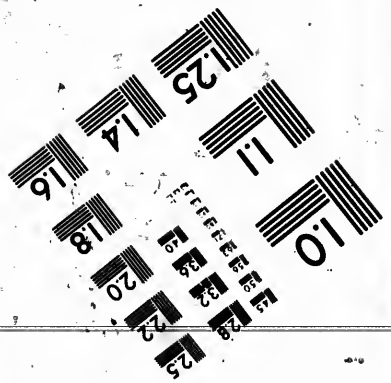


IMAGE EVALUATION TEST TARGET (MT-3)









Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Ethier vs. Homier.

as professional adviser of defendant: The question was overruled by the Judge at *Enquete*, and afterwards by the Court in term. On the 1st October the same witness was put the following question: "Take communication of exhibit "C" of the plaintiff, which was produced at *Enquete* in this case, and say whether you wrote this letter at the request of the defendant? This question was again overruled by the presiding Judge at *Enquete* (Mondelet, J.) and now is before the Court in term for revision. It is to be borne in mind that the charge against the defendant in the declaration is that he wrote, or caused to be written, the letter complained of. The rule of our code as to professional men is in C. C. P. 275. He cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal adviser, or as an officer of state where public policy is concerned. Guyot vo. Avocat makes the qualification, "unless his client has fraudulently reposed confidence in him only to get rid of his testimony." Taylor on Evidence, sec. 852, mentions exceptions to the rule: "These apparent exceptions are, where the knowledge was not acquired by the attorney solely by his being employed professionally, but was in some measure obtained by his acting as a party to the transaction, and the more especially so if this transaction was fraudulent," &c. Rolfe, V. C., observed in Follet *vs.* Jefferyes, 1 Sim. N. S. 3, 17: "It is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor." At sec. 853 Taylor continues: "If an attorney, having been engaged in a conspiracy, be willing to turn informer, he cannot be prevented from disclosing what he knows of the transaction." And further on, under the same section, page 823, Taylor alludes to the general principle that, "if an attorney acts as a party no knowledge he obtains will be privileged." It is to be borne in mind that the privilege, where it exists, is that of the client and not of the attorney, and it appears to me that if the attorney here has written a libellous letter at the request of his client, it would be most unreasonable to allow him and the client to decline to answer in a Court of Justice as to whether such letter were written by the attorney at the request of the client. Greenleaf Ev., vol. 1, sec. 242, says: "If the attorney were a party to the transaction, he would not be protected from disclosing." One case was cited at the bar of this Court which is in point. Mackenzie *vs.* Mackenzie, 9 L. C. J., p. 87. There it was held that an attorney could not refuse to declare what moneys he may have in his hands belonging to a defendant in the cause, on the ground that his doing so would be a betrayal of professional confidence. On the whole, the motion will be granted, and the witness ordered to answer the question.

C. C. Delorimier, for plaintiff.

C. Geoffrion, for defendant.

(J. L. M.)

COURT OF QUEEN'S BENCH, 1874.

[CROWN SIDE.]

MONTREAL, 9th, 10th, 11th, APRIL, 1874.

Coram RAMSAY, J.

REGINA vs. *Dougall* et al.

HELD:—1. That an application to postpone a trial, in consequence of the absence of material witnesses, must be supported by special affidavit showing that the witnesses are material.

2. That on a trial on an indictment for libel, the defendant cannot plead or prove the truth of the libel.

3. That the English Act of 1792, 32 Geo. III., c. 60, is in force in Canada, and consequently it is for the Jury to say whether under the facts proved there is libel, and whether the defendant published it.

4. That where the defendant has asked for a jury composed one half of the language of the defence, six jurors speaking that language may first be put into the box, before calling any juror of the other language.

5. The right of the Crown to tell jurors to "stand aside" exists for misdemeanors as well as for felonies.

6. When to obtain six jurors speaking the language of the defence all speaking that language have been called the Crown is still at liberty to challenge to stand aside, and is not held to show cause until the whole panel is exhausted.

7. That on a trial for libel, acts of the defendant immediately after the publication may be proved, in order to show that there was no malice.

8. That the existence of rumours cannot be proved in justification of the libel.

The following are the Rulings of the Court on questions arising in the case of the Queen *vs.* Dougall *et al.*, on an indictment for libel, tried on the 9th, 10th and 11th days of April, 1874.

Mr. Devlin moved to put off the trial till next term, owing to the absence of two witnesses whose evidence was material to the defence.

RAMSAY, J., said this could only be done on special affidavit, showing that the witnesses were material, and time would be given to the defence to draw the affidavit.

On the part of the defendants the following affidavit was filed:—

George H. Flint, of the city of Montreal, district of Montreal, reporter, being duly sworn, doth depose and say: that he is and was employed as reporter for the defendants' newspaper, the *Daily Witness;* that he saw Charles Lormier, for whom a subpœna has been issued in this cause, during his illness created by an attempt made by himself, as deponent was informed, upon his life; that this deponent communicated with the said Lormier, in the Hotel Dieu, through an attending physician who spoke French, the language of said Lormier, deponent's object being to ascertain all the particulars and circumstances which led him to attempt the taking of his own life—these he promised to give at a subsequent occasion. That this happened on the seventeenth day of February last, before the publication of the article of that day, and complained of; that deponent renewed his visit the next day, but was not permitted to see or to hold any conversation with the said Lormier; that the said deponent believes that the said Lormier is the only man who could account for the causes which led him to attempt his life, and to what extent the reports then in circulation as to his reasons for so doing were well founded, and that if it be, as this deponent is informed it is, material for the defence to show who were in the company of said Lormier and the woman called his wife during his stay in Montreal, and his visits in the

Regina vs. Dougall et al.

house known as the Maison Dorée, and especially who were in his company at the said hour, on the night between the fourteenth and fifteenth days of February last, such facts can best be established by his testimony and also by the testimony of the said woman then known as his wife; and the deponent verily believes these are the only persons whom defendants can call as witnesses to establish these facts. And deponent hath signed.

(Signed,) GEORGE H. FLINT.

Sworn in open Court this ninth day of April, one thousand eight hundred and seventy-four.

(Signed,) DESSAULLES & SCHILLER,
Clerk of the Crown.

Doutre, Q.C., and with him *Devlin*, were heard in support of the application.

Carter, Q.C., and *Kerr, Q.C.*, were heard *contra*, and they filed the following affidavit:

Lucien Huot, avocat, de la cité de Montréal, ayant été dûment assermenté sur les Saints Evangiles, dépose et dit:

Qu'il a connu Charles Lormier, jeune français, qui s'est trouvé à Montréal en février dernier;

Qu'il a été après que le dit Charles Lormier eut attenté à ses jours, l'aviseur et le procureur spécial du dit Charles Lormier, avec l'approbation et l'assistance de Monseigneur Fabre, Evêque de Gratianopolis;

Qu'à sa connaissance personnelle le dit Charles Lormier est parti pour l'Europe pour ne plus revenir, quinze ou vingt jours après l'accident, le ou vers le quatre Mars dernier;

Que le dit Charles Lormier a circulé dans la cité de Montréal, pendant plusieurs jours avant son départ pour l'Europe, et qu'il venait au bureau du déposant jusqu'à deux fois par jour pendant cinq ou six jours avant son départ, à la connaissance d'un grand nombre de personnes;

Que la femme qu'on appelait Madame Lormier, mais dont le véritable nom était Marguerite Prélippe, épouse d'un nommé Dauge en France, laquelle était venue en Canada avec le dit Charles Lormier, a été envoyée aux Etats-Unis, où il était convenue qu'elle devait se rendre en partant de Montréal, plusieurs jours après l'accident, avec les fonds que le dit M. Lormier avait mis à sa disposition pour son voyage, sur la demande spéciale de Monseigneur Fabre lui-même qui s'intéressait au sort de ce jeune homme dont il avait connu la famille en France, et aussi sur les instances du dit Charles Lormier qui voulait ne plus la revoir.

Qu'il a appris de source certaine que cette femme Dauge est en ce moment aux Etats-Unis, depuis la fin de Février dernier.

Qu'il sait par la voie du Courrier des Etats-Unis, de New York, que M. Lormier est parti pour l'Europe le huit ou le dix de Mars dernier, lequel dit M. Lormier avait informé le dit déposant qu'il se rendait dans sa famille à Amiens en France.

Et le dit déposant a signé,

(Signé,) LUCIEN HUOT.

Regina vs. Dougall et al.

After both affidavits were read and the hearing of counsel on both sides,

RAMSAY, J., said there was no great difference of opinion as to the principle upon which the application must be decided. The affidavit filed by the defence was defective in not stating that it is probable that the presence of these witnesses could be procured at the next term. This defect perhaps might be overlooked, as this was the first term at which the case was fixed for hearing; but the affidavit was wholly insufficient in not setting up any legal evidence that the absent witnesses could give. The defence were quite right in saying they were not obliged to disclose all the witnesses could testify to; but they must show that they can likely prove some fact which could go to the jury. This has brought up a question that must arise at the trial, and the Court was glad before beginning to put both parties on their guard that it would not be permitted to the prosecution to prove the untruth of the libel, or to the defence to prove that it was true. It will be observed that in England the truth of the libel is only allowed to be proved on a special plea alleging that the facts set forth in the libel are true, and that they were published for the public benefit. This is under the Act of the 6 and 7 Vic. which is not in force here. It is evident then that on the plea of "not guilty," as pleaded in this case, even in England the truth of the libel would not be in issue. Allusion has also been made to the Act of 32 Geo. III., c. 60, commonly known as Fox's libel bill, and it is urged on the part of the prosecution that that Act being passed subsequently to the introduction of the English criminal law into Canada was not in force. I stopped the counsel for the defence in their argument on this point, for I am clearly of opinion that that act is in the nature of a declaratory act, and that it is in force here.

The prosecution has cited an authority which treats it as an alteration of the law, but that is only a deferential mode of dealing with any expression of opinion on the part of the Judges commonly used in England. Historically it is declaratory. It will be remembered that the Judges laid down the doctrine that libel or no libel was matter of law for the Court, and they only left to the jury whether the defendant published. Juries refused to be guided by this monstrous doctrine, the object of which was really to create an exception to the general rule of the criminal law, and after a good deal of resistance Fox's libel bill was passed in 1792 to settle the difficulty. I do not intend to re-open that difficulty, which I think is settled for the whole empire, by the assertion of the true principle, and I shall leave the whole case to the jury—whether, under all the circumstances that may properly be proved there is libel, and whether the defendants published it.

The defendants having moved at their arraignment for a jury composed one-half of the language of the defence, that is English, the Clerk of the Crown was proceeding to put six English-speaking jurors into the box. This was objected to by the prosecution, saying that at the last term of the Court it had been declared to be irregular.

RAMSAY, J.—It was always practised when I was for the Crown, and has

Regina, vs. Dougall et al.

been usually practised since Mr. Justice Aylwin directed it to be done in a celebrated case. (*)

Carter, Q.C., said that the Statute was changed in 1869.

RAMSAY, J.—Does the change affect this question?

Carter, Q.C.—I think it does. It directs that there shall be two lists, one of English-speaking jurors, and the other of jurors speaking the French language, and that the names shall be called alternately from each list.

RAMSAY, J.—I don't think it necessary for the defence to reply, as I am with them on the point. The alteration of the Statute cited seems to me an additional reason for adhering to the rule laid down by Mr. Justice Aylwin, whose rulings on the criminal law deserve respect, if any judge's do. There are now two lists, an English one and a French one, and therefore it is easier than it was before to give the defendants their privilege. The calling their names alternately is only a direction in calling the jury in ordinary cases, where there is no privilege claimed and no consent.

The Crown having told a juror to "stand aside," Mr. Devlin objected, saying that the prosecution was only nominally in the name of the Queen, and that therefore the right to tell a juror to stand aside did not exist.

RAMSAY, J.—This point was fully argued when I was for the Crown, and it was then determined that the right to make a juror "stand aside" existed in misdemeanors as well as in felonies. It has since been recognized by Statute. (32 and 33 Vic., c. 29, Sect. 38.)

The six English-speaking jurors being sworn, it became necessary to call the list regularly, and the defence insisted that the Crown should now show cause, or withdraw the challenge to stand aside. On the part of the Crown, it was urged that the Crown could not be held to show cause until the whole panel was exhausted.

RAMSAY, J.—The authorities go very far in that way, and it has even been held that the list may be called over twice to see whether those who have not answered are in attendance before the Crown is called on to show cause. I shall direct the Clerk to call the names alternately, to avoid confusion, and your challenge to stand aside will hold good till the whole panel is exhausted. I have hardly any doubt that this is the right course; but I will reserve the point if there is a conviction.

The jury being sworn, Mr. Carter took occasion to expose the law by which he purposed to be guided in this case. In doing so, he again referred to the Act of 32 Geo. III., c. 60, and argued that the question of libel or no libel was still matter of law.

RAMSAY, J.—Undoubtedly; and so it may be said of larceny and of every other offence.

---

* On the trial of Morrison and another. Sir Louis Lafontaine would not allow it to be so done in the case of Blain, indicted for stealing a poll-book, and it was looked on at the time as a great hardship.

Carter, Q.C., quoted Deacon to show that the judge would tell them what was a libel.

RAMSAY, J.—That doctrine will not be denied by the other side. I propose to charge the jury just as Deacon recommends. That is to say, I shall tell them what are the constituents of libel, and leave them to find a general verdict on the whole.

You seem to accept with reluctance the ruling of yesterday as to Fox's Libel Act being in force: but in addition to its declaratory character, from the whole history of the controversy which led to it, we have our statute, (32 and 33 Vic., c. 29, sect. 33) recognizing the fact that the plea of "not guilty" puts the party accused upon any indictment, *upon the country for trial*, of what? Of the whole issue, in this as in every other case without exception.

The defence put in and wished to prove two copies of the *Witness*, one of the 19th and the other of the 20th, to rebut malice. It was objected on the part of the Crown, that though parts of the same paper or book might be used, no subsequent acts of the defendants could avail them. The absence of malice must be at the time of the offence.

Doutre, Q.C., argued that in a case of homicide the acts of the party immediately after would be admitted to show how the death happened and that there was no malice, and consequently that there could be no murder.

RAMSAY, J.—That case occurred to me while the objection was being made. I shall take time to consider. [After conferring with Mr. Justice Sanborn,] The case is not without difficulty. But we are both of opinion that though not very strong evidence it should go to the jury. It seems to have been admitted in one case mentioned in Starkie, 3 Ed., p. 714. Reg. v. Hone.

On the same principle a tender of amends was afterwards admitted; but it appearing that it was days after legal proceedings were taken, and that it came to nothing, the Court told the jury it had no legal significance in this case to rebut the presumption of malice.

The defence attempted to prove that rumors had existed in Montreal, prior to the 17th February to justify the articles complained of. This was objected to, and the Court maintained the objection. The truth could not be proved in justification, much less then can the defendants be allowed to prove that it was rumored to be true. The belief of defendants may be brought up by affidavit after a motion in mitigation of punishment.

Doutre, Q.C.—I wish my question noted.

RAMSAY, J.—Write it yourself and I will put it in my note book. I won't reserve it, for I am clear on that point; but you may use it on an application for a new trial. You will have plenty of time for this. As there is one point reserved, there can be no sentence this term in case of conviction, and you may find some who view it differently from me.

The question was then put as follows:

"Having read the articles contained in the *Witness* of the 17th February,

Regina vs. Dougall et al.

"concerning the attempted suicide, please state whether the rumors contained "in them concerning Mr. Mousseau existed in the city prior to the publi- "cation of the *Witness* of the seventeenth February last?"

Ruled out. Another question was put of the same nature.

RAMSAY, J.—That is the same question.

Doutre, Q.C.—It may be to the same effect, but it is a different question.

Mr. Devlin.—We want it taken down.

RAMSAY, J.—But I won't take down any more than one question open to the same objection. I shall, however, make a note that I ruled out the evidence of rumors as a justification for the defendants, in whatever shape the questions be put.

The following is the substance of Mr. Justice Ramsay's charge to the Jury in the above case:—

GENTLEMEN OF THE JURY,—I regret that the learned Counsel for the defence have thought it necessary to introduce into this case a question of religion, and that they should have spent time in explaining to you a question of procedure. There can have been no object in alluding to these matters but to divert your attention from the real question before you, and to excite prejudice in your minds. Surely it will not be contended that Protestant jurors will not do justice to a Catholic accused of an offence, or that Catholic jurors will not do justice to a Protestant on his trial. Our common experience repels the truth of such a charge. Again, you have been told that the jury was packed, and, with a strange ignorance of history, allusion has been made to the packing of juries in Ireland as being something like the mode in which you have been selected. The packing of juries in Ireland was a very dreadful thing. There, men were brought together specially selected for their hostility to the accused. Here, in a manner strictly prescribed by law, the jurors are summoned indiscriminately from the lists of persons qualified to act, by an officer totally beyond the reach of suspicion, and who dare not, even if he desired it, alter a single name. From the sixty jurors thus summoned, you are chosen, and the mode of your selection is established not by any rule made for this occasion, but by rules which have been followed ever since I have known anything of the practice of this Court. The experience of years has regulated what privileges should be given to the Crown, and what privileges should be given to the defence, and in this case each has exercised its rights. The defence claimed the right to have one-half of the jury speaking the language of the defence, that is English, and that those six jurors should be first placed in the box. The Crown resisted this, on the ground that this practice had been declared irregular at the last term of the Court; but I upheld the ruling I had constantly seen practised here, and decided in favor of the defence, and the six English-speaking jurors were sworn. The next question was as to the right of the Crown to order jurors to "stand aside" until the panel was exhausted. Again I followed the constant practice of the Court, and this time decided in favor of the Crown; whereupon you are told that this is an abominable law, and that public attention only requires to be directed to it in order that it should be changed. Yet,

gentlemen, we find that this practice, which was formerly only an institution of judicial creation, was formally recognized by statute no further back than 1869. You will see then how little any such arguments as these have to do with the matter, and you will entirely dismiss them from your consideration. I now come to the real question which must occupy your attention. In my charge to the grand jury at the opening of this term, I thus defined libel: "Libel consists in the malicious publication of an injurious writing, printing, picture or other sign; in short, the publication of what is injurious by more than mere words. Injurious spoken words amount only to slander, and are not generally subject of indictment." And further on I said: "The evidence of malice is presumed from the nature of the writing, and from the circumstances under which it was published." And still further on I said: "It is sufficient for our present purpose that if you find the words written were of an opprobrious or defamatory nature, tending to provoke the complainant to wrath, or to expose him to hatred, contempt, or ridicule, they constitute a libel." This definition has not escaped notice; but I have not seen anything like reasonable criticism of my exposition of the law. Had there been any such I should gladly have availed myself of it. But I believe none was possible, for I borrowed what I said from works of unquestionable authority; and in order that you may have no doubt on this point I shall quote from Russell on Crimes in support of the doctrine I laid down: "With respect to libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule."—P. 321.

"But it should be observed that there is an important distinction under this head between words *spoken* only, and words published by writing or printing." —*Ib., p.* 343.

"The criminal intention of the defendant will be matter of inference from the nature of the publication. In order to constitute a libel the mind must be in fault, and show a malicious intention to defame; for, if published inadvertently, it will not be a libel; but where a libellous publication appears, unexplained by any evidence, the jury should judge from the overt act; and where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. It is a general rule that an act unlawful in itself, and injurious to another, is considered both in law and reason to be done *malo animo* towards the person injured: and this is all that is meant by a charge of malice in a declaration for libel, which is introduced rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose. The intention may be collected from the libel, unless the mode of publication, or other circumstances, explain it: and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect."—*Ib.*, p. 368.

Now, gentlemen, examine the alleged libels, and say whether or not they are injurious. Ask yourselves whether it is injurious to accuse a married man, a

Regina vs. Dougall et al.

person well known in the community and upon whom every eye is at once directed, of having committed, or attempted to commit, adultery with the wife or mistress of another, and of passing his time in debauchery by indulging in orgies. A great deal of time was wasted in trying to prove whether the orgy which was renewed, was begun at the inauguration of the Hudon factory, or elsewhere. Some say the article should have one interpretation and some another; but this is really of no importance. The libel consists in alleging that Mr. Mousseau had taken part in one or more orgies, and in renewing it or them. It does not affect the case in the least where the writer intended to say this dissipation began. I don't think it is possible for any man of common intelligence to read these two articles in the *Witness* without arriving at the conclusion that they are highly injurious. If they are injurious, the malice will be inferred from the writing itself. You have been told by the defence that this law of libel differs from the law of all other offences. But this is not so. The general principles involved in the law of libel are the same as those applied to every other offence. If I do an unlawful act likely to cause death, with premeditation, it is murder, and the malicious intention is presumed, and so it is with libel. The only other point the prosecution had to prove was the publication by the defendants. Under our statute this is only the proof of a matter of record. The proprietors of a newspaper are obliged to make a declaration of their proprietorship, and the declaration of the defendants has been produced and proved. The case for the Crown, then, is complete unless it is contradicted by the defence. But when we come to the defence it is really a revolt against the law. The learned counsel complain that they have not been allowed to make their proof, that they have not been allowed to prove the truth of the libel, and that they have not had a fair trial, but that notwithstanding enough had leaked out (one of the counsel went so far as to boast that he had got round or evaded the ruling of the Court) to show that the libels were true. They say that the law of libel as laid down by the Court is a barbarous law, that the law here should not be inferior to that of England; they tell you also that you are the masters of the case and that you can render what verdict you please, and they in so many words invite you to disregard the rulings of the Court in matters of law. As to the defendants not having a fair trial, no one better than the learned counsel knows that there is no foundation for their saying this. Instead of their not having a fair trial, I have admitted evidence which, so far as I can find out, has only in one case been admitted in England; and I have even gone further than that case, and further than perhaps I should have gone, by admitting evidence of a negotiation as to tendering amends days after the arrest of the defendants. You have heard a great deal of the 6th and 7th Vic. It may be a very good law, but it is not in force here. It is an Act of the Parliament of England, passed long since we had a parliament in Canada empowered to make our own criminal law, and it has no application here. However good that law may be, I have no power to introduce it, and if I did attempt to give it effect here, I should be a law breaker. But even if it did exist here, it would be no protection to the defendants in this case. Their only chance of escape consists in the fact of its not being in force. If it had been in force, and they took advantage of it, they must have pleaded

that the facts were true, and that they were published for the public good. Had they pleaded this they must instantly have been convicted, for they have insisted upon proving that the allegations were not true. They have produced and proved articles in their paper of the 19th and 20th, in which, in the first partially, in the last completely, they admit that the accusations against Mr. Mousseau were not true. In the tender of amends they have carefully proved that one of the things they offered to do was to print such a retractation as Mr. Mousseau's counsel might prepare. Yet, curious to say, the complaint is now made that they have been prevented from proving the truth of the libel. And how have they repelled the accusation of malice? The defence has taken care to prove that the publication was not accidental and unknown to the defendants; but, on the contrary, that one of them added a clause to the article, and that he had revised the proof of the whole article, and in doing so had amended it to suit his taste. In the paper of the 19th of February, in which is a letter from Mr. Lormier, denying the whole story that had been told, the *Witness* says that the accusation against Mr. Mousseau is not borne out by the testimony. Is that such a retractation as a person well disposed to Mr. Mousseau would publish? It is true, on the 20th, after legal proceedings had been taken, an article appeared saying they had obtained information assuring them that the story against Mr. Mousseau was untrue. Why did they not get that assurance before they wrote the articles of the 17th? The tender of amends here has no other legal signification than an admission of guilt.

We have heard a great deal of the liberty of the press. The word liberty is so attractive that we must not allow ourselves to be led into error about it. No one objects to the press being free. That is not the matter in discussion here. There is no objection to the publication of every public event, and to reasonable and decent criticism of it. For instance, all that we are doing here, every word that falls from my mouth, is public property. It may be reported and criticised with fairness; and those who do so are only rendering a service to the public which I shall always be willing to recognize and profit by. But that is no the liberty of the press that defendants seek to establish. They wish to have it admitted that they shall have a right to publish accusations against men's private character. Then the person accused is to go hat in hand to their office and produce his proofs of innocence, which these self-constituted judges shall deal with as they think fit. They don't consider themselves bound by the fairness they experience here, where you must say "guilty or not guilty." They arrogate to themselves the right to say, the evidence is not complete, but it is not clear that you are not guilty. This is precisely what they did in this case. The article of the 19th only says that Lormier's letter did not bear out the story against Mr. Mousseau. Again, in another article which appeared after they were arraigned and had pleaded to the indictment in this case, they wrote repudiating the doctrine that men's private characters were not open to attack. Now, gentlemen, I beg of you to look carefully at the dangerous doctrine which is thus advanced as the real defence to this case. It may be that in certain cases some good might arise from making public the conduct of some notorious private impropriety; but how and where is the line to be drawn? Will men

Regina vs. Brydges.

submit to this kind of investigation? There can be no doubt that if it was once ascertained that juries would not convict for libels on individuals, men would take the law into their own hands, and the result would not only be blows with the fist, as we have recently seen here, but probably stronger measures, and we should perhaps be called on to try cases of murder because we declined to convict of libel. Which of us is so pure as to be able to suffer that the veil which covers his private life should be drawn aside to satisfy public curiosity, and who is the one without sin to perform the operation? Those who have taken credit for doing God service by blackening private character should remember the admonition, "Judge not; that you be not judged."

Gentlemen, you have been told that you are not bound by my view of the facts; and this is perfectly true. You are to decide the case according to your own consciences, and you cannot make me share the responsibility with you. I have my duty, and you have yours; but it is part of mine to tell you how I view the evidence. Of it, however, you are the judges, as I am judge of the law. As I told the counsel at the beginning of the trial, the whole case is left to you, and it is for you to say whether the defendants are guilty or not. This is, however, very different from saying you can find any verdict you please. You are bound by your oath to take the law from me, and to render a verdict according to the evidence. If you neglect so to do, the burthen will be on your own consciences. As no bare question of law is ever submitted to a jury, it would be impossible to know whether you had refused to take the law from the Court, and you cannot be called to account for this; but, after all, society has no protection in courts of law but the sanctity of the oath. It is by it we are secured in the possession of our property and in the safety of our persons, and I feel persuaded you will be bound by yours.

NOTE:—The Jury found a verdict of Guilty. Sentence was deferred in consequence of the reserved point mentioned above.

E. Carter, Q.C., and *W. H. Kerr, Q.C.*, for the Crown.

J. Doutre, Q.C., and *B. Devlin*, for the Defendants.

(J.K.)

COURT OF QUEEN'S BENCH, 1874.

[IN CHAMBERS.]

MONTREAL, 11TH MARCH, 1874.

Coram RAMSAY, J.

REGINA VS. *C. J. Brydges.*

HELD:—An order having been granted, under 32 & 33 Vict., c. 29, s. 11 (1869), changing the place of trial from Quebec to Montreal, and ordering that the inquest and all the proceedings had before a coroner should be transmitted to the Court of Queen's Bench at Montreal, and such order for transmission of inquest having been obeyed; a writ of *certiorari* to produce the return of proceedings before a judge of the Court of Q.B. in Chambers, in order that the inquest may be quashed for illegality, is unnecessary, and a petition presented in Chambers, praying for the issue of such writ of *certiorari*, will not be granted.

RAMSAY, J:—The coroner of the District of Quebec held an inquest on the body of a man called Pierre Cauchon, who was killed by a train of the Grand

Trunk Railway in that district. It appears that the jury found that he came to his death by the culpable negligence of the Managing Director of the Grand Trunk Railway Company of Canada, and thereupon the coroner issued his warrant. In virtue of this warrant Mr. Brydges was arrested, and brought before Mr. Justice Badgley, who bailed him. On Mr. Brydges' own affidavit, declaring that he could not have a fair trial in the District of Quebec, Mr. Justice Badgley ordered that the trial should take place in Montreal, and that the inquest and all the proceedings should be transmitted to the Court of Queen's Bench at Montreal. The order was given under the authority of the 32 & 33 Vict., cap. 29, sec. 11, (1869.)

The 27th of last month, a petition setting forth these facts was presented to me in Chambers, alleging, moreover, that the coroner had returned the inquest before the Court in Montreal, and praying for the issue of a writ of *certiorari* to produce the coroner's inquest before me, in order that the same should be quashed, inasmuch as it does not appear by the said inquest that any offence had been committed by the accused.

The further hearing of this petition was deferred till the 9th instant, and in the meantime notice was served on the solicitor-general and on the coroner. The Crown was represented by Mr. Mousseau; the latter did not appear. On the part of the petitioner it was held, first, that a judge in Chambers, out of term, may by his *fiat* order a writ of *certiorari* to issue; second, that an inquest may be quashed for illegality, and that even in Chambers; and third, that it is the constant practice in England to issue a *certiorari* either by order of the Court or under the judge's hand, that is by fiat in vacation.

The English practice referred to has no application in the present case. In all the cases cited where a writ of *certiorari* was granted in England, it will be seen that it was used to transfer a record from one Court to another, and not to *make* a record, as was suggested. Thus take the practice as to inquests. In England they are returned to the Assizes, and if it is required to amend one, to quash it or to refer to it in any way in the Queen's Bench, it can only be brought up by *certiorari*, issued on the order of the Court, or by judge's *fiat* in vacation. The order or *fiat* requires the "clerk in Court" to issue the writ addressed to the custodian of the record, enjoining him to certify the same into the Queen's Bench. There is no instance of a *certiorari* being issued at the Assizes to bring up the record when the coroner has actually returned it, although it is the usage to quash illegal inquests at the Assizes. See Patteson, J., *re* Culley, 5 B. & A., p. 232. In the present case the record is in a position similar to an inquest returned to the assizes. It is already within my reach, and it is neither necessary nor possible for me to proceed as a judge of the Court of Queen's Bench would do sitting in Chambers in London. The writ of *certiorari* is not necessary to enable me to see the the record, and if I desired to issue such a writ, there is no one to whom I could order it to be addressed. This will appear clear by following out the proceedings I am invited to enter upon. If I were now to make my *fiat* I must address it to the clerk of the Crown, and enjoin that officer to issue a writ of *certiorari* addressed to himself, ordering himself to give himself the record. What would be gained by this circumlocution?

Muir et al. and Muir.

It is due to the organization of our Courts that the writ of *certiorari* is not in use in this Province. I am not, however, prepared to say that there are not many cases in which it should be used and is not, owing to a very loose practice, but evidently this is not one of those cases. The prayer of the petition is only that a *certiorari* should issue, and therefore, it might be sufficient simply to order that the petitioner should take nothing by his petition; but as the ruling goes no further than to say that the *certiorari* is not necessary, I may as well intimate to counsel, in order to save the accused trouble and expense, that I should not feel disposed to entertain any application to quash the inquest in Chambers so near the opening of the term on the Crown side. In speaking thus I wish it to be distinctly understood that I express no opinion as to whether a judge in Chambers has or not the power to quash an inquest.

Carter, Q.C., and *Macrae*, for petitioner.

Mousseau, Q.C., for the Crown.

(J.K.)

JUDICIAL COMMITTEE, PRIVY COUNCIL, 1873.

9th DECEMBER, 1873.

Coram SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER.

WILLIAM MUIR, ET AL., APPELLANTS;

AND

JAMES MUIR, RESPONDENT.

HELD:—1. Aliments, whether by disposition of the law or of man are favored, and *insaisissables* by law, and therefore a testamentary allowance by a father to his children, until the time fixed by his will for the final partition of his estate, is valid.

2. The testamentary condition attached to the alimentary allowance in a will against seizure, mortgage or anticipation by the alimentary beneficiaries and against its subjection, seizure, or other contingencies to which personal or other property is subject, frees it from compensation as respects debts due to the testator or his estate by the alimentary debtor.

3. Testamentary quarterly payments to the alimentary beneficiaries of the net annual revenue applicable as aliments, are not the legal equivalent of the final partition and distribution of the *corpus* of the estate at the time fixed by the will for its final partition.

This was an appeal from the Court of Queen's Bench, Quebec, pronounced on the 9th of September, 1870, and reported at 15 L.C. Jurist, 309-315.

PER CURIAM:—The questions to be determined on this appeal arise on the will of Ebenezer Muir, late of Montreal, who died on the 12th of January, 1866. The instrument, which bears date the 23rd of May, 1857, is made in notarial form; and the construction of its provisions, and the effect to be given to them, must, as both sides admit, be governed by the law of Lower Canada.

The material clauses are, in effect, as follows:—

By the first of these the testator bequeathed the whole residue of his property (to use his own words) "in trust unto my beloved sons, William Muir, George Barclay Muir, and James Muir, the survivors or survivor of them, that the said trustees shall reduce the same into possession without delay."

The next, after declaring that it should be the duty of the trustees to perform certain specified acts of management or administration, to defray the expenses

thereof, and to pay out of the then net annual proceeds an annuity to the testator's wife (who pre-deceased him), proceeded as follows:—"The remainder of the said annual revenue to divide and pay to the whole of my children, issue of my marriage with the said Jane Steel, or their lawful issue surviving, share and share alike, *par souche*, yearly and every year, by quarterly payments, until the youngest of my grandchildren shall have attained the age of majority, and upon the accomplishment of the majority of my youngest grandchild the whole of the immovable part of my estate, rest, residue, and remainder thereof, shall then be sold; and as soon as my entire estate can be converted into cash, the same shall be divided between the said children who may be then alive, or their lawful issue, representing them in full property, share and share alike, *par souche*, in the order in which successions are divided in this country."

Then follows a very material clause in these words:—

"And I do hereby declare it to be my will and desire that the revenue of my estate is bequeathed, and intended to be bequeathed, unto my beloved wife and children, and the lawful issue of the latter as an alimentary pension or allowance until the accomplishment of the majority of my youngest grandchild as aforesaid, and the said alimentary allowance shall not be sold, mortgaged or made away with by anticipation by them, or either of them, nor shall it be subject to seizure or other contingencies to which personal or other property is subject, but shall be paid to them only as an alimentary allowance."

By subsequent clauses the testator declared his will to be that, in the event of any one or more of his children dying unmarried, or dying married, but without issue, or such issue predeceasing them, the share of the party so dying, either in the revenue or capital, should revert and fall into the mass of his estate and be divided between the survivors or survivor of them, or their lawful issue as aforesaid, share or share alike; and, further, that William Muir should be chief manager of the estate, and receive a commission for his trouble; and that the trustees should be also executors, and should continue in office as executors and administrators even beyond the day and year limited by law.

The testator left several children and grandchildren besides his three sons and trustees above named; the state of the family being such that, under the provisions of the will, the annual income of his residuary estate was, on his death, divisible into ten shares, and continued to be so up to the commencement of this suit; at that time, also, his youngest grandchild was still under age.

Of the persons thus entitled to participate in the income of the residue, five, including the three trustees, were indebted to the estate; the aggregate of their debts amounting, it is said, to one-third of the whole residue. The only one of their debts which it is necessary to particularize is that of James, the respondent. At the date of his father's death he was indebted to the estate upon an overdue promissory note for $2,200 with interest; and he was also liable upon fifteen promissory notes for $350 each, which had been made by him to the order of and indorsed by his father. Of the latter he took up six, leaving the estate liable for the remaining nine; and at a meeting of the trustees, held on the 7th of April, 1866, it was arranged that these nine notes, amounting together to $3,150, should be taken up and paid by the estate, which was afterwards done;

Muir et al. and Muir.

that the amount paid on them, and costs, should be held as a claim against the respondent, upon the terms of his signing an agreement to pay interest thereon at the rate of 7 per centum per annum quarterly, depositing a policy of insurance on his life by way of collateral security, and undertaking to keep up the said policy.

Up to the 1st of June, 1868, the income of the residue was, in point of fact, dealt with in the following way:—The manager included in his computation of the income the interest due from the respondent and the other participators who were indebted to the estate, and, after paying the several outgoings payable under the will, divided the net income so calculated amongst the ten participants, but retained the instalments due to such of them as were indebted to the estate, setting off each instalment against the debt of the party indebted, first in satisfaction of the interest, and next in diminution of the principal. To this arrangement the respondent appears from the first to have objected; but he submitted to it on four occasions, signing receipts for the instalments so applied. The last receipt was dated the 1st of June, 1868. The result of these transactions was to reduce his gross debt to $5,200.20.

On the 18th of February, 1868, the respondent took the benefit of the "Insolvent Act of 1864" of Lower Canada, and received his discharge on the 31st of March in that year. He did not, however, insert in the schedule of liabilities his debt to his father's estate.

After the 1st of June, 1868, the respondent refused to acquiesce in the before-mentioned arrangement, and insisted on his right to receive his share of the annual income of his father's residuary estate as an alimentary provision; and on the 14th of April, 1869, he commenced his suit against the appellants for the recovery of the three quarterly instalments which had accrued to him on the 1st of September, 1868, the 1st of December, 1868, and the 1st of March, 1869.

It is possible that to the form of this action, which is peculiar, exceptions might have been taken. None, however, was taken in the Courts below; and it has fairly been conceded at the Bar, that their Lordships need not concern themselves with objections of form, but may determine the case on its merits.

The defence actually made by the appellant consisted of four pleas, each going to the whole action, viz: a plea of compensation; one of return or *rapport*; one of payment, and the *défense au fond en fait*.

The cause was first decided by the Superior Court, which gave judgment in the plaintiff's favour, on the 30th of November, 1869. The judgment, which is on page 5 of the Record, ruled that the plaintiff was not bound to suffer the compensation claimed by the defendants, and was not bound to make at present, and so as to vacate or diminish his claim in this cause, the *rapport* claimed by the defendants by reason of the plaintiff's indebtedness to the estate of his late father; and, further, that the defendants had failed to prove their plea of payment; and it condemned the defendants jointly and severally to pay the sums claimed with interest.

This judgment was on the 9th of September, 1870, upheld on appeal, by the unanimous judgment of the five Judges of the Court of Queen's Bench, against which this appeal has been preferred.

Muir et al., and Muir.

Their Lordships entirely concur with the two Canadian Courts in thinking that there was no evidence to support the plea for payment. If the appeal is to succeed, it must do so on the defence raised by either the first or the second plea. The question on the first plea is, whether the claim of the plaintiff can, by the law of Canada, be the subject of compensation. The plaintiff's share in the revenue of the testator's residuary estate is beyond all doubt an alimentary allowance; and the authorities cited by Mr. Justice Badgley, and the 1190th Article of the Civil Code, establish that a debt arising in respect of an alimentary allowance is generally incapable of being the subject of compensation. This has been admitted. That such a plea would be bad if the question had arisen between the trustees and one of the children indebted to the estate who was not a trustee, is, their Lordships apprehend, too clear for argument. It is however, contended that the fiduciary character of the plaintiff, and the duties imposed upon him by the will, take this case out of the particular rule. Sir Richard Baggallay relied, first, on the direction in the will that the trustees should reduce the residue into possession without delay. He did not go so far as to say that this clause made the realization of the whole residue a condition precedent to the distribution of the annual income of the residue. But he insisted that it expressly imposed upon the plaintiff, as trustee, the duty of bringing the debt which he owed into the common fund, and that his failure to do this suspended his right to receive his share of the fund.

Another argument was founded on the English doctrine, that a debt due from an executor is assets in his hands. This doctrine, however, if it obtains in Lower Canada, where the functions and powers of an executor are by no means the same as those of an English executor, seems to their Lordships to have little application to the present case, in which, *ex concessis*, the debt continues to be outstanding, the larger portion of it being the subject of a special contract between the debtor and his co-trustees. In truth the argument for the appellants on this part of the case seems to resolve itself into this: that the plaintiff being a trustee and executor, his claim has lost the immunity from compensation which by the general law it would possess, by reason of the rule (assumed to exist in Lower Canada as in England) that a trustee or executor cannot take anything out of the estate whilst he continues to be indebted to it. But for this exception to the general rule of the law of Lower Canada, no authority has been adduced. That law does not recognize the distinction between law and equity which obtains here. It has now been reduced to a code. The articles of the code expressly state: first, that when two persons are mutually debtor and creditor of each other, both debts are as a general rule extinguished by compensation; and, secondly, that compensation does not take place in the case of a debt which has for object an alimentary provision not liable to seizure. The defendants by their plea invoke the first Article, which is wide enough to embrace every case of set off, whether legal or equitable. And their Lordships cannot see that, by any other article of this code, or otherwise, the Courts in Canada have power upon some supposed ground of equity to engraft an exception upon the exception established by the second Article.

It is suggested in the appellants' factum filed in the Court of Queen's Bench,

Muir et al. and Muir.

that the respondent, being a trustee, might, if his argument be well founded, continue to receive his alimentary allowance, although he had misappropriated to a large extent the trust fund. It is not necessary to consider what would happen in such a case. It is sufficient to say that the debt by which it is now sought to compensate the alimentary provision, does not arise out of the misappropriation of trust moneys; but out of transactions with the testator in his lifetime.

Again, it is stated in the first plea that the presumable intention of the testator was only to exempt the alimentary provision made to his children, from transfer and assignment to strangers, and not to free it from any charge or lien which the executors might have on it for indebtedness to the estate. And arguments founded on this presumed intention have been used both in the Court of Queen's Bench and here at the bar. Their Lordships, however, concur with the learned judges of the Court of Queen's Bench in thinking that no grounds for imputing to the testator an intention to vary the general law as to alimentary provisions are to be found in his will. The scheme of his will is this: By the exercise of the testamentary power he suspended the vesting of the shares of his heirs in the corpus of his estate, or made them incapable of being divested; and so far deprived his children of that which the law would have given them if he had died intestate. As a compensation for this he gave them, until the period of final division should arrive, this alimentary provision, with the benefit of that protection which the law of Canada throws over such provisions. There are no words from which it can be inferred that he intended to diminish that protection. The fact that the respondent and others of his sons were indebted to him, or generally embarrassed when he made his will, or afterwards became so, tends in their Lordships' opinion rather to raise than to rebut the presumption that he meant this alimentary provision to be free from all claim to compensation; and to insure to them the means of support whilst they were kept out of their inheritance.

Their Lordships have next to consider the defence made by the second plea, which is founded on the right to "*rapport*" or "return." The slightest reference either to the Canadian Code, chap. v, sect. 1, or to the corresponding chapter in the Code Napoléon, livre III, chap. vi., sect. 1, is sufficient to show that this right is simply an incident to a partition; that it is one which may be claimed by the co-heirs (in France, natural; in Canada either natural or testamentary) against an heir who is either indebted to the estate, or has received certain advantages out of the succession from the ancestor in his life-time by gift *inter vivos* or otherwise. So far as it applies to a debt due to the estate, it is only compensation in particular circumstances, and in a particular form. And accordingly, it is not easy to see wherein the second plea substantially differs from the first.

In the argument at the bar it was almost conceded that this plea could not be supported, in so far as it insists on the application of the principle of "*rapport*," until the whole debt, principal and interest, was satisfied. But it was argued that the claim of the respondent was in the nature of an action for "*partage*" of the income; and, consequently, that he was bound to bring in, by way of "*rapport*," at least the interest of the debt.

This argument seems to their Lordships to proceed on a false view of the relations between the parties. The question does not arise upon a partition, properly so called, even of income, between the testator's co-heirs, but upon the execution, by his trustees, of a particular trust in his will; and, therefore, neither as to principal nor as to interest does there seem to their Lordships to be any solid foundation for the trustees' present claim to a "return;" a claim which is only an indirect mode of obtaining that compensation which the law will not allow them to have directly or *eo nomine*.

Their Lordships are, therefore, of opinion that the judgment of the Court of Queen's Bench was right as to all the defences raised in the action.

There remains, however, to be considered a question of minor importance which, though raised in the appellants' factum does not appear to have been noticed by the learned Judges of the Court of Queen's Bench. It is, that the judgment of the Superior Court is, at all events, excessive, in that it has given to the respondent the instalments of his alimentary provision, as calculated upon the assumption that the interest due upon his debt entered into the general income of the residue. The result would be that, though he has not paid that interest, he will receive one-tenth of it in the instalments claimed, and be overpaid by about $27. This point has now been discussed at the Bar, and it has been agreed that the sum for which judgment has been entered ought to be reduced by this amount and any interest that has been calculated upon it.

Their Lordships need hardly point out that the judgment under appeal will in no way prevent the respondent's co-trustees from enforcing, in another suit, the claims of the estate against any other property which he may possess, if any such there be, or his co-sharers in the estate, from insisting on the right of "*rapport*," on the final partition of the corpus. But, for the reasons above given, their Lordships must humbly recommend Her Majesty to affirm the judgment of the Court of Queen's Bench, subject to the reduction above stated. Their Lordships do not think that this slight variation in that judgment ought to occasion any departure from the general rule as to costs. And the respondent will accordingly have the costs of this appeal.

(J.K.) Judgment affirmed.

SUPERIOR COURT, 1873.

MONTREAL, 27TH SEPTEMBER, 1873.

Coram TORRANCE, J.

No. 1239.

Gibeau vs. *Dupuis*.

HYPOTHECARY ACTION—TRANSFER—SIGNIFICATION.

HELD:—That the article C. C. 1571, does not apply to an action founded on a transfer without signification, where the only plea is that the defendant is not proprietor. (C.C. P. 144.)

PER CURIAM:—This is an hypothecary action for $200, issued 13th December, 1862. The plea was that the defendant was not proprietor but only occupant, that the land had always belonged to Dame Veuve Emélie Bro, *dite*

Gibeau vs. Dupuis.

Pominville, deceased, now represented by her four children, Alfred Garicpy, Tancred Garicpy, Ludger Garicpy and Hermine Garicpy.

"Que les faits ci-dessus enoncés étaient parfaitement connus du demandeur lors de l'institution de la présente action, et que le dit demandeur devait porter son action non pas contre le défendeur en cette cause, mais bien contre les dits propriétaires."

Pourquoi, &c.

This is the sole issue between the parties, whether defendant was in possession as proprietor.

The defendant has admitted when interrogated on *faits et articles* that he had been in possession twenty-seven years, and that he had always paid the taxes which were laid upon this land, but that he had not any title.

There has been no signification of the transfer upon the defendant who relies upon *Forsyth & Charlebois*, 13 L.C. Jur. 328, and contends that there having been no signification of the transfer under which plaintiff holds the debt, he has no action. C.C. 1571.

The answer to this is that the defendant has only pleaded that he was occupant and not proprietor, and that plaintiff should have directed his action against the proprietor whom he designates. The defendant here admits that the plaintiff had an action, and he does not plead any other plea. Having pleaded one sole ground of defence, he has waived all others. C.C. P. 144.

The plaintiff is therefore on the whole entitled to the conclusions of his declaration.

Mederic Lanctot, for plaintiff.
E. Robidoux, for defendant.
(J.K.)

Judgment for plaintiff.

*** The judgment was confirmed in Review, 31st March, 1874, JOHNSON, MACKAY, BEAUDRY, JUSTICES. JOHNSON, J., for the Court, said :—The plaintiff is the *cessionnaire* of La Banque du Peuple, and brings an hypothecary action against the defendant for $200, under an obligation executed by Emelie Bro, *dite* Pominville, and which hypothecated several parcels of real estate, of one of which the defendant is alleged to be in possession as *détenteur*. By his plea, the defendant not admitting, but also not at all denying the other allegations of the action, contents himself with saying that he is not proprietor of the lot; but that it belongs to the heirs of Emelie Bro, *dite* Pominville, and asks for the dismissal of the action. This is the sole point in contestation; and every other fact alleged is, under the positive terms of the law, held to be admitted, if not expressly denied or declared to be unknown. There can therefore be no question here, as was suggested in argument, of the necessity of signification of the transfer. Upon the only point in issue, then, the defendant examined on *faits et articles* admits that he is in possession for the last twenty-seven years, that he pays no rent but pays the taxes, and is inscribed on the municipal roll, and has never been troubled in his possession. The judgment inscribed against was rendered contrary to the defendant's pretensions, and we think rightly, and should be confirmed with costs in both courts.

JUDICIAL COMMITTEE, PRIVY COUNCIL, 1873.

MARCH 18th, 1873.

PRESENT: The Right Hons. Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Lord Justice MELLISH, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

REGINA v. *Coote.*

By an Act of the Quebec Legislature, certain officers called "Fire Marshals" are appointed with power to inquire into the origin of fires in Quebec and Montreal, and for that purpose to examine persons on oath. Upon an inquiry, held in pursuance of this statute as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. No caution was given to him that his evidence might be used against him. At the time of such examination there was no charge against the prisoner or any other person. Subsequently the prisoner was tried for arson of the said warehouse, and the depositions made at the inquiry before the Fire Marshals were admitted as evidence against him.

Held (reversing the judgment of the Court of Queen's Bench for the Province of Quebec, Canada) that the depositions were properly admitted.

The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, excepting so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "*Nemo tenetur seipsum accusare,*" but does not apply to answers given without objection, which are to be deemed voluntary.

The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed—*Ignorantia juris non excusat.*

The statute (11 & 12 *Vict.*, c. 42, s. 18), requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them.

By the Consolidated Statutes of Lower Canada, c. 77, s. 57, it is provided that when any person has been convicted of any felony at any criminal term of the Court of Queen's Bench, the court before which the case has been tried may, in its discretion, reserve any question of law which has arisen on the trial for the consideration of the Court of Queen's Bench on the appeal side thereof, and may thereupon postpone the judgment until such question has been considered and decided by the said Court of Queen's Bench. By s. 58, the said court shall thereupon state in a case, to be signed by the presiding judge, the question or questions of law, with the special circumstances upon which the same have arisen.

The said Court of Queen's Bench shall have full power and authority at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine any question therein; and thereupon to reverse, amend, or affirm any judgment which has been given on the indictment on the trial of which such question arose, or to avoid such judgment and order an entry to be made on the record, that in the judgment of the said Court of Queen's Bench the party convicted ought not to have been convicted, or to arrest the judgment, or to order the judgment to be given thereon at some other criminal term of the said court, if no judgment has before that term been given, as the said Court of Queen's Bench is advised, or make such other order as justice requires.

The present appeal was from a judgment of the appeal side of the Court of Queen's Bench for the Province of Quebec, Canada, on a case reserved for that court by Badgley, J., under the powers of the above statute, on the trial of the respondent for arson.

The case so reserved was as follows:—

"The prisoner, Edward Coote, was indicted for arson of a warehouse in his occupation, and belonging to Alexander Roy.

Regina vs. Coote.

"The indictment contained four counts,—The first with intent to defraud the Scottish Provincial Insurance Company; second, to defraud the Royal Insurance Company; the third to defraud generally; and the fourth to injure generally; upon his plea of not guilty, he was tried before the Court of Queen's Bench, at the criminal term of the said court, holden by me at Montreal, in this present month, before a competent jury empanelled in the usual manner, and after evidence adduced by the Crown and by the prisoner, was found guilty, the jury returning a general verdict of guilty.

"In the course of the adduction of the evidence for the Crown, two depositions made and sworn to by the prisoner, with his signature subscribed to each, taken by the Fire Commissioners at their investigation into the cause and origin of the fire at his warehouse, before any charge or accusation against him or any other person had been made, were produced in evidence against him, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection previously made by the prisoner to their production in evidence, and after his said objection had been overruled by me—after the conviction of the prisoner, and before sentence was pronounced by me thereon, he moved the court by two motions filed in court in terms following:"

The case then set out the two motions, of which the first is immaterial, as Badgley, J., rejected it, and reserved no question respecting it; the second was in the following terms:—

"Motion on behalf of the said Edward Coote, that judgment upon the said indictment, and upon a verdict of guilty thereon, rendered against him, be arrested, and that the said verdict be quashed and set aside, and the said defendant, to wit the said Edward Coote, be relieved therefrom, for, among others, the following reasons:"

Twenty-one reasons were then set out, the only ones material to the present appeal being in effect that the two depositions were inadmissible in evidence, because the said Fire Commissioners, before whom they were taken, had no authority to administer an oath, or take such depositions, and such depositions were not admissible as statements made by the prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an oath.

The case then stated the rejection of the first motion, and that he, the said judge, though himself considering the reasons given insufficient to support the second motion, yet as doubts might be held by the Court of Queen's Bench as to the legal production of the said depositions, reserved it, and held it over for decision with reference to the admission of the said depositions by the Court of Queen's Bench, appeal side.

The Fire Commissioners, before whom the depositions were taken, are appointed under the provisions of two statutes of the Provincial Legislature of Quebec (31 Vict., c. 32, and 32 Vict., c. 29), under which Acts they are empowered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause.

The criminal law of England was introduced into Lower Canada at the time of the cession to the English, A. D. 1763, and the criminal law of England of that date still continues in force in the province of Quebec, Canada, except as it has been altered by Canadian statutes or imperial statutes applicable to Canada.

Previous to the year 1869 a statutable provision (Consolidated Statutes of Lower Canada, c. 77, s. 63) was in force, by which a power was vested in the Court of Queen's Bench, appeal side, if at the hearing of a case reserved they were of opinion that the conviction was bad, for some cause not depending on the merits of the case, to declare the same by its judgment, and direct that the party convicted should be tried again as if no trial had been had in such case; but by a subsequent statute (32 & 33 Vict., c. 29, s. 80), passed by the Legislature of the Dominion of Canada shortly after the establishment of that confederation, for the purpose of assimilating the criminal procedure throughout the various provinces of the Dominion, that section was expressly repealed, and there were at the time of the respondent's trial statutable provisions giving right to a new trial in criminal matters, or regulating motions in arrest of judgment in criminal proceedings in force in the Province of Quebec, Canada.

On the 15th Dec., 1871, the reserved case came on for argument in the Court of Queen's Bench, appeal side, before Duval, C. J., and Caron, Drummond, Badgley, and Monk, JJ., and on the 15th March, 1872, the Court gave judgment in the following terms: "After hearing counsel as well on behalf of the prisoner as for the Crown, and due deliberation had on the case transmitted to this Court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered, adjudged, and finally determined by the Court now here, pursuant to the statute in that behalf, that an entry be made on the record to the effect that in the opinion of this Court the production of the depositions made by the prisoner before the Fire Commissioners at Montreal was illegal, and, therefore, that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set side.

"But this Court, considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, Edward Coote, be tried anew on the indictment found and now pending against him, as if no trial had been had in the case, and that for the purpose of standing such new trial, he be bound over in sufficient recognizance to appear on the first day of the next ensuing term of the Court of Queen's Bench, sitting on the Crown side, at Montreal, and thereafter from day to day until duly discharged."

From this judgment Badgley and Monk, JJ., dissented.

On the 15th March, 1872, an application was made by the Attorney-General for the Province of Quebec, Canada, on behalf of the Crown, to the said Court of Queen's Bench, for leave to appeal to Her Majesty in Her Privy Council, and such leave was refused.

On the 10th May, 1872, special leave was granted by Her Majesty in Council to appeal from the said judgment of the said Court of Queen's Bench, of the 15th March, 1872.

Sir *John B. Karslake*, and *Bompas*, for the appellant.—The depositions

Regina vs. Coote.

were properly received in evidence by the judge before whom the indictment was tried. They were admissible although made on oath, and although made by the prisoner as a witness whose attendance might have been compelled. At the time the depositions were taken, no charge had been made against the prisoner, and he had the right of refusing to answer questions tending to criminate him. The prisoner answered voluntarily, and Badgley, J., states that he "frequently exercised his privilege of refusing to answer certain questions." It was not necessary that the Fire Commissioners should caution the prisoner that statements made by him on the inquiry might be used in evidence against him. The statute (11 & 12 Vict., c. 42, s. 19) relates only to proceedings before magistrates, and caution given to accused persons. There was no ground for moving in arrest of judgment; nor had the Court power to grant a new trial, for the statute empowering the Court to grant a new trial, (Consolidated Statutes of Lower Canada, c. 77, s. 57) was repealed by 32 & 33 Vict. c. 29, s. 80, which gives no such power. They cited the authorities given in the judgment *post*, and further, 1 Taylor on Evidence, 743; Rose. Crim. Evidence, 62; Joy on Confessions, 62, 68; *Reg.* v. *Gillis*, 17 Ir. C. L. Rep. 512.

Judgment was delivered by

Sir Robert P. Collier.—Edward Coote, the respondent, was convicted of arson, subject to a question of law reserved by Badgley, J., (the judge who presided at the trial), for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of c. 87, sect. 57 of the Consolidated Statutes of Lower Canada. The question reserved was, whether or not the prosecutor was entitled to read as evidence against the prisoner depositions made by him under the following circumstances:—An Act of the Quebec Legislature appointed officers named "Fire Marshals" for Quebec and Montreal respectively, with power to enquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any judge of session, recorder or coroner, to summon before him and examine upon oath all persons whom he deems capable of giving information or evidence touching or concerning such fire." "These officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a justice of the peace. Upon an enquiry held in pursuance of this statute as to the origin of a fire in a warehouse of which Coote was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the records, but their lordships accept the following statement of Badgley, J., as to the circumstances under which they were taken: "Among the several persons examined respecting that fire was Coote himself, upon two occasions at an interval of three or four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and which was attested by the commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not, the questions put to him, and frequently exercised his privilege

of refusing to answer such questions. Some days after the date of the latter deposition, and after the final close of the inquiry, Coote was arrested upon the charge of arson of his premises and duly committed for trial." At his trial the above-mentioned depositions were duly proved, and admitted in evidence after being objected to by the counsel for the prisoner. The objection taken at the trial appears to have been that to constitute such a court as that of the Fire Marshal was beyond the power of the provincial legislature, and that consequently the depositions were illegally taken. Subsequently other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole court (in their Lordships' opinion rightly,) that the constitution of the court of the Fire Marshal with the powers given to it, was within the competency of the provincial legislature; but it was further held by a majority of the court that the depositions of the prisoner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be taken in evidence against him, after the manner in which justices of the peace are required to caution accused persons, by an Act of the British Parliament adopted in this respect by the Colonial Legislature. The Court held the conviction to be bad, but inasmuch as the objection to it was not founded on the merits of the case, made an order directing a new trial. Their Lordships are unable to concur in what appears to be the view of one of the judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a prisoner of statements made by him upon oath is so unsettled that every judge is at liberty in every case to act upon his own individual opinion. It is true that doubts have from time to time arisen on this subject, and that conflicting dicta, and indeed decisions may be found upon it; but, in their Lordships' opinion, all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been if properly understood. In the case of *Rex* v. *Haworth*, 4 C. & P. 254, a deposition on oath made by the prisoner as a witness against a person named Sheard, on a charge of forgery, was received in evidence by Park, J., against the prisoner, on an indictment of forgery. In *Reg.* v. *Goldshede and another*, 1 C. & K. 657, Denman, J., admitted against the defendants, on a charge of conspiracy, answers which they had made on oath in a suit in Chancery. In *Reg.* v. *Sloggett*, Dearsl. C. C. 656, the prisoner was examined in the Court of Bankruptcy, under an adjudication against him and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the commissioner to consider himself in custody. On a case reserved, it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case Jervis, C. J., observes: "The test is whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In *Reg.* v. *Chidley and Cummins*, 8 Cox C. C. 365, Cockburn, C. J., admitted a deposition made by Cummins, when Chidley alone was accused of the offence for which they were afterwards both tried. The learned editor of the 4th edition

Regina vs. Coote.

of Russell on Crimes (vol. 3, p. 418), thus reports a case of *Reg.* v. *Sarah Chamberlain*: "Where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion. No charge had at that time been made against her. She made a statement on oath, which the coroner took down in writing. Campbell, C. J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed." The case of *Reg.* v. *Garbett*, Den. C. C. 236, accords with the foregoing. There the prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled, and he was compelled to answer. It was held by a majority of the judges on a Crown case reserved that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible. The case of *Reg.* v. *Scott*, D. & B. C. C. 47, seems to go somewhat further. It was there held by the Court of Criminal Appeal (Coleridge, J., dissenting); that although, under the Bankruptcy Act then in force (12 and 13 Vict., c. 106), the bankrupt was bound to answer certain questions, notwithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the improper exercise of judicial authority. From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle *Nemo tenetur seipsum accusare*, but does not apply to answers given without objection, which are to be deemed voluntary. The Chief Justice indeed suggests that Coote may have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of the law; but be this as it may, it is obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule recognised as essential to the administration of the criminal law, *Ignorantia juris non excusat*. With respect to the objection that Coote when a witness should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned (a question said by Badgley, J., not to have been reserved, but which is treated as reserved by the Court), it is enough to say that the caution is by the terms of the statutes applicable to accused persons only, and has no application whatever to witnesses. If, indeed, the Fire Superintendent had exercised the power which he possessed of arrest-

ing Coote on a criminal charge (but which he did not exercise), then it would have been proper to caution him before any further statement from him had been received. A question has been raised on the part of the Crown whether or not the Court had the power of ordering a new trial, inasmuch as c. 77, s. 63, of the Consolidated Statutes of Canada, giving the Court power to direct a new trial, has been repealed by the subsequent statute 32 and 33 Vict., c. 29, s. 80, which does not itself in terms confer any such power, but in the view which their Lordships take of the case it becomes unnecessary to determine this question. For the reasons above given their Lordships will humbly advise Her Majesty that the order made by the Court of Queen's Bench be reversed, that the conviction be affirmed, and that the said Court of Queen's Bench be directed to cause the proper sentence to be passed thereon.

The "Gordon."

Sir R. B. Kindersley, and *Bompas*, for the Crown in England.

W. Ritchie, Q.C., for the Crown, in Canada.

Robertson, for Coote, in Canada.

(J.K.)

VICE-ADMIRALTY COURT, 1873.

QUEBEC, 28TH NOVEMBER, 1873.

Coram G. OKILL STUART, *Q.C.*, DEPUTY JUDGE AND SURROGATE.

The "Gordon," Crosby, Master.

HELD:—That where a vessel, passing down the St. Lawrence in charge of a branch pilot, is through the negligence of those on board suffered to come into collision with a vessel at anchor, the owners of the former will be liable in damages if it appear that its master and crew participated in the negligence of the pilot which occasioned the collision.

2. That participation will be inferred from the fact that the pilot was not actually on deck at the time of the collision, and had left his post in the presence of the mate who failed to keep a good look out.

PER CURIAM:—On the sixteenth of August last, the Norwegian barque "Eros," of 466 tons, was anchored off the west end of Goose Island, the wind strong from the south-west, or west south-west. She lay to the ebb tide in eleven fathoms of water, with port anchor and forty-five fathoms of chain. The channel where she was anchored was in breadth from a mile to a mile and a quarter, and there was abundance of room on either side for vessels to pass her. Her sails were furled, the anchor watch set, and a look-out stationed forward. Between two and three o'clock in the afternoon a vessel, afterwards ascertained to be the "Gordon," of 604 tons, was seen coming down the river, with a fair wind and ebb tide, making six or seven knots an hour. All her square sails were set, except the mainsail. The weather was bright and clear, and vessels were visible at a distance of four miles. The "Gordon" came into collision with the "Eros," and thereby her jibboom, bowsprit, martingale, foretop mast, foretop-gallant mast, royal mast, the maintop-gallant mast, and main royal mast were carried away; the port cathead was bruised and strained, the outrigger broken, and three planks on the port bow, and the wooden sheathing and metal below them damaged; the end of the maintopsail yard and both the trucks of the topgallant-mast heads were broken off, one of them was lost, several of the lanyards were broken, and other damage done to the "Eros." At the time of this collision the master of the "Gordon" was in the cabin which was on deck, and the pilot was

The "Gordon," in the cabin also, where he had gone but a few minutes before. The master, while in the cabin, heard the chief mate sing out "Hard-aport, a ship right ahead." He then ran on deck and saw the "Eros" at anchor a little on the port bow of the "Gordon," not more than a cable's length off. The master of the "Gordon," who has been examined as a witness, has said that "there was no one in particular on the look out." The order 'hard-a-port' given by the chief mate while he was in the cabin, was the proper order to give under the circumstances; an order to starboard instead of to port would have made it a bad job. That if the helm had been kept steady, as the pilot ordered when he last heard him speak before the collision, and the chief mate had not given the order 'hard a-port the 'Gordon' would have struck the 'Eros' 'stem on' about her port cathead; that when the vessels fouled, he thought he heard some one on board the 'Gordon' sing out 'starboard.' That he was at the wheel, and seeing that it was necessary to starboard to ease the blow, he righted the wheel from hard-a-port and put it a little to starboard, at which he left it. The effect of this starboarding was, he says, to slew his ship round and to prevent damage as much as possible. * * He attributes the collision to the pilot not keeping a vigilant watch as to where he directed the ship." The chief mate of the "Gordon" states "the last order he heard him (the pilot) give to the man at the helm was 'steady, keep her as she goes;' this was between two and three o'clock in the afternoon. The order was obeyed, and about five minutes afterwards the steward, Henry Frazer, reported a vessel ahead. We were under sail at the time, going before the wind with the tide in our favor, at the rate of about five knots an hour through the water. He saw vessels ahead before the steward reported this one, but did not pay particular attention to them. When the steward reported the vessel ahead, he looked and saw a barque, which afterwards proved to be the 'Eros' not a quarter of a mile and almost ahead, a little on the port bow. He reported, as he thought, to the pilot 'vessel ahead," believing him to be on the house where he had seen him but a few minutes previously. Not receiving any answer he turned round and saw that the pilot was not there, he then ordered the man at the wheel, Adolphe Berer, to put the helm hard-a-port, which was done immediately. The 'Gordon' was only two cables length from the 'Eros' when he gave this order. The 'Gordon' payed off to southward, but not enough to clear the 'Eros,' and two or three minutes after he gave the order to port the vessels came into collision. There was no body, he adds, specially on the lookout, and the steward's duty is to attend to the cooking and provisions specially.

The boatswain of the "Gordon" states that he did not see the other vessel before the steward reported her, and that he looked when he reported, and she was then a cable's length and a half or two cables length from the "Gordon," a very little on the port bow, very nearly ahead. It was not more than a minute and a half or two minutes after that, the vessels came into collision. * * It was hard to tell whose watch it was, there was no watch set. We were all securing the deck-load ready for sea. There was no one on the lookout that I know off, it was not the pilot's orders that there should be any one." The steward who was the first to report the ship ahead had gone forward accidentally,

and it is very probable that if he had not done so the "Gordon" would have struck the "Eros" stem on and sunk her. The man at the helm from where he was could not see an object ahead. It has been proved by the respondents that objects ahead could be seen just as well from the top of the house aft as from the forward part of the ship, and that the lookout is generally posted aft in day time and forward at night. The pilot, examined for the respondents, says that when he left the deck the mate was close to the house on deck and must have seen him going into the cabin, that there was no lookout, that he had not ordered one, and if there had been one, had he reported the "Eros" a minute sooner, there would have been no collision, that he thought the people working forward were keeping a good lookout without orders from him, and if there had been a good lookout forward there would have been no collision. The "Gordon."

In this suit the owners of the "Eros" claim compensation upon the ground that the "Gordon" was improperly navigated, that her people were guilty of negligence, and that it was by their carelessness and default that the collision was occasioned. The answer of the owners of the "Gordon" is that she was in charge of a branch pilot to whose negligence the loss and damage sustained is to be imputed, and that they are consequently exempt from liability.

A difficulty to be met with in most cases of collision, conflicting testimony, has not been met with on this occasion. The "Eros" has not been charged with having committed any fault, nor was she guilty of any, and the question is simply whether the injury sustained was a consequence of the negligence of the pilot alone, and to determine this question the evidence adduced on behalf of the owners of the "Gordon" will suffice. Her crew appear to have been attending more to securing the deck-load than to the navigating of the vessel. No watch was set, and there was no lookout. The pilot had left his post in the presence of the mate, who was in a position on the house to see objects ahead, and, according to his own testimony, he had seen vessels ahead but had paid no particular attention to them. It may be a question as to which of the parties, the master and crew of the "Gordon," or her pilot, were most guilty of negligence, but that the two together were extremely careless there can be no doubt. The damage to the "Eros" is not attributable to the act of the pilot alone, but perhaps, more to the conduct of the master and crew of the "Gordon" than to his. It was decided in this Court on the 21st Nov., 1862, in the case of the "Courier," that where a pilot is on board the ship he must be actually on deck and in charge to relieve the owners of their responsibility: and on the 25th October, 1867, it was decided, also in this Court, in the case of the "Secret," that the duty of the pilot is to attend to the navigation of the ship, and the master and crew to keep a good look-out. The owners of a ship are compelled by law to have a pilot on board, and as a consequence when the fault is his exclusively they have the benefit of exemption from liability; but when they participate in it they are deprived of such relief. I must, therefore, pronounce against the owners of the "Gordon" for the damage done to the "Eros" by the collision.

Blanchet & Pentland, for the promoters.

W. Cook, counsel.

Fournier, Q.C., and *Hearn*, for the respondents.

(J.K.)

SUPERIOR COURT, 1873.

MONTREAL, 31st OCTOBER, 1873.

Coram TORRANCE J.

No. 1096.

De Gaspé et al. vs. *Asselin*; and *De Gaspé* et al., oppts.

Held :—That the judge in the exercise of a sound discretion may grant a *sursis* of proceedings under execution to allow of an appeal to the Privy Council in England.

PER CURIAM :—This case is before the Court on the merits of an opposition *à fin d'annuller* of a novel character. The opposants, who are the plaintiffs, set up by their opposition that they oppose the *saisie-execution* in this cause. That they appeal to Her Majesty in Her Privy Council from a judgment of the Court of Queen's Bench sitting in appeal at Montreal, on the 23rd of June last, dismissing with costs their action against the defendant, and that to this end they have notified their adversary, and have produced in the record of the said Court of Queen's Bench, a notice of motion to be presented the 11th September then next, for permission to appeal to Her Majesty in Her Privy Council in England. That under these circumstances they think themselves well founded in demanding the suspension of all proceedings in execution until final adjudication on said appeal in England. They, therefore, prayed for a *sursis* of the execution, until final adjudication; that all the proceedings on execution adopted, or to be adopted, be suspended, and in consequence, that all the proceedings be annulled on the reversal of said judgment of the Queen's Bench, in England. The plaintiffs contested this opposition, first, by a *défense en droit* and next by a *défense en fait*. The case is now before the court on the merits. There is no documentary evidence of any proceedings for an appeal to England. There is only the evidence of Mr. Doutre, Q.C., for the defendant, and of Mr. D.D. Bondy, attorney for plaintiff, both of whom were interrogated for the plaintiff. M. Bondy has made a declaration of a *changement d'état* of Dame A. C. Aubert de Gaspé, but the declaration is unsupported by any document or by affidavit, and there is no proof of any proceedings before the Queen's Bench to be permitted to appeal to the Privy Council, and no permission has been yet given. On the merits, therefore, the Court is against the conclusions of the opposition. Another point is worthy of notice. One of the judges of this Court, (BEAUDRY, J.) gave an order of *sursis* on the affidavit of the plaintiff, and suspended the issue of the execution until a decision on this opposition. The defendant has spoken somewhat strongly against the allowance of the opposition by a judge of this Court, but the Court as now constituted, after careful consideration, sees no irregularity or want of discretion in that allowance. Emergencies will arise requiring the provisional and summary intervention of the Judge. With this remark, the Court here dismisses the opposition with costs.

Opposition dismissed.

D.D. Bondy, for opposants.
Doutre & Doutre, for plaintiffs.
(J.L.M.)

SUPERIOR COURT, 1873.

MONTREAL, 30th DECEMBER, 1873.

No. 1798.

Coram JOHNSON, J.

Johnston vs. *The Minister and Trustees of St. Andrew's Church, Montreal.*

HELD:—1. That the Minister and Trustees of a voluntary organization such as the St. Andrew's Church, Montreal, exercising corporate powers under certain regulations, have a right to refuse to renew the lease of a pew in the Church, on the expiration of the term for which it was leased; and such refusal, unless it appear to be a mere cloak for malice, gives the dispossessed tenant no claim for damages.

2. That where the receipt given for the pew rent clearly defines the term of the lease, Art. 1658 C.C. applies, and no notice is necessary to terminate the lease at the expiration of the term.

3. That the Civil Courts as a general rule will not interfere with the determination of the majority of such voluntary organization, where no civil rights as to property are involved.

JOHNSON, J. :—The plaintiff complains that being a pew-holder in St. Andrew's Church in this city for the year 1873, he has been maliciously disturbed in the occupation of his pew; and, in fact, driven from the church, and injured and brought into contempt by the defendants, from whom he asks a condemnation for $1,000 damages. The circumstances under which this action has arisen are peculiar and painful. The plaintiff is evidently acting under strong feeling, whether of injury or of resentment. The defendants resolutely maintain they have acted within the limits of their right. I shall offer no opinion upon anything but the strict legal rights and liabilities of the parties; but to do this intelligibly requires reference to their respective pretensions, and to the ground on which they rest. The plaintiff represents that he has attended St. Andrew's Church ever since 1867, during all which time he has leased and occupied one or more pews in it. That from 1st January, 1872, to the 31st of December of that year, he was the lessee and holder of pew No. 68, paying annual rent for it to the amount of $66.50. That he was therefore a pew-holder under the 10th by-law of the corporation of the church, and held under a verbal lease. That on the 7th December, 1872, the plaintiff received notice from the defendants that they declined to let him a pew for the following year; whereupon he addressed to them a letter expressing his wish to renew the lease of his pew for another year; but being again informed that he could not get it, he caused a tender of $66.50 to be made to the treasurer of the defendants as rent for the year to come, which was, however, refused; that officer further declining to let the plaintiff a pew for any sum whatever. Subsequently, on the 27th Dec., he again, through a notary, tendered the money, and required delivery of the pew, and again met with a refusal. That on the 2nd January, 1873, pew rents being payable annually in advance, the plaintiff repeated the same request with the same result. That notwithstanding these refusals, the plaintiff persisted in attending the church, and sitting in pew No. 68 on New Year's Day, 1873, and occupied it for the first ten days of the month without any interference by the defendants; by which the lease was, as the plaintiff contends, renewed by *tacite reconduction*. That after the first ten days of the new year, during January, February, March and April, the defendants maliciously disturbed and molested the plaintiff in his enjoyment and occupation of pew No.

Johnston vs. The Minister and Trustees of St. Andrew's Church, Montreal.

68, which, however, he continued to hold under most disagreeable circumstances —such as having his books removed and others put there for the use of strangers; having the cushions and hassocks sent down to his office, having strangers shown into his pew, and having a printed placard with the words, "for strangers," stuck upon it. The plaintiff then proceeds to say that notwithstanding all these things he persisted in occupying his pew up to the bringing of his action in June last. He then reverts to something that had occurred in March, 1873. The books that had been put in the pew 68 for the use of strangers, having been removed by Mr. Johnston, he shortly afterwards got the following letter from the Secretary of the Church:—

"Sir,—It having been brought to the notice of the trustees of St. Andrew's Church, that you removed the books out of the strangers' pew, the Secretary was requested to write to you, desiring you for the future not to remove the books placed in this pew by the trustees for the use of strangers.

"Yours truly,

J. WARDLAW,

"Secretary."

Up to this point in the recital of the plaintiff's wrongs, it is quite intelligible that he contends for two things: 1st, that he was lawfully the tenant of pew No. 68, after the 1st January, 1873; and 2nd, that the defendants, being without right in what they did, moreover did it in a vexatious manner, entitling him to greater sympathy, and heavier damages. If they really were, or even if he thought they were wrongs that he had to complain of, (which is the one question to be hereafter considered) it is quite conceivable that the plaintiff should deem himself entitled to complain of them; but it is not so easy to understand, under these circumstances, why he should continue to complain that, having received the Secretary's letter, certainly a very civil one on the face of it, he answered it on the 6th March reasserting his rights, and received no reply to his remonstrances. He complains alike when the defendants do write to him, and when they do not; and as if determined to have as many complaints as possible, he proceeds still further to set up in his declaration, that after this, again on the 7th of May last, he wrote still another letter to the defendants, and that they have not even taken any notice of that. So that we have before us on the plaintiff's side an assertion of right on his part, and of a violation of it by defendants, not only by what they did, but by what they refrained from doing. They once let him a pew in their church, for a year, he says, and as long as he continues to pay the rent in advance he continues to hold that pew. That when in the exercise of what they considered their right the defendants put out his books, returned his hassocks, and stuck up a notice that the pew was for strangers, and supplied it with books for their use, they were using means that denote malice on their part; and not only that, but that when Mr. Johnston ejected the books, he has a right to complain of them for writing him a letter on the subject; and when he writes to them he has an equal right to complain if he gets no answer.

The defendants encounter this action by pleading, 1st. That plaintiff was not lessee of the pew No. 68 after 31st December, 1872, and they had a right to refuse to let it to him for the next year. 2nd. That under the by-laws,

custom and practice of the church, the pews are let each year, and for one year only, and the defendants are under no obligation to continue the leases; nor is there any continuation of them without their consent, nor any notice required of their termination. 3rdly. That the notice of the 7th of December was unnecessary; and the plaintiff frequently acknowledged the defendants' right to dispense with notice, and admitted that he was not the lessee. 4thly. That in the exercise of a discretionary power, and in good faith, and for the sake of peace and harmony in the congregation, they determined not to re-let the pew to the plaintiff; and their determination has been ratified by the congregation in general meeting on the 25th December, 1872, at which meeting the plaintiff participated, and admitted he was without right to the pew. 5thly. The defendants put in issue the truth of the plaintiff's allegations, and expressly deny any malice on their part.

In the view that I take of this case, I must say that I think much evidence and much argument have been expended unnecessarily. I do not consider that it presents any question as to the power of disfranchisement, or of amotion. I have had time fully to consider the matter, and I adhere to the opinion that I intimated at the trial, when I asked, whether there was in reality more than one question before the Court, viz: "Had the defendants a right to do as they did?" For, if they had, the plaintiff cannot complain that they exercised it, unless such exercise was a mere cloak for express malice; and, if they had not, all the best motives in the world would not give it. If, after the 1st of January, 1873, pew No. 68 was legally in the possession of the defendants to do as they pleased with it, it is obvious that they might put out of it anybody else's property that they found there, and might placard it to let or for the use of strangers; but if all this time the law gave this pew to the plaintiff, as a consequence of the nature or the terms of his previous lease of it, acts of ownership by the defendants would be unauthorized and offensive. The fact that the defendants gave notice on the 7th of December that the pew would not be re-let for the following year is unquestionable. The reasons they may have had for coming to this determination, whether they are good ones or bad ones, may serve to characterize their conduct; but cannot change the fact itself. The plaintiff knew on the 7th of December that the pew he occupied in St. Andrew's Church would not be let to him after the expiration of the year, as far as the defendants could settle that question. He must then rely upon the nature and terms of his previous contract to hold it against their will; and he does so. He says he had a verbal lease; that it entitled him by law and usage to hold the pew as long as he continued to pay in advance in the manner prescribed by the by-laws of the church; that the defendants let him know that he could not have it when the year was up, but that he defied them. He went there as usual, and for some days—the opening days of the year, the pre-eminent season of peace and good-will— the defendants would not openly assert their rights, and this he construed for a time to mean that they acquiesced in his view of their mutual obligations; but he is soon undeceived; for after a very short interval of seasonable forbearance on their part, they openly exercise ownership, and give him plainly to understand that he has no right there. The plaintiff must shew that he had a right, either, 1st, by

Johnston vs. The Minister and Trustees of St. Andrew's Church, Montreal.

the express terms of an unexpired lease; or, 2ndly, by the tacit continuation of it; or 3rdly, by the law and invariable usage of the church. The plaintiff produced at the enquête on the 4th November three papers with a list of exhibits describing them. The name given to these papers is unimportant. We have to look at what they make proof of; and they undeniably make proof as between these parties that the plaintiff rented successively three pews from the defendants. So much is this the case, that it is observable in the words of the descriptive list of these exhibits which the plaintiff himself furnishes, that he calls the first paper, "A *lease* for pew 68 in St. Andrew's Church for the year 1869." Then the word "lease" is barred by a stroke of the pen, and the word "receipt" i substituted. The reason of this alteration is manifest. The plaintiff in his declaration had set out that he held under a verbal lease, and to admit that he held under a written one would have bound him to its terms. But however this may be, the fact or series of facts is established. He paid pew rent in 1869, for pew No. 68. For the year 1870 no payment is proved; but in 1871, there is proof of the payment of $66.50 for pew No. 66; and in 1872 there is also proof that he paid the same sum for pew No. 68, which is the one he last occupied. This last receipt is dated January 9th, 1872, and acknowledges receipt of the money "*being for rent of 1st class pew No. 68, in St Andrew's Church, Beaver Hall, for the year* 1872." If this is not evidence of the intention of the parties (at least as far as it goes) it would be difficult to say what does constitute evidence. I do not mean to say that it must necessarily exclude, under all circumstances, positive and clear proof, of an invariable usage entitling the plaintiff to a renewal of the lease on the same terms; but that is a separate question; and in the absence of legal evidence of this usage (a point I will presently notice) this paper, whether called "lease" or "receipt," conclusively shows that the money was taken for a specific thing that was given, viz: the enjoyment of the pew for the year 1872, and no longer. We must then apply the law which, in such case, is found in Art. 1658: "The lease, if written, terminates of course, and without notice, at the expiration of the term agreed upon." So much, then, for the terms of the lease. Then as to *tacite reconduction*: this pretension is equally unfounded. There can be no *tacite reconduction* except under a presumption of the consent of both parties, and the very contrary is made decisively apparent by the notice of the 7th of December; the fact of the plaintiff being suffered at New Year's time to sit in the pew, though in the absence of notice, it might be important if not decisive, can have no weight under the circumstances. The plaintiff is therefore driven to rest his case upon the law and usage of the church, and in this attempt I think he has completely failed. We must not confound a voluntary organization like this one, exercising corporate powers under certain regulations, with the Church in Scotland from which it sprung. We have not imported the Scottish Parish Church and all its usages here. It is because *we had not got these things* that we were obliged to shift for ourselves, and get incorporated and agree among ourselves how we should be governed, all which appears to have been well and wisely done. The fact so highly creditable to St. Andrew's Church, that in few or no instances have refusals been given to renew leases, as long as the rent is paid in advance,

is a very distinct thing from the invariable obligation to renew them in all cases. It merely shows that the congregation has hitherto been harmonious, and that this is the first time a discordant note has been heard.

I hold therefore, in the present case, that the defendants have established their right under the terms of the lease, and I am therefore relieved from considering their reasons for exercising it, and I entirely fail to see any indication of express malice. According to this view of the matter, I ought properly to decline noticing this subject any farther; and I certainly shall do so, as far as the merits of that question are concerned; but as mere information for the parties, which may not be entirely useless to them, and as disclosing the general principles upon which courts of justice act *in pari materia*, I would refer to a book published in New York in 1868 by Mr. Murray Hoffman upon the ecclesiastical law of that State. It treats of questions connected with the incorporation of religious societies under the statutes of that State—questions which, the author observes, are often influenced by the ecclesiastical system of the church or body in connection with which they arise; and it contains an historical notice of all those churches which had a place of any importance in the colony before the revolution. At pages 275-6, the principle will be found laid down both by the courts of several of the States and by the Lord Chancellor of England—in the case of Forbes vs. Eden in the House of Lords, that courts will not interfere with the determination of the majority of the body of which the complaining party is a voluntary member, except in certain strictly defined cases of disposal or misappropriation of property in trust; and it is only when civil rights as to property are involved, that the secular tribunals will examine so far as to see that the fundamental rules of law have been observed. These principles have guided me in disposing of the present case; and having satisfied myself that, under the law applicable to the terms of his lease, the plaintiff has suffered no violation of his right, his action for damages for such violation must be dismissed with costs.

There was a motion made to reject answers to interrogatories, and also to reject a paper produced with one of these answers. These are disposed of by the judgment also, both of them being dismissed.

D. Macmaster, for the plaintiff.

Cross, Lunn, Davidson & Fisher, for the defendants.

J.L. Morris, counsel.

(J.K.)

COURT OF REVIEW, 1873.

MONTREAL, 31st OCTOBER, 1873.

Coram JOHNSON, J., MACKAY, J., TORRANCE, J.

No. 1256.

Labelle vs. *Walker* et vir.

HELD:—If an assignment of debts be made upon the condition that the assignor will pay their amount upon the default of the debtors and without obliging the assignee to discuss these debtors, such assignee has no action against the assignor before a demand for payment has been made upon the original debtors.

The defendant Dame Mary Walker assigned certain debts to one Mathieu obliging herself personally to pay their amount to him upon the default of the debtors

Labelle vs. Walker et vir.

to pay them when due and without obliging Mathieu to discuss the said debtors. Mathieu assigned the debts to the plaintiff who brought this action against the defendant for the amount $280, but without alleging or proving any demand of payment made upon the original debtors.

The defendant, amongst other exceptions, pleaded that no right of action accrued before demand upon the original debtors.

By the judgment of the Superior Court for the District of Richelieu of the 10th March, 1873, judgment was given for the plaintiff.

This judgment was reversed by the Court of Review at Montreal.

JOHNSON, J.:—The plaintiff in the Court below brought his action to recover $280.76, part of certain sums which had been assigned by the defendant on the 7th August, 1868, to one Joseph Mathieu, as being due and to become due to her by three of her debtors, viz: Bessette, Bernier and Boileau. Mathieu, on the 29th of October, 1870, assigned these sums to the plaintiff. In the deed from the defendant to Mathieu it was covenanted that if the debtors whose debts had been assigned did not pay them at the times the deed stated them to be coming due, the *cessionaire* should be entitled to recover them from the defendant, *cédante*, with interest at 12 per cent., and without discussing the original debtors. The question before us is simply whether this covenant can entitle the plaintiff to recover without making any demand upon these debtors. The judgment condemned the defendant upon the principle that the right of action against her accrued at once by the default of the original debtors to pay. That principle may be admitted; but the default to pay must be shown to exist. The Court below appears to have been of a contrary opinion, and to have laid down that the *simple échéance des termes de paiement* constituted this default, without any demand being made. We consider the covenant in the deed from defendant to Mathieu to have constituted simply an obligation to pay *en cas de refus, après un simple commandement fait au débiteur*, which is the exact case put by the author of the *Instructions faciles sur les conventions*, in the 1st chapter of the title 7, "*Transports ou cessions.*" These men may have been ready to pay, in which case the defendant was discharged; the defendant is not bound either by the terms of her contract, or by law. On the contrary, Art. 1152, C. C., reviving the old law, or rather declaring it, is expressly opposed to the rule laid down by the judgment.

The judgment is recorded as follows:—

The Court here sitting as a Court of Review, having heard the parties by their respective counsel upon the judgment rendered by the Superior Court of the District of Richelieu on the tenth day of March 1873, having examined the record of proceedings had in this cause, and maturely deliberated:

Considering that there is error in the said judgment of 10th March, 1873, doth, revising said judgment reverse the same, and proceeding to render the judgment that the Court below ought to have rendered in the premises; Considering that no right of action accrued to the plaintiff without any demand having been made by him upon the original debtors of the defendant, Dame Mary Walker, whose debts were assigned by her to one Joseph Mathieu, who was the *cédant*

of the said plaintiff, doth dismiss said plaintiff's action with costs in both courts, distraction whereof is granted to Mr. D. E. Gauthier, attorney for defendants, and it is ordered that the record be remitted to the said Superior Court of the District of Richelieu. Paige and Griffith.

Judgment reversed.

A. Gagnon, for plaintiff.
D. E. Gauthier, for defendant.
(J. L. M.)

SUPERIOR COURT, 1873.

SHERBROOKE, 1873.

Coram SANBORN, J.

Warren Paige, Petitioner, and *John Griffith*, Collector of Inland Revenue, Respondent.

HELD:—1. The tribunal constituted to adjudicate upon complaints under the Quebec License Act consists of "*two* justices of the Peace for the District," and a conviction by *three* justices is illegal.
2. A conviction for selling liquor in the house of another is null.
3. The conviction should be separate from the complaint.
4. The power conferred on the Legislature of Quebec by the B.N.A. Act, of "fine, penalty or imprisonment" does not restrict the power of the Provincial Legislature to the exercise of only one of these modes of punishment at a time by any particular Act.
5. Where a conviction is for two offences, incurring two penalties, the conviction should specify for each offence the time, place, and penalty incurred.

SANBORN, J. :—The petitioner in this cause raises six objections to the conviction made by three justices of the Peace, whereby he is condemned to pay two penalties $100, and costs $28.46, for selling by retail spirituous liquors in the Temperance Hotel of William Paige, of Compton, and is ordered to be imprisoned for six months unless the amount awarded is sooner paid :

First,—That the tribunal constituted to adjudicate upon complaints under the License Act, as respects ordinary Magistrates of the District, consists of "two Justices of the Peace for the District," and more or less than two does not meet the requirement.

Secondly,—That there is no offence specified in the complaint to which penalty is attached.

Thirdly,—That the conviction should be complete without reference to the complaint, and should be in the form provided by the Act.

Fourthly,—That the conviction containing order of imprisonment upon the option of complainant being declared, is bad, as time must be given after conviction for petitioner to pay, and then only, upon failure to pay, could the prosecutor declare his option for imprisonment without distress.

Fifthly,—That petitioner had been illegally convicted of two offences without mention of the time when each was incurred.

