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BY

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TABLE OF CASES

REPORTED, NOTED, AND DIGESTED,

In Vol. II.

ERRATA.—P. 201, for "rerespented," read "represented."
P. 202, for "*Mills & Weare*," read "*Mills & Meier*."
P. 312, for Lazeau, read Lareau.
P. 414, the heading "Superior Court," should appear over the case of "*Maillé* v. *Richler*."
P. 349, *Comp. de Prêt. et Crédit Foncier & Baker*, the grounds of the judgment of the Court below are imperfectly stated. The principal *considérant* was as follows:—"Considering that the petitioners *en nullité de décret* have proved the allegations of their petition, and that under the first notice of sale given in this case, the said sheriff cannot give them more than the thing sold, that is to say, lot 620, and that there was essential misdescription in saying that the house mentioned in the notice was on lot 620;" &c. The property was described in the notice as No. 620, and as having a two story wooden house on it, while, in fact, the house stood partly on the lot sold, and partly on the next lot.

The Legal News.

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CAPIAS—WHEN JUSTIFIABLE.

The case of *Shaw* v. *Mackenzie et al.*, which was decided last week by Mr. Justice Johnson, and a report of which will be found in our present issue, has great interest for the commercial community. The Judge held that in the case of a debtor who was capiased, and who afterwards brought an action for damages against his creditor, the affidavit charging an intent to defraud did not necessarily mean an intent to deprive the creditor finally and completely of his debt or his remedy; but that the debtor, having acknowledged he was going beyond the seas, and having told his creditor he might get his money in the best way he could, the indefinite duration of such absence being altogether within the debtor's power, and beyond the creditor's control, and the menace implying that he might never get paid at all, was precluded from bringing an action founded on absence of reasonable cause. Mr. Shaw, the plaintiff, being about to leave the jurisdiction, the defendants, his creditors, were pressing him for a settlement of their claim. Mr. Shaw chose to treat them with haughty indifference, and thereupon they caused a writ of capias to issue against him. Mr. Shaw then paid the debt, and sued them in damages for illegal arrest. The Court, defining the law as above stated, has freed the defendants from liability.

The case is one of a rather numerous class, the determination of which has given rise to some difference of opinion on the bench. The judgment of Mr. Justice Johnson in the present instance discusses in a very able manner the principles which should govern such cases, and the grounds of the decision are presented in so clear a light that the judgment will always be read with interest.

THE LAW OF NEGLIGENCE.

The case of *Crowhurst* v. *The Amersham Burial Board*, decided by the English Court of Appeal, is of such importance that we give it place in our columns at full length. It will doubtless take rank as a leading case in this branch of the law. The Amersham Burial Board had planted two yew trees within enclosed cemetery grounds, but the trees grew, and in course of time projected beyond the railing, over an adjoining meadow. Mr. Crowhurst, the plaintiff, had leased this meadow from the proprietor for purposes of pasture, and one of his horses having eaten of the portion of the tree which projected over the field, died from the effects of the poison. The question was whether the Cemetery Association was liable for the value of the horse. The Court of Appeal, in an able judgment rendered by Chief Baron Kelly, has held that the Cemetery Board was liable.

The above case bears some resemblance to that of *Firth* v. *Bowling Iron Co.*, decided last year by the Common Pleas Division of the High Court of Justice, (see vol. 1, Legal News, p. 164). In that case the plaintiff sued for the value of a cow that had died from the effects of eating a piece of wire which had fallen on the pasture from the wire fence belonging to the proprietors of the adjoining pasture. The Court held that the defendants were liable.

THE RAILWAY INJUNCTION CASE.

The judgment of the Court of Appeal, at Montreal, noted in the present issue, dissolving the injunction in the case of *Macdonald* v. *Joly et al.*, followed almost as a matter of course upon the previous decision pronounced by the same Court, suspending the injunction, (1 Legal News, p. 461). The same division took place, the Chief Justice and Judges Tessier and Cross composing the majority of the Court, while Judges Monk and Ramsay dissented. In addition to the reasons formerly given by the Chief Justice on the motion for suspension, reference was made to the case of *Attorney General & Kirk*, to which the *Macdonald & Joly* case bears a strong resemblance. The minority of the Court apparently did not question the authority of the statute which authorizes the government to resume possession of a public work, but it was said that the forms enjoined by the statute had not been adhered to,—in particular that a warrant had not been issued

signed by the Lieutenant-Governor. The Chief Justice, in answer to this, remarked that the form was that usually followed: the signature "L. Letellier" appeared at the head, and at the foot it was signed "By order, F. G. Marchand, Secretary."

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, Dec. 21, 1878.

Present: Sir A. A. DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

Hon. H. G. JOLY et al., (defts. in the Court below), Appellants; and MACDONALD (petitioner and plaintiff in the Court below), Respondent.

Injunction—Public Work—Contempt—32 *Vict.* (*Que.*) *c.* 15.

Held, that an injunction issued at the instance of a contractor against the Commissioner of Public Works of the Province of Quebec and the Government Engineer, to restrain them from resuming possession of a public work, which the contractor was constructing, was improperly allowed, it appearing that the Government acted under the Quebec Statute 32 Vict. c. 15, and also that the terms of the contract permitted the Government to cancel it, if the work was not duly prosecuted.

The appeal was from the judgment reported 1 LEGAL NEWS, p. 446, rejecting the motion to set aside the injunction.

