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THE BAR OF LOWER CANADA AND THE BAR OF ENGLAND.

In putting together a few rather desultory notes respecting the bar of Lower Canada, with some comparisons between it and the bar of England, I do not profess to do more than touch lightly upon topics, to develop which would compel me to exceed the bounds of a brief paper. I propose to advert in the first place to the numerical strength of the profession, its emoluments and the difficulty of success. I shall make a few observations upon the judicial system, and lastly on the relations of the bar with the bench and the public.

We have no statistics of the number of advocates in Lower Canada in the present year, but it probably falls little short of 600. According to the census of 1851, the number of advocates was returned at 273, 86 of whom were in Montreal and 80 in Quebec. The notaries in the same year numbered 538, of whom 35 were in Montreal and 50 in Quebec. The number of legal persons, exclusive of notaries, in Upper Canada, is considerably greater. In 1851, the number of barristers and attorneys was set down at 302, 83 of whom were in Toronto, 31 in Kingston, 22 in Hamilton, 10 in Ottawa and 7 in London. According to the census of 1861, the number of advocates had increased to 489, of whom 163 were resident in Montreal, 125 in Quebec, 21 in Three Rivers, and 9 in Sherbrooke. The notaries in 1861 numbered 571, of whom 73 were in Montreal and 59 in Quebec. The business of serving writs, levying executions, &c., was performed by 393 bailiffs. In Upper Canada, the number of barristers, attorneys, &c., had increased in 1861 to 632, there being 169 in Toronto, 20 in Ottawa, 12 in London, 27 in Kingston, and 44 in Hamilton.

In England, the profession in 1855 contained 4,035 members, (barristers.) In 1810, the number was only 880; in 1821, 820; in 1830, 1,129; in 1840 it had increased to 1,835, and in 1850 to 3,268. To these must be added 13,266 solicitors, attorneys and writers to the signet. They are assisted by 1,436 officers of courts of justice, 16,626 law clerks, of whom 9,270 are under 25 years of age, and 1,087 law stationers. The superior or local judges number 85. Of the 4,035 barristers, 500 are occupying public employments that debar them from practice; about 300 are resident in Ireland and the colonies, leaving about 3,235 as the number to whom the profession is open.

If we set down the number of legal persons, including judges, advocates and attorneys, and notaries, in all Canada at 2,000 in the present year, we have almost as great a numerical strength in proportion to our population of 2,800,000, as the English lawyers, numbering in 1855 18,422 persons, to the 23,000,000 population of England, while the vastly greater importance of the cases in England causes the scale of business to preponderate against us.

I proceed to say a few words respecting the difficulty of attaining success at the bar, and the emoluments which await success. There being much less difficulty in obtaining remunerative business as an attorney or solicitor than as a barrister in England, it is not uncommon for the lawyer to pave the way to practice at the bar by serving for a year or two as an attorney. The difficulty of attaining even moderate practice is so great that it is estimated that not more than 500 barristers in England live and prosper by the profession. The difficulty has been expatiated upon by many writers. The following is an extract from Byerley Thompson, (Choice of a Profession, p. 121.)

"When turning to the consideration of the moral qualities required for the bar, it is but right earnestly, even solemnly, to charge my reader to consult deeply before he launches on the sea of trial that the first years of the life of a junior barrister present. It has been described as eating "sawdust without butter." Indeed no trial in any other profession can equal it. It is made up of solitude, want of occupation and disappointment. Five junior barristers out of ten, whom fortune has not endowed with sufficient income to marry, reside either in chambers in their inns, or are the tenants of lodgings, and the habitués of clubs. The junior's life will vary from term to circuit,

from circuit to sessions, and from sessions to circuit, in one unsuccessful round for years, and he ought, before he take this course, to answer well these questions: Can you live alone? Can you keep away from temptation in the midst of forced idleness, or can you create occupation for yourself? Can you live for years without the daily solace of household affections? Can you bear up against trial and sorrow without aid or sympathy? Can you sit patiently for years in court or chambers, and see younger men passing you? Can you bear to see inferior men succeed, when you, a man of talent, have never been afforded an opportunity? Can you go on believing, until you are grey-headed, 'that there is a good time coming, wait a little longer?' Can you do all this without becoming intemperate, bitter, soured, or misanthropical? If you can do all this, you may safely go to the bar, for with such qualities you might conquer an empire."