Sixthly,—That the evidence is illegally applied to both charges indiscriminately, and sustains neither as to specific time, as alleged in the complaint.

There is a certain degree of force in all these objections. The conviction is obnoxious to criticism in all these particulars. As respects the first ground I consider it a fatal objection. Under section 152 of the License Act, all

Paige and Griffith.

actions or prosecutions when the sum or penalty demanded, or such sum and penalty combined, do not exceed one hundred dollars, may be brought before any two Justices of the Peace for the District, or a Judge of the Sessions of the Peace, or a Recorder, or a Police Magistrate or Sheriff.

By sub-section 2 of section 153, it is expressly declared that when such prosecution is brought before any two other Justices of the Peace (that is, any two other than a Judge of the Sessions, &c.,) the summons may be signed by one of them, but no other Justice shall sit or take part therein, unless by reason of their absence, or of the absence of one of them, nor yet in the latter case without the assent of the other of them. This last provision was made, doubtless, to prevent justices unfavorable to the prosecution from coming in and taking the case out of the hands of those who were first seized of it, and to prevent unseemly divisions among magistrates; but the enactment cannot operate in one way and not in the other.

There are certain expressions in the Act which seem to presume that more than two Justices may sit. Jurisdiction cannot be conferred by inference. It is expressly given to a certain tribunal, and none other can exercise it. Oke says: "The special authority given to Justices must be exactly pursued according to the letter of the Act by which it is created, or their acts will not be good." (1.) The same author says: "Where the statute refers the matter to the next Justice, or to any two Justices, no other but the one answering that description, or those having jurisdiction by common law or Act of Parliament, has any authority and does not enable them to act in any county." (2) These special jurisdictions are numerous in England, created by various Acts, so much so that this author has provided a table showing under the various Acts giving summary jurisdiction, in one column the penalties, in another the right of appeal or otherwise, and in another the number of justices or the special tribunal to hear. The principle is recognized by other writers, and amongst these by Tomlins in his work on the Office and Duties of Justices of the Peace, and by Dwarris on Statutes, and by Paley on Convictions. The doctrine is based on several decisions, among which are the Saunders case, Kite *and* Lane, and *Re* Peerless. It is said by respondent that petitioner accepted the jurisdiction, by pleading and not objecting to it. This cannot give to a Court jurisdiction when it has none by law. Magistrates under penal acts have no jurisdiction except such as is conferred by statute and in the manner in which it is given by the statute. (3) Upon this ground the conviction must be quashed.

(1.) Oke's Magisterial Synopsis, p. 38.

(2.) Idem, p. 10.

(3.) 3 Tomlins' J. P., p. 120-4.
Dwarris on Stat., p. 53.
Paley on Convictions, pp. 15 and 16.
Saunders' case, 1 Saunders, 263.
Re Peerless, 12 Q. B., 643.
Kite *vs.* Lane, 8 C. L. R., 44.
Regina *vs.* Wilcocks, 53 C. L. R., 315.

There are other points raised here which are of sufficient practical interest to deserve consideration.

Paige and Griffith,

The second objection, that no offence is charged, I do not consider good for the reason given that there should have been specific allegations that there was sale in less quantity than three half pints. The word "retail" under section 196 is made to mean this, and is a sufficient averment to meet the requirements of section 2. There is, however, a very important variance which was not mentioned in the argument. The complaint is, that petitioner did vend, sell, retail, &c., in the Temperance Hotel of William Paige. The penalty is incurred, under the second section of the Act, for selling in the person's own house, on premises, or in or upon any house, boat or barge, &c., upon frozen water; but not for selling in the house of another. Why this Act is so restrictive I cannot say; but it is so. It is true that under section 170 the delivery of spirits in a tavern is declared a violation of the first and second sections, but this does not enable a party to sue for a penalty in any other terms than those mentioned in the second section. The Act very illogically makes a sale in a tavern proof of sale in one's own house, or upon one's own premises, or in a building upon frozen water, but it does not warrant a conviction unless the complaint is for an offence described in said 2nd section. The conviction must describe the offence according to the statute. (1)

The third objection, that the conviction should have been in the form given by the Act and should be separate from the complaint, is not without reason. The Act says, "those forms or others of like effect." A conviction which is not perfect in itself is not a form "of like effect." There may be an informal conviction which may be extended. (2.) In fact this is a common practice, and it has been held that the formal conviction can be made at any time before the record is sent up on Certiorari. (3) It has even been held that such formal conviction can be drawn up and substituted for the informal one at any time before the conviction is quashed. (4)

The informal conviction as sent up in this case is certainly objectionable.

The fourth objection is that the option of prosecution for imprisonment instead of distress is no part of the conviction, and being included therein vitiates the conviction. The regular mode, undoubtedly, is, first to convict, then the defendant is expected to pay *instanter*; if he does not, the prosecutor may choose imprisonment under the Act, instead of distress. There is a reported case in which, under like circumstances, immediate imprisonment was held good, even when defendant was not present at the time of conviction. In that case, however, the conviction appears to have been entered, and the order for imprisonment was a subsequent act. (5) This adjudication of imprisonment,

(1.) Cloud *vs.* Turfrey, 9 C. L. R., 596.
Rex *vs.* Walsh, 28 C. L. R., 125.
Paley on Convictions, p. 67.
2 Oke, p. 132.

(2.) Paley on Convictions, pp. 61-2.

(3.) Selwood *vs.* Mount, 48 C. L. R., 55.

(4) Charter vs. Grecian, 66 C. L. R, 216.

(5.) Arnold *vs.* Dimsdale, 75 C. L. R., 579.

Paige and Griffith.

being a substantive part of the conviction, leads me to consider the question decided by Mr. Justice Torrance, as well as by Mr. Justice Drummond in the Papin case. (1) It is there held that the British North America Act does not confer power (S. 92 ss. 15) upon the Local Legislature to enforce laws made upon subjects within its jurisdiction by both fine and imprisonment at the same time. I cannot agree with this holding. The words of the Imperial Act are: "the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section". It was held in the case referred to that only one of these modes of punishment could be exercised at one time, because the enactment is in the alternative, as indicated by the word "or." I think it was intended by this section to give the range of these modes of punishment, not one or other of them and only one at a time. The word "or" is not necessarily disjunctive in all cases. It is sometimes a mere connective. For instance Art. 325 of the Civil Code provides for interdiction in case of "imbecility, insanity, or madness." Ray, in his Medical Jurisprudence, classifies under the general head of insanity, idiocy, imbecility, mania and dementia, and remarks, "It is not pretended that any classification can be rigidly correct, for such divisions have not been made by nature and cannot be observed in practice." (2) The word "or" in this instance cannot certainly be used in a disjunctive sense. Dodderidge, J., in Creswick vs. Rokeby (3) said, "When the sense is the same the words 'and' and 'or' are all one, and the words conjunctive and disjunctive are to be taken *promiscue*." I take it, at all events, that there is sufficient ambiguity in the expression to warrant a resort to the rules of interpretation where there is want of explicitness in the words of the statute. The B. N. A. Act, conferring legislative powers, is not to be construed rigorously, like a penal act conferring judicial powers. Prior to the B. N. America Act there can be no doubt that each Province had the power to enforce laws which now relate to subjects under the exclusive jurisdiction of the Provincial Legislature by fine, penalty and imprisonment, using discretion as to one or all, as circumstances might require. It is a generally accepted doctrine that where the Imperial Government has granted powers to a colony, it never withdraws them. This doctrine is recognized in Phillips vs. Eyre.

If the Imperial Act is to be understood in the restrictive sense, and the Provincial Legislature can only enforce their laws by fine, penalty or imprisonment, taking its option by one of the three modes, but by only one of the three modes, then a right and power which existed before that Act was passed has been taken away, inasmuch as the Provincial Legislature has exclusive jurisdiction over certain classes of subjects, and if it has not the large powers that existed under the old constitutional acts, it has been taken away altogether; and the inference necessarily follows that it was intended, contrary to constitutional maxims of legislation, to abridge our powers, and it has been done. This con-

(1.) Exparte Papin, 16 L. C. J., 319.
(2.) Ray's Medical Jurisprudence of Insanity.
(3.) Creswick *vs.* Rokesby, 2 Bulst., 47.
Dwarris on Statutes, p. 773.

Paige and Griffith.

casion should not be reached unless we are forced to it by explicit enactment or by evident intendment gathered from the Act generally. Chancellor Kent says: "It is an established rule in the exposition of statutes that the intention of the law-giver is to be deduced from a view of the whole and every part of a statute, taken and compared together. The real intention when accurately ascertained will always prevail over the literal sense of the terms." Again he says: "For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: 1. What was the common law before the Act. 2. What was the mischief against which the common law did not provide. 3. What remedy it provided to cover the defect; and 4, the true reason of the remedy." Applying these rules in their spirit, we must consider what legislative powers existed in the several Provinces of the Dominion prior to the passing of the British North America Act, and was it the intention to abridge these powers, or simply to make a new distribution of them? I think, plainly the latter. The words "by fine, penalty, or imprisonment," were not so well chosen as more definite language, to express the intention of the legislators, but I cannot think it was intended to give power to the Provincial Legislature to exercise only one of these modes of punishment at a time in any particular Act. It must have been intended to apply each according to the circumstances and gravity of the offence, and to use both or all when required. If the expression "fine, penalty, or imprisonment," is to be understood distributively as between penalty and imprisonment, it must be so understood as between fine and penalty, which would create a distinction too subtle for practical application. In fact the words fine and penalty are so alike that the one runs into the other. Dwarris says: "In construing Acts of Parliament, judges are to look at the language of the whole Act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and they can collect, from more large and extensive expressions used in other parts, the real intention of the Legislature, it is their duty to give effect to the larger expressions." For these reasons I am of opinion that the Provincial Legislature has not exceeded its powers in enforcing the License Act, or any other law relating to the class of subjects within its jurisdiction, by all the modes mentioned, used separately or together, according to circumstances.

The conviction here is for two offences, incurring two penalties, and it is urged that the time and place should be definitely stated under section 158. This objection has much force. In such case the conviction should be full for each offence, specifying the offence, time, place and penalty. This is in accordance with English practice where similar law was in force.

The sixth objection is that the evidence was taken illegally upon both charges indiscriminately. This was a matter within the discretion of the justices, and is not a ground for *certiorari*. The conviction will be quashed, but without costs, as the revenue officer acts on behalf of the Government.

W. L. Felton, Q.C., for the petitioner.

E. T. Brooks, for the respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 6th SEPTEMBER, 1871.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No. 1.

THE CORPORATION OF MONTREAL,

(*Defendants in the Court below,*)

APPELLANTS;

AND

DOOLAN,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—That a City Corporation is liable in damages for assaults committed by its servants, such as policemen, when the assaults are approved and attempted to be justified by the Corporation.

This was an appeal from a judgment of the Court of Review at Montreal, reported 13 L. C. Jurist, page 71 et seq.

BADGLEY, J. (*dissentiens*):—The plaintiff is a quiet and decent citizen and a respectable cab owner and driver, and on the occasion of the fire at Zion Church in this city, he was called from his stand at the corner of Victoria Square and McGill Street, and went near the church. Whilst there a person who had been severely injured by the fire was put into his carriage by some of the firemen, whose wet and dirty condition soiled and dirtied his carriage, and soiled his clean cushions, which of course did not please him, whereupon he called to them not to dirty his cushions, and was about taking his seat to drive the injured person, when two policemen called respectively James Maubry and Gedeon Marineau, seized him and dragged him away from his horse and carriage, which were driven off at full speed by a stranger. The policemen dragged him off to take him to the station house, treating him very roughly, and Mr. Perry, the injured man, says that he thought they were using him harshly, although he says that the plaintiff had not refused to take him in his carriage, and did not do anything improper. The same rough treatment was continued by the policemen until his arrival at the police office in Jacques Cartier Square where the officer on duty says the policemen had no charge against the plaintiff, except that *he would not drive furiously for them.* He was immediately set at liberty, and after about a couple of hours, received his horse and carriage which were brought back to the stand, the horse much over-driven and the carriage and cushions soiled and dirtied with burnt dust, ashes and cinders.

For his own arrest and for the injury done his carriage he sued the Corporation in damages, which, he averred, were caused by the policemen, as the alleged servants and agents of the Corporation and acting under the general authority of that body, the policemen being on duty at the time and acting as such. The defendants have pleaded first their non-responsibility or liability for the misconduct of the City policemen or for their unauthorized, unlawful or wrongful acts, and not content with this plea, they further plead, that plaintiff used abusive

language to the policemen who were justified at the time in arresting him; and that he suffered no damage, and finally they plead *défense au fond en fait*.

In judging this cause, the Court must take the case as they find it proved, and from that proof it is manifest that the conduct of the policemen, too anxious to exhibit their little brief authority, was unmistakably unjustifiable and without cause, whilst their treatment of the plaintiff at his arrest, and during their hold of him, was not only unnecessarily rough and harsh, but outrageous, as he was altogether passive in their hands. It is also in evidence that he was put to the expense of $35 for getting his carriage repaired and put into clean order as before. In the Court of *première instance* the action was dismissed upon the ground of the non-responsibility of the Corporation for the unauthorized and wrongful acts of the City policemen; but this judgment was reversed by the judges of the Superior Court sitting in review, who awarded to the plaintiff the $35 as proved for the carriage injury, and $65 for his unwarrantable arrest, making his total damage $100, for which judgment was entered in his favour against the defendant. Both these specific amounts of damages are predicated upon the fact that the cause of each injury proceeded from the policemen, and it is therefore necessary that the proof in support of each should be examined separately. As to the first, the injury to the carriage, there is not a tittle of evidence to inculpate the policemen. The plaintiff was not called from his stand by either of them, and injury done to the carriage proceeded from the firemen and persons assisting at the fire in placing Mr. Perry in the carriage, which was taken possession of, and used by others, but not by the policemen. There is therefore, nothing in evidence which can connect the carriage damage with the policemen. The remaining alleged damage, and, indeed, the cause of action altogether, is made to rest upon the averred responsibility of the Corporation for the unlawful acts of their so-called employés, the City policemen. Now it is proper to say that the connection of *préposé* and *employé* does not legally exist between the Corporation and the policemen. The last clause of art. 1054 of the C. C. enacts *que les maîtres et commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés*: *maîtres* are in the same relation to *domestiques* as *commettants* to *ouvriers*, and it is a principle of law in the interpretation of responsibility arising from this relation, that whether *domestique* or *ouvrier*, he is a person whom the master or *commettant* has instructed to perform things on his behalf, in other words, that the *domestique* or *ouvrier* was acting *sous les ordres, sous la direction, sous la surveillance du commettant*. This is the principle of French law, and the same principle will be found in Addison on Torts, (2 Ed.), pp. 340–341. The relation between the Corporation and the City policemen is not that either of master and domestic servant, nor of *commettant* and *ouvrier*, nor is it in evidence, that the policemen in this instance were acting under the order, the direction and superintendence of the Corporation. Again, policemen in this City are nothing more than the old constabulary or peace officers of the Municipal Bench of Magistrates of old times, whose powers were assumed and superseded by the incorporation of the City and the establishment of the Municipal Council, one of whose chief duties is the preservation of the

The Corporation of Montreal and Doolan.

public peace by public peace officers, whether called constables or policemen. In the place of City Magistrates, the Corporation were required by the Legislature to organize this peace force and pay them, but their service is not for the Corporation but for the maintenance of law and order, and their official acts are reported, not to the Corporation, but to judicial officers who adjudge upon their reports. The opinion of Chief Justice Bigelow in the case of Buttrick *vs.* City of Lowell, a case not dissimilar in its leading features with this contention, is founded upon substantial law, and may be fully adopted here. The Chief Justice in giving judgment said:—

"Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the Legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted, are derived from the law, and not from the city or town under which they have their appointment. *For the mode in which they exercise their power and duties the city or town cannot be held liable.*"

To which the Chief Justice added:

"Nor does it make any difference that the acts complained of were done in an attempt to enforce an Ordinance or By-law of the City. The authority (said the Chief Justice) to enact by-laws is delegated to the City by the Sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the Legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, *police officers act in their public capacity, and not as the agents or servants of the City.*"

The law, therefore, is plainly against the plaintiff, the respondent, who, however, has taken advantage of the very inconsistent second plea of the defendants, and assuming it to be a plea of justification for the policemen by the Corporation attaches to it the liability of the latter for the misconduct of the policemen. Now it is true that this plea is inconsistent with the former, and also with the general *défense en fait* afterwards, but it is not essentially a plea of justification by a body acting by its servants, and as such assuming in words the alleged responsibility for them; moreover, that responsibility is not even implied in the terms of the plea, nor does it override the first plea nor the general defense. All that can be said against it is, that it should not be there. It is *mala praxis* and should be rejected, and costs should be the penalty of its appearance in the record. Under the circumstances of the case, in fact as well as in law, the judgment in review is not sustainable, and must be set aside, leaving the original judgment to stand as the judgment in the cause, with costs against appellant of this Court and of the Court in Review.

DUVAL, C. J., (also dissenting) said this was entirely a question of legal responsibility, for as to the facts of the case there could be no doubt. The conduct

of the policemen was most outrageous and unjustifiable. His Honour could not understand why they were not immediately dismissed from the Force the moment their conduct came before the Police Committee. The plaintiff had done nothing. He appeared to have been a highly respectable man. But that was not the only question submitted. If the case came up in the shape of an action of damages against the policemen, there could be no hesitation in giving damages. But the question is one of the legal responsibility of the Corporation for the acts of policemen. The two principal cases on the subject are Sutton and Johnson, 1 T. R., and Viscount Canterbury vs. Atty. General, 1 Phil. See Dunlap on Agency, p. 300. 1 Sh. and Redf. 177. As to a public municipal Corporation, the distinction has been taken, and it is founded in reason as well as in law, between those *legislative* powers which it holds for *public* purposes, and as a part of the *government* of the country, and those *private* franchises which belong to it as a creation of the law. Within the sphere of the former it enjoys the exemption of government. So, in the case of a public officer, he is not responsible for the acts of those serving under him, where the latter fill a public office, and are not in *private* service. In 6 Cl. and Fin. the leading authorities are to be found, pp. 894, 904. Brown's Max. 772. A question might be raised as to the law which governs the case. His Honour thought it was to be decided in accordance with English law, the public constitutional law of the country. It is for the advantage of the people of this country that they have the public constitutional law of England to protect their interests, for it is more extensive than the French law. The first Napoleon gave larger rights in this respect, but with his usual cunning he qualified the privilege by saying that no action should be brought without the consent of the Government. His Honour thought, therefore, that the Corporation was not legally responsible for the damage which the plaintiff had most assuredly sustained.

CARON, J., for the majority of the Court, was in favor of confirming the judgment. After referring to the pleadings and evidence, His Honour stated that the French law must govern the case, and under this law he was clearly of opinion that the plaintiff was entitled to recover against the Corporation. Among other reasons, he remarked that it was the Corporation that appointed the policemen. Equity also strongly sustained the claim of the plaintiff.

DRUMMOND, J., concurring, said the judges were all agreed as to the facts, and as to the disgraceful conduct of the policemen. There remained simply the question on whom the responsibility should fall, upon the policemen alone, or upon the persons who employed them. The principle was one of vast importance. If the ruling laid down by the Chief Justice and Judge Badgley were to prevail everywhere, then even in a case like the *Westfield* explosion, the directors of the Company owning the steamer would have no responsibility whatever, though they employed an engineer who did not know what a vacuum was. For it might be said that they did not employ him for the purpose of blowing people up. But without digressing to that case, he thought even the English authorities are strongly in favour of the pretentions of the plaintiff. After citing several authors, he proceeded to say that the French authorities are still stronger, and most unquestionably fix the responsibility upon the employer in

The Corporation of Montreal and Doolan.

such cases. It was a very important question to what law we should resort in such cases. There was a great deal to be said in favour of the view of the Chief Justice, but he thought that where the civil rights of individuals were concerned, a Government stood in the same position as an individual. He thought the subject had a right to resort to the law of France. This law was strongly in the plaintiff's favour. Some American cases had been referred to, but his Honour attached no weight whatever to these decisions; for in the opinion of eminent jurists, as well as in his own, there had been more unjust opinions pronounced by judges in the United States in favour of corporations than in any other country. In England there was a gradual advancement towards a more enlightened regard for the rights of the subject, and Americans were a long way behind England in this respect. He was clearly of opinion that the Corporation should be held liable.

MONK, J., said the question was one of such importance that he would make one or two observations with regard to the technical points on which he concurred in the judgment. The preliminary question, whether this case was to be determined by English or French law, was of great importance. He was not prepared to say that the Chief Justice was wrong on this point, but he was rather disposed to concur with Justices Caron and Drummond. He thought that the law which determined the rights of the individual against a public body must be the law of the land—the French law. And according to French law, in his opinion, there was no difficulty in holding the Corporation liable. There was no difficulty whatever as to the facts. But supposing the case had to be decided according to English law, then there would no doubt be a difficulty, he admitted, in holding the Corporation liable. He was not prepared to say that the authorities cited by the Chief Justice were not perfectly sound, and might be applicable to a case in which the general principle alone was involved. But there was another plea in the record. No doubt, an intimation from the defendants of what they considered their position would relieve the Court from immense difficulty. How did the matter stand? The counsel for the Corporation, knowing the facts and the law, thought proper not to content himself with a *défense en fait*, but went further and added a plea of justification. He said, admitting all that you say to be true, the policemen were justified in what they did. This plea relieved him, Mr. Justice Monk, from all embarrassment. Upon the plea of justification he certainly thought that the Corporation was liable. They had thus taken themselves out of the general rule, and had made their position exceptional. All that remained was to look to the evidence, and upon the evidence they were responsible.

Judgment confirmed, Chief Justice Duval and Judge Badgley dissenting.

H. Stuart, Q. C., and *Rouer Roy, Q. C.*, for the appellants.

M. Doherty, for the respondent.

(J. K.)

SUPERIOR COURT, 1874.

MONTREAL, 21st APRIL, 1874.

IN CHAMBERS.

Coram TORRANCE, J.

In re *The Montreal Patent Guano Company*, and *Francis C. Maude*, et al., es qual., Petitioners.

HELD:—That a judge in Chambers has no jurisdiction to appoint a curator to a dissolved corporation until its dissolution has been judicially pronounced in due course of law.

This was an application for the appointment of a curator to represent the Montreal Patent Guano Company, represented to be dissolved on the 16th February last, and to liquidate the affairs thereof. The application was made by Francis C. Maude, late a director and president of the Company which was incorporated by Letters Patent of the Lieutenant Governor of the Province of Quebec, of date 19th June, 1873, under an Act of the Legislature of Quebec, A.D. 1868, passed in the 31st year of Her Majesty's Reign intituled "an Act "respecting the incorporation of Joint Stock Companies." On the 19th March last, Mr. Justice Beaudry gave an order for the calling together of the creditors and shareholders of the Company on the 7th. April, when a meeting took place and an election of joint curators was made subject to the objections made by the Canadian Rubber Company, a creditor represented by D. Girouard, Esquire, to the regularity and validity of the appointment.

Mr. Girouard contended that assuming that the shareholders were unanimously of opinion that the Company should be dissolved and agreed accordingly, nevertheless only the Lieutenant Governor representing the Crown could grant the dissolution.

Mr. Wotherspoon for the petitioners contended that the Rubber Company being only a creditor, was without interest to oppose the nomination of a curator. The corporation was purely private, and could dissolve itself: C. C. 368, 369, 370. It was not a public corporation such as referred to in C. C. 369.

Mr. Geoffrion followed on the same side, citing C. S. L. C., cap. 88, s. 10.

Mr. Girouard in reply said that the Company was a *quasi* public corporation in which the public had a great interest, as if it were not well managed, it might be an intolerable nuisance. Further, C. S. L. C., cap. 88, provided a mode of dissolution.

PER CURIAM:—I do not find in the Act providing for the erection of these corporations any provision for their dissolution, and it is necessary to look at the anterior law. Stephens, Commentaries on the Laws of England, vol. 2, p. 187, enumerates five ways in which a corporation may be dissolved:—

1. By Act of Parliament; 2. By the natural death of all its members; 3. By the loss of such an integral part of its members as is necessary, according to the charter, to the validity of corporate elections; 4. By surrender of charter to the sovereign; 5. By forfeiture of charter. Kent in his lecture on corporations (Lecture xxxii) [p. 310, 311] discusses at some length the question under

Riddell vs. Reay.

consideration, and says: "The better opinion would seem to be, that a corporation aggregate may surrender, and in that way dissolve itself; but then the surrender must be accepted by Government, and be made by some solemn act, to render it complete." This is the general doctrine, &c." And again at page [312], he adds: "the old and established principle of law remains good as a general rule, "that a corporation is not to be deemed dissolved by reason of any misuser or "non-user of its franchises, until the default has been judicially ascertained and "declared." Mr. Kent refers in terms of commendation to the treatise of Messrs. Angell & Ames, and I do not find in it anything which justifies a different course. But our own Legislature, by Chapter 88 of the Consolidated Statutes of Lower Canada, enacts that certain proceedings may be taken against a corporation when its surrender has been decided upon. This enactment has been carried into our Code of Civil Procedure, C.C. P. 997—1015. I do not see any more summary way of obtaining the appointment of a curator such as is sought for in the present case than is there indicated. Here all that I have before me is the resolution of the shareholders that the corporation be dissolved. I do not see that the C. C. 368, 369, 370, helps me, and the conclusion I come to is that I have no jurisdiction by the present mode of proceeding to make the appointment of curator prayed for by the petition.

Appointment of curator refused.

I. T. Wotherspoon, for petitioner.
C. A. Geoffrion, for shareholders.
D. Girouard, for creditor opposing.

(J. K.)

SUPERIOR COURT, 1874.

MONTREAL, 30TH APRIL, 1874.

Coram BEAUDRY, J.

No. 312.

Riddell vs. *Reay*.

HELD:—1. That a party acquiring a claim under the circumstances and for the purpose mentioned in sec. 91 of the Insolvent Act of 1869, cannot oppose said claim in compensation.
2. That the transfer of such debt is null and void as against the insolvent's estate.
3. That in the present case the compensation could not be acquired under articles No. 1188 and 1196, Civil Code.

PER CURIAM:—Le six de Juillet, 1872, le défendeur achète de la maison Lusk, Lough & Castle vingt-cinq caisses d'eau de vie, pour le prix de $193.75, payable au premier de Décembre, 1872. Au commencement de Novembre, 1872, sur l'offre qu'on lui en fait, il achète de H. L. Robinson et Cie. un billet de Lusk, Lough & Castle de $212.38 payable le seize de Décembre, 1872, (c'est-à dire à quatre mois de sa date) pour $190 que le défendeur a payé par son propre billet à trois mois ou quatre mois. Le billet de Lusk & Co. ne lui fut livré que trois ou quatre jours après la convention faite, savoir le douze Novembre, avec endossement de Robinson & Co. mais sans recours. Le quatorze de Novembre Lusk, Lough & Castle font cession au défendeur qui est ensuite définitivement

nommé Syndic, et en cette qualité poursuit le défendeur pour recouvrement de la susdite somme de 6193.75 avec $20 d'intérôt.

A cette demande le défendeur oppose une exception de compensation par le billet ci-dessus et une défense en fait.

Le demandeur répond que le transport du billet a été fait au défendeur dans les trentes jours qui ont précédé la faillite de Lusk, Lough & Castle, et lorsque le défendeur savait qu'il y avait raison de redouter le solvabilité de ces derniers.

Que la créance du demandeur ne peut être compensée ou affectée par celle que le défendeur a ainsi acquise et que ce transport est nul et sans effet, ayant été fait en vue de la faillite des signataires du billet.

Cette réponse basé sur la section 91 de l'Acte de la Faillite me paraît bien fondée et dans les conditions du Statut.

Le transport du billet n'a été fait que le douze Novembre l'avant veille de la cession lorsque le défendeur connaissait les rumeurs qui circulaient sur les embarras financiers de Lusk, Lough & Castle. Il a acquis ce billet moyennant un fort escompte et en dehors de ses négotiations ordinaires, ainsi qu'il l'a avoué lui-même.

Mais en supposant même que la preuve sur ce point ne serait pas suffisante si l'on examine strictement la cause, on ne peut admettre la compensation plaidée vu qu'elle ne remplit pas les conditions voulues par les articles 1188 et 1196 C.C.

1° Les deux dettes n'étaient pas également *exigibles* lors de la faillite. Il est bien vrai que la cession faite aux demandeurs a eu pour effet de rendre toutes les dettes dues par Lusk, Lough & Castle et non encore dues, exigibles mais ce n'est pas parce que le terme stipulé était arrivé, mais pour mettre tous leurs créanciers sur le même pied (Esnault No. 171).

L'exigibilité dont parle le code devait s'entendre de l'exigibilité ordinaire et non de l'exigibilité forcée. Mais la dette du défendeur n'était pas alors échue puis qu'il avait délai jusqu'au premier de Décembre, et qu'on ne pouvait au jour de la cession opposer compensation de la part des faillis. D'ailleurs, le défendeur n'était pas reconnu d'eux comme créancier, du moins rien ne le fait voir.

Il est bien vrai qu'il était libre au défendeur de renoncer au bénéfice qui lui résulte du délai à lui accordé pour son achat, pourvu que cette renonciation ne soit pas interdite par les circonstances, ainsi que l'établit Pardessus vol. 1, No. 234, et Toullier, vol. 7, No. 381. La cession ici a fait passer tout l'actif des faillis à leurs créanciers, ce n'est qu'à la suite de cette cession que la créance du défendeur sur le billet en question est devenue exigible et déjà la créance de Lusk, Lough & Castle était entre les mains des créanciers et dès lors n'était plus susceptible de compensation sans contrevenir à l'art. 1196 du Code Civil ci-dessus cité.

Pour ces raisons je suis disposé à donner gain de cause au demandeur.

Perkins, Macmaster & Préfontaine, for plaintiff.

Monk, Butler & Cruikshanks, for defendant.

(J.A.P.)

SUPERIOR COURT, 1874.

MONTREAL, 30TH APRIL, 1874.

Coram TORRANCE, J.

No. 306.

Lewis et al. vs. *Jeffrey et al.*

HELD:—That neither party can rescind a contract, without replacing the other in the same position in respect to the goods as he occupied before the delivery of the article, nor without rescinding in *toto*.

PER CURIAM:—The plaintiffs complain that on the 15th May, 1873, through the agency of J. S. Noad & Co., the defendants purchased from plaintiffs 73 cases of Martell brandy at $7.25 the case, to be taken in bond, less duty and four months' interest on the duty. That defendants, with intent to defraud plaintiffs, proposed to them that they should accept a promissory note of James R. Lowden, payable to his own order at six months from 20th December, 1872, for $400 in part payment of the price of the brandy, although the defendants then knew that said Lowden was then insolvent. That plaintiffs were then ignorant of said insolvency, and made delivery of said brandy and received said note. That said note was not paid at maturity, (23 June, 1873), and on 13th August, 1873, plaintiffs protested said defendants and offered them back the note and required them to pay $400, balance due on said purchase. The declaration prayed that the agreement on the part of plaintiffs to accept of said note be declared to have been obtained by fraud, that defendants be condemned to take back the note and to pay the sum of $400, &c.

The plea of defendants was the general issue.

The evidence shows that proceedings were taken in insolvency against the firm of A. H. Lowden & Co., of which said James R. Lowden was member, in April, but they were resisted until the 17th May, 1873, on the ground that the insolvency did not exist. These proceedings were taken at the suit of the creditors of the insolvent firm of Lusk, Lough & Castle, and among the inspectors of this last firm was one of the defendants, who were aware from the beginning of the proceedings against A. H. Lowden & Co.

About the 14th May, Charles Jeffrey, one of the defendants, called on James S. Noad and asked him to buy the note in question, and then said the note was quite good enough and he was quite satisfied it would be paid; that it was a good note. He also said he was willing to take goods in payment. Noad then offered the note to plaintiffs in payment of 73 cases of brandy to be purchased. Mr. Lewis, one of the plaintiffs, said he would make inquiry, which he accordingly did at the Mercantile Agency, and accepted the note a day or two after it was offered. The brandy went into possession of the defendants on the 17th May, and remained till 24th June, when defendants transferred it to A. R. Bell. The assignment of A. H. Lowden & Co., as insolvents, appeared in the newspapers on the 22nd May, and was made on the 17th May, five days before. The purchase of the brandy by the defendants was at the rate of $7.25 the case, and the sale by them to Mr. Bell, on the 24th June, was at $6.62.

I am satisfied, as a matter of fact, that the defendants knew or ought to have known of Mr. Lowden's insolvent condition on the 15th May, for as creditors of Lusk, Lough & Castle, they took the position that Mr. Lowden's firm was insolvent, and this position was admitted by them on the 15th May. They say that they did not know the position of Mr. Lowden as an individual, but only considered that of his firm, and a firm may be insolvent, while an individual partner may be quite solvent. That is true, but it is also true that the assignment by the firm would involve the assignment of the estates of individual partners. So held *In re* Macfarlane, 12 L. C. J., 239. Knowledge of the worthlessness of the note is therefore brought home to the defendants, and plaintiffs have well contended that the defendants at the sale warranted that they had then no knowledge of any facts, which proved the note, if originally good, to be worthless by the failure of the maker, for any concealment of this nature would be a manifest fraud. Story: Prom. Notes, § 118. But here another important question presents itself. Have the plaintiffs begun this action *en temps utile* with due diligence? Have they with reasonable despatch offered to place the defendants where they were before the exchange of the brandy for the note in question? The insolvency was published on the 22nd May. They allowed the defendants to hold the brandy in their own possession for upwards of a month, till the 24th June, when it was sold by the defendants to Mr. Bell, and another unaccountable delay of nearly two months more elapsed before the plaintiffs formally put the defendants *en demeure* to pay them the amount of the note in place of claiming back the brandy. The principle which underlies the rule of our Civil Code, Article 1530, should certainly have its application here. "The redhibitory action, resulting from the obligation of warranty against latent defects, must be brought with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made." "Il faut surtout avertir le vendeur diligemment, et agir promptement." Delamarre & Le Poitvin; Droit Commercial; Tom. 5, pp. 269, 270, n. 193. Story on Sales, § 427, and foot note. "Neither party can rescind a contract, without replacing the other in the same position in respect to the goods as he occupied before the delivery of the article, nor without rescinding *in toto*." In Benjamin on Sales, pp. 351–9 we read: "If, in consequence of his delay, the position even of the wrong-doer is affected, he will lose his right to rescind." This principle was affirmed in Clough *vs.* The London and North Western Railway Co., L. R. 7 Ex. 26 and reaffirmed in Morrison *v.* The Universal Marine Insurance Company, 10th May, 1873, in the Exchequer Chamber. The Cour de Cassation has frequently applied the principle, and the latest case to which I have had access is in the Journal du Palais, A.D. 1872, p. 532. This Court applied the principle in Ross *v.* Baker, first adjudged by Mr. Justice Mackay and afterwards confirmed in Review on the 31st October, 1871, and also in the case of Lapointe *vs.* Allard, decided on the 9th July, 1873.

The Court dismisses the action.

Action dismissed.

Abbott, Tait & Wotherspoon, for plaintiffs.

Perkins, Macmaster & Préfontaine, for defendants.

(J. K.)

SUPERIOR COURT, 1874.

QUEBEC, 9th APRIL, 1874.

Coram MEREDITH, C. J.

No. 1252.

Legaré vs. The Queen Insurance Company.

HELD.—A creditor cannot divide his claim, so as to subject the debtor to several actions on one contract.

MEREDITH, C. J. :—The plaintiff by his declaration alleges that he had a claim against the defendants (under a contract of insurance) for $8000, and he further alleges that he has transferred parts of it to:—

Cirice Tétu	$1208 00
William Venner	732 00
Frost W. Gray	2488 00
Building Society	485 00

leaving a balance of $2887,—for which the present action is brought.

The defendant has demurred on the ground that the plaintiff could not, according to law, and more particularly under the *Article* 1122 of the *Code Civil*, divide his claim, and sue for a part of it, as done by the present action.

At the argument, I adverted, as was to be expected, to the judgment recently rendered by me in the case of *Tétu vs. Garneau*, in which I held in effect "that "a debt cannot be divided so as to admit of several actions being brought upon it." Thereupon, I was informed that that judgment had been appealed from; it may, therefore, be well to place together some of the authorities by which I was guided in *Tétu vs. Garneau*, and which, in my opinion, establish beyond doubt that the attempt made by the plaintiff to subject the defendants to as many actions as he likes, upon a single contract, ought not to be successful.

Toullier, Vol. 7, *page* 148, *No.* 120, *Note* 1, says:

"S'il n'avait cédé qu'une partie de sa créance, un quart, une moitié, etc., "le subrogé aurait pour cette partie les mêmes actions que le subrogeant; "*mais le débiteur pourrait exiger qu'ils se réunissent tous les deux pour recevoir* "*en même temps la totalité de la dette*, car le créancier ne pouvait directement "forcer le débiteur à payer par proportions, (voy. Dumoulin de divid. et individ., "2nd part., Nos. 6 et 7; et ce que nous avons dit tome VI., No. 750), il ne peut "l'y forcer indirectement, et par son seul fait, en divisant la créance entre lui et "le subrogé, afin de ne pas exposer ce dernier à deux actions, à deux procès au "lieu d'un : *ne creditor, debitore invito de unâ eâdemque lite duas facere posset.*"

Duvergier, Vol. 2, No. 226, lays down the same doctrine in almost the same words. Troplong *vente, Vol.* 2, *p.* 507, *No.* 923, on the same subject, expresses himself as follows:—"Et s'il a été cédé partie de la créance, il ne doit pas être tenu de payer partiellement, il peut exiger que le cédant et le cessionaire se réunissent pour recevoir en même temps la totalité." And see, as establishing that when capital and interest are both due and exigible, the creditor cannot sue for interest alone: *Actes de Notoriété*, p. 8, n. B; *An. Deniz. Vo. Intérêt*, Nos. 6 and 7, Vol. 2, p. 510.

Marcadé, (Vol. 4, p. 492, No. 637) was referred to as an authority in favor of the plaintiff. What Marcadé says is simply that a single creditor may sell his claim to several persons; that is true, but it does not follow that each party, having a portion of the claim, can sue for it by himself; yet that is what is attempted in the present instance.

In the case of the *Quebec Fire Assurance Co. vs. Molson*, 1 *L. C. R.* 222, the plaintiffs, as assurers, had been subrogated on payment of the loss, in the rights and actions of the assured, but *for a part only of the loss*; and one of the grounds upon which the Court of Appeal—present, Sir James Stuart, Judges Bowen, Panet, Bedard, Mondelet and Gardiner—held that "the declaration doth "not set forth or show a legal cause of action against the said appellants" was, "that the said assignment, as in the said declaration alleged, was made *of a part "only of the damages claimed.*"

The Privy Council were of opinion that that ground of defence could not be taken advantage of under a plea of not guilty, or denial of the truth of all the matters alleged. But Baron Parke, in rendering the judgment, observed: "It seems to be reasonable that the quasi debtors should not be liable to a double action," and added, "The defendants, therefore, must have a remedy to prevent that injustice," (1 L. C. R. 235), and he then referred approvingly to the passage in Toullier, already cited.

The present case is a much more unfavorable one for the plaintiffs than the *Quebec Fire Assurance Co. vs. Molson*. There the division of the claim could hardly be deemed a voluntary act; whereas here the plaintiff by his declaration shows that, for his own convenience or interest, he has divided his claim into five different parts, thus, according to his pretensions, subjecting the defendants, on one contract, to five actions; and if he could do that, he could—the claim being for $8000.00—have subjected the defendants to eighty actions in the Superior Court.

In the words of Baron Parke, delivering the judgment of the Privy Council, I think I may say, "The defendants must have a remedy to prevent that injustice."

It may, however, be said that the defendants ought to have pleaded by exception but not by a *défense en droit*. But, it seems to me, it is sufficient for the defendants to show that the plaintiff is wrong upon the face of his proceeding, without going a step farther and pointing out to him how he may put himself right.

As I had occasion to say in *Têtu vs. Garneau*, it would hardly be contended that a debtor could compel a creditor to receive a payment on account; and yet, in principle, there is the same objection against compelling a debtor to *make* a payment on account, that there is against compelling a creditor to receive a payment on account. Larombière's words on this subject are: "L'obligation "même susceptible de division doit en effet être executé entre le créancier et le "débiteur, comme si elle était indivisible, et le débiteur ne peut point forcer le "créancier à recevoir un paiement partiel de la dette, pas plus *que le créancier "ne peut forcer le débiteur à faire un paiement partiel.*"

This case being one of some importance, I have thought it right not to con-

Balmer et al. vs. Browne.

fine my attention to the Article 1122 of the Civil Code referred to by the defendants, which is in these words: "A divisible obligation must be performed "between the creditor and the debtor, as if it were indivisible. The divisibility "takes effect only with their heirs or legal representatives, who, on the one hand, "cannot enforce the obligation, and, on the other, are not held for the performance of it beyond their respective shares as representing the creditor or the debtor."

But in my opinion that Article is quite sufficient to dispose of the plaintiff's action.

It is true, the obligation sued on is divisible; but between the debtor and creditor, it must (according to *Article* 1122 C. C.) be performed as if it were indivisible; and, such being the case, the plaintiff could not divide the obligation into five parts, and then seek to enforce payment of one of the five parts by itself, against the alleged debtors, leaving to the four transferrees to enforce the other four parts.

For these reasons, I think the demurrer must be maintained, and the action dismissed. Action dismissed.

Hamel & Tessier, for plaintiff.
Holt, Irvine & Pemberton, for defendants.
(H. I. & P.)

COURT OF REVIEW, 1873.

MONTREAL, 31st MARCH, 1873.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

No. 756.

Balmer et al. vs. *Browne.*

A, an architect, wrote a letter to B, bricklayer, in terms following: C "has contracted for the brick work of D's house, and the bricks he will require will be paid for as may be required by you."

HELD:—The above letter contained an undertaking upon the part of A to pay for the bricks if C did not do so.

The evidence showed that the bricks had been supplied upon the security and faith of the above letter, and that the plaintiffs had vainly endeavoured to collect the price from the contractor Wand. Defendant pleaded in substance that the letter in question was not a letter of guarantee, and that it had never been accepted.

As to the acceptance plaintiffs' counsel argued that a formal acceptance was not necessary, for the letter expressed an absolute engagement. It was an absolute guarantee, and plaintiffs had a right to act upon it without further communication. Burge, suretyship, p. 16 and 17.

The architect Browne knew that his letter had reached, and that plaintiffs

were acting on it and furnishing the bricks, for he saw the bricks delivered, and he used them. He it was who ordered specially and personally the last quantity of bricks to finish the house. Notice of acceptance was not required of what is already known. See Holcomb Leading Cases, p. 192 and 24 Wend. 35, case of Douglas vs. Howland, where it is said that the cases requiring notice have no foundation in English jurisprudence.

The following was the judgment of Mr. Justice Mackay, which was confirmed by the Court of Review :—

The Court, etc.....

Considering that by his letter to plaintiffs, dated fifth July, one thousand eight hundred and seventy-one, the defendant made assurance and undertaking towards plaintiffs that any bricks for Mr. Roe's house that Mr. Wand, meaning Messrs. Thomas & Charles Wand, would require and that plaintiffs would deliver to them, would be paid for; that by reason of the premises and of the facts proved in this cause, among them the fact of plaintiffs having upon the strength of said letter, delivered bricks, as alleged in plaintiffs' declaration, for Mr. Roe's house to said Thomas and Charles Wand; the fact of Messrs. Thomas and Charles Wand not having paid for said bricks, but owing now one hundred and fourteen dollars and ten cents to plaintiffs on account thereof, and the fact of the bricks last delivered by plaintiffs having been delivered upon the strength of said letter and at the particular, further, verbal request of defendant, while the defendant's original obligation towards plaintiffs was yet subsisting, defendant is liable to pay plaintiffs said one hundred and fourteen dollars and ten cents, balance unpaid to plaintiffs as aforesaid;

Considering that plaintiffs have sufficiently proved of their allegations of declaration to entitle them to a judgment against defendant for one hundred and fourteen dollars and ten cents, being balance due on the value of bricks required by Messrs. Thomas & Charles Wand and delivered to them at defendant's request by plaintiffs for the brick work of Mr. Roe's house, and for which defendant bound himself, to wit, by his letter of fifth July, one thousand eight hundred and seventy-one, and also by parol, to pay plaintiffs;

Considering that plaintiffs' costs of suing the Messrs. Wand cannot be allowed, doth condemn said defendant to pay and satisfy to said plaintiffs the said sum of one hundred and fourteen dollars and ten cents with interest thereon from the eighth day of March, one thousand eight hundred and seventy-two, date of the service of process, until paid, and costs *distraits* to H. W. Austin, Esq., attorney for plaintiffs, the Court hereby dismissing the rest of plaintiffs' action and *demande*.

Judgment confirmed.

H. W. Austin, for plaintiff.
A. & W. Robertson, for defendants.
(J. L. M.)

SUPERIOR COURT, 1874.

IN CHAMBERS.

MONTREAL, 15TH MAY, 1874.

Coram TORRANCE, J.

No. 1430.

Bélanger vs. *McCarthy*,

AND

The Imperial Insurance Company of London, Garnishees.

HELD:—1. That a *saisie arrêt* before judgment will not lie against a tenant, without an affidavit charging him in the usual form with an intent to defraud.

2. That the *hypothèque* upon a thing does not pass to the indemnity in the hands of an insurer against fire.

TORRANCE, J.:—The plaintiff sued out an attachment before judgment not under the C.C.P. 834 charging fraud, but on an affidavit setting out in effect that the defendant had been his tenant of certain premises at $450 per annum; that on the night between the 20th and the 21st April, 1874, the premises were destroyed by fire through the fault of defendant, causing plaintiff damage to the amount of at least $4000; that all the moveables of defendant were destroyed at the same time so that plaintiff was without any *gage* to answer for damages caused to said property by defendant; that defendant had insured against fire said moveables, with the Imperial Insurance Company of London for $3000, which sum was due to defendant;

"Que le dit James McCarthy n'a aucune propriété et ne vaut absolument rien. Le deposant dit de plus que la dite somme de $3000 provenant de la destruction des dits meubles et effets entre en leur lieu et place comme gage pour le dit deposant, et ce dernier croit vraiment en son âme et conscience que sans le bénéfice d'un bref de saisie arrêt avant jugement pour saisir et arrêter la dite somme de $3000, il perdra sa créance et souffrira des dommages d'autant."

Upon this affidavit a writ of *saisie arrêt* before judgment was issued in the usual form attaching all moneys in the hands of the Imperial Insurance Company.

The defendant has petitioned to have the attachment annulled on the ground that an attachment does not lie for the reasons given in the affidavit. The legality of such attachments was fully discussed in the case of Graham v. Côté, 16 L.C. Jur. 307, by the Court of Queen's Bench which reversed the judgment of the Court of Review. Following that judgment by the Court of Queen's Bench, there is no difficulty in holding that the attachment is illegal and that the petitioner is entitled to the conclusions of his petition. I would further remark upon the merits of the claim made by the plaintiff against this sum of money as his *gage* that I am satisfied that the pretension of the existence of such a *gage* has not been allowed in the American Courts. Phillips on Insurance. Vol. 1, N. 405; Vol. 2, N. 1962. In France the authors had been some what

divided in opinion. The Cour de Paris, 13 March, 1837, allowed the *gage*, but the *Cour de Cassation* decided against the pretention on 20th December, 1859, reported: Sirey, A.D. 1860. 1, 24, and J. du Palais, A.D. 1860, p. 146. Following this decision and approving of it, we have an article on the subject in the Revue Critique (Paris) Tom. 17, p. 450; and the *Cour de Douai*, 2nd December, 1869. Sirey, A.D. 1870 p. 295, 2nd Part., followed the *Cour de Cassation*. In the volume of Sirey 1870 the editor says in a foot note "c'est là un point "aujourd'hui généralement admis." I would refer counsel to the references in Sirey to the authors, and to other decisions there given. Troplong, Hypotheques Tom. 4, N. 890, speaking of the parallel case of a hypotheque on a house, says: "Je ne conçois pas comment on peut trouver dans ce cas une difficulté. L'hypothèque est éteinte par la perte de la maison; *re corporali extincta, hypotheca perit.* Comment donc pourrait-elle atteindre la somme, qui n'est allouée que *ex post facto* à titre d'indemnité pour le propriétaire? D'ailleurs, cette somme d'argent est purement mobilière; elle n'est et ne peut être subrogée à la maison, d'après tous les principes sur la subrogation."

H. F. Rainville, for plaintiff.

J. J. Curran, for defendant.

(J.K.)

Petition granted.

SUPERIOR COURT, 1874.

In Insolvency.

MONTREAL, 11th MAY, 1874.

Coram TORRANCE, J.

No. 341.

In the matter of John A. McCarville,

and

Insolvent;

Louis J. Lajoie,

and

Assignee;

Ephrem Hudon, et al.,

Petitioners.

Held:—1. That creditors upon an Insolvent estate being the parties interested therein are not bound to accept the highest tender for the assets of the estate under sale thereof made en bloc under section 41, of the Insolvent act of 1869.

2. That the judge in Insolvency will not interfere to rescind the vote of the majority of such creditors made at meeting called for the purpose legally held unless fraud be proven.

The insolvent assigned the 3rd March, 1874. At the meeting of creditors the 23rd March, 1874, called for the purpose of electing an assignee, the creditors resolved to accept an offer then made of 62½ cents on the $ upon the liabilities for the total assets. This offer was made by Ste. Marie Bros. These proceedings were by counsel held invalid, but a special meeting was called under section 41

Marchesault vs. Gregoire.

of the Act. Other tenders were made by J. H. Doré (13s. 9d. in the £), R. Gohier (14s. 6d. in the £), J. O. Guilmette (14s. 6d. in the £).

The only tender accompanied by offer of security was that of Ste. Marie Brothers. The creditors (petitioners dissenting) resolved to accept the latter offer. Petitioners pray for order upon the assignee restraining him from transferring the assets, and they pray for declaration of nullity of proceedings and that assignee be ordered to call for new tenders. The creditors examined prove that the offer accepted was an excellent offer and security unimpeachable. The judge decided as above mentioned.

Petition rejected with costs.

Rainville & Rainville, for petitioners.
Perkins, Macmaster & Préfontaine, for assignee.
(J.A.P.)

COURT OF REVIEW, 1873.

MONTREAL, 31ST MAY, 1873.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

No. 264.

Marchesault vs. *Gregoire.*

HELD:—The fact of the plaintiff's having had the defendant punished for assault, by a Recorder's Court, is no bar to his proceeding to recover damages for the assault, before another Court.

The defendant was tried and convicted for assault, before the Recorder's Court, Iberville.

The plaintiff afterwards instituted, before the Superior Court, an action for $800.00 damages against the defendant, which he claimed were caused through said assault, and judgment was rendered in the plaintiff's favor for $31.00 and interest and costs as of an action of the first class.

The defendant inscribed in Review. One of his principal pretensions was that because the plaintiff had had him condemned before the Recorder's Court, he had thereby renounced any right to claim damages.

The plaintiff contended that the condemnation before the Recorder was simply a punishment made in the interests of public peace and order, and that plaintiff had never given up his right to claim damages.

Judgment confirmed.

J. A. Perkins, for plaintiff.
Cassidy & Lacoste, for defendant.
(J. L. M.)

COURT OF QUEEN'S BENCH, 1874.

[CROWN SIDE.]

MONTREAL, 9th APRIL, 1874.

Coram RAMSAY, J., and SANBORN, J.

Ex parte *The Grand Trunk Railway Company of Canada; and* exparte *C. J. Brydges.*

HELD:—1. That under sect. 11 of 32 & 33 Vict. cap. 29, a judge of the Court of Queen's Bench sitting in the Montreal District may direct the trial of a person charged with the commission of an offence in the Quebec District to take place in Montreal; the power to change the venue not being limited to a judge sitting in the District where the offence is alleged to have been committed.

2. An improper finding of a Coroner's inquest may be quashed on a rule.

3. A Coroner's inquisition is identical with an indictment, and the omission of the words "feloniously" and "slay" in an inquisition of manslaughter is fatal.

4. The managing director of a Railway company is not liable to indictment for manslaughter by reason of the omission to do something which the company was not bound to do by its charter, though he had personally promised to do it.

Argument was had on the merits of the rules returned on behalf of the Grand Trunk Railway Company and Mr. C.J. Brydges for the quashing of the inquisition held on the body of the late Pierre Cauchon at Point Levis, in January last, and also the rule on behalf of Mr. Brydges for the discharge of his recognizance. (*Vide ante, p.* 94)

Macrae was heard in support of the rules and *Carter, Q.C.*, also addressed the Court on the same side. *Irvine, Q.C.*, representing the Crown, urged several objections to the rules, and amongst them a question as to jurisdiction.

Judgment was rendered by the Court declaring the three rules absolute, and ordering Mr. Brydges' discharge.

RAMSAY, J.—These are three rules *nisi* which have been obtained, the two first to quash certain portions of an inquisition taken before the Coroner of the district of Quebec, on the body of one Pierre Cauchon who was killed by a railway train of the Grand Trunk Railway Company of Canada at a level crossing of the highway and the railway in the said district.

Before entering on the merits of these rules it becomes necessary to deal with a question of jurisdiction which has been raised on the part of the Crown. It is urged that this case is not properly before us, and that if it is, that the law under which it is brought before the Court, sitting in this district, is of so inconvenient and dangerous a character that it should be altered. With the inconvenience of the law we have nothing to do; neither ought we to express any opinion as to whether the grounds on which the learned Judge who gave the order to change the venue were slight or not, provided he had jurisdiction. The whole question rests on the interpretation of Section 11 of the Criminal Procedure Act of 1869 (32 & 33 Vic. c. 29.) That Section is in these words: "Whenever it appears to the satisfaction of the Court or Judge hereinafter mentioned that it is expedient to the ends of justice that the trial of any person charged with felony or misdemeanor should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the Court at which such person is or is liable to be indicted may, at any term or sitting thereof, and *any Judge who might hold or sit in such Court* may at

Ex parte The Grand Trunk Railway Company of Canada; and ex parte C. J. Bryçges.

any other time, order, either before or after the presentation of a bill of indictment, that the trial shall be proceeded with in some other district, county or place within the same Province, to be named by the Court or Judge in such order, &c." We have only to ask whether, at the time this order was given, Judge Badgley was a Judge who might hold or sit in the Court of Queen's Bench. If so, he had jurisdiction.

But we are told that the statute evidently intended that the judge giving the order should be actually sitting in the district in which the offence is alleged to have taken place. There is no trace of any such intention in the statute, and there is no rule of interpretation of statutes so well established as this, that where the words of a statute are clear and sufficient they must be taken as they stand. If courts take upon themselves, under the pretext of interpreting the law, to diminish or extend the clearly expressed scope of a statute, they are usurping the powers of the Legislature, and assuming a responsibility which in no way devolves on them. In the particular case before us it does not appear clear to my mind that it was the intention of the Legislature to limit the power to change the venue to a judge sitting in the district where the offence was said to be committed. In the first place, our statute goes far beyond the old law, which, I believe, is still unchanged in England. Not only is the power given here to a Judge in Chambers to change the venue, but he may do so before the bill of indictment is either laid or found. The object, then, was to protect a man from being even put to trial by a prejudiced grand jury, and this could only be effectually done by giving the power to any judge who could hold or sit in the Court to change the venue, for it will be observed that in 1869 when the Act was passed there were many districts in this Province in which there was no resident Judge, and in Ontario the Judges of the Superior Courts of Law all live in Toronto, and so far as I know in each of the other Provinces, they live in the capital town. Unless then there was to be a particular provision for the Province of Quebec the law had to be drawn as we find it. Besides this the Court of Queen's Bench is not for the District, but for the whole Province. The object of dividing the Province into districts is for convenience in bringing suits, but the jurisdiction of the Court is general. This has never been doubted, and it has been the practice both in England and in this country to bail in the place where the prisoner is arrested. In the case of Blossom, where the taking of bail was vigorously resisted by the Crown, this Court, sitting at Quebec, bailed the prisoner, who was in gaol here. This is going a great deal further, but the power of the Court to bail was not, and I think could not be, questioned. We are told that great inconvenience might arise if this statute be not restrained. This is really no valid objection to the law. There are no facultative acts which may not be abused one way or another. A discretionary power involves the possibility of its indiscreet exercise, but that is not ground for us to annul the law creating it. In this case the inconveniences referred to are not specially apparent—the prisoner arrested in Montreal was bailed there, and made his application to have the venue changed to the District where he resided and where he actually was. The order made by Mr. Justice Badgley could hardly then be used as a precedent for an abusive use of the statute. It must be understood in saying

this I do not refer to the sufficiency or insufficiency of the affidavit on which the order was given, which is not in any way before us, but solely to the circumstance of the accused being actually before the judge here. As the point is a new one, and as questions of jurisdiction are always delicate, we would willingly have reserved it for the decision of all the judges; but the act allowing us to reserve cases is unfortunately as much too narrow as the statute before us appears to Mr. Ritchie to be too wide in its phraseology. We can only reserve after conviction, and irregular reservations for the opinion of the judges have no practically good results. We must therefore give the judgment to the best of our ability, and I must say for my own part that I cannot see any difficulty in the matter. The words of the statute are perfectly unambiguous, and there is no reason to say that they lead to any absurd conclusion.

On the merits of the rules to quash a portion of the inquest there can be very little to say. The finding is totally insufficient in form. It sets forth no offence punishable by law, and if it is intended to accuse of manslaughter it does not contain the necessary words. There is no allegation that the Managing Director of the Grand Trunk Railway did feloniously slay and kill Pierre Cauchon. As an indictment, then, the finding could not stand on demurrer, and the authorities are clear that an improper finding may be quashed in whole or in part on a rule as it is now moved. But the form of the finding is not its only defect. It is bad in substance. The finding undertakes to set up the facts exactly as in the *Culley* case, and those facts disclose no offence. The jury find that the deceased came to his death by no fault of those driving and managing the engine and train, but by the omission of the Company to do what the Company was in no respect bound to do, and because the Managing Director had not acceded to demands made upon him to perform acts for the Company beyond the exigencies of the laws by which it is incorporated, and which are not imposed on it by the general railway acts. A distinction was attempted to be made on the part of the Crown between the Company and Mr. Brydges. It is said that the facts set up only apply to the Company and not to Mr. Brydges. This is rather subtle. It is not easy to see that the jury did not impute the failure to put gates and a guardian to Mr. Brydges, and that this failure was the whole motive of the censure in the finding. If the failure to put gates and a guardian were not a fault in him, what bearing had the letters beseeching him to do these things on the matter? Whether then we look at the form or the substance of the portions of the finding complained of, it is evident that, so far as complained of, it must be quashed and the two rules be declared absolute. I do not wish, however, to be understood to say that I think a servant of a railway company cannot be held liable for an error of omission as well as for an error of commission. It will not be questioned that an engine driver may be indicted for manslaughter if he causes the death of any one by omitting to take any of the usual precautions in driving his engine. A case of his kind actually occurred in 1868. It went to the Petty Jury and the prisoner was acquitted on the facts. His legal responsibility was not doubted. If an engine driver can thus become liable for an omission, I cannot see why a managing director should not become liable also if he omits to do what the law imposes,

Ex parte The G. T. R. Co. of Canada; and C. J. Brydges.

and what he undertakes to see done. Of course the scope of his functions is a matter of fact to be considered; but names have a meaning, and "managing director" may signify a good deal.

The third rule will be declared absolute, as a matter of course, if the Crown has no reason to oppose.

SANBORN, J.—After the carefully prepared judgment rendered by the President of the Court, very little requires to be said by me. The subject, however, is an important one, and having been requested to assist at the hearing, by the President of the Court, it is reasonable and proper that I should express my views.

First, as to the jurisdiction. It is objected that the venue was improperly changed, and that this inquisition ought to be before the Court at Quebec. If we are not legally possessed of the inquisition, of course, we cannot entertain these motions to quash. This has been fully and exhaustively treated by the President of the Court. It is merely for us to inquire, had Mr. Justice Badgley the power to order the trial to take place here instead of in the District of Quebec where the accident occurred? The 11th section of the Criminal Procedure Act undoubtedly gives that power. He was a judge, entitled to sit at the court, where the party was sent for trial. The jurisdiction of any of the judges of the Queen's Bench is not local for any district, but extends to all parts of the Province. As to the discretion exercised in making the order, or the sufficiency of the grounds upon which it was granted, these are not subjects for our inquiry. The common law discourages change of venue, and it is only to be granted with caution and upon strong grounds.

It, however, may be observed that the right to trial in the vicinity of where the offence took place is mainly established in the interest of the accused, and further, it should be noticed that the charge made against Mr. Brydges was unlike ordinary crimes, where the accused is charged with direct agency in the commission of the crime. His liability of a criminal character, if existing at all, must arise from rules or orders made here, where is the *local* of the Company of which he was the manager.

Coming to the inquisition itself, before speaking of its sufficiency in form or substance, I would remark that I consider it the right of the Court to look at the evidence sent up. The inquisition being identical with an indictment, it is subject to the same rules generally, as respects a motion to quash. An indictment may be quashed from matters brought to the attention of the Court outside of it, and even, if susceptible of being reached, for illegal acts of the Grand Jury. One of the grounds on which an inquisition may be quashed is malpractice of the coroner, which can only be determined by examining his proceedings. Our Statute 32 & 33 Vic., c. 30, sec. 60, requires that when any person is indicted for manslaughter, the coroner shall, in the presence of the accused, put the evidence in writing, giving the accused party full opportunity of cross-examination. This is a sacred right affecting the liberty of the subject. It was not done, and the Court only discharge their duty in noting it as an element in their decision, as well as an important suggestion for coroners in future.

The inquisition, so far as relates to the Company, is invalid, because it does not declare the Company guilty of any breach of public duty enjoined by law. A Corporation can only be indicted for causing to be done what the law prohibits, or omitting to do what the law requires. There is a distinction in this particular as respects indictments and torts; as a Company may be responsible for negligence and want of ordinary prudence in the exercise of even legal powers as a tort.

The inquisition, as containing a criminal charge against Mr. Brydges, is wanting in the essential elements of an indictment. If he were guilty of manslaughter, all the authorities say the acts of which he is guilty should be set forth with particularity and precision. This is necessary to disclose a crime, for no person is to be put to trial upon a charge less than a crime. The conclusion does not contain the words "feloniously" and "slay," which are requisite even in the short form of indictment, for manslaughter under our Procedure Act. No trial could be had upon this indictment and it ought to be quashed.

It is proper to observe that any person, whether a manager, agent, or holding no official relation to the railway, may be guilty of manslaughter, not merely for violation of law, or disobedience to rules established by the Company according to law, but even in doing what is, in itself, legal, if the act or acts are done with malice or gross negligence whereby a life is lost. The act or gross negligence must have some direct agency with the death. I may conceive it possible that a case might occur in which the manager of a company might cause the Company's trains to be run or controlled under circumstances where human life is put in hazard, so recklessly and with so little regard for the safety of individuals as to expose himself to indictment for manslaughter in case of loss of life being occasioned by literal obedience to his orders. It must, however, be a case very different from this. I think Mr. Brydges is morally blameable for not doing what he promised to do, in not placing a watchman at this dangerous crossing. He was warned of its unusually dangerous character and admitted it, and promised the Attorney General that he would place a watchman there. He did not do it, and sad consequences resulted. While he promised what the law did not compel him to promise, or perform, he cannot be indicted for failing to fulfil the promise, but he cannot be fully exonerated from blame.

Mr. Justice RAMSAY then inquired of Mr. Ritchie, Q.C., as representing the Crown, whether he had any reason to oppose against the third rule, viz: for the discharge of Mr. Brydges' recognizance, and Mr. Ritchie declaring that he had none, rule was declared absolute, and the discharge ordered accordingly.

T. W. Ritchie, Q.C., for the Crown.

Carter, Q.C., and *Macrae*, for the defendant.

(J.K.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 20TH SEPTEMBER, 1873.

Coram DUVAL, Ch. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 69.

THOMAS S. BROWN *et al.*, APPELLANTS;

AND

THE MAYOR, &c., OF THE CITY OF MONTREAL, RESPONDENTS.

HELD:—That neither the S.C. nor any judge thereof had power to remove commissioners appointed for purposes of expropriation under the Stat. 27th and 28th Vic., ch. 10, and appoint others in their stead, on the ground that they were pursuing a vicious and illegal mode of expropriation.

This was an appeal from the judgment of the Hon. Mr. Justice Berthelot, as a judge of the S. C. at Montreal, rendered on the 13th of Sept., 1870, and reported in the 16th Jurist, p. 1 and *seq.*

DUVAL, Ch. J., (*dissentiens*) remarked, that there was no attack on the character of the commissioners, in the written judgment in the Court below, and that there was, therefore, no pretence of a ground for coming before this Court and complaining as they did of that judgment.

TASCHEREAU, J., in the name of the Court, pronounced the following judgment:—La Cour * * * Considérant que les appelants ainsi que Damase Masson, Ecuyer, de la cité de Montréal, furent régulièrement le 14 jour d'avril, 1868, appointis commissaires conformément au statut du Canada passé dans la 27 et 28 année du règne de sa Majesté la Reine Victoria, dans la chapitre soixante, à l'effet de constater le prix en compensation à être payé à l'Honorable Charles Wilson pour partie de sa propriété requise par la Corporation de la Cité de Montréal pour l'élargissement de la rue St. Joseph.

Considérant que les dits commissaires après avoir accepté comme le statut susdit les y obligeait sous une penalité, la dite charge de commissaires, et après avoir été duement assermentés, ont procedé à l'exécution de leurs devoirs et ont fait en la matière à eux soumise un rapport préliminaire d'évaluation qu'ils ont plus tard modifié et considérablement réduit le chiffre de l'indemnité à être accordé après consultation avec les parties interessées;

Considérant que le dixieme jour d'avril 1868 les intimés présentèrent deux Requêtes par lesquelles ils demandèrent la destitution des deux dits commissaires et aussi les présents appelants, sur les principes qu'ils n'avaient pas remplis leur devoir fidèlement, diligemment et impartialement, et de fait acousant les appelants de partialité et fraude;

Considérant que les appelants ont contesté les dites Requêtes et ont été admis sans objection de la part des intimés à faire valoir leur défense, et à entendre nombreux témoins, et pour ce ont retenu et employé des avocats;

Considérant que par jugement intitulé comme prononcé par la Cour Supérieure présidée par son Honneur M. le Juge Berthelot, en date du dit septième jour de Septembre 1870, les conclusions des dites Requêtes furent accordées sur le seul principe que les dits appelants en exécution de leur devoir de commissaires en expropriation avaient commis une erreur de jugement, et avaient pris pour bases de leur rapport de fausses idées d'expropriation;

Considérant que la dite cour a entièrement écarté comme non fondés les reproches faits aux dits appelants de manque de diligence, de fidélité dans l'exécution de leur devoirs, et surtout les reproches de fraude et de partialité, et que sous ce rapport le dit jugement est non blamable;

Considérant que par la loi du pays il y a appel à la Cour du Banc de la Reine de tout jugement rendu par la Cour Supérieure ou par tout tribunal ayant juridiction concurrente;

Considérant que ce jugement rendu en la présente cause et dont il est actuellement question est par la loi sujet à appel devant cette Cour du Banc de la Reine soit qu'on le considère comme jugement final ou simplement comme jugement interlocutoire;

Considérant qu'en supposant que ce jugement ne fut qu'interlocutoire et que comme tel il ne put être soumis à appel devant le tribunal actuel qu'après que les appelants en auraient obtenu la permission, les intimés en ne faisant pas apparaitre dans les delais voulus et en la manière exigée par le code de procédure de leur objection en droit d'appel *de plano* des appelants, ont virtuellement admis le dit droit d'appel, et ont dispensé les appelants de la formalité de demander la permission au présent tribunal d'appeler du dit jugement;

Considérant que le dit tribunal de la Cour Supérieure présidé par le dit Honorable Juge Berthelot ne pouvait pour aucune autre cause que celles mentionnées en la sous section neuvième de la section treizième du statut sus dit (27 et 28 Victoria, ch. 60,) démettre les dits appelants de leur charge de commissaires ou suspendre leur procédés, et pouvait encore moins substituer sa propre estimation ou celle de certains témoins à celles des dits commissaires seuls chargés d'évaluer l'indemnité;

Considérant que le dit tribunal en prononçant le jugement sus dit a outre passé ses pouvoirs et adjugé *ultra petita et ultra vires;*

Considérant qu'en autant il y a erreur dans le dit jugement du dit tribunal, prononcé à Montréal le dix-septième jour de Septembre 1870, destituant les dits appelants de leur dite charge de commissaires et suspendant leur procédés, cette Cour d'appel casse et annulle le dit jugement, et rendant le jugement que le dit tribunal aurait dû rendre, renvoie les dites deux Requêtes des intimés, met à néant toutes procédures prises et ordres prononcés sur icelle et condamne les intimés à payer aux appelants leurs frais et dépens légalement encourrues par chacun des dits appelants sur leur contestations respectives des dites deux Requêtes, tant devant la Cour Inférieure que devant cette Cour d'Appel. Et cette Cour prolongeante le délai dans lequel les commissaires sus nommés produiront leur rapport, declare et nomme que ce délai sera de quinze jours à compter de celui où le dossier du présent appel aura été définitivement transmis à la cour inférieure."

Judgment of S. C. reversed.

E. Barnard, for appellants.
Rouer Roy, Q.C., for respondents.
(S.B.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 21st MARCH, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A. J.

No. 193.

Kerby, appellant, & *Ross et al.*, respondents, & *Stevenson*, petitioner *par reprise d'instance.*

HELD:—1. That an appeal instituted in the name of a party who has died while the case was *en délibéré* in the Court below is null and void.

2. That a petition, by the alleged legal representative of such deceased party, to take up the *instance*, cannot be allowed.

TASCHEREAU, J., (*dissentiens*):—There are two applications before the Court, one to dismiss the appeal and the other to be allowed to take up the *instance*. It appears that the appellant died while the case was *en délibéré* in the Court below, and the respondents have moved to quash the writ, on the ground that a writ of appeal cannot issue in the name of a person who is dead. And then the alleged legal representative of the deceased petitions to be allowed to take up the *instance*, to which the respondents object on the ground that the writ of appeal being null there is no *instance* to take up. I must say, that owing to the importance of the case I should have liked a longer *délibéré*. It is to be observed that it is not alleged that the death was known by or *dénoncé* to the parties. I admit, that at the first blush the art. 1154 of the Code of C. P. appears explicit enough, and would seem to allow the legal representative to take out the writ. At the same time art. 1166 provides for the taking up of the *instance*, and makes no mention of the time when that may be done. Now, suppose, under art. 1154, A were to demand a writ as the legal representative, and at the same time B and C should demand the same thing, setting out their respective pretensions, how could the officer of the Court determine which of them had a right to the writ? Then, if we look at art. 437, we will see that in the S. C. the nullity of proceedings is only the result of knowledge of the death. I admit that the appeal is a new *instance*, but *non constat* that the appellant's attorney knew anything of the death of the client. I would also call attention to the fact, that the Code is silent in the case of the appeal to the P. C. According to my view, the art. 1154 is only facultative, and the respondents have no interest to contest. And as to the *cautionnement*, I consider it binding, inasmuch as it has been judicially given.

LORANGER, J.:—The majority of the Court is of opinion to reject the appeal and the petition *en reprise d'instance*. The principle of law is that no judicial or extra judicial proceeding can be conducted in the name of a person who is dead. In judicial proceedings there are but two exceptions to this rule, firstly where the proceedings have been gone on with, in ignorance of the death of the party, and secondly, the case of the execution of a judgment in the name of a party deceased, but, even in this latter case, if any contestation be raised, the legal representatives of the deceased must take up the *instance*.

Now it is admitted by the learned president of the Court that an appeal is an *instance nouvelle*. That being the case, it is plain that this new proceeding cannot be taken out in the name of one who is dead.

In France, appeals were taken out before the judge, and the attorney was allowed to declare that he appealed, but he could not *relever l'appel* in the name of a dead person. And, under the French Code, death suspended the delays a regarded the heirs, until the judgment should be *dénoncé* to the heirs, as will be seen by reference to Carré and Chauveau, Dalloz, Nouveau Pigeau, &c., &c. Our Code allows the heirs or legal representatives to take out the writ of appeal *de plano*, and although a possible case of rival writs being issued (such as the president of the Court suggested) might arise, there would be no practical difficulty under the circumstances, as this Court would then decide which of the appellants was really the legal representative of the deceased.

As the Court holds that the writ of appeal is a nullity, there is of course no *instance* to take up, and therefore the petition asking to be allowed to do so is rejected with costs. No costs, however, can be allowed on the motion to reject the appeal, which is granted without costs.

Appeal declared null, &c.

Carter & Keller, for appellant & petitioner.
Bethune & Bethune, for Jane Ross & vir, respdts.
Dorion, Dorion & Geoffrion, for Louisa A. Ross & vir, respdts.
(S.B.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 21st MARCH AND 19th SEPT., 1873.

Coram DUVAL, CH. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 45.

REGINA vs. *Chamaillard.*

HELD:—1. That where it is discovered after verdict, in a case of felony where half of the jury were ostensibly sworn as being skilled in the French language, (being that of the prisoner) that one of such half was not skilled in the French language, the trial and verdict are unlawful, null and void, and will be vacated and set aside on a reserved case by the judge in the Court below.

2 That where the judge in the Court below, after the trial and verdict are thus vacated and set aside, reserves for the "opinion" of the Queen's Bench, sitting as a Court of appeal, a motion by the Crown for a day certain for trial, the Court of Queen's Bench has "no jurisdiction in the premises."

On the 21st of March, 1873, the Court of Queen's Bench, on the appeal side rendered the following judgment:

"The Court * * * considering that at the trial for felony had in the above case, * * it was ordered on the application of the prisoner's counsel, that of the jury to be impaneled to try the case one half should be composed of persons skilled in the French language, being the language of the accused; and that of the jury to be impaneled and sworn, and who tried the said cause, one Adam Devine declared at the said trial that he understood and was skilled in the French language.

"And whereas it appears by the case reserved by the presiding judge for the decision of this Court, upon the application of the prisoner to that effect, after verdict had, that the said Adam Devine was not skilled in the language of the prisoner, a fact unknown till after verdict rendered:

Regina
vs.
Chamaillard.

"Seeing, therefore, that the trial had and the verdict against the prisoner was unlawful, null and void in law, doth declare and adjudge the said trial and verdict to be and to have been unlawful, null and void, and doth vacate and set aside the said verdict; hereby adjudging that no judgment should be pronounced on said verdict. And the Court doth further order that this judgment and the documents produced before this Court be transmitted, * * to the end that such proceeding be adopted as to law and justice may appertain."

Subsequently the following document was submitted for the "opinion" of the same Court:

CANADA,
PROVINCE OF QUEBEC,
DISTRICT OF OTTAWA.
} COURT OF QUEEN'S BENCH
CROWN SIDE.

THE QUEEN
vs.
BENJAMIN CHAMAILLARD.
} July Term, 1873.
On an indictment for rape.

At the last January Term of this Court, the prisoner was tried before me and convicted of rape, but upon motion of the prisoner's counsel, I reserved the sentence until the opinion of the Court of Queen's Bench, appeal side, should be asked. By a judgment of the Court of Queen's Bench, appeal side, of the twenty-first day of March, one thousand eight hundred and seventy-three, the said trial and verdict were declared unlawful, null and void in law and was vacated and set aside and the said judgment and documents produced were by the said judgment ordered to be transmitted to this Court in order that such proceeding be adopted as to law and justice might appertain. On the first day of this term L. R. Church, Esq., in behalf of the Crown, moved that a day for trial should be fixed, whereupon being of opinion that I had no authority to grant a subsequent trial after the former verdict of guilty, I directed that the opinion of the Court of Queen's Bench, appeal side, should be asked. First. Whether this Court has authority to order such subsequent trial and to fix a day therefor, and secondly as to the course to be pursued, should there be no authority to order such subsequent trial.

I have now respectfully to ask the opinion of the Court of Queen's Bench, appeal side, in respect of the premises, and have directed the defendant to be admitted to bail, until the first day of the next January Term of this Court.

Aylmer, the eighth day of July, 1873.

(Signed,) A. LAFONTAINE,
Judge Superior Court.

DUVAL, CH. J.:—In this case, the opinion of the Court is asked, by a sort of reserved case, whether or not a *venire de novo* should issue for the further trial of the prisoner, whose former trial and verdict therein were vacated and set aside by this Court. Now there can be no reserved case without a conviction, and it is therefore quite impossible for this Court to entertain the reserved case in the present instance. In doing so, the Court would be giving an opinion, or rather giving advice to the Court below, as to the granting or otherwise of an application for a day certain for trial.

The following was the written judgment pronounced by the Court, and which was rendered on the 19th of September, 1873:—

"The Court * * * seeing that no conviction has been had in this cause, and that, therefore, this Court hath no jurisdiction in the premises, doth order that the case reserved by * * be returned and remitted to the said Court, to the end that such further proceedings be there had as to law and justice may appertain."

Trial and verdict set aside, &c.

Church & St. Pierre, for the Crown.
W. H. Kerr, Q.C., for the prisoner.
(S.B.)

COUR DE CIRCUIT, 1874.

MONTREAL, 30 [illegible]

Coram BERTHE[illegible]

No. 1214.

Houle vs. Godère et *Dumesnil*, mis-en-cause.

JUGE:—1. Que par la loi du pays et la jurisprudence des tribunaux, un bailleur a le droit de faire saisir-arrêter, par voie de saisie-gagerie par droit de suite, les meubles et effets de son locataire qui ont été enlevés des lieux loués, et ce, aussi bien pour les loyers à échoir quand il n'y en a pas de dus, que pour ceux déjà dus et échus.

2. Que ces meubles et effets sont affectés au droit de gage et privilége du bailleur, pour le paiement des loyers dus et à devenir dus en vertu du bail ou de la convention.

3. Que le fait seul de la part du locataire, d'avoir enlevé les meubles qui garnissaient les lieux loués, pour sureté du paiement des loyers, et de les avoir transportés ailleurs, donne, en faveur du bailleur, ouverture au droit d'action, non seulement pour les loyers alors échus, mais de plus, pour le recouvrement de ceux à échoir en vertu du bail ou de la convention.

Le demandeur alléguait dans sa déclaration:

"Que par conventions verbales, en date du 1er novembre 1873, il avait loué à la défenderesse pour le terme de six mois à compter du dit 1er novembre 1873 et moyennant $3 par mois, le local décrit dans la déclaration.

"Qu'en vertu de ces conventions, la défenderesse avait pris possession du dit local et l'avait occupé jusqu'au 19 février 1874, époque à laquelle elle l'avait furtivement quitté et dégarni, et avait transporté son mobilier dans un autre logement.

"Que la défenderesse n'avait pas droit de mettre fin au bail avant l'expiration du temps pour lequel elle avait loué, ni de dégarnir les lieux, et qu'en conséquence, elle était en loi responsable du loyer et tenue de le payer immédiatement pour tout le temps qui restait à s'écouler avant la fin du bail.

"Que pour ces raisons, le demandeur était en droit de réclamer immédiatement de la défenderesse et réclamait d'elle la somme de six piastres, pour le loyer des mois de mars et avril alors prochains, bien que ces deux termes ne fussent pas encore échus. Et le demandeur concluait à l'émanation d'un bref de saisie-gagerie, pour saisir-gager par droit de suite les meubles et effets de la défenderesse qui avaient été transportés dans une maison appartenant au mis-

Lamontagne vs. Webster.

en-cause; à ce que la défenderesse fût tenue de comparaître pour voir dire et déclarer la dite saisie-gagerie bonne et valable et répondre à la poursuite du demandeur, et qu'elle fût en outre condamnée à lui payer la dite somme de six piastres avec dépens; enfin, à ce que les meubles et effets ainsi saisis, fussent vendus suivant la loi et sur la somme en provenant, le demandeur payé de sa créance en capital et frais."

La défenderesse plaida en premier lieu par une défense *au fond en droit* par laquelle elle alléguait:

"Que l'action du demandeur était mal fondée en droit.

"Que les conclusions de la dite action, ne découlaient pas des prémisses d'icelle.

"Que le demandeur alléguait lui-même que la dette réclamée n'était ni due ni échue.

"Que le demandeur ne pouvait conclure purement et simplement à ce que la défenderesse fût condamnée à payer une dette que lui-même alléguait n'être pas encore due ni échue."

La défenderesse produisit en outre une défense *au fond en fait* et sur le tout, conclut au renvoi de la saisie-gagerie et de l'action du demandeur.

Après avoir prouvé toutes ses allégations de fait, le demandeur cita, lors de l'audition, à l'appui de ses prétentions sur la question de droit, les causes suivantes: Aylwin et al. *vs.* Gilloran, 4 L.C.R., p. 360, et les autorités mentionnées aux pp. 367 et 368 même vol.; Lacroix *vs.* Prieur, 3 L.C.J., p. 42; Rodier *vs.* Joly, 4 L.C.J., p. 15.

Son Honneur le Juge Berthelot prit la cause en délibéré et le 30 Avril dernier, rejeta les défenses *en droit* et *en fait* de la défenderesse et donna gain de cause au demandeur, suivant les conclusions de sa demande.

Action maintenue.

J. G. D'Amour, pour le demandeur.

Ouimet, St. Pierre et Augé, pour la défenderesse.

(J.G.D.)

SUPERIOR COURT, 1874.

MONTREAL, 19TH MAY, 1874.

Coram TORRANCE, J.

No. 1507.

Lamontagne vs. *Webster.*

LESSORS AND LESSEES ACT.

HELD:—That where the duration of a written or verbal lease is certain, a *congé* is unnecessary to maintain an action by the landlord to eject the tenant.

This was an action by a landlord against his tenant to procure his ejectment. The lease bore date 29th April, 1870, passed before L. T. Fortin, N.P., for a year. It was continued by *tacite reconduction* till 1st May, 1872, when, by a verbal agreement between the parties, it was agreed that there should

be a change in the lease by the defendant undertaking to pay the water tax for the future, and the lease was continued by *tacite reconduction* until at any rate the 30th April, 1874. About the 3rd February last, the plaintiff notified the defendant that he required his house, and refused to make a new lease. The simple question between the parties was whether the defendant was entitled to three months notice before the first February before he could be ejected in the present suit.

G. Doutre for plaintiff cited:

C. C. 1657, 1658. C. Nap. 1736, 7. 6 Marcadé on C. N. 1736, 7.
Delvincourt, T. 3.
Duranton, T. 17, p. 116.
Duvergier, T. 1, n. 485.
Zachariæ, T. 3, p. 23.
Troplong, T. 2, n. 404.
Toullier, T. 6, n. 249.
11 L. C. Jur. 288, Laflamme v. Fennell.
1 Rev. de Leg. 383, Jobin & Morriset.
Sirey, Codes Annotés, p. 841, Note I *bis*. Sirey, Recueil General. Table Générale vo Bail à ferme, n. 103, 111.
Pothier, C. d'Orl. Intro. no. 76.
Troplong, Louage, n. 447, 452, 454, 5.
Pothier, Louage, n. 342, 363, 349.
Duvergier, T. 1, n. 503.
Merlin, Tacite Recond. 111 in fine.

E. Carter, Q.C., for defendant, cited:

Troplong, Louage, T. 2, p. 256, n. 447; p. 257, n. 451.
Pothier, T. 2, n. 342.
C. C. 1609.
2 Trop., p. 252, n. 443.
2 Trop., p. 229, n. 409, 410, 411.
Id., p. 367, n. 612, 613, 614.
Id., 369, n. 618, 619.
Id., 218.
C. C. Can., 1657.
Trop. Id. 252, n. 443.

PER CURIAM.—I hold, following 6 Marcadé Comm. on C. N. 1737, that the *congé* of three months is necessary where the duration of the lease is uncertain. In the present case the defendant held by *tacite reconduction* up to 1st May instant, and I adopt the ruling in Laflamme *vs.* Fennell, 11 L. C. J., 288, which held that where a lease had been continued for a year by *tacite reconduction*, a *congé* was not necessary. In the present case, the question was presented precisely before the Court by a *défense en droit* to the declaration and by an answer in law to the 2nd plea of the defendant. The *défense en droit* is overruled, and the answer in law is maintained. On the merits, the plaintiff is entitled to judgment.

G. Doutre, for plaintiff.
E. Carter, Q.C., for defendant.
(J. K.)

COURT OF REVIEW, 1873.

MONTREAL, 31st MAY, 1873.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

No. 997.

Wurtele vs. *Girouard.*

HELD:—A paper writing *sous seing privé*, by which defendant acknowledged and confessed to well and lawfully owe to the plaintiff, present and accepting creditor, $81.60 for value received by settlement of notes (réglement de billets) given before this date, which defendant obliged himself to pay to the plaintiff or order, in one year from the date of said writing, with interest at 7 per cent. per annum, to count from said date until complete payment, the said interest payable annually; is subject to the prescription of five years, even although the word obligation be written upon the back of said paper writing.

The facts of this case are fully disclosed by the facts of the parties, as follows:—

Gauthier, D. E., for Girouard. Le demandeur qui est commerçant a poursuivi le défendeur à la Cour de Circuit à Sorel, le 29 Nov., 1872, sur un billet au montant de $81.60 courant et les intérêts accrus formant la somme de $135, lequel billet aurait été consenti à la Rivière David, dit District, le 13 Février, 1863.

1. Le demandeur pour l'exempter et pour parer à la prescription qualifie faussement et sciemment dans sa déclaration du nom d'obligation le billet qui fait la base de son action.

2. Faussement et sciemment encore le demandeur ne déclare pas dans sa déclaration tel que le billet le comporte, savoir que le dit billet est payable à ordre.

3. Pour faire disparaître la qualification que les parties ont toujours donné à ce billet et leurs intentions, en le qualifiant et l'appelant *billet, billet sous seing privé*, le demandeur de mauvaise foi a collé un papier blanc sur le dos du dit billet et a écrit dessus le mot obligation, cependant à travers le dit papier ainsi collé, on peut lire encore le mot *billet à deux places.*

L'Appelant Girouard, a plaidé à cette action la prescription de cinq années entières et revolues longtemps avant l'institution de cette action.

Le billet en question a été fait le 13 Fevrier, 1863.

L'action a été intentée le 29 Nov. 1872, près de huit ans après l'échéance du dit billet.

L'appellant soumet donc que le jugement rendu en cette cause contre lui est erroné, evidemment contraire à la loi et qu'il doit être cassé.

1. Parceque longtemps avant l'institution de la présente action le billet du 13 Fevrier, 1863, qui fait la base de cette action, était prescrit.

2. Parceque le demandeur le 29 Nov., 1872, n'avait aucun droit d'action, ni aucun lien de droit contre le défendeur appelant en vertu du dit billet.

3. Parce que le dit billet est tout à fait commercial transférable par simple endossement regulier, ou en blanc, à ordre et sous *signature privée.* Notre jurisprudence a varié depuis 1859 jusqu'au 1865, sur le point de savoir si un billet en *brevet* pardevant notaires et à ordre était prescriptible par cinq années, mais nos

lois et notre jurisprudence ont été constants en le point qu'un simple billet sous signature privée, payable à ordre pour valeur reçue était radicalement *éteint* et *prescrit* après cinq années révolues, et le billet en question à sa face même est de cette nature et non autrement. Que le demandeur dise tant qu'il lui plaira, tout en trompant, que c'est une obligation, nous n'en trouvons par moins dans l'écrit du 13 Février, et qui fait base de l'action tout ce qui constitue un billet promissoire dans le sens de nos lois et de nos statuts, et non un billet ou une obligation en brevet; le demandeur ne peut changer la nature de son acte quelques efforts qu'il fasse. La cause et les prétentions de l'appelant à la face même et à la lecture du dit billet du 13 Février sont si claires et si evidentes qu'il suffit de citer quelques autorités, car elles sont en grand nombre et trop unanimes, à l'appui des deux propositions suivantes.

1. L'écrit du 13 Février, 1863, est un billet promissoire pur et simple dans le sens de nos lois et de nos statuts faits à cet égard, à *ordre*, transférable, négociable par endossement et sous signature privée, ce qui se voit par le billet lui-même.

2. Que longtemps avant l'action (3 ans) le dit billet était prescrit, et partant le demandeur n'avait aucun droit d'action contre l'appelant Girouard. C.C.B.C., arts. 2260 et 2270. L'on voit que notre code n'a apporté aucun changement. L'article 2260 est conforme à notre ancien droit et à nos statuts sur la matière. Il en est ainsi de l'article 2267 qui dit que la créance est absolument éteinte et que nulle action ne peut être reçue après l'expiration du temps fixé pour la prescription. Quoique l'article 2267 soit donné comme droit nouveau, il existait avant notre code, et le contenu de cet article est conforme à nos lois statutaires savoir au chap. 64, sec. 31, des statuts refondus du Bas Canada.