DORION, C. J. Macdonald has obtained a writ of injunction against Mr. Joly personally and as Commissioner of Public Works, and against Peterson, engineer, enjoining them not to interfere with the line of the Montreal, Ottawa & Western Railway, or with the station agents, &c., on pain of being held in contempt.

He alleged in his petition that by contract of 16th August, 1875, he obliged himself towards Her Majesty to perform all the obligations and all the works which by contract of 24th July, 1873, he was to perform for the M., O. & W. Railway Company, the works in question consisting in the building of a railway from Montreal to Aylmer, with a branch to the Parish of St. Jerome, for $3,601,649. The railway was to be completed on the 1st October, 1877, and he bound himself to proceed with all possible speed and according to instructions from government engineers, and failing this, the work might be proceeded with by the Government Railway Commissioners at the cost and charges of the petitioner. If he failed to prosecute the work in a proper manner, or at a rate of progress that would secure its completion within the time specified, the Government had power to cancel the whole contract, to take possession of the road, and enter into other arrangements for its completion. The petitioner alleged that he had done all in his power to complete the works according to the letter and spirit of the contract, but that through the interference, ignorance and malice of the Railway Commissioners and Government engineer, Peterson, the petitioner had been constantly interrupted, delayed, and ill-treated in the execution of the works. After alleging several protests, the petitioner went on to state that ever since the appointment of the Railway Commissioners, the petitioner's rights and position as contractor had been ignored and interfered with by the combined malice and ignorance of the Commissioners and Government engineer, the Commissioners altering works to be done on their own responsibility, and by men not under the control of the petitioner, spending large sums of money, which it was afterwards attempted to be debited to the petitioner. That the railway commissioners and engineer had refused to communicate to petitioner the reports by them made to the Government, to certify estimates of the works done by the petitioner, depriving him thereby of the means of obtaining the value of his works, and the advances necessary for carrrying them on. That as a result of such combination and malice, the petitioner has received no money whatever from the Government since the month of November, 1877, and has been obliged to exhaust all the personal means and credit he could command. That notwithstanding all these obstructions and misfeasances, the petitioner proceeded with his work with as much diligence as possible, and opened a portion of the road in January last, and would long since have completed the whole of the line, if the Government had performed their part of the contract. That an order in Council was passed by the Government on

the 24th August, to cancel the contract, and take possession of the railway and branch, without paying anything to petitioner. That acting on this order, Mr. Joly, on the 26th August, had served a notice that on the 27th he would take possession of the line of railway and branch, and that he had appointed Peterson as his agent to execute the order in Council. That the Government being the only party responsible for the delays which have occurred in the execution of the works, the order in Council is null and void, being without any legislative authority in the Government, and having for its object to take possession of the petitioner's works and property without paying for the same, and, moreover, tending to deprive petitioner of the benefit of his contract, and prevent him from completing the works. That in pursuance of this order in Council, Peterson had given notice to the employees that they would be dismissed if they aided petitioner in withholding the possession of the road from the Government. The conclusions were that the defendants be immediately ordered and enjoined to desist and abstain from further intrusion and interference in the line of railway, and with the station agents, &c., under pain of being in contempt, and that the injunction be made permanent, or until the works on the railway were completed, paid for, or adjusted according to law. This petition was presented in Chambers, without any notice whatever, on the 30th of August, and an order was given that as soon as the petitioner should have given security in the sum of $600, a writ should issue as prayed for, returnable 3rd September, before one of the Justices in Chambers. On the 2nd of September the petitioner moved that Peterson, one of the defendants, and the Sheriff be held in contempt for not obeying the writ of injunction. On the 4th of September the defendants, Hon. Mr. Joly and Mr. Peterson, moved to dissolve the injunction, and to quash the writ as improvidently issued. On the 13th of September the Court declared Peterson to have been in contempt of the order of the Court, and dismissed the motion of the defendants, the present appellants, to dissolve the injunction. The present appeal is from that part of the judgment which dismissed the defendants' motion to dissolve the injunction.

Under the Act of the Province of Quebec, 41 Vict., c. 103, relating to injunctions, an appeal is given to this Court from any interlocutory or final judgment rendered upon proceedings for injunctions, and the appellants having obtained leave to appeal, the case now comes up on the merits of the injunction. (His Honor stated the grounds for issuing a writ of injunction under the Statute.) It has been argued that the present injunction falls under the first class of cases—that arising out of a breach of contract. But the only breaches alleged are that the Government, through their commissioners and engineer, have interfered to delay the execution of the contract, and that they have not paid the respondent what is due. The first complaint could only be the subject of a claim for damages, and the second of a demand for work and labor performed under a contract; but in no case could this be matter for a permanent injunction, as prayed for in this case. The respondent is a mere contractor for works. He does not claim to be proprietor of the railway. As contractor, he has no privilege for his payment, and therefore no right to retain the possession until paid. Art. 2,013, C.C. He has no right to complete his contract against the will of the proprietor, even if the delay had not expired; for, under Art. 1,691, the owner may always cancel a contract for the construction of a building or other works, although the work has been begun, subject to the payment of damages. In the present case the respondent has alleged in his petition that the contract contained an express stipulation that the Government could cancel the contract at any time, if not satisfied with the progress of the works. The cancelling of the contract and the resuming possession of the railway are, therefore, strictly in accordance with the terms of the contract entered into by the respondent instead of being a breach of it. The Quebec Act, relating to public works, 32 Vic., c. 15, contains a provision, that the Government may re-enter into possession of any public work; so that the Government has this power not only under the terms of the contract, but also under the law.