It may be curious to compare the foregoing with the remarks of Oliver Wendell Holmes on the prospects of the medical student, in the course of an address before the Boylston Medical Society of Harvard University;—

"Some plain truths have been recently laid before the student as to the time during which he must, in most cases, be content to live on his future expectations. If fifteen years, as it has been said, are required to obtain a good city practice, of course, where no accidental aid or peculiar good fortune conspires with the requisite industry and ability, a long and dreary blank separates many of you from the object of your ambition. What becomes of medical men during this long period? The answer is not a flattering one. Many of them lose their impulse and ambition, shrink in all their intellectual dimensions, become atrophied and indurated, so that at the period when they have attained success, the sunshine comes too late for their development into their natural proportions. Many are worn out with long waiting, and seek for some other pursuit where their faculties may be called into active service. A few only, like the steady oak, add a new and wider ring to their mental growth with every year that creeps torpidly by them."

Both of these pictures are possibly highly colored, and of course are not applicable to our small cities, where the avenue to practice is comparatively easy, though the emoluments awaiting success are proportionably small. In England, on the other hand, the wealth and the grandeur of the honors that generally attend success, are calculated to attract and dazzle. To take one or two instances. The emoluments of Lord Eldon, during the six years he was attorney-general, varied from £10,000 to £12,000 per annum. The office of attorney-general is now understood to be worth £12,000 a year, independent of private practice. Sir William Follett, after a few years' practice, is said to have left £200,000 behind him. During the railway excitement in England, it is stated that the leader of the Parliamentary bar received 2,000 guineas for making a single speech. Then there are the legal appointments with high salaries attached;—the lord chancellor, the lords-justices, master of the rolls, three vice-chancellors, and twelve masters in chancery, fifteen common law judges, ecclesiastical judges, &c. "Such a glittering array (Warren's Law Studies,) of substantial honors and distinctions, while dazzling the aspiring eye which contemplates them, cannot fail in the case of a thoughtful observer, to suggest the certainty that they cannot be obtained without the greatest difficulty. The best and most highly trained intellects in the kingdom are, with their utmost energies, constantly competing for them; and numerous as are the prizes, they must ever bear a small proportion to the constantly increasing number of candidates."

In Lower Canada the grandeur of the legal prizes is far from dazzling, and their number is easily summed up. It is true that a considerable number of appointments are filled up by members of the bar, but the salaries attached are moderate. Thus there are two chief-justices, (Court of Queen's Bench and Superior Court,) at $5000 each; four puisné judges of the Court of Queen's Bench at $4000, and seventeen puisné judges of the Superior Court at from $4000 per annum downward; a judge of the Vice-Admiralty Court; Prothonotaries, Sheriffs, Clerks of the Crown, Crown prosecutors, &c. It would be difficult and perhaps uninteresting, to form any accurate estimate of the incomes derived by Canadian advocates from their practice, but it may,

I think, be safely assumed that while much larger incomes have been, and are, occasionally realized, yet $5000 per annum is a high figure for a first class advocate,—a figure attained by few, while the much larger number making half that sum steadily, will be tolerably hard worked.

But leaving this unedifying topic, let us glance for a moment at the judicial system in England and Canada. The bar of England is almost entirely concentrated in London. The fifteen judges who sit at Westminster, administer justice at every assize town in England. This differs very materially from the system in France, where there are local bars all over the country, and twenty or thirty Imperial Courts, each supreme over a certain number of departments, subject only to the *Cour de Cassation*, which can review the judgments of every court in the Empire. It necessarily follows that the bar of France is scattered over the country. One of the effects of this is a more equal distribution of employment. For an English barrister of note may be engaged in every important case in a number of the Circuits; but this cannot occur in France where twenty or thirty Imperial Courts are sitting at one and the same time. In Lower Canada, since the decentralization measures were carried out, our system bears a greater resemblance to the French. The appeal side of the Court of Queen's Bench, it is true, sits only at Montreal and Quebec, but the terms for the dispatch of Crown business and the terms of the Superior Court are held all over the country, so that advocates, more or less numerous, are established at Sherbrooke, St. Hyacinthe, Three Rivers, Sorel, and elsewhere, thus attempting to satisfy the popular demand that justice shall be brought to every man's door. Next, as to the relations of the bar to the bench. Our judges are almost invariably, as in England, selected from the practising advocates, and when the appointment is once made, there is very little subsequent promotion. In England there is still less promotion from one court to another. The barristers promoted to the Bench generally remain in the same court as long as they continue on the Bench. In France, on the contrary, the judges are far more numerous, and form in a great degree a distinct class, being promoted from the less to the more important positions. The official advocates, moreover, form a compact class, *ministère publique*. In England the same counsel prosecute one day and defend the next; the attorney-general holds his brief from the Crown as from a private client; but the French *procureur* or *avocat-general* sits on the Bench with the judges, and is remunerated by the government, which so to speak, is his only client. In Canada, the attorney-general and solicitor general are political personages in receipt of a salary, but still they generally continue (by means of a partner,) their private practice at the bar, and our Crown prosecutors are generally at liberty to practice as private advocates in the Civil Courts where not retained by the Crown.