La Cour d'appel à Montréal a decidé que le billet en brevet n'était pas un billet promissoire dans le sens de nos statuts concernant les lettres de change, billets, &c., et par conséquent qu'il n'était pas assujetti à la prescription quinquennale; Sejour & Bergevin, 7 Mars 1865, rapporté au 15 vol., des décisions des tribunaux p. 438, et je me permettrai de dire que je trouve cette décision bien conforme à nos lois, car le billet en brevet ou simple obligation par les formalités et sa nature, n'est pas un acte de commerce mais du droit civil.

Tous les commentaires rapportés dans cette cause sont à l'appui formel des prétentions de l'appelant Girouard. Ferrière Dict. de droit, verbo billet, definit ce dernier une promesse de payer sous signature privée. Au mot brevet il appelle la promesse de payer passée devant notaire obligation en brevet, et au mot obligation il dit, nous appelons obligation est acte passé par devant notaire pour prêt d'argent ou pour autre cause à la diffcrence des reconnaissances sous signatures privées que l'on appelle simples promesses, cédules ou billets. Il est donc de l'essence du billet promissoire qu'il soit redigé et signé sous signature privée, tel est le cas actuel. Pothier Traité des Oblig., No. 608, fait la même distinction. Rogue, jurisprudence consulaire, vol. 2, p. 138. Ferrière, Grand Coutumier, vol. 1, p. 1335, sur l'article 89 dit "Billet est une promesse de payer une somme de deniers écrite de la main du debiteur." Les termes de notre statut sont clairs et positifs en faveur des prétentions de l'appelant.

Dorion, Dorion & Geoffrion, for plaintiff, argued:—"On ne peut assimiler cet écrit à un billet promissoire. C'est un acte synallagmatique, signé par les

Louis Hebert, Petitioner for Habeas Corpus.

deux parties contenant un règlement de compte entre eux pour transactions anterieures, une déclaration de la part du créancier que la somme y mentionnée est tout ce que le debiteur lui doit, une reconnaissance de cette dette par ce dernier et une promesse de la payer au bout d'un an avec interêt payable annuellement. Ce n'est pas un engagement de payer une somme d'argent à tout evènement comme le veut la loi pour un billet promissoire. C'est simplement la reconnaissance d'une ancienne dette, reconnaissance qui ne se prescrit que par trente ans.

The judgment of the Court of Review, reversing that of the Court for the District of Richelieu, was as follows:—

The Court here sitting as a Court of Review, having heard the parties by their respective counsel, upon the judgment rendered in the Circuit Court in and for the District of Richelieu, on the 18th January, 1873, having examined the Record and proceedings had in this cause, and on the whole duly deliberated;

Considering that there is error in the said judgment of the 18th January, 1873, doth, revising the said judgment, reverse the same; and proceeding to render the judgment that ought to have been rendered in the premises;

Considering that at the time of the institution of the present action the paper writing in the said declaration mentioned and declared upon, of date 13th February, 1863, was by law prescribed and extinguished, and the plaintiff had no right of action against the defendant to recover the same: Doth dismiss the said action with costs of the Circuit Court against said plaintiff in favor of said defendant, distraction of which costs is hereby granted to Mr. D Z. Gauthier, the attorney of said defendant, and with costs of this Court of Revision against the said plaintiff in favor of said defendant, distraction whereof is hereby granted to D. Z. Gauthier, Esq., the attorney of said defendant, and it is ordered that the record be remitted to the Circuit Court in the District of Richelieu.

Judgment reversed.

Dorion, Dorion & Geoffrion, for plaintiff.
D. Z. Gauthier, for defendant.
(J. L. M.)

SUPERIOR COURT, 1873.

In Vacation.

SHERBROOKE, 10th OCTOBER, 1873.

Coram SANBORN, J.

Ex parte *Louis Hebert*, Petitioner for Habeas Corpus.

HELD:—That a warrant of commitment must show with certainty that a specific offence has been committed for which imprisonment can be awarded: and therefore, a commitment under the License Act which recited a conviction "for selling three glasses of whiskey and receiving payment therefor, contrary to the dispositions of the Statute in such case made and passed," without stating that the liquor was sold "by retail," was insufficient.

2. The place of sale must be stated in the commitment.
3. The commitment should state, that the prisoner had made option of imprisonment in preference to a warrant of distress. (34 Vict., c. 2, s. 108.)

SANBORN, J.:—The petitioner having been brought up upon Habeas Corpus, E. T. Brooks, Esq., counsel for petitioner, moves for his discharge upon the

Louis Hebert, Petitioner for Habeas Corpus

ground that the commitment is insufficient, for want of certainty and no legal offence being disclosed in it, and that said petitioner had been convicted without legal service of the summons upon him calling upon him to answer to the charge before the justices who heard the case, the summons only having been left at his domicile, in his absence, late on the day next previous to the day when the same called him to answer thereto, which was not a reasonable time and in fact no time, as no day intervened.

The second ground cannot be considered upon Habeas Corpus, because the record is not before me, and if it were, the objection could not be entertained because it is the province of the justice hearing the case to determine what time is a reasonable time for service. Oke, Mag. Synopsis, Vol. 1, p. 138, note 4.

The first ground is properly considered under Habeas Corpus. The object of Habeas Corpus is to prevent illegal imprisonment. Every person detained in custody under conviction of a justice of the peace has a right to test by this process the legality of his detention. The warrant of commitment must then shew with certainty that some distinct offence has been committed for which imprisonment can be awarded, and it must shew that the person awarding it is a justice of the peace having jurisdiction where the offence transpired. Paley on Convictions, pp. 283-4-5.

The warrant of commitment in this case is in the following terms: "Attendu que Louis Hebert, journalier du township de Weedon, a été convaincu devant nous, d'avoir, dans le dit township de Weedon, dans le dit District de St. François, mercredi, le quatrième jour du mois de Juin dernier, et à différents temps avant et depuis, vendu trois *vers* de wiskey et d'avoir reçu le payement et valeur contrairement aux dispositions du Statut fait et passé à cet égard, et que pour celle contravention il a été condamné à payer au conseil municipal du dit township de Weedon la somme de cinquante piastres courant et de plus la somme de six piastres et quinze centins pour les frais à cet égard, et attendu que le dit Louis Hébert a négligé de payer les dites sommes: à ces causes, nous vous commandons, par les présentes vous les dits huissiers constables ou officiers de la paix, ou aucun de vous, d'arrêter le dit Louis Hébert et de le conduire en sureté à la prison du District de St. François, et là le livrer entre les mains du gardien de la dite prison, en même temps que le présent mandat, et je vous commande, vous le dit gardien de la dite prison, de recevoir le dit Louis Hébert sur votre garde, dans la dite prison et là de l'y tenir enfermé pendant l'espace de trois mois à compter du jour de son arrivée, comme prisonnier, à moins que les dites sommes en dernier lieu mentionnées et tous les frais de la dite saisie et exécution et de l'emprisonment ou du transport du dit Louis Hébert à la dite prison, remontant à une autre somme de * * * ne vous soit plutôt payés à vous le dit gardien. Et pour ce faire que le présent mandat vous suffise.

Donné sous mon seing et sceau à Weedon, dans le dit District de St. François le huitième jour d'Octobre, mil huit cent soixante et treize.

(Signé,) J. Bte. Brodeur, J.P."

The conviction recited in this warrant of commitment does not shew of what specific violation of the License Act 34 Vic., c. 2, the petitioner was guilty.

Regina vs. Tremblay.

There are several provisions under this Act, whereby penalties are incurred for illicit sale of liquors, under various circumstances, and the penalties vary according to the nature of the offence. If it was intended to convict for retailing spirituous liquors without a license, (as was apparently the intention of the justice or justices convicting,) under section 2, of said Act, it should have been brought within the terms of said section, and should have stated that the spirituous liquor in question was sold *by retail*. This is essential to make it an offence under that clause of the Act. By 196 section "retail" is made to mean sale in a quantity less than three gallons, and selling *by retail*, that is in quantities less than three gallons, at one time, is what incurs the penalty so far as that clause is concerned. The terms "trois vers de wiskey," if thereby is meant *trois verres de whiskey* or three glasses of whiskey, does not determine the amount sold, as the glasses are not necessarily to be understood to be of any particular capacity. Also to bring the offence within said 2nd section, the place of sale must be shown to be one of those named in the Act, as for instance the party's house or premises, [illegible] as the case might be, otherwise it does not come within the prohibition.

Further, under the [illegible] Act, imprisonment can only be awarded when the complainant has declared his option to have it in preference to a warrant of distress. (Sec. 195.) It does not appear by the commitment that such option had been declared in this case. Under these circumstances, I am compelled to assume that there has been no violation of the law, because it is not made so to appear. The maxim "*non apparentibus non existentibus eadem ratio*" applies. I regret that such a conclusion is necessary, because it is very likely there may have been a violation of the law for which this man forfeited the penalty adjudged against him. I have, however, no equitable discretion to exercise. Penal acts, and particularly those that restrict trade, must be construed strictly, and unless the charge comes clearly within the terms of the prohibitory, statutory provision, the penalty is not incurred. While the warrant of commitment may be more concise than the conviction, it must be sufficiently comprehensive to shew that the imprisonment is legal. It not appearing that petitioner is legally in prison, he must be enlarged.

E. T. Brooks, for petitioner.

(J. K.)

COURT OF QUEEN'S BENCH, 1873.

(CROWN SIDE.)

CHICOUTIMI, 13TH FEBRUARY, 1873.

Coram TASCHEREAU, H. E., J.

REGINA vs. *Josephte Tremblay*.

HELD:—That upon the finding of "no bill" by the Grand Jury, on an indictment [illegible] murder, the Crown has the right to [illegible] the prisoner arraigned and tried upon the finding of the Coroner's Jury against him.

In this case the Coroner's Jury had found a verdict of manslaughter against the prisoner, a midwife. At the subsequent term of the Court of Queen's

Bench, the Crown submitted an indictment to the Grand Jury against the prisoner, but "no bill" was returned. The Crown prosecutor immediately moved "*that the prisoner be arraigned on the finding of the Coroner's inquest.*"

The Counsel for prisoner opposed the application: it was a most extraordinary proceeding on the part of the Crown. There is no doubt that, at first, a prisoner could be arraigned on the finding of the Coroner's Jury, but now, that the Crown had elected the mode of submitting an indictment to the Grand Jury, upon which there had been a "no bill," it would be illegal to allow the prosecution to return to the Coroner's inquisition, and proceed upon its finding.

PER CURIAM:—That the application is a novel one, cannot be denied. That the practice of our Criminal Courts does not show a single case where such an application has been granted, is probably true. But it must, at the same time, be admitted, that not a case can be cited, where such an application has been refused. It has never been asked for: that is why it has not been granted. Now that it is made before me, I have to decide it according to the law, and the fact that there has, perhaps, not been a single decision in the country upon the question, cannot be invoked with weight against the application. There seems, in my opinion, to be no room for doubt on the question. The authorities I have referred to since the present application was made, seem to me very conclusive. All our books repeat that the finding of a Coroner's inquest is equivalent to the finding of a Grand Jury. Archbold, Cr. Pl., 17th edit., p. 116; Fisher's Digest *v.* Coroner; 1st Chitty, 156, 157, 162. In Reg. *vs.* Ingham, 9 Cox, p. 508, Mr. Justice Blackburn said: "Upon the Coroner's inquest, the Jury have to enquire into the cause of death, and they find it in the present tense. Their presentment is equally an accusation as that of a Grand Jury, upon which a party may be tried." The prisoner's Counsel submitted that, though this principle of our Criminal Law could not be denied, yet it had no application now, in the present case, because the prosecution has elected to proceed by indictment. I cannot see that this alters the case. In England the practice is to proceed at the same time upon the indictment and upon the Coroner's inquisition. Of course, that is, after a true bill by the Grand Jury; but, if the Grand Jury return a "no bill," as in the present case, the Crown is at liberty to have the prisoner tried upon the finding of the Coroner's Jury. And this is exactly the case now before me. Umfreville, Lex Coronatoris, p. 314, after having said that the Coroner's verdict subjects the delinquent to a further prosecution, and that the trial is generally at the same time upon the finding of the Grand Jury, and the finding of the Coroner's inquest, adds: "*Unless the Grand Jury endorse their bill not found, in which case the delinquent, without a new indictment, is left for his purgation to the single charge found in the Coroner's inquest.*"

The case of Rex *vs.* Maynard, Russell & Ryan's cases, p. 240, is exactly in point. There, a Coroner's Jury had returned a finding of murder. Upon an indictment, the Grand Jury found a "no bill." The prisoner was then arraigned and tried upon the Coroner's inquest, and found guilty, and upon a reserved case, the full bench (Leblanc, J., diss.) maintained the verdict. And no one, during the whole case, raised the least doubt on the regularity of the

Langlois vs. Vincent.

proceedings, quoad the question raised here. The case was reserved upon another point. Moreover, if the prisoner, against whom a verdict has been found on the Coroner's inquest, and against whom the Grand Jury have found a true bill, is arraigned and tried upon one only and acquitted, he may afterwards be arraigned and put to his trial upon the other; in which case he may, of course, effectually plead *autrefois acquit*. See Archbold, Cr. Pl., p. 116, 17th edit., and the authorities there given. Surely, if a verdict of acquittal by the Petty Jury, after trial, is no hindrance to a prosecution upon the finding of the Coroner's inquest, it cannot be maintained that the finding of a "no bill" by a Grand Jury should have more important consequences. The prisoner must be brought to the bar and arraigned in the usual manner. If the Coroner's inquisition is defective, the defence will have ample means to take advantage of it.

E. Cimon, for the Crown.

A. Hudon, for the prisoner.

(E.B.)

SUPERIOR COURT, 1874.

QUEBEC, 7TH FEBRUARY, 1874.

Coram STUART, J.

No. 560.

Joseph A. Langlois vs. *Elzéar Vincent.*

JUGE:—Que nul autre que l'auteur ou les représentants légaux de l'auteur ne peuvent se prévaloir des dispositions de la loi concernant la propriété littéraire.

Que l'auteur ni ses représentants légaux n'ont pas d'action pour recouvrer la pénalité en vertu de cette loi, à moins qu'il n'ait enregistré son œuvre avant d'en avoir mis en circulation une ou plusieurs éditions de cette ouvrage.

Que le Grand Catéchisme de Québec n'ayant été enregistré qu'à sa treizième édition, cet enregistrement ne pouvait conférer aucun droit à celui qui en avait alors la propriété et qui se prétendait le représentant de l'auteur.

Que ni le demandeur ni son vendeur n'était l'auteur ni le représentant de l'auteur du dit ouvrage intitulé Grand Catéchisme de Québec.

Que le Grand Catéchisme de Québec, au moment de son impression et de sa publication par le défendeur était propriété publique.

PER CURIAM:—The plaintiff alleges himself to have the copyright of a book called Le Grand Catéchisme de Québec, and complains that the defendant in violation of his rights has printed and offered for sale the said book, whereby he has incurred penalties to the amount of $6000, whereof he prays a condemnation of one half for the Crown and the other half for himself and for the forfeiture in his favor of any copies of the book found in the possession of the defendant. The present qui tam action is based upon the Copyright Act 31 Vic., ch. 54, sec. 10.

To this action the defendant pleads in substance that the book referred to is a public book approved of by all the bishops met in Council at Quebec, in 1853. That the Archbishop of Quebec never was proprietor of it nor its author nor the legal representative of its author, but that the book was made for the benefit of the whole province and has gone through twelve editions by different persons,

none of whom were enrolled under the Copyright Act, that the enrolment of it by the owner is not warranted and is inoperative.

The plaintiff's title to this book consists in a sale of it to him by the Archbishop of Quebec, on the 12th May, 1873. Soon after this sale, on the 19th of the same month, the plaintiff enregistered Le Grand Catéchisme de Québec, as if he were the author or the legal representative of the author, and the penalties are now claimed because of the infringement of rights conferred upon the plaintiff by this registration. The plaintiff admits that before he purchased the work he knew that the defendant was engaged in printing it. Being asked whether it was not in consequence of this fact that he procured a sale of it to himself, he answered, "not exactly, it was to register it."

The catechism in question was composed by the second Bishop of Quebec, Monseigneur de St. Valier, about the year 1700, and many editions of it have been printed and sold from time to time since, one of them by the defendant himself; this is the edition of which the plaintiff had information before he purchased the book, and which he complains was printed to his prejudice.

The question is then one of literary property. It is sometimes difficult to define with precision where the exclusive rights of the author end and those of the public commence, but the present case is not one of any nicety. So long as writings and works are within the possession of the author, he has the same right to the exclusive enjoyment of them as of any other species of property. But when they are circulated abroad and published with the author's consent they become common property, subject to the free use of the community—such is the common law on the subject. But for the encouragement of learning, and that men of genius and science may reap the well merited fruits of their labors, authors and their legal representatives by observing the formalities of the Copyright Act are secured for a limited time in the exclusive right of publishing their own works. Whether after a voluntary publication of an author's works by himself or by his authority the author has a sole and perpetual property in that work, so as to give him a right to confine every subsequent publication to himself and his assigns for ever, or, whether all the property of the author did not cease and the work become open by his own act of publication, are questions set at rest more than a century ago by the decisions of the English courts, when the respective rights of authors and of the public were examined with profound erudition and the most consummate legal skill. The rights of authors are now confessedly those conferred upon them by the copyright laws and no other. The plaintiff relies on the Copyright Act in this case.

It is fitting to have the language of the law under one's eye when treating the subject (31 Vic., ch. 54, sec. 304).

"*Any person* who is the *author* of any book, &c., and the *legal representatives* of such person, shall have the sole right and liberty of printing, re-printing, publishing, reproducing and vending such literary, scientific or artistical works or compositions in whole or in part, &c., for the term of twenty-eight years from the time of recording the title thereof in the manner hereinafter directed.

"Sec. 4.—If after the expiration of the term aforesaid, such *author*, or *any* of the *authors* where the work has been originally composed and made by more

Langlois vs. Vincent.

than one person, be *still living* and residing in Canada or in Great Britain or Ireland, or being *dead* has left a *widow* or *a child* or *children* living, the same exclusive right shall be continued to such author, or if dead, then to such widow and child or children (as the case may be) for the further time of fourteen years."

The questions that present themselves are, what are the rights of the plaintiff to these provisions?

Is he the author? or,

Is he the legal representative of the author?

If the one or the other, is he still in time to take advantage of the law? Does he come within the purview and scope of the Copyright Act?

The author of the book died more than a century ago, whether he left any legal representative in Canada, is not alleged or shewn. It does not appear that the author ever published it for his own profit, nor that he did not intend to make it open by permitting the publication. Considering the nature of the work and the source whence it emanated, it being a summary of religious doctrine compiled by the head of the church in this country obviously for the comfort and use of his flock, it is to be presumed that it was intended for the widest and most unfettered circulation, and with no eye to private advantage. The voluntary publication of this book by the author or with his consent would make it common property, subject to the free use of the community, and I can hardly doubt that if the author were alive at this day, when his book has been in public use for 170 years and upwards, he could not acquire an exclusive right to print and publish it by the mere formality of registering its title in the manner prescribed by the Copyright Act though the author. Such registration to secure any rights must precede the publication of the work, it is inoperative after it has been thrown open to the public by its publication. If the author could not, can his legal representatives? But is the plaintiff in any sense the legal representative of Monseigneur de St Valier? This is not alleged or shewn; he bought the right of publishing the work for ten years from the Archbishop of Quebec. The defendant does not contest this sale, but he says that that confers upon him no exclusive rights and does not support to do so on its face. It is admitted that the Archbishop of Quebec is not the author, and he is not shewn to be the legal representative of the author. It follows that neither the plaintiff nor his vendor are clothed with the character of legal representatives of Monseigneur de St Valier, and therefore it follows as an irresistible legal consequence, that the enregistration by the plaintiff not being the act of the author nor of his legal representatives, for all practical and legal purposes is [illegible] fruitless, worthless formality in no way justified by the Copyright Act.

Looking at the case technically, do the facts bring the defendant under the lash of the law invoked? This law imposes penalties upon *any other person*, *after* the recording of the title of any book, who prints, publishes, or imports it. It is admitted by the plaintiff himself that the defendant printed the book in question before it was recorded, consequently when he lawfully could do so since there was no legal impediment in his way, and when he acquired a legal title to every copy he so printed. If what the defendant did was legal, when done it could not become illegal by an act of the plaintiff sub-

sequently done. It would be subverting every principle to hold that the defendant could be liable to a penalty for doing what no law forbad him to do, and that the copies he so legally printed should be forfeited to the plaintiff. That which the law forbids under heavy penalties is the printing and sale of a book to the prejudice of the author. The defendant has done nothing in violation of any such law. A printing before the recording is supposed to carry a penalty imposed by law on the printing after the recording. The pretension is extravagant and excessive.

There seem to be public considerations deserving of grave consideration, why a book of the nature of the one in question should not lightly be admitted to the tenure and franchise of private property. Such a book contains, I presume, nothing of the author's own; to be of any real value, it must contain the received doctrine of the Roman Catholic Church, and if once the exclusive right to publish such a catechism is conferred upon an individual, he comes to be vested with a monopoly of it coextensive with the Dominion, and it will be the duty of all the Courts of the Dominion to protect him in it, and to punish any invasion of such monopoly. I doubt whether the Bishops of the various dioceses and their congregations would be disposed to look upon the interpretation put upon the statute by the plaintiff as quite consistent with their rights. I could be brought with difficulty to the conclusion that the church throughout the Dominion is now confined in the use of this catechism to the copies printed by the plaintiff because of his action in the matter, yet if he has any rights at all they go all that length.

After very patient consideration of this case I am forced to the conclusion that the plaintiff is neither the author nor the legal representative of the author of Le Grand Catéchisme de Québec, and could not therefore invest himself with the right to the exclusive printing and vending this book throughout the Dominion by the mere formality of enrolling the title of the book under the Copyright Act. That the said Catechism has been for a century and three quarters in public use, and is no longer susceptible of being made private property. That the defendant at the time of printing the said Catechism had a right to do so, and that he violated thereby no law and exposed himself to no penalties; that the claim of the plaintiff against the defendant is aggressive in the extreme and groundless.

Action dismissed.

M. Chouinard, for plaintiff.
C. T. Suzor, for defendant.
(G. D.)

COURT OF QUEEN'S BENCH, 1874.

QUEBEC, 8th JUNE, 1874.

Coram DORION, C.J., MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J.

Ex parte CARL JOHANSEN, and JOHN NORDIN, Petitioners for a writ of *Habeas Corpus*.

HELD:—1. That sect. 126 of 36 Vict., cap. 129, does not modify or limit sect. 124 so as to restrict the application of the Act, in relation to ships in the merchant service of foreign countries, to the offence of desertion only, but the whole provisions of the Act apply to such foreign vessels, so far as is consistent with existing treaties between Great Britain and foreign countries.

2. That a commitment of two sailors under a conviction for refusing to go to *their* work is bad.

The prisoners Carl Johansen and John Nordin were convicted for that they were seamen legally bound and engaged to serve as such on board of a certain foreign merchant vessel called the *Agathe*, while such vessel was lying in the port and harbour of Quebec; and that they did on the 1st June unlawfully and wilfully refuse to obey a lawful command, to wit, to go to their work on board the said ship.

The petitioners under this conviction were committed to jail for two weeks. They now petitioned for a writ of *Habeas Corpus* in order to obtain their discharge, as there was no such offence as that of which they had been convicted.

By the 13 and 14 Vict., cap. 25, sec. 1, all the acts which by 47 Geo. III, cap. 9, were created offences when committed by seamen "in the merchant service," were made offences when done by seamen engaged to serve on board foreign merchant vessels. These provisions were transferred into the Consolidated Statutes of Lower Canada, and 47 Geo. III. and 13 and 14 Vict. were enumerated in schedule A of C. S. L. C. These Statutes were therefore repealed, and by an Act, passed in 1873, 36 Vict., cap. 129, sect. 5, of the Parliament of Canada, which became law, by proclamation, on the 27th March last, cap. 56 C.S.L.C. was also repealed.

Section 91 of the Act of 1873 is in these terms:—"Whenever any seaman who has been lawfully engaged or bound to any ship registered in either of the said Provinces, and has duly signed an agreement as required by this Act, or any apprentice who has executed indentures to the sea service in either of the said provinces, commits any of the following offences, he shall be liable to be punished summarily, as follows, (that is to say):

(4) "For wilful disobedience to any lawful command, he shall be liable to imprisonment for any period not less than two weeks and not exceeding four weeks, with or without hard labour, and also at the discretion of the Court, to forfeit out of his wages a sum not exceeding two days' pay."

And sections 124 and 125, under the head of "foreign ships," enact as follows:—

"124. The foregoing provisions of this Act relating to the shipping of seamen shall extend and apply to ships in the merchant service of every foreign

country, and to all persons in relation to such ships in the same manner as the same extend and apply to ships in the British merchant service, and to similar persons in relation to such last mentioned ships, unless there be something in the terms of some existing treaty between Her Majesty and such foreign country to prevent the same or any of the same from so extending and applying.

"125. In so far as may be consistent with the provisions of any Act of the Imperial Parliament in force in Canada, and with the terms of existing treaties between Her Majesty and foreign powers respectively, and the rights, privileges, and immunities secured to the Consuls, Vice-Consuls, commercial and other duly accredited agents, subjects and citizens of such foreign powers respectively, the foregoing provisions of this Act relating to desertion of seamen and apprentices, shall extend and apply to ships in the merchant service of foreign countries and to all persons in relation to such ships in the same manner as the same extend and apply to ships in the British merchant service, and to similar persons in relation to such last mentioned ships."

Dunbar, for the petitioners, contended that sect. 125 of the Act of 1873 only extended those sections of the Act which relate to "desertion of seamen and apprentices" to ships in the merchant service of foreign powers.

The *Attorney General* and *R. Alleyn*, contra.

DORION, C. J.:—[After stating the circumstances under which the application was made] At the argument it was urged on behalf of the petitioners that although section 91, sub-section 4, makes it an offence for a seaman lawfully engaged, to disobey a lawful command, this only applies to British seamen and not to those employed on foreign vessels. Sect. 125 was relied upon to show that this clause of Sect. 91 did not apply to the present case which is not a case of desertion. Upon this point, which was the sole point presented at the argument, the court cannot come to the same conclusion as the counsel for the petitioners. It is true that there is some little ambiguity in sections 124 and 125. But the way in which I read these sections is this: sect. 124 applies the provisions of the whole Act to foreign ships, and the mention of desertion in sect. 125 has been made for the obvious purpose of securing to a greater extent all rights which the parties might invoke under any Imperial Act. Section 124 applies to all offences, with the exception contained in section 125. Thus sect. 124 applies, reserving the rights which may be secured in cases of desertion to consuls, vice-consuls, etc., under any Treaty, or under any Imperial Statute. Taking this view of the case, I think the offence of which the petitioners were convicted comes under the Statute. The writ of *Habeas Corpus*, therefore, should not issue on that ground. But the application is upon general grounds, and upon reading the commitment, we find a special offence alleged, viz., the two seamen are convicted for not going to *their* work, and for disobeying a lawful command. It seems that under the Act, it must be an order given to one seaman: he cannot be convicted for not doing the work which another is ordered to do. This is a new point, not raised at the argument, and the Court will hear Counsel if they have anything to say upon it. The Court orders that the writ of *Habeas Corpus* issue, returnable *instanter*.

Johansen and Nordin, for a writ of Habeas Corpus.

TASCHEREAU, J.:—Les Requérants prétendent que la conviction prononcée contre eux est illégale et qu'ils doivent être libérés.

1°. Ils disent que la loi en vertu de laquelle ils ont été condamnés ne justifie rien de semblable; elle rappelle expressément au contraire la seule loi en vertu de laquelle ils pouvaient être convaincus, et cette loi se trouve exprimée en la section 4 du ch. 56 des S. R. B. C.—En effet il est constant que la loi nouvelle, 36 Victoria, ch. 129, section 5, rappelle non seulement la section 4 du ch. 56 des S. R. B. C., mais le chapitre entier.

2°. Les Requérants prétendent que la 36 Vict., ch. 129, tout en rappelant le ch. 56 des S. R. B. C. ne fait aucune disposition pour créer et punir l'offence dont ils ont été convaincus.

Il y a erreur dans les prétentions des Requérants, quoique de prime abord, elles puissent paraître très plausibles. En effet en référant aux sections 124 et 125 du ch. 36 Vict., ch. 129, on trouve que cet acte est désigné sous le nom seul de "*acte concernant l'engagement des matelots*" (shipping of seamen). On voit par la clause 124 que les dispositions de ce dernier acte relatives à l'engagement des matelots s'appliqueront aux vaisseaux de la marine marchande de toute puissance étrangère, et à toutes personnes concernant ces vaisseaux de la même manière qu'aux vaisseaux dans la marine marchande anglaise, et par la section 125, il est declaré que les dispositions de ce même acte relatives à la désertion, s'appliqueront aux vaisseaux et marins étrangers de la même manière qu'aux vaisseaux et marins anglais.

De prime abord l'emploi du mot désertion ne semblerait comporter que l'idée d'une offence de désertion proprement dite; mais si l'on refère au ch. 56 des statuts R. B. C., on a l'explication de l'idée et de l'intention du Législature en faisant usage de ce mot générique désertion. Cet acte a pour seul titre celui "d'*acte concernant la désertion des matelots*," et cependant il comprend et renferme un grand nombre d'offences mineurs qui toutes doivent deriver d'une origine commune savoir la désertion, et entre autres, d'avoir enlevé ses hardes et effets, ou ceux d'un autre matelot, ou du capitaine, ou de s'être absenté sans permission, ou de refuser de faire son devoir. J'en conclus que la Législature regarde comme désertion toutes les offences susmentionnées et entre autres celle de refuser de faire son devoir, et qu'en faisant usage du mot désertion dans cette section 125, on voulait y comprendre toutes les offences que je viens de signaler, et entre autres celle du refus de s'acquitter de leur devoir en travaillant à bord du dit navire. Le refus de travailler à bord suivant l'obligation que le matelot a contracté est une désertion, une répudiation formelle de son engagement; une absence plus ou moins longue et plus ou moins sévèrement punie suivant les circonstances qui caractérisent cette désertion qui dans un cas peut être complète par la fuite de l'accusé et dans un autre n'être qu'une absence assez courte accompagnée d'un refus positif de se livrer au travail requis par son engagement.

Les conséquences qui resulteraient d'une interprétation différente de l'acte en question seraient des plus sérieuses, et compromettraient non seulement l'intérêt du commerce, et affecteraient nos relations avec les puissances étrangères, mais seraient de nature à faire croire à un oubli bien regrettable de la part de nos législateurs. Ces considérations ne peuvent pas motiver notre décision en la ma-

scute cause, car il s'agit de l'interprétation d'une loi statutaire dont le texte doit toujours être considéré explicite et ne pas laisser place au doute. Je suis heureux de dire que dans le cas présent, il n'y a pas lieu au doute et encore moins au reproche d'oubli à notre Législature. Je ne vois rien d'approchant d'un casus omissus.

On ne trouve pas dans la catégorie des offences de désertion punissables par le statut en question, aucune offence designé comme celle que l'on trouve dans l'acte de conviction, savoir d'aller à l'ouvrage, mais on y trouve au paragraphe 5, de la section 91; l'offense de la désobéissance volontaire à un ordre legal, comme punissable d'une incarceration de deux semaines. Et dans la conviction les défendeurs sont accusés, convaincus et condamnés à deux semaines d'emprisonnement pour avoir illégalement et volontairement refusé d'obéir un ordre légal, savoir d'aller travailler a bord de leur vaisseau. Je retrouve l'offence indiquée par le statut, dans celle dont les défendeurs ont été convaincus.

Je considère la conviction parfaitement légale sous tous les rapports ci-dessus, et les Requérants ne devraient pas être libérés.

RAMSAY, J.:—I entirely concur with the Chief Justice upon both points. The difficulty with respect to the first point arises out of a piece of careless legislation by which sections 124 and 125 are not so clear as they might be. But I don't find on examination of those sections that the pretension of the petitioners' counsel can be sustained.

It is pretended that section 125 only extends the sections of the Act of 1873 "relating to desertion of seamen and apprentices" to ships in the merchant service of foreign powers. This is very true, but section 124 extends all the foregoing provisions "of this Act relating to the shipping of seamen" "to ships in the merchant service of every foreign country." The other offences created by section 91 are therefore comprised. It is pretended, I am aware, that section 124 should be read as though it were "The foregoing provisions relating to the shipping of seamen in this Act." But so to read the statute is a gratuitous and unwarrantable transposition of the words, in what interest and for what purpose I am at a loss to conceive. There are no provisions of the Act specially relating to the shipping of seamen as contradistinguished from the other provisions of the Act—the whole Act being entituled "an Act respecting the shipping of seamen." The reason which induced the Legislature to put desertion of seamen and apprentices into a separate section, is not perfectly clear to us, but it was probably to meet existing treaties with some foreign powers. I am therefore of opinion that the objection taken by the petitioners is not founded.

The conviction, however, seems to me bad for another cause. The two petitioners are accused of both refusing to obey one and the same lawful command to go to their work. This is nonsense. The offence of each is separate. It is in each the refusal to go to his work that is the offence. Johansen could not be convicted for refusing to go to Nordin's work or Nordin for refusing to go to Johansen's, or both for refusing to go to the work of both. This becomes doubly clear by reference to sub-section 7, which creates an offence for combining with any other or others of the crew to disobey lawful *commands* in the plural. The combination is then the offence.

Johansen and Nordin, for a writ of Habeas Corpus.

The writ must issue.

SANBORN, J.:—I quite concur with the reasons of the Chief Justice. I would only add that it is a maxim in the interpretation of statutes that we should endeavour to give effect to the statute, unless there is something inconsistent in it which prevents it from being carried out. In sect. 124 it is clearly stated that the penalties for offences are incurred by foreigners in our courts in the same way as by British seamen. The difficulty that arises is this: section 125 seems to come under that maxim, that specially mentioning one necessarily excludes the rest: that one offence being mentioned, all other cases are excluded. But keeping in view the object of the statute, then referring back to the former statutes, the difficulty disappears. The regulation with regard to the shipping of seamen was one of the principal things for which the law was enacted, and that object would be defeated if we failed to give effect to the Act in such cases as this. I think, therefore, it is a fair interpretation of the Act to say that sect. 125 was not an exception to the whole Act but a modified exception to sect. 124. I therefore think that the pretensions of the prisoners counsel are unfounded.

MONK, J.:—I have only to express my entire concurrence in the judgment given by the Court upon the first point. Upon the question of the joint and several condemnation we give no opinion at present.

The *Attorney General* remarked that he appeared in the case in the public interest only. He was not concerned as to any defect in the commitment: that was a matter of private litigation between the captain and the sailors.

The writ was ordered to issue, and later in the day the following judgment was rendered:—

"It is ordered by the Court now here that the within writ of *Habeas Corpus* and the return thereto be filed; and it appearing by the warrant of commitment, a copy of which duly certified is produced and annexed hereto, hath issued illegally against the two petitioners for the alleged offence of having disobeyed a lawful order to go to their work, while under the statute the conviction and warrant of commitment could only have been separate against each of them for having refused to obey a lawful order to go to his work, do order that the said warrant of commitment be quashed and the said Carl Johansen and John Nordin be discharged from custody."

Commitment quashed.

Mr. Dunbar, for the petitioners.
Mr. Atty. Genl. Irvine, and *Mr. R. Alleyn, Q.C.*, for the Magistrate.
(J.K.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 17TH SEPTEMBER, 1873.

Coram DUVAL, C.J., DRUMMOND, BADGLEY, MONK and TASCHEREAU, JJ.

ED. O. BICKFORD,
Defendant in Court below,
APPELLANT;

AND

WM. KERR,
Plaintiff in Court below,
RESPONDENT.

Goods were shipped at Liverpool for Montreal on board a vessel, whereof plaintiff was master, and by the bill of lading were to be delivered to "B." or his assigns, on payment of freight. The bill of lading was endorsed to H., a common carrier at M., with whom B. had a contract for the carriage of the goods in question to Toronto, where B. lived. B. paid H. the amount of ocean freight on being notified of the arrival of the goods at Montreal, and H. presented the bill of lading to the plaintiff, and received the goods from the vessel at Montreal without the freight being exacted from him. He then forwarded the goods to B. at Toronto and subsequently became insolvent, without paying the freight.

HELD:—That B. was not liable to the plaintiff for the unpaid freight.

Special declaration for freight, for carriage of goods from Liverpool to Montreal, with allegation of their reception there by defendant's agent.

The defendant pleaded:

1st. General and special denial of the allegations of the declaration.

2nd. Specially, that the fish-plates in question were delivered to one James H. Henderson, a common carrier at Montreal, whether upon credit or not being unknown to defendant; but if upon credit, solely upon the supposed credit of said Henderson, as the then endorsee and holder of the bill of lading set forth in plaintiff's declaration; that the defendant had contracted with Henderson as a common carrier for the carriage of certain goods of which these formed a part from Montreal to Toronto; that, upon the arrival of the vessel at Montreal Henderson notified the defendant and requested B. to forward him the amount of freight in question upon the said goods, which defendant did, together with all the other charges and expenses incurred up to the delivery of the goods to Henderson; that plaintiff always treated Henderson as his debtor, and made out the account for the freight against him, and made no demand upon the defendant till after Henderson's death, when his estate was discovered to be insolvent. That, prior to the delivery of the goods, B. had endorsed the bill of lading to the Bank of Montreal for value.

Upon these pleas issue was joined. The parties at proof fyled the following admissions:

1st. That, at all and every the times mentioned in plaintiff's declaration, the said plaintiff was the master of the ship or vessel, the *Oceola*.

2nd. That the eleven hundred and twenty bundles of fish-plates mentioned in the said plaintiff's declaration, were carried by the said plaintiff in the said vessel *Oceola*, from Liverpool to Montreal, under the bill of lading, plaintiff's exhibit number one.

---

* The analogous case of Fletcher *vs.* Bickford, S. C. M. No. 2487, was on the 19th May, 1874, decided in the Superior Court at Montreal in a similar sense, sitting Mr. Justice Mackay.

Ed. O. Bickford and Wm. Kerr.

3rd. That the freight thereon was the sum of two hundred and seventy-five dollars and nine cents.

4th. That the said fish-plates were delivered at the said city of Montreal, by the plaintiff, to the said James Henderson, on the production and delivery to the said plaintiff, by James Henderson, of the bill of lading, plaintiff's exhibit number one, duly endorsed by the said defendant.

5th. That the signatures to the contract, defendant's exhibit number one, are the signatures of James H. Henderson, referred to in defendant's pleas, and of him, the said defendant, and the said contract was written and signed by the said parties, about the day the said contract bears date.

6th. That the defendant subsequently received from the said James H. Henderson, at Toronto, the eleven hundred bundles of fish-plates, so carried for freight by the plaintiff, in the said vessel *Oceola*.

7th. That defendant's exhibit number two was sent by the said James H. Henderson to the defendant, about the day it bears date; and that the eleven hundred and twenty bundles, packages, therein mentioned, are the fish-plates referred to in the pleadings in this cause; and the charges in the said exhibit mentioned, include the said two hundred and seventy-five dollars and nine cents, freight payable for the carriage of said fish-plates, from Liverpool to Montreal, on board the said vessel *Oceola*.

8th. That, on or about the fourteenth day of October, 1871, the defendant endorsed and delivered to the Bank of Montreal (to secure to said Bank certain advances of money to him made) the bill of lading, plaintiff's exhibit number one, in this cause fyled.

9th. That thereupon said Bank transmitted said bill of lading to James H. Henderson, of Montreal, carrier, mentioned in the pleadings in this cause, with instructions to draw upon said Bank for the amount of freight and charges due on the goods mentioned in said bill of lading.

10th. That thereupon said Henderson drew the cheque, defendant's exhibit number three, filed in this cause, and had the same cashed by the said Bank, who charged the amount thereof to account of said defendant, who thereupon settled for and paid the same to said Bank.

The exhibits referred to in these admissions run as follows:

Plaintiff's Exhibit, No. 1.

Shipped in good order and condition, by Frank Pearce & Co., in and upon the good Ship or Vessel called the Oceola, whereof————is Master, for this present voyage, now lying in the Port of Liverpool and bound for Montreal, eleven hundred and twenty bundles Fishplates, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid Port of Montreal, all and every the dangers and accidents of the sea and navigation of whatsoever nature or kind excepted, unto E. O. Bickford, Esq., or to his assigns, he or they paying Freight for the said goods at the rate of——as per margin (wg. 61. 10. 2. 7. at 17.6., £53 16. 9. 5 p. c. primage £2. 13. 9., £56. 10. 6.) with primage and average accustomed. In witness

whereof the Master or Purser of the said vessel hath affirmed to——Bills of Lading, all of this tenor and date, one of which being accomplished the rest to stand void. Ed. O. Bickford and Wm. Kerr.

Dated in Liverpool, this 15th day of September, 1871.
Weight and contents unknown.

(Signed,) WILLIAM KERR.

Defendant's Exhibit, No. 1.

MONTREAL, July 7th, 1871.

E. O. BICKFORD, Esq., Toronto.

DEAR SIR,

I propose to freight hence to Toronto twenty-five hundred tons railway iron at two dollars and seventy-five cents per ton of 2240 lbs. The iron to arrive during balance of present season. This rate is exclusive of Marine Insurance, you to pay harbor dues here.

I accept the above. (Signed,) JAS. H. HENDERSON.

(Signed,) E. O. BICKFORD.

Defendant's Exhibit, No. 2.

MONTREAL, October 17th, 1871.

BANK OF MONTREAL, Toronto.

I beg to advise having this day entered at the Custom House for you 1120 bundles, packages per Oceola, on which I have paid charges as undernoted, amounting to two hundred and ninety-two dollars eight cents. The packages, when received from the vessel, will be forwarded with all possible despatch.

I am,
Sirs,
Your very obedient Servant,
JAMES H. HENDERSON.
(Signed,) Per A. H. LAVERS.

Value of goods £	Sterling, equal to $ at	
Wharfage 15.50, cartage	Postage and Telegraph Entry 1.50.....	17.00
Freight from Liverpool	per B.L. £56 10s. 6d. stg., at 9½, equal to..	275.09
Customs warehouse charges.....		$292.09
	Coms. and Telegram.....	0.75
		$292.84

Defendant's Exhibit, No. 3.

TORONTO, October 17th, 1871.

To the Managers of The Bank of Montreal:

Pay to Ocean Freight, *Oceola*, or Bearer, two hundred and ninety-two dollars and nine cents.

(Signed,) JAMES H. HENDERSON.

The only other point of importance on which evidence was adduced was as to whom the credit was given, and on this the depositions were conflicting. Mr. Hope, the ship's agent, swore that it was to the defendant, and that he

Ed. O. Bickford and Wm. Kerr.

made enquiries as to B.'s credit before giving up the goods; while Houston, his clerk, swore that the credit was given to Henderson, and that B. was not known to the ship's people at the time.

The case was first heard before the Superior Court, when the following judgment was rendered,—sitting His Honor Mr. Justice Beaudry:—

The Court, having heard the parties by their counsel respectively on the merits of this cause, examined the proceedings and proof of record, and on the whole, maturely deliberated; considering that it is in evidence that the said plaintiff conveyed in the ship "Oceola," under his command, the quantity of eleven hundred and twenty bundles of fish iron from Liverpool, to be delivered in the Port of Montreal to the defendant, or his assigns, and that the said fish iron was delivered at the said Port or City of Montreal to one James H. Henderson, for the said defendant, who had engaged the said Henderson to carry the said iron from Montreal to Toronto, the residence of the said defendant; considering that said plaintiff, for the aforesaid conveyance of the said iron from Liverpool to Montreal, is entitled to recover the sum of $275.09, and that the defendant's pleas are unfounded, doth dismiss the said pleas, and doth condemn the said defendant to pay the said plaintiff the sum of $275.09 with interest thereon from the 20th day of February, 1872, date of service of process in this cause, until perfect payment, and costs of suit, distraction whereof is hereby granted to Messieurs Kerr, Lambe and Carter, attorneys for said plaintiff.

From this judgment the defendant appealed.

In Appeal.

Mr. Ivan Wotherspoon for defendant (appellant):

Bickford was neither liable as a contracting party with the owners of the vessel, nor as the assignee of the bill of lading and recipient of the goods. No privity of contract existed between him and the ship; he neither shipped the goods, nor was he their owner when they were shipped, and he did not receive them. The attempt to establish that Henderson was his servant, and that Henderson's reception was his reception failed; for, although Henderson carried these goods from Montreal to Toronto for the defendant, it was not as his employee, or as being under his control, but in the capacity of a common carrier. Even if it were true that Henderson had been defendant's agent, it would have been necessary for the Respondent to have established, that he was his agent with power to pledge the credit of his principal *in futuro*, and that in obtaining the goods on credit he did not exceed his mandate. Supposing, for the sake of argument, that he was to be looked upon, not as the endorsee of the bill of lading, but as the mere holder of it for the appellant, to receive the goods for him, in that case he was a mere mandatary. What the nature and extent of his mandate was, the bill of lading must be taken to show. That was the authority communicated to the respondent, with the terms of which he was aware, and he should, therefore, have been on his guard and seen that they were conformed to. It was as holder of the bill of lading that Henderson claimed the goods; it was this authority respondent recognized, and when he delivered the goods to Henderson it was in virtue of this document. Now on examining this bill, its terms are found to be that the

goods were to be delivered "upon payment of the freight;" consequently the plaintiff was warned that if he considered Henderson to be Bickford's agent, it could only be to receive the goods "upon payment of freight." The legal presumption was that his authority extended no further. The proof of any greater or further authority devolved upon respondent. This principle is recognized and clearly laid down in the leading case of Tobin *vs.* Crawford, 5 Meeson and Welsby, page 235; (confirmed in appeal. v. M. & W., p. 716,) in which the facts are almost identical with those of the present case.

The following authorities were also cited on behalf of the defendant:

Abbott on Shipping [edition 1867,] p. 374. Where speaking of the effect of such a bill of lading as the one in question the learned author says: "It "is evidence of a contract by *the person receiving the goods*, to pay the "freight due on them. There is no assignment of contract, no shifting of "liability. The receiver of the goods is an original contractor to pay the "freight for them. A man who obtains goods as the holder of an instru- "ment, by which his right to claim them is conditional on the payment by him "of the charges to which they are therein stated to be subject, cannot complain "if his conduct be thought to raise an inference that he undertook to pay such "charge. *But no such contract can be implied against a consignee*, who, not "having himself received the goods, has, by endorsing the bill of lading, enabled "his endorsee to receive them." 'It is not,' said Lord Tenterden, 'The mere "receipt of goods by a person who is not the owner of them, with the knowledge "that they are subject to a charge, that will bind him to pay it; but if such a "person receive the goods, in pursuance of a bill of lading, making the payment "of such a condition precedent of their delivery, he will be liable for it.' And "in one case the receipt of goods under a bill of lading by which the goods "were made deliverable to consignees by name, but not to their assigns, was "considered by Lord Tenterden to be evidence of an agreement by *the persons*, "not the consignees, *who received them*, to pay the freight due upon them."

And in Story on Agency (edition 1869) Section 274; it appears that—*the person receiving the goods* is not the person for whose benefit ultimately they are received, but the person who takes physical possession of them from the vessel even though he be a mere agent. The precise words are: "The liability of an "agent may also arise by implication, from his own acts, with reference to a "written contract to which he is not originally a party: By the common form of a "bill of lading, the goods are deliverable to the consignee, or his assigns, or to the "shipper, or his assigns, he or they paying freight therefor; and upon the con- "struction of the instrument, it has been held, that whoever receives the goods "under the bill of lading, contracts by implication to pay the freight due on "them. Therefore, if the shipper, or the consignee, in such a case, should "endorse the bill of lading to his agent, whether known to be an agent or not, "the latter would be liable to pay the freight, if he took the goods upon the "consignment under the bill of lading." It is urged, however, by the respon- dent, that even though Henderson be liable the appellant is not relieved, but we find the contrary in the books; see Parsons on Shipping and Admiralty (1869) vol. 1, pp. 201, 8, 9.

Bd. O. Bickford and Wm. Kerr.

"And if a consignee assigns and endorses over the bill of lading, and the endorsee takes the goods, the original consignee is not bound to pay the "freight."

On reference to our Code, we find the same principles laid down. In art. 2454, "the acceptance of goods under a bill of lading, by which delivery is to be made to the consignee or his assigns, he or they paying freight (as in the present case) renders the person so receiving them liable for the freight due upon them." Except in the case of such person being the known agent of the shipper, which the defendant was not.

But it was not as Bickford's agent that the goods were delivered to Henderson, but as the endorsee of the bill of lading; the goods being deliverable to the holder of this bill endorsed by the defendant. This is conceded in the admissions given by the Respondent, in which he says: "that the plates were delivered to Henderson on the production and delivery of the bill of lading endorsed by appellant."

Another point, which is not without weight in the appellant's favor, is that Henderson did not receive the bill of lading from Bickford at all but from the Bank of Montreal, who received it for value from Bickford. This circumstance alone is one which if every thing else had tended to create a presumption in his favor, would make it imperatively necessary that the plaintiff, in order to succeed, should have established, beyond the shadow of a doubt, the agency of Henderson for defendant, and his authority to bind his principal's credit *in futuro*.

Mr. Kerr, Q.C., for plaintiff, (respondent.)

The case of Tobin *v.* Crawford is not applicable. The points of difference between this case and the case of *Tobin v. Crawford* are the following:

1o. Coupland & Duncan were the factors of the consignees, Crawford & Co., intrusted with the goods for the purpose of selling them, whilst Henderson in this case was but a carrier employed to obtain them from the ship and forward them to the appellant.

2o. The plaintiff in *Tobin v. Crawford* was not aware that Coupland & Co. were agents, he treated with them as principals and debited them in account with the freight. In this case the ship's agent was well aware of the fact that Henderson was but the appellant's agent, never debited him with the freight, never recognized him as the debtor, but always rendered the account against the appellant and in the appellant's name.

3o. *Tobin v. Crawford* was decided in 1839, previous to the passing of the Bills of Lading Act, 18 and 19 Vic. c. 111., of which s. 1 is the basis of Art. 2421 of the Civil Code L. C., whilst the cause of action in this case arose since the coming into force of the Code.

He then referred to Smurthwaite *vs.* Wilkins et al, N. C. B., N. S. 842, and Lewis *vs.* McKee, 2 L. R. Ex. 37 and 4 L. R. Ex. 61.

The principle which alone can be deduced from the cases of *Smurthwaite v. Wilkins & al.* and *Lewis v. McKee*, is that where the consignee indorses a bill of lading to his carrier, warehouseman, agent, or servant, for the purpose of obtaining delivery, and without transferring the property, the consignee is liable

for the freight. If the property in the goods carried remains his, the delivery to the carrier, warehouseman, agent, or servant, under the indorsed bill of lading, is a delivery to the consignee for [illegible], he is liable to the shipowner or master for the freight.

The case of *Lewis v. McKee* is excessively strong in support of the respondent's pretension. In that case not only was the bill of lading indorsed generally as in this case, but it was specially indorsed barring the shipowner's recourse against the consignee in express words, and yet though the goods were delivered to the party specified in such indorsation, it was held that the consignee, as owner of the goods, was liable.

It cannot be pretended, then, in the face of these last-mentioned cases, that *Tobin v. Crawford* is authority. Strange to say, in none of the cases bearing upon the point is that case cited, although in *Lewis v. McKee*, counsel of the very highest reputation pleaded for the defendant. *Tobin v. Crawford* was not mentioned. It must be regarded in England as inapplicable, owing to the changed state of the law by the 18 & 19 Vic. c. 111, or as a bad decision.

In this case it is perfectly clear that the shipper of the goods in question in shipping them, acted solely as the appellant's agent, the appellant being the consignee, from the moment of the shipment, if not before, was the owner of the goods (*Coleman v. Lambert*, 5 M. & W. 502; Abbott on Shipping, 11th ed. p. 734), and consequently must be regarded as the shipper (Blackburn on Sales, 277; *Higgins v. Senior*, 8 M. & W. 834.). In this case Henderson was the known agent of the appellant; consequently under Art. 2454 of the Civil Code, he, Henderson, was not liable.

Moreover, on investigating the principle by which, when in a bill of lading the goods are deliverable on payment of freight by the consignee or his assigns, the master delivering without previous payment retains a right of action against the consignor, it will be found that it only exists when the consignee is the owner of the goods, (*Domett v. Beckford*, 5 B. & Ad. 521), and that the owner of the goods is not discharged from his liability by the neglect of the shipowner to obtain payment from the consignee. "The law," said Parke B., "will imply from the fact that the goods were laden on a ship, to be conveyed from Jamaica to London, a contract by the owner of those goods to pay for the carriage." (Abbott, 370, 371.)

Applying these principles to the case of *Tobin v. Crawford*, how is it possible to reconcile the grounds of decision in that case with those enunciated by the judges in *Domett v. Beckford*, *Shepherd v. de Bernales*, (13 East 365), *Tapley v. Martens* (8 Term Rep. B. R. 451), and *Marsh v. Pedder* (4 Camp. 257). In *Tobin v. Crawford*, the delivery in violation of the bill of lading without previous payment of freight, was looked upon as destroying the recourse of the shipowner against the owner of the goods carried, whilst in the other cases a like violation was held not to destroy the liability of the owner to pay the freight. The ground of the decision in *Tobin v. Crawford* is pure sophistry, irreconcileable with the universal current of decisions regulating the relations of principal and agent, if a factor in such a case is to be looked upon as an agent. It is true Abinger C. B., and Parke B. did not regard the question as [illegible] agency, and that may perhaps be taking into consideration, also, that the [illegible] had debited Coup-

Ed. O. Bickford and Wm. Kerr. land & Duncan with the freight, and believed them to be principals, the real ground of the judgment.

The true principle would seem to be that laid down by Mr. Parsons in his work on Maritime Law, Vol. 1 p. 221: "If a bill of lading expresses that the goods are to be delivered to a consignee on payment of freight, if the master delivers them without freight being paid, he cannot afterwards fall back on the consignor if the goods are the property of the consignee. This must be the general rule. But if the consignor alone owns the goods, such a bill of lading would amount to no more than an order of the consignor to his agent to pay the freight for him, and on the failure of the agent to pay the freight the principal would still be held."

Applying the principle contained in the latter portion of the quotation to the case of a consignee indorsing to his agent for delivery, is it not clear that the consignee in such case is exactly in the same position as the consignor, owner of the goods mentioned by Parsons, the indorsement being nothing but the consignee's order to his agent to pay the freight, and intended as a receipt for the goods on delivery to the ship master. If the agent in such case fails to pay the freight his principal is held, as mentioned by Parsons.

Mr. Angell in his work on Carriers 4th Ed., § 397, says: "The Court in this case (*Collins v. Union Trans. Co.*, 10 Watts 384) considered the point before them had long been settled. It was fully discussed in *Shepherd v. de Bernales* and ruled upon the authority of *Penrose v. Wilks*, *Tapley v. Marten* and *Christie v. Rowe* that the stipulation in a bill of lading for delivery on payment of freight is introduced for the benefit of the consignor *or the party for whom the consignee is agent*, and if the agent should be faithless, the loss would fall on those who trusted him, and they ought to bear it, and this is a point conclusively settled." See *Ward v. Felton*, 1 East 507; *Fox et al. v. Nott*, 6 H. & N. 630; *Chitty & Temple* on Carriers, p. 208, 209, 222.

The ordinary rules regulating the liabilities of principals it is contended should be applied in this case.

Civil Code, Arts. 1715, 1716, 2454; Story on Agency (7 Ed.) § 160 *a*, 161, 162 & n. 3, 270, 274, n. 1.

In the last cited note it is remarked "it is not easy perhaps to reconcile the language of all the cases on the point," but it is to be remembered that the point involved in all of them was, *not the liability* of the *principal* but that of the agent. In the case of *Dougal v. Kemble*, 3 Bing. 383, Best, C. J., said "the captain has a lien for the freight against whoever shall become the owner of the goods." The point decided in the cases so referred to was in fact whether both principal *and* agent were liable. Story on Ag. § 442, 446, 447, 449, 451.

In this case also it is to be remembered that from the contract between Henderson and Bickford, the latter evidently authorised Henderson *generally* to get the goods for him, for on Henderson writing to him that he had paid the freight, although he had not done so, the appellant remitted him the money, consequently it was a fraud by the agent on his principal, and the innocent third party should not be made to suffer.

Story on Agency §127 & n. 1.

Ed. O. Bickford and Wm. Kerr.

Mr. Wotherspoon, for appellant, in reply:

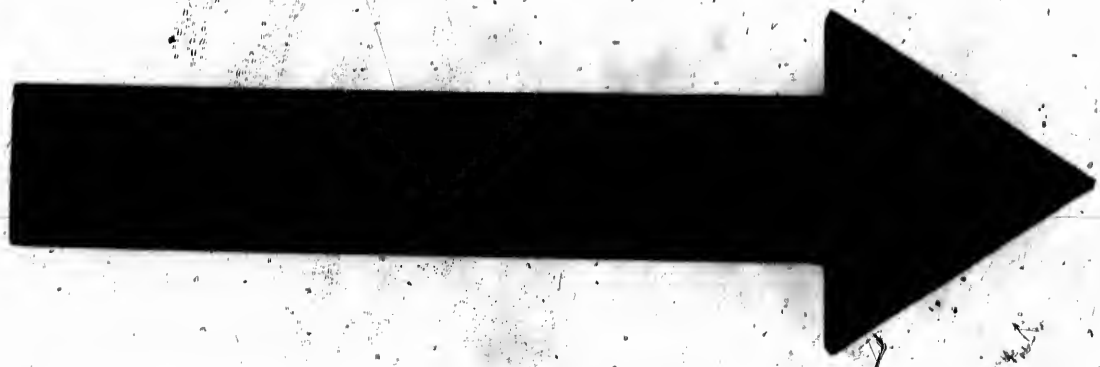
There is a distinction between the present case and the authorities cited by the respondent, which also exists between these authorities and the case of Tobin *vs.* Crawford; and this is that the principle referred to by Erle, C.J., in Smurthwaite *vs.* Wilkins *et al.* (where judgment went for the defendants,) and upon which Lewis *vs.* McKee was decided, was the existence of a special statutory enactment, which does not affect the present case, and which was not in [illegible] Tobin and Crawford was decided, and the art. of our Code is not, [illegible] duction of this clause of the Bill of Lading Act. (18 [illegible]) so that as regards the law this case and Tobin & Crawford [illegible] and the cases cited by the respondent in another. Mo[illegible] McKee special stress was laid upon the fact that the de[illegible]tted that the persons to whom the goods were delivered were their [illegible] and that they had not furnished them with money to pay the freight, and admitted also that they would be liable to repay their agents such freight, if paid by them, thus creating a presumption that their agents were authorized to pledge defendants' credit *in futuro*, a set of facts very different from the present.

Plaintiff's other authorities, cited in support of his pretentions, are inapplicable; for they refer to the right of the ship-owner against the *consignor* of the goods, in the event of their being given to the holder of the bill of lading, without receiving the freight at the time. The distinction between the consignor and consignee, which the respondent has thus ignored, is one drawn on sound principles of law. In the one case a privity of contract exists between the ship-owner and the person from whom he actually receives the goods, of which he is not deprived by anything which may take place subsequently; he knows the shipper, he may not know the consignee. No wrong is thus done the consignor, for he may, and it is his duty to, protect himself before he parts with the bill of lading, which is received by him in the first place.

The consignee, on the other hand, is in a different position; he does not put the goods on board the vessel, nor enter into any contract to pay the freight, and upon passing over the bill of lading to a third party, to whom the goods are deliverable upon payment of freight, he must be considered to have nothing more to do with the ship and to be entirely exonerated.

TASCHEREAU, J, (*diss.*): L'appelant qui réside en Canada, est le consignataire d'un chargement de fer expidé de Liverpool (en Angleterre). Kerr, l'intimé, est le maitre du vaisseau a bord du quel a été fait le chargement. Le connaissement (bill of lading) établit que le prix du transport sera payé sur délivrance au consignataire ou à ses ayans cause (*assigns*).—L'appelant a endossé en blanc le connaissement, et un nommé Jas. H. Henderson qui est un voiturier (*common carrier*) a reçu la marchandise en vertu de cet endossement, et sans payer le coût du transport dû à l'intimé comme maitre du vaisseau.

L'intimé ayant poursuivi l'appelant pour $275, valeur de ce fret, l'appelant a prétendu qu'il avait cédé ses droits à ce nommé Henderson par et au moyen de l'endossement du connaissement, et que l'intimé n'avait aucune privité de contrat avec lui ou recours contre lui, l'appelant, mais bien seulement contre ce Mr. Henderson auquel il avait livré le chargement, et auquel seul il avait fait ou donné crédit.



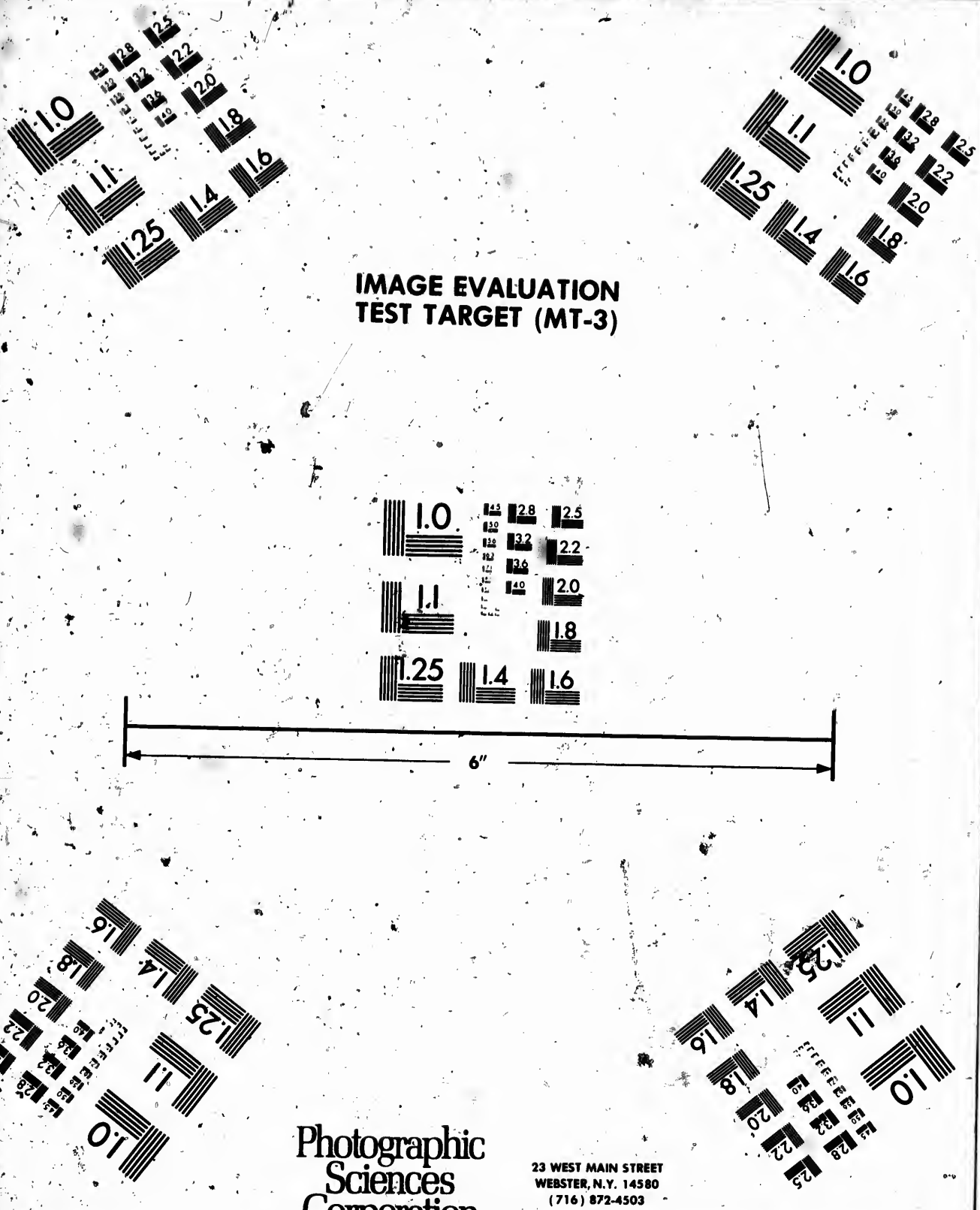


IMAGE EVALUATION
TEST TARGET (MT-3)
1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
6"
Photographic
Sciences
Corporation
23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Ed. O. Bickford and Wm. Kerr.

L'intimé a repliqué que Henderson n'était que l'agent de l'appelant et que comme tel il avait reçu le chargement pour l'appelant.

Cet exposé de faits et des prétentions respectives des parties fait naitre les questions suivantes.

1°. Le nommé Henderson a t-il reçu les marchandises pour lui-même et sur sa seule responsabilité, et en autant serait-il seul responsable vis-à-vis de l'intimé du montant du fret ?

2°. Le nommé Henderson étant reconnu comme agent de l'appelant, ce dernier est-il toujours demeuré débiteur du fret ?

L'enquête en cette cause établit à ma satisfaction que Henderson n'était que l'agent de l'appelant; qu'il n'est qu'un simple voiturier (common carrier and forwarder) ne faisant aucun commerce necessitant les marchandises en question en cette cause. L'endossement du connaissement (bill of lading) est fait en blanc, comme il serait fait à un simple serviteur pour l'autoriser à recevoir les effets, et non comme il devrait être fait s'il eût été fait pour valeur reçu en faveur d'un cessionnaire ou ayant cause. Le fer il est vrai est délivré à Henderson, mais c'est l'appelant qui le reçoit à Toronto et qui en profite. Le nommé Henderson usant de mensonge prétend avoir payé le fret, et demande à l'appelant de lui en rembourser le montant, et c'est alors que Henderson, en agent infidel, trompe son maitre et ne paye pas ce fret, et devient peu de temps après insolvable. L'appelant a toujours été considéré comme débiteur du fret, et de fait il en est débité dans les livres de l'agent du vaisseau, et cet agent jure que crédit n'a jamais été fait à Henderson mais bien à l'appelant. Evidemment Henderson n'était que l'agent de l'appelant.

La seconde question est facile de solution avec les premisses que nous avons. Il est evident que l'appelant n'a pas pour un instant cessé d'être débiteur du fret. En effet, les articles 1715, 1716, et 2454, du Code Civil de Québec imposent à l'appelant comme débiteur de ce fret une responsabilité que tous les précédents Anglais, tout respectables qu'ils soient, ne peuvent ébranler pour un instant. Pourquoi devrions nous chercher ailleurs un texte de loi, ou plutôt des précédents, en semblables matières, lorsque nous trouvons dans les articles ci-dessus de notre code la déclaration formelle, que la responsabilité du mandant n'est pas affecté par le fait que l'agent serait lui-même responsable, en autant qu'en contractant il l'aurait même fait en son propre et privé nom ? J'ai beaucoup de respect pour les décisions anglaises citées par les parties au présent appel, malgré que les unes soient opposées et en contradiction evidente avec les autres, mais je ne suis pas disposé à chercher ailleurs une loi que je trouve dans notre code civil, et encore moins suis-je disposé à me laisser exclusivement guider par de telles décisions; tout en les consultant comme raison écrite sous certains rapports, je me plais à dire qu'il faut, une fois pour tout, commencer à penser par nous mêmes et pour nous mêmes en interpretant notre Code Civil, si clair, si explicite, sur la question de cette responsabilité de l'appelant, et je considère comme œuvre de surrerogation le trouble que les parties ont pris de compulser, comparer et interprêter les divers précédents anglais dont mention est faite en leurs factums respectifs. Il est prouvé à ma satisfaction que Henderson n'était que l'agent de l'appelant, qui lui avait mis en mains les deniers

nécessaires pour payer le fret; cet agent se montre infidel, et ne paye pas ce fret, serait-il juste que l'intimé qui, n'est qu'un tiers, et n'a pas participé à tromper l'appelant, souffrirait de cette fraude de l'agent de l'appelant? N'est-ce pas un axiome de droit, que si deux parties sont exposées à souffrir de la fraude d'un tiers, la perte doit retomber sur celui qui a employé ce tiers, l'a choisi spécialement pour transiger en son nom l'affaire qui leur est commune? Et dans le cas actuel n'est-ce pas sur l'appelant que doit plutôt péser la faute et même la fraude de son agent Henderson, que sur l'intimé, qui ne l'a pas choisi? Je crois que l'appelant doit s'imputer les conséquences du choix d'un tel agent, et que le jugement prononcé par la Cour Supérieure devrait être confirmé.

MONK, J. (*diss.*) I consider whatever questions there may be in this case, there is none as to the ownership of the goods. These clearly belonged to Bickford. I consider too, that the fact that the credit was given to Bickford and not to Henderson is well proved. Bickford, the owner of the goods, transfers the bill of lading to Henderson for a specific purpose only. Finally the defendant has admitted his liability by telling Henderson to pay the freight and giving him his cheque for the amount after delivery. In this view of the facts I cannot but dissent from the opinion of the majority of my brother judges.

DRUMMOND, J.—In my view of this case the question is one of Henderson's agency. Now, in my opinion he was not Bickford's agent, or at most his agency was limited, and conditional on the payment of the freight before reception of the goods, as expressed in the bill of lading; he was merely a common carrier and not an employee of the defendant. He did not even receive the bill of lading from the appellant, but from the Bank of Montreal, to which it had been transferred for value. The whole case is to be found in the admissions. I may add that there is no doubt in my mind that the credit was really given to Henderson. For these reasons I concur in the judgment of the Court.

BADGLEY, J.—I find in this case a fact which is sufficient to relieve the defendant, it is that the bill of lading was transferred to the Bank of Montreal for advances. When this was done the bank took the place of Bickford, and he ceased to be liable even under the terms of the Bill of Lading Act. It was the bank who transferred to Henderson, and on this transfer being made Henderson became the endorsee. It was he, as such endorsee, who applied to the ship's agent for an order for the iron, and it was to him that this order was given, as such endorsee and upon his personal credit. I therefore am of opinion that we are right in reversing the judgment of the Court below.

The following was the written judgment of the Court.

The Court * * *.

Considering that by law the bill of lading for the carriage of goods is a negotiable instrument, and that the property in the goods to which it relates may be transferred by indorsement to a particular person or in blank, with a delivery thereof to the persons to whom it is intended to pass the goods; considering that the liability of the consignee for freight of goods consigned and deliverable to him, or to his assigns, as in this case, on payment of freight, ceases on his endorsement of the bill of lading before the delivery of the goods to him, and that his rights and liability pass from him by such endorsement to a third person; considering that

Ed. O. Bickford and Wm. Kerr.

it is in evidence in this case that the goods, the subject of the freight demanded by the action in this behalf by the respondent, plaintiff below, against the appellant, defendant below, were deliverable at Montreal to the said appellant, as consignee thereof, or to his assigns, under the bill of lading, on payment of freight of the said goods; and, considering that the appellant had, before the delivery of the said goods, indorsed and delivered the said bill of lading for valuable consideration to the bank of Montreal, to whom the said bill of lading was transferred to the said James H. Henderson in the pleadings mentioned, who was the holder thereof at the delivery of the said goods; and, considering that the said respondent delivered the said goods to the said James H. Henderson, upon his responsibility for the payment of the said freight; and, considering that the liability of the said appellant for the said freight did not remain after his said endorsement of the said bill of lading; considering, therefore, that in the judgment rendered in this cause by the Superior Court at Montreal on the 27th day of November, 1872, there is error, doth reverse and set aside the said judgment; and, proceeding to render such judgment as the said Court should have rendered, doth dismiss the said action of the respondent, with costs in favor of the appellant as well of the said Superior Court as of this Court, distraction whereof is granted to Messrs. Abbott, Tait & Wotherspoon, attorneys for the said appellant.

The Honorable Justices Monk and Taschereau dissenting.

Judgment of Superior Court reversed.

Abbott, Tait & Wotherspoon, for appellant.

Kerr, Lambe & Carter, for respondent.

(I.W.)

COURT OF REVIEW, 1873.

MONTREAL, 29th NOVEMBER, 1873.

Coram JOHNSON, J., MACKAY J., BEAUDRY, J.

No. 91.

Ex parte *Blain*, for Writ of Prohibition, & *The Corporation of the Village of Granby, Respondent,*

HELD:—That a writ of prohibition cannot be legally issued against a Corporation, to stay proceedings on a warrant of distress signed by the mayor to compel payment of taxes.

This inscription was in Review of a judgment of the Superior Court for the District of Bedford (Dunkin, Justice) rendered on the 12th day of May, 1873, dismissing the petition, and quashing and annulling the writ of prohibition, with costs.

The writ of prohibition was issued by the Prothonotary, in the absence of the Judge, and was directed against the respondent.

The petition for the writ was predicated on a distress warrant signed and issued under chapter 24 of the Consolidated Statutes of Lower Canada, section 59, subsection 15, and under date of the 14th of March, 1870, by the then mayor of the Village of Granby, for alleged neglect and refusal to pay $5.25, therein said to be due by the petitioner to the municipality, as apparent from

Ex parte Blais and the Corporation of the Village of Granby.

its collection roll for 1869, under which warrant of distress certain moveables of his were said to have been seized and to be under seizure.

The petition, after setting out the issue of the warrant and the seizure made under it, alleges that the sum seized for was a pretended amount of tax for 1868 on a certain designated lot; that petitioner does not and never did owe it; that he only held the lot since the 29th of October, 1869; that in 1868 it was held by one Mercure, who became insolvent, and the lot was regularly sold by his assignee, and bought by petitioner, who thus acquired it free from all arrears of tax; that his name was not and could not be on the collection roll for 1869; that he never had notice from the secretary-treasurer; that the mayor exceeded his jurisdiction in signing the warrant, and in, fact had none in the premises; and that the Corporation had no right to cause the seizure. Wherefore, for a variety of formal reasons, stated as arising out of this alleged state of matters, he prayed for the writ against the Corporation, to order suspension and stay of proceedings, on the seizure and appearance of the corporation before the said Court, to show cause why it should not be condemned to proceed no further, and why the seizure should not be declared null, and *main levée* thereof granted, and the writ of prohibition maintained; and concluded for such maintenance of the writ and annulling of the seizure, and order to the Corporation to stay all further proceedings in the premises, the whole with costs.

The Corporation met this, firstly by a demurrer, on the grounds that the petition does not allege the warrant to have issued from a Court, that the warrant set forth issued from no Court, but simply under the provisions of the Act respecting municipalities and roads in Lower Canada—that the writ was illegally issued, inasmuch as such a writ can only issue to a Court of inferior jurisdiction whenever it exceeds its jurisdiction, and that it is not alleged or shown that the petitioner has no other remedy; secondly, by an affirmative plea, setting forth in other form the same grounds of defence; thirdly, by a plea affirming the regularity of the procedure impugned; and fourthly, by the general issue.

The parties went to proof, and the case came up before the Court on its whole merits, and, after hearing the parties, the Court pronounced the following judgment:—

The Court, considering that the said petition [*requête libellée*] neither purports to complain nor in fact complains of any action of any Court of inferior jurisdiction, as being in excess of its jurisdiction, and that the writ purporting to be a writ of prohibition, issued in pursuance thereof, neither purports to be, nor, in fact is, addressed to any such Court, as being in excess of its jurisdiction; but is addressed only to a local municipality, in respect of its exercise of a public function, not having any judicial character, nor pending before any Court whatever, doth hence dismiss the said petition (*requête libellée*) and doth quash and annull the said writ, with costs, &c."

In rendering judgment the Honorable Judge stated that it was unnecessary for him to pass beyond the consideration of the manifest inapplicability of the writ of prohibition to this case.

The Corporation, respondent, is no Court of inferior jurisdiction; and neither

Exparte Blain, and The Corporation of the Village of Granby.

the writ nor the petition at all purports to deal with it as so being. What is complained of by the petitioner is an act such as usually emanates from a Court, but which the Legislature, in respect of certain matters connected with local taxation, has seen fit to allow to be done ministerially by a municipal functionary without recourse or reference, in any wise, to any Court. The mere quasi-judicial character of the act, which may be thought to attach to it, from its being ordinarily the act of a Court, does not constitute either the functionary here charged to do it or the municipality for whom he does it, or both of them, into a Court. There is, in truth, no Court, or proceeding before a Court. Execution is allowed without intervention of a Court in any wise.

Nor indeed, by this petition, is the municipality ever so little dealt with as a Court. The complaint is, not that it has exceeded its jurisdiction, but that the mayor has done so. The municipality is to be merely enjoined to proceed no further. But on this showing it is the mayor only who is exercising a jurisdiction, who is viewed as in some sense a Court; the municipality is a mere plaintiff before him.

But it is certain that the writ of prohibition can only issue where a Court is acting in excess of its jurisdiction, and must be addressed primarily to such Court, and can only reach a party before the Court, subsidiarily.

The writ, therefore, must be quashed, and the petition rejected, of course with costs.

JOHNSON, J.—This inscription is made by the petitioner for a writ of prohibition in the Court below, where the proceedings were dismissed on the ground that no writ of prohibition could be maintained under the circumstances. The judgment of the Superior Court in the District of Bedford, which is now in question, in the reasons which it assigns for dismissing the writ and petition expresses all that it is necessary to say upon the subject. These reasons were that the petition neither complained, nor purported to complain, of any action of any court of inferior jurisdiction, as being in excess of its jurisdiction, and that the writ issued upon this petition was not even addressed to any Court, but only to a local municipality. We therefore confirm this judgment.

Judgment of S. C. confirmed.

Girard & Girard, for Petitioner.
J. A. Mousseau, Q. C., Counsel.
Bethune & Bethune, for Respondent.
(S.B.)

COURT OF REVIEW, 1873.

MONTREAL, 29TH NOVEMBER, 1873.

Coram JOHNSON, J., MACKAY, J., BEAUDRY, J.

No. 1346.

Blain vs. The Corporation of the Village of Granby.

HELD:—That in an action of damages against a Corporation for illegally issuing a warrant of distress, the Corporation is not entitled to one month's previous notice of action, under art. 22 of the Code of C.P.

This was an inscription in Review by the plaintiff, whose action was dismissed in the Superior Court for the District of Bedford.

The plaintiff, who described himself as a "labourer" (journalier), sued to recover the sum of $300, for alleged damage arising from the seizure of his effects, under a distress warrant issued under the Municipal and Road Act (Cons. Stat. of L. C., ch. 24, sec. 59, subsec. 15) for municipal taxes amounting to $5.25; the plaintiff alleging that, in reality, he did not owe the taxes, and that the warrant of distress had been illegally and wrongfully issued.

The defendant, by *défense au fond en droit* and exception, raised the question of the necessity of one month's notice of action, under the 22nd article of the Code of Civil Procedure, which had not been given in the present instance, and by other pleas traversed the allegations of the declaration.

The point that created most discussion at the argument of the case on the merits (the hearing of the demurrer having been postponed till then) was as to the want of a month's notice; and on this point the Corporation relied on the language of the 22nd article of the Code of C. P:—"public officer or other person fulfilling any public duty or function," and on the 8th subsection of sec. 6 of ch. 5 of the Cons. Statutes of Canada (the Interpretation Act), which distinctly provides that the word "person' shall include any body *corporate or politic*, or party." The Defendants also relied on the judgment of the Court of Review at Quebec, in the case of Basin *vs.* The School Commissioners of St. Anselme (a body corporate just as the defendant here), where it was held that in an action of damages against them, they were entitled to one month's previous notice—1st Rev. Crit. p. 480.

On the whole the Honorable Judge (Dunkin) who pronounced the judgment under Review on the 12th of May last did not hesitate to dismiss the plaintiff's action with costs.

JOHNSON, J.:—This was an action of damages arising out of the same matters as were made the subject of the petition and writ of prohibition that have just been disposed of. The plaintiff sued for $300 damages for the wrongful seizure of his goods by the defendant, under a warrant of distress. The action was dismissed for want of a month's notice, as required by law to be given to *any public officer or other person fulfilling any public duty or function;* and also on the grounnd that, by the evidence, the plaintiff had not proved his case, irrespectively of the question of notice.

On the first point we are with the plaintiff, and think that no notice of action was necessary. It is not contended in argument for the defendant that the words "officer or other person" in themselves apply to a municipal Corporation, but it is argued that the word person is, by the Interpretation Act, extended to mean corporations. The number eleven in the schednle to article 17 of the Civil Code certainly says that the word "person" includes bodies corporate, "unless such a meaning is contrary to law, or inconsistent with the particular circumstances of the case," which can only mean that a corporation is what the law says it is, viz. an artificial or ideal person, but not that it is a public officer. They execute no office in the legal sense of that word. The individual members exercise public offices in many cases, and their intrusion may be enquired into by *quo warranto;* but the aggregate corporation itself is the local government of the parish or county it represents. The boards or the councils of municipal

Blain & vs. The corporation of the Village of Granby.

corporations also may be conceivably treated as public officers, because they execute duties imposed upon them individually, but they are not sued as such here. In this sense it is reported in the "Revue Critique," page 480, that the Court of Review at Quebec held a Board of School Commissioners entitled to notice.

Upon the other part of the case we come to a different conclusion from that of the Court below. We consider that it is proved in the present case that the debt was purged by the sale of this property by the assignee to the defendant, and the seizure was, therefore, illegal, and without right. In the absence of proof of specific damage, none but nominal will be awarded, and we reverse the judgment, therefore, and award $10 and costs as in an action for that amount in the Court below. The defendant to pay the costs in Review.

Judgment of S. C. reversed.

Girard & Girard, for Plaintiff.
J. A. Mousseau, Q.C., Counsel.
Bethune & Bethune, for Defendants.
(S.B.)

SUPERIOR COURT, 1873.

MONTREAL, 30th SEPTEMBER, 1873.

Coram JOHNSON, J.

No. 561.

Warner vs. *Buss.*

HELD:—That, in ordering imprisonment under the 92 section of the Insolvent Act of 1869, the Court is bound to limit the payment, by way of release (in the precise words of the Act), to "the debt or costs."

PER CURIAM:—This is an action under the 92nd section of the Insolvent Act [32-33 Vic., c. 16] to recover $227 and interest, and to award imprisonment against the defendant for the fraud which he practised in obtaining the loan of that sum from the plaintiff. This charge of fraud reposes upon the allegation that the defendant, on the 25th November, 1872, called at the office of the plaintiff, who is an exchange broker, and obtained an advance of American money represented by the amount sued for, stating that he would, as soon as he could reach his own office, send the plaintiff a cheque for the amount, but that he has never done so, and, in fact, had no account at any bank to enable him to do so, and was guilty of a false pretence in holding out that such a cheque would be sent. The necessary averments to bring the case within the ninety-second section are made in the declaration; and it is contended that the defendant has brought himself within the two prohibitions of the section: 1st, by procuring the advance, knowing himself to be insolvent, and concealing it from the plaintiff; and, 2nd, by obtaining a term of credit by the false pretence that he was in a position to give a cheque immediately for the amount advanced. The plea specifically denies all the essential averments, and the parties have been to proof.

I am constrained to say that I consider the penal part of the case made out. It appears from the evidence, no doubt, that the defendant is a person of upright character, and being of a sanguine temperament, he thought and hoped to the last that he could pay his debts. The defendant is not, I think, guilty of express and preconcerted wrong-doing; but the law exacts from traders a sufficient knowledge of their own affairs, and classes with fraud the kind of recklessness proved against the defendant here. This loan was obtained on the 25th November, a Monday. On the Saturday previous, the defendant gave the plaintiff, for a previous advance, a cheque for $300, which he said would be good on Monday morning, and which was probably paid in part with the proceeds of the advance got on that day. On the 18th and 25th November he borrowed from other brokers sums respectively of $560 and $216. On that day, the 25th, he stopped payment; on the 2nd December he made an assignment. Being examined under an order in insolvency, he says himself that he supposed when he borrowed the money from the plaintiff that he would be able to meet his engagements, and did so up to ten days before the assignment. His total liabilities are over $20,000, and his assets a little over $5,000. There must be judgment for the debt, of course; and as regards the question of imprisonment, I must hold that the words of the Statute, "knowing or believing himself unable to meet his engagements," are satisfied by the fact that he ought to have known, and I award imprisonment in consequence, for the term of three months, "unless the debt *or* costs be sooner paid," as the Statute reads. By this strange defect in the enactment, the judgment is rendered practically inoperative, as the defendant can escape imprisonment by the payment simply of costs.*

Judgment for Plaintiff.

Girouard & Dugas, for Plaintiff.
A. & W. Robertson, for Defendant.
(S.B.)

VICE ADMIRALTY COURT, 1874.

QUEBEC, 26TH JUNE, 1874.

Coram Hon. G. OKILL STUART, Judge, Vice Admiralty Court.

The *Latona*, Lewis, Master.

HELD:—Where there was a deviation in the voyage from that stated in the Shipping Articles, occasioned by a return to the port of Quebec not specified in them, the engagement of a seaman was terminated, as there was then no subsisting contract, and a plea to the jurisdiction of the Admiralty, alleging a subsisting voyage under the 149th section of the Merchant Shipping Act, 1854, which enacts that no seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom, is entitled to sue in any court abroad for wages, overruled.

Quære.—Can an engagement of a seaman, void from its not stating the nature of *the voyage*, as required by the Merchant Shipping Act, 1854" be considered as operative under a subsequent Act which admits, instead of the nature, a statement of the maximum period of the voyage and the port, or places (if any) to which the voyage is not to extend.

This suit was for wages brought by James Williams, a seaman, before the Judge of Sessions at Quebec, and referred by him to this Court for decision, as allowed by "The Merchant Shipping Act, 1854."

(**Sed vide contra*—Rogers et al, appellants, and Sancer & al, respondents, 17 L. C. Jur., p. 57.)

The Latona, Lewis, Master.

PER CURIAM:—The promoter sues for his wages as a seaman from the 19th October, 1873, to the 10th June, 1874. The owners, the respondents, have appeared, and have excepted to the jurisdiction of this Court, setting forth, as they allege, a subsisting contract in ships' articles to terminate in the United Kingdom, and pray that the promoter's demand may be dismissed, as by the Merchant Shipping Act, 1854, "No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom is entitled to sue in any Court abroad for wages." In their Act on protest the respondents state the engagement of the promoter to be contained in ships' articles, signed by him on the 18th October, 1873, at Quebec, for a voyage which had been previously commenced, *from Liverpool to Montreal, thence to and from and to any ports and places in the Atlantic, Pacific and Indian oceans, the China, Eastern, Mediterranean, North Baltic and White seas and Continent of Europe, calling for orders, if required, and back to a final Port of Discharge in the United Kingdom, term not to exceed three years.*" It is admitted that the vessel, after the articles were signed at Quebec, proceeded to Buenos Ayres, thence to Barbadoes, and back to Quebec, where she now is.

The questions submitted to the Court are, 1st: Is the engagement of the promoter void under the 149th section of the Merchant Shipping Act of 1854, which requires the nature of the voyage to be stated, and, if not; 2ndly was there a deviation from the voyage which has relieved the promoter from his engagement. Either of these questions being determined in the affirmative no engagement for a voyage to terminate in the United Kingdom exists, and this Court has jurisdiction to allow the promoter his wages. Cases, as well in the High Court of Admiralty as in this, have occurred wherein agreements with seamen, less indefinite then the present, have been declared void under the provision of the Merchant Shipping Act, which provides that such an agreement shall, among other particulars, contain the nature of the voyage, which the Courts have held was one intended to protect the mariner and give him a fair intimation of the nature of the service in which he might engage himself. The engagement of the promoter has a wider range, and the nature of the voyage is more indefinite than in the case of the "Marathon" decided in this court in 1859, wherein the engagement of a seaman was declared null; and there would have been no hesitation in this court to pronounce a similar judgment, on the same ground in this case, were it not for a recent statute of the Imperial Parliament, "An Act to amend the Merchant Shipping Acts," passed in 1873, whereby the rigor attached to a statement of the nature of the voyage is materially relaxed. In many cases it is very difficult to state its precise nature, alterations and deviations being required after the sailing of the vessel, and the consequences of these have rendered the engagements of seamen void, a result injurious to the shipowners, while the changes may have been indifferent to the seaman, until the temptation of higher wages to be had, as at the port of Quebec, where the crimping system has so much prevailed, induces the seaman to demand his release from his articles and to claim his wages. By this recent Act it is provided in the 7th section, that "any agreement with a seaman, made under section 149 of the Merchant Shipping Act, 1854, may, instead of stating the nature

and duration of the intended voyage or engagement, as by that section required, state the maximum period of the voyage or engagement and the places or parts of the world, if any, to which the voyage or engagement is not to extend." Although this enactment does not repeal the 149th section, in so far that a contract stating the nature of the voyage must always be carried into effect, it makes a very material and beneficial change for both the shipowner and the seaman. Limitation as to the period of a voyage seems to be now more of the essence of the contract than its nature. The maximum period must be stated, but, its nature, no further than a statement of the places or parts of the world, if any, to which the voyage is not to extend. The voyage expressed in the articles in this case is of the most comprehensive nature, and whether a statement of the places where the vessel is to go is not an indication of where she is not to go, upon the principle that the mention of the one excludes the other, *inclusio unius exclusio alterius*, and that, in the spirit, if not the letter, the recent Act has been complied with, might have been a question for the Court now to decide were it not that, conceding the validity of the engagement, the second objection to it, that of a deviation, is conclusive, the departure from the intended voyage being somewhat analogous to the one in the case of the Varuna, decided in this Court in 1855. The express stipulation in the engagement is that after leaving Quebec the Latona should go to and from, and from and to, any ports and places in the Atlantic and other oceans and seas, and back to a final port of discharge in the United Kingdom. A return to the port of Quebec does not seem to have been contemplated either by the master or the seaman. If the engagement is valid, under the one statute or the other, a deviation has relieved the mariner from his contract. The evils of a crimping system have been referred to by counsel as prevailing at this port, and, no doubt, some of these have arisen from the difficulty of stating the exact nature of an intended voyage, the absence of which has in many instances led to the release of a ship's crew. By the recent Act a rigorous interpretation of the 149th section of the Merchant Shipping Act, 1854, may be avoided by a simple statement "of the maximum period of the voyage or engagement and the places or parts of the world (if any) to which the voyage or engagement is not to extend." A compliance with these requirements is easy. The Legislature has, after a long trial of the 149th section of the Merchant Shipping Act, come to the relief of the shipowner by removing a difficulty which has occasioned defective articles, and one of the causes which has led to the abduction of seamen. In the present case the agreement excludes the port of Quebec as a port of return after having been once there, and the duty is imposed upon this court to overrule the Act on protest. The contract has terminated and the promoter is entitled to his wages.