The circumstances of the present case are in many respects so similar to the cases of *Kirk* and the *Queen*, and of the *Attorney-General* and *Kirk*, 14 L. R. Eq. cases, p. 558, that it will be necessary to refer briefly to the pro-

ceedings in those two cases. In the first case, John Kirk, who had contracted with the Secretary of State for War to construct barracks, commenced a suit by a petition of right against the Queen and one Capt. Percy Smith, of the Royal Engineers, who had acted as superintendent of the works. He complained that the delay in the prosecution of the works had been caused by the unreasonable exactions of Smith (just as the present respondent complains of the action of the railway commissioners and of the engineer), and that the War Department had committed a breach of contract, and he therefore prayed, 1st, for an account and payment of what was due to him; 2nd, damages in respect of the alleged breach of contract; 3rd, an injunction to restrain the Secretary of State from determining the contract; 4th, a like injunction against the further employment of Captain Smith as superintending engineer; 5th, and for further relief. The second suit was commenced by the Attorney-General against Kirk, whereby after stating the facts, the informant prayed a declaration that defendant had failed to proceed with due diligence, and in the manner referred to by the terms of the contract; and an injunction to restrain the defendant, his agents and workmen from retaining possession, or continuing or being upon the site of the works, or obstructing the officers of the War department in taking possession thereof, and from removing any temporary building, staging, tramways, fixed machinery or plant placed thereon, or any materials delivered for the execution of the works. The cases were argued upon two motions;—the first, on behalf of the Attorney-General, for an injunction as prayed for by his information. The second, on behalf of Kirk, for an injunction to restrain Her Majesty's principal Secretary of State for War, and officials of the War department from preventing him from carrying on the contract, or excluding him from the site of the works, or interfering with the due completion of the contract. The report states that the arguments both of law and fact were extremely lengthy, and were conducted among others by Sir Roundell Palmer on one side, and the present Master of the Rolls, who was then Solicitor General. On the latter rising to reply, Vice Chancellor Wickens, before whom the case was being argued, said; "Mr. Solicitor General, I do not want to hear you on the question of Mr. Kirk's motion. I am quite clear I can make no order upon that. But I want to hear you on the question whether I can make an order on your own motion." On rendering the judgment, the Court, after referring to the terms of the contract, and disposing of some questions of form, said: "This contract the War Office has determined on the ground of delay. Mr. Kirk, alleging that the delay was caused by the vexatious and unreasonable interference of the officers employed in the War department, (just as Mr. Macdonald complains here of the interference of the railway commissioners and their engineer) seeks in effect—these are not the terms, but that is the effect—that the War department's notice to determine the contract shall be treated as inoperative; and that he shall be allowed to retain possession of the site, and to complete the works. On the other hand, the Attorney General has filed an information for the purpose in effect of obtaining possession of the site and materials on it, excluding, of course, rejected ones." The questions being so stated, after discussing some points of form the learned Vice-Chancellor continued: "But in truth the contractor's case fails on the merits. A great portion of Mr. Kirk's complaint is in fact that he has not been allowed to deviate from the contract where he thinks it would have been reasonable and fair, according to the ordinary course of business to let him do so. So another large part of them is founded on the alleged ignorance and what may be called the alleged martinetship of the officer deputed by the war office to superintend the works; and his consequent error of judgment. Supposing all these allegations proved, they afford no ground for the Court's interference for such a purpose as this. And if they are put out of sight, the delay on the part of the contractor, which unintentionally occurred, is not justified, even if he has other minor grounds of complaint."

After examining the merits of the Attorney-General for an injunction against Kirk, the learned Vice-Chancellor concluded by saying: "On the whole, thinking as I do that it would be in many respects more convenient, if I could grant an injunction instead of leaving things alone, I propose simply to make on the Solicitor-General's motion the same order that

I do upon Mr. Kirk's motion, namely, that it should stand to the hearing." The Solicitor-General said: "If the Crown resumes possession, will your Honor consider it as acting contrary to your judgment?" The Vice-Chancellor replied: "The meaning of the judgment is that the Crown is at liberty to resume possession." We have it decided here in the most positive manner, and this without the defendant's counsel being called upon to answer: 1st, That the complaint of the contractor, that he was delayed and interfered with in the progress of his works by the superintending engineer and agent of the Government, if fully proved, was no ground for the interference of the Court by injunction; 2nd, that the Court would not grant an injunction to enable the War Department to obtain possession of the site and materials where the barracks were being erected; and 3rd, that the Crown was at liberty to resume possession without the aid of such injunction. According to the ruling here, Mr. Macdonald, on his own showing, had no ground for obtaining a writ of injunction, the effect of which would, as stated by Vice-Chancellor Wickens, be to supersede not only a notice to determine the contract, but an order in council, made under the authority of the Act respecting Public Works (32 Vict. c. 15, ss. 179, 180, 181), but also in conformity with an expressed condition contained in the contract. The case here is a much stronger one than the case just referred to, for here the law allows the Government to determine a contract and to resume possession of the works contracted for. This does not appear to have been the case in England. If by the law the Executive is created the sole tribunal to decide the cases when they can determine a contract, this Court has not power to interfere and declare the order so made inoperative. It has been urged that a warrant from the Lieutenant-Governor was required to resume possession of the railway. But supposing the warrant to be essential, it has been produced by the appellants with their motion, and this ought to be conclusive. Being of opinion that on the face of the proceedings, there was no case made out by Mr. Macdonald for the issue of an injunction, it is unnecessary to discuss the other points raised. Yet, two questions of great importance have been raised here; the first, that an injunction could not issue against the Crown, or to restrain the execution of an order-in-council sanctioned by the Crown. This seems to be a necessary consequence of the rule that the Crown cannot be impleaded, at least without its own consent, as by a bill of rights where such a proceeding is admitted. If the Crown cannot be sued, how can it be enjoined not to do a certain thing? The authorities are clear on this point. Kerr on Injunctions, p. 3; Joyce, p. 238; 9 Howard. How far these authorities apply to our Provincial Government, is the only question that could be raised on this point. The other question is as to the right of the party to be heard while he is in contempt of the Court. Objection has been taken to the form of the warrant, but it is signed as such documents usually are under our system. It begins with Luc Letellier at the top, and is countersigned by the Provincial Secretary. On the whole, I have come to the following conclusions: First, there were no grounds to justify the Judge in Chambers in issuing the writ of injunction; and, secondly, even if there were grounds, it was an *ex parte* order, which might be dissolved when the parties had shown sufficient cause to dissolve it. The judgment of this Court reverses the judgment of the Court below which refused to dissolve the injunction, and the injunction is dissolved and quashed.

MONK, J., and RAMSAY, J., differed from the judgment. The former was of opinion that the appellants having set the order at defiance, were not in a position to move to dissolve the injunction. RAMSAY, J., considered that the appellants had not strictly complied with the formalities required by the Quebec Statute under which they professed to act, and in particular that the warrant was not duly signed by the Lieutenant Governor.

Judgment reversed.

E. Carter, Q.C., for Appellants.
Doutre & Doutre for Respondent.

SUPERIOR COURT.

Montreal, Dec. 30, 1878.

JOHNSON, J.

SHAW v. MACKENZIE et al.

Capias—Damages—Probable Cause.

A debtor, resident in Ontario, being on the eve of departure for England, was requested by a creditor at

Montreal to make a settlement of his claim. The debtor replied that the creditor might get his money in the best way he could. The creditor then caused a *capias* to issue. The debtor having afterwards brought an action for damages against his creditor, *held*, that the affidavit charging an intent to defraud did not necessarily mean an intent to deprive the creditor finally and completely of his debt or his remedy; but that the debtor having acknowledged he was going beyond the seas, and having told his creditor he might get his money in the best way he could, the indefinite duration of such absence being altogether within the debtor's power, and beyond the creditor's control, and the menace implying that he might never get paid at all, the debtor was precluded from bringing an action founded on absence of reasonable cause.

JOHNSON, J. This is an action for a malicious arrest of the plaintiff at the suit of the defendants. The allegations of the declaration are peculiar. It is said, first, that the defendants, upon an affidavit in the usual form, made by one of them, caused a *capias* to issue against the plaintiff, and that his arrest actually took place; the words are that "in pursuance of the said writ of *capias*, the said plaintiff was taken into custody, and imprisoned, and detained and deprived of his liberty and subjected to great indignity. Subsequently there is an averment that, in order to avoid being unjustly and maliciously detained by said writ of *capias*, he was compelled to pay the debt for which the *capias* issued." These statements are, perhaps, not absolutely contradictory of each other. There is an actual arrest alleged clearly enough, and the detention and imprisonment may be intended as constructive, and the payment of the money being said to have been compulsory, it may be meant that it was made to avoid further detention. At all events it is certain that an arrest and imprisonment are alleged, and it is very doubtful whether they are proved. The bailiff charged with the writ went to the hotel and told plaintiff he had a *capias* against him, and the latter told him to go down to the Quebec boat with him and he would pay him, which he did; and the bailiff seems to have considered him in his custody, and some sort of an arrest, or understanding that it was to be an arrest, took place. The defendant, however, settles this, for in his second plea he admits that the plaintiff was arrested and taken into custody by the officer, so that both parties are agreed this was an arrest and a taking into custody; but the writ was never returned, and the defendant now contends that the paying the debt, interest and costs, and never contesting the process, constitute an acquiescence. I do not think so. The case of *Lapierre* v. *Gagnon*, which was cited (8 Rev. Leg. 727), was the case of a compromise before a notary between the debtor and the creditor, where everything affecting the situation of the two parties may be supposed to have been present to their minds; and it was there held that there was an acquiescence precluding the subsequent action. Here payment was made after what both parties admit to have been an arrest to avoid detention and further damage, and the circumstances rebut the idea of acquiescence. The defendant then has a third plea, that the *capias* not having been returned or contested under 810 C. P., the truth of the affidavit cannot now be tried incidentally by the present action. Here, again, I am against the defendants. The purpose of 819 C. P. is to give a party arrested the means of getting his discharge. Here in this present case the party is already discharged from the *capias*, and the plaintiff has to go further than he would under a petition to be discharged from custody. He has to prove, not only that there was no actual ground for making affidavit—which would have been sufficient to discharge him on the petition—but that the defendant who had made affidavit had no reasonable or probable cause for making it. Therefore I hold that the case must be looked at under the fourth issue raised, *i. e.*, with reference to the reasonable or probable grounds for making it, and the damage, if any, resulting from it. The plaintiff's counsel contended that where the debtor's intention to return immediately is known to the creditor, he ought not to *capias* him. I give no opinion upon that, for I do not know precisely what is meant by returning immediately. The cases on this, as on most subjects under our system of reports, are not always convincing. There have been to my knowledge, cases of an absence of a few days—the party arrested going to New York for instance—where that circumstance has been held decisive as to the want of probable cause for arrest; but it has never been decided, that I am aware of, that a creditor was bound to find out and make inquiry at his own diligence, whether a debtor leaving the jurisdiction was going to return. There is,