Alleyn & Chauveau, for the Promoter.

Fournier, Hearn & LaRue, for the Respondents.

(J. K.)

COURT OF REVIEW, 1873.

MONTREAL, 31st OCTOBER, 1873.

Coram JOHNSON, J., MACKAY, J., BEAUDRY, J.

No. 1064.

Marlow vs. *Lajeunesse* et al.

HELD:—That the measure of damage in the case of breach of a notarial contract to manufacture and deliver a carriage within a specified period, does not include loss of profit, by reason of the non-delivery.

JOHNSON, J.:—The judgment in question under the present inscription awarded $260 damages and costs, jointly and severally, against the defendant, Lajeunesse, who now inscribes in review, and against one Prudon who acquiesces in the judgment and does not inscribe. Upon a question of the *quantum* of damages awarded by a court under conflicting evidence, this court sitting in review interferes with extreme reluctance; and indeed if those damages, whatever their amount, were due *under the law*, I believe I may say that this court would not interfere at all, unless there were evident injustice. The principle, however, upon which those damages can be held to be proved at all is that of *loss of profit by the plaintiff* by reason of the non-delivery of a carriage, which the defendants had undertaken by notarial contract to deliver. The non-delivery of this carriage, or the breach of contract, of course involved the responsibility of the contractors for such damages as are recoverable at law. Here those damages are estimated by the loss of the profit which it is proved that the plaintiff sustained—that is, they are assessed by an estimate of what the plaintiff might have made, if he had had his carriage as agreed. We think that this is a wrong principle. The measure of damages was the difference of expense to the plaintiff between the price of the carriage contracted for, and that which he was obliged to give for another, including those arising from the necessary delay in procuring another. Here the contract was that the landau was to be delivered on the first of July, 1872. It was quite competent to the parties to stipulate what damages would be due in case of default to deliver; but no such stipulation is made. The plaintiff, after protesting on the 3rd of July, and tendering the first payment that was to become due on delivery of the carriage, remains perfectly passive until March of the present year, and then brings his action for damages (*dommages et intérêts*) generally. The evidence proves merely what he might have made, if he had had the carriage. Now it is perfectly plain that the loss of profit, or the failure to gain it, which is here made the foundation of the demand, must, before that demand can be sustained, be shewn to be the necessary result of the act complained of, viz., the non-delivery of the thing as stipulated. It is equally plain that this loss of profit was *not* a necessary consequence of the non-delivery of the carriage merely, because if the plaintiff had purchased another, he might have made this profit. The loss alleged then results as much from the plaintiff's failure to procure another carriage (unless he could establish his effort and inability to do so, which is not suggested) as it does from the non-delivery which is complained of as the sole cause of it. If the plaintiff has a right to loss of profit that he might have made up to the bringing

of the action, or even for what he might have made during the three summer months, to which the evidence seems limited, he might with equal reason have demanded all that he failed to make during the succeeding summer, and have postponed his action until the amount was large enough to enable him to retire upon a fortune.

There was an offer made by the defendant in pleading, to confess judgment for $25 and costs, to which offer we think he must in effect be held, though it was not accepted at the time by the plaintiff. It is certainly not a confession of judgment in the terms of the law, any more than a similar act that has just been noticed in the case of Marc Aurele vs. Durocher; but it constitutes an admission, and we have no other evidence of damage but this admission. As to the contention that the joint and several condemnation to pay costs was wrong—in the first place there is a *retrait* fyled as to one-half of the costs; and secondly, the other defendant is not before the Court to complain either of the costs or of any other part of the judgment. We must therefore reverse this judgment with costs of this Court, and condemn the defendant Lajeunesse to pay $25 and costs that he admits to be due up to the time of the making of that admission.

Judgment of Superior Court reversed.

L. N. Benjamin, for Plaintiff.

Belanger, Desnoyers & Ouimet, for Defendants.

(S.B.)

SUPERIOR COURT, 1873.

MONTREAL, 30TH SEPTEMBER, 1873.

Coram JOHNSON, J.

No. 207.

Hart & al., vs. *The Northern Insurance Company.*

HELD:—1. That a motion for a jury trial cannot be granted until after the issues are perfected.

2. That a special answer cannot be fyled to a special answer, without leave of the Court.

3. That where, instead of moving to reject such additional special answer, the plaintiff fyles a demurrer, and inscribes for hearing on law, the Court will discharge the inscription and order a repleader.

PER CURIAM:—This case is before me upon a motion for a jury trial, and upon an inscription for hearing on law on a demurrer to a special answer. The former is premature, and must be rejected; it is impossible to grant a jury trial while the issues are unsettled. The plaintiffs on the face of the declaration are John Hart and Matthew Hicks, carrying on business under the firm of Devaney & Company. The defendants by one of their pleas aver that they never contracted with any firm of Devaney & Co., except one, and that one was composed of Dame Ann Hart, widow of the late Lawrence Devaney, and John Hart; and that the present plaintiffs have no interest whatever in the policy of insurance which is the basis of the present action. To this the plaintiffs answer that they are the continuing partners; that it is quite true that when the insurance was effected the firm of Devaney & Co. was composed of John Hart and Ann Hart, the latter of whom relinquished the business and retired from the firm on the 8th March, 1872; and that on the 1st of June, 1872, she transferred her interest

Hart et al. vs. The Northern Insurance Company.

in the concern to her co-partner, who afterwards admitted Hicks as a partner; and the defendant treated with the present plaintiffs as Devaney & Co., and received an annual premium from them, &c. . Then comes a special answer by the defendant to this special answer of the plaintiffs, on the ground that it introduces new matter at variance with the averments of the declaration.

This last special answer by the defendant to the plaintiffs' special answer to defendant's exception is plainly contrary to the express rules of pleading which have been followed in this country for considerably more than half a century. Sixty-three years ago, in the famous case of Forbes *vs.* Atkinson, decided by the great authority of Chief Justice Sewell, these rules were laid down. They have not been in any manner altered. They could scarcely have been amended by our present code of procedure which merely expresses in a concise manner what these rules are. Art. 148 says that the issues are completed: "1. By declaration, "pleas and replications, if there are no perpetual exceptions; "2. By declaration, "exceptions, answers to exceptions, and replications to answers, if the answers contain facts that are not in the declaration; 3. They are also held to "be completed by foreclosure from filing, or by failure to file answers or replications." It can rarely, and, as far as my individual opinion goes, I should say never, happen that these forms if duly observed should fail to present any issue in a shape susceptible of logical and precise deductions. But if it should so happen, the parties are not without remedy. The concluding paragraph of article 148 comes in aid to such exceptional cases, if they should ever arise. The words are: "Nevertheless, if the proceedings secondly enumerated are not sufficient to fully set out the grounds of the parties, the court may grant leave to file further pleadings." In the present instance no such leave has been asked; and to make matters worse, the plaintiff, instead of moving to reject the pleading thus irregularly fyled by the defendant, inscribes for hearing on law. The only course that the court can take under the circumstances is to discharge this inscription, and order a repleader from the date of fyling the defendant's pleas to the declaration.

Motion for jury trial rejected and repleader ordered.

Cross, Lunn, Davidson & Fisher, for Plaintiffs.
Trenholme & Maclaren, for Defendants.
(S.B.)

COURT OF REVIEW, 1873.

MONTREAL, 31ST OCTOBER, 1873.

Coram JOHNSON, J., MACKAY J., TORRANCE, J.

No. 1546.

Darling et al. vs. *St. Julien* et al.

HELD:—That a declaration setting out a promissory note as made by one of the defendants "St. Julien, *tuteur*," and praying for judgment against him and the other defendant, the endorser, is not demurrable.

JOHNSON, J.:—This action was against the maker and the endorser of a promissory note jointly and severally. The defendant St. Julien was described as of the parish of Vaudreuil, '*tuteur*'; the other defendant as of the same

place, notary. Both the defendants appeared together and pleaded, first, a demurrer to the declaration, secondly, that no value had been given for the note, and, thirdly, the general issue. The ground of the demurrer assumed that the defendant St. Julien had been impleaded in his quality of tutor to certain minor children who were not named, and the learned Judge who rendered judgment appears to have been misled by this erroneous pretension, and to have given judgment quite conformably to the law, if such had been the case, to the effect that an authorization was necessary to enable a tutor to minors to bind their estate. We fail to see that a man can demur to a declaration by assuming that it contains what it does not. The defendant Lajeunesse may have been called a tutor, or anything else, but unless a condemnation is asked against him in that capacity it is no ground of demurrer to assume that something was meant that is not alleged—particularly after a general appearance, and no pretension or reservation of a right to pretend that he is erroneously designated. In the present case a joint and several personal condemnation has been prayed for and, we think, rightly. The judgment dismissing the action upon demurrer will, therefore, be reversed, with costs in both Courts.

Judgment of Superior Court reversed.

Doutre & Doutre, for Plaintiffs.
D. D. Bondy, for Defendants.
(S.B.)

SUPERIOR COURT, 1873.

MONTREAL, 31st OCTOBER, 1873.

Coram MACKAY, J.

No. 2481.

Colson & al., vs. *Ash, & Torrance* & al., plaintiffs *par reprise d'instance.*

HELD:—That it is not competent, either for the notary who receives an award of arbitrators or for one of the arbitrators, to give evidence explanatory of certain expressions in such award.

PER CURIAM:—This was a motion to revise a ruling at *enquête*, maintaining objections to questions put to Mr. Hunter, the notary who received the award of arbitrators in dispute in this action, and to Mr. Winn, who was one of the arbitrators. They were both asked to explain the meaning of certain words to be found in the award and of the real intention of the arbitrators when using such words. The questions submitted to these witnesses were objected to and the objections maintained on the ground that they tended to contradict or vary the written award. After due consideration, I am of opinion to sustain the ruling at *enquête*, and the motion is, therefore, rejected.*

Motion to revise ruling at *enquête* rejected.

Abbott, Tait & Wotherspoon, for plaintiffs and pltffs. *par reprise d'instance.*
Bethune & Bethune, for defendant.
(S.B.)

*Plaintiffs' counsel cited Taylor on Ev. § 972 & seq., and defendant's counsel cited Ord. of 1667, Tit. XX, art. 2. 1 Jousse, p. 290. Arts. 1211 and 1234, of our Civil Code, and Bonnier, 2nd Ed., No. 107, p. 112.

SUPERIOR COURT, 1874.

MONTREAL, JULY, 1874.

(IN CHAMBERS.)

Coram TORRANCE, J.

No. 1984.

Privett vs. *Sexton*, et al.

HELD:—That the Superior Court has no authority to issue a mandamus to the license commissioners under 37 Vic. C. 3, to compel them to grant a license.

PER CURIAM:—This case is before me on the merits of a petition, which petitioner presents, praying for a peremptory *mandamus* against John P. Sexton, William H. Brehaut, Joseph Jones, Charles A. Leblanc, Esquires, that they confirm the certificate to which petitioner holds himself entitled under the license acts (Quebec) 34 Vic. C. 2; 35 Vic. C. 2; 36 Vic. C. 3; 37 Vic. C. 3.

The petitioner avers that his application for a license with several affidavits, certificate, and bond were duly placed before the license commissioners at Montreal, to the end and intent that such certificate should be confirmed by them according to the provisions of law in that behalf, to enable petitioner to obtain a license in conformity with his application, and petitioner then and there became entitled to a confirmation of his certificate. Nevertheless the commissioners refused to confirm. The counsel for the petitioner contends that the commissioners have no discretionary powers, no contentious, or judicial powers; that their powers are simply ministerial. Their duty, he contends, is imperative if the petitioner has complied with the law; they have no power of discrimination; that the power of refusal is only given in country parts to the councils. He says that S. 12, which gives power of refusal to confirm, does not apply to Montreal. He says it is impossible to suppose that the petitioner should be deprived of his means of living by a Star Chamber inquiry of the Commissioners.

I may here remark that the evidence shows that the petitioner is a most respectable person, and not a word of objection has been uttered against him personally.

I shall now shortly state what my view of the law is, and I may add that I have found no difficulty in arriving at a conclusion.

By 37 Vic. C. 3, S. 2, the 7th section of the License Act is made to read as follows: "7. Except in so far as it is otherwise provided in this Act with respect to the City of Montreal, no license shall be granted to any person for keeping, in any organized part of this Province, an inn, tavern, or other house or place of public entertainment, unless the person applying for the same produces to the revenue officer a certificate signed by 25 or a majority of the municipal electors, &c., and *confirmed after due deliberation* by the municipal council, &c., or *confirmed under section* 12." By S. S. 12, "such council or such mayor and justices, or "such justices, as the case may be, may refuse to confirm any such certificate, "if he or they see fit so to do."

So far we may reasonably say that the municipal council, or mayor and justices, or justices, as the case may be, have power of deliberation and of confirmation or refusal to confirm a certificate if he or they see fit so to do.

Then comes a special provision for Montreal, S. S. 13. "In the city of Montreal, the powers and duties conferred and imposed upon the council by sections "7 and 11, concerning the examination and confirmation or rejection of such "certificates, shall be exclusively exercised and performed by a board of license "commissioners, &c." Petitioner contends that S. S. 13 omits to give to the commissioners the powers of refusal given to the councils, mayor and justices, or justices, by S. S. 12. It is possible that by a clerical error the words, "and twelve" have been omitted in S. S. 13, after the words "sections seven and eleven;" but does not section 7 say that the certificate may be confirmed under section 12? and section 13 confers upon the commissioners the powers and duties of the councils under S. S. 7 and 11.

Then follows S. S. 13, (a) "All proceedings of the said board, in relation to "such certificates, shall be signed and concurred in by a majority of the members "composing the same, and shall be reported to the City clerk, and the adjudica-"tion of the board shall be final."

My attention has also been called to an expression in 37 Vic. C. 3, S. 3, amending S. 22 of the License Act. The enactment says that the eating house shall be *to the satisfaction* of the commissioners.

The case has been fully argued by Mr. Carter, the counsel for the petitioner, as well as by Mr. Morris, Mr. Lacoste and Mr. St. Pierre for the commissioners, and I hold as regards the powers conferred upon the commissioners, that the statutes empower them to deliberate, to confirm or refuse to confirm a certificate, and their adjudication is final. Holding this view of their powers, the Superior Court or one of its justices could not issue the mandamus prayed for, and the petition must be rejected.

E. Carter, Q.C., for petitioner.
J. L. Morris, for Sexton.
Lacoste, for Brehaut and Jones.
St. Pierre, for Leblanc.

Petition dismissed.

(J.K.)

SUPERIOR COURT, 1874.

(IN CHAMBERS.)

MONTREAL, 14TH JULY, 1874.

Coram BEAUDRY, J.

No. 2235.

Wm. A. Smith, petitioner for writ of mandamus, vs. *John P. Sexton*, recorder, respondent.

HELD:—That under article 1023 of the Code of Civil Procedure, as amended by the 35th Vic. cap. 6, Section 22 of the Statutes of Quebec, a judge in chambers may, even during term, grant an application for a writ of mandamus; and that the affidavit in support of the application may be general, and simply to the effect that the allegations of the petition are true.

The petitioner laid an information before the Recorder against Malcolm Leishman for engaging a servant of the petitioner to abandon such service.

Wm. A. Smith. vs. John P. Sexton.

The Recorder refused to issue his warrant on this information, on the ground that it did not set forth that the servant engaged had been engaged before witnesses.

Smith accordingly applied on the 26th of June, (while the Superior Court was sitting in term) to a judge in chambers, for an order for a writ of mandamus to compel the Recorder to issue his warrant against Leishman.

The application was granted, and the writ was served upon the Recorder, who appeared and fyled an exception to the form, based upon the pretensions: 1st, that a judge in chambers could not order the writ during term; and 2nd, that a mere general affidavit was insufficient.

To this plea the petitioner demurred, and after argument, Mr. Justice Beaudry, on the 14th July, 1874, dismissed the exception to the form.

Abbott, Tait & Wotherspoon, for petitioner.

Kerr, Lambe & Carter, for respondent.

(I.T.W.)

SUPERIOR COURT, 1874.

MONTREAL, 30TH MAY, 1874.

Coram TORRANCE, J.

No. 369.

Ex parte Charles E. Brown, Petitioner for certiorari;

AND

J. P. Sexton, Recorder, mis en cause.

HELD:—That a conviction based upon a by-law making a penalty for every day that a thing is done while the Statutes upon which the by-law is framed do not clearly give authority to impose more than one penalty, will be quashed.

PER CURIAM:—This case is before the Court on a motion to quash a conviction of the recorder of Montreal made on the 19th March last. The conviction in effect stated that the petitioner on 16th January last was a butcher keeping a private stall for the sale of fresh beef, &c., and did then neglect to pay the duty of $500 imposed upon each person keeping such private stall, &c, "contrary to the by-law of the council of the City of Montreal."

The by-law concerning markets and the sale of meats, &c., is in chapter XIX of the By-laws of the city. Section 43 enacts that no butcher shall keep a private stall without leave; section 44 enacts that the annual duty on such private stall shall be $500, and section 45 enacts that every person neglecting or refusing to pay the duty "shall be liable to a fine not exceeding $20, and to an "imprisonment not exceeding 30 days, for each and every day, (if sued for "separately) that he, she or they shall so continue to keep such private stall, or "to sell or expose or offer for sale as aforesaid."

14 & 15 Vic., c. 128, s. 58, has been cited as containing the authority for the by-law. This section *inter alia* gives power to the city council "to impose a "duty on all the private marts in the said city, or that may hereafter be "established therein, for the sale of cattle, provisions or provender, or of any-"thing else whatsoever that is usually sold in public markets, with power to "regulate and fix the said duty as regards each particular mart, as the said

"council may see fit." The penal clause is in these words at the end of the "section: "and by any such by-law for any of the purposes aforesaid, the said "council may impose such fines not exceeding £5, or such imprisonment not "exceeding 30 days, or both, as they may deem necessary for enforcing the "same."

Charles E. Brown, and J. P. Sexton.

Mr. Kerr, for the petitioner, contends that the by-law is *ultra vires*, inasmuch as there is nothing in the statute which authorizes the imposition of a penalty for each and every day that the private stall may be kept open. He has cited Garrett v. Messenger, L. R. 2 Comm. Pl. 583, which was an action by a common informer for a second penalty, Willes, J., at the trial ruled that the penal powers of the act were exhausted by the recovery of one penalty, and on a motion made before the Court, Bovill, C. J., said: "I quite concur in the view taken by my brother Willes, viz: that one penalty only was incurred by the defendant for keeping open his house for a purpose prohibited by the statute, and that he did not thereby subject himself to commutative penalties from day to day. If the legislature had intended that there should be more than one penalty, that intention would no doubt have been expressed in clear and unequivocal terms." Byles, J., said: "I am of the same opinion. In construing every statute which gives a penalty to a common informer, care must be taken that we do not impose a heavier burthen than the legislature contemplated."

I hold that the creation of a penalty for every day that the private stall should be opened was a nullity as being without authority, and that the conviction must be quashed.

W. H. Kerr, Q.C., for petitioner.
R. Roy, Q.C., for the Corporation.

Conviction quashed.

(J.K.)

COURT OF QUEEN'S BENCH, 1874.

APPEAL SIDE.

MONTREAL, 22ND JUNE, 1874.

Coram MONK, TASCHEREAU, RAMSAY, and SANBORN, JJ.

No. 45.

BENJAMIN BREWSTER, ET AL., APPELLANTS

AND

HENRY STARNES, ET AL., RESPONDENTS.

HELD:—That on an appeal *all* of the appellants' "opposite party" in the Court below must be made respondents.

An action of special *assumpsit*, for goods sold and delivered, was instituted in the Superior Court, at Montreal, in 1860, by Benjamin Brewster and others, representing the preëxisting firm of *Brewster, Mulholland & Co.*, against William Sullivan Childs and 31 other persons, who were alleged to have carried on business under the name of the *Montreal Rail-road Car Company*. On the 30th of January, 1872, the Court (TORRANCE, J.) rendered judgment against 23 of the defendants, jointly and severally, for the amount of the plaintiffs' demand; but by a judgment of the same Court, sitting in review, (JOHNSON,

Benjamin Brewster, et al., and Henry Starnes, et al.

TORRANCE, and BEAUDRY, J J.), rendered on the 30th of April, 1873, this judgment was reversed, and the action was dismissed, with costs. From the latter judgment the plaintiffs, by writ No. 162, dated 16th October, 1873, appealed, but made only Henry Chapman and ten others of the defendants respondents; and afterwards, by writ No. 45, dated 27th April, 1874, they again appealed, from the same judgment, making only Henry Starnes and four others of the remaining defendants, respondents. Thus, of the 23 defendants condemned by the first judgment eleven were made respondents by the first writ of appeal, and five by the second; but there was no appeal *quoad* the remaining seven.

In the case No. 45, the respondents moved for the quashing of the writ of appeal, chiefly on the grounds—(1) that no appellant can have more than one appeal from the same judgment; and (2) that, in this case, *all* of the "opposite party" to the appellants in the Court below, affected by the judgment appealed from, had not been made respondents in the appeal.

The Court granted the motion, and quashed the writ, with costs.

Ritchie, Q.C., & Borlase, for appellants.

Griffin, Q.C., & Laflamme, Q.C., for respondents.

(J.K.)

COURT OF QUEEN'S BENCH, 1874.

QUEBEC, 8TH JUNE, 1874.

Coram MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J.

No. 10.

THE WATER WORKS COMPANY OF THREE RIVERS, APPELLANT;

AND

OLIVIER DOSTALER, RESPONDENT.

HELD:—That where counsel for respondent omitted to move for distraction of costs in appeal until the following term, distraction will nevertheless be granted; and it is for the appellant to establish by affidavit that the respondent has received the costs personally, if such be the case.

Costs were awarded to the respondent without distraction, and counsel for respondent allowed the term to pass without moving for distraction. The following term he presented a motion for distraction.

The motion was objected to on the ground that the respondent might have been paid the costs personally in the interval.

The Court, however, holding that if such were the case the appellant should have established the fact by affidavit, granted the motion for distraction.

The following is the judgment:—

"The Court, having heard the parties, by their counsel respectively, on the motion made in this cause by A. M. Hart, Esquire, the attorney of the respondent, on the second day of March last for distraction of costs in his favour for the reasons therein set forth, and deliberated thereon: doth grant the said motion, and it is ordered accordingly."

Turcotte, Paquin & Turcotte, for appellant.

A. M. Hart, for respondent.

(J.K.)

COURT OF REVIEW, 1873.

MONTREAL, 31st OCTOBER, 1873.

Coram JOHNSON, J., MACKAY, J., TORRANCE, J.

No. 1626.

Marc Aurele vs. *Durocher.*

HELD:—1. That where the defendant, besides other pleas, offers to confess judgment, such offer, though not technically a confession of judgment, is conclusive of the indebtedness.
2. An application to be allowed to affix stamps to an unstamped instrument sued upon will not be granted, where there is nothing to show that the holder was ignorant that the duty had not been paid, and made the application as soon as he became aware of the fact.

The case came up for judgment September 30, when JOHNSON, J., made th following remarks: —

This case comes from the District of St. Hyacinthe, and was brought against the defendant upon a note executed *en brevet*. Without now referring to the points raised in the case, some of them of great importance, we desire to call the attention of the parties to the fact that the instrument upon which the action is brought is unstamped, and that, therefore, no action or remedy of any kind at law or in equity could lie upon it, if it was liable to be stamped. This is a point which, if decided in the affirmative, would dismiss the action; but it is one upon which the parties have never been heard, and which, indeed, was not suggested in the Court below. We discharge the *délibéré* therefore, and order a hearing on that point.

After rehearing, the following judgment was rendered:—

JOHNSON, J.:—It so happens that upon the merits of this case, the record came under our consideration before the discovery of the point now before the Court, and on which a rehearing was had. We feel bound to say that as the case was first presented, we should unhesitatingly have confirmed the judgment; the defendant in one of his pleas offering to confess judgment; nor do we attach any importance to the objection that was raised on his behalf, that this act is not a valid confession of judgment, under the 94th article of the code de procedure. It clearly is not *eo nomine* a confession of judgment; an act which must be done by the party or a specially authorized Attorney; but it is a pretension or offer set up in one of his pleas; and is conclusive of the case. Still less importance attaches to the contention that this offer was made under reservation of all matters previously pleaded. It is intelligible that under the system of pleading that still exists in this country a defendant may plead everything he chooses, under reservation of everything else that he has already pleaded: that is to say, that he can go on contesting the action under as many new grounds as he pleases, reserving all that he has pleaded before tending to the same end, viz., the dismissal of the action; but I cannot understand how he can be allowed to reserve to himself the benefit of previous pretentions set up in order to get the action dismissed, while he admits that judgment ought to be rendered against him. A defendant may ask for the dismissal of an action against him for as many good reasons as he is able to give; but he surely cannot be allowed to ask

Marc Aurele vs. Darocher.

in nineteen consecutive pleas that the plaintiff be sent out of Court; and reserve to himself the benefit of all these pretensions in a twentieth plea admitting that the same plaintiff is entitled to judgment; or in other words ask to reserve means of defence which he expressly renounces.

The Court was stopped last term from rendering judgment in this case, by the discovery that the instrument sued on was not stamped; and a rehearing was ordered upon the point of the necessity of its being so. The parties were heard at length, and it was argued on both sides that no stamp was necessary. The plaintiff contended for this, because he could not recover at all, if the instrument ought to have been stamped; unless indeed stamps can now be affixed; which is a separate question. The defendant also contended for the same thing, because he imagined himself interested in showing, under his special pleas, that this is not a promissory note at all, nor subject to be stamped as such. We have to consider the matter, however, not only with reference to the contention of the parties, but also with reference to the 9th section of the Act 27 and 28 Vic., c. 4, to impose duties on promissory notes and bills of exchange, which enacts that unstamped instruments of certain descriptions are of no effect in law or in equity—a provision repeated in the subsequent legislation on this subject. There are two points to be decided: 1st, Is this an instrument upon which a stamp is required by law? 2ndly, If it be so, can the omission to affix it be remedied now? 1st. This first point is one which must be determined by the first statute upon the subject, which is the 27 and 28 Vict., c. 4. The next statute relating to the matter (the 29 Vict., c. 4.) merely altered the scale of duties. The third statute (31 Vic., c. 9,) applies only to instruments executed on or after the 1st February, 1868. If this third statute could apply to the case in hand it would cut the matter short, as it defines (which the previous statutes had omitted to do) what are promissory notes, subject to the duty, and leaves no room for doubt that the present note is one of them, if it could be affected by these latter provisions; but it is clearly not subject to the operation of the last named statute, inasmuch as it was made on the 13th July, 1867. We must, therefore, look at this note by the light of general principles, and we discern nothing to justify a determination that it was not a promissory note subject to the duty imposed by the Act. The case of Seguin *vs.* Bergevin, decided in appeal in March, 1865, has been cited; but the authority of that case only extends to saying that the instrument that was before that Court, which, be it remarked, was not made payable either to bearer or to order, as in the present instance, but was merely payable to the creditor, his heirs or assignees, was not subject to the five years' prescription. Art. 2344 of our Civil Code lays down that "a promissory note is a written promise for the payment of money at all events, and without any condition. It must contain the signature or name of the maker, and be for the payment of a specific sum of money only. It may be in any form of words consistent with the foregoing rules." We cannot hesitate to say that the note or instrument before us in this case, tried by this definition, is a promissory note, and as such is subject to the duty, which has not been paid, and ought to have been stamped to give a right of action.

The next point is as to whether the omission to stamp can be remedied now. The plaintiff makes a motion totally unsupported by anything extraneous, that stamps be now affixed, and he relies upon the last Statute relating to this complicated subject (the 33 Vic., cap. 13.). If this last Statute applied to the present case, of which serious doubts may be entertained, it is quite certain that the relief sought could not be granted under the circumstances, the express language of the Statute being such as to preclude it. The relief afforded by this Statute is in cases where, to use the words of the law, "it appears that the holder of the instrument when he became holder, had no knowledge that the proper duty had not been paid by the proper party, or at the proper time;" and the instrument shall still be valid, says the Act, if it appear that the holder paid double duty as soon as he made the discovery. What evidence have we of this? None whatever. Not even an affidavit. Again: "if it appears to the satisfaction of the Court or Judge that it was through inadvertence or mistake:" these are words requiring the Court to be satisfied upon the point, not making it a matter of course for a holder to neglect to stamp as long as he sees fit; and then affix stamps as soon as he finds he cannot get judgment without them. We, therefore, reverse this judgment, because the instrument sued on has no legal validity—being unstamped; and we say that even under the latest Statute, which we even doubt the application of to the present case, the plaintiff has not brought himself within the conditions by which alone, even under that Statute, relief could have been afforded to him. Each party will pay his own costs—neither having discovered, or at all events availed himself of the discovery of the absence of stamps.

The judgment is recorded as follows:

The Court here sitting as a Court of Review, having heard the parties by their Counsel respectively upon the judgment rendered in the Circuit Court for the District of St. Hyacinthe, on the 28th of January, 1873, &c.

Considering that there is error in the said judgment of the 28th of January, 1873, doth, revising said judgment, reverse the same, and proceeding to render the judgment that said Circuit Court ought to have rendered in the premises;

Considering that the promissory note, or instrument in writing sued upon in this case, bearing date the 13th of July, 1867, was at the time the same was made, subject to the duty imposed by law upon promissory notes, and was not stamped, as was and is required by the Statutes in that behalf made and enacted; and that it has therefore no effect in law or in equity;

Considering that the motion made on the plaintiff's behalf, on the 22nd of October instant, to be permitted to affix double stamps to the said promissory note, is unsupported by proof that the holder thereof when he became holder, had no knowledge that the proper duty had not been paid; and that it does not appear that the holder paid double duty as soon as he made the discovery that the same was unstamped, nor that it was through inadvertence or mistake that stamps have not been affixed thereto; doth dismiss the said motion, and doth further dismiss the present action;

And considering that neither of the parties has availed himself of the fact

Marc Aurele vs. Durocher.

that the said instrument was unstamped, it is adjudged that each party pay his own costs, as well in this Court, as in the Court below.

Judgment reversed.

Chagnon & Sicotte, for the plaintiff.
Dorion, Dorion & Geoffrion, Counsel.
Mercier & Co., for the defendant.
DeLorimier, Counsel.

(J. K.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 11th FEBRUARY, 1874.

[IN CHAMBERS.]

Coram RAMSAY, J.

In the matter of the application of *The U. S. Government* for the extradition of *Israel Rosenbaum*, on a charge of arson.

HELD:—1. That sub-section 2 of section 8, of the Imperial Extradition Act of 1870, is inconsistent with the subsisting Extradition Treaty between Great Britain and the United States, and is therefore, not in force, *quoad* any application under such treaty.
2. That a copy of a Bill of Indictment found against the prisoner in the United States cannot be received as evidence.
3. That the evidence adduced was sufficient to sustain the application.

RAMSAY, J.:—Before proceeding to adjudicate on the merits of this application I must dispose of a question raised while the evidence was being taken, the decision of which was reserved till after the final hearing. The District Attorney for the State of New York being called as a witness by the prosecution, is asked in cross-examination on the part of the prisoner, "Is there any provision in the law of the United States or in that of the State of New York prohibiting the trial of the person extradited for any other crime than that for which he is so extradited?" On the part of the Government of the United States it was objected that this question is irrelevant. Mr. Kerr, for the prisoner, cited sec. 27 of the Extradition Act, passed in 1870 (33 and 34 Vic., cap. 52). The section in question reads as follows:—"The Acts specified in the third schedule to this Act are hereby repealed as to the whole of her Majesty's Dominions, and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign States with which those treaties are made, in the same manner as if an order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." This raises the whole question as to what law governs extradition in Canada, and whether our Statute respecting extraditions on the demand of the Government of the United States of America, is repealed, and if not, to what extent it is in force. The first enactment of Section 27 is perfectly simple. It repeals the Act under the

French Treaty, both the Acts under the treaty with the United States, the Act giving effect to Extradition Convention with the King of Denmark, and the Act for the amendment of the law relating to treaties of extradition—a general Act passed in 1866, or the amendment of the law relating to treaties of extradition. (29 and 30 Vic., cap. cxxi.) The difficulty arises with regard to the construction of the second member of the section. In order fully to understand the scope of the question raised, it is necessary to observe that by the form of expression used in the previous parts of the Act, and notably in sections 2, 4, and 5, it would seem as though it were not intended to apply the Act in any degree until the foreign countries, with which treaties existed, had either by law or by arrangement with Her Majesty, recognised certain principles. If the statute had gone no further than this, the effect of these enactments would have been to sweep away the whole of the Imperial Acts giving effect to extradition with any foreign country. This could not have been contemplated, and the necessity of avoiding such a result gives us the key of the second part of section 27, which thus becomes clear. The Act of 1870, except in so far as it is inconsistent with the treaties referred to in the Acts enumerated in the 3rd Schedule, that is with the Treaties with France, with the United States and with Denmark, shall apply as if an order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect "as part of this Act." The effect then of these treaties is saved for all Her Majesty's dominions; secondly, the Colonial Legislation is saved; but to what extent? Colonial Legislation is to be read as *part* of the Act of 1870, and the Act of 1870 is only to apply in so far as it shall not be inconsistent with the treaties with France, with the United States, and with Denmark. I may observe *en passant* that the Act of 1870 seems to affect section 132 of the British North America Act of 1867, by which the Parliament and Government of Canada is granted "all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." At least it has hitherto been supposed that this section gave the Canadian Parliament power to legislate on treaty questions, and it was on this understanding our Extradition Act of 1869 was passed. I may further observe that if there had been any order from the Queen in Council suspending the operation of the Act in Canada, as provided in section 18, all this difficulty would have been avoided, but I am informed officially that no such order exists. I must, therefore, at each step decide what part of our Act is not inconsistent with so much of the Act of 1870 as is consistent with the treaties mentioned in the 3rd Schedule, that is the treaties with France, with the United States, and with Denmark. This may become a very involved operation; but as the question is now raised I see no other mode of dealing with it. I am confirmed, too, in the view I take by the case of Foster, so far as it goes. There it was urged, at the last moment, that our legislation was repealed by the Municipal Act of 1870, and this pretension was negatived by the unanimous judgment of the Court, and I may add, I think

Extradition of Israel Rosenbaum

rightly. In the present case it only requires me to decide whether there is any necessity for the proof of the existence of a special law in the United States to the effect that a prisoner extradited for one offence cannot be tried for another until he has had an opportunity of leaving the jurisdiction. Is this exaction of the Act of 1870 inconsistent with the Treaty with the United States? On the part of the prisoner, Mr. Kerr has urged, with great ingenuity, that the provisions of sub-sections 1 and 2 of section 3 are not inconsistent with the old treaties, and that they are, therefore, in force; and that until there is an order in Council under section 5, which would of itself settle the fact as to whether sub-section 2 has been complied with, the existence of the foreign law or arrangement must be proved. He further says, in support of the proposition that sub-section 2 of section 3 is not inconsistent with the old treaties, that the trial of a prisoner surrendered for any other crime than that mentioned in the demand is a violation of international law. Notwithstanding the plausibility of this reasoning it fails to convince me. In the first place, it goes too far, for, if it were recognized as a principle of international law that a prisoner extradited could only be tried for the crime for which the extradition took place, it would not have been necessary for the Imperial Parliament to make these provisions, and it would not be necessary to ask this question. I am not, however, aware that it has ever been laid down in England that a man once within the jurisdiction of English courts, could set up the form of his arrest or the mode by which he came into custody, as a reason for discharge when accused of a crime. But even were this otherwise, it is not the international law that it is sought to prove, but the special requirement of a new statute. Now, I cannot conceive how a new provision of the Act of 1870 could be consistent with the treaties with France, the United States and Denmark, entered into years before. Being of this opinion, I do not think the 1st and 2nd sub-sections of section 3 can be considered in force until there is an order in Council proclaiming them. I am officially informed that there is no such order. The case of Bouvier, Law Journal Reports, vol. 42 part 2, New Series, has been cited to establish that, where there was no order in Council proclaiming that the Act of 1870 applied, in its entirety, to France, it was necessary to show by evidence that by the law of France the French Government would not try the prisoner for an offence other than that for which the demand in extradition had been made. It seems to me that the case cited does not maintain this proposition. The judges in England did not decide the point raised here. They admit its difficulty and speak of the complicated and obscure language of section 27, and they discharge the rule on the ground that there was evidence that by the law of France, the prisoner surrendered cannot be tried for any other offence, and consequently that it was unnecessary for the Court in that case to interpret section 27. Mellor, J., said, however, that he was inclined to agree with the argument of the Attorney-General, which seems to me to express the [illegible] section 27 which I take. Mr. Kerr insisted strongly that the Chief [illegible] Justice Blackburn would not have said that they considered the [illegible] sub-section 2, section 3, complied with, unless they had thought it was in force. But by the context we see clearly that

Extradition of Israel Rosenbaum.

they do not decide whether it was in force or not, but that if in force it was complied with. Whether it was in force or not depends on the interpretation of section 27, on which they did not enter. The two points raised by the Attorney-General were these: (1) Sub-section 2 is not in force; (2) If it is its provisions have been complied with. The Court adjudicated on the last point only. No more recent case in England has been brought under my notice, and there has not been any modification of section 27. Under the circumstances I may be permitted to say that the obscurity of the language of the Statute appears to me to result from the complication of the system to be introduced, rather than from any defect of phraseology. Whether that complication is desirable or necessary I am not called upon to determine. It is sufficient for me to interpret the Statute as I find it, and about the question before me I have no doubt or difficulty. The evidence will therefore be rejected.

Having got over the preliminary question, as to what Statute governs us here, I come to the merits of the demand. It is urged for the prisoner that no *prima facie* case has been made out, and that he is entitled to his discharge. For the prosecution the evidence principally relied on is a copy of the bill of indictment found by the Grand Jury for the City and County of New York, the evidence of the Assistant Fire Marshall, Mr. Hill, and of one Tiews, a house agent in New York. With regard to the copy of the bill of indictment, I cannot accept it as evidence. It is not one of the copies mentioned in section 2 of our Act, and I don't think it is equivalent to anything there mentioned. It was argued by Mr. Carter, for the prosecution, that, although the Statute only mentioned copies of the deposition, in one case the originals had been admitted as evidence. I cannot see that the case referred to would justify me in admitting the copy of a bill of indictment as evidence. In that case the admission of the original was held to follow from the admission of the copy as evidence; in this case it is sought to use a copy which is not one of those mentioned in the Statute. Another argument might, perhaps, have been drawn from the Imperial Act of 1870. No such argument was used, and I presume advisedly. Although the remaining evidence is not perfectly conclusive, I do not think that with it before me I could discharge the prisoner. It is perfectly clear that the prisoner's store was purposely set fire to, and that it was carefully prepared so that it might be consumed. Kerosene was spilled on the floor, the windows were closed up with boards and bagging, and the fire took in a room where there was neither fire-place nor gas from which any accidental ignition could arise. It is also proved that the prisoner and his partner were occupied the day before the fire in sending away their property, and that hardly any property remained in the store at the time of the fire. It is also proved that both partners disappeared simultaneously at the time of the fire, and when seen afterwards they both declared that they had lost $6,000 worth of property by the fire and that they were only insured for $5,000. The departure of the prisoner and his family for Montreal, and his living here under a false name, are also suspicious circumstances which I ought not to overlook. It is possible that on the spot where the whole thing happened, the prisoner may be able to clear away all these suspicions, and if it is possible for him, it is manifestly his interest

Extradition of Israel Rosenbaum.

to do so. "But as it stands now a cloud hangs over him, and it is fit that a jury should decide whether he is or is not guilty of the felony laid to his charge. The prisoner will, therefore, stand committed for extradition.

Extradition ordered.

Edward Carter, Q.C., for the U. S. Government.
W. H. Kerr, Q.C., for the prisoner.
(S. B.)

SUPERIOR COURT, 1874.

MONTREAL, 9TH JULY, 1874.

Coram TORRANCE, J.

No. 629.

Cordingly vs. *Nield.*

HELD:—That the opening and reading of a private letter by a person to whom it was not addressed and for whom it was not intended, renders the person who thus violates the sanctity of private correspondence answerable in damages.

TORRANCE, J:—The plaintiff complains that, on the 13th January, 1873, he addressed a private and confidential letter from Port Hope, in Ontario, being then in the employ of the firm of J. & R. O'Neil, to one Edward Sait, then in the employ of the defendant; that the letter came by post to Montreal on or about the 14th January, 1873, and the defendant maliciously, and with intent to injure the plaintiff, and become possessed of certain information which was calculated to do damage to the plaintiff, without any right whatever, but contrary to law and good morals, opened the letter, and not satisfied with reading the same, took a copy thereof, plaintiff having foolishly made frivolous revelations therein about a certain drinking party, in which he stated he had been engaged; that on or about the 27th February, 1873, defendant, with a view to injure and destroy the character and prospects of plaintiff with his employers, stated to one of them that plaintiff was a drunkard and a man of no character; that, on the 2nd March, 1873, plaintiff came to Montreal, with the view of entering into partnership with one Robert G. Brown, and owing to the malicious statements and slanderous remarks made by defendant to said Brown, the said Brown refused to enter into partnership, or to have any business connection with plaintiff; that defendant told said Brown that he had a copy of said letter in his possession and told him the contents thereof, and that defendant was about to proceed to England and intended to shew said copy of plaintiff's letter to his relations and friends in England; that defendant, on or about the 15th May, 1873, did go to England and did show said letter to divers persons, and among others to John Nield, a maternal uncle of plaintiff, with the express purpose of injuring plaintiff, and damaging him in the esteem of said John Nield and his relations and friends, thereby causing plaintiff loss and damage and injuring his character and reputation; that defendant, moreover, since his return

from England to Montreal, at various times at Montreal, and in presence of many persons, had frequently attacked the character and reputation of plaintiff. Damages are claimed to the amount of $10,000.

The defendant has pleaded the general issue.

The witnesses have been heard in open court. It appears that plaintiff brought a letter of introduction from the uncle of John Nield some years ago, that he was in Montreal for some time, and part of the time, about a year or a year and a half, was spent in the employ of defendant. In the month of January, 1873, plaintiff was in the employ of a firm at Port Hope, and while there, about the 6th January, wrote a letter in the following terms to defendant:

"Port Hope, Jan. 6th, 1872.

"Dear Sir,—My father has promised to advance me money to commence "business in partnership with R. G. Brown, Bleury st., but would like to have "your opinion respecting the chance of our doing well, and also your opinion of "young Brown. He wants to know, in fact, whether it would be advisable for me "to join Brown or not. By writing me a candid report, as nearly as possible, you "will confer a favor I shall ever remember. Kindly write in time for me to "enclose it in my letter to my father.

"In confidence,

"I remain, dear Sir,

"Yours obediently,

"C. H. CORDINGLY."

At this time plaintiff was negotiating with Robert G. Brown for the formation of a partnership between them. One week later, the plaintiff addressed a letter to a friend of his in Montreal, Edward Sait, to the care of the defendant. The letter and its reception by the defendant was the cause of the litigation in this action, as well as of criminal proceedings against the defendant for unlawfully detaining and opening the letter. The letter is in these terms:—

"To Edward Sait, Esq.:

"Port Hope, January 13, 1873.

"DEAR TED,—I arrived here safe and sound after a long and tedious journey. I wish I had stopped with you another day, for after I got out of the train I met a young fellow on the go; he was going to Cobourg for a drive, and asked me to go with him. I consented, so we went and got beastly drunk before we came home. I don't know how the devil we got home at all; it certainly was not the fruits of careful driving, for I was driving, and I'm damned if I knew where I was going until the horse brought us into the livery stable yard at Port Hope. (You know how it is yourself.)

"I am up to my ears in work, and shall be until the end of the month.

"How are things progressing in Montreal? Has friend Glover arrived home yet?

"I expect to commence business for myself this spring, as my father has promised to hand out the needful, so you may look out for me in the month of March. Things are very dull here in the way of trade. I may very likely

Cordingly vs. Nield.

have to go to Oshawa next month to help with stock-taking and balancing books, &c., &c.

"Another month of damned hard work in store for me. I'll make up for it when I come to Montreal. Nothing further to say at present, so by-bye till I see you in moral city. Remember me to the girls Jennie and Miss Wallworth, give them my love and a $. Give my kind regards to Mrs. Sait, Annie and Miss Youhue.

"I remain,

"Your attached chum,

"CHARLIE."

"P.S.—I owe Bob some money for things I got when down. I told him, if he wanted payment to apply to you for $10 on account."

The defendant tells us how he opened the letter. In the witness box he says: "This letter was addressed to my care, which I found out after I had opened "the letter. The plaintiff was at that time in the employ of J. & R. O'Neil, "merchants, of Port Hope. This letter was a private and confidential one. I "took a memorandum of its contents under the following circumstances: "Charles H. Cordingly, the plaintiff in this cause, came to this country in the "fall of 1870, bringing with him to me a letter of introduction from my cousin, "John Nield, who is also a kind of foster brother of mine, and with whom I had "lived and slept for three or four years before coming to Canada. He is also "Cordingly's uncle; and he told me to have an eye on the boy, as did also my "uncle, Edward Nield, senior, who is also uncle of Charles H. Cordingly." Further on, he says: "I had read nearly the whole of the first page of the letter "before I found out that it was not intended for me. I found this a most "extraordinary letter. I was astonished at it." Defendant then says he only volunteered a statement to Brown to guard him, as he was a good customer of his. Elsewhere he says he told Brown that if Cordingly went with him not to send him down to his place to buy goods, as he did not wish to see him coming near his young men. He then narrates how the matter came up in England. He says: "While I was sitting with my wife and family with John Nield, the "plaintiff's father came in. I at once got up to shake hands with him, but he "turned his back upon me and would not speak. I asked John Nield the "reason, and after the plaintiff's father had left, he told me that the plaintiff "had written home to his father, stating that I had told all the clerks in my "employ what his father had been guilty of a few years previous, for which he "had been imprisoned a number of years. I had not told anybody any such "a thing. When I heard about these lies I then, in order to show John Nield "what kind of fellow Cordingly was, produced the memorandum. He said it "was unnecessary, that he knew what the boy was at school." The defendant is asked as to statements he has made about the matter in Montreal, and he answered that since his arrest in July last, on the charge of opening a letter, he mentioned it to parties who asked him about the letter, but not for the purpose of injuring the plaintiff.

Robert G. Brown, who is mentioned in the declaration, says:—

"Just before I was to sign the deed, Mr. Nield spoke to me about Mr. Cord-

"ingly, and said he was not a fit young man to take into business, and that I "was doing wrong to take him. I then told my father what Mr. Nield had "said about Cordingly, and he said, that being the case, you had better have "nothing to do with him at all. That was the only reason I gave Mr. Cord-"ingly for not signing the deed. Father said if his own cousin was against "him, that he ought to know more about him than I did." Further on he says that defendant told him that he had taken a copy of the letter and intended taking it home with him. It is proved as a matter of fact that the partnership between the plaintiff and Brown was not carried out in consequence of Mr. Nield's words to Brown. Is defendant liable for having used these words, or can he shelter himself by any privileged occasion? The Court holds that a merchant dealing with another merchant or a customer about their business relations, has a right to discuss the effect of the admission of a third party into the business of one of them provided he do so without malice in fact. Starkie on Slander, says, p. 281: "In general, where a communication is made in confidence, either by or to a person interested in the communication, supposing it to be true, or by way of admonition or advice, it seems to be a general rule that malice is essential to the maintenance of an action." Here it may reasonably be said that defendant, in speaking to Brown or Nield about the plaintiff, was much more moved by his own interest than by malice to the plaintiff. The Court does not see malice on the part of Mr. Nield in what he said to Brown and John Nield. The letter under consideration was far from creditable to the plaintiff, and having addressed it to one whom he supposed to be yet in the employ of Mr. Nield, Mr. Nield might naturally object to such communications coming to his clerks. The Court does not, therefore, see that plaintiff can claim damages from defendant for the use which he made of his own knowledge in confidential interviews with Brown or John Nield.

But there is another point still to be considered. Was Mr. Nield right in reading the letter after going a certain length down the first page, when he discovered that it was not intended for him? Was he justified in taking a copy of it? Admit that the letter was a most discreditable production, for the writer as well as the person to whom it was addressed, and there is evidence that the latter fully sympathized with the writer, confidences between man and man must be protected or the very foundations of society are in peril. The thoughts of few men will bear a scrutiny if laid open to the public gaze or even to the gaze of the most intimate friend Momus, the god of wit and ridicule, is recorded to have found fault with Vulcan for having created man without making a window in his breast, so that his thoughts might be seen. It is fortunate for us that such windows do not exist, or the society of men one with another would be most miserable and unendurable. Mr. Nield was wrong in reading to the end of the letter, and wrong in making a copy of it, as Mr. Brown says, or a memorandum of it, as Mr. Nield admits. Therefore the Court holds that, for the voluntary perusal and copying of a letter not intended for him, the defendant should answer in damages; the plaintiff was not under his control, nor were his confidential communications to others subject to his scrutiny. At the same time we must consider the friendly

Cordingly vs. Nield.

relations in which the parties had stood to one another for years, and the fact that, on the 6th of January the plaintiff had written to the defendant requesting his good offices in informing his father what his chances of success were in Montreal, in business and in partnership with Brown. The Court gives a certain amount of damages, as Mr. Nield was wrong in reading the letter to the end and taking a copy, but these damages will not be large under the circumstances, namely, fifty dollars and costs as in an action over one hundred dollars.

Judgment for plaintiff.

Curran & Coyle, for the plaintiff.
Perkins, Macmaster & Prefontaine, for the defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1874.

QUEBEC, 8th JUNE, 1874.

Coram MONK, J., TASCHEREAU, J., RAMSAY, J., and SANBORN, J.

No. 18.

J. S. PRINCE ET AL., APPELLANTS;

AND

ADOLPHE MORIN, RESPONDENT.

HELD:—That a security bond in appeal is not sufficient if given over real estate, the title deed of which is not enregistered.

This was a motion by the respondent that the appeal be dismissed by reason of the insufficiency of the security bond. The point taken by the counsel for respondent was that there was no enregistration of the surety's title, and he referred in support of his pretention to the last paragraph of Art. 2098 C.C.: "So long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs or real rights granted by him in respect of such immoveable are without effect."

The Court maintained the objection to the security, but the counsel for the appellants offering to deposit $200 in money, in lieu of security, the following judgment was rendered:—

La Cour après avoir entendu les parties *de novo* par leurs avocats respectifs, sur la règle obtenue par l'intimé en cette cause, le six Septembre dernier, tendant à faire déclarer insuffisant le cautionnement fourni en cette cause, et avoir délibéré, décharge la dite règle, et condamne les appelants à payer à l'intimé les frais par lui encourus sur icelle. Et de plus la Cour ordonne aux appelants de déposer entre les mains du Député Greffier de cette Cour d'hui à six semaines à compter de cette date la somme de deux cents piastres pour tenir lieu du cautionnement déjà fourni en cette cause en cour inférieure. Et qu'à défaut de ce faire le dit appel soit renvoyé avec dépens et le dossier transmis à la Cour de première instance, sans ordre ultérieur."

Objection maintained.

Wilfred Laurier, avocat des appelants.
Eugène Crépeau, avocat de l'intimé.
(J.K.)

COURT OF QUEEN'S BENCH, 1874.

QUEBEC, 6th JUNE, 1874.

Coram MONK, J., TASCHEREAU, J., RAMSAY, J., and SANBORN, J.

No. 58.

SYMPHRONIEN BERNIER, APPELLANT;

AND

THOMAS GAUMOND, RESPONDENT.

The appellant took a writ of appeal in which the judgment complained of was referred to as of the 20th March. Seeing this to be an error, he took out, with a view of saving costs, what was called an "*alias* writ." Subsequently he asked leave of a Judge in Chambers to be allowed to affix the full stamps as of an original writ. This was granted by Mr. Justice Taschereau, subject to all objections. Respondent having moved to reject the appeal on the ground that the first writ was a nullity, and that the *alias* writ should be a copy of the former writ;

HELD:—That although the original writ was null, the words calling the second writ an "*alias* writ" were merely surplusage, and the motion was dismissed.

SANBORN, J:—A motion is made to reject the appeal. It seems that a former writ of appeal issued in this cause, and in reciting the judgment it is referred to as of the "20th March, 1874," while in fact the judgment was rendered on the 27th March. The writ was therefore found to be a failure. Instead of taking a new writ, the appellant issued an "*alias* writ," putting on the necessary stamps for an *alias* writ, which, of course, were less than for a new writ. Being convinced that there was a doubt as to the sufficiency of the stamps, he applied to Mr. Justice Taschereau, in Chambers, who permitted him to put on stamps sufficient for a new writ. A motion is now made by the respondent to reject the appeal on the ground that the original writ being a nullity, there could not be an *alias* writ, but only a new writ. On examining the so-called *alias* writ we find the words "ci-devant." In other respects the writ is complete. The objection as to the insufficiency of the stamps for an original writ has been remedied by the Judge in Chambers, and the question now is whether this *alias* writ should be treated as a nullity. The Court is not inclined to hold the appellant to that degree of strictness as to say that the writ is an absolute nullity: It may be said, I think, that an *alias* writ takes the place of a former writ for some defect in that writ. There seem to be some grounds for holding that it was a case in which an *alias* writ might issue. It has all the attributes of a writ of appeal, and the objection as to insufficiency of stamps having been cured, it would be unreasonable to declare it a nullity from its simply containing the word "ci-devant." The Court therefore rejects the motion with costs.

The judgment is as follows:—"La Cour après avoir entendu les parties par leurs avocats respectifs, sur la motion de l'intimé, en date du premier Juin courant, domandant à faire rejeter l'appel en cette cause, pour les raisons mentionnées en sa dite motion, et avoir délibéré, rejette la dite motion, avec dépens distraits en faveur de Mr. A. X. Talbot, avocat et procureur de l'appelant en la présente cause."

A. X. Talbot, avocat de l'appelant.

W. C. Languedoc, avocat de l'intimé.

(J. K.)

SUPERIOR COURT, 1873.

MONTREAL, 30TH SEPTEMBER, 1873.

Coram MACKAY, J.

No. 19.

Taylor vs. *The Mayor, Aldermen and Citizens of the City of Montreal.*

HELD:—That where Commissioners in expropriation apparently allowed $12,500 as a capital sum of indemnity in lieu of an annual sum of $1000 which the proprietor got as rent of the property expropriated, such estimate was an error in the amount of indemnity within the meaning of Quebec Act, 35 Vict., c. 32, sec. 7.

MACKAY, J.:—This is a case which has arisen out of an expropriation made against Mr. Hugh Taylor by the City, of property which he had in Little St. James Street. In November, 1872, the sum of $12,500 was awarded to Mr. Taylor as the amount of the indemnity. Mr. Taylor now brings an action under chap. 32, sec. 7, of 35 Victoria, alleging that there has been error in the amount of the indemnity awarded to him by the Commissioners. The declaration of the plaintiff recites his title deeds, the proceedings in expropriation, the nomination of Commissioners, their having acted and made an award, and the homologation of the award; and then goes on to say that the award is not sufficient and that the Commissioners have violated their duties in adjudging so little. Further, that plaintiff has a right, under the Act above referred to, to proceed by this direct action.

The law of expropriation formerly did not allow such an appeal as is provided by this direct action, it made a finality of the report of the Commissioners once it was homologated. But, by the 35th Victoria, subsection 12 of clause 13 of 27 and 28 Victoria is amended, and "in case of error upon the amount of the indemnity only on the part of the Commissioners," the party expropriated may proceed by direct action in the ordinary manner to obtain the augmentation of the indemnity; such action to be instituted within fifteen days after the homologation of the report. This new action will probably throw upon the Court the duty of passing upon nearly all the reports of the Commissioners for expropriation, for most persons whose property is taken will be disposed to complain that they got too little. It would have been very fitting, in making this change in the law, to have altered the rule which does not require, which, in fact, *quasi* prohibits the Commissioners from taking the evidence in writing. For the Court has now to pass upon the question whether the amount of indemnity allowed is erroneous, and yet it has not before it the evidence upon which the Commissioners proceeded, and in their estimate of which the Court is asked to say that the Commissioners erred. The corporation, I think, are getting some amendments to their charter, and this should not be neglected. The Courts will hesitate to disturb the findings of Commissioners unless it be ordered that they return with their report the evidence on which they acted. In an ordinary case I would have great difficulty in disturbing the judgment of the Commissioners; but I think this is an exceptional case. The Commissioners themselves, it may be remarked, have been examined as witnesses. It is a strange proceeding, but perhaps it is legal; at all events no objection was raised. The evidence of the Commissioners is perfectly harmonious, and I am bound to give

Mr. Taylor the benefit of it. The Commissioners say that the $12,500 was allowed him as the capital of $1,000 a year rent, which he got for the property. Their intention then, was to allow him a sum that would produce $1,000 a year. Now, could a man take $12,500 to the Corporation and get a bond of $1000 a year for it? I think there is error here, and I give Mr. Taylor the benefit of it. On the ground that the Commissioners all say they meant to give Mr. Taylor $1000 a year, and that they could not reasonably require him to invest the indemnity so as to produce 8 per cent., I supplement their award by allowing him $4166.50 more.

The judgment is recorded in these terms:

The Court etc.:

Considering that the plaintiff has sufficiently proved his allegations of declaration to entitle him to a judgment against defendants, to wit, to the extent of the present judgment;

Considering that all of the Commissioners of Expropriation in the matter concerning plaintiff's land referred to in his declaration, have been examined as witnesses in this cause, to explain their meaning and intentions in awarding the $12,500 to plaintiff as per their award of 2nd Nov., 1872; that the examination of them as witnesses to that effect, was and is not objected to; that they all agree that they meant to assure and give plaintiff $1,000 a year for the property taken from him; that meaning so, they, the said Commissioners, had not right to require plaintiff to make for himself that $1,000 a year by employment or investment of said $12,500, in manner to produce eight per cent. per annum; that the award and operation of the said Commissioners does, substantially, so require, and that here may be seen injustice and error to the damage of plaintiff, who must, therefore, get augmentation of indemnity, which the Court here settles and adjudges at $4,166,50 over and above the $12,500 mentioned in the aforesaid award, with interest and costs of suit, *distraits* &c., less only the costs of the witnesses who were not examined before the said Commissioners during their work preliminary to their aforesaid award.

Judgment for plaintiff.

Perkins & Monk, for the plaintiff.
R. Roy, Q.C., and B. Devlin, for the defendants.
(J.K.)

SUPERIOR COURT, 1873.

MONTREAL, 30TH SEPTEMBER, 1873.

Coram TORRANCE, J.

No. 1597.

Bagg vs. *The Mayor, Aldermen, and Citizens of the City of Montreal.*

HELD:—That notwithstanding 35 Vict. (Quebec) c. 32, sec. 7, the Court will have difficulty in disturbing the award of Commissioners in expropriation as to the value of property expropriated, and the amount of indemnity to be allowed the proprietor.

TORRANCE, J.:—This case resembles that of Taylor against the Corporation which has been already adjudged to-day. (p. 210.) The demand is for $59,000,

Bagg vs. The Mayor et al. of Montreal.

which the plaintiff says is the sum he should have got in addition to that allowed him by the Commissioners in expropriation. Mr. Bagg was proprietor of a lot of land in the neighbourhood of the city, now forming part of the Mount Royal Park, containing some 32 acres. The plaintiff alleges that it was worth $128,000, and that the majority of the Commissioners only gave him $69,000. The Court is asked to find that the Commissioners made an error as to the indemnity to be allowed. Now, the Court is here in a position very different from the valuators or Commissioners who were selected in the first place from their known experience in these matters. What does the Court here know about the value of land in the neighbourhood of Montreal compared with the judgment of these gentlemen? The Court has not had the advantage which they had of hearing and seeing the witnesses or of seeing the land. It is impossible upon such evidence for me to say that the Commissioners committed an error in the award they have made, and it is my duty to declare that the plaintiff is not entitled to any additional compensation, and that his action must be dismissed, as it is dismissed, with costs.

The judgment is recorded as follows:

The Court, etc.,

Considering that plaintiff hath not established that there was any error in the award made by the majority of the Commissioners on the 31st of May, 1872;

Seeing that the Commissioners had the advantage of seeing the land in question, and seeing and hearing witnesses before them before making their award;

Considering that they were selected for their experience and skill in the valuation of real estate;

Considering that plaintiff hath failed to prove the allegations of his declaration, doth dismiss, &c.

Action dismissed.

Laflamme, Huntington & Laflamme, for the plaintiff.

R. Roy, Q.C., and B. Devlin, for the defendant.

(J.K.)

COURT OF QUEEN'S BENCH, 1874.

[CROWN SIDE.]

MONTREAL, 13th APRIL, 1874.

Coram RAMSAY, J.

Regina vs. *John Lowenbruck.*

HELD:—That an indictment for larceny will not lie against a partner under 32-33 Vict. cap. 21, sec. 38.

RAMSAY, J.:—The prisoner is indicted for stealing money, the property of the partnership of which he is a partner, under section 38 of the Larceny Act of 1869. If it was the intention of the Legislature to overthrow the whole order

of ideas as to the subject of larceny and embezzlement, they should have proceeded with a little more care than they have done in this section. This would have a doubly good effect. First, the reducing the thing proposed to precise words would have the effect of making the proposition clear to the mind of the proposer; and, secondly, it would warn the public what it is necessary to avoid. The Act really says that if the joint owner steals or embezzles any money or other property of which he is joint owner "he shall be liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership, or one of such beneficial owners." But he cannot steal or embezzle it; therefore the indictment for stealing or embezzling must fail. This is sufficient for me to say to determine the present case; but there is another category. If any such joint owner unlawfully converts the same he shall be liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership, or one of such beneficial owners. At worst he is only in the position of one unlawfully converting. How far is that indictable? Section 99 it is said will meet the difficulty; but on looking closely at that section it will be seen that its object is to meet the case of larceny being laid in the indictment and the obtention by false pretences only being proved. The indictment could not have been laid, or the case for the Crown been more satisfactorily proved, but the prosecution must fail because the section of the Statute could not be applied. To have had the effect sought to be given to it, the Statute should have stated that the unlawful conversion of the partnership property should be deemed to be larceny. But if the Act had been drawn in that form, it can hardly be supposed it would have passed. Such a law would destroy any tangible distinction between guilt and innocence, for partners are every hour of the day found unlawfully converting the partnership property, if their acts were strictly examined. The simple unlawful conversion of the property of another is not indictable, and it should not, in my opinion, be made indictable.

Ritchie, Q.C., for the Crown.

J. J. Curran, for the Prisoner.

(J.K.)

COURT OF QUEEN'S BENCH, 1874.

[CROWN SIDE.]

MONTREAL, 18th APRIL, 1874.

Coram RAMSAY, J.

Regina vs. *Atkin*.

HELD:—That the Court will not give an order for the restitution of stolen goods, where the ownership is the subject of a dispute in the Civil Courts.

The prisoner Atkin having been convicted of larceny of certain goods, an application was made for the restitution of the goods to the owners.

RAMSAY, J.:—In this case an application was made for the restitution of the goods to Messrs. Cassils & Stimson, under the 32nd and 33rd Vict., c. 21, sect.

Regina vs. Atkin.

113. In England it seems it is not usual to grant a writ of restitution; *R. vs. Macklin*, 5 Cox, 216. It therefore only remains to be seen whether we should give a summary order. The difficulty in this case arises from the fact that the goods in question have been seized in the hands of the High Constable by civil process of revendication. It is said on the part of the applicant that we have no discretion, and that we are bound to give the order. We are not of that opinion. "Shall be restored to the owner" is only a waiving of the rights of the Crown. It does not decide any right between other parties. *Scattergood vs. Sylvester*, 19 L. J. Q. B., 447. Were it considered otherwise, such an enactment would be beyond the jurisdiction of Parliament. It would be a matter of civil law. The other words, "the Court shall have power to award," are evidently permissive. It has been said that they are permissive in form because of the proviso of the section; but the proviso is an absolute exception, and therefore, unless it was intended to leave the granting of the order discretionary with the Court, it was not necessary to use the permissive form. Again, the Statute says, "from time to time." This shows the intention of the Legislature to leave it discretionary when this order was to be given. The objection to granting the order now is not so much that it might affect the rights of third parties, but because it would place our officer in an awkward position. He would be between two fires. On one hand he would have our order to make restitution; on the other he would be open to civil liabilities if he delivered up. It does not alter the question that the applicants say they won't press the delivery till the civil suit is decided. We are asked for an order and we must see what it may lead to. Nor can we see any inconvenience in delaying to give the order for any Judge holding the Court might give it when the obstacle created by the seizure is removed.

Ritchie, Q.C., for the Crown.

Carter & Keller, for Petitioners.

(J.K.)

SUPERIOR COURT, 1874.

[In Chambers.]

BEAUHARNOIS, JULY 16th, 1874.

Coram Belanger, J.

Lebœuf & Viaux, & Viaux, fils, Mis en cause; and *Viaux, fils*, Petitioner for Habeas Corpus.

Held:—That a Writ of Habeas Corpus will be granted to liberate a prisoner charged with process in a civil suit (*contrainte par corps* against *Gardien*) issued out of a Court of inferior jurisdiction, when it appears on the face of the writ of arrest that the proceedings had are beyond the jurisdiction of the Court from which it issued.

Belanger, J.—This is an application by one Gedeon Viaux, fils, for a Writ of Habeas Corpus. In his petition he sets forth that he is now detained in the Common Gaol of this district under a warrant of the Sheriff of Montreal, based upon a *contrainte par corps* issued out of the Commissioners Court for the

Lebeuf & Vieux & Vieux.

Parish of St. Timothée in this district or during his arrest and imprisonment until he shall produce certain articles seized in the district of Montreal by virtue of a Writ of Execution issued out of that Court and addressed to a bailiff in the district of Montreal; to which the petitioner was named gardien, or shall have paid the debt and costs. He urges several reasons for his liberation, but I need only mention one, as it fully disposes of the case. That is, that the Commissioners Court of St. Timothée has no jurisdiction to enforce by way of execution against the goods of a defendant residing in the City of Montreal, any of its judgments; and that a seizure made in the district of Montreal of a defendant's goods under a writ of execution so issued is a nullity, and all proceedings incident thereto are null and void.

This application, however, is resisted at the outset by the Clerk of the Crown, Mr. Baudry representing the Crown, who, relying upon section 25, of cap. 95, C. S. L. C. and article 1052 of C. of C. P., urges that the petitioner is deprived of the rights of the Writ of Habeas Corpus and of his liberation thereunder, and that I have no power to grant it to liberate the petitioner, he being detained under Civil Process. This last point must therefore be disposed of first, for if I have not the power to liberate in any case where a party is detained by Civil Process then this application must fail.

I must therefore inquire if this party is detained under any legal process issued out of a Court having really jurisdiction to issue this civil process under which he is detained, holding as I do that this sect. 5 and art. 1052 applies only to cases where a party is detained by some legal process issued by some Court having competent jurisdiction, in which case I am debarred from inquiring into the irregularity of the proceedings but not into their illegality.

The cases cited by Mr. Baudry, *i.e.*, of exparte Donaghue, and Barber & al., *vs.* O'Hara, do not go so far as to say that the Writ cannot be granted where the want of jurisdiction is apparent, but on the contrary go to show that it can, where the want of jurisdiction is manifest. Happily I am not alone in this view, for even in the Donaghue case Mr. Justice Meredith seems to have intimated that, if a want of jurisdiction had appeared on the face of the proceedings he would have been disposed to have granted the writ. There are a number of cases already decided but none of which I have found reported where parties have been liberated under Habeas Corpus detained under civil process. I refer to exparte Elmire Prince, exparte Egan, exparte Killeny, exparte Crebassa and several others in Montreal. Holding, as I have said before, that I have power in the present case to grant the writ, I must see if, on the face of the proceedings before me, the Commissioners Court of St. Timothée has gone beyond the scope of the jurisdiction given it by the Statute creating it, for, if it has, my duty is clear and I must liberate the petitioner.

By sect. 41 of cap. 94 of the C. S. L. C., establishing Commissioners Courts, power is given the Commissioners to issue an execution against the defendant's goods within the district wherein the Court is held. Art. 1212 of the C. of C. P. gives the same power and no more. Clearly then the Commissioners of St. Timothée had no power or authority to issue an execution against the goods of the defendant in this cause within the district of Montreal. Having no power to issue

Lebeau & Vieux & Vieux.

the execution the bailiff had no authority to name the petitioner gardien to the articles seized; and the Commissioners had no authority or jurisdiction to issue a Rule against the petitioner for not producing goods that were never legally seized, and they could in no way upon such an execution bring the petitioner within their jurisdiction, so as to give them authority to issue *contrainte par corps* as they have done in this case. I refer counsel to Hurd on Habeas Corpus, pages 335, 336, 363, 365 and seq. At the argument my attention was called to art. 1192 of same code, which allows of certain writs being executed beyond the limits of the judicial districts in which they are issued; this article does not, however, apply to the present case, which is a writ of execution. The Commissioners' powers are too clearly defined by art. 1212 to leave even a doubt upon my mind upon that point; and even if it was less clear, acting on the well established rule laid down in Hurd, page 367, that the jurisdiction of an Inferior Court is never presumed, I would liberate a party under the present circumstances.

On the whole, therefore, the petitioner is entitled to be liberated under the writ of Habeas Corpus, and he is consequently discharged.

Petition granted.

Elliot, for Petitioner.
Baudry, Clerk of Crown, for Crown.
(J.K.E.)

SUPERIOR COURT, 1873.

MONTREAL, 29TH NOVEMBER, 1873.

Coram JOHNSON, J.

No. 1657.

Scheffer et ux. vs. *Fauteux.*

HELD:—An application to the Court to be allowed to affix stamps to a promissory note fyled in a cause will not be allowed, unless supported by affidavit shewing that the affixing of stamps had been omitted through inadvertence or mistake, and that the application was made so soon as the discovery of the omission took place.

In this case a promissory note formed the basis of the action. It was fyled in the cause as an exhibit, without being stamped, and upon the 10th of October, 1873, the case was inscribed for judgment *ex parte* on the 17th of October.

On the 17th of October the plaintiff gave notice of a motion to be made on the 20th October, to be allowed to affix stamps. No affidavits were fyled or evidence offered in support of the motion.

PER CURIAM:—This case is before me upon two motions, one on behalf of plaintiff, to be permitted to affix stamps to the promissory note on which the action is founded; the other on the defendant's behalf, to be permitted to plead. These motions were both made on the 22nd of October, when the case was called on the roll for hearing *ex parte*, on an inscription made on the 17th of October, and which stood over from day to day at the desire of the parties.

This Court, sitting in Review, in October last decided, that it had no power to

Scheffer et ux. vs. Vanleux.

grant relief, even if the Statute of 1870 applied, unless there was evidence that the application was made as soon as the discovery took place of the want of stamps; and that it appeared to the satisfaction of the Court that it was through inadvertence or mistake that they had not been affixed. This motion is unaccompanied by any affidavit, and no law gives power to this Court arbitrarily to set aside statutory requirements, or to afford relief on any other conditions than those imposed by the law which gives the power. There is everything in the present case, moreover, to repel the existence of the only facts that could justify the relief sought.

As regards the second motion, it becomes useless under the circumstances, but it is also more than useless—it cannot be granted; because, although it professes to tender a plea, none is produced. Both motions will, therefore, be dismissed.

Motion to affix stamps rejected.

Chapleau & Champagne, for plaintiffs.

D. D. Bondy, for defendant.

(J. L. M.)

COURT OF QUEEN'S BENCH, 1874.

QUEBEC, 8TH JUNE, 1874.

Coram MONK, J., TASCHEREAU, J., RAMSAY, J., and SANBORN, J.

Alphonse Humbert et al. vs. *Henri Mignot.*

HELD:—That where of two co-plaintiffs, not co-partners, and between whom no *solidarité* exists, one leaves the country after suit brought, security for costs can be demanded only from the absent plaintiff.

This was a motion to be allowed to appeal from an interlocutory judgment. The action was brought by two co-plaintiffs, not co-partners. Subsequently one of the plaintiffs left the country, whereupon the defendant moved for security for costs. The Court below having granted the motion, the plaintiff who remained in the country asked for leave to appeal, contending that there was no *solidarité* between himself and his co-plaintiff, and the latter alone was bound to give security.

The Court was of opinion that the plaintiffs being non-partners, and there being no *solidarité* between them, the defendant was only entitled to security from the plaintiff who had left the country.

The defendant having filed a *désistement* from that part of the judgment which ordered Humbert, the plaintiff remaining in the country, to give security, the following judgment was rendered:—

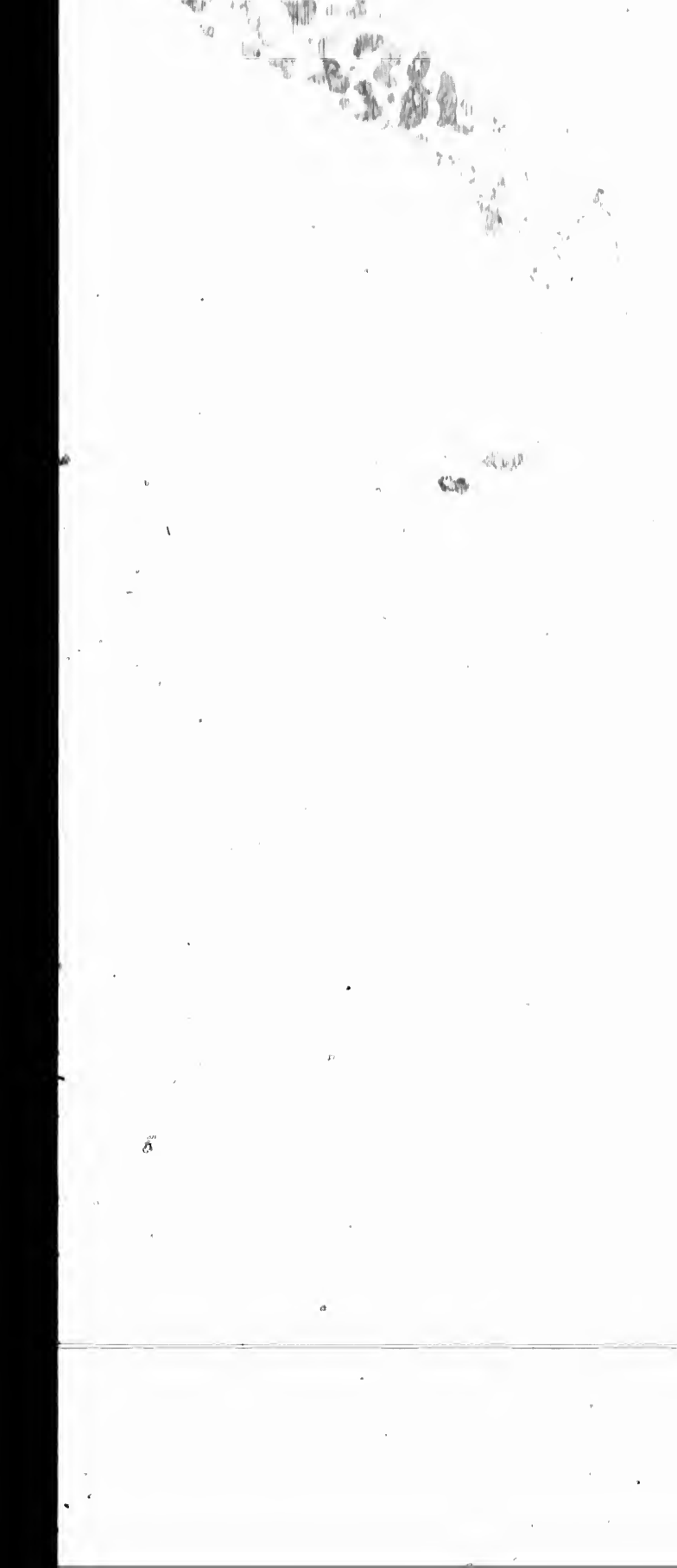
"La Cour après avoir entendu les parties, par leurs avocats respectifs, sur la Requête pour permission d'appeler d'un jugement interlocutoire rendu par la Cour Supérieure, siégeant à Arthabaskaville le trente et un Octobre dernier, présentée par le dit Alphonse Humbert, un des demandeurs en la présente cause, le cinq Decembre dernier, et avoir délibéré: vu le *remittitur* produit, aujourd'hui, en cette cause par le dit défendeur par lequel il déclare se désister de la partie du dit jugement interlocutoire ordonnant au dit Humbert de fournir un cautionnement en sa faveur, renvoye la dite Requête, avec dépens contre le dit défendeur Mignot.

Motion dismissed.

Ernest Pacaud, for the plaintiff.

Wilfrid Laurier, for the defendant.

(J.K.)



SUPERIOR COURT, 1874.

MONTREAL, 30TH APRIL, 1874.

Coram TORRANCE, J.

No. 513.

Rochon vs. *Mongenais.*

Plaintiff being liable to the seignior to pay him a constituted rent of $7.20 stipulated with defendant who purchased from him on 7th of April, 1859, that he should assume this liability. On the 4th May, 1859, the defendant was discharged by act of Parliament from the liability which was assumed by the State.

HELD:—That there was no action by plaintiff to compel defendant to continue the payment of the rent to plaintiff as part of the price of the land sold.

The declaration set up that on the 7th August, 1859, the plaintiff sold to the defendant a piece of land described in the declaration; that as a consideration for the sale, defendant undertook to pay in discharge of plaintiff certain claims specified in the act and among others

"1°. de fournir et faire valoir à la dame seigneuresse de Rigaud, pour et à "l'acquit du vendeur, la rente annuelle et perpétuelle créée sur le dit terrain "pour le rachat des lods et ventes, de la manière et dans les termes portés au "contrat de concession d'icelui terrain, auquel titre de concession le vendeur "refère pour le mode de paiement de telle rente annuelle et perpétuelle."

That this clause was so inserted and the plaintiff left in the hands of defendant the capital of said *rente, par erreur*, by error, that at that date the plaintiff had ceased to be responsible for said *rente*, the government having assumed the responsibility, that if it had not been for said error, defendant would have paid to plaintiff a sum equivalent to the capital of said *rente* in place of assuming said pretended obligation, that said *rente* represented a capital of $120 and payable at the rate of $7.20, beginning 29 September 1859. The principal amounting to $120 and the interest at $7.20 calculated from 1859 to December, 1872, amounting to $93.60 was claimed by plaintiff unless the defendant preferred continuing the annual payment of $7.20, in which case only the *rente* and not the capital was claimed.

The defendant pleaded that by the consolidated seigniorial act of Lower Canada, it was declared that every land which any seignior had by prior contract liberated from all seigniorial claims in virtue of a sum of money or rent had been from the date of such contract freed from all seigniorial rights, and that every rent expressly stipulated in a deed of partial commutation made in virtue of acts abrogated by the consolidated seigniorial act as being the indemnity to be paid by the censitaire in place of *lods et ventes* should be held to represent the value of the right of *lods et ventes* on the land in question, and by 22 Vic. Cap. 48 S. 7, it was enacted that so much of the constituted rents representing the *lods et ventes* and other casual rights, as will not be redeemed out of the Fund appropriated for the relief of the censitaires by the seigniorial act of 1854, should be assumed by the Province and paid by the Receiver General out of the consolidated revenue Fund, to the seigniors or parties respectively entitled to such rents, half yearly, on the first of January and July, and the censitaire should be discharged from the payment thereof. The plea then sets forth

that the seignioress of Rigaud on the 26th June, 1832, conceded to Luc Perillard land comprehending the land in question which was one half of it and by another act of the same date the land was then commuted by the creation of a constituted rent of $3.12 payable on the 29th September every year, beginning 1853, for which payment the land was hypothecated; that on the 15th Dec., 1853, said Perrillard sold to Benjamin Menard, subject to said rent payable to the said seignioress; that on the 7th November 1854, Menard sold the half of said land to Luc Perrillard on condition of paying to said Seignioress the annual rent of $7.20; that on the 22nd February, 1855, Perillard sold on the same terms to the Plaintiff, who, on the 7th April, 1859, sold the land in question on the same terms as regards the rent to the defendant. (The stipulation is given in the declaration.) The plea then alleged that plaintiff though personally bound had never paid any portion of said rent to the seignioress, and that the seignioress had never discharged him from payment and had never accepted the government as her debtor, and on the 7th April, 1859, the obligation of plaintiff was still complete in favour of the said seignioress, and the statutes discharging the land as regards the seigniors freed the censitaires liable to the payment without subrogation of any person to the State.

Jetté, for plaintiff, said that the cloture of the cadastre of the Seigniory in question was made in October, 1860, and confirmed 20th May, 1861, and there was no obligation on the part of defendant in law to pay the rente which should inure to the benefit of plaintiff.

St. Pierre, for the defendant, argued that the plaintiff had failed to prove that the defendant had not paid to the Seignioress the rent in question, and the presumption of law was that the defendant had fulfilled all his obligations to her. It was also to be remarked that the clause by which a *rente* was stipulated in favour of the Seignioress was to be found in all the deeds by which the ownership of the property had been transferred, commencing with the title of original concession, and was clearly nothing else than a "*clause banale*", which was meant to create no specific obligation. It was put into the deed of 7th April 1859, because it had been put into that of 1855, into that of 1854, and into the original concession of 1852. There could not be any error on the part of the plaintiff in the deed of 7 April, 1859, as the rent was then due to and claimed by the Seignioress. That rent had been substituted in the deed of original concession to the right of *lods et ventes* under 8 Viot. Cap. 42; S. 23, A.D. 1845. By 18 Vic. Cap. 3, this law and the amendments thereto were repealed, but "deeds of commutation granted on other things done under them remained in full force and had the same effect as if the said acts had not been repealed." (Vide C. S. L. Can. Chap. 41. S. I.) In passing the acts of 1854 and 1855, the object of the legislature was to change in this country, the tenure of land; and in order to attain that object all seigniorial rights and privileges were abolished which entailed the maintenance of the feudal system. But the Legislature did not interfere with the voluntary commutations made under the powers vested in the Seigniors and *censitaires* by the Act of 1845, as the object sought to be effected was by such commutations accomplished *pro tanto*, and such *rentes* as were thus created remained in force in all subsequent legislation as appears by

Gervais vs. Gareau.

Sec. 1, 30 & 33 of C. S. L. Can. Cap. 41 down to 1859, when by 22 Vic. Cap. 48 S. 7, they were assumed by the government. This was just about one month after the plaintiff ceased to be owner of the land.

PER CURIAM: The Court sees no difficulty in this case. There was no error on the part of the plaintiff when, on the 7th April, 1859, he stipulated that defendant should pay the rent. The defendant was only released from that obligation by the statute of 4th May, 1859, which discharged him from the payment and charged the Province as the substituted debtor. But there was no subrogation in favor of the plaintiff who had ceased to be owner. The Court cannot help remarking in conclusion that if this demand of the plaintiff were maintained, a similar demand might be made by his vendor against him, which would make it appear that the plaintiff has no interest in bringing this action.

Action dismissed.

L. A. Jetté for plaintiff.
St. Pierre for defendant.
(J. K.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 13TH JUNE, 1874.

Coram DORION, CH. J., MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J.

No. 1516.

Gervais vs. *Gareau.*

HELD:—That the day set apart by Proclamation of the Governor General for the celebration of 'the Queen's Birth Day' is a juridical day, notwithstanding such Proclamation.

DORION, CH. J.:—This is a petition by the defendant, in a suit in the S. C. at Montreal, complaining of a judgment rendered by that Court, dismissing an exception *à la forme* fyled by him, on the ground that it was not fyled within the four juridical days following the return day of the writ, and praying for a writ of appeal.

The correctness of the judgment complained of depends upon whether the day set apart by Proclamation of the Governor General for the celebration of 'the Queen's Birth Day' is or is not a juridical day; the defendant in his calculation of time treating it as a *non*-juridical day.

The Article of the Code of Procedure enumerating the non-juridical days, specifies 'the Birthday of the Sovereign,'—not the day fixed for its celebration but the day of birth itself,—and the cases governed by Proclamation are those only where the day is set apart as one of general fast or thanksgiving.

The provision in the Code, it may also be observed, is quite different to that in the Dominion Act of 1872, on Banks and Banking, in which 'the birthday

(or the day fixed by Proclamation for the celebration of the Birthday,) of the reigning Sovereign' is declared to be a holiday, or non-juridical day.

On the whole, we are clearly of opinion that the exception was fyled too late. The petition is, therefore, rejected with costs.

Petition for appeal rejected.

Desnoyers, Ouimet, et al, for defendant and petitioner.

Longpré & Dugas, for plaintiff.

(S.B.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 24 JUNE, 1873.

Coram DUVAL, C. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

No. 1.

AMOS JOHNSON,

(Mis en cause *in the Court below.*)

AND APPELLANT;

JAMES O'HALLORAN,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—A guardian of cattle and hay seized simultaneously, under the same writ, has a right to use the hay for feeding the cattle, even although it be afterwards proved that the cattle did not belong to the defendant.

This Appeal was instituted from a judgment of the Court of Review, which confirmed a judgment of the Circuit Court of Bedford—sitting, Mr. Justice RAMSAY.

The facts of the case were as follows. The Respondent recovered judgment in the said Circuit Court against one Micah T. Hawley, and sued out a writ of execution against his effects. Under this writ there were seized, as belonging to Defendant, everything upon the farm on which he resided, including, amongst other things, a quantity of cattle and grain, and about twenty-two tons of hay. To this seizure, Amos Johnson, the said *mis en cause*, was appointed guardian. By an opposition to withdraw, one Morris T. Hawley, the Defendant's son, claimed as his own all the effects seized. This opposition was maintained for the grain, cattle and everything else seized except the twenty-two tons of hay. Whereupon, a writ of *venditioni exponas* was sued out for the sale of the hay, and upon its not being forthcoming, a rule *nisi* was taken upon the said Appellant, (the guardian,) ordering him to produce the hay or pay the debt. Against this rule the Appellant showed cause in writing, setting up as the grounds of his defence. 1st. That by one and the same seizure, in the suit of the Respondent against Hawley, an attachment had been made of everything on a farm,

Johnson and O'Halloran.

on which said Defendant was living, and that he, the Appellant, as guardian to the effects seized, had a right to use the hay to feed the cattle seized simultaneously therewith; and that, had he not done so, they would have been starved. 2nd. That the seizing bailiff, Stevenson, authorised him to so use the hay in feeding the cattle. 3rd. That the value of the hay was only from $7 to $8 per ton, and not $12 as claimed by Respondent.

The Plaintiff replied both by a general and special replication, the principal grounds of the latter being an allegation, that the cattle were not Defendant's but had been claimed by and adjudged to Opposant.

Issue was joined and the parties went to proof. The evidence taken on the part of the Appellant clearly established:

1st. The unity of the seizure and that the opposition fyled was one claiming all the effects seized.

2nd. That the hay had been used in feeding the cattle and in no other manner, and this by the express authority of the bailiff.

The court of original jurisdiction ordered the rule to be made absolute against the guardian, and thereby condemned him to produce the hay or pay therefor at the rate of twelve dollars per ton.