abstractly speaking, a positive danger of losing your recourse when your debtor leaves the jurisdiction in which you live; but the circumstances, no doubt, must be fairly judged of by the creditor at his own risk. There is one class of cases where it has always been held that the leaving the jurisdiction is of itself conclusive evidence of the *meditatio fugæ*, the cases of captains of ships, and residents in foreign countries. Here, however, the plaintiff resided in Ontario, and his circumstances and credit there and here, where he did business, were for the consideration of the plaintiff before taking this step. I do not think that the debt having been sued for in Hamilton, which was admitted, is at all important, any more than if he had been sued here, which certainly would not have prevented his creditor from capiasing him, if the other circumstances warranted it; but the fact shows, what indeed is shown clearly by other evidence, that his debt was overdue; efforts had been made to get a settlement according to the contract, and had failed. Mr. Greening's evidence seems to show that the plaintiff was shirking a settlement. Then the creditor himself before taking his process, went to see his debtor at the Inn, and asked for a settlement; the debtor did not dispute the terms of the contract; but seemed to be defiant, and said the defendant might get his money in the best way he could, and he admitted that he was going to England that night. Mackenzie in his affidavit, gave one Howard of Toronto as his informant of the fact of the leaving—about which there may be doubt, for Howard says he does not recollect it,—but we have nothing to do now with the particular source of the information, (which would have been apposite enough under a petition for discharge) but with the truth of the fact, which was admitted by the plaintiff himself to his creditor. In this state of matters what was the creditor to do? When he is called as a witness by the plaintiff he gives his reasons founded on his estimate of the defendant's commercial standing, for thinking that he might not be coming back at all. I do not say these reasons satisfy me now; but they may have satisfied him then—and that is the gist of the case—they may have reasonably satisfied him that there was danger. Am I to say then that this man who could not get his claim settled—and saw his creditor defiantly leaving the country,—and was honestly satisfied in his own mind that he was being ill used, and running great risk of losing his recourse; am I to say that if he did not choose to let his debtor slip through his hands, and trust further where his trust had already failed, he is to pay damages to his debtor, who has brought all this upon himself? I should be going very far to say that. I do not go into the reasons given by Mr. Mackenzie in the box, because commercial credit is a delicate thing, and Mr. Mackenzie may have been misinformed; but the question is, was he honestly acting as he thought right, and on reasonable and probable grounds, so appearing to him at the time. If he was he was exercising a legal right, and there would be an end of the matter. It may be said that the defendant cannot make evidence for himself. No, he cannot; but the plaintiff who calls him as his witness is bound to prove the absence of probable cause, and he proves the presence of it instead. Then the evidence given on the defendant's behalf by other witnesses is also of grave importance in estimating the propriety of the step taken by Mr. Mackenzie; but I refrain from noticing it in detail, for the same reasons that prevent me from noticing all that Mackenzie said he had heard and acted upon. The plaintiff's counsel argued that the intent imputed to him in the defendant's affidavit was at variance with his recognized position and circumstances. I do not think so at all. What is an intent to defraud? It seemed to be assumed by the plaintiff's counsel that the fraud contemplated by the law means nothing short of total deprivation of payment forever. I have heard no reasoning—much less authority for such a proposition; and I certainly have not felt it necessary to look for any against it. The thing is too plain to me on principles of common sense, to suffer any discussion. If it is not fraud, what is it? Is it good faith? I should be sorry to think that any decent mercantile man would say so. There are three things, and only three things to which probable cause can possibly have reference. The debt, the departure, and the intent of the debtor. The two first are certain; all that remains is the intent to defraud. Now, what does that mean? The affidavit was made in the terms of the law; it charged the intent generally, and as regarded

the plaintiff in that case, particularly. What is fraud in such cases? What is the difference between taking a man's money from his pocket against his will, and taking his goods with the promise to pay for them at a given time, and then refusing or postponing payment, and telling him he may get his money in any way he can? If this is not fraud, on ordinary principles of personal integrity, to say nothing of the principles of commercial credit without which the intercourse of civilized trade is impossible, I should find it very difficult to say what it is. If the defendant could keep the plaintiff in that case out of his money for months, why not for years? When does fraud begin? It would surely be dangerous and unsound to say that the fraud meant by the law in such cases must be the distinct purpose of finally and completely robbing the creditor of every farthing of his debt for ever. It could never be maintained that leaving your creditor in the lurch for weeks or months—why not years?—and going over to Paris, for instance, to see the Exhibition, leaving a debt of over $2000 unsettled to his possible ruin, was not a fraud upon him. On the whole case, I am of opinion that the plaintiff has not proved, as he was bound to do, the want of probable cause for issuing this *capias*, which is the only foundation of such an action as this. He may think that it was harsh or unnecessary, but if it was, whom has he to thank for that but himself? When he was waited on at his hotel by the defendant, a word would have been enough, a compliance with the terms of his contract, which were payment in four months, and not in five, as he wanted to make it, instead of defiance, which left the defendant no choice but to *capias* or run the risk he honestly thought he would be running if he did not *capias* him. This kind of action is well known in the profession as a *hard action*. The plaintiff is bound to make out his case—that is, a case of an illegal proceeding against him; a proceeding without any reasonable or probable grounds for it. I cannot say that any one in the defendant's position could be reasonably expected to act otherwise than he did. I should be unwilling to believe that all these serious considerations as to what may constitute fraud were present to the plaintiff's mind. I know too much of human nature to believe it for an instant; but he is asking for law, which must be administered on plain principles, and he gets what he asks, as far as I am able to give it him. Action dismissed with costs.

Trenholme & Maclaren, for plaintiff.

Doutre & Branchaud, for defendants.

COMMUNICATIONS.

LANDA v. *POULEUR.*

To the Editor of the LEGAL NEWS:

SIR,—I notice in the LEGAL NEWS of the 28th of December, 1878, the report of a judgment rendered by the Hon. Mr. Justice Johnson in the case of *Landa* v. *Pouleur*.

It would appear therefrom that the defendant had caused the arrest and prosecution of the plaintiff for bigamy, but the bill having been thrown out by the Grand Jury, Landa instituted an action against Pouleur for malicious prosecution. Mr. Justice Johnson, in giving judgment, said: "The facts are few: The plaintiff was mar- "ried to Antoinette Vanden Daden, at Brussels, "on the 30th of January, 1870, and the marriage "was dissolved at Lacken on the 31st of March, "1876; or, rather, the dissolution was then "pronounced, the divorce itself having been "granted on the 6th of October, 1875. On the "21st January, 1877, the plaintiff was married "in Montreal, in the Roman Catholic Church, "to Miss Octavie Viau, having previously been "married to her in the United States. There "had been difficulty here in getting the authori- "ties of the Roman Catholic Church to marry "him, and correspondence with Rome took "place, and before the answer came, Landa and "Miss Viau went to the United States, and there "got married; and though the dispensation "from Rome came at last, it was not required, "Landa, who had been a Jew, having in the "interval professed the Roman Catholic faith. "There is no doubt, of course, that if Landa "came here and got married here, while his "previous marriage in Belgium, (supposing it "to have been a lawful marriage there,) was "subsistent, he would have committed the "offence of bigamy."

Mr. Justice Johnson could not have revised the report, otherwise he never would have allowed himself to appear as having uttered

the following words: "And so, also, if he left "this place to contract a second marriage in the "United States, the previous marriage stil "subsisting, and came back here and was taken "into custody here, he would have committed "the like offence, and could have been prose-"cuted for it here."

Mr. Justice Johnson surely did not intend to say that a person could be convicted of bigamy on his return to Canada merely because he had "left this place to contract a second marriage in the United States, the previous marriage still subsisting," without a second marriage having been actually solemnized. Such an assertion would be too absurd, and to all who know the learned Judge's power of marshalling facts to support his conclusions, it is apparent that through haste or from some other cause, he forgot to put in the keystone of his arch, the second marriage in the United States.

But taking the facts as Mr. Justice Johnson intended to state them, the conclusion he draws therefrom that Landa could be prosecuted here for bigamy committed in the United States, is bad in law, for the reason that Landa is not alleged to a subject of Her Majesty resident in Canada; but on the contrary, is mentioned by Mr. Justice Johnson at the commencement of his judgment as a Belgian domiciled here; s. 58, 32 & 33 Vict. c. 20, cited by the learned Judge, is conclusive on this point.

Yours, faithfully,

WILLIAM H. KERR.

[NOTE.—In reference to the above judgment, we have been requested to state that the plaintiff intends to appeal therefrom.—ED.]

LIABILITY FOR CONSEQUENCE OF NEGLIGENT ACTS.

ENGLISH COURT OF APPEAL, NOVEMBER, 1878.

CROWHURST v. AMERSHAM BURIAL BOARD.

Noxious tree projecting over land of another.—A cemetery association planted yew trees, which are noxious to horses, upon its own ground, but so near to the ground of a neighbor that the branches projected over his ground. The neighbor's horse, which was at large in the field, cropped the yew trees and died therefrom. *Held*, that the cemetery association was liable for the value of the horse.

Appeal from the decision of a county court n favor of the plaintiff. The opinion states he case.

Herschell, Q.C., and *Shaw*, for defendant.

J. O. Griffits, Q. C., and *Cooper Wyld*, for plaintiff.

KELLY, C. B. This is an appeal from the county court of Buckinghamshire, held at Chesham. The judgment in the court below was for the plaintiff, damages £21, and the judge stated a case for our opinion.

The material facts of this case are as follows: The defendants, some seventeen years ago, obtained a piece of land for the purposes of their cemetery, and fenced it round, with a dwarf wall, in which, at two places, there were openings filled up with iron railings about two feet high. Where these railings occurred, the defendants planted two yew trees at a distance of about four feet from the railing. These grew through and beyond the railings, so as to project over an adjoining meadow.

The plaintiff, two years before the alleged cause of action, hired this meadow to pasture his horses for a term of three years. After the plaintiff had occupied the field for two years, his horse, which was feeding in the meadow, ate of that portion of the yew tree which projected over the field, the wall and rails not being sufficiently high to prevent a horse from so eating, and died from the effects of the poison contained in what he ate.

The question for our determination is whether the death of the horse so occasioned afforded any cause of action against the defendants.