Its judgment is worded as follows:—

This court having heard the Plaintiff by his counsel, and the said guardian *mis en cause* by his counsel, the said Defendant and Opposant not appearing at the argument, having examined the proceedings and proof of record and having deliberated thereon:

Considering that the said Guardian *mis en cause*, to wit, Amos Johnson hath failed to produce part of the goods seized in this cause, to wit, in all twenty-two tons of hay, in order that the same may be sold as required by law.

Considering that the said hay estimated according to the evidence taken on the rule issued against said guardian in this cause is of the value of twelve dollars per ton, which would give a sum more than equivalent to extinguish the claim of the said Plaintiff, in debt, interest and costs:

Doth order and adjudge that the said Amos Johnson be imprisoned *contraint par corps* in the common gaol of this district until he produce and deliver up the said twenty-two tons of hay, in order that the same may be sold according to law unless he had rather, and do, within fifteen days of the date hereof, pay to the Plaintiff in this cause, the debt, interest and costs due the said Plaintiff by said Defendant under the judgment of this court rendered on the 7th of October 1869 and subsequent costs accrued on said judgment. The whole with costs of this rule, and of all proceedings had thereon.

The judgment was confirmed by the Court of Review in the following terms:

The Court now here sitting as Court of Review having heard the Plaintiff and the *mis en cause*, by their counsel respectively, upon the judgment rendered by the Circuit Court in and for the District of Bedford, on &c.

Considering that there is no error in the said judgment of the 22nd day of April, 1872, doth, in all things, confirm the said judgment in Revision with costs against said *mis en cause*, in favor of the said Plaintiff.

Johnson and O'Halloran.

And it is ordered that the record be remitted to the Superior Court, in and for the District of Bedford.

The appellant in support of the guardian's pretention that he had a right to use the hay as he did, referred to Pothier, proc. civ. part 4, ch. 2, art. 5, p. 4, where he says :—" Lorsqu'on a saisi tous les effets d'une métairie, les chevaux, " bestiaux, les grains, fruits, etc.; le gardien peut employer à la nourriture des " bestiaux les grains et les fruits saisis, comme il est d'usage de les y employer."

Also to Pigeau at page 101, vol. II. who says, " that the guardian may make " use of the effects seized when it is for the good of such effects."

MONK, J., *dissentiens.*—A seizure issued upon a judgment obtained by O'Halloran against Hawley, and some cattle and a quantity of hay were seized. Johnson, the appellant, was named guardian, and he proceeded to feed the cattle with the hay seized. All the effects seized were claimed by Morris Hawley, defendant's son, and he being declared proprietor of the cattle by a judgment of the Court, they were released from seizure. Thereupon a *vend. ex.* issued to sell the hay, but the guardian answered that it had all been consumed by the cattle. The guardian was condemned by the Court below, and appeals. The question now is whether he was justified in taking the hay to feed the cattle. I think that he was not, without first having obtained the permission of the Court. The judgment should therefore be confirmed.

DUVAL, C. J., remarked that the cattle were seized at the instance of the plaintiff, and therefore he could not complain that they had been fed with his hay. With regard to the right of the guardian to make use of the hay, His Honour could not see that there was any doubt whatever. The guardian was obliged to feed the cattle at once. Were he forced to make application to the Court for permission to use that hay, they might have starved in the meantime and the guardian would have been responsible. Common sense showed that he had done right.

The judgment is as follows :

Considering that by the judgment of the Circuit Court in and for the District of Bedford, rendered on the 22nd day of April, 1871, it is ordered and adjudged that the said Appellant be imprisoned *contraint par corps* in the common gaol of the said District until he produces and delivers up the said 22 tons of hay of which he was guardian as in the proceedings in the said case is mentioned, in order that the said hay may be sold according to law, unless the said appellant had rather, and do within 15 days of the date of the said judgment pay to the plaintiff to wit the said Respondent his debt, interest, costs, and subsequent costs as in the said judgment mentioned.

Considering that by the evidence adduced in this cause it is established that the said hay was by the said appellant as such guardian given as food to the cattle also at the same time seized and of which he was also guardian ; considering that by law the appellant as such guardian was justified in using the said hay for the purpose aforesaid and that in the said judgment of the Circuit Court there is error, doth revise and set aside the said judgment and also the subsequent judgment of the Court of revision sitting at Montreal confirming the said judgment of the said Circuit Court, and doth hereby dismiss the rule against the

Johnson and O'Halloran.

said appellant guardian aforesaid in the said judgment of the Circuit Court obtained by the said Respondent, and the Court doth condemn the Respondent to pay to the appellant his costs as well in the said Circuit Court as in the Court of Review and in this Court. The Honorable Mr. Justice Monk dissenting.

Judgments of Courts below reversed.

Abbott, Tait & Wotherspoon, for Appellant.
M. Doherty, for Respondent.

(J. L. M.)

COURT OF QUEEN'S BENCH, 1874.

QUEBEC, 5TH SEPTEMBER, 1874.

Coram DORION, C. J., MONK, TASCHEREAU, RAMSAY, AND SANBORN, JJ.

No. 71.

Dubuc vs. *Champagne.*

HELD:—That an appeal may be rejected on motion, on the ground that no appeal lies, notwithstanding that the record is incomplete, provided it appear that the papers wanting to complete the record cannot affect the question of the right to appeal.

In this case a motion was made by the counsel for the respondent to dismiss the appeal, on the ground that there was no appeal, the case having been inscribed in revision under 36 Vict., chap. 12, without the appellant having reserved his right of appeal under the Statute, or made the declaration thereby required.

Respondent's counsel objected, among other grounds, because the record was incomplete.

The Court, considering that the papers wanting to complete the record had no bearing on the question of the right to appeal, granted the motion.

The following is the judgment as recorded:—

La Cour après avoir entendu les parties par leurs avocats respectifs, sur la motion de l'intimé en cette cause, en date du premier Septembre courant; Attendu que cette cause a été inscrite en Cour de Révision à Québec sous l'empire du Statut 36 Vict., chap. 12, de Québec, sans que l'appelant ait déclaré se réserver son droit d'appel à la Cour du Banc de la Reine dans le cas où le jugement ne lui serait pas favorable, tel qu'exigé par cet acte, et sur le tout mûrement délibéré, accorde la dite motion. Et en conséquence renvoie le présent appel avec dépens distraits, &c.

Motion granted.

A. B. Cressé, for appellant.
P. A. Boudreault, for respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 20TH JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., and MACKAY and TORRANCE, JJ., *ad hoc.*

No. 1.

THE MAYOR ET AL., of MONTREAL,

(*Defendants in the Court below,*)

APPELLANTS;

AND

DRUMMOND,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—A Corporation having acquired a right to close streets generally by an Act amending its Charter, and in which Act there is no mention of indemnity, may be condemned to pay damages for the exercise of the right conferred by such amending Act, particularly if compensation for damages be recognized in its Charter and other Acts in amendment thereof.

Semble, that under the French law the loss of a right is equivalent to an expropriation, if the injury be direct and appreciable; and that expropriation always gives rise to indemnity.

The respondent having instituted an action against the appellants for causes which will be fully apparent from the opinions of the Honorable Judges which follow, the matter was referred to experts, and the experts having reported the following judgment was rendered by BEAUDRY, J., on the 30th September, 1872:—

"La Cour, après avoir entendu les parties par leurs avocats, examiné la procédure ainsi que les rapports distincts faits par les trois experts nommés en cette cause en vertu du jugement interlocutoire en date du 29 d'Avril, 1871, et sur le tout mûrement délibéré: Considérant que par le dit jugement interlocutoire, le droit d'action du demandeur se trouve implicitement reconnu quant à la demande principale, et que la demande supplémentaire, et les prétentions des défendeurs ont été écartées et que la cause a été renvoyée aux dits experts pour constater et établir quels dommages le demandeur a soufferts par suite des faits dont il se plaint en sa déclaration et nommément de la fermeture de la dite rue St. Félix et de la clôture érigée dans la ligne sud-est de la propriété du demandeur.

"Considérant que les dits experts ne se sont pas accordés sur l'évaluation des dits dommages, l'Expert John Pratt les ayant évalués à deux mille dollars, l'Expert Daniel Gorrie à trois mille dollars, et l'Expert Victor Hudon à quatre mille dollars; considérant que la Cour n'est maintenant appelée qu'à adjuger sur le montant à accorder au dit demandeur et est justifiable d'adopter la moyenne de ces estimations: condamne les défendeurs à payer au dit demandeur pour les dommages par lui réclamés dans sa demande principale la somme de trois mille dollars, avec intérêt de ce jour, et les dépens dont distraction est accordée à M. W. D. Drummond, procureur du demandeur, rejetant la demande supplémentaire avec dépens."

From this judgment both parties appealed, and both appeals were dismissed.

MACKAY, J., (*dissentiens*).—In July, 1868, Mr. Drummond sued the Corporation, charging it with having in 1867 illegally, forcibly, and by *voie de fait*,

The Mayor et al of Montreal, and Drummond.

closed up St. Felix street, by setting up a fence across it, upon the line of which street he had previously built a lot of tenement houses, some occupied as taverns or inns. He claimed $6,000 damages. These are not claimed as structural damages, but consequential. He says that his houses were rendered less valuable after the erection of the fence, they were not as accessible as before, they were thrown into a *cul de sac*, &c. The Corporation pleaded that it never committed *voie de fait*; but, in the exercise of its right, had shut up part of Felix street; that it had not appropriated to itself any land or property of Drummond's, and that plaintiff had no right to indemnity whatever. In 1871 the case was sent to three experts for a report as to what damages Drummond had suffered. They differed, one reporting $2,000 damages, another $3,000, and the third $4,000; by the final judgment pronounced in 1872 the Court below adopted the mean between the two extremes found, and Drummond was allowed $3,000 damages, with interest and costs. Both parties appeal; the Corporation claims that the action ought to have been dismissed; Drummond complains of the reference to experts, and insists that he ought to have obtained his conclusions in full, the $6,000, and even more, namely, $12,000, under a supplementary demand which he made in 1870, but which has been disregarded. I take up the case upon the appeal by the Corporation. It appears that St. Felix street in 1854–55 ran only from Bonaventure street south-eastwardly to St. Joseph street. It was the next street west of Bonaventure Station. Mr. Drummond built upon it in those years. The Lachine Railway Co. before that built the Bonaventure Station and used it; the Grand Trunk Railway Co. in 1861 commenced to use it, and afterwards made it, (in lieu of Point St. Charles), its principal passenger depot. By the Act of Parliament, 23 Vic., c. 72, the Corporation has power to make by-laws, to alter and discontinue streets, and in exercise of this power, it made a by-law on the 11th September, 1866, and ordered Felix street to be shut up, and in 1867 a fence was erected across it, accordingly. This deprived Drummond and everybody else of right of way along Felix street if wishing to go from Bonaventure street towards St. Joseph street, or to come from St. Joseph to Bonaventure street by crossing the rails of the Railway Companies. It, however, left Drummond, and his tenants, as free as before to move in the other direction, that is, towards Bonaventure street, or to get from Bonaventure street to their houses on Felix street. As to the Corporation having illegally, forcibly and by *voie de fait* closed part of Felix street as is charged by Drummond's declaration, which charge he ought to have proved to maintain his action, nothing of the kind occurred. The negative is proved. Proof against the Corporation having committed *voie de fait* is by Drummond's own factum, as respondent upon the appeal by the Corporation. Upon page 3 of it he says that he does not deny "them (the Corporation) the "right of closing up Saint Felix street; for by their by-law ch. 29, sec. p. 369, "of the Municipal Laws of Montreal (sanctioned by the 23 Vict. ch. 72, C. S. C.) "they *are authorized to discontinue any street, whenever in their opinion, the safety or convenience of the inhabitants of the City shall require it.*" True that he adds: "But the respondent asserts that notwithstanding the power conferred upon the appellants to discontinue streets generally, the manner in which they

abused that power in this instance places them in the position of trespassers in so far as the valuation of damages is concerned." Why so? Because of a principle fundamental in the laws of all civilized countries "*that no citizen can be legally deprived of his property for the benefit of the country or community of which he forms merely a unit,—without full indemnity being paid to him before being dispossessed,*" general principle in cases of expropriation, which is not denied, and of which I shall say more by and by. The judgment *à quo* has found Drummond entitled to recover from the Corporation $3,000 in compensation for damages sustained by the Corporation shutting up the street. The Corporation claims to have only exercised the power granted to it by Act of Parliament.

The principal question is whether under the facts proved to support Drummond's claim the Court below was warranted in condemning the Corporation. That depends upon the view the Court may take of the powers of the Corporation under their Charters, and of Drummond's rights, seeing those powers of the Corporation. Drummond insists that the Corporation is bound to pay him damages; though (as I said before) he admits that it had the right of closing St. Felix street, as undoubtedly it had. Decisions and authorities have been referred to by Drummond which have not application to the case before us, which is *not* a case of *retrait* for *utilité publique*, nor one of *jours*, or *vues*, from houses having been taken away; nor is it like the case of a *privation d'eau*, nor of the lowering, or raising, of a street, damaging the adjoining properties. Drummond has not had any land taken from him. The case, however, stated in plaintiff's declaration turns out what Drummond, by his factum, admits it to be, i. e., the Corporation, having had the right to close part of Felix street, did close it; but whereas, it is a principle that no citizen can be deprived of his property for the benefit of the community without previous payment of indemnity, the Corporation not having made or offered any such indemnity, is to be held abuser of its power, and no better than trespasser. That is Mr. Drummond's proposition, as I understand it. Is it sound? Was the Corporation bound, under pain of being reputed trespasser, to make any indemnity to Drummond before running that fence across St. Felix street? Is it liable by law to pay him damages? The law and by-law have been already stated, and are admitted. My own ideas are these; that the Legislature when making the law (the Corporation Charter) was not ignorant that some damage might be caused by the Corporation closing streets, and that irritations might arise; nevertheless it enacted as we read. When the Legislature authorizes works to be done, and means compensation to be given to persons damaged in their possessions by them, it orders it. Road Acts authorize alterations of lines of roads; sometimes satisfaction is ordered to be made to persons whose property is damaged, but sometimes not. Horse-railway companies get powers from Parliament, making streets and property much less enjoyable than before, and sometimes injuriously affecting an individual's property by making his access to his door disagreeable or difficult; yet they cannot be sued in damages if the Legislature has not ordered them to make compensation in such cases. Compensation in expropriation cases is our general rule, and our Code Civil has an article on the subject. This Corporation of

The Mayor et al. of Montreal, and Drummond.

Montreal is bound expressly by its Act of 1864 to make compensation for all land taken by it. Drummond's case is not one of expropriation. Compensation clauses are sometimes enacted for cases like his; sometimes *not*. In the case of altering a market place this Corporation is ordered to indemnify all who may be damaged. So when it alters levels of foot-paths to the damage of private property it is ordered to make indemnity. It has been authorized to close streets and no compensation for damages alleged by individuals is ordered. This is significant and fatal, I think, to Drummond.

I found upon a series of decisions of English Courts from 1792 downwards, also upon American cases and the French law. 1st. For the English cases there is the case of the Governors, &c., v. Meredith, 4 T. Rep. 1792, cited by the Corporation. 2nd. Rex v. Directors of the Bristol Dock Co., 12 East R., A.D. 1810. 3rd. Sutten v. Clarke, 6 Taunton, A.D. 1815. In this case it was held that the defendants had a public trust to perform, a public duty was cast upon them; they have acted not maliciously but to the best of their judgment; though damage be caused to an individual, defendants are not liable. 4th. Boulton v. Crowther, 2 Barn. & Cr., A.D. 1824, cited by the Corporation. This is what was held: "Can an action be maintained against a Corporation, which in execution of a public trust and for the public benefit does an act which by law it may do, but which act works injury to an individual? No!" The statute giving no remedy, there is none, per Abbott, Ch. J. 5. The London & N. W. Ry. Co. v. Bradley, 6 English Ry. cases, A. D. 1851. In this case the Lord Chancellor said:—"Whether an action will lie on behalf of a man who sustains a private injury by the execution of parliamentary powers exercised judiciously and cautiously, is not an easy question, or rather it is not easy to come to a conclusion that an action will lie. I entertain a decided opinion (probably, however, erroneous) that no such action will lie." 6. The Caledonia R. Co. vs. Ogilvy, 2 McQueen's Scotch Appeals, A.D. 1867. In this case it was said:—"Where is the difference between a public river and a public road? The rights in both are common. If you have only that common right which belongs to all, you cannot claim compensation in regard to a damage caused to either one or other under acts authorized by Parliament." The rulings in the cases that I have referred to are against Drummond's claims, and completely in favor of the Corporation. Such rulings are frequent in railway and dock cases, and others of mere private enterprise; *a fortiori* ought they to be in cases like the one before us, where defendants are acting as a City Corporation, for the benefit of the public, and not for any private gain. 7. Cushing's Reports show that in Massachusetts the English decisions that I have mentioned would be followed. It states a case nearly all fours with the one before us. Nos. 428-437, 1 Sourdat. I find that the Corporation did the work or act complained of within the scope of its power, power derived from Parliament; the work was not done wrongfully; no malice nor *faute* is proved. It is impossible to see *faute* in the Corporation in the face of the fact proved, namely, of the dangers that beset all persons who, before the erecting of the fence across St. Felix street, might attempt to go along the street across the railway tracks. Look at what Hannaford says:—"With the constant moving and shunting of trains near the station and across St. Felix

street, I consider it would have been the most dangerous place of all the Grand Trunk crossings in existence. There are fully fifty regular trains going and arriving daily at the station, without counting the shunting. If the street had remained open, it would have been really impossible for the public to use it, because the cross gates which would have had to be erected would have been closed almost all the time; and it would have so barred the traffic that people would have been obliged to come through another street." The Corporation plainly was bound to shut up Felix street as it did. Was it to wait till men, women and children should be killed? But its right to shut it up has been admitted. For the loss occasioned to Drummond it is not liable. When the G. T. R. ran rails across Felix street it diminished his easement; yet, he never thought of suing them, and would have done so in vain, for they were in the exercise of power under Act of Parliament. The loss may be greater to him than to others, but all who ever had easement in or over the part of street shut up suffer loss in a degree. Drummond has not ground of complaint differing save in degree from that which might be made by all the inhabitants of houses in the neighborhood of Felix street, even in other streets. Such injury as he complains of was never meant to be made subject of compensation. It appears that in 1862 a new street or passage prolongation of Felix street was opened by the Corporation from Bonaventure street, north-westwardly, up to St. Antoine street, and that Drummond's property upon Bonaventure and Felix streets was taxed towards the improvement $103. By reason of this, I believe some members of the Court would give him *gain de cause*; but I cannot see upon what sound principle. The Legislature has not made proviso, or exception, and it is not for Courts to make them. Because he was taxed formerly for Felix street, north-west of Bonaventure street, the Corporation must pay damages to him for shutting up part of Felix street, south-east of Bonaventure street. I cannot agree to this. There can be no particular virtue in the $103, I take it. I suppose no special potency is in the amount. Suppose he had been taxed a mere $5, his claim for damages would be as good as the majority of the Court sees it here, in the case of the $103; but it is impossible for me to hold that the mere fact of having been so taxed can give right of action for damages. If he have such an action each other person who was taxed has a right of action. The street that he was taxed for is as open as ever it was. I do not see more right of action in him in consequence of having been taxed for new St. Felix street than would be from his having been taxed for a street, a block further off. Finally, his declaration does not found upon that payment of $103, though, parenthetically, as it were, it is mentioned. The proposition in his factum is not based upon such payment. I am of opinion that the Corporation appeal ought to be maintained.

TORRANCE, J., also *dissentiens*, would merely say that he concurred in the reasons given by Mr. Justice Mackay for differing from the judgment of the majority of the Court.

TASCHEREAU, J:—Il s'agit d'un appel et d'un contre appel par les parties, qui sont en conséquence devenues respectivement appelantes et intimées. L'Honorable Lewis T. Drummond, demandeur en Cour Inférieure, réclamait contre les défendeurs, le Maire, les échevins et citoyens de Montréal, par son

The Mayor et al. of Montreal, and Drummond.

action dirigée contre eux une somme de $6000 et par une demande suppletoire produite pendant l'instance une autre somme de $6000, comme dommages lui résultant de ce que les défendeurs dans le mois de Juin, 1867, en élevant une certaine cloture de la hauteur de 10 à 12 pieds avaient fermé la rue St. Félix au sud des propriétés du demandeur consistant en cinq maisons construites sur ces propriétés, et ce en violation du droit d'accès à la dite rue dont l'intimé avait joui depuis un grand nombre d'années.

Les appelants ont plaidé à cette action qu'en fermant cette rue, ils n'avaient fait qu'user des droits que leur acte d'incorporation leur accordait, et ont de plus nié les dommages réclamés par le demandeur Drummond.

Il est indubitable que d'après l'acte d'incorporation de la cité de Montréal les appelants, défendeurs en Cour Inférieure, avaient le droit de fermer cette rue St. Félix, de la faire disparaitre même en entier ou en partie, et ce dans l'intérêt général du public ou de la localité. Mais aussi il faut admettre que le demandeur qui avait sur la foi publique, construit sur cette rue St. Félix un nombre de maisons dont il pouvait espérer retirer un revenu rémunératoire avait aussi le droit d'espérer une indemnité des dommages que lui causerait la fermeture de cette rue ordonnée, j'imagine non par un pur caprice de la corporation mais dans un but d'intérêt ou avantage public. Il pouvait espérer n'être pas le seul dans cette localité qui n'en profiterait pas; Il pouvait encore plus espérer n'être pas le seul qui souffrirait de ce changement fait dans l'intérêt public. Or c'est cependant le contraire qui a eu lieu vis-à-vis du demandeur. Il est prouvé que ce changement ou fermeture de la rue St. Félix lui a causé un dommage assez considérable dont nous parlerons dans un instant, et la question principale soulevée en la cause est celle de savoir si lui seul peut supporter le dommage causé par cet acte des défendeurs. La question est controversée et n'est pas exempte de difficultés, j'avoue.

Les défendeurs ont prétendu qu'en fermant "cette rue St. Félix, ils n'avaient "commis ni violence, ni illégalité, ni voie de fait; qu'ils n'avaient qu'exercé un "droit, un privilège qui leur était conféré par la charte d'incorporation de la cité, "que n'ayant pas empiété sur la propriété même du demandeur, ils ne pouvaient "être poursuivis en dommage."

Le droit de fermer ou supprimer la rue St. Félix indubitablement appartenait aux défendeurs, aussi bien que celui d'exproprier le demandeur du terrein même de ses maisons. Les défendeurs sans aucun doute ne pouvaient exproprier le demandeur de la plus minime partie de sa propriété sans l'indemniser. Dans le cas présent, on ne lui ôte pas un pouce de sa propriété mais on fait plus, on ferme une rue sur laquelle il a bâti ses maisons, et on le prive ainsi d'une grande partie de la valeur de sa propriété. Peut-on dire qu'en ce cas, il n'y a pas expropriation de partie de son domaine. La cité de Montréal en permettant l'ouverture de cette rue, a invité non seulement tous ses contribuables mais tout le monde à bâtir sur cette rue, dans des vues de spéculation ou autres, et en en décrétant la fermeture sans indemnité elle manque à la bonne foi, à la promesse implicite qu'elle a faite de tenir cette rue ouverte, ou si elle se déterminait à la fermer elle s'oblige à en indemniser les intéressés que s'y sont bâtis, sur la foi de cette promesse. Les autorités contraires aux prétentions du demandeur semblent ne pas manquer je

l'avoue, mais ces autorités sont plutôt l'expression d'un droit différent de celui qui doit régir cette matière en ce pays, et n'envisagent pas comme violation du droit de propriété le fait de la suppression d'une rue. L'ancien droit français et surtout le nouveau droit français me semblent à peu près unanimes en faveur du demandeur et consacrent cette maxime. En effet quelle différence y-a-t-il entre enlever à un homme une moitié de sa propriété et lui enlever la moitié du revenu annuel de cette même propriété ; c'est à mon sens dans l'un et l'autre cas une expropriation donnant droit à une indemnité. Ce mode d'expropriation est sous un point de vue plus fatal ou plus désavantageux au propriétaire que celui d'une expropriation réelle du terrain, en ce que ce premier mode le laisse avec une propriété isolée et dépréciée et dont l'entretien et assurance annuels seront aussi considérable que si l'expropriation n'avait pas eu lieu, et ce sans avoir les chances d'un revenu proportionel. L'article 407 du Code Civil Canadien qui exprime l'ancien droit sur la question n'est que la reproduction *verbatim* de l'article 545 du Code Napoléon, et est conçu en ces termes : "Nul ne peut être contraint de céder sa propriété si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnité." Avec un texte de loi identique il est intéressant de savoir comment les commentateurs du Code Napoléon interpretent cet article et s'ils en limitent l'application au seul cas où l'expropriation est de l'immeuble en entier ou en partie ou bien si le fait de construction d'ouvrages publics, d'une suppression de rue ou autre chose de nature à diminuer la valeur de la propriété elle-même, est ou n'est pas considéré comme équivalant à une expropriation *de facto* et donnant droit à une indemnité en faveur du propriétaire. Les nombreuses autorités citées au factum du demandeur comme tirées du Droit Français établissent à ma satisfaction son droit à une indemnité. J'y adjoinderais les autorités suivantes, savoir :

1o. Larombière, vol. 9, page 511, Nos. 566, 567, exprimant l'opinion que l'abaissement ou l'exhaussement du sol résultant de travaux exécutés sur la voie publique et au moyen des quels la maison d'une personne se trouve déchaussée ou enfoncée donne ouverture à une demande en indemnité, et il exprime que ce dommage qui s'attaque au droit de jouir constitue une véritable expropriation.

2o. Proudhon, Domaine Public, vol. 1, page 169, où il exprime l'opinion que si une administration prescrit quelques travaux ou établissement dont l'exécution entraine une lésion dans la propriété ou les droits légitimement acquis à quelqu'un, celui-ci est fondé à prétendre que ne devant souffrir le sacrifice de sa propriété pour cause d'utilité publique qu'à la charge d'une juste indemnité, il doit avoir la faculté de l'exiger, ou de traduire cette administration devant les tribunaux compétents pour en décider.

3o. Même opinion dans Proudhon, vol. 2, Domaine Public, p. 344–567 où il cite des arrêts de la Cour de Cassation, dont les considérants sont l'expression des idées philosophiques du plus haut intérêt et affirment des principes d'équité que l'on ne peut perdre de vue ou vouloir ignorer sans blesser les règles de droit qui veulent qu'un seul ne puisse être soumis à faire des sacrifices, aux quels ses concitoyens qui en profitent ne contribueraient pas.

M. Sourdat, dans son traité de la Responsabilité, vol. 1, No. 426, p. 427, commentant l'article 545 du Code Civil Napoléon qui déclare que nul ne peut

The Mayor et al, of Montreal, and Drummond.

"être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique et "moyennant une juste et préalable indemnité," nous dit, que dans un sens large cette disposition s'entend de la privation de toute partie de la propriété comme aussi de tout avantage inhérent à la jouissance, et qui est retiré par une sorte d'expropriation indirecte, et dans les nos. suivants, il cite diverses décisions des tribunaux judiciaires et notamment de la Cour de Cassation accordant des indemnités dans des cas même où l'exhaussement ou l'abaissement d'une rue avaient été faits par ordre de l'administration et il les approuve: cependant au No. 428, il déclare que la suppression d'une route (il ne parle pas d'une rue) ne donne pas droit contre l'état à une réclamation en faveur des aubergistes et autres commerçants qui étaient venus s'établir sur ses limites; cette décision semble avoir été donné par le Conseil d'Etat, et non par aucun tribunal judiciaire ordinaire. Le fait qu'il s'agissait non d'une rue dans une ville mais d'une de ces grandes routes qui sillonent la France sur un long parcours, appuyé de celui de la décision prononcé par le conseil d'état peut expliquer l'apparente contradiction entre les décisions de la Cour de Cassation et le Conseil d'Etat. Il me semble que si le simple abaissement ou exhaussement d'une rue a été déclaré par maintes décisions de la Cour de Cassation et autres tribunaux de la France comme donnant droit à une indemnité pécuniaire, *a fortiori* la suppression entière d'une rue doit elle y donner lieu. Cependant je remarque qu'à la page 432 M. Sourdat dit que "le refus d'indemnité n'est que le résultat d'un étroit point de vue, "et qu'en refusant dans tous les cas l'indemnité on méconnaitrait la véritable "nature des choses et on fausserait les notions du droit qui leur sont applicables. L'administration et les particuliers ne sont pas, l'un envers l'autre "dans le même état d'indépendance que les particuliers entre eux. Les "intérêts généraux dominent toujours les rapports qui les unissent. Ces intérêts "leur imposent des obligations corrélatives et réciproques. Ainsi les propriétés "riverains d'une voie publique sont grevés de charges spéciales à raison du "pavage, du balayage de l'alignement. D'un autre côté si la loi ne leur "accorde positivement aucune servitude sur la voie publique, l'établissement de "celle-ci a créé pour elle des attentes respectables, un état de choses que l'ad"ministration est engagé jusqu'à un certain point à maintenir. Il importe à la "securité de la circulation et à l'embellissement de la ville que des constructions "régulières, que des établissements utiles se forment le long de la voie publique. "Il faut donc présenter aux constructeurs et aux propriétaires quelques garanties "contre des événements qui viendraient ruiner toutes les espérances," &c., &c.

Et à la page 435 il déclare que "dans le doute la voie la plus libérale est "préférable, que la société a bien moins à redouter de voir allouer aux propriétaires "des indemnités aux quelles ils pourraient ne pas avoir droit, que de voir s'accréditer par les examples réitérés d'une rigueur excessive l'opinion que la propriété "n'a aucune sauvegarde contre les actes de l'administration et ne doit attendre "aucune compensation du préjudice qu'elle lui cause assez souvent." Je déclare en toute sincerité que ces diverses opinions de M. Sourdat me semblent affirmer un droit et une équité que nous sommes justifiés à considérer comme loi en notre pays. Si donc la fermeture d'une rue cause des dommages à un individu propriétaire d'une maison, et si d'après les autorités du demandeur, cet acte peut être

considéré comme une expropriation, les défendeurs étaient obligés avant que d'avoir recours à un tel acte d'adopter vis à vis du demandeur les procédures ordinaires prescrites par la charte d'incorporation de la cité de Montreal. Ils n'ont rien fait de semblable mais se faisant justice à eux mêmes, ils ferment la rue et causent le dommage. Cette conduite des défendeurs justifie l'allégation de la déclaration du demandeur que les défendeurs avaient en fermant la rue, agi violemment, illégalement et s'étaient rendus coupables d'une voie de fait, et sont passibles des dommages que le demandeur a pu souffrir. En ce cas devons nous renvoyer les parties à se pourvoir en la manière et forme pourvues par le statut d'expropriation, ou devons nous condamner les défendeurs aux dommages résultant de leur acte illégal? Dans le délibéré, cette question s'est élevée dans mon esprit mais j'en suis venu à la conclusion que les parties s'étant toutes deux soumises à la juridiction du tribunal, ayant nommé des experts, ces experts ayant fait rapport, et la sentence du tribunal donnant gain de cause au demandeur pour une somme dont le montant était l'expression de l'évaluation d'au moins deux de ces experts, et considérant l'acte des défendeurs au point de vue de voie de fait, je suis venu à la conclusion de dire que cette Cour avait juridiction en la matière, tout de même que si les défendeurs, sans observer aucune des formalités de l'acte d'expropriation avaient jugé à propos de détruire en tout ou en partie la propriété ou de s'en emparer.

Passant maintenant au chiffre des dommages accordés au demandeur, je dirai que ce dernier les trouve excessivement minimes et s'en plaint par son appe tandisque les défendeurs s'en plaignent, comme exorbitants. La preuve étant assez contradictoire sous ce rapport, le tribunal de premier instance a référé la question du montant de ces dommages à trois experts qui ont différé entre eux quant au chiffre des dommages mais se sont tous accordés à dire que le demandeur avait éprouvé des dommages que l'un des experts estime à $4000, l'autre à $2000 et le troisième à trois mille piastres. Le juge qui était chargé de la cause, ayant devant lui toute la preuve testimoniale et l'opinion des trois experts a cru devoir prendre pour base de son jugement l'opinion des trois experts avec un terme moyen qu'il a établi à $3000. Je ne crois pas ce chiffre exagéré; je le crois au contraire juste et conforme à la preuve testimoniale et à l'opinion des experts. En conséquence je suis disposé à confirmer le jugement de M. le Juge Beaudry, avec depens contre les appelants, et à renvoyer l'appel et contre appel avec dépens contre chacun des appelants respectivement.

RAMSAY, J.—The question raised in this case is as to whether the Corporation of the city of Montreal can close a street without being liable for the special damage incurred by a proprietor owing to this act.

It is not possible to place the question more frankly than it has been by the learned Counsel for the appellants. He says that in the Act of Parliament passed in 1860 (23 Vic., c. 72, sect. 10, ss. 6) authorizing the Corporation "to regulate, clean, repair, alter, widen, contract, straighten or discontinue the streets in the said city," there is no clause saying they shall give indemnity for anything done under this Act, and that consequently they are not liable for any damage special or otherwise suffered by any individual. If any one suffers damage, it is *damnum absque injuriâ*. The Corporation is only using the

The Mayor et al, of Montreal, and Drummond.

powers conferred on it by law. *Qui de jure suo utitur, damnum non facit.* The appellants then go on to cite a dictum of Lord Kenyon in the case of the Governor of the East Plate River Company and Meredith & Co., (L. T. R., p. 796), to establish the doctrine that what a Statute allows is law, and that if no condition is expressed in the law none can be added. In a word it is not wrongful because it is authorized by the Legislature. In support of this proposition other cases have been cited, and many cases are to be found amongst the English Reports bearing on the matter. These cases seem to form two classes—one in which the damages result consequentially from the performance of some act authorized by the Legislature; the other in which the damages result from the manner in which an act lawful in itself is performed.

There will be no great hesitation in accepting the general rule supported by these cases; but they do not appear to me to apply in the present case. These cases were all Acts permitting a special thing to be done; the Act allowing the Corporation of Montreal to discontinue streets is a general Act amending the various Acts of incorporation of the city. That Act must therefore be read with these Acts, and compensation is at the root of them all. The power to injure without compensation must be express, it cannot be presumed.

If we were to adopt the appellants' doctrine, we should have to say that they could not alter the level of a street without compensation, but that they could abolish it without compensation. By the expropriation clauses too it would be possible for them to tax a proprietor for the consequential advantage of opening a street in his neighborhood, put his money in their pocket, and close the street the next day without indemnity. Curious to say this is not a fancy illustration. Not long ago the respondent was taxed for the opening of the division of St. Felix street in which division he has no property and they close up the division of St. Felix street in which his property actually stands now and they tell him he has no right to indemnity. All this is proved in the record. It is St. Felix street to-day but it might be Notre Dame street to-morrow. But appellants have no faith in their own pretentions. On the faith of the report of one of their committees, appellants have actually paid the proprietors in the division of St. Felix street above where respondent's property is, and to the cost of opening which he contributed; but they decline to indemnify the greatest sufferer. This is not fair dealing on the part of a great public Corporation.

The excuse given for closing the street was that the Grand Trunk made up their trains across it, and that it would be dangerous to the public to leave it open. But the Grand Trunk had no right to make up their trains across the street, and there was no reason why the plaintiff should be injured on that account. With regard to the Boston case (Smith v. The City of Boston, 7 Cushing), what did Chief Justice Shaw say? He said the damage complained of was the same sort of damage as other people sustained, and the plaintiff had another outlet. The inference was that if there had been no outlet, Chief Justice Shaw would have given judgment the other way. The case is therefore against appellants' pretensions.

There can be no objection to the amount of damage awarded. It does not go beyond the evidence, and it is a fair way of dealing with the report of the xperts.

The Mayor et al, of Montreal, and Drummond.

SANBORN, J.—The Honorable Judge Mackay, in his dissent from the majority of the Court, having so fully explained the nature of this case, it is unnecessary for me in rendering the judgment of the majority of the Court to review the facts of the case except as to certain particulars, which deserve notice in the conclusion arrived at. This is an action of damages by Drummond against the Corporation of the city of Montreal, for closing up and discontinuing a part of St. Felix street in said city, whereby he was deprived of the use of said street as before, and for deterioration of the value of his property, particularly 18 tenement houses erected thereon, which by the closing of said street were placed in a *cul de sac*, instead of having, as before the closing of the street, free access; by means of St. Felix street from St. Antoine to St. Joseph street. There are two appeals. The city appeals against the judgment of the Court below awarding damages on the ground that the street was ordered closed in the interest of the citizens generally for public safety and convenience and in conformity with powers conferred upon the Municipal Corporation, by law, and that the plaintiff being deprived of no part of his land, and still having access to his property, is not in law entitled to indemnity. The plaintiff also appeals because he claims that the damage should have been awarded to the full amount of his loss, as proved by witnesses instead of a less sum awarded *à dire d'experts*.

It is of some importance to observe that plaintiff built his houses upon this street in 1854, long before any power was conferred upon the city Corporation to discontinue existing streets, the power to do this being given by Prov. Stat., 23 Vic., c. 72, s. 8, sub. s. 6 (in 1862). It is also to be borne in mind that the alleged necessity for discontinuing a portion of St. Felix street, viz., public safety, by reason of the railway track of the Grand Trunk Railway crossing it, near its station, rendering it unsafe to keep the street open, did not exist when plaintiff built his houses there, because the railway station was originally outside of the city and it was brought to the vicinity of St. Felix street at the solicitation of the city authorities, and an agreement was entered into between the city authorities and the Railway Company that a portion of this street should be discontinued and given over to the Railway Company for the purposes of their station.

It is also to be remarked that about the year 1862 a prolongation of St. Felix street was made so as to terminate in St. Antoine street, and to accomplish this a special tax of $103.73 was exacted of Drummond, which was not levied proportionally upon the citizens generally, but only upon property holders in St. Felix street. The authorities cited by the parties from French authors, and civil law writers generally, are very conflicting as to the right to recover indemnity for loss in deterioration of the value of property, by reason of the exercise of powers conferred by law, in the interest of the public, when no actual property is taken, and the loser is not deprived of access to his property, but the access is rendered more difficult. The general rule, under English and American law, following the leading case, The Governor & Co. British Plate Manufacturing Co. vs. Meredith, is, that where a person so suffers loss in common with the other inhabitants of the city, the loss differing only in degree, it is *damnum absque injuria*, and no indemnity can be recovered. Justice Buller, however, remarks in that case that the civil law is more favorable to the claimant in such

The Mayor et al, of Montreal, and Drummond.

case than the common law. The case of Smith vs. the City of Boston, referred to by Mr. Justice Mackay, is in some respects very similar to this. Even in that case the judge guards himself against making the principle absolute in all cases, and seems to admit that a case might arise where indemnity might properly be awarded. As an abstract principle, it is acknowledged by all writers, under both systems of law, that when a person is deprived of his property for the good of the public, he is entitled to be indemnified for it, and the reason given why he shall not have it when he only suffers a loss in common with the general public, though his loss may be much greater than that of many others, is that it would give rise to a multiplicity of actions and would render municipal government a failure. The deterioration of the value of property by changes in the grading of a street or the using of the street for a railway track, or establishing other servitudes upon it for the common advantage, so long as its character as a highway is retained, is a very different thing from closing it up and diverting it from its original purpose altogether. The case of Governor & Co. vs. Meredith decides nothing upon this state of facts. In this case, the fact that a special tax was laid upon Drummond for the opening of this street, recognizes that he has an interest in it not shared by the inhabitants or the citizens generally. If so, the converse is true, and being deprived of it, he suffers a loss not shared by the citizens generally. The street was closed up without notice to him and without any attempt to conciliate him. The loss he sustains is real and considerable. It appears by documents of record that by a report of the Committee of the City Council approved by them, they declared that property holders on this street have sustained loss by the closing of it, and a certain compensation is recommended. This does not preclude them from testing the legal rights of plaintiff, because admissions against persons acting *jure civitatis* are not to have the same effect as when parties act in their own right, but it cannot be regarded as destitute of significance as evincing their appreciation of the justice of the case. The majority of the Court, without impugning the authorities cited, or denying the doctrine laid down in the English and American cases, as applied to the facts presented in such cases, are of opinion that the damages suffered by Drummond, in this case, are exceptional and direct, and differing, not simply in degree, but in kind, from those of the inhabitants generally, from the closing of this street, and that he is entitled to indemnity therefor. And we consider the estimation of his loss by *experts* or viewers instead of taking the opinion of witnesses was the correct and legal mode, and if these *experts* have taken into consideration that, as respects a portion of this loss he should share it in common with the rest of the rate-payers, we do not think in this they erred. The judgment as a whole is confirmed with costs against the Corporation in the Court below, and upon their appeal in this Court, and with costs against Drummond upon rejection of his appeal in this Court.

Judgment confirmed.

R. Roy, Q.C., and *B. Devlin*, for the appellants.
W. D. Drummond, for the respondent.
(J.K.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 20th JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A.J.

No. 27.

JUBINVILLE ET AL., (*Defendants in Court below,*) APPELLANTS;

AND

THE BANK OF BRITISH NORTH AMERICA, (*Plaintiff in Court below,*) RESPONDENT.

HELD:—That an opposition *à jugement* filed by defendants, under Art. 484 of the Code of C. P., on the sole ground that one of them has been summoned by a wrong name, is in the nature of a preliminary exception to the action, and must, consequently, be accompanied by the deposit required by Art. 112 of the Code of C. P., in addition to that required by Art. 486 of the same Code.

This was an appeal from a judgment rendered by the S. C. at Montreal, (MACKAY, J.) on the 22nd April, 1873, granting a motion of the Plaintiff that the paper writing fyled by the opposants on the third of that month, and intituled "*Opposition à jugement et affidavit,*" be rejected from the record, with costs, for the reasons therein stated.

The facts of the case may be briefly stated as follows:—

In the month of February, 1873, the Plaintiff took out an action against the commercial firm of Jubinville & Leclerc, of Pointe Claire, in the District of Montreal, for the sum of $776.74, the amount of their promissory note in favour of James Austin & Co., which had been endorsed over by the said latter firm to the Plaintiff. The writ was served on P. Jubinville, (one of the members of the firm and one of the opposants) *in person* at the place of business of the said firm.

The Defendants failed to appear, and on the 10th of March judgment was rendered against them according to the conclusions of the Plaintiff's declaration.

On the 1st of April the Plaintiff sued out a writ of execution against the goods and chattels of the Defendants, and on the 3rd of April the said opposants fyled in the office of the Prothonotary of the Superior Court, a paper writing (paper 9 of the Record) intituled "*Opposition à jugement et affidavit,*" alleging therein that the opposants are co-partners carrying on trade under the name or firm of Jubinville & Leclerc, at Pointe Claire; that the writ of summons was served at their place of business in Pointe Claire; that the said Leclerc is erroneously and falsely called "Pierre Leclerc" in the said writ and declaration, whereas his true name, and the name he has always been known by, is "Moise Leclerc;" that the defendants did not appear, and that judgment was rendered against them by default, and that the writ and action are illegal, null and void, with conclusions that the judgment and seizure be annulled and that the Plaintiff's action be dismissed with costs.

The prothonotary thereupon caused the notice (paper 10 of the Record) to be served on the bailiff charged with the said writ of execution, who thereupon

Jubinville and Bank of B.N.A.

made his return that he was unable to proceed with the publications and sale of the goods and chattels seized, in consequence of the service upon him of the said notice.

On the first day of the following term of the Superior Court, the Plaintiff moved that the said paper writing (paper 9 of the Record) be rejected from the Record with costs, for the following reasons:

"Because the said paper writing, which is in the nature of a preliminary exception to the declaration and action of the Plaintiff, was not accompanied with a deposit of the sum of £2 1s. 8d. required by the 112th article of the Code of Civil Procedure and the 32nd Rule of Practice of the Superior Court, and because the opposants did not, with said opposition, deposit in the hands of the prothonotary of the said Court a sufficient sum to meet the costs incurred, after the return of the writ up to the judgment, as required by article 486 of the Code of Civil Procedure."

The following was the judgment of the S. C.;—

"The Court, having heard the parties by their counsel upon the plaintiff's "motion of the seventeenth day of April instant that the paper writing fyled by "the opposants on the third instant and intituled '*opposition à jugement et affi-*"*davit*' be rejected from the record of proceedings in this cause with costs, for "the causes, matters and reasons mentioned in said motion, having examined "the proceedings and deliberated, doth grant the said motion and doth reject "the said opposition from the record in the said cause, with costs (See Art. 490 "Code Procedure, in addition to the articles mentioned by mover)."

Rainville, for appellants:—

Deux questions se présentent sur ce jugement. La première est de savoir si les allégations de l'opposition sont de la nature d'une exception préliminaire, et la seconde de savoir, en supposant qu'elles seraient d'une telle nature, si, en plaidant par une opposition à jugement, les opposants n'étaient pas libérés de l'obligation de produire le dépôt requis pour les exceptions préliminaires.

Sur la première question nous croyons que le plaidoyer de *misnomer* ne peut pas faire le sujet d'une exception à la forme, et sur ce point nous citons avec confiance la cause de Jones *vs.* McNally rapportée dans Stuart's Rep., p. 56.

Sur le second point, nous croyons que les opposants n'étaient pas obligés de faire de dépôt avec leur opposition.

En effet la loi et les règles de pratique n'exigent de dépôt qu'avec une exception préliminaire produite dans les délais réglés et avec les formes voulues. Or, dans une opposition à jugement rien de semblable n'est requis: aucun délai n'est fixé et d'après sa nature tous les moyens à invoquer doivent être allégués en même temps et dans le même document.

Cette opposition doit être accompagnée d'un affidavit lequel, pour la Cour, est une garantie que les faits qui y sont allégués sont vrais. Voilà autant de raisons qui font voir que le dépôt ne doit pas être requis.

D'ailleurs la loi ne l'exige pas, et dans semblable matière, surtout lorsqu'il s'agit de priver une partie d'un droit certain, on ne doit pas suppléer à la loi, même par inférence.

Lorsque l'intimé a présenté sa motion en question, les appelants ont offert

de parfaire le dépôt s'il y avait lieu : cette demande aurait dû leur être accordée ; et dans le cas où cette cour serait d'opinion que le dépôt était nécessaire elle devrait donner aux appelants le droit de le faire, et cela, sans frais vû l'offre faite.

Sur le tout nous croyons le jugement de la cour inférieure mal fondé et nous en demandons la cassation avec dépens.

Bethune, Q.C., for Respondent :—

By reference to article 490 of the Code of Civil Procedure, it will be seen that such an opposition as the one fyled by the opposants is held to form part of the proceedings upon the original suit, and *to be a defence* to the action, and *as such subject to the provisions concerning the contestation of ordinary suits.*

Now, by reference to art. 116 of the Code of C.P., it will be seen that any informality "in the writ of summons or service" must be pleaded by exception to the form, and art. 49 reqaires, on pain of nullity, the statement in the writ of the names and actual residence of the defendants. It is quite clear, therefore, that the opposition in question is in the nature of a preliminary plea.

Then, according to article 112 of the said Code, and the 32nd Rule of Practice, no plea containing a preliminary exception can be fyled, unless it be accompanied with a deposit of the sum of £2 1s. 8d.; and as the opposition fyled by the said opposants is in the nature of a preliminary exception, viz., an exception *à la forme*, it cannot by law be fyled unless accompanied by the aforesaid deposit.

Besides this, according to article 486 of the said Code, the opposants were also bound to deposit with the Prothonotary, when fyling their opposition, a sum of money sufficient to meet the costs incurred after the return of the writ up to the judgment, viz., the sum of $9. 60 cy. But the opposants wholly failed to do so. It is true that they deposited a less amount, and, although the appellants now contend that they offered to *parfaire* there is no evidence whatever in the record that they did so.

TASCHEREAU, J.—(After stating the facts) :

Il est évident que les appelants n'ont pas fait un dépot suffisant conformément à l'article 486 ; il est vrai que le déficit est peu de chose et que la cour pourrait peut-être venir au secours des appelants et leur accorder de parfaire la différence, mais nous ne pouvons le faire, à raison de ce que le dépot de £2.1s.8d. sur l'opposition comme exception préliminaire n'a pas eu lieu. Nous considérons cette opposition comme une défense à l'action, comme une exception à la forme, et, conséquemment, comme un de ces plaidoyers préliminaires qui ne peuvent conformément à l'article 112 C. P. C. être produits sans le dépot de £2.1s.8d. L'article 490 du C. P. C. énonce en propres termes, que l'opposition au "Jugement n'est qu'une défense à l'action et comme telle assujettie aux dispositions relatives aux contestations des demandes ordinaires."

Nous déclarons que cette défense des appelants plaidant *misnomer* est une exception à la forme exigeant un dépot de £2.1s.8d.

Les appelants ont prétendu que le misnomer se plaide par exception temporaire, mais nous déclarons que les articles 49, 51, 116 décident que cette objec-

Jubinville and Bank of B.N.A.

tion doit se faire au moyen d'une exception à la forme. En effet l'article 49 dit que le bref de sommation doit contenir les noms, occupation et domicile du défendeur, l'article 51 dit que cette formalité est à peine de nullité, et l'article 116 énonce que cette informalité est le sujet d'une exception à la forme. Le jugement de la Cour dont est appel sera en conséquence confirmé avec dépens.

RAMSAY, J., remarked that the case of Jones *vs.* McNally had long since been overruled, by the case of Paradis *vs.* Lamère (Law Rep., p. 81) and by the constant jurisprudence of the courts.

LORANGER, J.:— Les appelants ont fondé leur appel sur la proposition que le défendeur, condamné par défaut en vacance sur action portée sur un billet promissoire, peut baser son opposition à paiement en vertu de l'article 484 du Code de Procédure Civile sur des moyens qui, s'ils eussent été opposés sur l'instance originaire, auraient dû être l'objet d'une exception préliminaire, sans faire le dépot voulu par l'article 112, qui porte: "Le plaidoyer contenant une exception "préliminaire ne peut être reçu à moins qu'il ne soit accompagné du dépot de la "somme de deniers fixé par les règles de pratique du tribunal."

Je dis que l'appel est fondé sur cette seule proposition, car il ne saurait y avoir de doute que l'exception fondée sur un faux prénom, qui est ici le moyen d'opposition, ne soit une exception préliminaire, malgré que les appelants aient prétendu le contraire. Au soutien de leur prétention, les appelants ont cité le jugement rendu à Québec en 1811, dans une cause de Jones *vs.* McNalty, où il a été jugé que ce moyen fait l'objet d'une défense au fond, parce que, y est-il dit en substance, en ce cas le défendeur assigné n'est pas le débiteur et il doit obtenir congé de la demande, qui alors sera rejetée sur un moyen de fond. Cette raison est excellente dans le cas où le vrai débiteur n'est pas assigné, mais ne rencontre pas l'espèce actuelle où le vrai débiteur a été mis en cause sous un nom qui n'est pas le sien, et dit, et c'est tout ce qu'il peut dire: "Quoique je sois le débiteur ou la personne mentionnée comme débiteur au libellé de la demande, je suis assigné sous un faux nom, et l'assignation est invalide." Ce moyen forme évidemment ce qu'on appelait en France une fin de non procéder et une exception à la forme ici.

Malgré tout le respect que je porte aux anciennes décisions, je ne puis suivre celle-ci, qui est en contradiction avec tous les procéduriers, et avec la jurisprudence suivie depuis trente ans à ma connaissance. Le nom des magistrats qui l'ont prononcée n'est pas donné par l'arrêtiste. Il serait surprenant que l'un d'eux eût été le juge en chef Sewell.

Reste la question du dépôt. Le tribunal de première instance, sur motion de la banque, intimée, et au profit de laquelle se poursuivait l'exécution, en a proclamé la nécessité en rejetant l'opposition. A première vue et en ne considérant que l'esprit de la législation qui a permis le pourvoi contre les jugements rendus par défaut sur simple requête dans certains cas et sur simple opposition dans certains autres, on serait porté à croire qu'en donnant à la partie condamnée par défaut le moyen de faire réviser le jugement et de se défendre, elle n'a entendu pourvoir qu'à une révision fondée sur un moyen de fond, et n'a pas entendu inclure le moyen de forme. Cependant, outre que sur l'article 162 du Code de Procédure Civile français, auquel notre propre Code de Procédure paraît avoir

emprunté le système qu'il a établi sur les oppositions de ce genre, les moyens de forme se cumulent avec les moyens de fond, ainsi qu'on peut le voir à la question 689 du Traité de Carré sur l'article 162, notre article 492 proclame cette faculté en disant: Si l'opposition est maintenue à raison de quelque irrégularité, dans la procédure du demandeur.....La question de la nécessité du dépôt se présente donc légitimement.

On tire un argument contre cette nécessité sur l'article 486, qui n'ordonne que le dépôt d'une somme suffisante pour refonder les frais de la procédure du demandeur, encourus depuis le rapport du bref jusqu'à la signification du jugement, et l'on dit: si le Code eut contemplé d'autres dépôts et notamment celui dont on invoque l'absence, il aurait ajouté à la disposition relative à la révision, une autre disposition particulière, par exemple, au cas actuel, par voie de proviso ou même par un article particulier, ce qu'il n'a pas fait. Donc, son intention contraire résulte de son silence.

Cela, je crois, serait fort vrai, si l'article 490 ne contenait implicitement au moins cette disposition spéciale en disant: "La Requête en révision où l'opposition est censée faire partie de la procédure dans la poursuite originaire, et être une défense à l'action et comme telle assujettie aux dispositions relatives aux contestations des demandes ordinaires."

L'opposition ici est donc censée être une défense à l'action, et l'on pourrait être porté à croire que le Code n'a pas entendu permettre les oppositions fondées sur des moyens de forme, car virtuellement les moyens de forme ne constituent pas à proprement parler une défense à l'action, qui ne s'entend que des moyens de fond, mais outre que, comme je viens de le dire, l'article suivant (art. 491) permet les moyens contraires, nous allons voir que les dispositions précédentes avaient compris les exceptions préliminaires dans la catégorie des défenses. L'opposition remplace donc ici l'exception à la forme, et est censée être cette exception opposée *in limine litis*. Elle est donc sujette aux dispositions relatives à ce qu'aurait été la contestation de la demande originaire. Or, la section première, intitulée "dispositions générales," du chapitre troisième qui a pour titre "De la contestation en cause," traite des exceptions préliminaires depuis l'article 107 jusqu'à l'article 112, qui porte: Le plaidoyer contenant une exception préliminaire ne peut être reçu, à moins qu'il ne soit accompagné du dépôt de la somme de deniers fixée par les règles de pratique du tribunal.

Les règles de pratique prescrivent un dépôt spécial avec l'exception à la forme, qui est traitée par le Code comme une partie de la contestation, et qui, même suivant l'article 131, n'arrête pas l'instruction au fond, si le Demandeur le désire, mais s'instruit simultanément avec lui, aux termes de l'article 490, il est à être fait en sus du dépôt de réfusion prescrit par l'article 486. En cette matière, tout est de rigueur, et le jugement qui a décidé en ce sens me paraît à l'abri de la critique.

Judgment of S. C. confirmed.

Duhamel, Rainville & Rinfret, for appellants.

Bethune & Bethune, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 22ND SEPTEMBER, 1874.

Coram DORION, C.J., MONK, J., TASCHEREAU, J., RAMSAY, J., and SANBORN, J.

No. 12.

THE QUEEN vs. JOHN REDPATH DOUGALL and JAMES DUNCAN DOUGALL.

HELD:—Where, to obtain six jurors speaking the language of the defence (English) the list of jurors speaking that language was called, and several were ordered by the Crown to stand aside; and the six English speaking jurors being sworn, the clerk re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one of those previously ordered to "stand aside" was again called, *held*, that the previous "stand aside" stood good until the panel was exhausted by all the names on both lists being called.

A case reserved by the Hon. Mr. Justice RAMSAY (*vide ante*, p. 88) came up for decision by the full Court. The following was the reserved case:—

"1st. On their arraignment, the defendants applied for a jury, one-half speaking the language of the defence, to wit: English, at their trial, which application was granted.

"2nd. The defendants moved the Court that six jurors speaking the English language should first be secured and sworn. Their motion was granted, and the Clerk of the Crown was ordered to verify the fact as to each juror called, whether he spoke the English language, until six jurors were sworn.

"3rd. John Walker being called, and it appearing that he spoke English, he was ordered to stand aside by the Crown.

"4th John Day having been sworn and there being then six jurors speaking the English language sworn, the Clerk of the Crown, under the instructions of the Court, re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, as provided by 32 and 33 Vic., Cap. 29, Sec. 40 and S.S. 1.

"John Walker being again called, the Crown insisted that the stand aside stood, until the panel was exhausted. On behalf of the defendants, it was objected that the Crown had already ordered this juror to stand aside, and was now bound to show cause. I over-ruled the objection, as the panel had not been exhausted. I, however, reserved the point for the consideration of the Court sitting in Error and Appeal, and I now submit for its opinion: whether the Crown under the law as it stood on the ninth day of April last was obliged to show cause or withdraw its challenge until the panel was exhausted. I suspended judgment after conviction, and the defendants are now on bail awaiting the judgment of this Court.

"(Signed), T. K. RAMSAY, J.

"*Montreal*, 10th April, 1874."

TASCHEREAU, J., *dissentiens*. The defendants in this case were indicted for libel, and stood their trial last April, before a jury. At their own request they had a mixed jury; were found guilty; but sentence was deferred until a reserved point could be brought before the Court sitting in Error and Appeal with reference to the method adopted in the composition of the jury. According to the *exposé* made by the Honorable Judge in submitting to us the question re-

served by him, it would appear: First—Immediately after the first call of the jurors, the six speaking the English language having been sworn, the name of the last one being John Day, the Clerk of the Court, upon the order of the Judge, began again to call the list of the English-speaking jurors, and also that of the French-speaking jurors, in conformity with Vic. 32 and 33, Chap. 29, Sec. 40, S. S. 1.

Secondly—That at that moment the name of "John Walker," which had already been called, was called once more, and the Crown insisted on its right to compel him to stand aside a second time, until the panel had been exhausted, to which the defendants objected, on the principle that the juror had been already compelled to stand aside, and that consequently the Crown was obliged to show cause against or for the empanelment of this juror. The Judge dismissed this objection on the principle that the list had not been exhausted, but reserved this point for the consideration of the present tribunal. This is the question which is to-day submitted to us.

It seems to me that two questions arise, to wit:—The list, was it really exhausted? and how is it it was not exhausted? and to conclude, what are the results if either of these questions are resolved affirmatively or negatively? According to the declaration of the Judge, as I read and interpret it, it would seem to me that not only was the panel not exhausted, but that the Clerk stopped at too early a part of the panel, as soon as the six English-speaking jurors had been procured; in other terms, the bottom of the list was not reached, and the minutes in the register of the Court give proof of this important fact. I think that the Clerk ought to have received from the Court a special injunction to continue calling off the list, immediately after the last juror, "John Day," had been sworn in, taking the next name after his, and not recommencing the calling from the first name. This interruption in the calling of the panel is contrary to Sec. 40, Cap. 29, Vic. 32, 33, which says and ordains that the panel shall be alternately called from French and English jurors. The law does not say that this calling can be varied or interrupted, and recommenced at any stage of the list. If you may recommence the empaneling of the jury you have as much right to begin at any part of the panel desired. You might even begin at the end or top of the list. The law is that the calling should be continued until the panel is exhausted, otherwise the rights of the accused party might be seriously compromised, and the Crown in private proceedings, with such an extraordinary power as it would then possess, might obtain condemnations for political offences with the greatest facility, and to the great detriment of the sound administration of justice. One could thus with the magical word "stand aside," repeated frequently, without any given reasons, eliminate the jurors considered favorable to the accused, and thus compel him, considering the limited number of jurors he would have to challenge, to accept a verdict of guilty against himself from jurors without character, or who would be known partisans of the prosecution, or of the Crown, especially in a libel case. All English law is in favor of giving the accused a fair trial. The English nation prides itself, and with truth and reason, upon the liberality of its institutions in this respect; but I believe that the most distinct denial would be given to the gratulations of those who praise these

The Queen vs. Dougall.

institutions (at least in Canada) were we to adopt a system of selection of our jurors, such as to take away from the accused the slightest particle of his chances and means of defence. I maintain that in not continuing the calling of the jurors from the name of the last juror called, we take away from the accused the chance of finding in the following names jurors enjoying the accused's confidence and even that of the Crown; or in a word, those upright, independent, and enlightened jurors, who consider that they have to fulfil their duties in an honorable manner. If a contrary line of action be followed the law is violated, and one puts a limit to the right that the accused has of choosing from the 60 jurors, which is the number of those the law declares must form the panel. The report of the case of Thomas Mansel, to be found in the eighth volume of the Queen's Bench Reports, page 73, confirms my views on this question. In fact in that case, the juror, Ironmonger, had already been called, and had been told to stand by; the list had been exhausted; nevertheless, when the calling was once more begun, twelve jurors who had been engaged in another suit just terminated, came into Court, and the Court at once ordered that their names should be called instead of calling "Jacob Jacobs," whose name followed that of Ironmonger. Evidently the Court, which was presided over by Lord Chief-Justice Campbell, absolutely expressed the idea that before recommencing the calling of the jurors, they had to continue and to re-commence calling the list, with those who, temporarily engaged in another suit, had returned on the panel, and were therefore eligible. In the case of Mansel the list could not be considered as exhausted, since twelve jurors presented themselves and were eligible. The calling of the panel in the case of Mansel was continued, but it was commenced by the names of the jurors absent at the first calling. Therefore, they did not follow in this case of Mansel the rule which was followed in the present case. In the case of Mansel, the panel was exhausted after calling the twelve jurors who had been absent. In the case of Dougall, a stop was made in the middle of the list, and the calling of the names first on the list was recommenced without having called the list to the end, when the first calling was made. That created a fatal irregularity in the verdict of the jury according to my opinion. There is, besides, between this case of Mansel and the present case, a remarkable difference; *i.e.*, the list of jurors could not be considered as exhausted, owing to the absence of the twelve jurors, but who afterwards appeared at the moment when Ironmonger was called; in the present case the list was not exhausted, for the very good reason that they did not call the jurors down to the last man.

For these reasons I think that, in the present case, the jury was empanelled in an irregular fashion, and that the order given for a second time to the juror, "John Walker," was illegal, and of a nature to place in jeopardy the rights of the accused.

DORION, C. J.:—(After reading the reserved case). The question submitted to the Court is not whether the panel was called regularly. The question is whether the Crown was bound to withdraw its order to "stand aside" and show cause for challenge before the panel was exhausted. The right of the counsel for the Crown to order a juror to stand aside is not contested, but a juror having been called and told to stand aside, and his name having been called again

before the panel is exhausted, does the first "stand by" still hold good? In England it has been held by Chief Justice Cockburn that the panel is only exhausted when all the jurors have answered to their names or their absence has been ascertained by calling them again. The panel is not exhausted by calling the list half way down and then returning to the beginning. I do not consider, therefore, that the panel had been exhausted in the present case. Then, as to the order to "stand aside," these words mean simply, wait until we see whether a jury can be formed without you. When the name of John Walker was called the second time, the repetition of the order to "stand aside" was not a second "stand aside," but simply a confirming of the first, until all the names should have been called to see whether a jury could be obtained. The majority of the Court are disposed to think that the ruling of Mr. Justice Ramsay was correct. The Court has nothing to do with any previous irregu[illegible] which may have occurred in calling the list, no objection having been taken [illegible] the defence.

MONK, J.:—The point raised seems to me a very [illegible] It is quite true a good deal has been said in the reserved case that [illegible] to speculation whether the calling of the list was regular or not. [illegible] nothing to do with that. We have to ascertain precisely what the point reserved is. It is simply whether the Court was right in maintaining a previous stand aside, until the list should have been exhausted, and no more. No objection seems to have been taken to the mode of calling the list; at all events, there is none reserved. The panel not having been exhausted, I think that the point reserved admits of no difficulty, and that it was an exercise of very considerable indulgence on the part of the learned Judge to reserve the case at all.

SANBORN, J.:—I come to the same conclusion as the majority of the Court; but I cannot think the Honourable Judge who presided at the trial intended merely to reserve the question whether a "stand aside" could be maintained till the panel was exhausted. This would be too simple. I think we must look at all that was done, as related in the reserved case.

By the Consolidated Statutes L. Canada, c. 84, s. 24, in the districts of Quebec and Montreal, the sheriff is to summon one half speaking the English language and one half speaking the French language.

By 33 Vic., c. 29, s. 40, the sheriff is required to specify in his return those jurors speaking the English language and those speaking the French language, and the names are to be called alternately from these lists.

In the case reserved, it appears from the facts stated by the Honorable Judge that the jurors in the first instance were not called alternately from these lists but entirely from the English names until six jurors speaking the English language had been elected.

By reason of this irregularity to elect the remaining six jurors to constitute the jury to try defendants, jurors that had been called and ordered to stand by were again called before exhausting the panel in the order determined by law.

Inasmuch as the law makes a positive declaration that the jurors shall be called alternately from the lists which the sheriff is required to make of those speaking the English language and those speaking the French language, and inasmuch as if the direction of the Statute had been followed in calling the

The Queen vs. Dougall.

jury, John Walker could not have been called a second time till the panel was exhausted, I think there was a dislocation of the jurors, and the calling of John Walker at that stage of the proceedings was unwarranted by the Statute.

While it is clear that the Crown, as the law then stood, could reserve its right of challenge for cause until the panel was exhausted, and exercise its right to require jurors to stand by so long as the panel was not exhausted, I think it is equally clear, that this right of "stand by" cannot be legally exercised twice before the panel is exhausted by a continuous calling of jurors in the order required by law. The Mansel case is not like this. In that case, the reason why Ironmonger was called a second time was that it was supposed when he was called that the panel was exhausted, and the jury that had been deliberating being released before the question was determined, he was treated as if not regularly called a second time because the panel was not exhausted.

It seems by the statement of the reserved case, that the departure from the mode indicated by the Statute of calling the jury in the first instance, was accorded upon the motion of defendants. How far a consent of parties can be permitted in criminal matters against a direction of the Statute in changing a mode of trial is a delicate question. In misdemeanors, however, a waiver on the part of a defendant of any right as to the constitution of a jury has generally been held to preclude him from afterwards taking advantage of it. Bishop mentions an instance where a defendant, in a misdemeanor consented to be tried by eleven jurors, and, being convicted, the Court refused to disturb the conviction. Assuming that the defendants cannot complain of the first irregularity which was occasioned by their request, it then becomes a question whether any practical result unfavorable to the defendants could accrue by recalling the English speaking jurors that had been ordered to stand by. I am unable to discover that any privilege is lost to the defendants thereby. If these jurors had not been called a second time, the jury would have been completed from the remainder of the panel, in the same manner and with the exercise of the Crown right of stand by, of the same jurors as actually made up the jury. Under these circumstances, taking the question reserved in connection with the facts presented, I think the objection as made was properly overruled.

The counsel for the defendants has referred to various incidents in the trial which the Court here cannot consider. As to the propriety of the exercise of the right of stand by in prosecutions for misdemeanor we are not called upon to express any opinion. The Legislature has since this trial considered it right to take away the privilege in cases of libel, and it therefore cannot give rise to any question in a like case hereafter.

RAMSAY, J:—I had not intended to say anything on the point, but after the remarks of Mr. Justice Sanborn I feel myself compelled to say a few words. I quite agree with Mr. Justice Sanborn as to the simplicity of the point reserved. That learned judge from his own extended experience must be aware how easy it is for a judge at *nisi prius* to be misled by a question ingeniously put. I reserved the case because it was called a second "stand by," and this struck my ear for a moment. In a matter of doubt, of course, an opportunity should be left to the prisoner to get the error corrected, and I cannot feel that my position is very ridi-

culous for having reserved a question seriously urged upon me by counsel of eminence. Be the question reserved difficult or not, the Court has no authority to go beyond it, and any excursion into other matters is totally uncalled for and without jurisdiction. The question is this, when a name is called a second time, no matter for what cause, before the panel is exhausted, should the first "stand by" stand or not? I could have reserved no other question because no other point was raised. One of the learned judges has said that it appears from the wording of the reserved case that the panel had not been called in the regular manner and according to section 40 of the Crim. Pro. Act, 1869. As a matter of composition I deny this. I have not stated whether it were so or not, for I do not remember, as it gave rise to no question at the trial. It was, however, totally unimportant, for no exception to it was taken at the time. It has been questioned whether this could be covered by consent. There can be no consent in a criminal case, in this sense, that the law cannot be waived. For instance, even with the consent of the accused, one witness would not suffice in perjury; but no one has ever doubted that matter of procedure might be the subject of consent, tacit or express.

What I did in swearing the jury was to follow the practice of the Court established by Mr. Justice Aylwin twenty-two years ago. The defendants having claimed the right to have half of the jury speaking the language of the defence, I ordered that six English speaking jurors should be secured. This was a ruling in favour of the defence. I think it a wise rule, and one I intend to follow until it is declared to be illegal by this Court in a regular manner. Six jurors being thus secured I ordered the Clerk of the Crown to go back to the point where he had begun so that the jurors who did not speak English and consequently whose names had only been called for a particular purpose, might be offered for general challenge. I am not prepared to say that it might not have been perfectly legal to go on from the point where the sixth English speaking juror's name stood; but I know no law which declares the other illegal, and I think it was the fairest way to proceed, for in that way all names were presented as they came for challenge. A great deal has been said about section forty of the Criminal Procedure Act, 1869, and I am afraid what has been said is calculated to mislead. We have a difficulty in the Province of Quebec arising from the two langusges which gave rise to legislation by acts applying to Lower Canada alone. When it was determined to assimilate Criminal Procedure as far as possible, this difficulty had to be provided for, and in doing this it was enacted that the sheriff should form his panel of two lists—one of English speaking jurors and the other of French, and that the jurors should be called alternately from these lists. It is quite evident that this was directory. The sheriff cannot make an examination to find out what language a man speaks, and he judges from the name. There are many people with French names who don't speak a word of French, and with English names who don't speak English. Again, in selecting the jury it only applies to cases of ordinary occurrence when there is no special application, or no consent for a jury speaking only one language. This is clear enough from the section itself, but it becomes still clearer if we look at section forty-two which preserves all local laws or practice not expressly inconsis-

The Queen vs. Dougall.

tent with the Criminal Procedure Act. Of course if the view taken by Mr. Justice Taschereau and Mr. Justice Sanborn is correct, and section forty is obligatory and not directory, then the reservation of our local laws and practice is illusory. We can no longer consent to a jury of one language, and there will virtually be two juries and two trials in every case, and there will be a successful challenge to the array or a mis-trial if inadvertently the sheriff returns a juror ignorant of the language indicated by the list on which his name appears. A result so alarming will probably prevent the adoption of this mode of interpretation which appears to me so mischievous that I feel called upon to dissent from it the instant I hear it proposed. The Statute has been in force for four years, and I venture to say it has not altered the practice in any District except in the return of two lists instead of one. I may further add that this forced interpretation would not have prevented the calling of Walker's name a second time, because the English list having only twenty-four names, six having been selected and sworn, the balance of the French list must have been called alternately with the jurors of the English, and till the French list was exhausted the Crown was not obliged to show cause. The defence had had full scope for its privilege by following the old practice, and the Crown must have its privilege.

The judgment is as follows:—

The Court, etc.

Considering that it appears by case reserved for the consideration and decision of this Court, that at the time of the second calling of John Walker, mentioned in the case reserved, the panel of the petty jury had not been all called once and was not exhausted;

Considering that it does not appear by the case reserved that the order to the said John Walker to stand aside was not (*sic*) a second stand aside as contemplated by the law, but it was an order by the Court maintaining the first and previous stand aside until the panel be exhausted and no more;

Considering, therefore, that the order of the presiding Judge was under the circumstances regular and legal, and the prosecution was not bound to shew any cause as pretended by the defence;

Doth declare and adjudge that the order and ruling of the Honorable Presiding Judge at the trial had as stated in the reserved case, was and is according to law and the practice of the said Court of Queen's Bench, Crown Side, and such ruling and order are hereby confirmed;

Considering that judgment on the conviction in this case has been postponed;

The Court doth order judgment to be rendered on the verdict against the said defendants at some future Criminal Term of this Court, and doth further order the said defendants, to wit, John Redpath Dougall and James Duncan Dougall, to be and appear before this Court on the crown side thereof on Thursday, the 24th day of September instant.

Conviction sustained.

E. Carter, Q.C., & W. H. Kerr, Q.C., for the Crown.
Joseph Doutre, Q.C., & B. Devlin, for the defendants.

(J. K.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 22nd JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A.J.

No. 10.

CHARLES A. VILBON, *es qualité*,

(*Petitioner in Court below,*)

APPELLANT;

AND

DAME ROSE-DELIMA MARSOUIN,

(*Defendant in Court below,*)

RESPONDENT.

HELD:—The provisions contained in the Act 29 Vict., c. 17, whereby insurances upon the lives of husbands may be effected or indorsed in favor of their wives and children, are in the nature of *aliments*, and the insurance money due under policies made under said Act is free from the claims of the creditors of both the husband and wife.

The facts of this case are as follows: On the 18th of June, 1873, upon the demand of one of her creditors, Dame Rose-Delima Marsouin, *marchande publique*, was put into insolvency under a writ of attachment, under the Insolvent Act of 1864 and amendments, and the appellant, Charles Albert Vilbon, was appointed interim assignee.

At the time of her husband's death, which took place shortly before the attachment, there was in force a policy of assurance upon his life, for $1500, issued by "The New York Life Insurance Company," which had been effected conformably to the dispositions of the Act of the late Province of Canada, 29 Vic., chapter 17, for the exclusive benefit of his wife, the respondent.

The appellant, by his petition in the Insolvent Court, asked that the insolvent be ordered to hand over to him the said policy as forming part of her insolvent estate, and being the *gage* of her creditors.

The insolvent contested the petition, invoking the above recited Act and particularly its fifth section, as follows: "Upon the death of the person whose life "is insured, the insurance money due upon the policy shall be payable according "to the terms of the policy or of the declaration as aforesaid, as the case may be, "free from the claims of any creditor or creditors whomsoever."

She alleged, therefore, that the amount due under the policy was her personal property in the nature of *aliments*, and could not be subject to the claims of her creditors.

The appellant, in answer, submitted the following:—

Les faits n'étant pas contestés, la seule question qui se présente dans l'espèce est une d'interprétation de l'acte ou statut plus haut mentionné.

Comme on peut le voir, en y référant, c'est un statut fait pour protéger la femme contre les créanciers de son mari qui assure sa vie et non une loi passée pour déclarer que les créanciers de la femme ne pourront pas saisir les argents que cette dernière pourrait avoir et qu'elle ne voudrait pas payer.

Vilbon and Marsouin.

Cette question fut plaidée et soumise à la dite Cour de Faillite, devant l'Hon. Mr. le Juge Baudry, qui, le 21 Octobre dernier, 1873, rendit le jugement suivant:

"La Cour après avoir entendu le dit C. A. Vilbon et la dite R. D. Marsouin, "par leurs avocats, sur la Requête du dit C. A. Vilbon, en sa qualité de syndic "provisoire et gardien sur le bref en liquidation émané en cette cause contre la "dite défenderesse, examiné la procédure et les admissions contenues dans les "réponses de la dite défenderesse et sur le tout mûrement délibéré:

"Considérant que la dite défenderesse admet qu'elle est porteur d'une police "d'assurance au montant de $1,500 effectuée en son nom et pour son seul "profit et avantage aux termes de l'acte du Parlement de la ci-devant Province "du Canada, 29 Victoria, ch. 17, sec. 5.

"Considérant qu'il n'y a aucune preuve de la part du dit C. A. Vilbon de "nature à modifier la dite admission et à enlever à la dite défenderesse le "bénéfice du susdit statut, renvoie la requête du dit C. A. Vilbon, avec dépens "dont distraction est par les présentes accordée à Messieurs Dorion, Dorion & "Geoffrion, procureurs de la dite défenderesse."

L'appelant croit que ce jugement est erronné et a cru devoir en appeler pour la raison que l'interprétation donnée par l'Honorable Juge en Cour Inférieure, était fausse et erronnée et que ce statut n'avait été passé et sanctionné que pour protéger la femme et les enfants de celui qui assure sa vie comme dans l'espèce, contre ses créanciers et non contre les créanciers de la femme et des enfants.

L'appelant est convaincu qu'il est impossible de donner à ce statut une autre interprétation que celle-là et demande en conséquence l'infirmation du dit jugement du 21 Octobre dernier (1873) avec dépens tant de cette Cour que de la Cour Inférieure.

RAMSAY, J. (dissenting)—The Legislature has undertaken to break in upon an old principle of law, that the property of the debtor is the *gage* of his creditors. The Statute has made an exception of a peculiar kind. It is enacted that a person may make a life insurance upon his own life, paying the premium while he lives, and then the insurance is to go to the person in whose favor it is made, and the creditor of the deceased cannot touch it. I do not question the power of the Legislature to do this. The question that arises here is the interpretation of a clause of the Act. It says that the insurance effected for the benefit of the wife shall be payable according to the terms of the policy, free from the claims of any creditor whatsoever. The majority of the Court think that this includes the creditors of the wife. I differ. I think the Act refers to the creditors of the husband, and that the creditors of the wife may claim the insurance, because the wife thus gets the benefit of it in having her debts paid. No one would pretend that if the money was paid into a bank to the credit of the widow, it could not be seized by her creditors. It is urged that this insurance must be treated as *alimens*. But it has none of the character of *alimens*; there is no limit to the amount of the insurance that may be effected.

LORANGER, A. J.—Le Statut 29 Viet., chap. 17, de la ci-devant Province du Canada, art. 5, porte:

Lors du décès d'une personne dont la vie est assurée, le montant de l'assurance

due sur la police, sera payable aux termes de la police, et ne pourra être reclamé par aucun créancier ou créanciers que ce soit.

Le mari de l'intimée, Mercier, avait fait assurer sa vie pour $1,500 à une compagnie d'assurance (*The New York Life Insurance Company*), au profit de sa femme. Après sa mort, l'Intimée étant saisie de cette police, tomba en faillite. L'appelant, à qui avait été confiée la garde de ses biens, fit une requête devant la Cour de Faillite pour obtenir un ordre enjoignant à l'intimée de verser cette police dans la masse en faillite.

Cette requete fut rejetée, et sur l'appel l'unique question qui se présente est de savoir si, en vertu de la loi ci-haut citée, la police d'assurance est insaisissable envers les créanciers de l'Intimée, ou si cette insaisissabilité devait se limiter aux créanciers de son mari.

La raison de décider comme l'a fait le tribunal de première instance, en faveur de l'insaisissabilité, est que la loi dit en termes généraux, "que semblable police ne peut être réclamée par aucuns créanciers," sans faire de distinction entre les créanciers de celui qui a pris la police, et les créanciers de ses héritiers ou des personnes au profit desquelles a été effectué la police. Quand la loi ne distingue pas le juge ne doit pas le faire, et ici la créance, à cause de son origine et de son affectation puisqu'elle a remplacé auprès de la famille d'un défunt les secours qu'elle recevrait des ses auteurs, et qu'elle est affectée aux aliments, doit être en droit l'objet d'une faveur speciale.

Il ne peut, à mon sens, y avoir de doute je ne dirai pas sur l'interprétation, mais sur l'application de cet article. Mais fût-il sujet à ce doute, que toutes les règles de droit se réunissent pour le faire pencher du côté de l'Intimée. Les jurisconsultes proclament à l'envi la solution des questions douteuses au profit des causes favorables. *Semper in dubio benigniora præferenda sunt. In re dubiâ benigniorem interpretationem sequi non minus justitius est quam tutius. Rapienda occasio est, quæ præbet benignius responsum* disent les jurisconsultes romains dont les opinions sont rapportées au titre des règles de droit.

Il ne faut pas oublier que la cause des femmes est favorable, et que c'est ici une mère de famille dans l'indigence dont la police que veulent lui arracher ses créanciers est le dernier moyen de subsistence, et qu'en la lui laissant on porte une décision fondée non seulement sur l'humanité, mais sur le droit même.

Confirmons donc un jugement rendu avec tant de justice.

SANBORN, J.—This is an appeal from a judgment of the Superior Court on a petition on the part of the appellant, as the assignee of the estate of Respondent, in insolvency, to be put into possession of a policy of insurance effected upon the life of her husband, deceased, and that the benefit thereof may accrue to the benefit of her creditors.

The insurance was effected by her late husband under the Prov. Stat. 29 Vic., c. 17, for her benefit. It is claimed on her part that under said Act such insurances were in the nature of alimentary allowances and not susceptible of seisure. The terms of the Act admit of two constructions—Section 5, "Upon the death of the person whose life is insured, the insurance money due upon the policy shall be payable free from the claim of every creditor or creditors whatsoever." This may be understood to mean any class of creditors of the deceased or any creditors of either husband or wife.

I think the wife's pretensions are well founded. The evident intention of the Act was to secure something in the nature of sustenance for wife or children as the case might be, and it would be thwarted if creditors could take it from her or them. It is also to be remarked that the premiums paid upon the policy have been paid out of the husband's estate not the wife's, and it may be likened to a special legacy made by the husband conditioned upon its being appropriated for the benefit of the wife for her support and not liable to seizure by her creditors.

The terms of the subsequent Act of the Province of Quebec, 33 Vic., c. 21, favor this view, as the provisions of this last Act indicate that the insurance is to be appropriated for alimentary allowance for children, and tutors of minors are empowered to expend the accruing interest for such purpose.

Alimentary allowances are *insaisissables*. Vide Dalloz Dic. Mot "Aliments."

The following was the judgment of the Court.

La Cour, &c.

Considérant qu'il n'y a pas matière à infirmer le jugement rendu par la Cour Supérieure siégeante à Montréal le [illegible] dont est appel, confirme le dit jugement avec dépens contre [illegible] en faveur de la dite Intimée.

(The honorable Mr. Justice Monk dissenting.)

Judgment of Superior Court confirmed.

Archambault & De Salaberry, for appellant.

Dorion, Dorion & Geoffrion, for respondent.

(J. L. B.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 20TH JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A. J.

No. 3.

ALEXIS ST. CHARLES,

(Defendant in Court below),

APPELLANT,

AND

JOSEPH DOUTRE,

(Plaintiff in Court below),

RESPONDENT.

HELD:—That an action of damages will lie against the proprietor of an establishment such as a ham-couring factory, for the diminution of rent sustained by an adjacent proprietor, in consequence of offensive odours from the factory and the general character of unhealthiness which was attached to his property; and this notwithstanding the fact that the factory was established prior to the construction of the houses injured.

This was an appeal from a judgment rendered by the Superior Court at Montreal, TORRANCE, J., on the 30th of September, 1872, condemning the appellant to pay respondent the sum of $194.80. The action was instituted for the recovery of damages alleged to have been caused to the respondent by the smell proceeding from a ham-curing establishment owned by the appellant, in the vicinity of some houses belonging to respondent.

The following was the judgment appealed from:—

The Court having heard the parties as well on the motion of the defendant to reject the evidence of the plaintiff objected to by defendant, as on the merits of the answer *en droit* to a portion of defendant's plea, and on the merits of this action, having examined the procedure and evidence and duly deliberated:

Considering that defendant is not well founded in his objections;

Doth dismiss said motion with costs;

Considering further that the *Défense en droit* of the defendant, is unfounded;

Doth reject the said *Défense* with costs;

Considering that the right, which belongs to a proprietor, to enjoy and dispose of his property in the most absolute manner, is qualified, in its exercise, by the natural and legal obligation to abstain from causing any damage to the property of another;

Considering that it is in evidence that plaintiff was the proprietor of houses in the *rue St. André* from the first May, 1869, to the period of the institution of this action, and that the defendant had an establishment of *charcuterie*, adjoining the said houses, from which offensive odours reached the said houses of the plaintiff;

Considering that the plaintiff, by protest of date 24th February, 1870, notified the defendant of the damage by him suffered, owing to the said establishment;

Considering that it is in evidence that the plaintiff hath suffered direct damages in the loss and reduction of rent consequent upon the existence of the said

St. Charles and Doutre.

establishment, to the amount of $174.80, down to the date of the institution of this action;

Doth adjudge and condemn the defendant to pay and satisfy to plaintiff, the said sum of $174.80, and the further sum of $20, for the character of unhealthiness given to the houses of plaintiff, by the said wrongful acts of the defendant, making together, the said sums, the sum of $194.80 with interest from this day until payment; with costs of suit *distraits* to Messrs. Doutre, Doutre & Doutre, the attornies of said plaintiff.

LORANGER, J., (*dis.*):—Les parties sont propriétaires de terrains contigus situés en cette ville. Sur le terrain de l'appelant se trouve un établissement de charcuterie, et sur celui de l'intimé une rangée de maisons de ville. L'intimé réclame des dommages de l'appelant, à raison de la dépréciation de valeur locative d'une de ces maisons, celle la plus rapprochée de l'établissement de l'appelant, et séparée de cet établissement par un simple mur mitoyen, causée par l'insalubrité des exhalaisons qui s'échappent de la charcuterie. L'appelant a nié le fait mis à sa charge, et a prétendu que s'il existe des odeurs malsaines dans la maison de l'intimé, ce qu'il n'admet pas, l'insalubrité de cette maison est due à la mauvaise construction et distribution des lieux, et non à son établissement, qu'il prétend être tenu en bon ordre, sous la surveillance de la police et avec son approbation, et n'être nullement nuisible au voisinage.

Ecartant pour le moment la question de fait, voyons d'abord quel est l'état de notre droit par rapport aux nuisances causées par les établissements industriels tenus avec la sanction de l'autorité municipale ou de la police, quand ces nuisances causent des dommages aux particuliers.

A mon sens, la loi sur ce point est claire et se déduit des principes les plus élémentaires du droit civil, je pourrais dire des notions les plus simples du droit naturel. Le droit est fondé sur trois principes, disait Ulpien, dont le second consiste à ne pas faire de tort à autrui, *neminem lædere*, et c'est l'application de ce second principe qui doit décider cette cause. Ne faire tort à personne et réparer ce tort quand il est fait: tel est le principe fondamental de tout droit, qui fait en grande partie la base du pacte social, et sur lequel sont fondés les articles 1053 et 1054 de notre Code et la théorie des délits et des quasi-délits. Tout individu vivant en société est soumis à cette loi, et nul pouvoir législatif n'en peut délier les corps publics plus qu'il en peut dégager les individus. C'est à la charge de respecter les droits privés que la Législature accorde des chartes et des actes d'incorporation. Le seul effet de ces chartes, toujours accordées dans l'intérêt public, quoiqu'elles aient en apparence pour objet l'intérêt individuel des impétrants, est d'affecter à leur usage une partie du domaine public, avec des priviléges exorbitants du droit commun, comme par exemple le droit d'expropriation, mais à la charge de l'indemnité et dans tous les cas de celle de ne faire nul tort à la propriété privée. Toute charte est censée donnée avec cette condition spéciale, bien qu'elle ne soit pas toujours exprimée. Cette clause y est toujours sous-entendue.

Voilà pour les cas où l'industrie est protégée par une charte. Dans les cas où elle ne l'est pas, mais où elle est simplement autorisée ou tolérée, ce qui est plutôt ici le cas, par les règlements de police, la règle est la même, et cette autorisation-

ou cette tolérance ne la met qu'à l'abri des coups de l'autorité publique, qui non-seulement ne peut la molester, mais qui au contraire lui doit protection ; mais c'est là que s'arrête son privilége, et cette protection ne peut jamais s'étendre au cas de dommage fait au particulier. L'autorité publique, en permettant à l'industriel une exploitation quelconque, est censée lui imposer, comme dans le cas de la charte, pour condition de ne faire aucun tort à personne. St. Charles and Doutre.

Mais quelle est l'étendue de cette responsabilité, et quels sont les faits dommageables à autrui et par rapport auxquels l'auteur est tenu à une réparation ? En d'autres mots, dans quelle mesure doivent s'appliquer les articles 1053 et 1054 dans le cas qui nous occupe ? Disons d'abord qu'il ne peut être question de leur application aux délits toujours punissables. Il est clair qu'il s'agit ici des quasi-délits et de la loi qui les concerne dans son application aux causes de dommages ; c'est-à-dire qu'il s'agit de mesurer l'étendue de la tolérance que se doivent réciproquement les maîtres d'héritages voisins. Car cette question en est une purement de voisinage.

Voyons d'abord quels sont les inconvénients résultant de la contiguïté de leurs héritages que les propriétaires doivent supporter mutuellement, et quand nous aurons trouvé la règle qui fait la ligne de démarcation entre le fait imputable, c'est-à-dire la faute, et celui qui ne l'est pas, nous verrons si elle s'applique à la contiguïté d'un établissement industriel avec une propriété bourgeoise, qui est le cas actuel.