There being no pleading in the county court, the question is not in any way affected by the form in which the cause of action is put forward, and the facts, as found by the judge of the county court, must be taken as conclusive. The only matter, therefore, for our decision is whether, upon these facts, any legal liability is disclosed.

The matter might appear to be somewhat trivial, but the case gives rise to a question which may not unfrequently arise, and, therefore, is of some general importance. Considering this, it is remarkable that there is an absence of any immediate authority by which our decision should be governed, and it is, therefore, necessary to determine what are the principles of law properly applicable to it.

Before doing this, it may be well to state shortly what I apprehend to be the effect of the finding of the county court judge. In the first place, I consider that the judge has so found the facts as to the planting and growth of the yew trees as to preclude the supposition of mere accident, and that the trees must be taken so to have been planted and grown with the knowledge of the defendants as to make them responsible for whatever might be the direct consequence of the original planting.

Secondly, although it is found that the plaintiff saw the horse in the meadow the day before it died, it is also found that he was not aware of the existence of the yew trees, and I think it must be taken that any such negligence on the part of the plaintiff as would disentitle him to recover is negatived. The mere fact that the plaintiff saw the horse in the field would go for nothing, and I do not think that he was bound to examine all the boundaries so as to see that no tree likely to be injurious to his horse was projecting over the field he had hired.

It ought also to be noticed that the decision in no way depends upon any question of fencing or the co-relative rights and duties arising therefrom, and therefore the cases which are cited to us based upon these afford us no assistance.

The question seems to resolve itself into this: Was the act of the defendants in originally planting the tree, or the omission to keep it within their own boundary, a legal wrong against the occupiers of the adjoining field, which, when damage arose from it, would give the latter a cause of action?

On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary that a court of law ought not to decide that it can be made the subject of an action, especially when an adjoining land-owner, over whose property it grew, would, according to the authorities, have the remedy in his own hands by clipping.

On the other hand, the plaintiff may fairly argue that what was done was a curtailment of his rights, which, had he known of it, would prevent his using the field for the purpose for which he had hired it, or would impose upon him the unusual burden of tethering or watching his cattle, or of trimming the trees in question; and although the right to so trim may be conceded, this does not dispose of the case, as the watching to see when trimming would be necessary, and the operation of trimming, are burdens which ought not to be cast upon a neighbor by the acts of an adjoining owner. It may also be said that if the tree were innocuous it might well be held, from grounds of general convenience, that the occupier of the land projected over would have no right of action, but should be left to protect himself by clipping. Such projections are innumerable throughout the country, and no such action has ever been maintained; but the occupier ought, from similar grounds of general convenience, to be allowed to turn out his cattle, acting upon the assumption that none but innocuous trees are permitted to project over his land.

The principle by which such a case is to be governed is carefully expressed in the judgment of the Exchequer Chamber, in *Fletcher* v. *Rylands*, 14 W. R. 799, at p. 801, L. R., 1 Ex. 265, at p. 279, where it is said. "We think that the true rule of law is that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This statement of the law was cited and approved of in the judgment of the House of Lords in the same case.

In *Fletcher* v. *Rylands*, the act of the defendant complained of was the collecting in a reservoir a large quantity of water, which burst its bounds and flowed into the plaintiff's mine; but though the degree of caution required may vary in each particular case, the principle upon which the duty depends must be the same, and it has been applied under many and varied circumstances of a more ordinary kind, as in *Aldred's Case*, 9 Rep. 75b, where the wrong complained of was the building of a house for hogs so near to the plaintiff's premises as to be a nuisance: *Tenant* v. *Goldwin*, 1 Salk. 360; and others which are cited in Comyn's Digest, tit. "Action on the Case for Nuisance"; and in the judgment in *Fletcher* v. *Rylands*, in all which cases the maxim "*Sic utere tuo ut alienum non lœdas*" was considered to apply, and those who so interfered with the enjoyment by their neighbors of their premises were held liable.

Other cases of a similar kind may be found in the books. Thus, in *Turbevil* v. *Stamp*, 1 Salk. 13, it was held that an action lay by one whose corn was burnt by the negligent management of a fire upon his neighbor's ground, although one of the judges did not agree in the decision, upon the ground that it was usual for farmers to burn stubble. In *Lambert* v. *Bessy*, Sir T. Raym. 421, the action was in trespass *quare clausum fregit*. The defendant pleaded that he had land adjoining the plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer, judgment was given for the plaintiff, on the ground that, though a man do a lawful thing, yet, if any damage thereby befalls another, he shall be answerable if he could have avoided it.

This case was alluded to and approved of by Lord Cranworth in his judgment in the case of *Rylands* v. *Fletcher*, in the House of Lords, L.R., 3 H. L. 330, 17 W. R. H. L. Dig. 17, where he says: "The doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

It does not appear from the case what evidence was given in the county court to prove either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge amongst persons who have to do with cattle. As to the defendants' knowledge it would be immaterial, as whether they knew it or not, they must be held responsible for the natural consequences of their own act. It is, however, distinctly found by the judge: "The fact that cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby, is generally known," and by this finding, which certainly is in accordance with experience, we are bound.

Several cases were cited during the argument. In two of them, *Lawrence* v. *Jenkins*, 21 W. R. 577, L. R. 8 Q. B. 274, and *Firth* v. *Bowling Iron Company*, 26 W. R. 558, L. R., 3 C. P. D. 254, the liability of the defendant was based upon his duty to fence. These, therefore, as I have already said, throw no light upon the present question. In *Wilson* v. *Newbury*, 20 W. R. 111, L. R., 7 Q. B. 31, which arose upon demurrer to declaration, the court merely decided that an averment that clippings from the defendants' yew tree got upon the plaintiff's land, was insufficient, without showing that they were placed there by or with the knowledge of the defendant. Mr. Justice Mellor, however, in giving judgment, says, after alluding to *Fletcher* v. *Rylands*: "If a person brings on to his land things which have a tendency to escape, and to do mischief, he must take care that they do not get on his neighbor's land."

Another case which was cited during the argument was that of *Erskine* v. *Adeane*, 21 W. R. 802, L. R., 8 Ch. 756, in which the Court of Appeal held that a warranty could not be applied by the lessor of land let for agricultural purposes, that there were no plants likely to be injurious to cattle, such as yew trees growing on the premises demised. This decision obviously rests upon grounds foreign to those by which the present case should be determined. I notice it therefore, only that I may not appear to have overlooked it.

In the result I think that the judgment of the county court was correct, and that it should be affirmed with costs.

Appeal dismissed.

CURRENT EVENTS.

CANADA.

A QUESTION OF PRECEDENCE.—The following letter is published:

DOWNING STREET, 31st Oct., 1878.

SIR,—I have the honor to acknowledge the receipt of the Earl of Dufferin's despatch, No. 193 of the 19th July, on the subject of precedence of the judges of the Supreme Court and of the retired judges of Provincial Courts. I approve of the arrangement made by Lord Dufferin, by which the judges of the Supreme Court take precedence after the Speaker of the Senate, and I am of opinion that as lately decided in the case of New Zealand, and some of the Australian colonies, retired judges of whatever courts should take precedence next after the present judges of their respective courts.

I have the honor, &c.,

(Signed), M. E. HICKS-BEACH.

ONTARIO.

GRAND JURIES.—The movement for the abolition of grand juries, says the Toronto *Evening Telegram*, lost one of its best friends when Chief Justice Harrison died. Whether the grand jury system should be abolished or curtailed may be a question; but it is no question that as at present constituted it is expensive, cumbersome, and at times unsatisfactory. The duties which now devolve upon the grand jury could be quite as well discharged by a Public Prosecutor, whose duty it would be to determine whether the evidence taken at the preliminary investigation was sufficient to send the accused to trial upon. Such a change in the system would result in a great saving of valuable time to business men. Besides, the interests of justice would be served fully as well by being entrusted to the hands of an official versed in the law, as they possibly can be by being entrusted to a number of men to whom the law is a sealed book.

QUEBEC.

DISTRICT MAGISTRATES.—The Hon. Judge Loranger, in his address to the late Grand Jury of the District of Richelieu, referred to the abolition of district magistrates, lately brought about by the Quebec Legislature. He argued that the district magistracy had been very useful, and that the saving to the country by the system was immense. In the Richelieu District the number of cases tried by the district magistrate during the last five and a half years was 1,106, of which 193 were felonies which without a district magistrate would have had to be tried by jury. The expense of each case if tried by jury would have been at the very least $100, or an aggregate sum of $19,300, out of the public treasury, whereas the salary of the district magistrate for that period was only $7,000, making by the change a clear gain of $12,300 for the people.

IRELAND.

CRIME IN IRELAND.—A remarkable fact, says a Dublin correspondent, is stated in the volume of Judicial and Criminal Statistics for 1877-78, issued lately in Dublin, that of the whole number of crimes in Ireland, 6,328, not disposed of summarily, 3,232, or more than half, occurred in the Dublin metropolitan district. Agrarian crime shows an increase up to the 30th of June of the present year, but a slight one, and chiefly in intimidation by threatening letters. They trace thirty-three cases of intimidatory crimes to the murder of Lord Leitrim.

EXTRAORDINARY SPECULATION.—The Master of the Rolls in Dublin recently made some strong observations upon the case of the widow of an iron merchant named Vincent, who, having been granted limited letters in administration on her husband dying intestate, had applied £30,000 to her own use and to the loss of her children, selling shares in a variety of companies for the purpose of stock-broking ventures, which companies agreed to the sale at her instance, although informed of her having only a title in certain cases to the receipt of dividends. Mrs. Vincent offered her creditors 5s. in the pound, and bills remained unpaid of tradesmen of every class, and also to a stock-broking firm for balances in respect to Stock Exchange transactions. The Master of the Rolls said nothing in fiction was wilder or more deplorable. The splendid fortune of the minors had been scattered to the winds. He added that every pound of the money should be traced. On that he was determined. He hoped the companies would restore the property.

SCOTLAND.

THE GLASGOW BANK AND THE LIABILITY OF TRUSTEES.—A question of very great importance, not only to the parties immediately concerned, but also to the public generally, is likely soon to be raised, says the *Statist*, in connection with the Glasgow Bank failure. It is whether trustees who are holders of shares in the bank are to be held personally liable, like other shareholders, or whether their liability is to be limited to the amounts of the trust estates which they represent. There is no doubt whatever that at English law the liability of trustees is not subject to any such limitation. The Scotch law on the subject, however, is by no means so clear.

FRANCE.

JUDICIAL SEPARATIONS.—From 1846 to 1850 there was an average of 1,080 judicial separations in France, which in 1876 had increased to 3,251. Only fourteen separations in the hundred are asked for by the husband.