L'application des règles abstraites de droit a pour mesure le bien du plus grand nombre ou l'intérêt public qui domine toujours l'intérêt privé. L'organisation sociale est fondée en partie sur des sacrifices d'intérêt réciproque ou des concessions mutuelles que les individus sont obligés de se faire dans l'intérêt collectif. Parmi ces inconvénients par rapport auxquels chacun doit faire le sacrifice de son droit de répression, sont ceux qui sont une conséquence nécessaire du libre exercice du droit d'autrui, et au nombre de ces concessions généreuses on doit compter les actes de tolérance que se doivent les voisins dans l'intérêt du droit de propriété lui-même. La loi ne dit pas quels sont ces actes de tolérance, mais les usages de la vie journalière les font assez connaître. Sur le principe signalé ci-haut, qu'il n'est permis à personne de faire tort à autrui, un voisin ne devrait jamais incommoder son voisin ; l'expérience nous apprend cependant que le voisinage n'est possible qu'en souffrant une multitude d'incommodités. Aussi l'on ne verra probablement pas de sitôt un avocat se plaindre du bruit de l'atelier de l'artisan son voisin ou le propriétaire d'une maison bourgeoise située dans un quartier élégant, d'un clos de bois dont le voisinage déprécierait la valeur locative de sa demeure, tant qu'une loi de police ne défendra pas à l'artisan de s'établir à côté de l'avocat et au trafiquant de bois de faire son négoce dans le quartier, excepté que le bruit ne fût en disproportion avec les besoins de l'atelier, ou augmenté dans le but de provoquer les voisins, ou bien encore que le clos de bois contînt des embarras inutilement dommageables à la propriété voisine : auxquels cas le bruit et les embarras constituent des nuisances publiques donnant ouverture aux recours particuliers. Notons ces circonstances de la prohibition de la police publique et de l'inutilité de l'incommodité, qui jouent un rôle dans la question.

St. Charles and Doutre.

On pourrait à l'infini multiplier les hypothèses pour établir la règle générale que je pose ici comme une des bases de mon opinion, c'est que tant que les incommodités ne font que diminuer les agréments des propriétés voisines ou de leurs occupants, elles ne donnent pas droit d[illegible]ce. Excepté toutefois les cas où les inconvénients proviendraient [illegible] prohibés dans certaines parties, et ou bien encore où ils [illegible] une intention malicieuse. Auxquels cas constituant une infraction aux règlements de police, une nuisance ou un délit privé, ils donneraient lieu à une action particulière.

Mais nous sommes en présence d'un cas où aucune de ces circonstances ne se présente, car il est en preuve que l'établissement de charcuterie de l'Appelant est permis par l'autorité municipale, qu'il est tenu avec [illegible] propreté que possible, et l'Intimé ne lui reproche aucune intention malicieuse.

Il ne pourra évidemment être tenu de la dépréciation de la maison de l'Intimé résultant de la diminution des agréments du séjour qu'elle procure à ceux qui l'habitent.

Aussi ce n'est pas ce genre de dépréciation que l'Intimé met à sa charge. C'est une dépréciation matérielle qu'il lui reproche en lui disant : " Il s'exhale de votre établissement des odeurs malsaines, dont l'insalubrité affecte la santé de mes locataires, qui abandonnent mes maisons ou ne me donnent qu'un loyer minime, et vous me devez compte du tort que j'en souffre." On voit que sa prétention est tout autre que s'il lui disait : " Votre charcuterie diminue la valeur aristocratique de ma maison, dont les gens du beau monde n'aiment pas le voisinage." En ce dernier cas, ce qu'il reprocherait à l'Appelant serait une dépréciation tout accidentelle, toute de circonstances, et ne découlerait pas nécessairement de la nature de l'établissement. Car quoiqu'en général les raffinés n'aiment pas le voisinage des établissements de ce genre, pour des gens à goûts plus vulgaires une charcuterie peut ne pas soulever les mêmes objections, surtout s'ils y trouvent d'autres avantages. Supposons le propriétaire de la charcuterie même ayant besoin d'un logement ?

Ce dont l'Intimé se plaint, c'est que l'Appelant cause une dépréciation substantielle à sa maison, en la rendant impropre à l'usage auquel il la destine, c'est-à-dire en la rendant inhabitable.

L'on voit tout de suite que la question se présente sous un aspect tout différent du premier, et qu'il s'agit d'un trouble qui s'attaque au droit de propriété lui-même, du moins aux conditions essentielles de son exercice. On peut fort bien louer une maison exposée au bruit et sans agrément de voisinage, mais on ne loue pas une maison malsaine. Et le grief de l'Intimé est spécifiquement d'avoir rendu sa maison insalubre.

N'est-il pas évident que la loi de tolérance doit s'effacer [illegible] devant la loi de propriété ; et que si un voisin doit tolérer les inconvénients de voisinage qui n'occasionnent qu'une dépréciation accidentelle à sa propriété, il ne peut être forcé à supporter ceux qui en affectent la substance même, ou les qualités essentielles à son usage, c'est-à-dire à l'exercice de son droit même. On produirait un résultat aussi fâcheux en admettant le voisin à exercer une action à raison de la détérioration de valeur accidentelle, ou à raison des qualités arbitraires ou spéculatives de la propriété, qu'en la refusant pour cause de dépréciation réelle ou

de diminution dans les qualités matérielles et substantielles. Le voisin qui voudrait se soustraire à l'obligation de supporter les inconvénients de la première classe, comme celui qui voudrait le forcer à supporter ceux de la seconde, porterait également atteinte au droit de propriété. Aux actions de la seconde classe s'applique donc la maxime.

La question en est donc une de fait.

RAMSAY, J.:—The first question is whether any action will lie in such a case, and whether it is not such a use of his property as the proprietor is entitled to make. If this be decided in the affirmative it will be needless to go further. It is proper, however, to observe that defendant's works were established prior to the construction of the houses which it is said these works injure, and prior to the purchase of the property by plaintiff. Also, it is not pretended by plaintiff that defendant's operations were not carried on in a cleanly manner, and it further appears that there is another pork-curing establishment in the same street, and at no great distance from that of defendant.

No authority that I can find, either under the English system or the French system, maintains the extreme pretension that any lawful trade may be carried on to the detriment of a neighbour. The French authorities give as the limit "les obligations ordinaires du voisinage." Now, I understand it thus, that one among a number of persons carrying on trades of an offensive character cannot turn round on his neighbour, who carries on his trade in a proper manner, and sue him for damages, for the neighbour has not violated the "obligations ordinaires du voisinage." But if a person chooses to carry on an offensive trade next door to my house, and by doing so causes me damage, he must pay me for it. Nothing seems more natural or more just than that. It was the rule laid down in the case of Tipping & The St. Helen's Smelting Co., cited by appellant.

But we are told Doutre followed appellant there and built after him. The precise fact is that St. Charles had a pork-curing establishment long before Doutre built, but that he increased it and added the buildings complained of just about the time Doutre was building. The question, however, is not very important, for a nuisance does not cease to be a nuisance simply because it has been established a little before the coming into the neighbourhood of the person complaining. The quotation from Sirey does not maintain the appellant's pretension. All we find there is that the character of the locality shall be considered. This is a very different thing. There is another case of Tipping and The St. Helen's Smelting works, in which the plaintiff applied for an injunction. The defendant said that Tipping had bought after his works were built, and from the same *auteur*; but the injunction was granted. The case in 2 C. and P., *Rex vs. Cross*, is only an *obiter dictum*. The question was not in issue.

The evidence is conflicting and not without difficulty, but I do not think the judgment of the Court below should be disturbed on a mere question of evidence, unless it is evident that some serious injustice has been done.

SANBORN, J.:—This is an appeal from a judgment of the Superior Court Montreal (TORRANCE, J.) which awards $194.80 damages to respondent, against appellant, for loss of use of certain houses and diminution of their value as tenant houses, by reason of their being rendered more or less uninhabitable, in

St. Charles and Doutre.

consequence of appellant's carrying on the business of making sausages and boiling hams in immediate contiguity therewith. The locality is in and near St. Catherine street, a populous and eligible part of the city. It is alleged that injurious and offensive exhalations are emitted from this sausage factory. The defence to the action was, in substance, that appellant had a right to carry on the business in question by law, and by the local municipal law of the city his right was recognized and he paid taxes upon his business; that the business was prudently and in a cleanly manner carried on, and under such circumstances he could not be held to pay damages occasioned by inconvenience or annoyance to others; and, further, that the pretended bad odors which drove respondent's tenants from his houses did not arise from appellant's business but from defective drainage and other causes in, and about, respondent's houses.

It appears that the building of appellant, adjoining one of the tenement houses of respondent, and used for a sausage factory and for curing and boiling hams, was built about the same time as respondent's houses. The buildings progressed together, but appellant appears to have entered upon the actual occupation of his factory before respondent's houses were occupied. The appellant proves, and it is not questioned by respondent's witnesses, that he carried on his business with care and that his shop was tidily kept.

The evidence as to appellant's establishment causing the offensive and unwholesome odors, which rendered some of respondent's houses unfit to inhabit, is very conflicting. That there was in respondent's houses, nearest to appellant's sausage factory and smoke house, an odor of a character not only very uncomfortable but injurious to health is established by all the witnesses. It was called *hydrogène sulphuré*. This the medical witnesses say could result from the decomposition of meats and fatty substances, and it could equally well be produced by defective sewerage. The theory of the appellant is that it was the latter. The most of appellant's witnesses give rather opinions than facts. The respondent destroys the theory of appellant's witnesses that the odor was produced by defective drains and water-closets, by having these opened and examined and proving them to be in good condition, and having all the requisites to work well. There are other facts established by respondent's witnesses that are very convincing.

Some of them speak of the smell from having endured it from day to day, and they have the best opportunity of judging of its quality and effect. They say it was unmistakeably a fatty smell, sickening in its effect and destroying appetite, and identical with that often perceived in passing appellant's factory; that it varied, being intense on some days and scarcely perceivable on others as appellant's works went on or slacked. The evidence, as a whole, convinces me that the odors complained of arose from appellant's works and that respondent by reason of them sustained damage in loss of rent and depreciation of his property, which has been carefully estimated by the court below. As to the law, it must be remarked that the authorities cited from some modern French authors, to the effect that parties who are licensed to carry on a particular trade which may incommode the neighborhood, not being liable for damages for exercising their rights, do not exactly apply to this case. There is no license here pretended. The appellant

St. Charles and Doutre.

has not, so far as the record shews, sought permission to carry on the business of sausage making where his factory is located within the city, as an exceptional business that falls under the by-law of the city, like slaughter houses, dyeing establishments, and the like. All that can be said in his case is that he carries on his trade in the city, and the authorities do not prohibit him from doing so, and tax him like other proprietors carrying on business, and the city inspectors have, from time to time, examined his factory to see that it was well kept.

This doctrine is by no means absolute when applied to licensed business which occasions damage to the neighborhood. Larombière, who is cited by both parties, says where establishments of this nature are licensed, after inquiry, and are carried on properly, the inconvenience occasioned to neighbours must be borne as a debt due to society, but says the Court must decide upon the fact: "Mais quelque incontestable que soit en droit le principe que nous venons d'énoncer, son application soulève dans la pratique, de sérieuses difficultés. Les juges doivent, en effet, se demander, du coté de l'autre, l'auteur du fait s'il n'a fait qu'user de son droit sans en excéder les justes limites, s'il a pris toutes les précautions, que l'usage et les circonstances particulières l'astreignaient à prendre."

Sourdat asserts that administrative regulations and licenses of injurious trades do not derogate from the right of individuals suffering damages from the exercise of them. There are certain things which have to be borne as servitudes to society, such as the noise from a machine shop, or the hammering of a smith upon the anvil, which are more or less annoying to neighbours. These are very different from unwholesome odors, which are not only prejudicial to comfort but more or less injurious to health. Articles 1053 and 1054 of our civil code give the general principle of law, which is, according to circumstances and a correct discrimination of the measure of fault or negligence of one or both parties, of universal application. "Tout individu est garant de son fait d'où il suit que si ce fait cause à autrui quelque dommage, il faut que celui par la faute duquel il est arrivé soit tenu de le réparer. Ce principe n'admet point d'exception." (Bertrand de Greuille.) A distinction is made by some authors between material and moral damages. The one referring to loss entire or partial of products; the other being a depreciation of the value of the property, which can be arrived at only by opinion. By most authors this distinction is rejected, and real, effective damage whether material or moral may be awarded (Langlois Ateliers Dangereux, pp. 30 and 31.) The judgment in this case is based mainly upon loss of rent which comes under the class of material damage; $20 is given for the character of unhealthiness given to respondent's houses, which comes under the head of moral, or opinion damages. I think there is no error in the judgment and it ought to be confirmed.

TASCHEREAU, J.:—L'exposition des faits qui ont donné lieu au présent litige nous fournit deux questions à résoudre. 1°. Une de fait consistant à savoir si l'odeur dont l'intimé se plaignait comme venant de l'établissement de charcuterie de l'appelant et que tous les témoins s'accordent à dire avoir été insupportable, originait chez l'appelant ou non; 2°. Une question de droit, savoir, si l'appelant était civilement responsable envers l'intimé du tort qu'il a éprouvé

St. Charles and Doutre.

dans la jouissance de ses propriétés dans le voisinage immédiat de la charcuterie de l'appelant. Ce dernier a été condamné en cour inférieure à payer à l'intimé la faible somme de $174.80 pour dommages par lui éprouvés par suite de la perte et réduction des loyers de ses propriétés.

L'appelant alléguait que pour établir sa charcuterie il avait obtenu sinon une licence expresse du moins une autorisation tacite des autorités municipales pour l'exercice de son métier de charcutier et ce au moyen de la taxe qu'il payait, qu'il avait toujours tenu sa boutique en parfait état de propreté, que l'odeur ne venait pas de chez l'appelant mais bien de chez l'intimé qui n'entretenait pas ses canaux dans un état de propreté convenable.

Un examen superficiel du dossier pourrait sinon exonérer complètement le défendeur présent appelant de tout blâme, du moins jeter quelque doute sérieux sur sa responsabilité. Des témoins en grand nombre ont rendu un témoignage assez fort en sa faveur, mais je crois que l'ensemble de la preuve a établi à notre satisfaction comme à celle du Juge en première instance que l'odeur intolérable dont l'intimé se plaint prenait son origine chez le défendeur. L'enquête constate que cette odeur est la même que celle que les gens ressentaient en passant près de la boutique du défendeur et dans sa boutique même. Le témoin Pélagie Caty constate le fait qu'il n'y a d'odeur dans la maison de l'intimé que quand l'appelant fond ses graisses ou fume ses jambons. Il est prouvé qu'il en fond une énorme quantité par semaine. La preuve constate que les canaux de l'intimé ont toujours été dans un état irréprochable de propreté et bien entretenus. Il est prouvé au contraire que l'appelant ne vidait ou éloignait ses déchets de graisse et autres choses que toutes les trois semaines. Il fumait ses jambons deux fois par semaine, au nombre de 200 à 300 à chaque fois, et on conçoit la quantité de graisse qui s'en devait détacher et l'odeur qui devait en être le résultat. Les locataires de l'intimé ont abandonné ses maisons et ont donné pour motifs, l'impossibilité de vivre dans l'atmosphère que leur procurait la charcuterie de l'appelant. Sur ce premier point l'appelant est fautif. Quant au second, je crois l'appelant aussi peu fondé; car quoiqu'il soit juste que chacun puisse exploiter son industrie, il serait souverainement injuste que tout un quartier d'une ville pût être rendu inhabitable par suite des odeurs qui résulteraient de l'exercice de cette industrie. Ce principe de droit est reconnu par tout le monde, et M. Larombière en son traité *Obligations*, arts, 1382-1383 tom. 3, pp. 693, sec. 12, exprime cette opinion: savoir "que les établissements classés "ou non parmi ceux qui sont réputés dangereux, insalubres ou incommodes "peuvent donner lieu à une action en dommages et intérêts en faveur des proprié- "taires voisins, à raison du dommage qui leur est causé soit par le bruit des "ateliers, les émanations de la fumée ou autres causes d'incommodités inhérentes "à leur exploitation, mais il faut que par leur degré de violence et d'intensité, "elles excèdent la mesure ordinaire des obligations du voisinage."

M. Larombière résume toute la question par ce peu de mots si expressifs.

Toullier, Vol. 3, No. [illegible] dit: "Les lois défendent encore de rien faire "sur son héritage d'où il puisse parvenir sur l'héritage voisin quelque chose qui "lui soit incommode ou nuisible, par exemple, une fumée épaisse telle que celle

"d'un four, d'un fourneau, d'une forge ou du tuyau d'un poêle qui serait "dirigé vers les fenêtres du voisin.

St. Charles and Doutre.

Voir aussi Domat, liv. I, tit. 12, sect. 2, No 8 et seq. La conclusion à tirer de la lecture de ces autorités est des plus faciles, et c'est celle-ci, que l'on trouve dans Avisse, tome 2, p. 11: "Que chacun peut user de sa propriété à sa "guise, mais à la condition que cet exercice ne nuise à personne, et à la charge "de respecter les droits légitimes des voisins."

S'il n'en était ainsi, trois ou quatre établissements de la nature de celui de l'appelant pourraient forcer un quartier entier d'une ville à émigrer, en s'imposant de par la loi: heureusement la loi leur refuse une telle immunité, et je crois, avec raison.

Les dommages que la cour Inférieure a prononcés contre l'appelant sont minimes, et je trouve que le tribunal n'a pas fait sa condition très-onéreuse. Je suis d'opinion de confirmer le jugement dont est appel, avec tous frais et dépens.

Judgment confirmed.

Jetté, Archambault, & Beique, for the appellant.
Doutre, Doutre, & Doutre, for the respondent.
(J.K.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 20TH JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A. J.

No. 22.

WATSON, APPELLANT;

AND

PERKINS, RESPONDENT.

HELD:—1°. That a vendor of immoveables, (before the passing of the Code,) who has assigned portions of the purchase money, can, nevertheless, bring a resolutory action by reason of the default of the vendee to pay any portion of the purchase money, and that the intervention in such action by the assignees, containing a declaration of acquiescence in such action, places the plaintiff's right of action beyond question.

2°. That the sale of Government timber limits is a sale of an immoveable.

Semble.—That the resolutory action would lie, even if such last mentioned sale were really a sale of moveables.

This was an appeal from a judgment of the Court of Review at Montreal, (JOHNSON, TORRANCE, and BEAUDRY, J. J.), rendered on the 31st of March, 1873.

The action of the respondent was *en résolution de vente*, and was dismissed on the 30th of January, 1872, by the Superior Court at Montreal, (Mackay, J.,) on the ground that the vendor had assigned the greater part of the purchase money to third parties who were not made co-plaintiffs with him, and the Court

Watson and Perkins.

of Review reversed that judgment and rescinded the deeds of sale referred to in the declaration, assigning the following reasons:—

"Considering that the plaintiff has proved the allegations in his declaration contained, and that the transfers and assignments by him made to the said intervening parties, were so made, as collateral security for the payment of principal sums of money, amounting only to five thousand one hundred dollars and interest accrued and to accrue thereon, and with warranty on behalf of the plaintiff, and that he was and is entitled, as against the said defendants, to ask for the resolution of the deeds of sale in his said declaration mentioned, for default of payment of the balance of the price thereof, either to the plaintiff or to the intervening parties; And considering that the pleas of the said defendant William Lindsay, *es qualité*, are unfounded, he being without interest to invoke the facts therein alleged; And considering that the said intervening parties, by their declaration in this cause fyled, declare that they consent to and acquiesce in the conclusions of the plaintiff's demand, provided that in and by the judgment to be rendered, the deeds sought to be rescinded by the plaintiff's action, be so rescinded, as prayed for, subject to the payment of the respective claims of the said intervening parties, to wit: the sum of two thousand one hundred dollars to Louis Alphonse Boyer & al., with interest from the 1st November, 1868, and the sum of three thousand dollars to the Trust and Loan Company of Upper Canada, with interest at the rate of eight per cent. per annum, from the 1st day of November, 1871: And considering that thereby, the said intervening parties have renounced all recourse against the defendant, William Lindsay, *es qualité*, or the other defendants, and that the plaintiff has acquiesced in the said conditions of the said intervening parties, and is entitled to judgment in accordance with the same.

LORANGER, J.:—Le 11 Novembre 1865, l'Intimé vend pour le prix de $16,000, payable à termes, à Thomas D. Lewis et Thomas C. Brigham, Brodie, Notaire, à Montréal, un nombre de lots de terre, toutes ses licenses (*timber limits and licenses*) dans les townships de Templeton, Wakefield et Portland. Le 23 mars suivant (1866) il vend aux mêmes, même notaire, pour un prix nominal payé sur-le-champ, certains autres biens immobiliers et tous ses droits dans les chaussées et glissoires de la Rivière Blanche; il fut stipulé au dernier acte que les deux actes n'en feraient qu'un, et que les biens vendus en second lieu demeureraient hypothéqués pour le prix de la première vente.

Il est évident que pour toutes les fins du litige les deux ventes doivent être considérées comme n'en faisant qu'une.

L'action qui a donné lieu au jugement dont est appel, invoque ces deux ventes, allègue la prise de possession des acquéreurs, le fait qu'ils ont coupé du bois pour un montant considérable, le défaut de paiement du prix, et demande la résolution des deux ventes.

Pour l'intelligence de cette opinion, il est essentiel de mentionner les mutations dans la personne des acquéreurs, et que l'action est dirigée contre un syndic qui les représente.

La défense plaide le transport de la somme de $14,300 fait par le demandeur à L. Boyer et Fils, et à la Compagnie de Prêt du Haut-Canada,

du montant de divers termes de paiement, transport signifié et accepté, et la réception par le demandeur de $1,100 ne laissant dues au demandeur que la somme de $1,200. Elle prétend que les limites ou licenses de bois ou droit de couper du bois sont meubles, que la vente du 11 novembre 1865, a été une vente de meubles et d'immeubles faite par le même acte, et invoque quelques autres faits sans intérêt dans l'état ou s'est présenté le litige, qui n'a offert que des questions de droit, la défense ayant prétendu en première instance comme elle l'a fait sur l'appel, que le demandeur, ayant disséminé son prix de vente, dont il a transporté la plus grande partie, et n'étant aujourd'hui créancier que d'une balance minime, ne pouvait exercer l'action résolutoire, laquelle, à tout événement, ne peut avoir lieu sans jonction dans l'action des créanciers cessionnaires du reste du prix, et en outre que le vendeur ayant à la fois vendu des meubles et des immeubles pour un seul prix, était sans action pour résoudre la vente après l'insolvabilité de l'acquéreur.

Il est bon d'observer que L. Boyer & Cie. et la Compagnie de Prêt du Haut-Canada sont intervenus—devant le tribunal de première instance, et ont consenti aux conclusions du demandeur, sous la réserve de leurs droits d'hypothèque sur les terrains vendus, et à condition d'être payés de leurs réclamations respectives réduites à $5,200.

Le premier juge a rejeté la demande, la Cour de Révision l'a maintenue, et c'est de ce dernier jugement qu'est appel.

Les questions qui se soulèvent en cette cause sont les suivantes:—

1°. Un vendeur qui a cédé partie de son prix de vente, peut-il, seul et sans le concours de ses cessionnaires, poursuivre la résolution de la vente pour défaut de paiement du prix?

2°. Dans le cas ou l'absence des cessionaires serait fatale à l'action, leur intervention et leur adhésion aux conclusions du vendeur valideraient-elles la demande?

3°. Le droit conféré par une licence ou permis de coupe de bois sur les terres de la Couronne en vertu du chap. 23 des Statuts Refondus du Canada, est-il un droit mobilier ou immobilier? S'il est mobilier, le fait que semblables droits ont été vendus en même temps que les lots de terre par les actes cités, sans assigner un prix distinct aux uns et aux autres, a-t-il pu interdire au demandeur la faculté de demander la résolution de la vente par une seule et même action, vu la faillite de l'acquéreur?

Pour résoudre la première question, il faut d'abord bien préciser les principes qui régissaient l'action en résolution de la vente faute de paiement du prix et les effets que produisait cette action tant entre le vendeur et l'acheteur eux-mêmes, qu'entre leurs ayants cause, suivant la loi en force avant le Code, et en l'absence de stipulation, car ces deux particularités se rencontrent dans l'espèce.

Dans le droit romain, la résolution de la vente à défaut du prix n'existait pas sans stipulation. L'on n'y connaissait que le pacte commissoire. Il en était de même en France dans les pays de droit écrit que suivaient les lois romaines, ainsi qu'on peut s'en convaincre en consultant les auteurs de ces pays.

Cette action, toute de droit coutumier, était fondée sur la maxime consacrée par l'article 1184 du Code Napoléon, ignorée par le nôtre, "que la condition

Watson vs. Perkins.

résolutoire " est toujours sous entendue dans les contrats synallagmatiques, pour " le cas où l'une des deux parties ne satisfera point à son engagement." C'est à la faveur de cette maxime, qu'elle a été transmise dans le Droit Canadien, dont l'a pourtant bannie l'article 1536 de notre Code qui l'interdit sans stipulation; mais comme le Code Napoléon l'a perpetuée de l'Ancien Droit par l'article 1654, on peut puiser dans les écrits des jurisconsultes contemporains les principes communs à l'une et l'autre action.

En suivant la foi de l'acheteur et en lui donnant terme, le vendeur d'un immeuble aussi bien que d'un meuble, car la résolution existe pour les meubles aussi bien que pour les immeubles, tous les auteurs à l'exception de Duranton en conviennent; le vendeur, dis-je, est censé dire à l'acheteur: Je vous vends à la condition que si vous ne me payez pas toute et chaque partie du prix, la vente sera résolue, et que nous serons remis dans l'état où nous étions avant le contrat; c'est-à-dire, vous me remettrez la chose vendue avec les fruits que vous en aurez perçus et je vous remettrai de mon côté ce que je pourrai avoir retiré du prix avec intérêt. L'acheteur est donc censé n'être propriétaire de la chose que quand il en a payé le prix, et c'est dans ce principe que repose le privilége attaché à la créance du vendeur, de reprendre sa chose, s'il n'est payé, non-seulement du tout, mais encore de chaque partie. Ce privilége suit la créance en quelques mains qu'elle passe et chaque partie de cette créance, divisible comme la chose vendue, représente une partie correspondante de la propriété de cette chose, et divisible comme la créance, ce privilége est cessible comme elle et va se poser avec elle sur la tête des cessionnaires auxquels il plaira d'acquérir et au vendeur de céder le prix.

De son côté, l'acheteur peut diviser et subdiviser la chose, et la faire passer en autant de mains qu'il lui plaira, mais cette chose et chaque partie de cette chose restera fatalement asservie au privilége résolutoire attaché au prix tant qu'il ne sera pas entièrement acquitté. Ce qui veut dire que tout acquéreur, à quelque titre que ce soit, ne deviendra propriétaire plus que le premier acquéreur ne l'était lui-même, et que les propriétaires ne cesseront pas d'être les créanciers du prix. Si ni la chose ni la créance ne changent de mains, le vendeur et l'acheteur resteront en présence; au cas contraire les cessionnaires et les nouveaux acquéreurs leur seront substitués dans les proportions de la vente de la chose et du transport du prix. Chaque nouvel acquéreur devient passible de l'action pour la part qu'il possède.

Le vendeur resté créancier peut faire résoudre la vente contre l'acheteur resté propriétaire, non-seulement pour la totalité mais pour aucune partie du prix, en remboursant ce qu'il a déjà reçu. Les autorités sont concordantes sur ce point; cette conséquence découle rigoureusement du principe. Il peut aussi la faire résoudre contre les tiers acquéreurs pour le tout si un seul possède la chose, et pour chacune des parties possédées par plusieurs. Il procède alors séparément ou simultanément, à son choix, contre l'acheteur et les tiers. Dans l'un et l'autre cas il fait résoudre la vente contre l'acheteur, se fait déclarer propriétaire de la chose, et poursuit ses conclusions réelles contre les tiers. Les remboursements dans l'un et l'autre cas se font à l'acheteur, contre lequel les tiers font

valoir leur recours. Ce sont pour le vendeur des possesseurs sans titre avec lesquels il n'a aucun différend à démêler.

Voilà pour le cas où le vendeur ne s'est pas dénanti du prix. Quand il l'a fait, les cessionaires subrogés à ses droits et à tous ses priviléges peuvent exercer les mêmes recours qu'il exercerait lui-même. Si un seul est cessionaire du prix ou d'une partie du prix, il poursuit la résolution de la vente pour le tout, mais étant aux droits du vendeur, il est aussi à ses obligations, et il doit rembourser tout ce qui a été payé sur le prix comme le devrait faire le vendeur dont il remplit la situation. S'il y a plusieurs cessionnaires, chacun d'eux étant subrogé au vendeur dans les proportions de la créance cedée, et chaque partie de cette créance étant armée d'un pouvoir résolutoire, les cessionnaires pourront se concilier pour intenter l'action ensemble, ou chacun pourra l'intenter pour le tout. Si le vendeur avait été payé du prix, moins la part cédée à aucun d'eux, quelque minime qu'elle fût, il pourrait à raison de cette proportion intenter l'action; chaque cessionnaire subrogé à ses droits peut le faire, comme lui. Ce qui n'exclurait pas le vendeur, resté créancier d'une partie du prix non cédée, de l'intenter lui-même pour cette part, sans égard aux transports partiels qu'il pourrait avoir faits. Le seul droit de l'acheteur est d'être remboursé, quelque soit son agresseur, c'est-à-dire d'être remis dans l'état où il était avant la vente.

Toutes ces alternatives découlent des principes énoncés, que tant que le prix de vente n'est pas payé, l'acheteur ne devient pas véritable propriétaire; que pour aucune partie du prix la vente peut être résolue, l'effet de cette résolution étant de remettre les parties dans l'état où elles seraient si le contrat n'eût pas eu lieu. Or, dans toutes les hypothèses supposées, l'acheteur reprend sa condition primitive, et c'est tout ce qu'il peut demander. Il ne peut se plaindre de ces recours nombreux qui sont exercés contre lui, car c'est son défaut de payer ce qu'il doit qui leur a donné ouverture, et il peut toujours s'en délivrer en payant.

En appliquant ces principes à la présente cause, et il n'est pas nécessaire de les appliquer au cas de la transmission de la chose entre les mains des tiers, l'acquéreur étant ici encore possesseur, du moins son syndic ou le représentant de son syndic l'étant pour lui, il est facile de résoudre la première question. Le vendeur, quelque soit le montant transporté, est resté créancier d'une partie du prix, et le jugement dénoncé le condamne à rembourser ce qu'il a reçu, du moins ordonne des procédés pour parvenir aux répétitions réciproques relatives au prix pa[illegible] à la perception des fruits. Quel intérêt possible peut avoir l'acheteur à se plaindre de ce que le vendeur a cédé une partie du prix, et que les cessionnaires ne sont pas en cause, puisque par la résolution de la vente, la créance qu'ils avaient contre lui s'est évanouie avec le titre qui lui avait donné l'existence. Car, qu'on le remarque, le vendeur qui n'a au prix que des droits subordonnés à la permanence de l'acte, ne peut transporter que la créance résoluble qu'il a lui-même, *nemo plus in alium transferre potest quam ipse habet*, et l'acte qui l'a créée étant éteint, elle s'est éteinte avec lui dans les mains des tiers: *resoluto jure dantis, resolvitur jus et accipientis.*

Wilson vs Perkins.

En dehors de toute intervention des cessionnaires, l'appelant était donc sans intérêt légal à critiquer le droit d'action de l'intimé. Voilà pour la première question.

La seconde ne se présente pas, mais l'action de l'intimé eût-elle été originairement mal intentée sans la participation de ses cessionnaires, que leur intervention et leur consentement aux conclusions de la demande valideraient. En effet, le seul motif que pouvait avoir l'appelant de faire à l'intimé un reproche de leur non-participation, devait venir de la crainte qu'il pouvait éprouver d'être de leur part l'objet d'un recours préjudiciable; nous venons de voir ce que cette crainte a d'illusoire, mais fût-elle fondée, que leur adhésion au jugement en ferait disparaître le prétexte même.

Il nous paraît que l'appelant a senti ce que sa position avait d'insoutenable; aussi l'a-t-il changée en assimilant l'espèce actuelle où le vendeur est resté créancier d'une partie du prix, au cas où un vendeur non-payé meurt laissant plusieurs héritiers qui se partagent la créance, et dont aucun d'eux n'a droit à l'action résolutoire pour la totalité de la vente. Ce qui est un cas tout différent, la transmission d'une créance entre plusieurs successeurs à titre héréditaire, s'opérant voilà autrement que par la cession transport entre plusieurs cessionnaires. Dans la succession du vendeur non payé laissant plusieurs héretiers, aucun d'eux n'est propriétaire seul du prix ou d'une partie du prix faisant l'objet d'un terme de paiement. Ce prix ou cette partie de prix se fractionne dans la proportion des parts viriles. Je suppose un acheteur qui doit £100 prix entier, ou £500 par termes de £100 chacun à cinq héritiers; aucun d'eux n'étant propriétaire de £100 dus à forfait ou pour terme, mais ne pouvant réclamer qu'un cinquième de cette somme ou £20 à la fois, ne pourra réclamer la résolution pour le total du prix comme aurait pu le faire le vendeur, mais son action sera restreinte à la résolution pour un cinquième. Elle sera en principe bien fondée. Cependant, dit l'acquéreur, je n'ai pas acheté l'héritage pour le conserver par parties; je veux le répudier en entier ou le garder en entier, ce que je serais en mesure de faire, si mon vendeur était en cause; je ne puis souffrir de sa mort; concilliez-vous avec vos héretiers, et quand vous serez tous en cause, nous procéderons sur votre demande. Faute de se soumettre à cette exigence raisonnable, l'héritier serait justement mis hors de cause. Ecoutons M. Troplong à ce sujet. Vente, Tome II, Nos. 638, 639 et 640.—"Nous venons de faire ressortir le caractère personnel réel de l'action en résolution; il faut insister sur une autre qualité dont elle est revêtue, c'est qu'elle est divisible, lors qu'elle a pour objet un héritage ou autre objet divisible.

Cette divisibilité de l'action en résolution a lieu tant au coté du vendeur qu'au coté de l'acheteur contre qui elle est donnée.

639.—Elle est divisible au coté du vendeur. Ainsi si le vendeur laisse plusieurs héritiers, chacun peut user de la résolution pour sa part et portion.

Néanmoins, si un des héritiers du vendeur demande la résolution de la vente, l'acquéreur peut exiger que tous ses co-héritiers soient mis en cause pour se concilier sur la reprise de l'héritage en entier, c'est ce qui s'induit de l'Art. 7670 du Code Civil, et ce qui a été jugé par arrêt de la Cour de Cassation au 6 Mai, 1829. Cette décision me parait très-plausible, car on ne peut forcer l'acquéreur

à garder pour partie une chose qu'il ni a achetée que pour l'avoir entière. Je conviens cependant qu'il n'y a pas parité parfait entre l'acheteur contre qui on exerce l'action en réméré et celui contre qui on exerce l'action en résolution. Le premier est exempt de la faute; le second n'encourt la résolution que par sa négligence à payer le prix. Néanmoins cette négligence ne doit pas être punie par une injustice, et il y aurait évidemment une rigueur inique à obliger l'acheteur à conserver pour partie une chose qui, étant divisée, ne pourrait lui être qu'à charge. C'est pourquoi nous avons vu ci-dessus que dans l'action rédhibitoire, qui est fondée, aussi soit sur la faute soit même sur la mauvaise foi du vendeur, ce dernier ne peut être forcé de reprendre sa chose pour partie.

640.—L'action en résolution est divisible au coté de l'acheteur contre qui elle est donnée. Ainsi, si l'acheteur laisse plusieurs héritiers, le vendeur devra leur demander la résolution pour leur part et portion; il pourra même n'actionner que les uns, tandis qu'il laissera les autres tranquilles. Ceux des héritiers contre qui l'action sera exercée ne pourront se plaindre et demander que leurs cohéritiers soient mis en cause; en effet, le partage les a rendus tous étrangers les uns aux autres; leurs intérêts sont distincts et séparés; la résolution en retirant des mains des défendeurs les parts non payées, n'entraîne aucun des inconvénients dont nous parlions dans un numéro précédent.

Cette doctrine, dont on ne peut méconnaître la justesse, est celle des auteurs sur le Code Napoléon, en matière de résolution légale comme de résolution conventionnelle, y compris M. Larombière, dont on peut réconcilier les contradictions apparentes en étudiant ses opinions dans leur ensemble, et ayant sous les yeux les principes sur la matière.

Tous tirent argument de l'analogie de la résolution de la vente avec la faculté de reméré pour le cas qui nous occupe.

Voici d'abord comment Pothier s'expliquait à ce sujet sous l'ancien droit.

"Si plusieurs vendeurs ont vendu avec cette clause (de reméré) un héritage "ou si un vendeur a laissé plusieurs héritiers, chacun des vendeurs ne peut "exercer le reméré que pour sa part, et pareillement chacun des héritiers ne peut "l'exercer que pour sa part quant à laquelle il est héritier; L'action de reméré "étant divisible, puisqu'elle a pour objet un héritage qui est quelque chose de "divisible, elle se divise nécessairement entre les héritiers du vendeur. Chacun "des héritiers ne succédant à cette action que pour la part dont il est l'héritier, "ne peut par conséquent l'intenter que pour cette part; et il doit être au pou-"voir de conserver, s'il le juge à propos, les autres parts, quand les autres "héritiers n'exercent pas le reméré.

"Néanmoins, si l'acheteur juge qu'il n'est pas de son intérêt de retenir des "portions indivisibles, ou ne pourra pas l'obliger à souffrir pour partie le "reméré de cet héritage qu'il n'a acheté que pour l'avoir en entier. C'est "pourquoi l'acheteur peut, en ce cas, conclure au congé de la demande de cet "héritier pour partie, si mieux il n'aime reprendre l'heritage en entier, et "rembourser en entier l'acheteur du prix et des loyaux coûts de son acquisi-"tion." Vente: No. 396.

C'est sur cette opinion de Pothier que sont fondés les articles 1556, 1557 et 1558 de notre Code, qui portent.

Watson vs. Perkins.

Article 1556. Si plusieurs ont vendu conjointement et par un seul contrat, un héritage commun entre eux, avec faculté de reméré, chacun d'eux ne peut exercer cette faculté que pour la part qu'il y avait.

Article 1557. La règle contenue en l'article précédent a également lieu si le vendeur d'un immeuble laisse plusieurs héritiers; chacun d'eux ne peut exercer le droit de reméré que pour la part qu'il a dans la succession du vendeur.

Article 1558. Dans le cas des deux articles précédents, l'acheteur peut, à son gré, exiger que le co-vendeur ou le cohéritier reprenne la totalité de l'immeuble vendu avec droit de reméré, et à défaut par lui de ce faire, il peut faire renvoyer la demande de tel co-vendeur ou co-héritier, pour une portion seulement de l'immeuble.

Ces articles sont en substance les articles 1668, 1669 et 1670 du Code Napoléon, à l'exception du dernier, qui correspond à notre article, lequel article du Code Napoléon porte: Mais dans le cas des deux articles précédents, l'acquéreur peut exiger que tous les co-vendeurs ou tous les cohéritiers soient mis en cause, à fin de se concilier entre eux pour les reprises de l'héritage; et s'ils *ne se concilient pas il sera renvoyé de la demande.*

Notre article 1558, qui prescrit au demandeur de reprendre l'heritage en totalité, est certainement plus juste que celui du Code Napoléon, qui punit par le rejet de la demande du co-vendeur ou du cohéritier qui a exercé un juste droit un défaut de conciliation sur lequel il ne peut user de contrôle, ou qui peut même être frauduleusement concerté contre lui. Cependant, le principe des deux Codes est le même; c'est l'intérêt de l'acquéreur, qui ne peut être forcé de consentir à la revente partielle de son héritage, qui les a inspirés tous deux, avec la différence que le Code Napoléon protége à la fois les droits du co-vendeur et du co-héritier et ceux de l'acquéreur, pendant que le Code Français ne sauvegarde que l'acquéreur. Appliqué à l'action résolutoire pour partie du co-vendeur, ce principe opérerait d'une manière également équitable, mais il est sans application dans l'espèce actuelle où l'action, poursuivie pour la totalité, l'a été par le vendeur du consentement de ses cessionnaires. On pourrait même dire que portée au nom du vendeur, cette action a été poursuivie, dans l'intérêt des cessionnaires, qui, comme *procuratores in rem suam*, pouvaient aussi bien l'exercer au nom de leur cédant qu'en leur nom propre.

La question de savoir si la licence d'une coupe de bois accordée par la couronne est meuble ou immeuble ne saurait nous occuper longtemps. La jurisprudence de ce pays, quels que fussent les usages en France, a considéré le droit abstrait de coupe de bois comme un droit réel, et l'a traité, comme une servitude. Je me rappelle l'avoir fait juger vers 1850 dans une cause de Croteau *vs.* Quintal, et je crois qu'il ne serait pas difficile de mettre la main sur plusieurs autres jugements semblables, maintenant des actions *confessoires* pour droit de coupe de bois. Peu importe les opinions des auteurs qui disent que la vente du droit de couper une portion quelconque d'une forêt aménagée ou non à coupe réglée, est meuble. Cela se comprend parce que ce droit se résout en vente du bois qui ne peut appartenir que quand il sera coupé et détaché du sol, et réduit à sa condition de meuble. Dans ce cas-là l'esprit des contractants, comme le contrat lui-

même, se porte sur le résultat de la vente, et n'en considère que l'objet pratique dépouillé du droit de propriété sur le fonds et abstraction faite de sa possession. C'est ce qu'expliquent fort bien Demolombe, Duranton, [illegible]arcadé, sur l'article 521 du Code Napoléon dont notre article 378 a reproduit les dispositions. Dans ce cas là, le droit cédé, tout circonscrit et tout éphémère, s'épuise par son exercice même. Mais il en est autrement d'un droit illimité qui s'applique à tout une forêt, qui, perpétuel ou temporaire, embrasse toute la superficie qui s'attache à chaque arbre de grande futaie comme à chaque taillis, qui pénètre même le sol puisqu'il comporte nécessairement un droit de possession; d'un droit qui, comme l'usufruit ou l'usage, a servit tout le domaine à l'utilité de l'acquéreur et comme eux comporte un démembrement de la propriété, qui peut même devenir l'objet de la prescription. Evidemment c'est ici la réalité que la contrat cède, et la mobiliser serait choquer tous les principes sur la distinction des biens. Aussi le Statut, qui, il est vrai, n'accorde que pour un an la licence que l'administration des forêts publiques renouvelle indéfiniment, en revêtant le concessionaire du droit de possession de la limite, de celui de poursuivre pour voie de fait les déprédations, et de revendiquer le bois coupé par des tiers sur le terrain concédé, droits qui ne peuvent appartenir qu'au possesseur civil du fonds, a-t-il emphatiquement reconnu à la licence son caractère de réalité.

Mais ces licences, fussent-elles meubles, en quoi leur cumul dans l'acte de vente et dans l'action pourrait-il affecter le droit résolutoire du vendeur, puisque comme nous l'avons vu, cette action a lieu pour les meubles aussi bien que pour les immeubles. L'appelant a prétendu que, d'après l'article 1998 du Code, le vendeur d'un meuble non payé ne peut le revendiquer, dans les cas de faillite, que dans les quinze jours qui suivent la vente. Mais cette revendication est toute différente de la resolution de la vente des meubles, qui, d'après l'article 1543 qui la concerne, n'est pas sujette à cette limitation, et peut être exercée tant que ces meubles restent en la possession de l'acheteur sans préjudice au droit de revendication du vendeur tel que réglé au titre *des Privilèges et Hypothèques*, ajoute l'article.

Sur le tout, je suis d'opinion de confirmer le jugement de la Cour de Révision dont est appel.

SANBORN, J.:—The plaintiff, respondent, instituted an action against William Lindsay in his quality of assignee of the Estate of Thomas D. Lewis, an insolvent, for the dissolution of two deeds of sale (considered as one) of certain timber limits sold by him to said Thomas D. Lewis and Thomas C. Brigham. The issue is between plaintiff, respondent, and Lewis' Estate. Brigham does not contest the action. The original price was $16,000, payable by instalments, all of which were overdue. Appellant, Watson, has taken up the instance in place of William Lindsay. The defendant, appellant, pleaded that plaintiff, respondent, had made assignment to L. Boyer & Son of $2100, and to the Trust and Loan Co. of $12,000 of said debt due by defendant, appellant *es qualite*, and that $1100 had been paid on account of said debt and only $1200 remained due to respondent, and he had no right to have dissolution of the sale. 2nd. That the sale was of a *coup de bois* which is a moveable, that contract of sale of moveables is not subject to dissolution. 3. The gen[illegible]

Watson vs. Perkins.

issue. Upon this plea issue was joined, and parties proceeded to enquête, and during the enquête, the Trust and Loan Company and L. Boyer & Son intervened, and asked that plaintiff's, respondent's, action be maintained, subject to their claims of hypotheque on the property. The Court, in the first instance dismissed the action. The Court of Review reversed that judgment, and maintained the action of plaintiff, respondent, subject to the mortgages of the intervenants as against him instead of plaintiff, respondent *es qualité*.

The only question that admits of doubt is whether the plaintiff, respondent, should in the first instance have made these assignees parties to the cause in order to have a clear action against appellant. The appellant had a clear right to bring these parties into the cause before pleading, to have their claims reconciled with respondent's. This is the course pointed out by the authorities for him to take. —Larombiere Art. 1252, s. 14, also 1184, s. 75, and s. 81, Troplong No. 639. Instead of this he denies respondent's right of action altogether. These assignees, intervening, removed all interest which appellant had to object to the *demande*.

The respondent has a right to have *fruits et revenues* compensate *pro tanto* payment of one instalment, and to have these estimated by experts. Pothier, "Vente," No. 639. As to the plea that licenses to cut timber on government lands are moveables, I am not inclined to think that it would alter respondent's rights to a dissolution of a sale like this, if such sale is a sale of moveables. I do not consider this a sale of moveables. It is a sale of a real right and an immoveable. The authorities cited from Demolombe, indicating that the purchase of standing crops or [illegible] wood is a purchase of a moveable, refer to a different sort of contract [illegible] one of a less permanent nature, giving no control over the land. Our [illegible] licenses issued by the Crown continue for a term of years, and are subject to removal and to the payment of an annual rent, and the holders have the rights of proprietor as respects trespassers. It is as distinctly an immoveable as an emphyteusis. In fact it is a species of emphyteusis. The judgment of the Court below appears to me well reasoned and in all respects correct, and should be confirmed.

Judgment of Court of Review confirmed.

Kerr, Lambe & Carter, for appellant.

Dorion, Dorion & Geoffrion, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 14TH JULY, 1874.

[In Chambers.]

Coram Dorion, C. J.

Ex parte *E. Cahill on behalf of Luke Moore* for a writ of Habeas Corpus.

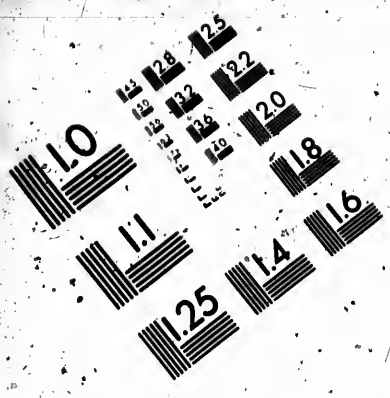
Held:—That the curator to a lunatic or insane person cannot remove him from his domicile to an hospital or asylum without the authority of the Court, acting on the advice of his relations or friends.

A curator having been appointed to Luke Moore, interdicted for insanity, he caused the interdict to be removed to an hospital. The wife of the interdict

petitioned for a writ of habeas corpus, alleging that the curator had no authority over the person of the interdict. Ex parte E. Cahill.

J. J. Curran opened the argument on behalf of the curator. He said that, on the 15th day of June last, a petition had been presented to the Superior Court, by Mrs. Luke Moore, setting forth that her husband was of unsound mind, in fact that for several months past he had been insane and unable to take care of himself or his estate. That on the 20th of June, at an *assemblée de parents*, where there were present two brothers of Mr. Moore, [illegible] relatives and friends, Mr. O'Neill was appointed by a unanimous vote curator to Mr. Moore. The question that first came up for consideration was what were the powers of the curator. Has he a right over the person as well as over the estate of the interdict? He (Mr. Curran) thought there could be no difficulty about this point. It was distinctly stated that he had such authority in the Civil Code of Lower Canada, and all the standard authors were agreed in this matter. Meslé, pages 11 and 12, states that the difference between curatorship and *sequestre, commissaire* and *gardien* was that the curator had absolute control of the person, whilst in the other instances such was not the case, and it is further stated "*Curator proprie is est, qui gerit vicem personæ, seu domini, sive rei, sive personæ detur.*" Thus, even when the curator was merely appointed to the care of the estate, he had likewise power over the person of the interdicted party. On this point he thought there was no difficulty. The next question was, Is Mr. Moore illegally confined? He contended that there was no confinement or detention whatever. By the order of the Superior Court, Mr. Moore had been placed in the hands of his curator, who had ordered his removal to the *Hotel Dieu*, where his disease would receive the most careful and skilful treatment. Was this a case to give rise to the issue of a writ of *habeas corpus ad subjiciendum?* Certainly not. What was sought here was to determine whether Mrs. Moore or the curator had the right to have the personal control of the *interdit*. Hurd, on *habeas corpus*, disposes of this effectually at pages 152 and 550. This writ cannot be used for the purpose of settling rival claims of this kind; and at page 550 it is stated, with reference to the guardian and his ward, that the guardian stands *in loco parentis*. Under these circumstances this matter should have been brought before the Superior Court for adjudication after *enquête*. Mr. O'Neill was in the exercise of his rights as curator, and the writ must be set aside.

B. Devlin, for the petitioner, after speaking of the painful character of the case, went on to say that here we had a wife who presented a petition setting forth that she desired to have her husband returned to her, whose mind had been weakened by affliction, and who had on that pretense been taken away from her. It was evident that she was concerned for her husband's welfare; otherwise, if she had been a designing woman who desired to get hold of his property, she would not have presented a petition for his interdiction. He was not here to find fault with the proceedings before the Court. But the fact was that through some reason or other, Mr. O'Neill, almost a stranger, had stepped in and become curator. He did not care to speak at length of the case as it presented itself to his mind. It struck him as singular that Mr. O'Neill should



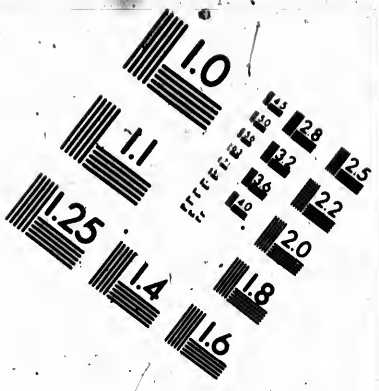
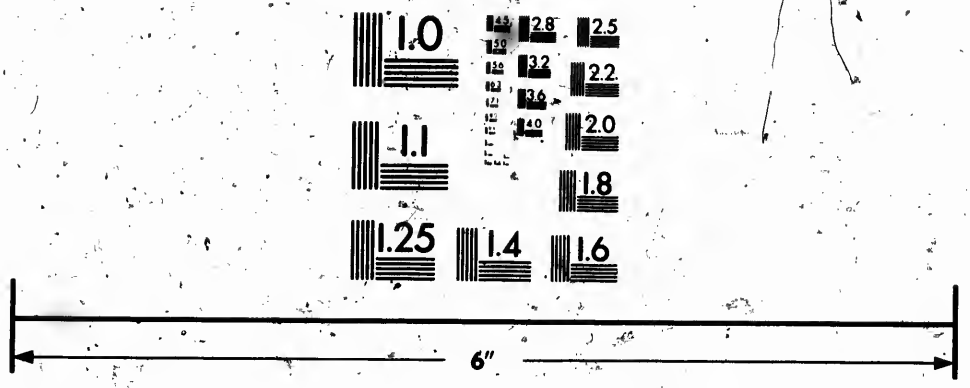
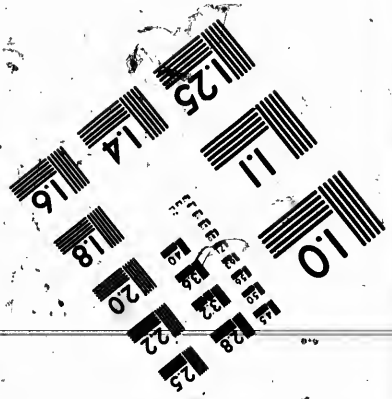


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Ex parte E. Cahill.

have stepped in at this time and conveyed Mr. Moore to the hospital when he could prove, on the highest medical authority, that there was no necessity for such action. The wife, in whose charge he was, swore that Mr. Moore had been removed against his will and her will, from his sick bed, from his comfortable home, and placed in an hospital. It could not be pretended that the curator could exercise power over a man's body, but only over his property, except under certain conditions, and these must be exercised with reason, and in accordance with law. If Mr. Moore had been without a domicile, without a wife, and lived in a boarding-house among strangers, he could understand the propriety of his removal on the ground that he could be better cared for in another house. There had not been an allegation that he had not been well cared for, and that he had not received the best medical treatment. In view of the facts, it was amazing that Mr. O'Neill should persist in his efforts to retain in his custody and possession Mr. Moore. He had the highest testimony to prove that Mr. Moore's health had been endangered by this removal. Who could say that he would be better treated in the Hotel Dieu Hospital than at home? The real secret of the removal was, as appeared in one of the documents, the desire of the curator to dispose of some property. To accomplish this, Mr. Moore must be removed. Mr. Moore had been ailing for a long time, why had not his friends stepped in before. It was only when they wanted to sell a house that they took action against him. He denied the necessity of the sale of any property, Mr. Moore being worth at least $20,000 per annum. He cited Pothier's 6th volume, section 625, to show that it was only when an interdicted person became furious or dangerous that it was allowable to remove him and place him under restraint, and that until this was the case the wife was the proper custodian of her husband. A removal could not take place without the interposition of the courts, which had not been applied to.

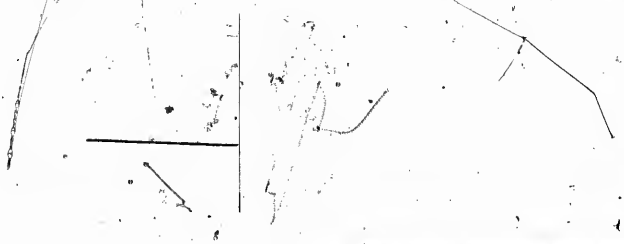
DORION, C. J.:—This is an application for a writ of *habeas corpus*, made in behalf of Luke Moore, a merchant of this city, by the petitioner, his wife. In the petition it is alleged that, on the 15th of June last, the petitioner caused her husband to be interdicted, and that James O'Neill was appointed his curator; that on the 9th instant the said James O'Neill introduced himself with other persons into the house where she and her husband lived on Sherbrooke street, and against the will of the said Luke Moore and the petitioner, forcibly carried him away and has since illegally detained him. Mr. O'Neill by his return, states that in his capacity of curator and on medical advice, and on that of the friends and acquaintances of Mr. Moore, he has removed him to the Hotel Dieu Hospital, in order that he may be free from excitement, and also that it was necessary to remove him in order to sell the house in which Mr. Moore resided, and its contents. The only question raised by this return is as to the authority of the curator over the person of the party interdicted. Under article 343 of the Code, that authority is declared to be the same as the authority of the tutor over his ward, and article 290 expressly states that a tutor has the care of the person of his pupil. These articles correspond to articles 509 and 450 of the Code Napoleon, under which, notwithstanding their express provisions, it has been held by all the French writers, in accordance with the jurisprudence before

the Code, that the authority was not absolute but subject to the control of the relations, (*conseil de famille*), and of the tribunals and judges to whose care lunatics and infants are specially confided. It has, therefore, been held under the provisions of those articles that the tutor could not, without being authorized thereto and for cause, remove his pupil from the charge and care of his father and mother, and that the *tutelle* to a stranger did not deprive the parents of their parental authority over their children. So the authors declare that a curator to a lunatic or insane person cannot remove him from his domicile to an asylum or an hospital without the authority of the Court, acting on the advice of his relatives and friends. Toullier, Proudhon, Delvincourt, and Demolombe hold this view in more or less decided terms. But a passage in the speech of Bertrand de Greville before the tribunal at its sitting of 26th March, 1803, seems to have been written in prevision of a case like the present one. He says: —"On a donc du laisser, sur ce point, au tuteur une large étendue de pouvoir; "on a du aussi lui imposer l'obligation de ne faire transférer le malade dans "une maison de santé, ou même dans un hospice, que sur l'avis du conseil de "famille, d'abord, parce que les conseils qu'il reçoit dans son domicile sont en "général plus appropriés à son état, par l'affection et la patience qui les admi- "nistrent; en second lieu, parceque sa translation dans une maison de santé, "pourrait déplaire à la famille; ce qui porte à croire que le déplacement ne sera "effectuée, si elle est consultée, que lorsque la nature du mal, ou la modicité "de la fortune de l'interdit, en imposeront l'absolue nécessité." Demolombe, vol. 8, pp. 407 and 408, Nos. 615 and 619, and vol. 7, pp. 323 and 324, Nos. 535 and 537, shows clearly the extent of the control to be exorcised by the *conseil de famille* and by the judge. I am therefore of opinion that Mr. O'Neill had no authority to remove Mr. Moore from his home and place him in an hospital against the wishes of his family, and that he has no authority to retain him, and I, therefore, must order that he be returned and restored to his residence and family. The right to give such an order cannot be doubted, and has been frequently exercised both in England and the United States under writs of *habeas corpus*. See Hurd on *Habeas Corpus*, pp. 211, 212, 213, and from p. 454 to p. 460. 1 Chitty's Practice, p. 689.

Devlin, for the petitioner.

Curran, for the curator.

(J.K.)



COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 20TH JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A. J.

No. 99.

JAMES DOUGLAS, ET AL, APPELLANTS;

AND

THOMAS RITCHIE ET AL, RESPONDENTS.

HELD:—1. That interrogatories *sur faits et articles* may be taken *pro confessis*, without any motion to that effect.

2. That interrogatories so taken *pro confessis*, when they furnish sufficient *commencement de prèuve par écrit* may supply the want of the memorandum in writing required by art. 1235 of our Civil Code.

This was an appeal from a judgment rendered by the S. C. at Montreal, on the 30th day of December, 1872, (BEAUDRY, J.,) as follows:—

"The Court, having heard the parties by their counsel, respectively, as well on the merits as on the motion to reject the oral evidence, to prove the contract alleged in plaintiffs' declaration, examined the proceedings of record and proof, and on the whole maturely deliberated:—Considering that no action could be maintained on the alleged promise of sale mentioned in plaintiff's declaration of a certain quantity of teas to arrive, without a writing signed by the defendant or his representatives under Article 1235 of the Civil Code; and considering that no such writing is alleged in said declaration; and considering that no such writing was proved in this cause, and that no bought or sold notes were drawn or made in relation to the said pretended sale by Archibald Moir, alle[illegible] have acted as broker in this transaction; and considering that the defe[illegible]s have not admitted said pretended sale, but have denied it, and pleaded a different contract; doth dismiss the said plaintiffs' action with costs, *distraction* whereof is granted to Messrs. Monk & Butler, attorneys for defendants."

TASCHEREAU, J., (*dissentiens*):—

Les appelants, demandeurs en cour inférieure, réclamaient des intimés par leur action $1000 de dommages, leur résultant de ce que les intimés leur ayant vendu, le 2 Mai 1872, par le ministère d'un courtier du nom de Archibald Moir, une quantité de thé, savoir: 70 demies boîtes de thé Hyson à 48 cents la livre, et 54 demies boîtes du même thé à 46 cents la livre, chaque boîte contenant 65 livres, en tout 7650 livres, suivant échantillon livré aux intimés, et le tout délivrable à l'arrivée des vapeurs *Niger* ou *Nile*, abord l'un desquels ce thé devait se trouver, avaient refusé de livrer aux appelants ces quantités de thé, à leur dommage de $1000.00.

Les intimés plaidèrent:—

1°. Un contrat tout différent, savoir: une vente de 70 demies boites de thé Young Hyson à raison non de 48 cents, mais de 46 cents, et de 68 demies boites du même thé à raison non de 46 cents, mais de 48 cents la livre, le tout formant non pas 7650 livres, mais 8144 livres.

2°. Refus par les appelants de recevoir ces quantités de thé.

3°. Défaut par les appelants d'avoir allégué en leur déclaration, acceptation du thé ou d'aucune partie d'icelui, ni aucun payement à compte ou sous forme d'arrhes, ou d'aucun écrit signé par les intimés conformément à l'article 1235 du Code Civil Canadien, et qu'en conséquence les appelants ne pouvaient réussir dans leur action.

Le jugement en cour inférieure a renvoyé l'action des appelants pour les motifs suivants:

1°. Absence d'écrit signé par les intimés.

2°. Absence de preuve de l'existence de *bought and sold* notes comme échangées par le ministère du courtier Moir.

3°. Dénégation par les intimés du prétendu marché et affirmation par eux d'un différent contrat.

Je considère ce jugement parfaitement légal, et je dois exprimer mon chagrin de voir que mon opinion ne sera pas partagée par la majorité de cette cour.

Il est évident, et chacun de nous l'admet, que cette action ne pouvait être maintenue sans un écrit signé par les intimés conformément à l'article 1235 du Code Civil qui se lit comme suit :

"Dans les matières commerciales où la somme de deniers ou la valeur dont il "s'agit excède cinquante piastres, aucune action ou exception ne peut être main- "tenue contre une personne ou ses représentants sans un écrit signé par elle de "tout contrat pour la vente d'effets, à moins que l'acheteur n'en ait accepté ou "reçu une partie ou n'ait donné des arrhes. La règle qui précède a lieu lors "même que les effets ne doivent être livrés qu'à une époque future, ou ne sont "pas, au temps du contrat, prêts à être livrés."

Ces termes sont impératifs et déclarent formellement qu'aucune telle action ne peut être maintenue. D'après les commentateurs du droit anglais sous le Statut de Charles II, ch. 3, Sect. 17, dont l'article 1235 de notre Code est la reproduction assez approximative, il faut que l'écrit requis soit signé par la partie que l'on prétend obliger, contienne toutes les conditions essentielles, et ne laisse rien aux dangers et éventualités d'une preuve testimoniale pour le contredire ou le modifier dans des parties importantes, et la raison donnée est " pour prévenir les fraudes et parjures sans compter les surprises, les erreurs et les mécomptes qui peuvent ruiner le commerçant le mieux établi."

Mais les appelants ont prétendu prouver leur cause :

1°. Par l'absence de réponse par les intimés aux questions sur faits et articles qui leur furent soumises par les appelants.

2°. Par un écrit subséquent, (une lettre des intimés adressée aux appelants.)

Je crois que les appelants ne peuvent se prévaloir du défaut des intimés d'avoir répondu aux interrogatoires sur faits et articles parce que ces interrogatoires ne sont pas, conformément à l'article 227 du Code de Procédure, rédigés d'une manière claire et précise et de telle sorte que l'absence de réponse soit une admission du fait dont on veut obtenir l'aveu. Par exemple, un de ces interrogatoires est conçu en ces termes. .

2°. Was not the weight of said seventy half chests of tea fifty six pounds each? If not, what weight were they, and what were the weight of the other

Douglas et al. and Ritchie et al.

" half chests mentioned in the Plaintiff's declaration, and for what price did the " Defendants sell the same and to whom and when ?

On voit du premier coup d'œil que les intimés, en ne répondant pas à cet interrogatoire n'encourrent aucun défaut ni responsabilité, si ce n'est à propos du poids des soixante-et-dix demies boîtes de thé, et nullement quant aux autres 54 demies boîtes, car la question quant à ces dernières demies boîtes, n'est ni claire ni précise et n'oblige pas les intimés à avouer ni leur nombre, ni leur poids, ni le fait de leur vente aux appelants, ni de leur prix, ni de la date de la vente ; c'est une omission fatale et irrémédiable. Malgré cela les intimés vont être condamnés sur une preuve aussi légère et suivant moi aussi illégale.

Ici s'élève la question de savoir si dans un cas comme celui-ci, une partie peut, après son enquête terminée, remplacer par un interrogatoire sur faits et articles l'écrit exigé par l'article 1235 du Code Civil, en un mot si le refus de répondre par une partie peut être invoqué comme formant une preuve équivalente à une écrit signé par elle. J'ai toujours cru jusqu'à présent qu'on devait, au moins depuis la promulgation du Code Civil, interpréter strictement et littéralement ces mots "sans un écrit," comme signifiant un acte antérieur à l'institution d'une action, et qu'un refus de répondre à un interrogatoire ne pouvait être l'équivalent de cet écrit signé par la partie exigé si formellement par l'article 1235 du Code Civil. La loi étant nouvelle, il est naturellement assez difficile de mettre la main sur des précédents dans des causes absolument identiques. On trouve une décision de son Honneur le Juge Loranger en 1864 dans la cause No. 558, Baylis vs. Ryland, maintenant la même doctrine, et le savant Juge d'après le rapport de la cause à la page 94 du Vol. 15 R. B. C., avait formellement dit que le commencement de preuve au moyen de réponses sur faits et articles ne tenait pas lieu de l'écrit exigé par le *Statute of frauds* à sa section 17. J'avoue qu'en cour de Révision cette décision a été renversée. Une décision que l'on trouve au Vol.2, Taylor on Evidence, p. 837, consacre le principe qu'un "*written memorandum made after action brought will not satisfy the Statute of frauds*, cause de Bill vs. Bament 9th M. & W. p 36. Dans le cas présent il n'y a pas même cet écrit après "*action brought*," mais il y a un refus de répondre à une question faite aux défendeurs comme dernière planche de naufrage. Par analogie on peut citer l'opinion des commentateurs du Code Napoléon à l'article 1793. Messrs. Troplong et Marcadé à page 542 de son 6. Vol, déclarent qu'un architecte ne serait pas reçu à prouver par le serment du propriétaire pour lequel il a fait une construction, et duquel il reclame une valeur d'augmentations, le fait de sa promesse de payer ces augmentations, et il en donne la même raison que celle apparaissant au *Statute of frauds* savoir, de prévenir les supercheries, les fraudes et les parjures. Cependant cet article 1793 du Code Napoléon ne contient pas une prohibition plus stricte de la preuve que l'article 1235 de notre Code, l'un et l'autre déclarent que les réclamants ne pourront réussir. Cet article 1793 du Code Napoléon se lit ainsi : " Lorsqu'un architecte ou entrepreneur s'est chargé de la construction à forfait d'un bâtiment, d'après un plan arrêté et " convenu avec le propriétaire, il ne peut demander aucune augmentation de prix, " ni sous le prétexte de l'augmentation de la main d'œuvre ou des matériaux, ni " sous celui de changements ou d'augmentations faites sur ce plan, si ces change- " ments ou augmentations n'ont pas été autorisés par écrit, et le prix convenu avec

"le propriétaire." Mr. Troplong, louage, Vol 3, page 234, dit en commentant en cet "article 1793 : Vainement l'entrepreneur déférerait le serment au propriétaire sur "un prétendu accord qui aurait changé l'état primitif du plan. Ces moyens de preu- "ve n'ont aucune valeur, ils ne peuvent remplacer l'écriture" et il cite de nombreu- ses décisions dans ce sens par les tribunaux Français. Il cite Duranton, Duver- gier, Zachariae.

M. Marcadé à la citation ci-dessus, dit "L'architecte ne peut pas plus recourir "à la délation du serment ou interrogatoire sur faits et articles qu'à tout autre "moyen de preuve."

Mais les appelants ont prétendu en second lieu trouver cette preuve écrite au moyen d'une lettre écrite par les intimés au moment où les parties s'accusaient ou justifiaient mutuellement et cela sans que les conditions essentielles du marché y soient exprimées, savoir quant au contrat lui-même, à la quantité, qualité et prix. Trouver cet écrit comme preuve d'un marché dans une lettre de récrimina- tions serait se mettre en guerre ouverte avec tous les commentateurs du *Statute of frauds* sur la nécessité de trouver on cet écrit les conditions principales de l'en- gagement. Ce serait ouvrir la porte à une preuve étrangère, toute autre que celle que fournirait un écrit ; en un mot, ce serait manquer au but de la loi, qui a voulu mettre fin aux fraudes et aux parjures.

Mais d'ailleurs, cette lettre, quoique la signature en soit prouvée, n'est pas identifiée avoir rapport à la transaction en question : Je crois donc que les appelants n'ont pas légalement prouvé leur demande et que le jugement de la Cour inférieure devrait être confirmé pour les raisons ci-dessus en droit, et faute par les appelants d'avoir prouvé des dommages. Leur principal témoin, Frede- rick Hughes, établit une absence de dommages à ma pleine satisfaction.

RAMSAY, J. :—The decision in this case turns on the interpretation to be given to two articles of the Civil Code, (1233, 1235.) Have they introduced new law; and if so, has such new law the effect of abolishing the old French law as to *commencement de preuve par écrit* in commercial contracts?

This question has come up three times in our judicial history. First under the authority of the Ord. 25 Geo. III, which introduced the English laws of evidence in proof of commercial matters. In the case of Hunt & Bruce (Pyke's Reports, p. 8) it was formally held that the Statute of Frauds established a rule of evidence and, consequently, that it was in force here. The very day this case was decided, one of the defendants, in the case of Oakley *vs.* Morrogh & Dunn (Pyke's Reports, p. 19) refused to answer a rule *sur faits et articles*, on the ground that the introduction of the English rules of evidence in commercial matters excluded the old French law. Mr. Stuart, arguing against this pretention, remarked that the right had been constantly recognized in practice; and the reporter tells us that the defendant, having agreed to answer, "the point was not decided by the Court, but they intimated their opinion so strongly that the objection urged in this case by the defendant has not since been raised, and the parties in several instances have been examined on *faits et articles* in commer- cial cases."

By the 10 and 11 Vic., the disposition of the Statute of Frauds was introduced and applied to contracts over £10 stg. Perhaps, speaking strictly, this should have put the law on a new footing, and, possibly, this might have been the effect

Douglas et al. and Ritchie et al.

of the Act; but the following year it was enacted: "for the avoidance of doubts—* * * that any party to any suit or action of a commercial nature may be examined on *faits et articles*, in the like manner as parties may be examined in other cases, any law touching the rules of evidence in such cases to the contrary notwithstanding." The following year an Act was passed to remove doubts, admitting interrogatories on *faits et articles* in all cases. Ten years later the old question was raised in the case of Levy and Sponza. Interrogatories on *faits et articles* remained unanswered, and Mr. Justice Morin held that they could be taken *pro confessis*, and be used as evidence of an executory contract. The case went to appeal and the judgment was confirmed there. (6 L. C. J., p. 183.)

Again, in 1863, Mr. Justice Monk, sitting in the Circuit Court, held in the case of Reeves *vs.* Malhiot (8 L. C. J., p. 84) that, in an action for $32.25 parol evidence was inadmissible to prove a contract of suretyship, *unless there was some writing or memorandum sufficient to constitute a commencement de preuve par écrit.* In 1864 Mr. Justice Loranger, in the case of Baylis & Ryland (15 L. C. R., p 94) drew attention to the difference between the dispositions of the ordinance of Moulins and the Statute of Frauds, and gave judgment for the defendant. But this case went to review and the judgment was reversed, that court holding that an admission given by a defendant, when examined as a witness, is equivalent to the note or memorandum in writing referred to in the Statute of Frauds.

Again we have the case of Minor & al. and Knight, where it was held in the Court of Appeals that a *commencement de preuve par écrit* would serve to admit parol evidence. Although decided subsequently to the enactment of the codes, this case arose before.

The jurisprudence seems to have been tolerably well settled by these cases, but we have now to consider the effect of the articles of the codes.

Article 1233 C. C. lays down the general principle that proof may be made by testimony (*i.e.*, verbal) of all facts concerning commercial matters. But that article is to be read subject to the exceptions and limitations specially declared in the section. One of these is that in commercial matters, where the value in question exceeds fifty dollars "no action or exception can be maintained," unless there is a writing signed by the party or his agent; "upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain."

A very strict reading of this article leads to the conclusion arrived at by the Superior Court, that the want of this writing, signed by the party or his agent, saving the exceptions of earnest, or of the buyer having accepted or received part of the goods, is a bar to the action. But when it is considered that the Commissioners evidently did not contemplate any change in the law,* that article 221 C. C. P. reproduces the 12 Vic.; that the Statute of Frauds, though in a form similar to the code, has been looked upon as a rule of evidence, Taylor No. 914, we are

---

The article (1235) as reported became law. It was not, however, the first *redaction*. The terms of the article were debated at seven sittings of the commission, and the case of Levy & Sponza, which had been decided by one of the Commissioners, was examined. It cannot, therefore, be imagined for an instant that the commissioners thought they were changing the law.

forced to the conclusion that the old jurisprudence must be maintained under the operation of the codes, and, consequently, that a *commencement de preuve par écrit* derived from interrogatories *sur faits et articles* will be equivalent to the writing signed by the party or his agent.

SANBORN, J. :—The question of some difficulty in this case is how far the admissions obtained from the parties by means of *faits et articles* can supply the place of a memorandum in a commercial case under Art. 1235 of our Civil Code. By the 10th and 11th Vic., c. 11, s. 8, the Statute of Frauds was made applicable to all contracts for the sale of goods of ten pounds sterling and upwards.

It appears that doubts arose whether this excluded the right to make proof by the party himself by means of *faits et articles*. To remove such doubts it was enacted the next year, 12 Vic., c. 38, s. 89, "that any party to any suit or action of a commercial nature may be examined on *faits et articles*, in the like manner as parties may be examined in other cases; any law touching the rules of evidence to be observed in such cases to the contrary notwithstanding." This section was brought up in the Consolidated Statutes of L. Ca., c. 82, s. 19. By the 221st Article of our Code of Civil Procedure it is declared that "the parties in any suit may at any time during the trial or judgment be examined upon articulated facts pertinent to the issues." I do not understand that the law is in any manner restricted by the Code upon this point. The jurisprudence has been settled in this sense. In the case of Levey vs. Sponsa, 6 L. C. J. 183, it was held by Judges Lafontaine, Aylwin, Caron and Duval in appeal, confirming the judgment of Judge Morin, that answers to interrogatories *sur faits et articles*, or a refusal to answer pertinent questions, taken *pro-confessis* supply the place of a memorandum in writing under the Statute of Frauds. The same doctrine was incidentally affirmed in the case of Fry vs. The Richelieu Co., 9 L. C. R. 406, also in Baylis vs. Ryland, Court of Review, 15 L. C. R. 94, by Judges Smith, Berthelot and Monk, and again the same view was taken in the case of Minor vs. Knight since the Code. It is true that Art. 1235 of our Civil Code declares that no action or exception can be maintained in commercial matters against any party in which the sum of money or value in question exceeds fifty dollars, unless there is a memorandum in writing signed by the former in the cases therein mentioned. It is equally true that Art. 1245 of the Civil Code declares that "a judicial admission is complete proof against the party making it." Means must be sought to give effect to both these provisions of law in commercial cases which are apparently conflicting. When the party contracting denies the contract, and when examined on oath still denies it, the action fails under article 1235. When he admits the alleged contract by his answer to the action, or upon being examined on oath admits it or so far admits the transactions as to render it probable that the contract was made, the case cannot well be dealt with, otherwise than under the rules of the old law governing cases where there is a *commencement de preuve par écrit*. It is urged that the interrogatories *sur faits et articles* having been served after the evidence was taken cannot operate a *commencement de preuve par écrit*. It was held by the Court of Review, I think rightly, in the case of Beaudry vs. Ouimet, 9 L. C. J. 158, to have this effect. In this case the defendants admit that a contract to deliver

Douglas et al, and Ritchie et al.

teas was made, but that the price per lb. was different from that alleged. There is also a letter filed which goes far to prove a contract. Then there is a failure to answer the interrogatories upon *faits et articles*. These are not very carefully drawn and do not, when taken as confessed, prove the price of the teas but the other incidents of the contract must be taken to be admitted by them. Taking all these together there is sufficient to allow of parol proof by the broker who fully establishes plaintiffs' case. I think the judgment should be reversed.

LORANGER, A. J., concurred.

The following was the judgment in appeal:—

The Court * * * Considering that the respondents neglected to answer the interrogatories *sur faits et articles* served upon them in this cause;

Considering that the said interrogatories may be taken *pro confessis* without any motion being made to that effect by the opposite party, and that the interrogatories in this cause being so taken *pro confessis*, furnish a *commencement de preuve par écrit* to warrant the introduction of parol evidence; and considering that it appears by the evidence adduced that the appellants did, on or about the second day of May, one thousand eight hundred and seventy-two, purchase from the said respondents, through Archibold Moir, their broker, seventy half-chests of tea at forty-eight cents per pound, and fifty-four half-chests of tea at forty-six cents per lb., to arrive by the steamers "Niger" and "Nile," similar to the samples then exhibited to said appellants;

Considering that the said steamers arrived on or about the fifteenth day of May, and that the said respondents refused to deliver said tea according to said samples;

Considering that at the time the said respondents failed and refused to deliver the said tea to appellants the price of tea had advanced at least six cents per pound, and that the said seventy half-chests of tea and the said fifty-four half-chests of tea ought to have contained fifty-one and one half pounds each;

Considering that the failure of the respondents to carry out the said agreement caused a damage to said appellants of three hundred and eighty-three dollars;

Considering that there is error in the judgment appealed from;

Doth reverse the said judgment appealed from, to wit, the judgment rendered by the Superior Court sitting in the District of Montreal on the thirtieth day of December, one thousand eight hundred and seventy-two,

And proceeding to render the judgment which ought to have been rendered by the said Superior Court on the day and year last aforesaid,

Doth condemn the said respondents, jointly and severally, to pay and satisfy to said appellants, plaintiffs in the Court below, the said sum of three hundred and eighty-three dollars, and interest from the third day of July, one thousand eight hundred and seventy-two, and costs as well of this Court as of the Court below."

Judgment of S. C. reversed.

A. & W. Robertson, for appellants.
Monk & Butler, for respondents.
(S.B.)

SUPERIOR COURT, 1874.

MONTREAL, 30TH MAY, 1874.

Coram JOHNSON, J.

No. 2481.

Colson et al. vs. *Ash*, and *Torrance*, et al., Plaintiffs *par reprise d'instance*.

HELD:—That where a reference to arbitrators requires that they shall "finally adjust, settle and determine the precise state of account" between the parties and "the precise amount which either of the said parties should pay to the other," and the arbitrators, by their award, merely determine in a general way how the matters in dispute shall be adjusted, without determining any precise figure of indebtedness by the one party to the other, no action will lie on such award.

The action was based on an award of arbitrators, to whom had been referred certain difficulties and disputes arising out of a deed of co-partnership between the plaintiffs, Colson, Lamb & Co., and the defendant.

The deed of reference required the arbitrators "finally to adjust, settle and determine the precise state of account between the said parties, in relation to everything connected with the said deed of agreement, and the precise amount which either of the said parties should pay to the other, for or by reason of anything connected with the said agreement, or arising therefrom."

And by their award, the arbitrators determined as follows;—

"1st. That all goods, wares and merchandize be forthwith taken back by the parties who furnished the same, he and they respectively paying all charges of delivery and return, and no claim whatever to be made, nor any such allowed, for interest thereon.

2nd. That the lease of the store, fittings, &c., be disposed of by the said Colson & Lamb with the least possible delay and loss, and, unless the same be disposed of before the first day of May next (1869), the said Colson & Lamb shall bear and pay all rent to become due thereon from the said last mentioned date.

3rd. That all expenses incurred for rent of store, fittings, clerk's salary, printing, together with all notarial expenses and counsel fees and all other necessary expenses necessarily incurred in preparing the premises in question for the intended business, shall be paid by the said Colson & Lamb to the undersigned notary, and, after deducting such sum as may be realized from the sale of the said lease and fittings of the said store, shall be paid and borne by the said Colson & Lamb and the said William H. Ash, and in equal proportions, to wit, one half by the said Colson & Lamb and one half by the said William H. Ash.

4th. That neither the said Colson & Lamb nor the said William H. Ash shall have any right to nor shall they claim any damage whatever."

PER CURIAM:—The original plaintiffs whose insolvent estate was assigned to Lindsay, are now represented by Torrance and his partners, the transferees of Lindsay. The action as brought set out that a partnership was entered into between Charles E. Colson and John Lamb of the one part, and the defendant of the other part, on or about the 29th of October, 1868, by deed executed before notaries, under the style of "The London Dock Wine and Spirit Company," and that the defendant was to have the general management of it; the

Colson et al. vs. Ash, and Torrance et al.

principal place of business to be in Montreal, and the duration of it to be five years. There were also stipulations as to the amount of capital each party was to furnish, and as to the division of profits; and the plaintiffs alleged that they went to work to carry out this agreement; hired a store, bought stock, and engaged servants; but the defendant kept aloof, and in January, after the deed of partnership, they notified him that the thing was at an end, and that they would hold him responsible for the consequences. That the parties then referred their difficulties to arbitration, and a regular bond of arbitration was executed, and recited the making of the partnership, and the contentions of the parties respectively, the plaintiffs protesting that the defendant had made default, and caused them $3,000 damages, the other insisting that he was the sufferer to the extent of $5,000; and three gentlemen were appointed to finally settle the whole matter, and adjudge by a majority of them, what, if anything, might be due by one party to the other, both of the parties agreeing to abide the decision under a penalty of $1,000, and it is particularly averred that this arbitration bond provided that the award should be final and conclusive between the parties, to all intents and purposes whatsoever, notwithstanding any defect of form whatsoever therein, or any informality or irregularity of procedure whatsoever in respect thereof, or of the conduct and management generally of the arbitration to be held under the said bond. These are the words of the instrument. The plaintiff then says that the gentlemen appointed went to work, and two of them—being a majority—made their award before Hunter, notary. That this award in effect gave $557.68 to the plaintiffs, which they have a right to recover from the defendant. They then proceed to state that the true meaning of this award is different from its expressed meaning, in one respect; the language actually used in the award with respect to the payment by either of the parties of the different expenses already incurred is "that "the expenses incurred for rent of store, fittings, clerk's salary, printing, "together with all notarial expenses and counsel's fees, and all other "necessary expenses, necessarily incurred in preparing said premises for said "business, shall be paid by the said Colson & Lamb *to the undersigned notary*," &c. The plaintiffs, however, contend that the real meaning of this is that the plaintiffs should pay the said several expenses in the first instance. This is important, because the defendant makes it a ground of defence that these expenses were not paid to the notary as by the award. The defendant pleads besides that there was in reality no award as agreed; that the terms of submission and the object to be attained were a *final settlement*, and so far from this having been effected, or any final sum adjudicated as due by one to the other, the award only opens up new difficulties, and directs that certain modes of settlement are to be adopted by the parties. Both parties are in effect agreed that there is no award at all, and the Court thinks so too. The plaintiff, in saying that the award as expressed is not the award really meant, deprives himself of any action upon it without an *inscription en faux*. The defendant equally insists that there is no award, because instead of a termination there is to be a recommencement of difficulties; so it would seem that nothing remains but an action *pro socio*. The action of the plaintiffs must, therefore, be dismissed with costs.

The following were the reasons assigned in the written judgment of the Court:—

"Considering that by the *acte* before Hunter, N. P., of the 26th of January, 1869, called bond of arbitration between Charles E. Colson and John Lamb, of the one part, and the defendant of the other part, it was agreed that the several matters and things in dispute between the said parties and in the said bond set forth were referred to the arbitrators therein mentioned, to be by them, as such arbitrators and *amiables compositeurs*, or by a majority of them, finally adjusted and determined, power being thereby given to them, the said arbitrators, to finally adjust, settle and determine the precise state of account between the said parties, and the precise amount which either of the said parties should pay to the other; and considering that the said arbitrators have not made any award whereby any of the said matters and things are finally determined, but have, by their pretended award in this cause fyled, opened new fields of contention between the parties; considering, therefore, that the plaintiffs *par reprise d'instance* have not established their case by evidence, doth dismiss the present action with costs."

Action dismissed.

Abbott, Tait & Wotherspoon, for plaintiffs & plaintiffs *par reprise d'instance*.
Bethune & Bethune, for defendant.
(S.B.)

SUPERIOR COURT, 1874.

MONTREAL, 10TH SEPTEMBER, 1874.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 793.

In re *Downey, Doherty* et al., and *Louis J. Lajoie*, Petitioner, and *Thomas Doherty*, mis en cause.

HELD:—1. That a motion for a rule for contempt against a witness must be notified to the party moved against.

2. That the rule must be served personally upon the party, unless such party absconds in order to avoid it.

PER CURIAM:—In this cause, an application is made to have a rule for contempt declared absolute against the witness Thomas Doherty, who has neglected to sign a deposition made by him under the Insolvent Act. The rule was ordered to issue *ex parte* without notice of the application having been given to the witness. The order was given by a judge in Chambers. It was held in *Roy* vs. *Beaudry*, 6 L. C. Jur. 85, that the witness must have notice from the beginning. Further, in the present case, the rule was not served personally, without any explanation of the reason of there being no personal service, and this is plainly in contravention of C. C. P. 781, which requires it.

Rule discharged.

J. A. Perkins, for applicant.
(J.K.)

COURT OF REVIEW, 1874.

MONTREAL, 30TH JUNE, 1874.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

No. 731.

O'Halloran vs. *Kennedy.*

HELD:—1. That where money is payable at the domicile of the debtor, demand of payment must be made there before interest can accrue thereon.

2. That a payment of the capital so due to a party indicated by the creditor, although after the date at which it fell due, is sufficient to prevent the accruing of interest thereon.

This was a review of a judgment rendered in the Circuit Court at Sweetsburg, in the district of Bedford, (Dunkin, J.) on the 27th of April, 1874, dismissing the plaintiff's action with costs.

The action was instituted on the 17th of November, 1873, and claimed from defendant the sum of $150 and interest at 7 per cent. from the 1st of said month of November, and costs of suit.

The $150 claimed formed the first instalment payable under a deed of sale, and by the deed was made payable on the 1st of November, 1873; the deed providing that interest at 7 per cent. should be payable from that day.

The money was payable at the defendant's domicile at Granby.

The defendant notified the plaintiff by letter dated 31st Oct., 1873, that the money was ready, and that he would be prepared to pay it to plaintiff, on his calling for it at Granby, and that he would not pay interest should the plaintiff neglect to call for his money.

This letter was written, on defendant's behalf, by Mr. Amyrault, N. P., and plaintiff replied to it by letter dated 5th November, 1873, addressed to Mr. Amyrault, intimating that the amount really due to him on the 1st November was $209.50, instead of $150, (the difference being composed of an alleged claim of $59.50 for interest, not really payable under the deed, and not even asked for in the declaration), and that on defendant remitting it by express he would give him a receipt, adding these words: "*The express agent's receipt will be a receipt.*"

Mr. Amyrault, some days after the receipt of plaintiff's letter, handed it to defendant, and he, on the 18th of November, 1873, delivered the $150 to the express agent at Granby, *and obtained his receipt.*

The package containing the money was addressed to the plaintiff, at Sweetsburg, (he really living at the village of *Cowansville*), and was received by the express agent at Sweetsburg on the 18th of November, 1873.

On the 20th of November, 1873, the Sweetsburg express agent called with the package at the plaintiff's residence in Cowansville, but the plaintiff was absent, and on the 22nd of November the plaintiff called at the express office at Sweetsburg and got the money; having in the meantime caused his action to be served on the defendant at Granby on the 20th of said month of November.

O'Halloran vs. Kennedy.

The action was returned into Court on the 27th of November, 1873, and on the 9th of December, 1873, the defendant fyled a *retraxit*, whereby he acknowledged the receipt of the $150, and declared that he reduced his demand "to the interest merely on said principal debt from the first day of November last until said date of payment, and the costs of this suit."

To the action thus reduced the defendant pleaded, in effect, that by law the $150 were only payable at his own domicile; that he had nevertheless (although not bound to do so) notified plaintiff, as already explained, of his readiness to pay at such domicile; that plaintiff, instead of calling and demanding the money at defendant's domicile, notified defendant through Mr. Amyrault, as explained, to pay the money to the express agent, whose receipt should be binding, and that he accordingly paid the amount to such express agent long before he was served with the present action.

By his answer to defendant's plea the plaintiff contended, amongst other things, that no payment was really made by defendant until the 22nd of November, and that he ought then to have paid interest since the [illegible]st of the month, and the costs of the suit.

Under the circumstances the Court dismissed the action with costs.

JOHNSON, J.—There is a question of the plaintiff's right to costs presented here. These are in the discretion of the Court below, and are rarely interfered with in review. This Court, however, has never gone the length of saying that it would not rectify a plain violation of principle; and such, it is contended by the plaintiff, there has been here. The debt was due on the 1st of November, and the defendant notified the plaintiff that he would be ready to pay on that day; but would not pay interest afterwards. The plaintiff replied that the defendant might send the money by express, and that the receipt of the express agent would be a sufficient one. This reply of the plaintiff was received by the defendant on the 6th of November; that is, it was received by Amyrault, who acted for him, and communicated it to him. On the 18th, the defendant delivered the $150 to the express agent, and took his receipt. The defendant was under no obligation to do this. All he had to do under the law was to stay at home until his creditor, who had been notified that the money was ready, should come and get it, and no interest was due if notice had been given as was the case here, unless there was a default on the part of the defendant. Being therefore under no obligation to take the money to his creditor or to his agent, the Express office, it was a gratuitous mandate he was executing at the risk of the plaintiff. The debt was payable at Granby; it never was demanded there by action or otherwise before the defendant paid it to the person, and in the manner indicated by the plaintiff for his own accommodation. Therefore, when the action was brought, there was nothing due by the defendant, and the judgment is right, and should be confirmed.

Judgment of Circuit Court confirmed.

T. J. Doherty, for plaintiff.
Bethune & Bethune, for defendant.
(S.B.)

SUPERIOR COURT, 1874.

MONTREAL, 31ST MARCH, 1874.

Coram BERTHELOT, J.

No. 2198.

Benoit et al. vs. *Benoit* et al.

HELD :—That an authorisation to the curator to a substitution to sell real property affected by the substitution, unaccompanied by a similar authorisation to a tutor *ad hoc* to such of the substitutes as are living but incapable of acting, is insufficient.

This was an action by the institutes to compel a curator to a substitution to execute a deed of sale of certain real property, which it was alleged he had been judicially authorized to sell, and to compel the purchaser of such property to accept of such deed and pay the necessary purchase money.

The defendants severed in their defence, and pleaded to the effect, that the authorisation to sell obtained by the curator was insufficient, inasmuch as a number of the substitutes were living and incapable of acting, and no similar authorisation had been granted to a tutor *ad hoc* to such substitutes.

The Court sustained these pleas and dismissed the action, assigning the following ressons :—

" La Cour * * * considérant que l'autorisation de vendre l'immeuble dont il est question en cette cause et dépendant de la succession de feu François Benoit et soumis à des dispositions testamentaires, selon son testament solennel du 11 Mars 1863, reçu devant Mr. Belle et son confrère, notaires, n'a été ainsi obtenu, le vingt trois Aout, mil huit cent soixante et onze, que sur la requête du défendeur François Benoit, en sa qualité de Curateur à la substitution créé par le dit testament, sans l'avoir été en outre, aux termes de l'article neuf cent quarante cinq du Code civil au nom d'un Tuteur *ad hoc* pour représenter les appelés à recevoir en vertu de la dite substitution (nés au temps de la dite autorisation mais incapables) et qu'en ce, il y a eu insuffisance d'autorisation pour faire procéder légalement à la vente de l'immeuble ci-dessus mentionné affecté par la dite substitution, et que par conséquent les demandeurs ne peuvent forcer en justice les défendeurs à accepter le titre de vente qui leur est offert, lequel serait insuffisant pour transférer tous les droits de propriété du dit immeuble tant à la jouissance qu'au fonds :—

Considérant qu'il est indifférent que l'insuffisance de l'autorisation de vendre résulte du défendeur François Benoit lui-même, et de la part qu'il a eu aux procédés qui l'ont précédé :—

La Cour pour ces raisons déboute l'action des demandeurs, mais sans frais, attendu la part que les défendeurs ont eu à l'irrégularité des procédés qui ont précédé et accompagné la vente du cinq Décembre mil huit cent soixante et onze dont les demandeurs prétendent poursuivre l'exécution."

Action dismissed.

Belanger, Desnoyers & Ouimet, for the plaintiffs.
L. A. Jetté and *Jetté & Béique*, for the defendants.
(S. B.)

COURT OF REVIEW, 1874.

MONTREAL, 30th JUNE, 1874.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

No. 121.

Latham vs. *Martin.*

HELD:—That an admission in a plea of a portion of plaintiff's demand, unaccompanied by an actual confession of judgment, will not entitle the defendant to the costs of contestation, in case the plaintiff does not obtain judgment for more than the amount admitted, and that, under any circumstances, a prayer in such plea that the defendant be condemned to pay costs as in an uncontested action only is irregular.

This was a review of a judgment of the C. C. for the district of Iberville, (CHAGNON, J.,) rendered on the 13th of March, 1874.

JOHNSON, J:—There is only a question of costs involved in the present case. The plaintiff has judgment for his debt; but he is condemned to pay to the defendant the costs of contestation after plea fyled. He brought his action for $180; but the defendant pleaded that he only owed $150, and in the conclusion of his plea, declared his consent that judgment should go for that amount, with costs as in a suit not contested, and prayed costs against the plaintiff in case of contestation; but he neither fyled a confession, nor made a tender, in the way that either could be made available to plaintiff, who fyled a general answer, and got judgment only for the amount which the defendant admitted by his plea to be due. This judgment, as far as the debt is concerned, is admitted to be right; and it is undeniable that any actual contestation by the plaintiff as far as the amount of the debt is concerned would have been unfounded. The question then is whether the judgment condemning him to pay the costs of contestation in the present case is right. At first sight, it might appear to be so; and at the argument, I confess that I was struck by the plausibility of a condemnation to pay costs for an unfounded contestation; but looking at things and not merely at words, it will appear evident that the judgment was wrong. There is no real contestation in this case after plea fyled. The defendant owes a debt that he admits; but he does not fyle a confession of judgment which would enable the plaintiff to get a judgment against him upon a simple inscription; and enable himself to get judgment for costs against the plaintiff, if the confession was not accepted; nor does he bring the money into Court, which the plaintiff could put into his pocket; but he contends by his plea, which the plaintiff cannot see until after it has been fyled, that he ought only to pay costs as in an uncontested action, and the plaintiff's general answer is necessary to join issue upon that unfounded pretension. The contestation, so called, therefore, by the plaintiff, is right so far as it goes, and the defendant by this plea forces the plaintiff either to file a general answer, which he did, or to leave the plea unanswered, in which case a general answer would be deemed by law to have been made, and though if a contestation be special, and evidence be had upon it, a plaintiff might have to bear those costs if it were unfounded, yet the plaintiff here was not bound to be satisfied with a mere admission upon which he

Latham vs. Martin.

had to proceed to judgment, since he had neither the confession nor the money; and even the admission of the debt was accompanied by a condition as to costs which was inadmissible, inasmuch as it was only by the plea that the admission was given, which would have entitled the plaintiff to judgment for costs of the action after plea fyled. The judgment is therefore wrong in principle, and in this particular is reformed; though the Court in no way retracts its practice of not interfering in a matter of costs only where they are in the discretion of the Judge below. There is, however, a real difference between disturbing the exercise of a lawful discretion; and laying down the rule that we will in no case rectify a violation of principle. The defendant was clearly wrong in not following the direction indicated by Art. 97 of the Code of Procedure; for if he had fyled a confession, and it was not accepted, the costs would have fallen on his adversary. By his contesting the case here, the defendant must pay the costs of review, as well as those below.

The following were the reasons assigned in the written judgment in Review:

"The Court * * * Considering that there is error in the said judgment, to wit in so far as it condemns the plaintiff to pay the costs of contestation, doth, revising said judgment, reverse the same, in that particular only, and proceeding to render the judgment that ought to have been rendered in the premises, considering that the defendant did not conform to the Article 97 of the Code of Civil Procedure by filing a confession of judgment, which if not accepted by the plaintiff would have thrown the costs upon him; and considering that by his plea admitting the debt the defendant prayed that he might not be condemned to pay costs except as in an uncontested action, and that the Plaintiff had a right to contest that part of the said plea, inasmuch as it was only after plea fyled that he could ascertain the defendant's pretensions, doth condemn the said defendant to pay the said costs of contestation in the said Circuit Court, with costs of this Court of Revision against said defendant in favor of said plaintiff *distraits* to Messrs. A. & W. Robertson, his attorneys.

Judgment of C. C. reversed.

A. & W. Robertson, for plaintiff.
Lacoste & Drummond, for defendant.
(S.B.)

COURT OF REVIEW, 1874.

MONTREAL, 30TH MAY, 1874.

Coram MONDELET, J., BERTHELOT, J., TORRANCE, J.

No. 803.

In the matter of *Cranson A. Starke & George Shaw*, Insolvents, Petitioners for discharge.

HELD:—That the giving of notice, required by section 105 of "The Insolvent Act of 1869," does not include the necessity of notice to each individual creditor required by section 117.

This was a review of a judgment rendered by the Superior Court at Montreal (MACKAY, J.) on the 31st March, 1874, rejecting a petition by the in-

solvents for a discharge under the 105th section of "The Insolvent Act of 1869," on the ground that the insolvent had not given a separate notice to each individual creditor as required by the 117th section of the Act.—Vide 18 L. C. Jurist, p. 73.

MONDELET, J., (*dissentiens*) :—In this case I entirely concur in the reasoning of the Hon. Judge who rendered the judgment complained of, and am of opinion to confirm that judgment.

BERTHELOT, J., referred to the clauses of the Insolvent Act, and considered that they did not bear the interpretation which had been put upon them in this instance. This was not one of the occasions when notice by mail was required to be sent to the creditors.

TORRANCE, J., felt that something was to be said on both sides, and had not come to the conclusion just stated by Berthelot, J., without a good deal of hesitation. In agreeing with the majority, however, he was sustaining a practice which had obtained for quite a number of years.

The following was the judgment in review :—

"The Court * * * Considering that the petitioners have given the notices required by law, namely those referred to in section 105, without having mailed the notices to their creditors referred to in section 117 of the Insolvent Act of 1869, doth reverse and set aside the judgment of the Superior Court for Lower Canada, of date the twenty-first day of March, one thousand eight hundred and seventy-four, and proceeding to render the judgment that ought to have been rendered in this cause; and, considering that the said petitioners have observed all the requirements of the said Insolvent Act of 1869 to obtain the granting to them of their discharge as such insolvents; and, considering that none of the creditors of the said petitioners have appeared or shown cause against the granting of their petition for a discharge : the Court here doth grant the said petition, and doth hereby grant a discharge to the said insolvents, Cranson A. Starke and George Shaw, and they are hereby discharged from all their debts and liabilities existing at and previous to the date of the said assignment, to wit, the seventh day of November, one thousand eight hundred and seventy-two, under and in accordance with the terms and provisions of the said Insolvent Act of 1869.*

His Honor Mr. Justice MONDELET dissenting."

Judgment of Superior Court reversed.

A. & W. Robertson, for petitioners.

Strachan Bethune, Q. C., counsel.

(S. B.)

---

* The case of Waddell, referred to by Mackay, J., is reported in the U. C. Law Journal, Vol. 2, N. S., pp. 242, 243 and 244. And a prior judgment in the same sense is reported in same vol. at pp. 303, 304. The case of Hope & Franck, also referred to by Mackay, J., is reported in the 18th L. C. Jur., p. 28. [Reporter's note.]

SUPERIOR COURT, 1874.

MONTREAL, 30TH JUNE, 1874.

Coram TORRANCE, J.

No. 639.

Hargrave vs. *Clouston* et al.

HELD:—That the usufructuary of shares of stock in the Bank of Montreal is entitled to the dividends and profits on all new shares of stock subscribed for, under the privilege granted by the Bank to the holder of the original shares to so subscribe.

The facts of this case and the pretensions of the parties are to be found in the following written admissions:—

"It is admitted by the parties, plaintiff and defendants in this cause.

First.—That in and by the contract of marriage duly made and executed on the 2nd of June, 1859, at Edinburgh in Scotland, between the late James Hargrave mentioned in the declaration, and the defendant Margaret Alcock, the said James Hargrave did assign and transfer one hundred shares of stock of the Bank of Montreal, being five thousand pounds of said stock, then the property of said James Hargrave, to William Mactavish, Dugald Mactavish and the defendant James Stuart Clouston, and the survivors or survivor of them, in trust, first, for the payment of the free annual dividends, interest and profits of the said stock to the said James Hargrave during the joint lives of himself and said Margaret Alcock, and secondly, for the like payment of the aforesaid free annual dividends, interest and profits to the said Margaret Alcock in case of her surviving the said James Hargrave, and that during all the days of her natural life as a provision or annuity to her, and that in case the said Margaret Alcock should survive the said James Hargrave, then the said trustees should at her death assign and transfer the said trust funds and estate to such person or persons and for such purposes and under such conditions as the said James Hargrave had directed and appointed or should direct and appoint by any will or codicil then executed or thereafter to be executed by him.

Second.—That the marriage between the said James Hargrave and Margaret Alcock was duly solemnized at Edinburgh aforesaid on the 3rd of June, 1859.

Third.—That in virtue of the said marriage contract the said one hundred shares of Bank of Montreal stock were thereafter duly transferred to and vested in the said William Mactavish, Dugald Mactavish, and the defendant James Stuart Clouston. That William Mactavish and Dugald Mactavish are dead, and that the defendant, James Stuart Clouston, is the sole surviving trustee under said marriage contract and continues to act as such, and that the said one hundred shares of Bank of Montreal stock now stand in the books of the Bank in the name of the said James Stuart Clouston as such trustee.

Fourth.—That on or about the 21st of October, 1864, the said James Hargrave died, having on the 31st of January, 1856, at Edinburgh aforesaid, made, signed, sealed and published his last will and testament before witnesses in conformity with the laws of Scotland aforesaid, and did thereby (after sundry bequests) direct, with regard to the residue and remainder of his estate, real and personal,

that the same be divided into five equal parts or shares, of which the said James Hargrave thereby willed and appointed that two fifth parts or shares should belong to and be held in trust for the said plaintiff, his son, to be payable to him on his attaining majority or at the first term of Martinmas or Whitsuntide happening after the death of the said James Hargrave, whichever of said events should last happen.

That the said will has been duly proved and registered according to law.

That the plaintiff attained the age of majority in the year 1860.

Fifth.—That on the 16th of January, 1872, at a meeting of the directors of the Bank of Montreal, held at Montreal, it was resolved that, in accordance with the recommendation of the special general meeting of the shareholders of the said Bank, held on the 9th of January then instant, the issue of two million dollars then authorized be and is hereby allotted to the shareholders registered upon the stock books of the Bank at the close of business on the 15th day of January then instant, in the proportion of one new share for each three shares of the then capital stock, at a premium of twenty-five per cent., such premium together with the first instalment to be payable at the time of each shareholder's acceptance of his allotment of new stock.

That the printed paper herewith fyled, marked plaintiff's exhibit "A," is a true copy of said resolution and of a circular relating to the same which was, on the said 16th of January, 1872, issued to the shareholders therein.

That under said resolution the owners and proprietors of the said one hundred shares of stock in the Bank of Montreal, so assigned in trust by the late James Hargrave and held in trust by the defendant James S. Clouston, became entitled to subscribe for and receive and be allotted thirty-three shares of said new stock of said Bank of Montreal upon payment of the par value thereof together with the premium of twenty-five per cent.

Sixth.—That on the 29th of November, 1872, at a meeting of the directors of the Bank of Montreal, held at Montreal, it was resolved that, in accordance with the recommendation of the special general meeting of the shareholders of the said bank, held on the twenty-seventh of November then instant, the issue of four million dollars new stock then authorized be and is hereby allotted to the shareholders registered upon the stock books of the bank at the close of business on the fourth day of December then next, in the proportion of one new share for each two shares of the said capital stock, at a premium of twenty per cent. That the printed paper herewith fyled, marked "Plaintiff's Exhibit B," is a true copy of said last mentioned resolution and of a circular relating to the same, which was on the 4th of December, 1872, issued to the shareholders of said Bank of Montreal.

Seventh.—That at the time when the said new stock of the Bank of Montreal was offered to be allotted as aforesaid, the same was and still is worth a premium largely in excess of the said premium of twenty-five per cent. and twenty per cent., to wit, a premium of one hundred per cent. or two hundred dollars per share.

Eighth.—That the said defendant Margaret Alcock claims to be entitled, under the conditions of her said marriage contract with the said late James Hargrave, to

Hargrave vs. Clouston et al.

the said new issues and allotments of capital stock of the Bank of Montreal and all the profits and benefits arising therefrom, and to subscribe for and hold the same in her own name and as of her own absolute property, and has caused the said thirty-three shares and sixty-six shares to be subscribed for and alletted with the view of retaining the same as her own absolute property, and has furnished the funds necessary for such subscription, and the said ninety-nine shares now stand and are registered in the books of the said Bank of Montreal in the name of the said defendant James Stuart Clouston, as such trustee, who holds and retains the same for the benefit of the said Margaret Alcock, and has since hitherto paid her the annual profits arising therefrom.

That the annual dividends and revenues arising from the one hundred shares of stock in the Bank of Montreal mentioned in the said marriage contract have been regularly paid to the said Margaret Alcock since the death of the said James Hargrave.

Ninth.—That the plaintiff as proprietor of two-fifths of the residue of the estate of the said James Hargrave claims to be and to have been entitled to subscribe for and hold as his own property two-fifths of the said ninety-nine shares, namely thirty-nine and three-fifths shares of such issues of new stock, and was at the times mentioned in the declaration ready and desirous to subscribe for and obtain his proportion of the same and to pay the par value thereof, together with the stipulated premiums as above mentioned, and duly notified the defendants of his said claim, and desired, and offered to pay said value and premiums, and has since the said subscription of said new stock tendered and offered the defendants and each of them an amount sufficient to repay and refund the amount so expended by the said Margaret Alcock in taking up the said new stock, all which offers have been refused by defendants on the alleged ground that under the terms of the said marriage contract the said Margaret Alcock was entitled to subscribe for said new stock and to receive all the advantage to be obtained by such subscription, and to hold said new stock as her absolute property.

Tenth.—That the question submitted for adjudication by the parties, plaintiff and defendants herein, is as to the right to subscribe for and retain said new stock of the Bank of Montreal, and whether such right belongs to the said Margaret Alcock, in virtue of her said marriage contract, or to the proprietors of the residue of the estate of the said James Hargrave under his will or to the surviving trustee James Clouston."

PER CURIAM:—The parties have admitted the facts of this case, and the Court has to give its interpretation to a marriage contract which gave to the female defendant, Mrs. Hargrave, the free annual dividends, interest and profits of 100 shares of the stock of the Bank of Montreal. Is the new issue of stock claimed by plaintiff an increment of the 100 shares, or is it something in which Mrs. Hargrave has no interest? If we look at the terms of the contract she is entitled to the free annual dividends, interest and profits of the 100 shares; she is entitled to the annual profits of all that is produced by the 100 shares; and it is impossible to deny that the new stock in question is the produce of the 100 shares, and therefore the Court holds that Mrs. Hargrave gets the benefit of this new stock during her lifetime, and the demand of the plaintiff that James Clouston, the

trustee, be ordered to transfer the new stock to him is inadmissible. The Court applies to this case the dictum of C. J. Bigelow, 12 Allen, R. 361 (Mass.) "It seems to us that the proceeds of the sale of the right to take new shares in "the corporation are to be regarded as an extraordinary bonus or addition to the "stock, which was devised in trust for the benefit of the widow of the testator, "for her life or widowhood, with remainder over to his nephew; and that this "increment must be treated as capital, and added to the principal fund, the "income of which is to be paid to the widow as directed by the will. The right "or privilege to take new shares in a corporation upon an increase of the capital "stock within the limits fixed by the charter is a benefit or interest which "attaches to stock, not as profit or income derived from the prosecution of the "corporate business, but as inherent in the shares in their very creation."—Gray vs. Portland, Banks' Mass. 364.

The following is the judgment of the Court:—

"Considering that, under the terms of the contract of marriage, of date the 2nd of June, 1859, between the late James Hargrave and Margaret Alcock, the said James Hargrave did assign and transfer one hundred shares of stock of the Bank of Montreal to William Mactavish, Dugald Mactavish and the defendant, James Stuart Clouston, and the survivors or survivor of them, in trust, first for the payment of the free annual dividends, interest and profits of the said stock to the said James Hargrave during the joint lives of himself and said Margaret Alcock, and secondly for the like payment of the aforesaid free annual dividends, interest and profits to the said Margaret Alcock, in case of her surviving the said James Hargrave, and that during all the days of her natural life as a provision or annuity to her;

Considering that the demand of plaintiff is that he be held and declared to be entitled to have, own and possess as his own property thirty-nine and three-fifth shares of the new stock of the said Bank of Montreal;

Considering that said new stock is rightfully held by the defendant James S. Clouston in trust for the payment of the free annual dividends, interest and profits thereof to the defendant Margaret Alcock, doth dismiss said plaintiff's action and *demande*, with costs *distraits* to Messrs. Kerr, Lambe & Carter, attorneys for defendants."

Action dismissed.

Ritchie, Borlase & Rose, for plaintiff.
Kerr, Lambe & Carter, for defendants.
(S. B.)

COURT OF REVIEW, 1874.

MONTREAL, 30th JUNE, 1874.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

No. 1459.

Salvas vs. *Levreau*, and *Gendron*, Oppt., and *Stewart*, Assignee of Gendron, Petr., and *Taché*, sheriff, *mis en cause*.

HELD:—That a payment by the Sheriff, under a judgment of distribution, to an opposant therein collocated at a time when such opposant was no longer possessed of his estate (having assigned the same under the Insolvent Act of 1869) is good, and cannot be questioned subsequently by the assignee

This was a review of the following judgment rendered by the S. C. at St. Hyacinthe, (SICOTTE, J.) on the 22d November, 1873:

Salvas vs. Levreau.

"La cour après avoir entendu le syndic Stewart et le shérif Taché sur la requête du premier aux fins de contraindre le shérif à lui livrer un ordre reçu par ce dernier du trésorier de la Province payable à l'ordre de George E. Gendron pour la collocation faite en sa faveur par jugement de distribution du 16 Avril, 1872, avoir examiné la procédure et la preuve:—

Considérant qu'il est constant que les deniers prélevés par le shérif ont été versés au bureau du trésorier longtemps avant la mise en faillite de Gendron par la cession volontaire de ses biens:—

Considérant que Gendron a été colloqué par ce jugement sur opposition qu'il avait fait avant telle cession pour la somme que réclame le syndic, et que ce dernier n'est pas intervenu dans l'instance sur la distribution des deniers, preparée, affichée et homologuée, après les publications ordinaires et faites depuis la cession et sa nomination comme syndic:—

Considérant qu'il est constaté que le shérif, en obéissant aux instructions du trésorier et aux dispositions de la loi, a, le douze Juin mil huit cent soixante-douze, fait remise à Gendron de l'ordre en faveur de ce dernier que lui avait delivré le trésorier:

Considérant que le syndic n'a fait aucune démarche auprès du trésorier ou du shérif, pour réclamer cet ordre que longtemps après la livraison faite à Gendron:—

Considérant que le shérif en remettant et délivrant à Gendron cet ordre du trésorier a agi de bonne foi, en conformité à la loi, et pour exécuter le devoir qui lui était imposé, déclare qu'il ne peut être inquiété sous ces circonstances pour ce fait; déboute le syndic de sa requête et procédure contre lui avec dépens distraits à MM. Papineau & Morison."

JOHNSON, J:—On the 30th of March, 1872, Gendron, an opposant in this case, was collocated by the judgment of distribution for $189.11. This judgment of distribution was published in the usual manner in the Prothonotary's office, and open to all who had a right to contest it. Nobody, however, did contest it, and it was duly homologated on the 16th of April, and Gendron, on the 12th of June, was handed a cheque for his money in the usual form, signed by the Treasurer of the Province, and payable to Gendron's order. Nearly a year afterwards, on the 22nd of April, 1873, Mr. Stewart presented himself to the Court, and by his petition asked that the Sheriff might be ordered to deliver this cheque to him, as having been appointed assignee to Gendron's insolvent estate on the 9th of April, 1872. The Sheriff made answer, among other things, that he had paid Gendron nearly a year before by order of the Court, and that the petitioners might have contested the judgment of distribution, but had neglected to do so: two propositions that appear quite conclusive against the prayer of the petition, and on the merits it was dismissed. Mr. Stewart could not avail himself of his own neglect in not contesting the judgment of distribution which remained open for contestation up to the 16th of April, he having been appointed assignee on the 9th; nor could he ask that the Sheriff should be held liable for obeying the order of the Court, while he himself omitted to object, or to notify the Sheriff in any manner. All debtors of insolvent parties may be bound to take cognisance of the estate of their creditors

being vested in the officer of the insolvent court; but it is not necessary to notice that point here. The Sheriff could no more take upon himself to alter a judgment of distribution without the authority of the Court, than this Court could *ex mero motu*, give judgment for or against an assignee who was not before it to preserve the rights of the creditors. The judgment is, therefore, confirmed.

Judgment of S. C. confirmed.

Dorion, Dorion, & Geoffrion, for Stewart.
Lacoste & Drummond, for Taché.
(S. B.)

COURT OF REVIEW, 1874.

MONTREAL, 30TH MAY, 1874.

Coram BERTHELOT, J., MACKAY, J., TORRANCE, J.

No. 151.

Macdonald et al. vs. *Prémont* et ux., and *Lague* et al., Opposants.

HELD:—That an *alias* writ of *fi. fa. de terris*, in a case in which judgment was rendered in the Circuit Court, cannot legally be issued and signed by the Prothonotary of the Superior Court.

This was a review of a judgment of the Superior Court for the district of Iberville (CHAGNON, J.) rendered on the 23rd of January, 1874, maintaining the opposition *afin d'annuler* fyled in this case, for the following reasons:—

"La Cour * * * attendu que le Bref d'exécution *alias Fieri Facias de Terris*, émané en cette cause, portant numéro cent cinquante-un de cause de la Cour de Circuit de ce district d'Iberville, a été ainsi émané, par le protonotaire de la Cour Supérieure du dit district, et attendu que l'autre Bref d'exécution dans la cause numéro huit cent quarante-cinq des causes de la dite Cour de Circuit, noté par le shérif sur le dit premier bref d'exécution pour valoir comme opposition afin de conserver, a été ainsi émané par le protonotaire de la dite Cour Supérieure;—

Considérant que le dit protonotaire n'avait aucune juridiction ni autorité pour émaner les dits Brefs, lesquels auraient dû émaner de la Cour de Circuit par laquelle les jugements mentionnés dans les dits Brefs avaient été rendus et prononcés;—

Considérant que les dits *alias* Brefs de *Fieri Facias de Terris* ne sont pas de la nature d'un Bref de *venditioni exponas*, mais qu'au contraire les dits *alias* Brefs de *Fieri Facias de Terris* doivent émaner de la Cour qui a prononcé le jugement originaire;—

Considérant que l'émanation des dits *alias* Brefs de *Fieri Facias de Terris* n'est pas une procédure incidente à la saisie faite en vertu du premier Bref d'exécution de *Fieri Facias de Terris*, émané dans chacune des dites causes;—

Considérant qu'il est faussement énoncé aux dits *alias* Brefs de *Fieri Facias de Terris* que la Cour Supérieure ait émané le premier Bref d'exécution contre les terres du défendeur, et ait commandé au shérif de saisir les immeubles du

Ford et al. vs. Auger et al.

défendeur en vertu du dit premier Bref, le dit premier Bref étant émané de la Cour de Circuit, qui avait rendu le jugement dans les causes y indiquées ;—

Considérant que ce moyen d'opposition invoqué par les opposants, s'applique aux dits deux *alias* Brefs de *Fieri Facias de Terris* et qu'il est bien fondé en loi ;

Renvoie la dite contestation tant en droit qu'en fait produite par les demandeurs à l'encontre de la dite opposition des opposants, et en conséquence les dits Brefs d'exécution *alias Fieri Facias de Terris*, sont déclarés illégaux, irréguliers et nuls et non avenus, de même que tous procédés faits sur iceux, et la Cour déclare de plus la saisie faite de l'immeuble de l'opposante, en vertu du dit *alias* Bref de *Fieri Facias de Terris* dans les dites causes sous numéro cent cinquante-un, nulle, illégale et non avenue, et main-levée en est accordée à la dite opposante, le tout avec dépens dont distraction est accordée à E. Z. Paradis, avocat des dits opposants."

BERTHELOT, J :—The Court is of opinion that the judgment complained of in this case is in all respects correct, for the reasons stated therein, and it is, therefore, confirmed with costs.

Judgment of Superior Court confirmed.

A. & W. Robertson, for plaintiffs.

E. Z. Paradis, for opposants.

(S.B.)

SUPERIOR COURT, 1874.

MONTREAL, 30th JUNE, 1874.

Coram JOHNSON, J.

No. 639.

Ford et al. vs. *Auger* et al.

HELD:—1. That in a personal action against several defendants, they may be all legally sued in the district within which one of them has been served personally.

2. That a paper writing purporting to be a promissory note which is proved to have been fraudulently written over the signature of the maker, which had been written on a piece of paper as indicatory merely of the party's address, cannot be recovered on.

JOHNSON, J :—There are eleven cases, of which this is the first on the list, which were heard before me in the early part of this month at enquête and merits, and as they all originated in a series of dealings of precisely the same character, the parties consented to let the evidence in one be common to them all. The inscription also made the enquête applicable both to the declinatory exception pleaded in each of the cases and to the plea which was fyled to the merits; and the judgment now to be rendered will apply to all the eleven cases.

First, as to the declinatory exception. The alleged makers of the notes are persons residing in the Districts of Joliette and of Terrebonne, and they except to the jurisdiction of this Court. The general rule with respect to service of summons is stated in Art. 34 C. C. P., and the law in personal actions is that the defendant may be served, 1st, before the court of his domicile; 2nd, before the court of the place where the demand is served upon him personally; or

3d, before the court of the place where the right of action originated. There are two defendants in each of these cases, first, a man named Rhoades, and second, the maker of the note in each case. Rhoades makes default; the other defendants say that they are only liable to be sued before the court of their domicile. The declarations allege the notes to have been made out of the jurisdiction of this court, in the several places where the defendants resided, and yet they are dragged here, not before the court of their domicile, nor before that of the place where the right of action originated; neither have they been served personally in this district. But where there are several defendants in the same suit (as is the case here) residing in different jurisdictions, the law makes an exception to the general rules laid down in Art. 34, and says they may all be brought before the Court of the jurisdiction where one of them has been summoned in conformity with those rules; and here Rhoades has been served in Montreal and sued before the court of his alleged domicile; therefore the other defendants can also be brought here. But the declinatory exception raises the questions of of fact that Rhoades really had no domicile here, and that his name is only put forward as a pretence to bring the other defendants into the district, and deprive them of their right. The defendants also contend by their exception that the right of action did not originate here. Upon the first of these two points the Court would be, as far as the declaration can furnish information, against the defendants; for Rhoades' domicile is alleged to be in Montreal, and therefore we must ascertain the fact from the evidence. Upon the second point there can be no difficulty whatever, since the declaration itself settles it at once against the plaintiffs. The right of action did not originate in the district of Montreal, but in the district of Joliette, and the plaintiffs themselves say so. They allege that the note was made at St. Lin, in the district of Joliette, by the defendant in favor of one N. B. Smith, who *then* and *there* endorsed and delivered the same to J. G. Rhoades, who also *then* and *there* endorsed and delivered the same to the plaintiffs. Although, therefore, in an action by an indorsee and holder against the indorser and the maker, where the note has been endorsed in Montreal, the right of action of the plaintiff may be said to have originated here, the plaintiffs themselves say they acquired it from Rhoades at St. Lin, in another district, and their right of action, whatever it may be, originated there. We have only, therefore, to see by the evidence whether the fact that Rhoades' name is put forward fraudulently, and that he is a mere sham defendant raised up for the purpose of frustrating the defendant of his *forum* is true; because if it is, I entertain no doubt that the declinatory plea must hold, *fraus omnia corrumpit*, and the injustice of bringing all these people here with their witnesses, at enormous expense, merely by the device of getting a sham defendant to put his name on the note at the eleventh hour would be grave and undeniable. But there is another point that the defendants have overlooked. Rhoades was served here personally. That is a good service, wherever his domicile may have been, and wherever the right of action originated. I mean it is a good service *prima facie*; not if this service is a collusive pretence to deprive the other defendants of their right to their own *forum*. But to appreciate the facts which would establish such a collusion and pretence, it is necessary to

Ford et al. vs. Auger et al.

adjudge upon the plaintiff's right of action against Rhoades. This the Court is enabled to do by the proceeding that has been adopted by the parties of adducing evidence upon both issues at once. There are eleven notes, all of them payable 6 months after date. The earliest is dated 31st of July: the latest the 5th of August; so that all these notes would have become due from the 3rd to the 8th of Feb. The consent in all the cases is that the evidence taken in the case against Auger is to be common to all the others. Taking this strictly, all the notes would have been over-due when Rhoades endorsed them to the plaintiffs, for the plaintiffs went to consult Messrs. Monk and Butler on the 6th of Feb., and Ford says that Rhoades endorsed the note in Auger's case a few days after that. Now Auger's note is dated the 2nd of August, therefore it would have been overdue when endorsed; but this is not so certain as regards the notes dated on the 5th of August, of which there are three, nor even those of the 4th, of which there are two; for the expression of a few days is not precise, and the spirit of this consent is evidently that the testimony in Auger's case is to apply to the others *mutatis mutandis*. Besides these notes were acquired before they were endorsed, and there is a good deal to be said as to the time of putting the name on them being merely a completion of the transfer already made; and such has been held to be the law in some cases. Then it is said there is no right of action at all against Rhoades, an endorser without protest or notice; but Rhoades has waived this, by a written renunciation, and his signature is proved to it—which is conclusive as against him, and that is all we are concerned about upon the declinatory plea. All this and more that has been proved in these cases looks very suspicious; but the Court hesitates to adopt all these suspicious circumstances which affect the right of action itself and to apply them incidentally to a preliminary question of collusive service affecting the jurisdiction, when they can be urged as a defence to the action on its merits. Upon this declinatory plea, therefore, the Court is of opinion that as there was a personal service on Rhoades in this district, that is sufficient in itself to make the other defendants amenable under Article 38, and the circumstances relied on to prove collusion are not sufficiently conclusive in all the cases to make it safe to dismiss the action on that ground.

Upon the merits of these cases there is much less to be said. The defendants plead that the whole of the note in each case is forged, including the signature. There is obvious confusion and error in contending, on the part of the plaintiffs, that the defendants admit their signatures to be genuine, *and only allege fraud in filling up the notes*. This is the precise language of plaintiff's counsel in argument, and in a written factum with authorities afterwards sent up. It is very inaccurate, and in fact, is begging the question. The action says that the defendant in each case made his promissory note. The defendant says he never made a promissory note at all and never signed one. He signed his name to indicate his address to a person who swindled him, and who never asked or got his note at all, but who went round appointing people agents to sell churns, and took their names, sometimes written by themselves and sometimes by the gentleman who wanted to get so many agents to sell his wares. The defendant in each case denies his *signature to the promissory note sued on*, and also the making or

consenting to the note at all, and under the law he swears he never signed or made or consented to the note at all. This is conformable to the very words of the law, "*that such instrument* or some material part thereof, or his signature or some other *on the document* is forged." The defendant does not swear that all the signatures of his name that can be produced are forgeries; but only that the signature of his name *on a promissory note of a given date and amount is a forgery*. He supports it by his oath. This destroys the presumption of its genuineness, and calls upon the plaintiffs to prove that he *did sign the note*; not that he signed something else to which somebody afterwards, without his knowledge or any consideration whatever, gave the form of a note. More than this, the same doctrine applies to any material part of the document as to the signature. The making of the note itself being denied, under oath, the presumption of its forgery must be rebutted by the plaintiffs. Nothing of this kind has been attempted. All that has been done is to extract from the defendants that they signed, or caused to be signed, a large printed paper which the churn seller carried away with him, leaving a duplicate, signed by himself, with each victim who thereby had conferred on him the lucrative appointment of agent for the sale of churns, which were, and are still, to come. The case of Dorwin vs. Thomson, 13 L. C. J., p. 226, has been cited to prove that the defendant's signature on the large paper might be applied to any undertaking whatever. It is impossible to extend that decision to such dimensions. The point there decided was that an accommodation endorser who was in the habit of trusting his friend, the maker, to fill up blanks, could not complain of the amount filled in, as against a subsequent *bona fide* holder. But there the defendant *had endorsed a note*. Here the party has neither signed nor endorsed a note at all. In the one case there was an implied authority to the friend to fill up as he pleased. Here it might as well be pretended that the defendants' names could support promises to give deeds of all their farms. Putting your name upon commercial paper may very well call for caution as to the extent of blank paper in that particular form that you sign, but that rule would furnish no authority for saying that every man who writes his name on a visiting card could be made liable for a million sterling, by subsequently printing the form of a note above it. The Court is of opinion therefore to dismiss the actions on their merits against all the defendants alleged to be makers of the notes. Judgment will go against Rhoades as a matter of course;—as endorser he guaranteed the authority of the note, and got value. The other points raised by the defence it is not necessary to enter into.

Action dismissed.

J. S. Archibald, for plaintiffs.

Jetté & Béique, for defendant Auger.

(S.B.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 20TH JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A.J.

No. 8.

PREVOST ET AL., APPELLANTS;

AND

DROLET, RESPONDENT.

HELD:—That an assignee, under an assignment to him by an insolvent for the general benefit of his creditors, *not made under the provisions of The Insolvent Act*, has no quality to sue in his own name for anything connected with such assignment.

This was an appeal from a judgment rendered by the Superior Court at Montreal, (Beaudry, J.,) on the 31st January, 1873, as follows:—

"La Cour, après avoir entendu les parties par leurs avocats, sur le mérite, "examiné la procédure et preuve au dossier et sur le tout mûrement délibéré; "Considérant que les demandeurs poursuivent comme représentant feu Amable "Prévost, le recouvrement de la somme $940.06 qu'ils allèguent leur être due "comme balance restant due par la défenderesse, suivant acte reçu devant L. "A. Desrosiers, notaire, le deux Décembre, 1869; Considérant que par ce dit "acte, le dit Amable Prévost a, en sa qualité de syndic et de séquestre et ces- "sionnaire de Henri Larocque, vendu à la défenderesse un fonds de commerce "et de créances, cédé par le dit Henri Larocque et ce pour le prix et somme de "$2,361.72, payable en quatre paiements de six mois en six mois; et que dans "et par le dit acte, la dite défenderesse s'est reconnue endettée à la société "Amable Prévost et Cie., composée du dit Amable Prévost et de Sinaï Prévost, "en une somme de $1,002.02, qu'elle s'obligea de payer à la dite société aussi "en quatre paiements;

"Considérant qu'il appert par les réponses sous serment du dit Sinaï Prévost "et les livres de la dite société que la dite défenderesse ne devait alors rien à la "dite société, mais qu'une somme à peu près égale était due par le dit Henri "Larocque, le mari de la dite défenderesse, et que la dite reconnaissance est "ainsi nulle et de nul effet; Considérant de plus que les sommes de deniers "reconnues par les demandeurs avoir été payées par la défenderesse, doivent "être imputées sur le prix des dits fonds de commerce, créances, etc., et l'on "éteint, et que les demandeurs se trouvent ainsi sans aucun droit d'action contre "la défenderesse.

"Déboute l'action des dits demandeurs avec dépens dont distraction est "accordée à MM. Duhamel, Rainville et Rinfret, procureurs des dits défen- "deurs."

LORANGER, J.:—Le 26 Novembre, 1869, Henri Larocque, marchand insolvable de St. Jean d'Iberville, offrit de faire moyennant décharge, cession de ses biens à ses créanciers de Montréal, lesquels acceptèrent cette offre, et nommèrent feu Amable Prévost, membre de la société commerciale Amable Prévost & Cie., aussi créancière, syndic et séquestre pour recevoir la cession, qui fut effectuée

le 2 Décembre de la même année devant DesRosiers, notaire. Le même jour, par acte reçu devant le même notaire, Amable Prevost, en sa qualité de syndic et séquestre, vendit la masse cédée à l'intimée Dame Hermine Drolet, épouse séparée de biens de Larocque, pour $2,361.72, payable en six, douze, dix-huit et vingt quatre mois dans les proportions d'un quart de cette somme. "Et "attendu," est-il dit dans l'acte, "que la dite Dame acquéreure est endettée ce "jourd'hui envers la société de commerce Amable Prévost & Cie., composée du "dit Amable Prévost et de Simon Prévost, représentée aux présentes par le dit "Amable Prévost, l'un deux, à ce présent, en la somme de $1,002.02 pour "valeur reçue, et pour bonnes et valables considérations par elle reçues dès avant "la passation des présentes," l'Intimée promit payer la dite somme aux dits Amable Prévost & Cie. en quatre paiements égaux, aux mêmes termes que l'autre créance.

Amable Prévost étant mort, ses exécuteurs testamentaires, les appelants, réclamèrent de l'intimée $949.06, balance restée due sur les deux créances, dit le libellé de la demandé, sans dire sur quelle.

L'intimée a opposé à la demande, en cour de première instance, outre ses moyens de fond, une défense en droit, par laquelle elle pretend que Amable Prévost n'a contracté avec elle et qu'elle ne l'a reconnue, comme son créancier, que comme syndic, séquestre et mandataire des créanciers de son mari, qu'il n'a jamais eu au regard de leurs transactions d'action personnelle, et que les appelants, qui poursuivent comme ses représentants personnels, n'ont pas en cette qualité d'action contre elle.

Cette défense en droit, qui ne distinguait pas entre les deux obligations contractées par l'intimée envers Amable Prévost, l'une comme syndic et séquestre des créanciers de Henri Larocque et créancier lui-même, et l'autre comme membre de la société commerciale d'Amable Prévost & Cie., créancière de l'intimée elle même à titre particulier, a été rejetée à tort par le tribunal de première instance puis qu'elle était fondée sur la proposition irréfutable que le créancier, syndic ou mandataire des autres créanciers, qui reçoit du débiteur une cession de ses biens pour en distribuer le produit en acquittement de ses dettes, n'a point d'action personnelle pour le réaliser, et telle était la situation légale de Prévost, qui a vendu et n'a pu vendre à l'intimée que dans la qualité qu'il avait à l'acte de cession.

Bien que qualifié de cession, cet acte n'était en réalité qu'une dation en paiement. Dans l'ancien droit français tel que nous l'avions avant le Code, la cession de biens empruntée au Droit Romain—Digeste, Liv. 42, Tit. 3, ne produisait qu'un effet, celui de libérer le débiteur malheureux de la contrainte par corps, et ne conférait pas aux créanciers la propriété complète des biens cédés. Elle ne leur conférait qu'une propriété limitée, qu'un mandat irrévocable, en les constituant *procuratores in rem suam*, mandat qui leur attribuait le droit de vendre ses biens et de réaliser le prix de la vente par action personnelle, car les auteurs s'accordent à dire qu'en Droit Romain le *procurator in rem suam* avait l'action utile. Doneau surtout contient à ce sujet, dans le tome 7 de ses œuvres, édition de 1833, sur la loi première du titre troisième, livre quatre du Code, une dissertation fort étendue, et il n'est contredit par aucun auteur de distinction. Voet,

Prévost et al. and Drolet.

sur le titre 3 du livre 3 du digeste, tome 1, page 211, No. 8, tirait la même doctrine. "*Est ei procurator*, dit-il, *in rem suam, qui scilicet negotia expedit non ad mandantis sed propriam utilitatem, sive actiones mandae seu cessæ sint, quibus deinde tanquam actor experiatur.*" Parlant de l'abandonnement de ses biens fait par un débiteur à ses créanciers, au mot *abandonnement* même, Guyot, dans son Répertoire, dit: "Les créanciers sont procureurs constitués "dans leurs propres affaires, et les lois disent que celui qui est intéressé per- "sonnellement dans une affaire est regardé comme une sorte de propriétaire, "qu'on ne peut priver du droit qu'on lui a donné de disposer de la chose, con- "formément aux conventions qui ont été faites avec lui; c'est pourquoi le dé- "biteur ne peut rentrer dans la possession de ses biens qu'en payant ses dettes." Voyez aussi Troplong, mandat, nos. 37, 737, et les annotateurs de Zachariæ, Masse et Verger, tome 5, livre 3, Titre XIII, du mandat, page 35, note 3.

Mais le pouvoir donné à l'un des créanciers pour agir au nom collectif *de tous*, ne consistait qu'en un simple mandat *in rem domini*, en autant que les autres y étaient intéressés, et ce mandat ne lui conférait pas l'action utile ou personnelle.

Si donc le débiteur Larocque eût fait cession de biens sous l'ancien régime, Prévost, appelé par les créanciers syndic et séquestre, termes sans valeur dans l'espèce actuelle, excepté pour définir sa qualité de procureur ou mandataire des autres créanciers, et qui a vendu en cette qualité à l'intimée, n'aurait pas eu d'action personnelle pour réclamer le prix de vente. Cette action n'eût pas cessé d'appartenir aux créanciers et n'eût pu être exercée qu'en leur nom.

Je dis que les termes de syndic et séquestre donnés à Prévost étaient sans valeur technique. Je le prouve par rapport à l'appellation de *séquestre*, qui n'est que le *dépositaire d'une chose contestée*.

Je le prouve de même par rapport à celle du *syndic* comme suit: Le code n'a pas reproduit les dispositions de l'ancien droit sur la cession de biens que nous avons dans nos mœurs remplacé par nos lois de faillites, comme l'ont fait les législateurs français postérieurement au Code Napoléon. Dans l'organisation régulière de la cession de biens, les créanciers unis peuvent nommer un syndic. Ce syndic a un titre légal et un caractère officiel. Il a un *status*, il devient une personne juridique, et peut poursuivre en cette qualité. Si Prévost eût été nommé sous un régime semblable, il aurait pu se pourvoir, mais en cette qualité, et non en son nom personnel. Cette qualité, cependant, se serait éteinte avec lui, ce qui, dans tous les cas, aurait laissé ses représentants sans action.

Mais Larocque n'a point fait une cession de biens proprement dite, et l'acte fait sous l'empire du droit commun avec les créanciers qui lui ont accordé sa décharge, est une dation en paiement laquelle a conféré aux créanciers la propriété pleine et entière de tous ses biens. Ces créanciers ont nommé Prévost leur mandataire, avec pouvoir de vendre, de retirer et de distribuer le prix par contribution. Il n'était lui-même créancier que comme associé de la maison Amable Prévost & Cie., et ce fait enlève toute personalité à sa gestion. Il n'aurait donc pu porter en son nom une action qui n'avait pas cessé de reposer sur la tête de ses mandants. Comment ses représentants ont-ils pu le faire d'avantage?

Voilà pour le chef relatif au prix de vente des biens de Larocque à l'intimée.

Quant à l'autre chef de la Demande, contre lequel l'intimée ne s'est pas pourvue par défense en droit, celui fondé sur la reconnaissance d'une dette personnelle de l'intimée à la société d'Amable Prévost & Cie., l'acte fait mention expresse que l'intimée promit payer cette dette aux dits Amable Prevost & Cie ; ainsi c'est la société qui, pendant son existence, eût pu en poursuivre le recouvrement, et ce sont les seuls représentants d'Amable Prevost, non des associés, qui le réclament.

The Harold Haarfager, Hellieesen, Master.

En droit, l'action, à mon sens, était donc sans fondement.

Mais en fait, elle ne l'était pas d'avantage. Il est abondamment prouvé que l'intimée a payé des sommes d'argent suffisantes pour éteindre son prix de vente. Quant à la reconnaissance d'une prétendue dette en existence lors de l'acte en faveur d'Amable Prevost & Cie., il ressort suffisamment de la preuve que l'intimée ne leur devait rien personnellement. Elle a plaidé ce défaut de cause dans son obligation et la nudité de son pacte. Le tribunal de première instance a maintenu sa défense sur ce moyen, et avec raison. Car si l'obligation de l'intimée a eu une cause quelconque, cette cause a été une cause illégale, et son engagement a été frappé de nullité comme contracté en fraude de la loi, puisque comme le révèle le témoignage de Sinaé Prevost, l'un des exécuteurs testamentaires d'Amable Prevost, et un des demandeurs, ce fut pour remplir la société Amable Prevost & Cie., de la balance de leur créance contre Larocque, que l'intimée, séparée de biens d'avec lui, promit payer la somme de $1,002.72, dont elle s'est reconnue la débitrice personnelle. Or, l'engagement pris par une femme pour son mari autrement que comme commune en biens avec lui, est frappé de nullité absolue : l'article 1301 du Code en renferme les dispositions expresses.

Pour ces motifs, je suis donc d'avis de confirmer le jugement qui a accordé congé de la demande à l'intimée.

The other members of the Court concurring, the judgment of the Court below was unanimously confirmed with costs.

Dorion, Dorion & Geoffrion, for Appellants.

Duhamel, Rainville & Rinfret, for Respondent.

(S. B.)

VICE ADMIRALTY COURT, 1874.

QUEBEC, 31ST JULY, 1874.

Coram G. O'KILL STUART, J.

The *Harold Haarfager*, *Hellieesen*, Master.

HELD:—1. That the leaving of a ship's jibboom run out, in the harbour of Quebec, is an act of negligence which would render the owners liable for damage occasioned by collision with another vessel, if it appeared from the evidence that such damage was caused by the jibboom being extended.

2. Where a collision is held to have occurred from inevitable accident, costs will not be given to either side.

This was a suit of Mr. John Ross against the owners of the ship Harold Haarfager for running foul of and colliding with his steamer Providence, whereby she was damaged to the amount of several hundred dollars. At the time of

The Harold Haasfager.

the collision these two vessels were at their winter berths, inside of Dinning's booms, on the north shore of the St. Lawrence, at the City of Quebec, and where they were brought into contact by the irresistible force of a field of ice, and injured. The alleged cause of damage was the neglect of a Port Regulation and improper mooring of the ship. Plea, inevitable accident the result of a *vis major*.

PER CURIAM:—The Harold Haarfager, a Norwegian ship of 1019 tons, was compelled by the setting-in of winter, in November last, to remain in Dinning's booms until between two and four o'clock in the afternoon of the 8th of May, where she was then lying, near the Providence, and frozen in with her. Each of them then had their heads westward up the river. The bow of the Harold Haarfager rather overlapped the stern of the steamer, which was inside towards the shore on the right side of the ship, at a distance of about ten feet. Four chains and three hawsers, from bow and stern secured the Harold Haarfager to the wharf and booms, one hawser passing over the stern of the Providence without however touching her. Her yards were topped up, her jibboom was partly rigged in but extended from twelve to twenty feet beyond the cap of the bowsprit, and the crew, consisting of nineteen men, were on board. The ice-bridge then began to move and brought the Harold Haarfager and the Providence into collision, the cast metal walking beam of the steamer and some of her machinery was broken, while the bowsprit of the ship was split and six of her stanchions with a portion of her rail, bulwarks and some planking broken on the starboard quarter. Her jibboom remained loose in the cap of the bowsprit and had a chip or abrasure inside the ship, but was not broken. The bowsprit was rendered useless and was replaced. The jibboom continues in use. The promoter complains that this jibboom had been extended during the winter, in contravention of a by-law of the Trinity house at Quebec which provides, "that vessels shall within forty-eight hours after their arrival in the port of Quebec, have their jibboom and flying-jibboom rigged in, so as not to exceed the length of three feet outside the cap of the bowsprit, and the same shall be so kept rigged in until they may be about to sail, and no vessel shall be allowed to have her jibboom or flying-jibboom run out within the harbour of Quebec until after she shall be loaded and at anchor in the stream," and, further, that while so extended the Harold Haarfager was struck by the ice and thereby forced from her position, which brought the jibboom across the Providence, striking her walking-beam, breaking it, and damaging other parts of her machinery. It is said also that the berth of the ship was a foul one, owing to a difficulty of exit except at high tides and that the hawser over the stern of the Providence should not have been placed there. The first of these two last objections in no way affects the promoter, and the second is of no weight, as the hawser in no way interfered with the Providence. Although an extension of a jibboom is necessary in the navigation of a vessel, it is easily understood that in a crowded port like Quebec, in a busy season, its remaining extended would lead to collision, and if it is made to appear that a by-law, as stated, has been passed, and that the damage was caused by the jibboom, the owners of the Harold Haarfager are liable, because it would be an omission on their part which contributed to the collision.

By the Trinity House Act of 1849, every by-law, before taking effect, "must be inserted during two weeks in English in a Quebec newspaper published in English, and in French in a Quebec newspaper published in French, and such by-laws shall be then printed in a pamphlet form, and any person shall be entitled to a copy on paying its fair value, and a copy of any by-law of the Trinity House of Quebec, certified by the clerk, under the seal of the corporation, shall be deemed authentic and shall avail accordingly in all courts of justice in this Province." No by-law, or copy of any by-law, which prohibits the running out of a jibboom has been proved, but a printed notice said to be of extracts from the by-laws of the Trinity House containing such a prohibition has been placed upon the record. These extracts are not proved to be true extracts, nor is there any evidence to shew that such a by-law has been published, which is essential to its being binding on the respondents. The Harbour Master, who has been examined as a witness, states that such printed notices are given to most of the ship masters coming to this port, but this evidence is not sufficient—and, particularly in the present case, as the Harbour Master has testified that the master of the Harold Haarfager has been, by his direction prosecuted for his neglect in not rigging in his jibboom, and that the prosecution has failed, but from what cause does not appear.

As it would be a matter of regret if this suit were to fail from the absence, of documentary proof, which possibly might have been had, and as it has been heard upon the merits, it is fitting that this Court should pronounce its opinion as if the port regulation, as alleged, had been proved:—The promoter says that the damage was caused by the extended jibboom; the respondents, on the contrary, say that it was by the bowsprit. In the former case the respondents would be liable for the damage done, in the latter not. This is a question of evidence entirely. Three witnesses belonging to the Providence, attribute the cause of damage to the Harold Haarfager, and they say that she was forced by the ice upon the Providence, that the jibboom was brought across her walking beam and broke it, with other parts of the machinery. This testimony conflicts with an equal force of testimony given by persons belonging to the Harold Haarfager; perhaps the testimony of the latter may be the best entitled to credit, but a perusal of the testimony of two persons belonging to neither vessel will set the question at rest. The one, John Webb, witnessed the collision from the wharf, at a distance of thirty feet; and the other, Ignace Fortier, from his bateau, seventy feet distant. In addition to their testimony there are the material facts, not to be controverted, that the bowsprit was broken about a foot inside the ship, and that the jibboom was not and remained loose in the cap of the bowsprit. John Webb says "that he was watching the vessels at the moment. The Harold Haarfager started first and ran astern about ten or twelve feet until her hawsers brought her up. The next thing I saw was the Providence breaking her mooring and coming athwart the Harold Haarfager, that is broadside on, to the ship's bow. The parts of the vessels which first came into contact were the steamboat's walking beam with the cap of the ship's bowsprit. I did not see the ship's jibboom touch the walking-beam at all, had it done so I must have seen it. When the walking-beam struck the cap of the

Regina vs. Guay.

bowsprit, as the ice continued to shove, the force of it caused the steamboat to cant and the walking-beam got under the bowsprit. The walking-beam was broken by the collision. The minute after the beam struck the cap the boat canted, and as the beam got under the bowsprit I saw that it was broke in two. *** The jibboom of the Harold Haarfager did not contribute to the accident in any way, it was higher than the walking-beam and I am positive did not come in contact with it. I believe the jibboom would certainly have broken had it struck the walking-beam." Ignace Fortier states "that as the steamer came down upon the Harold Haarfager, her walking-beam, that is, the after part of it, got under the cap of the ship's bowsprit and broke. ***The jibboom did not touch the walking-beam nor any part of the steamboat's machinery. **I am quite positive that the walking-beam was broken by coming in contact with the under part of the cap of the bowsprit. ** Had the jibboom come in contact with the walking-beam it would have snapped at once. The jibboom is a light spar and is easily broken."

A careful examination of the testimony leading to the conclusion, as it does, that the respondents did not, by any act or omission, contribute to the coming into contact by these vessels, their plea has been made out, and the present suit must be dismissed; but, as it is the practice of the High Court of Admiralty not to give costs on either side when a collision is held to have occurred from inevitable accident, and as this rule was followed in this Court very recently, it is adhered to on the present occasion :

Action dismissed.

Fournier, Hearn & Larue, proctors for promoters.
Blanchet & Pentland, proctors for respondents.
R. Alleyn, Q.C., counsel.

(J.K.)

COURT OF QUEEN'S BENCH, 1874.

QUEBEC, 7TH SEPTEMBER, 1874.

Coram DORION, C.J., TASCHEREAU, RAMSAY and SANBORN, JJ.

Regina vs. *Guay*.

HELD:— That on a trial for perjury the admission of evidence of extra-judicial confessions by prisoner's sister, tending to prove fraud concerted between prisoner and his sister, was illegal and verdict set aside.

The following reserved case was submitted :—

LA REINE *vs.* GUAY.

Sur indictment et conviction pour parjure.

Les 17 et 18 jours de juin dernier (1874) à la Malbaie, le défendeur en cette cause a subi son procès devant la Cour du Banc de la Reine, ayant jurisdiction criminelle siégeant à la Malbaie et présidée par moi.

Les faits de la cause étaient ceux-ci :

Le 13 mai, 1859, Guillaume Charette prend une action contre Justine Guay avec saisie-arrêt avant jugement entre les mains de son frère Joseph Guay, l'accusé. La saisie-arrêt est signifiée à la défenderesse et au tiers-saisi le 14 mai 1859, et rapportée en cour de Circuit le 7 septembre suivant. Le 12 du même mois de septembre, Joseph Guay, l'accusé, fait sa déclaration comme tiers-saisi, et jure qu'il ne doit rien à sa sœur, la défenderesse, et qu'il n'a en mains rien qui lui appartienne.

Regina vs Guay.

C'est dans cette déclaration que Joseph Guay est accusé de s'être parjuré.

Pour prouver le parjure, la poursuite a produit une obligation en date du 10 décembre 1858, par laquelle Joseph Guay s'obligeait de payer à sa sœur £22 alors courant, et elle a établi, en outre, que lors de la signification de la saisie-arrêt sur lui, l'accusé avait en sa possession des moutons, une vache, une armoire, et quelques autres effets appartenant à sa sœur.

L'accusé a répondu à cette preuve en produisant une quittance devant notaires à lui consentie par sa sœur, pour l'obligation ci-dessus, quatre jours avant la signification sur lui de la saisie-arrêt, savoir le 10 mai, 1859; et quant aux effets sus-mentionnés qu'il avait en sa possession, il a prétendu que sa sœur les lui avait donnés *verbalement* antérieurement à la saisie-arrêt, à charge de la faire vivre.

La poursuite a nié cette prétendue *donation verbale*, et a dit qu'en supposant qu'elle ait eu lieu, elle était frauduleuse et nulle, de même que la quittance notariée du 10 mai 1859. Elle en a conclu qu'en réalité l'accusé, lors de la signification sur lui de la saisie-arrêt, devait vraiment à sa sœur Justine Guay le montant de l'obligation (£22), et avait en sa possession les divers effets sus-nommés appartenant à sa sœur.

Toute la preuve de la poursuite a donc tendu à établir que Joseph Guay et sa sœur Justine s'étaient concertés ensemble pour frauder Guillaume Charette, et pour mettre à l'abri de sa poursuite les biens et effets de sa débitrice Justine Guay, et que les transactions intervenues entre eux étaient entachées de dol et de fraude, et nulles.

La parenté de la défenderesse avec le tiers-saisi, le fait qu'ils vivaient ensemble, et que le tiers-saisi connaissait la dette due par sa sœur à Charette, la date de la quittance, si rapprochée de l'émanation de la saisie-arrêt qu'elle n'a précédée que de *trois* jours, l'admission de Justine Guay, qu'en consentant cette quittance, elle n'a rien reçu de son frère, les actes de possession de Justine Guay, postérieurement à la saisie, étaient autant de présomptions très fortes de fraude contre l'accusé à sa sœur. Cependant la poursuite a voulu aller plus loin et prouver les *dires* et les *aveus extra-judiciaires* de Justine Guay.

Le premier témoin auquel une question ait été posée, tendant à prouver les *dires* de Justine Guay, est Lecocade Maltais. Le défendeur a objecté, non seulement à cette question, mais généralement *à toute preuve des dires de Justine Guay*.

Malgré cette objection, j'ai cru devoir admettre la preuve des *dires* et des *aveux extra-judiciaires* de Justine Guay, tout en réservant la question pour la considération de cette Cour.

Dans mon opinion, la poursuite avait : 1° à contredire la prétendue *donation verbale* de Justine Guay à son frère, laquelle n'était prouvée dans la cause que par Justine Guay; 2° à établir la fraude concertée entre l'accusé et sa sœur. Or, il me semble que sur ces deux points les dires et aveux de Justine Guay étaient une preuve parfaitement légale et admissible. Les règles de la preuve au civil et au criminel sont à peu près les mêmes, et lorsqu'il s'agit au civil de faire déclarer un contrat nul, parce que les deux parties contractantes se sont concertées ensemble pour frauder un tiers, je crois que la preuve des *dires* de

Regina vs. Guay.

ces *deux parties contractantes*, doit être admise. Je comprends qu'les *dires* de l'une ne font pas preuve contre l'autre, si aucuns autres faits et circonstances ne sont prouvés; mais il me semble qu'il faut les admettre pour valoir ce que de droit.

Les témoins qui dans cette cause ont prouvé des *dires* de Justine Guay, sont Leocade Maltais, Alexis Guay, Séraphin Brisson, Joseph Boudreault, Henriette Mailloux et Jules Bergeron. Je transmets à cette Cour une vraie copie des notes des témoignages, afin qu'elle puisse en toute connaissance de cause, décider si j'ai eu tort ou raison d'admettre la preuve faite par la poursuite des *dires* et *aveux* de Justine Guay, et déclarer en même temps dans quelle mesure le verdict rendu devait être affecté par la décision de cette Cour, dans le cas où cette décision renverserait la mienne.

Il n'est peut-être pas inutile d'ajouter que l'accusé est actuellement sous caution.

Kamouraska, 25 août, 1874.

A. B. ROUTHIER,
(J. C. S.)

DORION, C. J., was clearly of opinion that the evidence admitted was illegal, and that the verdict must be set aside for the reasons set forth in the judgment.

RAMSAY, J., remarked that a man could not be indicted for one offence and tried for another. Here the indictment was for perjury, and the question was whether the prisoner had sworn a false oath; but evidence was admitted to prove a conspiracy to defraud by the verbal admissions out of Court of the other pretended conspirator. The admission of this evidence was undoubtedly illegal.

The judgment is as follows:

La Cour ayant entendu la partie privée sur une poursuite pour parjure, et le dit Joseph Guay l'accusé par leurs avocats respectifs sur les questions réservées par le juge présidant au procès qui a eu lieu devant la Cour du Banc de la Reine, dans le district de Saguenay, examiné les dites questions réservées et sur le tout délibéré;

Considérant que le juge présidant au dit procès a permis de prouver les dires et aveux extra-judiciaires hors la présence de l'accusé de Justine Guay, sa sœur: 1° Pour contredire une prétendue donation verbale de la dite Justine Guay à son frère qui n'était prouvée que par elle-même; 2° Pour prouver la fraude concertée entre l'accusé et sa sœur;

Considérant que cette preuve en autant qu'elle tendait à prouver la fraude concertée entre l'accusé et la dite Justine Guay, témoin de la poursuite, est irrégulière et illégale, et qu'elle n'aurait pas dû être admise sur une poursuite pour parjure;

Cette Cour déclare et adjuge la dite preuve irrégulière et illégale, et casse, annulle et met de côté (quashes) la conviction ou verdict de culpabilité rapporté par le jury contre le dit Joseph Guay le 18 juin, 1874, sur la dite accusation de parjure.

Verdict set aside.

Alleyn, for the Crown.
Colston, for the defendant.
(J. K.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 20TH JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., AND LORANGER, A. J.

No. 98.

ROBERT KELLOND,

(*Plaintiff in the Court below,*)

APPELLANT.

AND

THOMAS D. REED,

(*Defendant in the Court below,*)

RESPONDENT.

Held:— That the enumeration in the Code of Procedure of modes of setting aside a judgment is not exclusive, and a direct action may be brought for the purpose where the plaintiff alleges that the judgment was fraudulently obtained, without his knowledge and without service on him of the writ of summons.

The judgment appealed from was rendered in the Superior Court, Montreal, on the 30th of December, 1872, (JOHNSON, J.) dismissing the action of the present appellant on a *défense en droit* to the declaration. The declaration set out, in substance.

1st. A deed of dissolution, before Notaries, of the 17th October, 1855, between one Samuel Rogers and the late Thomas D. Reed, (respondent's father,) of the copartnership theretofore existing between them, under a deed of partnership of the 14th September, 1852, and a transfer by the said late Reed to the said Rogers, of all the said Reed's stock and interest in the firm.

2nd. The formation of a partnership, as cabinet-makers, between the said appellant and the said Rogers, on the 1st November, 1855, under the firm of Kellond & Rogers; and that the parties carried on business for some months, until the 15th January, 1856; and the dissolution of the copartnership, at the end of three months, from the date of a Notarial notice, given by the appellant to Rogers.

3rd. That after the receipt of said notice, the said Rogers made a promissory note, signed Rogers & Kellond, in favour of the said Reed, antedating it to the 5th January, 1856, for £250 currency, payable nominally at three months from the date given to the said note; and that this note was made and contrived by Reed and Rogers with intent to defraud the appellant, for a debt which was not a partnership debt, with the intent injustly to render the appellant liable therefor, and for no consideration or value given.

4th. A judgment of the Superior Court, Montreal, on the 28th of June, 1856, in a suit of the said Reed, upon the said note, against the said Rogers, and now appellant, as defendants.

5th. That no service of the writ and declaration, in said cause, was made on the now appellant, nor had he any knowledge of said suit; that the return to said writ, as to service, is false and untrue as to the alleged place of service; that the appellant and Rogers had no place of business at the time of the

Kellond and Reed.

pretended service, at the pretended copartnership domicile; nor did appellant authorise any one to appear for him in said suit, and that all the proceedings therein were unknown to him, and that the judgment was obtained by fraud and surprise; that the said Rogers and Reed concealed from the appellant the making of the note, and the institution of said action, and the rendering of the judgment; that appellant had no knowlege thereof until the 15th day of February last, 1872; and moreover, that he, the appellant, never had any transactions with the said Reed, and was not indebted to him in any sum of money whatever; and furthermore, that since the rendering of the judgment, the said Reed received large sums of money, to the extent of $800, for which no credit is given.

6th. The death of the said Reed, intestate, on the seventh day of March last, leaving the now respondent as his sole heir and legal representative, who accepted the succession; and after the death of his father caused a writ of execution to be issued against the now appellant, under which his goods and chattels were seized; and the now appellant filed an opposition against said seizure, and demanded to have the said seizure and judgment set aside.

Conclusion, to have the judgment declared fraudulent, and that it be set aside, as regards the now appellant, with costs.

The only ground of demurrer which attracted the notice of the Court was that contained in the third reason, which was as follows:

"Because, if the facts alleged by plaintiff in his declaration are true, his "proper remedy is by opposition, petition or *requête civile*, and not by ac- "tion."

The judgment dismissing the demurrer was as follows:

The Court having heard the parties by their counsel on the demurrer fyled by defendant to plaintiff's action and *demande*, having examined the proceedings and deliberated;—

Considering that by law the allegations of the plaintiff's declaration disclose no right of action in manner and form as set forth and demanded by the said declaration; and that in the circumstances in the said declaration alleged, the plaintiff's only recourse would have been by petition in revocation of judgment (*requête civile*), doth maintain the said demurrer, and doth dismiss said plaintiff's action with costs, *distraits* to John J. Maclaren, Esquire, Attorney for defendant.

TASCHEREAU, J.:—L'appelant demandeur en Cour Inférieure demandait par son action qu'un Jugement rendu contre lui et contre le nommé Samuel Rogers le 28 Juin 1856, à la demande du père de l'intimé, fut annulé comme obtenu par fraude entre ce dernier et le susnommé Samuel Rogers, qui s'étaient liés et entendus pour faire et antidater un billet du 5 Janvier 1856, pour £250.0.0 payable à trois mois à l'ordre d'un nommé Thomas D. Reed, et lequel billet était signé ou prétendu signé par l'association Rogers et Kellond dont l'appelant formait partie jusqu'au 17 Octobre 1855, époque à laquelle la dite association fut dissoute.

L'appelant allègue en sa déclaration que ce billet n'a jamais été consenti par lui, ni avec son autorisation, et qu'il ne lui a jamais été fourni valeur ou considération

pour icelui, qu'il n'a été consenti que par fraude entre Reed et Rogers pour en rendre l'appelant responsable : Il allègue qu'il n'avait jamais reçu signification du bref de sommation et de la déclaration, et que ce n'est que le 15 Février 1872, que lui l'appelant a eu connaissance du jugement en question.

L'intimé a répondu en droit à l'action du demandeur présent appelant, et entre autres allégations il disait que si l'appelant avait quelque droit, ce n'était pas par une action, mais par opposition ou Requête civile.

Le jugement en Cour Inférieure a renvoyé l'action du présent appelant sur le principe que son recours n'était qu'au moyen de la Requête civile.

Je crois le jugement erroné.

1o. L'appelant allègue qu'il n'a jamais reçu la signification du bref de sommation et de la déclaration qui servaient de base au jugement dont il demande la nullité. Conséquemment quoique nominalement défendeur en cette cause-là, on ne peut dire qu'il y fut partie, car on doit pour discuter le mérite d'une défense en droit considérer comme vraies toutes les allégations de la déclaration, et d'après cela on peut conclure qu'il n'était pas partie au procès quoique son nom y apparût comme défendeur. En effet il n'y a de parties au procès que celles qui ont été sommées d'y répondre, et même le demandeur peut n'y être pas partie quoique son nom y apparaisse comme demandeur. Or le Code, art. 505, en disant que celui qui a été partie à un procès peut faire révoquer le jugement pour certaines raisons au moyen de la Requête civile, n'a pas pu vouloir dire qu'il suffisait pour qu'une personne dût être considérée comme partie à un procès, que son nom y fût, soit comme demandeur ou défendeur ? Ce serait admettre un principe bien dangereux en pratique. Je considère l'appelant comme tierce personne dont les droits sont sérieusement compromis par un jugement rendu dans une cause où elle n'était pas partie et à laquelle elle n'avait pas été appelée, et comme telle elle tomberait sous l'empire de l'article 510 du Code de Procédure civile qui dit que " Toute personne dont les intérêts sont affectés par un " jugement rendu dans une cause où ni elle ni ceux qui la représentaient n'ont " été appelés, peut y former opposition," et l'article 512 déclare qu'il " est pro- " cédé sur la tierce opposition produite comme dans une instance ordinaire.

Mais l'appelant n'a pas pris ce moyen de la tierce opposition, mais bien celui d'une action ordinaire. Je crois qu'il est justifié par les faits de la cause, et par les précédents d'avoir pris ce moyen de faire valoir ses droits.

D'abord le demandeur originaire T. D. Reed est décédé, et son fils le présent intimé qui n'était pas partie au procès, comme représentant légal ou héritier du sang, devait être mis en cause dans l'action actuelle pour protéger ses droits comme héritier de son père décédé, et c'est ce qui a été fait, car l'action du demandeur présent appelant est dirigée contre lui. Or les articles 510, 511, 512 qui traitent de la tierce opposition et de la procédure à y observer, nous disent bien que le représentant de celui dont les droits sont affectés peut former cette opposition, mais sont muets quant aux représentants de ceux à qui la procédure a profité, et au contraire disent que l'opposition doit être signifiée aux parties ou à leurs avocats, si l'opposition est faite dans l'an et jour à compter du jugement.

Kellond and Reed.

Dans le cas présent, l'appelant n'a rien su du jugement dont il se plaint qu'environ seize ans après la date du jugement, et le demandeur Reed était mort depuis longtemps et ses avocats en la cause n'auraient pas eu mission de le représenter sur la tierce opposition. La tierce opposition était certainement plus que douteuse en face de ces trois articles du Code de Procédure Civile—Or que fait l'appelant ? Se fondant sur la loi générale du pays consacrée par l'article 28 du C. P. C qui dit que "la Cour Supérieure connait en première instance de toute "demande ou action qui n'est pas exclusivement de la juridiction de la Cour de Circuit ou de l'amirauté," l'appelant porte son action devant la Cour Supérieure, y appelle et assigne le seul intéressé et l'y défie de faire valoir ses droits au jugement. Que pouvait-il faire de mieux en pareille circonstance ? Je crois que son action en la supposant pour un instant distincte d'une tierce opposition avait les mêmes allégations et les mêmes conclusions et tendait au même but, et ne pouvait lui être refusée. Le fait d'y avoir ajouté le bref de sommation n'ajoute rien dont l'intimé puisse prendre avantage ni se plaindre par une défense en droit ; le fait d'avoir donné à sa procédure un No. différent de celui que comportait la cause originaire, ne peut être invoqué sérieusement contre l'appelant. Mais je prétends que la tierce opposition n'est pas le seul moyen à employer en pareille matière, et au contraire il me semble que tous les recours en loi sont cumulatifs et que l'un et l'autre des remèdes tendant au même but doivent être admis.

On trouve au vol. 10 des Rapports Judiciaires du Bas Canada, la sanction de ces droits cumulatifs, exprimée dans la cause de Thouin et Leblanc, page 372, dans laquelle cause la Cour du Banc de la Reine en appel "a décidé qu'une per-"sonne dont les droits se trouvent affectés par un jugement dans une instance "à laquelle elle n'était pas partie peut se pourvoir par tierce opposition ou "par action directe contre ce jugement à l'effet de se faire maintenir dans tous "ses droits."

Il me semble que ce jugement de la Cour du Banc de la Reine règle le sort de celui dont nous nous occupons en ce moment ; en conséquence, je me prononce contre le jugement dont est appel et suis disposé à l'infirmer.

RAMSAY, J.:—This case comes up on an appeal from a judgment on demurrer, dismissing the action in the Court below, on the ground that no independent action would lie to set aside a judgment. The reason alleged in support of the judgment appealed from is that our Code of Procedure has enumerated the modes of setting aside a judgment, namely, by *requête civile*, *tierce* opposition, and by appeal. It is contended that this enumeration impliedly excludes any other mode of attacking a judgment. It may not be out of place if I remark that the authors of our Codes looked upon enumerations as being open to danger, similar to that attending definitions. Hence they only considered those enumerations to be exhaustive which were stated in express words to be so. It will be found that enumerations are not very frequent in the Codes, that very few are in the exclusive form, and it will be admitted that Chapters 2, 3 and 4 of title second, C. C. P., are not in that form. There is not, therefore, any positive law in the Code abolishing the use of the direct action. If, then, it could be resorted to before the Code it can be so now. As to the law before the Code, we have the case of Thouin and Leblanc,

10 L. C. R., p. 370, which is directly in point. There the matter of a *tierce opposition* was incorporated in a direct action, just as the matter of a *requête civile* is incorporated in this action. In France the Code of Procedure, which is also general in its terms like ours, is not held to exclude the former law.

LORANGER, J.:—L'appelant, condamné *ex parte*, par un jugement rendu dans une instance où son nom figurait en qualité de défendeur, se plaint de n'avoir pas été assigné, et reprochant au demandeur d'avoir obtenu ce jugement par fraude et au moyen d'une fausse assignation, demande par action la rétractation du jugement.

On lui oppose une défense en droit dont le motif, adopté par le tribunal de première instance, est qu'il ne pouvait se pourvoir par action, mais que c'est par Requête civile qu'il eût dû le faire.

C'est là toute la question soulevée sur l'appel. Ce moyen se divise en deux branches. La Requête civile existe-t-elle dans un cas semblable? Si elle existe, est-elle exclusive de l'action?

L'article 1 du titre 35 de l'Ordonnance de 1667 portait: Les arrêts de jugement en dernier ressort ne pourront être rétractés que par lettres en forme de Requête civile, à l'égard de ceux qui auront été parties ou dûment appelés et de leurs héritiers, successeurs et ayants cause.

D'après cet article, il n'y avait que contre le jugement rendu en dernier ressort, c'est-à-dire non sujet à appel, qu'on pouvait se pourvoir par Requête civile, quand on y avait été partie dûment appelée.

Permettons de se pourvoir par simple Requête à fin d'opposition, dit l'article 2, contre les arrêts et jugements en dernier ressort, auxquels le demandeur en Requête n'aura pas été partie ou duement appelé.

L'article 3 ajoutait: Permettons pareillement de se pourvoir par simple Requête contre les arrêts et jugements rendus en dernier ressort, qui auraient été rendus à faute de se présenter ou à l'audience à faute de plaider. Ce que nous appelons ici les jugements par défaut ou *ex parte*.

On voit clairement que, sous l'Ordonnance de 1667, aucun de ces articles ne s'appliquait nommément au cas qui nous occupe, qui est celui d'un jugement sujet à appel, et non rendu en dernier ressort.

L'article 505 de notre Code de Procédure Civile porte: Les jugements qui ne sont pas susceptibles d'appel ou d'opposition, tel qu'expliqué plus haut, peuvent être rétractés sur Requête présentée au même tribunal, par ceux qui y ont été parties ou assignées dans les cas suivants.

Cet article nécessite l'occurrence de l'une ou de plusieurs des trois conditions suivantes, pour obtenir le bénéfice de la Requête civile: 1o. Avoir été condamné par un jugement en dernier ressort; 2o. avoir été condamné par un jugement dont il n'y a pas d'opposition par le Code; 3o. avoir été partie ou assigné dans le jugement en dernier ressort ou dont il n'y a pas d'opposition.

Ici l'appelant ne tombe pas évidemment dans le cas de la première condition, puisque le jugement n'était pas en dernier ressort.

Tombe-t-il dans le cas de la seconde en ce que le jugement n'était pas susceptible d'opposition? L'article 505 ne parle que des jugements non sujets

Kelland et al Reed.

l'opposition, dont il a été fait mention antérieurement à cet article; mais il est évident, par les principes reçus sur la matière, qu'il n'entend soumettre à la Requête civile que les jugements qui échappent à toutes les voies d'opposition à jugement établies par le Code, la tierce opposition y comprise.

D'après l'article 483, il est loisible au défendeur de se pourvoir par simple Requête contre un jugement rendu contre lui par défaut, dans tous les cas où l'assignation ne lui a été faite ni personnellement, ni à son véritable domicile ou lieu ordinaire et actuel de sa résidence. Le texte anglais dit: *Whenever he has not been served personally, or at his real domicile or ordinary and actual place of residence.*

L'article 510 sur la tierce opposition porte: Toute personne dont les intérêts sont affectés par un jugement rendu dans une cause où ni elle ni ceux qui la représentent n'ont été appelés, peut y former opposition.

Il est clair que l'appelant, qui n'a été assigné ni personnellement ni à son domicile, puisqu'il allègue qu'il ne l'a pas été du tout, avait droit de se pourvoir contre le jugement aux termes de l'article 143.

Il l'avait également aux termes de l'article 510, puisqu'il n'a pas été appelé au jugement, c'est-à-dire qu'il n'a pas été assigné, et si l'on réfère aux lois de la Procédure, dans le traité de Carré et Chauveau conféré avec les principaux auteurs qui ont écrit sur la procédure, Edition belge, tome 3, sur l'article 474, question 1079, page 538, on verra que le cas actuel, où un défendeur non assigné a été condamné, est exactement un de ceux où il peut se pourvoir par tierce opposition contre le jugement. Voyez aussi la question 1732, sur l'article 478, page 565.

Reste la troisième condition de la Requête civile, exigeant que celui qui la forme ait été partie ou assigné. Assigné, l'appelant ne l'a pas été: c'est sur le défaut d'assignation qu'il fonde son action. A-t-il été partie au procès? Une partie à un procès comme à un acte est celle qui y prend part. Si l'on consulte les Dictionnaires de Jurisprudence de Guyot et celui de Favard de Langlade, Vo. partie, on voit qu'ils donnent tous deux du mot partie la désignation suivante: Celui qui plaide contre quelqu'un soit en demandant soit en défendant. La partie à un acte est celle qui contracte. Un procès est un contrat judiciaire. Or comment peut-on y être partie comme défendeur sans avoir été assigné?

Tout jugement, pour produire l'autorité de la chose jugée, doit avoir été rendu entre parties litigantes. Qui pourrait prétendre qu'un jugement rendu contre une partie non assignée, produira cet effet? Or, je le demande, un jugement qui ne produirait pas l'autorité de chose jugée, serait-il un jugement?

Il résulte donc de ce qui vient d'être dit que l'appelant ne pouvait pas, pour toutes ces raisons, se pourvoir contre le jugement par Requête Civile, et qu'il y a erreur dans celui dont est appel qui prononce le contraire.

L'appelant avait donc la tierce opposition. Or, la tierce opposition peut s'exercer tant par action principale que par Requête incidente: la chose est élémentaire. L'action était donc bien fondée en droit, du moins quant aux fins de la défense en droit, et le demandeur doit donc obtenir de ce tribunal la faculté de l'instruire au fond.

Kelload and Reed.

SANBORN, J.—The question that arises in this case is simply whether under the statement of facts set forth in the declaration, the plaintiff can proceed by direct action to set aside a judgment. The naked question is presented by demurrer. What gave the *Requête civile* its peculiar character under the ordinance of 1667, in France, was that it was only permitted on obtaining Royal letters. "Les requêtes civiles s'obtiennent par lettres Royales," Ferrière, Dict. de droit, p. 674. The abolition of these letters by ordinance of 1690, in France, left the *requête civile* a matter of right, and differing very little from an ordinary action. No such Royal letters being required or obtainable here, the modern French authorities are applicable to the state of our law. I do not understand our Art. 505 of the Code of Civil Procedure to be restrictive of the old law, but declaratory of the ordinary procedure in setting aside a judgment. The case of Thouin and Leblanc is authority in this case, although it was the tiers opposant, that proceeded by action in that case, inasmuch as the plaintiff in this case alleges that in the case complained of he was never served with process and was in the position of a stranger to the suit.

"La requête civile principale et la requête civile incidente ne diffèrent pas, on le voit, comme la tierce opposition, sous le rapport de la compétence, toutes deux doivent indistinctement être portées devant le tribunal qui a rendu le jugement attaqué, mais ces deux cas de requête diffèrent, ou du moins peuvent différer relativement à la manière d'engager la procédure. Ainsi la requête civile principale se forme nécessairement par une assignation, tantôt par une simple requête d'avoué à avoué," 4 Carré par Chauveau, Adolphe, pp. 365 et 366. The same distinction is made by Pigeau, 1 Pigeau, 723 to 730. "Elle est principale lorsqu'elle est formée par action principale," 4 Carré par Chauveau, Adolphe, p. 260. In this particular case the judgment complained of is of so long standing and the plaintiff being dead, service upon the attorney is impossible, and if there is remedy at all it must be by action to permit of bringing in the parties interested by writ.

The judgment is as follows:

La Cour, etc.;

1o. Considérant que le présent appelant demandeur en Cour Inférieure, demandait par son action en la dite Cour l'annulation quant à lui-même d'un jugement rendu par la dite Cour Supérieure à Montréal, le 28 jour de Juin, 1856, le condamnant à payer au défunt Thomas D. Reed, père du dit intimé, une somme de £250 avec intérêt du 20 jour de Mai, 1856, et les dépens;

2o. Considérant que l'appelant fondait son action sur des faits de fraude pratiquée à son encontre par le dit feu Thomas D. Reed de concert avec le nommé Samuel Rogers, et notamment sur la fausseté et illégalité d'un billet promissoire fait, signé et antidaté par les dits Rogers et Reed dans le but de frauder l'appelant;

3o. Considérant que l'appelant alléguait en sa déclaration en la dite cause, n'avoir jamais reçu signification du Bref d'assignation et de la déclaration qui furent pris à l'instance, du dit feu Thomas D. Reed et sur laquelle action fut rendu le jugement susdit;

4o. Considérant que l'appelant alléguait de plus qu'il n'avait pas eu

Cox and Patton.

connaissance du dit jugement avant le 15 Février, 1872, et que du reste il n'avait jamais eu de transaction avec le dit Thomas D. Reed, et qu'il ne lui devait rien ;

5o. Considérant que le demandeur présent appelant pouvait légalement instituer contre l'intimé une action directe pour faire annuler comme frauduleux le dit jugement rendu par la Cour Supérieure à Montréal le 28 jour de Juin, 1856, contre lui l'appelant, le condamnant à payer au défunt Thomas D. Reed la dite somme de £250 ;

6o. Considérant qu'il y a erreur et mal jugé en le jugement dont est appel, en autant que sur défense en droit à l'action susdite du présent appelant, la Cour Supérieure a déclaré que la déclaration du présent appelant n'énonçait pas et ne faisait pas apparaître d'un droit d'action en faveur du demandeur, présent appelant, contre l'intimé, et que sous les circonstances le seul recours de l'appelant était au moyen d'une Requête Civile, et a en conséquence renvoyé l'action de l'appelant ;

Casse, annule et met au néant le dit jugement dont est appel, savoir, le jugement rendu par la dite Cour Supérieure à Montréal le 30 jour de Décembre, 1872, et cette Cour rendant le jugement que la dite Cour Supérieure aurait dû rendre, renvoie comme non fondée en loi la dite défense en droit produite par l'intimé à l'encontre de l'action du dit appelant, etc.

Judgment reversed.

A. & W. Robertson, for appellant.

Trenholme & Maclaren, for respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 20TH JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, A. J.

No. 47.

THOMAS H. COX,
(*Plaintiff in the Court below,*)
APPELLANT,

AND

RICHARD PATTON,
(*Defendant in the Court below,*)
RESPONDENT.

HELD :—Where an action was brought for the price of a horse sold and delivered, and the defendant, being examined, stated that the horse was received by him on trial, that, even if the transaction were treated as a non-commercial one, this answer made a *commencement de preuve par écrit*, and oral evidence was admissible on the part of plaintiff to prove the sale.

This was an appeal from a judgment of the Superior Court, Beaudry, J., dismissing the appellant's action with costs. The appellant claimed by the action $120, price and value of a horse sold and delivered to the respondent. A previous action had been dismissed *sauf recours*. The respondent pleaded that he received the horse on trial; that the trial proved unsatisfactory; that he offered to return him, and is not liable.

Cox and Patton.

The following was the judgment rendered by the Superior Court:—

The Court having heard the parties by their Counsel, respectively, as well upon the merits of this cause as

1o. The defendant's motion that the objection by him taken at the *enquête* in this cause, to the examination of Maurice Nagle and James Quigley, respectively, and appearing on the face of their depositions, and each of them, be now declared good and valid, and be maintained, and the evidence of the said Maurice Nagle and James Quigley be thereupon rejected and held for naught:

2o. Upon the plaintiff's motion that all the testimony in this cause, adduced by defendant in the depositions of the witnesses, Gaffney, and defendant Patton himself, be rejected from the record, and held for naught, with costs; examined the proceedings and proof of record, and on the whole maturely deliberated; considering that present action is brought for the recovery of the sum of one hundred and twenty dollars, as being the price of a horse sold and delivered by plaintiff to defendant; considering that said sale is not alleged to be a commercial transaction; considering that there is no writing to prove said pretended sale; and considering that in the examination of the defendant, as witness, by the plaintiff, there is no *commencement de preuve* of said sale, so as to allow oral evidence in this cause; and considering, in consequence, that the plaintiff has failed to prove the contract by him alleged; doth maintain the said defendant's motion and doth dismiss the plaintiff's action, and the said plaintiff's motion, the whole with costs, distraction whereof is hereby granted to Messrs. Monk & Butler, attorneys for the said defendant.

J. A. Perkins for the appellant:— The case is a very simple one. The respondent when examined makes every effort to avoid stating a positive sale; he speaks of trial and the offer of a cheque, but the following facts remain undisputed; respondent approached appellant, asking him if he had a horse for sale; he asked to be allowed to try him, but appellant absolutely refused, stating that he had had enough of horses on trial; appellant then left. The horse which was at a stable in another part of the town was visited by respondent, and by Quigley, plaintiff's man. The horse was taken to Gaffney, from thence by respondent, driven to Lachine with his own harness, and again put into respondent's stable and later offered back to appellant, lame, with a shoe off. Quigley and Nagle prove positively the sale for $120, and in this case there is certainly delivery. The appellant refers to the following article of the Code:—*Code Civil*, ART. 2260, S. 5.—"Pour ventes d'effets mobiliers, (entre non commerçants,) de même qu'entre un commerçant et une personne qui ne l'est pas, ces dernières ventes dans tous les cas reputées commerciales." The Judge in the Court below dismissed this action upon the ground that there was no memorandum in writing. Article 2260 of our Code specially declares that the sale in like cases is a commercial transaction, and Article 1233 allows verbal evidence "de tout fait relatif à des matières commerciales." The courts here have unanimously held that the evidence or answers to *faits et articles* of the party charged should constitute the memorandum required. In this case the respondent admits sufficient, were any admission required. He speaks of taking the horse on trial. Is this not evidence of some kind of contract? He speaks of

Cox and Patton.

offering a cheque. Is not this evidence of some kind of contract? He declares that he had the horse in his possession, and his man proves that it was in his stable. Is not this sufficient evidence of delivery to enable parol testimony were it otherwise inadmissible to prove the contract? The evidence of the respondent is unsatisfactory on most points, but sufficiently explicit to govern the appellant on questions as to the value, contract and delivery.

Monk & Butler for the respondent:—The question simply is, was there a *sale* and delivery of a horse, as alleged, on the 5th July, 1871, by appellant to respondent, for the price of $120, and was such sale proved? The Court will see that, not only was there no *commencement de preuve par écrit*, which was absolutely necessary, in order to admit any oral evidence whatever; but the evidence, even were oral evidence admissible, distinctly establishes the truth of the allegations of respondent's pleas, and that there never was a sale operated at all of the horse in question, the witness, Gaffney, swearing distinctly that the plaintiff himself admitted to him, in defendant's presence, that he would allow the horse to be taken on trial. The respondent, upon whose oath appellant had to rely to open the door at all to any proof of a sale, denies most emphatically that he ever purchased the horse from appellant. This ought to be decisive.

LORANGER, J (*dissentiens*):—Deux questions se présentent préliminairement sur l'appel, lesquelles, si elles sont décidées défavorablement à l'appelant, devront entraîner la confirmation du jugement dénoncé.

La première est de savoir si la vente d'un cheval faite par un commerçant à un autre, mais ne trafiquant ni l'un ni l'autre sur les chevaux, est un acte civil ou commercial, et la seconde, s'il existe dans l'espèce un commencement de preuve par écrit suffisant pour justifier le complément de la preuve par témoins, c'est-à-dire pour prouver la vente.

Sur la première question, qui n'est guère citée que par ordre de matière, il ne peut exister de doute sur la solution négative. Ce qui fait attribuer à un acte un caractère commercial, ce n'est pas la qualité de ceux qui le font ou de l'un d'eux, mais bien la qualité même de l'acte, qui n'est tel que parce qu'il constitue une opération de commerce faite dans le cours du négoce propre à l'un ou l'autre des contractants; ou bien c'est la présomption de la loi qui, en raison de sa nature même, le répute un acte de négoce, le billet à ordre par exemple. Ici rien de semblable. La vente alléguée a donc été une vente civile.

L'appelant ayant par sa demande réclamé $120, pour prix de ce cheval qu'il a allégué avoir vendu à l'intimé le 5 Juillet 1871, et l'intimé ayant nié cette vente, prétendant n'avoir pas acheté le cheval, mais l'avoir eu à l'essai, l'appelant, dans l'état où se trouvait le litige quand il a fait entendre ses témoins, qui ont déposé sous réserve, pouvait-il prouver verbalement la vente, en d'autres mots avait-il fait, par le témoignage de l'intimé entendu de sa part comme témoin, un commencement satisfaisant de preuve par écrit? Voilà toute la question.

L'intimé dépose: que le 5 Juillet 1871 le nommé Gaffney, un maréchal-ferrant qui avait été chargé par l'appelant de vendre son cheval, lui proposa d'en faire l'acquisition, et qu'ils se rendirent ensemble au magasin de l'appelant, qui est un épicier, l'intimé étant un plombier; que le prix du cheval fut mentionné comme étant de $120; qu'il demanda à l'appelant s'il pouvait emmener le cheval à Lachine

Cox and Patton

pour l'essayer, ce que l'appelant refusa; qu'il se rendit avec le nommé Quigley, palefrenier de l'appelant, à l'écurie de ce dernier; que n'ayant pas trouvé d'abord le cheval à sa guise, il s'exprima en ce sens à Quigley; que nonobstant il fut convenu entre eux que l'intimé emmènerait le cheval à Lachine, où il habitait, pour l'essayer; que le cheval fut conduit, derrière une voiture de l'appelant dans laquelle montèrent l'intimé et Quigley, au magasin de l'appelant; que de nouveau il fut alors convenu entre Nagle, le teneur de livres de l'appelant, et Quigley, que l'intimé emmènerait le cheval à Lachine pour l'essayer, et que l'intimé aurait fait la remarque que, si son teneur de livres n'eût été absent, il aurait donné son chèque pour $120 comme sûreté de la remise du cheval; que Quigley fit ferrer le cheval, qui était alors déferré pour être mis à l'herbe, par Gaffney; que l'intimé prit le cheval dans la boutique de Gaffney, lui mit son propre harnais, l'attela sur sa voiture, le conduisit à Lachine, d'où il le ramena le lendemain, et le renvoya déferré à l'appelant par son domestique, disant que le cheval ne lui convenait pas; que l'appelant le refusa, disant qu'il avait été vendu à l'intimé, qui, sur ce refus, fit mettre le cheval chez Gaffney, où il l'avait pris et où il est demeuré pendant le procès.

Dans une partie de sa déposition, l'intimé, interrogé particulièrement sur ce point, et à qui l'on a demandé si au cas où le cheval avait été à sa guise, il l'aurait acheté, répond que non, et que son objet en s'en servant était de s'assurer si l'animal avait les qualités que lui avait attribuées Quigley, mais cette réponse, qu'il a pourtant répétée deux fois, ne paraît pas avoir été l'objet d'une considération sérieuse de sa part. Il me paraît, d'après l'ensemble de son témoignage, que sa version soutenue de l'affaire est que le cheval lui avait été donné à l'essai, et qu'il ne lui a pas plu. Il donne à entendre, s'il ne le dit pas en autant de mots, que quand il a vu le cheval pour la première fois, il a été persuadé qu'il ne lui conviendrait pas, et qu'il était encore sous cette persuasion quand il l'a emmené à Lachine. Et pour donner mon appréciation de son témoignage, l'effet qu'il m'a fait est que dans toute cette affaire il n'a jamais songé sérieusement à acheter le cheval. Je ne parle naturellement que de l'impression que m'a faite son témoignage isolé des autres faits de la cause, en rapport avec lesquels il faut l'examiner. Il ressort par les autres témoignages, dans les parties non sujettes à objection, et qu'il faut rapprocher de la déposition de l'intimé, pour en saisir la portée, que Quigley en effet fit ferrer le cheval pour le compte de l'appelant par Gaffney, qui lui mit des fers postiches comme on en pose aux chevaux que l'on veut mettre au verd; que l'intimé le ramena déferré d'un pied le lendemain, et qu'il le fit referrer avant de le renvoyer à l'appelant, qui refusa de le reprendre, et que le cheval est resté chez le maréchal-ferrant pendant le procès.

L'on peut dire sur le tout, qu'abstraction faite, de la partie du témoignage de l'intimé qui a rapport à la nature de la convention, l'ensemble de ce témoignage est corroboré par le reste de la preuve.

Sous les circonstances, le témoignage de l'intimé, considéré dans son ensemble et rapproché de toutes les circonstances du procès, contient-il un commencement de preuve par écrit suffisant pour permettre la preuve testimoniale de la vente; en d'autres termes, a-t-il rendu vraisemblable le fait de la vente, car la vraisemblance du fait allégué est le *criterium* du commencement de preuve par écrit.

Cox and Patton.

"On appelle ainsi (commencement de preuve par écrit) tout acte par écrit "émané de celui contre lequel la demande est formée, ou de celui qu'il repré- "sente, et qui rend vraisemblable le fait allégué," dit l'article 1347 du Code Napoléon.

Notre Code ne s'exprime pas sur la nature du commencement de preuve par écrit, mais la doctrine de l'ancien droit en France était sur ce point à peu près semblable à celle du nouveau. Pothier, *Obligations*, No. 801, dit: "Un premier "genre de commencement de preuve par écrit est lorsque l'on a contre quelqu'un "par un écrit authentique où il était partie, ou par un écrit privé, écrit ou signé "de sa main, la preuve non à la vérité du fait total qu'on a avancé, mais de "quelque chose qui y conduit ou en fait partie."

C'est bien, n'est-ce pas, la même pensée, exprimée en termes différents?

L'appelant prétend qu'il a vendu le cheval, l'intimé prétend qu'il l'a eu en essai. Y a-t-il dans le témoignage de l'intimé (car il a été décidé maintes fois et il paraît être aujourd'hui de jurisprudence, que la déposition d'une partie peut, aussi bien que les interrogatoires sur faits et articles, constituer un commencement de preuve par écrit, ce qui me paraît fort rationnel), y a-t-il dans ce témoignage, rapproché de l'ensemble des faits non contestés de la cause, quelque chose qui, dans les termes de Pothier, conduise plutôt au fait de la vente qu'à celui de la *livraison à l'essai*, ou rende, dans les termes du Code Napoléon, plus vraisemblable un fait que l'autre? Voilà la question.

L'appelant a cité la prise de possession du cheval par l'intimé, le fait qu'il l'a conduit à Lachine, couvert de son harnais et attelé à sa voiture. Mais aurait-il fait autrement s'il l'avait pris à l'essai? Parmi les contrats dont la possession est un des éléments, elle ne prouve pas plus l'un que l'autre. A part deux points particuliers, je dois dire du reste de ce témoignage ce que j'ai dit de la possession: c'est que ce témoignage n'a pas produit sur mon esprit d'impression plus caractérisée dans un sens que dans l'autre des deux prétentions. Tous les aveux qu'il a faits peuvent aussi bien se concilier avec une prise à l'essai qu'avec une vente, et réciproquement avec une vente qu'avec une prise à l'essai.

Les deux points que j'excepte sont ceux-ci. L'intimé admet que l'appelant a refusé de lui laisser emmener le cheval à Lachine, et ajoute que c'est sur la permission de son palefrenier et de son teneur de livres qu'il l'a fait, et il a avoué que le cheval eût-il été de son goût, il ne l'aurait pas acheté. Sur le premier point, est-il vraisemblable que malgré le refus du maître, sans acheter le cheval, l'intimé l'eût pris à l'essai sur la permission de ses employés, qu'il aurait pu croire tacitement ou expressément autorisés par leur patron, malgré qu'il en avait dit au contraire? La chose ne me paraît pas telle; du moins, je ne vois rien d'assez étrange dans cette croyance, pour que j'en doive conclure qu'il est vraisemblable qu'il l'a acheté, et que sans cela il ne l'aurait pas emmené. Surtout quand je me rappelle le témoignage de Gaffney, qui dit que l'appelant a refusé à l'intimé d'emmener son cheval à Lachine, mais qu'il lui a permis de s'en servir ou de l'essayer en compagnie de son domestique, et cela avant la vente que l'appelant prétend avoir été faite en son absence par ses employés.

Maintenant, si l'on prend comme réfléchie la remarque de l'intimé, qu'il n'aurait acheté le cheval à aucune considération, il s'ensuivrait qu'il aurait voulu en

imposer à l'appelant, mais certainement pas qu'il aurait voulu effectuer l'achat, puisqu'il dit péremptoirement le contraire. Le fait que l'intimé aurait témoigné le désir de donner son chèque, ne me paraît pas non plus avoir de caractère déterminant. Il me semble qu'entre étrangers, surtout quand on a affaire à des employés et non au maître, il est aussi naturel de dire: "Si mon teneur de livres n'était pas absent, je vous donnerais mon chèque, pour sûreté de la remise d'un cheval qu'on prend à l'essai, si je ne l'achète pas, et pour prix dans le cas contraire," que de dire la même chose quand on l'achète, surtout quand on se contente de dire que *l'on donnerait* un chèque qu'on ne donne pas! A tout événement, la différence ne me paraît pas assez tranchée, pour en tirer une induction.

L'on va dire: Chacune des circonstances isolées peut être insuffisante, mais réunies, elles forment un faisceau de présomption emportant la conviction ou du moins la probabilité avec elles. Elles ne me frappent point de cette manière, je trouve même dans le sens contraire un fait qui serait suffisant pour les équilibrer. Le cheval devait être mis à l'herbe et on l'avait déferré pour cela. Quigley dit qu'avant de le livrer à l'intimé il l'a fait ferrer. Comment se fait-il qu'il ne lui a fait mettre que des fers postiches, dont il avait perdu un le lendemain matin, si ce n'était pour les lui faire enlever de nouveau, quand on le mettrait à l'herbe? Gaffney, qui dit que Quigley lui a dit que le cheval devait être livré à l'intimé à l'essai, dépose de ce fait. Quigley contemplait donc l'éventualité de la remise du cheval.

Je suis donc d'avis que l'appelant n'a point fait de commencement de preuve par écrit suffisant pour lui permettre de prouver la vente qu'il a alléguée par témoins, et que le premier juge a rejeté avec raison la preuve qu'il a faite.

Si l'appelant actuellement vend son cheval, il ne pourra attribuer sa perte qu'à son incurie d'avoir négligé de faire un écrit, étant dans la condition des gens à qui l'écriture est si facile.

TASCHEREAU, J., regarded the transaction between the parties as a commercial one. Art. 2260 C.C. (5) makes a sale of "moveable effects" between a trader and a non-trader a commercial matter. Here both parties were traders. Moreover, a commencement of proof was to be found in the answers of defendant on *faits et articles*.

RAMSAY, J.—I do not think it necessary to decide whether this was a commercial transaction or not. I will only remark that our Courts have gone a long way in making transactions commercial which would not be held commercial in England. But in my view of the case the question does not come up here. There can be no doubt there was a delivery: that would take it out of the Statute of Frauds, if it were treated as a commercial matter. But regarding it as a non-commercial transaction, the necessary commencement of proof in writing is complete. The defendant chose to answer as a witness that he took the horse on trial, and he added that because he was a stranger to Mr. Cox he offered his check as a guarantee that he would bring the animal back in the morning. But if he was an utter stranger his check was worth nothing at all as security, so that his excuse for offering the check is of no weight. Then, in his evidence, he also said that he got the horse on trial, and

Cox and Patton.

that Gaffney, the plaintiff's agent, gave him leave to take it. This leave, if given at all, must have been given by signs, not by words. But Gaffney in any case had no power to give such leave. His *mandat* only allowed him to sell the horse; and Cox had told the defendant, you shall not take him out of the hands of my servant unless you buy him. Defendant knew the extent of Gaffney's authority. After all this the defendant took the horse, offered his check and brought him back lame the next day.

SANBORN, J.—This is an appeal from a judgment of the Superior Court, Montreal, dismissing appellant's action. The action was for the price of a horse. The horse was delivered to respondent and he used it, drove it to Lachine, and had it some time in his possession. Respondent pleaded first a denial of the allegations of appellant's declaration, and secondly that there was no sale; but that he received the horse on trial and he was only to purchase it upon its proving satisfactory, and that it did not prove suitable for him, and he returned it. The appellant was under the necessity of proving his case. The respondent was examined as a witness, and he denied the sale, and states that he had the horse on trial; but states that he proffered his check for the price of the horse as security. The Court *a quo* held that a *commencement de preuve par écrit* was necessary to enable appellant to avail himself of the oral evidence of sale, and rejected the proof by witnesses, and dismissed appellant's action. It is urged, that this is not a case to which English rules of evidence apply, inasmuch as the transaction was not between parties dealing in horses as a business. It is not necessary to determine this question. There was an obligation of some kind presumed from the fact of delivery, and it was necessary to resort to oral evidence to determine whether it was a sale, or lease, or a taking upon trial. "On peut définir la présomption un jugement que la loi ou l'homme porte sur la vérité d'une chose incertaine par une conséquence tirée d'une autre chose connue. Ces conséquences sont fondées sur ce qui arrive communément et ordinairement." Danty, Preuve par Témoins, p. 6, note. Both parties have resorted to oral evidence to prove what the contract was. The issue raised on respondent's second plea could not otherwise be proceeded with as there was no written contract. It was a "*tradition de la main à la main*," which was a visible, palpable fact and a sign of a contract. The respondent failed to prove his exception to the effect that he had the horse upon trial, and appellant proved by witnesses that the horse was sold to him at the price claimed.

The offering of a check for the price by respondent was a sign of a sale. For him to proffer his check for the price for security, when no security was asked, is very improbable.

I think the judgment is erroneous and ought to be reversed, and appellant have judgment for the price of the horse.

The judgment is recorded as follows:—

La cour considérant que l'appelant a prouvé avoir vendu et livré à l'intimé un cheval tel que mentionné en sa déclaration, et pour le prix de cent vingt piastres;

Considérant qu'en autant qu'il y a erreur et mal jugé dans le jugement dont

est appel, savoir le jugement rendu par la Cour Supérieure siégeant à Montréal le 31 jour de Janvier, 1873, lequel a renvoyé l'action du dit appelant, casse, infirme et met au néant le dit jugement de la dite Cour Supérieure; et cette Cour rendant le jugement que la dite Cour Supérieure aurait dû rendre, condamne l'intimé à payer à l'appelant la dite somme de cent vingt piastres, prix de vente du dit cheval, avec intérêt &c., (*Dissentiente* l'Honorable M. le Juge assistant Loranger.) Judgment reversed.

Caverhill et al, and Ryan.

J. A. Perkins, for appellant.
Monk & Butler, for respondent.
(J.K.)

COURT OF REVIEW, 1874.

MONTREAL, 31st OCTOBER, 1874.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

ELECTORAL DIVISION OF MONTREAL CENTRE.

No. 7.

Caverhill et al.,

Petitioners,

and

Ryan,

Respondent.

Held:—That an election held on illegal voters' lists will be set aside, notwithstanding that the petitioners themselves fail to prove that they were legally entitled to petition.

This was a hearing in Review of a judgment rendered by MACKAY, J., which rejected the petition of the petitioners, on the ground that they had failed to prove that they were legally entitled to petition.

The following were the reasons assigned by MACKAY, J., in so giving judgment:—

MACKAY, J:—The petitioners allege, first, that they were and are duly qualified to vote at the election held in January last.

5th. That the returning officer has returned the said M. P. Ryan as duly elected to the House of Commons for the Division of Montreal Centre.

9th. That the voters' lists used at the said election were irregular, insufficient, illegal, null and void. The fourteenth reason of the petition alleges that the voters' lists delivered by the city clerk to the registrar on the 6th of May, 1873, had not previously been by the city clerk certified by oath in the manner provided by law, or in any manner whatever, etc.; that the said lists were not duplicate of the last list of such duly qualified electors as aforesaid, duly corrected and revised according to law, nor were they certified to be such by the city clerk, they, the petitioners alleging that the formalities required by law to be observed with respect to the preparation of the assessment roll, and the list of voters to be made therefrom, and also with respect to the filing of the said voters' lists and the revision and correction of the same, both before and after said revision and correction, and also with respect to the delivery of duplicate thereof to the registrar, have never been observed.

Caverhill et al. and Ryan.

The fifteenth reason alleges that the extracts delivered by O'Meara (the assistant city clerk) to the returning officer on the 28th of January, 1874, and by the returning officer furnished to his deputies, at the said election, were not true copies of the lists of voters duly qualified to vote at said election as last revised and corrected according to law, or of so much thereof as related to subdivisions, for which the said deputy returning officers acted, nor were they certified as such by the clerk of the city, or even by the said O'Meara, nor were they furnished to said deputy returning officers by the said city clerk, nor were they furnished by the said returning officer to the said deputies as being true copies of the then last list of voters for each ward respectively, nor were they certified by the registrar to be true copies of the then last list of voters for each of the said wards fyled in the Registry Office.

By other reasons the petitioners complain of the manner in which the polling places were fixed; that votes of improper persons were received and recorded for the said M. P. Ryan; that votes of persons guilty of corrupt practices had been so received and recorded, that the said M. P. Ryan directly and indirectly by himself and his agents, employed means of corruption to induce electors to vote for him; that he unlawfully opened houses of public entertainment for the accommodation of the electors; that the said M. P. Ryan organised committees comprised of electors, and that these committees met in houses kept open for their accommodation by the said M. P. Ryan.

The petitioners conclude as follows:—Wherefore your petitioners pray that it be determined that the said Michael P. Ryan was not duly elected or returned, and that the said election was void, and that the said Michael P. Ryan was and is incapable of being a candidate, or of being elected, or returned, during the present Parliament.

The petition is under section ten of the Act of 1873.

The trial was commenced before me on the ninth of May last.

It appears from the evidence of Mr. Ryland, the deputy registrar, that he was the returning officer at the election in question, that the 22nd of January, 1874, was the nomination day, and the 29th day of voting. There were thirty-three polling places. On the 26th of January the city clerk furnished the returning officer the last revised list of electors, certified by the assistant city clerk, as extracts from the copy. They were then certified by the registrar as duplicates of lists of voters deposited in his office 6th of May, 1873, and afterwards were distributed to the deputy returning officers, and the election proceeded upon them.

The city clerk deposes that the voters' lists were made from the revised and corrected list of electors, corrected at the beginning of January, 1873, by the Board of Revisors; that this was made from the assessment rolls made in 1872; that the list given to the registrar was not certified by any oath of anybody; he, the clerk, did certify by oath before two justices to the original list; nobody certified by oath the list furnished to the registrar. Later in his evidence the clerk seems to correct himself, and says that the original was *not* sworn to at any time until 15th of April, 1874, that is, more than a month after the date of the petition in this matter, and more than two and a half months after the

election. It was in consequence of hearing of proceedings in Court, in this matter, that he thought of supplying his oath to *the original* on 15th of April; so he says. Caverhill et al, and Ryan.

Revised and certified lists of voters are ordered by Sec. xi of cap. vi. Cons. St. of Can. to be made by the city clerk from the assessment rolls, and to be certified to be correct by the clerk, by oath or affirmation before a J. P., and the original to be kept in the city clerk's office—a copy certified shall be delivered to the registrar, and a copy of the lists shall be kept posted up in the clerk's office.

Provisions are made for correcting the lists upon complaints by persons aggrieved, and if corrections be made, the city clerk shall correct the copy stuck up in his office, to conform with the revision, and until other lists, in "future" years, are made revised and corrected, those persons *only* whose names are "entered upon list finally revised and corrected shall be entitled to vote, &c.

Every deputy returning officer shall get a copy of the last revised list of voters, &c., and no deputy returning officer shall receive vote of any person unless the name of person be upon the copy of the list furnished to him.

If at time of election no list of voters for the current year has been made or exist, the returning officer and deputies shall be furnished with the list of voters last made, or existing, and shall govern themselves thereby, and such list shall have same effect as if it were the list of the current year.

If city clerk do not furnish lists to deputy returning officers, the returning officer shall procure from the registrar a copy, certified by him to be correct, of the then last list of voters, &c., and to deliver to the deputies.

The petitioners press upon me to hold that owing particularly to no formal voters' list, sworn to, having existed at the time of the election, the voters' lists used were illegal, null and void; and Mr. Barnard argued before me at the final argument, that "all the voters' lists and the assessment rolls were and are "informal, null and void; that a man may vote merely because his name is on a "list, whatever [added Mr. Barnard] is absurd; no certitude is here [he said] "that those who voted had right, or that those who did *not* or were *not* on the "lists had *no* right."

"We agree, say the counsel for respondents, that the voters' lists used were illegal, null and void."

I have already shown that a substantive reason [the ninth] of the petition is that the lists were illegal, null and void.

The petitioners, charged with alleging contraries, reply that the *status* of the petitioners is established, without recourse to the illegal lists being necessary.

I will indulge the parties by holding as each does upon this part of the case.

What is to be the result?

At the opening of their case, counsel for petitioners said: "Our contestation is divided into three heads—1st. Polling places illegally arranged and distributed; 2nd. Illegality and nullity of all the voters' lists used; 3rd. Bribery and corrupt practices." In reality, the division ought to have been into four heads, the first one affirming that the petitioners had due quality to vote. This the petitioners made the first item, or allegation, of their petition, very properly.

Caverhill et al. and Ryan.

At the outset, I said that the petition being on trial, *onus* was on the petitioners to prove all their allegations, in so far as they might or could, or as they choose to do, and that, at the end, I would pass upon the case.

The question is forced upon me—have the petitioners proved that they had the quality to vote?

They have *not*, says the respondent.

What constitutes a legal voter? who is duly qualified to vote?

Consolidated Statutes of Canada, chap. vi, section four, orders that the following and *no other* persons, &c., shall, if duly registered or entered in the revised and certified list of voters, according to provisions of this Act, be entitled to vote, &c., &c.

Every male person entered on the then last assessment roll, revised, corrected and in force, &c., shall be entitled to vote, &c.

Until newer lists are made, revised and corrected, those persons only whose names are entered upon such list as last revised and corrected shall be entitled to vote. (Sec. 15 which I have referred to before.)

Without recourse to the lists the *status* of the petitioners has been established, says their counsel.

As to qualification of Caverhill, R. McCready and G. Horne, P. O'Meara swears he knows them, and knows that each of petitioners is (McIntyre included) a qualified voter, and was qualified to vote at the election referred to. As to Caverhill he says:

Poll Book No. 2 of West Ward shows that he was qualified. McCready ditto; McIntyre ditto; and Geo. Horne is shown so, by voters' list for the Centre Ward.

O'Meara swears that the 33 extracts furnished by him to the Registrar with the original voters' lists were true and correct copy. R. McCready supplies further proof of his qualification by his brother's evidence proving payment of taxes.

McIntyre, too, proves by a witness payment by him of all his taxes.

Wm. Lane proves payment by Mr. Caverhill of all Corporation dues for 1872. He adds that Geo. Horne was a qualified voter in 1872-3-4; and each of the petitioners is qualified as voter.

It is elementary, and our Code has an article express to this effect, that proof must be the best of which the case by its nature is susceptible.

I am of opinion that the petitioners have not proved their quality, have not proved, in manner required by law, their *status* alleged of duly qualified voters. Parol proof was and is *not* the best evidence to prove their *status*. Several passages of Mr. Barnard's argument are to the effect that petitioners could make nothing merely out of their names being upon such lists as used at this election, and that these were illegal. But the law provided for petitioners; they might have proved that their names were entered upon some former list revised and corrected; none such is shown.

De non apparentibus et de non existentibus eadem est ratio. We see now that petitioners have no *locus standi*; I must hold that they appear as never having had a right even to present a petition.

I find them wanting in quality to petition, without interest to complain, of the lists that were used, or of anything. Caverhill et al, and Ryan.

By their 20th reason of petition, the petitioners say that the votes recorded were not of persons entered on the then last revised and certified list of voters. They seem to have in view such a list, and that it ought to have been resorted to, the other lists (those that have been worked upon) being illegal. If this be so they ought themselves to have fallen back upon such anterior regular list, but they omitted to do this.

At the date of the petition my jurisdiction seemed perfect. The petition is formal, and it is easy to petition; no oath being required, things are facilitated. Even till the end of petitioners' *enquête* my jurisdiction looked real, but these appearances have disappeared since the closure of the *enquête*, the quality of petitioners being left unproved.

There appear no real legal petitioners before me, and, in one view, no petition.

Under these circumstances, I shall report to the Speaker and the House of Commons that this petition has failed for the reasons I have stated, and that under the circumstances I have not felt bound to go into the full, or total case. The petitioners cannot complain. Nobody else has complained. The candidates appear to have gone to the polling without protesting in any way against the lists that were used. The defeated candidate does not petition.

If the House of Commons call upon me for further report, I shall be ready to make one.

As to Forest and Hurteau's case, I said that the main question was—Is the sitting member entitled to retain his seat? True, but I said that with reference to "an election petition such as that before us," that is, before us in Forest and Hurteau's case. The petitioners here do not resemble Forest. Forest was a candidate, and he claimed the seat from the member returned. The petitioners here only claim to be voters, and do not claim seats for themselves or others. A primary question on the merits in this case of Montreal Centre was and is—"Were the petitioners duly qualified to vote?" They have failed to show it.

JOHNSON, J.—This inscription brings before us the decision of one of the Election Judges for the Montreal Division, acting under the Controverted Elections Act of 1873, and it is authorized by the subsequent Statute of 1874, sec. 33, which expressly gives the right of review in such cases.

It is proper to notice at once a misapprehension that seems to exist, and to have extended even to those who ought to be responsible for the statements in the petitioner's factum, which assuredly ought to be free from any inaccuracy—to the effect that the learned judge who sat at the trial has decided that the first ground of objection taken by the petitioners was well founded; but that instead of making the nullity of the voters' lists a ground for setting aside the election, he has made it a ground for holding the election to be valid. Such a statement as this ought not to be made. No judgment has been given as to the validity of the respondent's election. The utmost that can be said is, that the judgment in question has not the effect of disturbing the return, and only goes to the extent of holding that the petition is not properly before the Court, having been

Caverhill et al, and Ryan.

presented by certain persons who say they have a right to present it; but do not show that they have. That is the extent of the judgment and nothing more.

The question whether that is a right judgment under the circumstances is now before the Court, and is not free from difficulty—so much so, indeed, that I feel it right to say, speaking for myself merely, that my impression at the time was certainly that the decision that was given by the learned judge as far as the report shows was inevitable, if it appeared that the petitioners had no *status* before him. The subject has, however, received since that time special attention at the hands of the three judges who sat in review, and the decision about to be rendered by the majority of the Court is one in which I concur as respects its main results; but as there is one important point upon which I differ, and which would have the effect of basing the judgment, I think, upon surer grounds, and carrying it farther than it will now reach, I will state as shortly as I can the view I take of that point, and also of the other questions in which there is general concurrence among the members of the Court.

The return in this case was contested upon three grounds:- 1st. That the formalities required by law with respect to the voters' lists had not been observed; 2nd. That the polling places had not been distributed as required by law; and 3rd. That corruption had been used by respondent and his agents. Whether any or all of these things be true, as the petition alleges, I will not now stop to examine. They may, or may not, according to the evidence given; but, assuming the possibility of their having been proved during the trial, I think I may properly say that it would be most unsatisfactory, *prima facie*, that the petitioners should be the only persons to suffer.

They say the return of the respondent is void by reason of the facts alleged. If these facts are true, the inference would seem to be that the respondent ought to be unseated for his own and his agent's acts, and that somebody else who ought by law to have made and deposited lists in the manner required, and also that some other person still, who ought to have subdivided the polling places, have neglected their duties, and by such neglect have made the return void; and yet for all these irregularities, if they exist, the petitioners, as it appears, are, after a trial has been had on all the issues, to be the only sufferers.

This petition was presented on the 9th of March. The answer of the respondent was fyled on the 21st, and is a general one.

Now, if the respondent had had any preliminary objections to urge against this petition being further proceeded with, he was bound by the statute to make them within five days after the time limited for objecting to the security, or within the same time after the security had been established. There cannot, of course, be two opinions upon the point that it would have been a fatal objection to further proceedings upon this petition that the petitioners themselves were not qualified to present it; yet the respondent never made any such objection, either at the proper time, nor indeed in any specific form upon the record at any time; but contented himself with denying all the allegations, of which he treated the qualification of the petitioners as one; and so the petition was under the 15th section of the Statute "at issue," that is to say, the proper time for raising this question as to whether the petition was properly before the Court or not

had elapsed, and all the allegations were at issue, except the one which the law says must be raised by itself before going to trial. The respondent, however, contended that the petitioners' qualification was also at issue at the trial. I am against that pretension, because the legal result of the non-qualification to petition would have been that the respondent was not called upon to answer the other allegations, which he has, however, done, and therefore he is getting not only what he never asked, but he is getting it after having done the very thing which the non-qualification would have exempted him from doing, after having admitted that he was bound to answer these charges, and having, moreover, actually answered them. But, however this may be, whether the qualification to petition was at issue or not, it certainly was not the only point at issue; but all the other things were also being tried—those affecting the respondent as well as those affecting the petitioners. It, therefore, seems to me impossible that this petition could have been at issue and the parties have gone to trial, while the respondent was not bound to answer at all; yet that is the extent of his right, if the petitioner is disqualified from coming into Court. Therefore, it appears highly inconvenient, not to say [illegible] that he should be allowed, after making his own choice of the terms o[illegible]he desired to go to trial, to pretend that there was no petition before the Court, and nothing to try. He admits that the petition is there. He never says it is improperly there. He answers the things charged in it, it is therefore properly there as far as he is concerned; or he would not have been bound to answer the charges it contained against himself, and to go to trial upon them; yet the trial proceeds, and evidence is given as to the illegality of the voters' lists; as to the charges of corrupt practices, and as to the illegal distribution of the polling places; and when all this has been done, it is found out that the petitioners had not made the best proof of a fact that the respondent had never contested as the law requires; and upon the latter urging that objection, judgment is rendered maintaining it, and declaring that the petitioners are not properly before the Court, and their petition is rejected, and they are charged with the costs of a contestation into which the respondent, if he is right on the point of qualification, ought never to have entered. In my opinion, then, this objection could only have been urged by preliminary objection, and not afterwards, for the consequence, as I have already said, of the non-qualification of the petitioners would have been that they would have had no right to proceed further in the matter, and not that the respondent was to be absolved from doing what he had already done; nor yet from the further consequences of a contest in which he had consented to engage on the issue of the truth, or otherwise, of all the charges. The pretension, however, that the qualification ought to have been proved as one of the facts at issue, is supported by reference to the the practice in England now; and such I find the practice to be there now, under the law at present in force in England; but there is a reason for it which does not exist here, and which, under our statute, operates the other way. Under the English statute, preliminary objections are unknown, and if they were unknown here, the same reason would apply; but they have been introduced into our statute from the practice of parliamentary committees, to which we can have access in books, and under which the preliminary objection was known;

Caverhill et al, and Ryan.

and it was always the practice before those bodies to dispose of such objections before joining issue on the petition itself; though there are cases where the parties were allowed by favor, as they say in the books, to urge them afterwards upon special application, which was never made in this case, and could only have been done at all upon payment of such costs of contestation as might have been then incurred. I cannot see what can be the use or meaning of the 14th section of our statute, if, after the petition is at issue, such matters are to be enquired into, and certainly the general rules of procedure in England are opposed to allowing a party, after pleading over, to urge points of a preliminary nature. By the 33rd section of the Act of 1873, where we have made no rule, or where our rules do not extend, the practice in England is to guide us, "as far as consistently with this Act it can be observed." Now, no rules that we have made extend to this subject; but the practice in England at this day cannot be, consistently with our Act, observed here, for the statute there gives no right of preliminary objection, and ours does; therefore we must fall back on the practice of Parliamentary Committees, which was not to allow what might have been the subject of preliminary objection to be urged after issue joined, and indeed after trial. Page 64—Rogers on Elections, quoting Mr. Orme's valuable book, says, "Where any objection is made to the right of the petitioner having his petition heard, committees will *enquire into*, and decide the same before they enter into evidence as to the merits of the petition." Taking this view of the question of procedure, I should be of opinion now to overrule the objection made at the trial as coming too late, and proceed to determine the other parts of the case. The majority of the Court are of opinion to hold the return to be void, without holding the petitioners' *status* to be established; I do not clearly see my way to exercising jurisdiction to that extent without feeling certain that the petitioners have a right to ask it, under the rules of procedure; and, for the reasons I have given, I think they have that right. Taking that practical view of this difficulty, the fact itself of the proof of qualification to petition would be immaterial; but I have felt bound in the peculiar circumstances of this case to go further, and to look at the other questions, which are of great public importance. Leaving out of consideration, then, what may be the proper time for making the objection, there are two questions to be looked at: 1st. What is the qualification required of a petitioner before the Election Court? 2nd. Is that qualification apparent?

The qualification of a petitioner is described in the 10th sec. of the Act of 1873: The only persons who can petition are candidates, or those claiming so to be, or persons duly qualified to vote at the election to which the petition relates. We are only concerned with the latter class here. The petitioners state that they were duly qualified to vote at the election in question. It is the first statement made in their petition. They then go on to state that the writ issued and the election was proceeded with, and other things not material to the present question. Then, in their ninth statement, they say that the voters' lists *used at the election* for Montreal Centre were irregular, insufficient, illegal, null and void. In paragraph 10 they state that the *voters' lists that were used* purported to be, according to the certificate of the city clerk, the lists that he had

made of the persons qualified to vote. Then, in paragraph 11, that the voters' lists aforesaid (that is the lists used) were made by the city clerk for each ward, and what purported to be true copies, with his certificate that they were so, of the last revised and corrected lists of the electors qualified to vote were deposited with the registrar. Paragraph 12: That on the 28th January, the day before the election, the assistant city clerk delivered to the returning officer, what he certified to be, true and correct extracts from the last revised and corrected lists of voters. Paragraph 13: That these certified extracts were by the Returning Officer delivered to his deputies, and that voting took place upon them. Paragraph 14: That the voters' lists delivered to the registrar on the 6th of May were not certified under oath, and were not a duplicate of the alphabetical list made from the last assessment roll, of persons qualified as to property, and did not distinguish as between owners and occupiers, nor show the numbers of the lots, and were never certified, fyled, revised, corrected or posted up, as required. Paragraph 15: That the extracts furnished by the assistant city clerk to the returning officer, and by the latter to his deputies, were not true copies as they purported to be, in so far as they related to the sub-divisions which the deputy returning officers acted for. This is the full and exact purport of every averment in the petition relating to the question of the qualification of the voters at this election. The result of them all is that *the voters' lists which were used* at the election in question, are in this petition alleged to be illegal, null and void. The petition does not allege one word about there being no legal lists of voters actually made and in existence, so that, as far as their petition is concerned, they certainly do not destroy their own qualification. All that they say is, the votes given were null, because the lists used were bad; and, therefore, there was no due return; but they also say that they themselves were duly qualified to vote, and therefore that they have a right to petition. As far as the petition itself goes then, there is nothing in it to negative their right. I notice this because it was contended for at the argument, that the petitioners had not only failed to show that they were qualified to petition; but that in effect they themselves showed by their petition that they were not; because they alleged there were no legal lists of voters, without which they could have had no qualification to vote; and the qualification of a petitioner is the same as that of a voter at the election. What the petitioners really do say is that they had a right to vote at the election, (and therefore can petition now) and further that the votes given are bad, because they were given under illegal lists. Whether what they say about their own qualification is true is quite another matter, which I am not now discussing; I am now only treating the question of the qualification of a petitioner, and as incidental to that, I have noticed in passing that the petitioners state that they *are* qualified, and do not state anything necessarily at variance with that pretension, so that the question as far as their own statements go remains precisely where it was.

Under the laws passed to regulate voting at elections, there is no doubt that the list of voters as finally revised and corrected is the thing to be looked at to ascertain whether polls can be held at all, and also to ascertain who are the persons who can vote. The 17th sec. of cap. 6 of the Consolidated Statutes

Caverhill et al, and Ryan.

amended by the 27th Vic., cap, 8, sec. 7, settles this as far as concerns the holding of the polls, and the 15th sec. of cap. 6, goes further and says: "Those persons only whose names are entered upon such list as finally revised and corrected shall be entitled to vote at any election." Therefore the qualification to petition is the same as the qualification to vote; and though the petitioners have not stated anything at variance with the existence of their right to petition; but, on the contrary, state that they have the right; and though I am of opinion as already stated, that they were not called upon to prove it at the trial; yet it also appears that there was no evidence given there of the existence of any other valid lists besides those that were used; and that if it were necessary for the petitioners after issue joined to prove their qualification as a fact, they have not done so, and possibly might not have been able to do so; so that the respondent is in the position of a party who, perhaps, had a good preliminary objection to make; but instead of making it, went to trial upon all the issues; and the petitioners' position is that of persons who did not prove at the trial that they had the qualification they alleged; but relied upon the fact not having been contested in proper form, and proceeded to prove the charges. The effect of this proof is, perhaps, to establish that the petitioners were not qualified to petition; but in my opinion that is wholly unimportant, for the evidence is to be looked at solely with reference to the questions that were at issue at the trial; and the qualification of the petitioners not being one of those questions, the Court was bound to proceed to the other parts of the case. The illegality of the lists that were used, is admitted on all hands, and no proper lists are shown to exist. The return of the respondent, therefore, under that head of the petition ought to be declared void. Under the evidence as to corrupt practices, the result ought to be the same; we do not particularise, because by law we are only required to do that in reporting to the Speaker, not in determining the case itself. We have paid, however, very particular attention to the evidence on this subject, and we all think that, though there is clear evidence of corrupt practices resorted to on behalf of the respondent by others acting in his interest sufficient to bring them within the rule of agency in such cases, there is nothing to reach the respondent personally. Under these circumstances it appears to be a very unsatisfactory way of disposing of this case to turn the petitioners out of the Court. Holding, on the contrary, that in the present case, and as far as the contestation goes, they are properly before the Court, I should have been of opinion to condemn the respondent to pay the costs. I do not think he ought to profit by his own default to urge the point of qualification at the proper time; nor can I persuade myself, if the petitioner is disqualified, that we have anything left before us on which we can proceed. On the other hand, to sanction the monstrous case that could never have been foreseen by the Legislature—of a candidate in a contested election retaining the seat in the teeth of the law, and without a single vote, would be scandalous and impossible; yet it appears to me that it would also be inevitable unless we have jurisdiction given us to set the return aside by a petition that is lawfully before us. Therefore, as I understand the law, and the power of this Court, there were only two possible remedies under the circumstances of this case. The first would have been for the other candidate to petition, which,

however, has not been done; the second would seem to be to adhere strictly to the rules of procedure, and hold the respondent to the terms upon which he has chosen to enter upon this contest. The judgment that the Court will render does not, therefore, go so far as I should have gone. It does not hold the petitioners' qualification to be admitted for this purposes of this case, but the return being evidently bad, it will be set aside, without adopting the reasons which would have led me to go further, and to condemn the respondent also to pay the costs.

TORRANCE, J.—The judgment complained of was rendered by Mr. Justice Mackay on the 13th June last, under the provisions of the Controverted Elections Act of 1873. We have jurisdiction under section 63 of the Dominion Controverted Elections Act of 1874, which enacts that the provisions of section 33 should apply to the present case. Section 33 enacts that "the Court shall "determine, and certify its determination and decision, to the Speaker upon the "several points and matters, as well of fact as of law, upon which the Judge "might otherwise have determined, or certified his decision, in the same manner "as the Judge would otherwise have done in pursuance of sections 29, 30 and "31 of this Act, and the determination of the Court thus certified shall be "final, &c."

Sec. 29 enacts: "At the conclusion of the trial the Judge shall determine "whether the member whose election or return is complained of, or any and "what other person was duly returned or elected, or whether the election was "void, and other matters arising out of the petition, and requiring his deter-"mination, and shall, except only in the case of appeal hereinafter mentioned "immediately after the expiration of eight days from the day on which he shall "so have given his decision, certify in writing such determination to the "Speaker, appending thereto a copy of the notes of the evidence, and the determ-"ination thus certified shall be final to all intents and purposes."

This section is precisely similar to sec. 19 of the Act of 1873, under which Mr. Justice Mackay acted, except that the words, "and other matters arising "out of the petition, and requiring his determination," are added after the words, "whether the election was void," and excepting also the case of appeal here provided.

Sections 30 and 31 are precisely similar to sections 20 and 21 of the Act of 1873. So much for the jurisdiction of the present Court.

The petition under consideration prays "that it be determined that the said "Michael P. Ryan was not duly elected or returned, and that the said election "was void, and that the said Michael P. Ryan was and is incapable of being a "candidate, or of being elected or returned during the present Parliament."

The Judge has held that a primary question on the merits was and is, "were the petitioners duly qualified to vote, and that they had failed to show it." Mr. Justice Mackay has also said that if the House of Commons called upon him for a further report, he would be ready to make one.

The petitioners complain that they have been put out of Court.

The view which I take of this case is very simple. If the contestation were simply between two private individuals, I would probably deem it my duty

simply to confirm the judgment, but the question before us is one of the highest public importance concerning the franchise of an important constituency, and the composition of the present House of Commons. The trial has been had in due form, and we are called upon in the plainest terms to "determine whether "the member whose election or return is complained of, or any and what other "person was duly returned or elected, or whether the election was void, and "other matters arising out of the petition and requiring his determination."

The Judge, at the conclusion of the trial, "shall determine;" the words are imperative; there is no option or alternative. It is true that the petitioners have failed to prove that they were duly qualified voters, entitled to petition, but the merits of the case have been gone into, and it has been most plainly proved that not a legal vote was given for the respondent, Mr. Ryan, and that he has no more right to hold the place of member for Montreal Centre than to sit in the Imperial House of Commons for one of the Ridings of Yorkshire, in England. The law says that all matters arising out of the election and requiring determination shall be determined, and I hold upon the very full consideration which we have given this novel constitutional question, that we are bound to declare the election complained of to have been void.

BEAUDRY, J.—As the honorable Judge who presided at the hearing of this case has just stated, we are all unanimous as to the judgment which is to be rendered, and which declares that the Judge *a quo* should have pronounced the election null. It is true that we have arrived at this decision in different ways. For my part I find no fault with the first portion of the judgment appealed from. And I think that the Judge should necessarily take cognizance of the petitioners' title in the general examination of the case. The petitioners themselves felt the necessity of making that proof, for they brought up witnesses to establish that they were qualified to vote. Neither our rules of practice nor the Statute furnish precise rules respecting the course to be followed in such case, and we should be obliged under sec. 33 of the Act of 1873, to have recourse to the practice now followed in England, according to which the whole proof is made at the trial. But, it is said, they have no dispositions analogous to our section 14, and then the practice before controverted election committees should be followed, under which preliminary objections were disposed of before passing on to the merits. On this point we find that this rule was not always followed and is not our rule, and I am disposed to conform to the existing English practice, followed, if I mistake not, in the Argenteuil case, when it was held that there could be only one *enquête* on all the points of the contestation. For the rest, I account for the fact of the defendant not pleading, by preliminary objection, the defect of the petitioners' title. The latter did not allege that they had a right to vote in virtue of the lists of which they contested the validity, and which were used for the voting. Their title might be derived from a previous list regularly made, and which they might have proved at the trial of the case. The petition alleged enough to have justified the ordering of proof of that title, without the defendant being held to deny it specially. The fyling by him of a general plea or denegation ought not to put him in a worse position than if he had not pleaded to the merits, a proceeding which is nowhere required.

The parties consequently being regularly at *enquête*, the judgment should pass upon the whole proof there made. Now, in this case, the petitioners have not at the time they proved the nullity of the election, proved their title, and they are without status. Here the defendant might have insisted on the petitioners, at the beginning of the *enquête*, proving their quality, and, in default of such proof, asking for the dismissal of the petition. He did not do so, and must submit to the consequences. The proof of the illegality of the election appears at the same time as the absence of the petitioners' title. As both parties are chargeable with irregularity neither can obtain costs.

Judgment of Election Judge reversed.

John A. Perkins, for petitioners.
B. Devlin, *E. Barnard*, } counsel.

J. J. Curran, for respondent.
Wm. H. Kerr, Q. C., counsel.

(S. B.)

COURT OF REVIEW, 1874.

MONTREAL, 31st MARCH, 1874.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 1058.

Cournoyer vs. *Tranchemontagne* et al., & *Barthe*, Intervening party.

HELD :—1. That an intervention which has not been served on the parties to the suit can have no effect.
2. That an assignment under the Insolvent Act by one member only of a copartnership cannot operate as an assignment of the partnership estate.

The judgment complained of was rendered in the Circuit Court for the District of Richelieu (Loranger, J.) on the 15th December, 1873, maintaining an Intervention by the intervening party claiming to be the assignee under the Insolvent Act of the estate of the defendants, copartners under the name or firm of Tranchemontagne & Aurichon.

The deed was signed by only one of the parties, and the Intervention was not served on all the parties in the case.

The following was the judgment in the Court below :—

La cour après avoir entendu la plaidoirie contradictoire des avocats des parties, sur le mérite de l'intervention produite en cette cause, par George W. Barthe, en sa qualité de syndic officiel, nommé à la faillite des défendeurs, pris connaissance des écritures des parties faites pour instruire leur cause, examiné leurs pièces et productions respectives, duement considéré la preuve et sur le tout avoir mûrement délibéré ;—

A maintenu et maintient la dite intervention, donne main-levée au dit intervenant de la saisie-arrêt avant jugement pratiquée en cette cause contre les défendeurs, laquelle est mise de côté, déclare le dit intervenant légalement en possession des effets et biens des dit défendeurs et faillis, mentionnés au

procès-verbal de saisie du shérif du district de Richelieu, le tout avec dépens sur l'intervention contre le demandeur."

The following was the judgment in review :—

"The Court considering that the proceedings of said intervening party, Barthe, were and are irregular; that he never signified his Intervention upon the other parties in this cause and produced certificate of such signification as required by the Code of Procedure, and that therefore his Intervention could and can have no effect;

Considering also that the cession made to said Barthe by only one of the firm of Tranchemontagne and Aurichon could not operate to the effect found by the judgment of the Court below, nor justify said judgment, which judgment is erroneous:—This Court doth dismiss said Intervention with costs in the said Circuit Court against said intervening party in favor of said plaintiff, and with costs of this Court of Revision against said intervening party in favor of said plaintiff."

Judgment of C.C. reversed.

Mathieu & Gagnon, for plaintiff,
Barthe, Mousseau & Brossard, for Int. party.

(S.B.)

INDEX

TO THE PRINCIPAL MATTERS IN THE EIGHTEENTH VOLUME

OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q.C.

ACTION RESOLUTOIRE:—*Vide* SALE.

PAGE

ALIMENTARY ALLOWANCE:—An, under a will, being *insaisissable*, is not liable to be compensated by a debt due by the legatee to the testator, so long as such allowance is payable by way of aliment. (Muir et al., appellants, and Muir, respondent, P. C.) 96

AMENDMENT:—*Vide* PRACTICE.

APPEAL:—An, of which two judges *ad hoc* (under Arts 1161 and 1162 of the Code of C.P.) have "taken judicial cognizance," by having heard the case and ordered a rehearing, must be reargued before such two judges as part of the Court, notwithstanding that one of the judges of the Court, who was replaced by one of such judges *ad hoc*, has ceased to be a judge of the Court, and has been replaced by another permanent judge, and notwithstanding that the other judge, originally replaced by a judge *ad hoc*, has been replaced by an assistant judge. (The Mayor, &c., of Montreal, appellants, and Drummond, respondent, Q. B.) 76

" :—An appeal instituted in the name of a party who has died while the case was *en délibéré* in the Court below is null and void. (Kerby, appellant, and Ross et al., respondents, and Stevenson, petr. *par rep. d'instce*, Q. B.). 148

:—A petition by the alleged legal representative of such deceased party, to take up the *instance*, cannot be allowed. (Do) 148

" :—On an, all of the appellant's "opposite party" in the Court below must be made respondents. (Brewster et al., appellants, and Starnes et al., respondents, Q. B.) 195

" :—Where counsel for respondent moves for *distraction de frais*, only in the term following that in which judgment was rendered, the motion will be granted, in the absence of proof by affidavit on the part of the appellant that the costs have been paid to the respondent personally. (The Water Works Co. of Three Rivers, appellant, and Dostaler, respondent, Q. B.) 196

" :—Security in, on real estate, the title deed to which is not registered, is insufficient. (Prince et al., appellants, and Morin, respondent, Q. B.) 208

" :—A writ of, issued as an *alias* writ (in consequence of a defect in the original writ) is not null where such writ has all the characteristics of a writ of appeal. (Bernier, appellant, and Gaumond, respondent, Q. B.) 209

" :—An appeal may be rejected on motion, on the ground that no appeal lies, notwithstanding that the record is incomplete, provided it appear that the papers wanting to complete the record cannot affect the question of the right to appeal. (Dubuc vs. Champagne, Q. B.) 224

PAGE

ARBITRATION:—Where a reference to arbitrators requires that they shall "finally adjust, settle and determine the precise state of account" between the parties and "the precise amount which either of the said parties should pay to the other," and the arbitrators, by their award, merely determine in a general way how the matters in dispute shall be adjusted, without determining any precise figure of indebtedness by the one party to the other, no action will lie on such award. (Colson et al. vs. Ash, and Torrance et al., plaintiffs *par repos. d'instee*, S. C.),..... 281

ASSAULT:—*Vide* DAMAGES.

ASSIGNMENT:—An, not made under the provisions of the Insolvent Act, by an insolvent for the general benefit of his creditors, does not entitle the assignee to sue in his own name for anything connected with such assignment. (Prévost et al., appellants, and Droiet, respondent, Q. B.)..... 300

BAILLEUR DE FONDS:—The unpaid vendor of an immovable, who has instituted an *action resolutoire* for non-payment of the price, before the *deceit* of the property, (although the judgment be not rendered until some months after) has a right to be paid by preference even to a mortgagee, whose hypothec has been registered two years before the registration of the deed of sale by the vendor. (Gauthier, appellant, and Valois, respondent, Q. B.)..... 26

BANK OF MONTREAL:—The usufructuary of shares of stock in the, is entitled to the dividends and profits on all new shares of stock subscribed for, under the privilege granted by the Bank to the holder of the original shares to so subscribe. (Hargrave vs. Clouston et al., S. C.)..... 290

CAPIAS AD RESPONDENDUM:—The President of an Incorporated Co. is competent to make the affidavit for. (The Moisie Iron Co., appellant, and Olsen *alias* Jacobsen, respondent, Q. B.)..... 29

" " " :—The affidavit for, may be sworn before the Deputy Prothonotary. (Do.).. 29

" " " :—The following form of the judge's order required by 801 of the Code of C. P. is sufficient:—"Seeing the foregoing affidavit, the amount of bail to be given under Art. 801 of the Code of C. P. is hereby fixed at——" (Do.)..... 29

" " " :—The writ of, as to its execution on Sunday, is not governed by Art. 786 of the Code of C. P. (Do.)..... 29

" " " :—The affidavit for, is not bad, because it states that the debtor is about to leave the "Dominion of Canada," when it can be gathered from the other allegations of the affidavit that the departure is really from a point within the limits of the former Province of Canada. (Do.)..... 29

" " " :—It is not necessary that it should be positively sworn that at the time of the making of the affidavit the debtor is actually within the limits of the former Province of Canada. (Do.)..... 29

" " " :—Damages claimed for the breach of a contract made in Norway, but to be executed in the Province of Quebec, do not constitute "a debt created out of the Province of Canada." (Do.)..... 29

" " " :—In an action for $72.65, commenced by *Capias*, the S. C. has jurisdiction to condemn the defendant to pay the amount, notwithstanding that the writ of *Capais* has been quashed. (Prévost et al. vs. Ritchot, S. C.)..... 72

CARRIER:—In the case of goods carried by The Ocean Steamship Co. to Portland and there delivered to The Grand Trunk Railway Co. and by them carried to Montreal, the Railway Co. are responsible for damage to the goods caused by their negligence, and such negligence will be presumed if it be shown that they received the goods in apparent good order and delivered them in bad order. (The Grand Trunk Railway Co. of Canada, appellant, and Atwater et al., respondents, Q. B.)..... 53

CERTIORARI:—A conviction, based on a by-law making a penalty for every day that a thing is done, while the Statutes upon which the by-law is framed do not clearly give authority to impose more than *one* penalty, will be

PAGE.

quashed. (Exp. Brown, *for certiorari*, and Sexton, Recorder *mis en cause*, S. C.)..... 184

COLLISION:—Where a vessel, passing down the St. Lawrence in charge of a branch pilot, is, through the negligence of those on board, suffered to come into collision with a vessel at anchor, the owners of the former vessel will be liable in damages, if it appear that the master and crew participated in the negligence of the pilot which occasioned the collision, and such participation will be inferred from the fact that the pilot was not actually on deck at the time of the collision, and had left his post in the presence of the mate who failed to keep a good look out. (The "Gordon," V. A. O.) 109

" :—The leaving of a ship's jibboom run out, in the Harbour of Quebec, is an act of negligence which would render the owners liable for damage occasioned by collision with another vessel, if it appeared from the evidence that such damage was caused by the [illegible] being extended, and where the collision is held to have occu[illegible] itable accident, costs will not be given on either side. (T[illegible]rager, Hellineau, Master, V. A. O.) .....

COMPENSATION:—A debt of an insolvent tran[illegible]son who is a debtor of such insolvent, within the 30 days [illegible] the assignment by the insolvent under the Act, cannot be [illegible]ered in compensation by such debtor, particularly when his own debt was not due at the time of such transfer and did not become due until after the assignment by the insolvent. (Riddell vs. Reay, S. C.)..... 303

" :—*Vide* ALIMENTARY ALLOWANCE. 130

CONFESSION OF JUDGMENT:—*Vide* PRACTICE.

COPYRIGHT:—No one but the author, or his legal representatives, can avail himself of the Copyright law. (Langlois vs. Vincent, S. C.)..... 167

" :—No one can invoke the benefit or protection of the copyright law, unless his work has been enregistered before putting any copy thereof in circulation. (Do.)..... 160

CORPORATION:—*Vide* DAMAGES.

" :—A judge in chambers has no jurisdiction to appoint a curator to a dissolved corporation until its dissolution has been judicially pronounced in due course of law. (*In re* The Montreal Patent Guano Co., and Maude et al., petrs., S. C.) 129

COSTS, *distraction of*:—*Vide* APPEAL.

COSTS, *security for*:—When one of two plaintiffs, not co-partners and bet[illegible]om no *solidarité* exists, leaves the country after suit brought, [illegible]y for costs can only be demanded from the absent plaintiff. (Humbert et al. vs. Mignot, Q. B.)..... 217

CRIMINAL PROCEDURE:—An application to postpone a trial, in consequence of the absence of material witnesses, must be supported by special affidavit showing that the witnesses are material. (*Regina* vs. Dougall et al., Q. B.) 85

" " :—In a trial, on an indictment for libel, the defendant cannot plead or prove the truth of the libel. (Do.)..... 85

" " :—The Imp. Act 32 Geo. 3, ch. 60, is in force in Canada, and consequently it is for the jury to say whether under the facts proved there is libel, and whether the defendant published it. (Do.)..... 85

" " :—Where the defendant has asked for a jury *de medietate linguæ*, six jurors speaking that language may first be put into the box, before calling any juror of the other language. (Do.)..... 85

" " :—The right of the Crown to [illegible] jurors to stand aside exists for misdemeanors as well as for felonies. (Do.) 85

" " :—When to obtain six jurors speaking the language of the defence, all speaking that language have been called, the Crown is still at liberty to challenge, by calling on the jurors to "stand aside,"—and is not bound to show cause until the whole panel is exhausted. (Do.)..... 85

PAGE.

" " :—On a trial for libel, acts of the defendant immediately after the publication may be proved, in order to show that there was no malice. (Do.).... 85

" " :—The existence of rumours cannot be proved in justification of a charge of libel. (Do.)..... 85

" " :—An order having been granted, under 32 and 33 Vic. ch. 29, s. 11, changing the place of trial from Quebec to Montreal, and ordering that the inquest and all the proceedings had before a coroner should be transmitted to the Court of Q. B. at Montreal, and such order for transmission of inquest having been obeyed; a writ of *certiorari* to produce the return of proceedings before a judge of the Q. B. in chambers, in order that the inquest might be quashed for illegality, is unnecessary, and a petition praying for the issue of such writ of *certiorari* will not be granted. (*Regina* vs. Brydges, Q. B.)..... 94

" " :—A deposition made by witness, without objection on his part, before the "Fire Marshals," on an inquiry as to the origin of a fire, may be read to the jury as evidence against the witness in a trial of the witness on an indictment for arson. (*Regina* vs. Coote, P. C.)..... 103

" " :—Under Sec. 11 of 32 and 33 Vic. ch. 29, a judge of the Court of Queen's Bench, sitting in the Montreal District, may direct the trial of a person charged with the commission of an offence in the Quebec District to take place in Montreal, the power to change the venue not being limited to a judge sitting in the district where the offence is alleged to have been committed. (Exp. The Grand Trunk Railway Co. & Exp. Brydges, Q. B.) 141

" " :—An improper finding of a coroner's inquest may be quashed on a Rule. (Do.) 141

" " :—A coroner's inquisition is identical with an indictment, and the omission of the words "feloniously" and "slay," in an inquisition of manslaughter is fatal. (Do.)..... 141

" " :—The Managing Director of a Railway Company is not liable to manslaughter by reason of the omission to do something which the Company was not bound to do by its charter, though he had personally promised to do it. (Do.)..... 141

" " :—Where it is discovered after verdict, in a case of felony where half of the jury were ostensibly sworn as being skilled in the French language, (being that of the prisoner) that one of such half was not skilled in the French language, the trial and verdict are unlawful, null and void, and will be vacated and set aside on a reserved case by the judge in the Court below. (*Regina* vs. Chamaillard, Q. B.)..... 149

" " :—Where the judge in the Court below, after the trial and verdict are thus vacated and set aside, reserves for the "opinion" of the Q. B., sitting as a Court of Appeal, a motion by the Crown for a day certain for trial, the Court of Q. B. has "no jurisdiction in the premises." (Do.)..... 149

" " :—*Vide* HABEAS CORPUS.

" " :—Upon the finding of "no bill" by the Grand Jury, on an indictment for manslaughter, the Crown has the right to have the prisoner arraigned and tried upon the finding of the Coroner's jury against him. (*Regina* vs. Tremblay, Q. B.)..... 158

" " :—*Vide* EXTRADITION.

" " :—The Court will not give an order for the restitution of stolen goods, where the ownership is the subject of a dispute in the Civil Courts. (*Regina* vs. Atkin, Q. B.)..... 213

" " :—Where to obtain six jurors speaking the language of the defence (English) the list of jurors speaking that language was called, and several were ordered by the Crown to "stand aside;" and the six English-speaking jurors being sworn the clerk recommenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one of those previously ordered to "stand aside" was again called, the previous "stand aside" stood good, until the panel was

PAGD.

exhausted by all the names on both lists being called. (*Regina* vs. Dougall et al., Q. B.)..... 242

" " :—On a trial for perjury the admission of evidence of extra-judicial confessions by prisoner's sister, tending to prove fraud concerted between prisoner and his sister, is illegal, and the verdict will be set aside. (*Regina* vs. Guay, Q. B.)..... 306

CURATOR, *to an interdicted person*:—A, cannot remove such person (although he be a lunatic or insane) from his domicile to a hospital or asylum, without the authority of the Court, acting on the advice of his relations or friends. (Exp. Cahill, for *habeas corpus*, Q. B.)..... 270

DAMAGES:—An action for, will not lie against a party for having caused another to be arrested, if probable cause and no malice be proved, even although the Grand Jury have found no bill against the party accused. (Belanger vs. Collin, S. C.)..... 78

" :—*Vide* COLLISION.

" :—A City Corporation is liable in damages for assaults committed by its servants, such as policemen, when the assaults are approved and attempted to be justified by the Corporation. (The Mayor, &c., of Montreal, appellants, and Doolan, respondent, Q. B.)..... 124

" :—The fact of the plaintiff's having had the defendant punished by a Recorder's Court for an assault is no bar to his proceeding to recover damages for the assault, before another Court. (Marchesault vs. Gregoire, C. of R.)..... 140

" :—In an action of, against a Corporation, for illegally issuing a warrant of distress, the Corporation is not entitled to one month's previous notice of action, under Art. 22 of the Code of Civil Procedure. (Blain vs. The Corporation of the Village of Granby, C. of R.)..... 182

" :—The measure of, in the case of breach of a notarial contract to manufacture and deliver a carriage within a specified period, does not include loss of profit, by reason of the non-delivery. (Marlow vs. Lajeunesse et al., C. of R.)..... 188

" :—*Vide* LETTER.

" :—An action of, will lie against the proprietor of an establishment, such as a ham curing factory, for the diminution of rent sustained by an adjacent proprietor, in consequence of offensive odours from the factory, and the general character of unhealthiness which was attached to his property; and this, notwithstanding the fact that the factory was established prior to the construction of the houses injured. (St. Charles, appellant, and Doutre, respondent, Q. B.)..... 253

ELECTION:—An, held on illegal voters' list will be set aside, notwithstanding that the petitioners themselves fail to prove that they were legally entitled to petition. (Caverhill et al., petitioners, and Ryan, respondent, C. of R.)..... 323

EVIDENCE:—The allegations of a declaration founded upon notarial deeds of sale, seeking to fasten a personal liability upon defendant towards plaintiff will not be proved by a declaration made by defendant in another deed to a third party; no *lien de droit* being thereby created between plaintiff and defendant. (Pelletier vs. Ratelle, S. C.)..... 75

" :—*Vide* SALE.

" :— " MINOR.

" :—It is not competent, either for the notary who receives an award of arbitrators, or for one of the arbitrators, to give evidence explanatory of certain expressions in such award. (Colson et al. vs. Ash, and Torrance et al., plaintiffs, *par repos d'instce*, S. C.)..... 191

" :—Interrogatories sur *faits et articles* may be taken *pro confessis*, without any motion to that effect. (Douglas et al., appellants, and Ritchie et al., respondents Q. B.)..... 274

PAGE.

" :—Interrogatories so taken *pro confessis*, when they furnish sufficient *commencement de preuve par écrit*, may supply the want of the memorandum in writing required by Article 1235 of our Civil Code. (Do.)..... 274

" :—Where an action is brought to recover the price of a horse sold and delivered, and the defendant, being examined, states that the horse was received by him on trial, even if the transaction be treated as a non-commercial case, this answer makes a *commencement de preuve par écrit*, and oral evidence is admissible on the part of the plaintiff to prove the sale. (Cox, appellant, and Patton, respondent, Q. B.)..... 316

EXECUTION:—*Vide* PRACTICE.

" :—A seizure effected in the hands of a third party, *who does not object*, is valid, and the actual *consent* of such third party to the seizure is unnecessary; his failure to object being of itself sufficient. (Brossard, appellant, and Tyson, respondent, Q. B.)..... 54

" :—A judge in the exercise of a sound discretion, may grant a *sursis* of proceedings under execution, to allow of an appeal to Her Majesty in Her P. C. (DeGaspé et al. vs. Asselin, and DeGaspé et al., Opposants, S. C.)..... 112

EXTRADITION:—Sub-section 2 of section 3 of The Imp. Extradition Act of 1870 is inconsistent with the subsisting extradition treaty between Great Britain and the United States, and is therefore not in force *quoad* any application under such treaty. (In the matter of the U. S. Government for the extradition of Israel Rosenbaum, Q.B.)..... 200

" :—A copy of a Bill of Indictment found against the prisoner in the U. S. cannot be received as evidence. (Do.)..... 200

" :—The evidence adduced in above case was sufficient to sustain the application. (Do.)..... 200

FREIGHT:—When goods, shipped from Liverpool to Montreal, deliverable to B. or his assigns, on payment of freight, are delivered to H., the endorsee on the bill of lading, without the exaction of freight, B. is not liable for the freight, although H. be only a forwarder employed by B. to receive and forward the goods to B. (Bickford, appellant, and Kerr, respondent, Q. B.)..... 169

GUARANTEE:—A letter by an architect, to a brickmaker, to the effect, that the bricks which a contractor will require "will be paid for as may be required" by the brickmaker, is a guarantee by the architect that on failure by the contractor to pay for the bricks he will pay for them. (Bulmer et al. vs. Browne, C. of R.)..... 136

GUARDIAN:—A, of cattle and hay seized simultaneously, under the same writ, has a right to use the hay for feeding the cattle, even although it be afterwards proved that the cattle did not belong to the defendant. (Johnson, appellant, and O'Halloran, respondent, Q. B.)..... 221

HABEAS CORPUS:—A warrant of commitment must show with certainty that a specific offence has been committed for which imprisonment can be awarded: and therefore a commitment under the License Act which recited a conviction "for selling three glasses of whiskey and receiving payment therefor, contrary to the dispositions of the Statute in such case made and passed," without stating that the liquor was sold "by retail," was insufficient. (Ex parte Louis Hebert, for *habeas corpus*, S. C.)..... 156

" " :—The place of sale must be stated in the commitment. (Do.)..... 156

" " " :—The commitment should state that the prisoner had made option of imprisonment, in preference to a warrant of distress. (Do.)..... 156

" " " :—A warrant of commitment against sailors, under The Merchant Seamen's Acts, "for refusing to go to *their* work," is bad, and will be quashed on petition. (Ex parte Johansen et al., for *habeas corpus*, Q. B.)..... 164

PAGE.

" :—A writ of, will be granted to liberate a prisoner charged with process in a civil suit (*contrainte par corps* against *a gardien*) issued out of a court of inferior jurisdiction, when it appears on the face of the writ of arrest that the proceedings had are beyond the jurisdiction of the court from which it issued. (Lebœuf & Viaux, and Viaux fils, *mis en cause* and petr., S. C.)..... 214

" " :—*Vide* CURATOR *to an interdicted person.*

INSOLVENT ACT OF 1869 :—The notice required by the 101st section of the Act cannot be given by advertisement in the *weekly* edition of a *daily* newspaper. (Hope, appellant, and Franck, respondent, Q. B)..... 28

" " " :—Where the Court is satisfied that the fraud charged, in an action under the 92nd Section of the Act, has been proved, the insolvents will be ordered to be imprisoned, in default of payment of *costs* as well as of the debt. (Rogers et al., appellants, and Sancer et al., respondents, Q. B.)..... 57

" " " :—An assignee who sold outstanding debts due to the insolvent under the 44th sec. of the Act, according to a schedule exhibiting the *original* amounts of such debts, *without deduction of payments received by the assignee on account*, was bound to account for and pay over to the purchaser of such debts the *full amount of such payments* so made to the assignee, notwithstanding that the conditions of sale declared :—" that the sale is made without any guarantee whatever or any warranty of any kind or description whatever, *so much so that no warranty is given that the debts have even existence*,"—and notwithstanding also, that the audience were informed by the auctioneer, *that dividends had been paid*, and that the amounts in the schedule were the *original amounts without deduction of such dividends*, and notwithstanding, further, that the total amount paid for such debts was *only a few dollars* and the *payments* in question amounted to more than 600 dollars. (Lafond et al., appellants, and Rankin, respondent, Q. B.)..... 62

" " " :—An insolvent petitioning for his discharge under the Act must give notice by mail to all creditors and representatives of foreign creditors within Canada, in addition to the notices required to be given by advertisement. (*In rebus*, Esinhart, Insolvent, and Starke et al., insolvents, S. C.)..... 73

" " " —*Vide* COMPENSATION.

" " " :—The creditors are not bound to accept the highest tender for the assets of an insolvent estate, sold under section 41 of the Act, and are free to act as they deem best for the interests of the estate. (*In re* McCarville, insolvent, and Lajoie, assignee, and Hudon et al., petitioners, S. C.)..... 139

" " " :—In ordering imprisonment under the 92nd section of the Act the Court is bound to limit the payment, by way of release (in the precise words of the Act), to " the debt *or* costs." (Warner vs. Buss, S. C.)..... 185

" " " :—The giving of notice required by section 105 of the Act does not include the necessity of notice to each individual creditor required by section 127. (In the matter of Starke et al., ins. petrs. for discharge, C. of R.)..... 288

" " " :—A payment by the sheriff, under a judgment of distribution, to an opposant therein collocated at a time when such opposant was no longer possessed of his estate (having assigned the same under the Act) is good, and cannot be questioned subsequently by the assignee. (Salvas vs. Levreau, and Gendron, oppt., and Stewart, assignee, petr., and Taché, sheriff, C. of R.). 293

" " " :—An assignment under the Act by one member only of a copartnership cannot operate as an assignment of the partnership estate. (Cournoyer vs. Tranchemontagne et al., and Barthe, int. party, C. of R.)..... 335

INSURANCE :—When a Fire Insurance Co.'s local agent, acting within the scope of his powers and according to usage with such company, receives the premium for an insurance and grants an interim or deposit receipt, subject to the

PAGE.

approval of the chief officer of such company and the conditions of the company's policies, the applicant is insured until he has notice that the risk is declined. (Goodwin, appellant, and The Lancashire Fire and Life Insurance Co., respondent, Q. B.)..... 1

" :—When a party applies to one agent of an Insurance Co. and is refused insurance, and afterwards applies to another agent of the same company, and secures insurance through him in the ordinary mode and preceded by the usual inquiries; the fact that such party does not mention that he had before applied to another agent of the same company for insurance and was refused, is not the concealment of a material fact to render the insurance void. (Do.)..... 1

" :—When a company absolutely repudiates the insurance effected by interim or deposit receipt, and when the policy has not issued, the right of action accrues at once, and there is no necessity of giving the preliminary notices and conforming to the delay and other conditions precedent, in case of loss, indorsed upon the company's policies. (Do.)..... 1

" :—A policy of, containing the following clause is legal,—viz:—"The Company will not be answerable for any loss or damage by fire occasioned by earthquakes or hurricanes, *or by burning of forests*; and this policy shall remain *suspended and of no effect* in respect of any loss or damage (*however caused*) which shall happen or arise, *during the existence of any of the contingencies aforesaid*." And in order to exempt the company from liability it is only necessary to prove that at the time of the loss the neighbouring forests were burning. (The Commercial Union Assurance Co., appellants, and The Canada Iron Mining and Manufacturing Co., respondents Q. B.)..... 80

" :—A landlord cannot attach, by *saisie arrêt avant jugement*, the money payable under a fire insurance policy to his tenant, on the simple pretension that the tenant is worthless and that the moveables insured and destroyed by the fire were hypothecated or affected for the landlord's claim. (Belanger vs. McCarthy, and the Imp. Ins. Co. of London, T. S., S. C.)..... 138

" :—*Vide* LIFE INSURANCE.

INTERVENTION:—An, which has not been served on the parties to the suit can have no effect. (Cournoyer vs. Tranchemontagne et al., and Barthe, Int. party, C. of R.)..... 335

JUDGMENT, *Procedure against*:—*Vide* PRACTICE.

JURY TRIAL:—A motion for a, cannot be granted until after the issues are perfected. (Hart et al. vs. The Northern Insurance Co., S. C.)..... 189

LARCENY:—An indictment for, will not lie against a partner, under the 32nd and 33rd Vic., ch. 21, s. 38. (*Regina* vs. Lowenbruck, Q. B.)..... 212

LEASE:—*Vide* PEW.

" :—When a tenant removes any portion of the moveables in the leased premises, the landlord may sue out process of *saisie gagerie par droit de suite*, as well for rent overdue as for rent yet to accrue. (Houle vs. Godère, and Dumesnil, *mis en cause*, C. C.)..... 151

" —Where a written lease has been continued by *tacite reconduction* during several years, the lease terminates *ipso jure* at the end of any one of such years, unless continued by common consent for another year. (Lamontagne vs. Webster, S. C.)..... 153

LETTER:—The opening of a private, by a person to whom it was not addressed and for whom it was not intended, and voluntarily perusing and copying such letter, renders the person who thus violates the sanctity of private correspondence answerable in damages. (Cordingly vs. Nield, S. C.)..... 204

LIBEL:—*Vide* CRIMINAL PROCEDURE.

LICENSE ACT:—The tribunal constituted under the Act being that of *two* Justices of the Peace, a conviction by *three* such Justices is illegal. (Paige, petr., and Griffith, respondent, S. C.)..... 119

PAGE.

" " :—A conviction for selling liquor in the house of another is null. (Do.).... 119

" " :—The conviction should be separate from the complaint. (Do.)..... 119

" " :—The power conferred by The B. N. A. Act, to impose "fine, penalty or imprisonment," does not restrict the power of the Provincial Legislature to the exercise of only one of these modes of punishment at a time by any particular Act. (Do.)..... 119

" " :—Where a conviction is for two offences, incurring two penalties, the conviction should specify for each offence the time, place and penalty incurred. (Do.)..... 119

" " :—The S. C. has no authority to issue a *mandamus* to the License Commissioners under 37 Vic., ch. 3, to compel them to grant license. (Privett vs. Sexton et al., S. C.)..... 192

LIFE INSURANCE:—The provisions of the Statutes enabling insurance to be effected in favor of wives and children are in the nature of *alimens*, and therefore such insurances are free from the claims of the creditors of both husband and wife. (Vilbon, appellant, and Marsouin, respondent, Q. B.)..... 249

MANDAMUS:—*Vide* LICENSE ACT.

" :—Under Art. 1023 of the Code of C. P., as amended by the 25th Vic., ch. 6, s. 22, of the Statutes of Quebec, a Judge in Chambers may, even during term, grant an application for a writ of *mandamus;* and the affidavit in support of the application may be general, and simply to the effect that the allegations of the petition are true. (Ex parte Smith, for a writ of *mandamus*, and Sexton, recorder, respondent, S. C.)..... 193

MERCHANT SEAMEN'S ACT:—The 125th section of the Act of 1873 does not restrict the application of the Acts in the cases of foreign vessels, to the offence of desertion only. (Ex parte Johansen et al., for *habeas corpus*, Q. B.)..... 164

" " " :—Where there was a deviation in the voyage from that stated in the Shipping Articles, occasioned by a return to the port o Quebec not specified in them, the engagement of a seaman was terminated, as there was then no subsisting contract, and a plea to the jurisdiction of The Admiralty, alleging a subsisting voyage under the 149th section of The Merchant Shipping Act of 1854, which enacts that no seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom, is entitled to sue in any court abroad for wages, will be overruled. (The Latona, V. A. C.)..... 185

MINOR:—In the case of a loan of money to a, the *onus probandi* is on the plaintiff suing for such loan, that the loan was beneficial to the minor. (Miller *vs* Demeule, C. C.)..... 12

MISNOMER:—A plea of, is necessarily an exception to the form. (Jubinville et al., appellants, and the Bank of British North America, respondent, Q. B.)..... 237

MONTREAL, CITY OF:—Neither the S. C. nor any judge thereof had power to remove commissioners appointed for purposes of expropriation under the Statute 27th and 28th Vic., chap. 10, and appoint others in their stead, on the ground that they were pursuing a vicious and illegal mode of expropriation. (Brown et al., appellants, and The Mayor, &c., of Montreal, respondents, Q. B.)..... 145

" " " :—In a case of expropriation, where the commissioners clearly intended to award $1000 per annum, but only awarded a capital sum of $12,500, which would produce at 6 per cent. a sum less than $1000 per annum, the S. C. will augment the amount of the award. (Taylor vs. The Mayor et al. of Montreal S. C.)..... 210

" " " :—Notwithstanding the Quebec Act 35 Vic., ch. 32, section 7, the Court will have difficulty in disturbing the award of commissioners in expropriation as to the value of property expropriated and the amount of indemnity to be allowed the proprietor. (Bagg vs. The Mayor, &c., of Montreal, S. C.)..... 211

" " " :—The Corporation having acquired a right to close streets generally by An Act amending its Charter, and in which Act there is no mention of

indemnity, may be condemned to pay damages for the exercise of the rights conferred by such amending Act, particularly if compensation for damages be recognized in its Charter and other Acts in amendment thereof. (The Mayor et al. of Montreal, appellants, and Drummond, respondent, Q. B.)..... 225

OPPOSITION:—An, under Article 484 of the Code of C. P. cannot be fyled to a judgment of the C. C. rendered in term, and an opposition to such a judgment will be dismissed on motion. (Lord vs. Bazinet et al., and Bazinet et al., opp., same, C. C.)..... 9

"—An, under Article 484 of the Code of C. P., on the sole ground that one of the defendants has been summoned by a wrong name, is in the nature of a preliminary exception to the action, and must, consequently, be accompanied by the deposit required by Article 112 of the Code of C. P. in addition to that required by Article 486 of the same Code. (Jobin vic et al., appellants, and The Bank of British North America, respondent, Q. B.)..... 237

PARTNERSHIP:—An agreement between a sheriff, an advocate and a merchant, for the carrying on, and profit, is a commercial partnership. (Couture vs. Brossard et al., S. C.)..... 8

"—An agreement between two persons carrying on business as iron founders, that no contract for the purchase or sale of material exceeding $100 was to be made without the consent of both, did not exempt the partnership from liability to a third party, under a contract of sale of pig iron exceeding $100 made by one partner in the firm's name, such sale being within the scope of the partnership business, and the purchaser buying in good faith. (Cuvillier et al. vs. Gilbert et al., S. C.)..... 22

"—*Vide* LARCENY.

PAYMENT:—Where money is payable at the domicile of the debtor, demand of payment must be made there, before interest can accrue thereon, and a payment of the capital so due to a party indicated by the creditor, although after the date at which it fell due, is sufficient to prevent the accruing of interest. (O'Halloran vs. Kennedy, C. of R.)..... 284

PEW:—Where the term of a lease of a pew in a church such as St. Andrew's church, Montreal, is clearly defined by the receipt for the rent, no notice is necessary to determine the lease at the expiration of the term, and The Minister and Trustees of the church have a right to refuse a renewal of the lease. (Johnston vs. The Minister and Trustees of St. Andrew's Church, Montreal, S. C.)..... 113

PRACTICE:—*Vide* OPPOSITION.

"—A sale of goods may be validly made under an execution *de bonis* on the day fixed for the return of the writ into Court. (Elliott vs. St. Julien, and St. Julien, opposant, S. C.)..... 11

"—*Vide* CAPIAS AD RESPONDENDUM.

" EXECUTION.

" SAISIE ARRÊT.

" TIERS SAISI.

" APPEAL.

"—A plaintiff cannot move to amend his declaration, so that it may agree with the facts proved, while the case is *en enquête*. (Beard vs. McLaren, ... 38

"—*Vide* TRANSFER.

"—CORPORATION.

"—PROHIBITION.

"—JURY TRIAL.

"—A special answer cannot be fyled to a special answer, without leave of the Court: (Hart et al. vs. The Northern Insurance Co., S. C.)..... 189

"—Where, instead of moving to reject a special answer irregularly fyled, the plaintiff fyles a demurrer, and inscribes for hearing on law, the Court will discharge the inscription and order a repleader. (Do.)..... 189

PAGE.

" :—A declaration setting out a promissory note as made by one of the defendants "St. Julien, *Tuteur*," and praying for judgment against him and the other defendant, the endorser, is not demurrable. (Darling et al. vs. St. Julien et al., C. of R.)..... 190

" :—Where the defendant, besides other pleas, offers to confess judgment, such offer, though not technically a confession of judgment, is conclusive of the indebtedness. (Aurele vs. Durocher, C. of R.)..... 197

" :—*Vide* QUEEN'S BIRTHDAY.

" :—GUARDIAN.

" :—MISNOMER.

" :—An admission in a plea of a portion of plaintiff's demand unaccompanied by an actual confession of judgment, will not entitle the defendant to the costs of contestation, in case the plaintiff does not obtain judgment for more than the amount admitted, and under any circumstances, a prayer to such plea that the defendant be condemned to pay costs as in an uncontested action only is irregular. (Latham vs. Martin, C. of R.)..... 287

" :—An *alias* writ of *fi. fa. de ter.* in a case in which judgment was rendered in the Circuit Court, cannot legally be issued and signed by the Prothonotary of the S. C. (MacDonald et al. vs. Prémont *et ux*, and Legue et al., appellants, C. of R.)..... 295

" :—In a personal action against several defendants they may be all legally sued in the district within which one of them resides personally. (Ford et al. vs. Auger et al., S. C.)..... 296

" :—The enumeration in the Code of C. P. of modes of setting aside a judgment is not exclusive, and a direct action may be brought for the purpose where the plaintiff alleges that the judgment was obtained without his knowledge, and without service on him of the writ of summons. (Kelland, appellant, and Reed, respdt., Q. B.)..... 309

" :—*Vide* INTERVENTION.

PRESCRIPTION :—The, of a promissory note made in a foreign country and payable there, is to be governed by the *lex fori* and not by the *lex loci contractus*. (Hillsburgh vs. Mayer, S. C.)..... 69

PROHIBITION :—A writ of, cannot be issued against a corporation, to stay proceedings on a warrant of distress signed by the Mayor to compel payment of taxes. (Exp. Blain, for writ of prohibition, and The Corporation of the Village of Granby, respondent, C. of R.)..... 180

PROMISSORY NOTE :—*Vide* PRESCRIPTION.

" " :—A paper writing, *sous seing privé*, by which defendant acknowledged and confessed to well and truly owe to plaintiff a certain amount for value received by settlement of notes (*reglements de billets*) given before the date of such paper writing, which defendant obliged himself to pay to plaintiff, or order, in one year from the date of such paper writing, with interest, is a promissory note and liable to the short prescription of five years, even although the words "obligation" be written on the back of such paper writing. (Wurtele vs. Girouard, C. of R.)..... 154

" :—A paper writing purporting to be a, which is proved to have been fraudulently written over the signature of the maker, which had been written on a piece of paper as indicatory merely of the party's address, cannot be recovered on. (Ford et al. vs. Auger et al., S. C.)..... 296

QUEEN'S BIRTHDAY :—The day set apart by proclamation for the celebration of the Queen's Birthday is a juridical day, notwithstanding such proclamation. (Gervais vs. Garean, Q. B.)..... 220

REGISTRATION :—*Vide* BAILLEUR DE FONDS.

SAISIE ARRÊT :—In the case of a, before judgment, the absence of a specific allegation in the affidavit that the defendant "is secreting or is about to secrete his estate, debts and effects" is fatal. (McNeven vs. McAndrew, S. C.)..... 70

" " :—*Vide* INSURANCE, 1 and 2.

PAGE.

SALE :—Where goods are sold and purchaser refuses to pay on ground that the goods were not as represented, and on reference to arbitrators, they award that purchaser is only entitled to a small deduction for broken bottles, the Court will condemn purchaser to pay costs, notwithstanding that the arbitrators awarded (without authority, however, to pronounce as to costs) that each party should pay his own costs. (Urquhart vs. Moore, S. C.)..... 71

" :—Proof of a new sale by witnesses is inadmisible, without a writing or without previous delivery. (Beard vs. McLaren, S. C.)..... 76

" :—A sale of goods cannot be rescinded, on the ground of fraud in the mode of payment, after the lapse of such time as will prevent the wrong doer being in the position he would otherwise have been in *quoad* the goods had the demand for rescision been made promptly. (Lewis et al. vs. Jeffrey et al., S. C.)..... 132

" —A vendor of immoveables (before the passing of the Code) who has assigned portions of the purchase money, can, nevertheless, bring a resolutory action by reason of the default of the vendee to pay any portion of the purchase money, and the intervention in such action by the assignee, containing a declaration of acquiescence in such action, places the plaintiff's right beyond question. (Watson, appellant, and Perkins, respondent, Q. B.)..... 261

SEIGNIORIAL TENURE :—Where a purchaser of land in a seigniory assumed in his deed of acquisition to pay a certain *rente* to the seignior to the relief of the vendor, and the Government subsequently paid the capital of the *rente* and thereby extinguished it, the vendor has no claim against the purchaser to compel payment to him of the proportion of the price of the land represented by such *rente*. (Rochon vs. Mongenais, S. C.)..... 218

SCHOOL TRUSTEES :—The corporate name of those of the dissentient minority is, by implication, the same as that of the Trustees proper. (Cushing vs. The School Trustees of the Municipality of Acton Vale, S. C.)..... 21

" " :—There cannot be more than one dissentient school in each municipality. (Do.)..... 21

SHERIFF :—*Vide* INSOLVENT ACT OF 1869.

STAMPS :—An application to affix, will not be granted, where there is nothing to show that the holder was ignorant that the duty had not been paid, and made the application as soon as he became aware of the fact. (Aurele vs. Durocher, C. of R.)..... 197

" " :—An application to affix, will not be granted, unless supported by an affidavit showing that the affixing of stamps had been omitted through inadvertence or mistake, and that the application was made as soon as the discovery of the omission took place. (Scheffer vs. Fauteux, S. C.)..... 216

SUBSTITUTION :—An authorization to the curator to a, to sell real property affected by the substitution, unaccompanied by a similar authorization to a tutor *ad hoc* to such of the substitutes as are living but incapable of acting, is insufficient. (Benoit et al. vs. Benoit et al., S. C.)..... 286

TIERS SAISI :—A, has no right to appear by attorney, in answer to the writ served on him, and an appearance fyled under such circumstances will be rejected on motion. (Forbes et al. vs. Lewis, S. C.)..... 74

TIDAL LIMITS :—The sale of Government, is a sale of an immoveable. (Watson, appellant, and Perkins, respdt., Q. B.)..... 261

TRANSFER :—An assignee, under a duly executed transfer of a debt, can sue for and recover the debt in his own name, although he may be in reality only the agent of the assignor. (Nault vs. Charby et al., C. of R.)..... 19

" :—The want of signification of a, cannot be invoked against a plaintiff in a hypothecary action, in which the only plea is that the defendant is only an occupant and not a proprietor. (Gibeau vs. Dupuis, S. C.)..... 101

" :—If an assignment of debts be made upon the condition that the assignor

PAGE.

will pay their amount upon the default of the debtors, and without obliging the assignee to discuss these debtors, such assignee has no action against the assignor before a demand for payment has been made upon the original debtors. (Labelle vs. Walker et vir., C. of R.)..... 117

" :—A creditor cannot divide his claim so as to subject the debtor to several actions on one contract. (Legaré vs. The Queen Ins. Co., S. C.)..... 134

USUFRUCTUARY:—*Vide* BANK OF MONTREAL.

VENDOR:—*Vide* BAILLEUR DE FONDS.

WITNESS:—A professional adviser cannot refuse to answer as a witness, where he is a party to the transaction as well as adviser. (Echler vs. Homier, S. C.)... 83

" :—A motion for a rule against a, for contempt, must be notified to the party moved against, and the rule must be served personally, unless the party absconds in order to avoid such personal service. (*In re* Downey, Doherty et al., and Lajoie, petr., S. C.)..... 283