Lastly, as to the relation of advocate to client. In this country, there being no distinction between the classes of barrister and attorney, the same person who originally receives instructions from the client, generally conducts the case to its final issue. Even if it be appealed to the Privy Council, there is nothing to prevent the Canadian advocate from appearing before the court of final resort. This system which bears more resemblance to the French than to the English custom, probably gives the advocate a warmer and more constant interest in the success of his client's cause, than is felt by the English barrister of established reputation, receiving his brief from an attorney. It also gives the barrister a more practical and intimate knowledge of the details of procedure. On the other hand, it may be urged that it is not good for the advocate to be in immediate contact with the hopes and fears, likings and dislikes of his clients. Moreover, some of the qualities of an orator, ease and grace of gesture, strength and tone of voice, are not always found united with the patience and legal acumen necessary to the attorney in sifting a case, and so forth. Having, however, already exceeded my prescribed limits, I shall not attempt to enter here upon the discussion of this subject. X.E B.

REMARKABLE TRIALS IN LOWER CANADA.

No. 2. The St. Jerome Murder of 1858.

The village of St. Jerome, on the night of the 18th January, 1858, was the scene of a most atrocious and dastardly murder. The victim, Catherine Prévost, was the wife of Antoine Desforges, an inhabitant of the place, and a man bearing a tolerably fair character. About midnight, the persons in the house of Antoine Desforges aroused the neighbors with the intelligence that Catherine was dying. The first that arrived on the spot, Rosalie Baron, found life already extinct. Catherine, a woman somewhat past the middle age, had not been in very good health. She was becoming feeble and sickly, but still continued to toil uncomplainingly at the duties of her household. Her life, however, did not ebb fast enough to satisfy the inhuman desires of those around her, and her feeble health became the very means of covering up a plot for cruelly putting her to death. Suspicion, however, was awakened, and naturally fell upon the persons who were in the house at the time. These were Jean Baptiste Desforges, the brother of Catherine's husband, and a female, named Marie Anne Crispin, generally known as the widow Belisle. Antoine Desforges, the husband of deceased, was absent on that night, but he also was held to answer the charge of murder.

The trial began at Montreal on Friday, the 16th April, 1858, before the late Chief Justice Lafontaine and Mr. Justice Aylwin. Mr. Monk, Q.C., appeared for the Crown. The defence was conducted by Mr. Smyth on behalf of the two brothers Desforges, and by Messrs. Smyth and Cassidy jointly on behalf of the female prisoner.

The indictment contained three counts:—1st. Charging the Widow Belisle with the murder of Catherine Prévost, charging J. B. Desforges with assisting in the same murder, and charging Antoine Desforges with being an accessory before the fact.

2nd. Charging the Widow Belisle and Antoine Desforges with the murder, and J. B. Desforges with being an accessory before the fact.

3rd. Charging J. B. Desforges with murder, and Widow Belisle and Antoine as accessories before the fact.

The first witness called was a neighbour, named Rosalie Baron, who resided in a house belonging to Antoine Desforges, situated at a distance of only thirty feet in the rear of Antoine's residence. At half-past five in the afternoon of the 18th, this woman, Rosalie Baron, went to Antoine's house to assist his wife in washing. The following is her account of the events of the evening and night:—

"A little after I arrived, Antoine Desforges said to me, 'My wife was very much disturbed all night, but she has been well since morning.' On this, I remarked to the deceased, 'I think you are better to-day, but not altogether well;' and she answered, 'I assure you, I am not yet better.' Shortly afterwards, about a quarter to seven the same evening, I returned to my own house. Jean Bte. Desforges came over to my residence to play cards. About half-past nine, I went over to the house of Antoine Desforges, and saw his wife Catherine in company with Widow Belisle, sitting near the fire. Catherine said to me, 'You should not have come out in the cold without covering.' Widow Belisle remarked, 'Some people don't know the effects of cold.' Shortly afterwards, I went home, and saw Jean Baptiste Desforges in my house. I told him I had seen Widow Belisle with his sister-in-law. The evening before this, Sunday evening, Jean Baptiste, when he came from prayers, seeing his brother's wife lying in bed, said, 'How much like a corpse she looks.' About a week previous to this, he told me that his brother Antoine was about to go to Chatham, and that he, Jean Baptiste, was to remain at home with his, Antoine's, wife; but, at the same time, he remarked that he would not do so for any amount, because, as she was sickly, she might die suddenly, and he might be suspected of having caused her death. On leaving my house, on the 17th, (Sunday,) Jean Baptiste remarked to me, 'Catherine has not two months to live—perhaps not a fortnight, for this day she has done her last cleaning.' I am myself aware, that deceased often complained of disease of the stomach. At midnight, on the 18th, Jean Baptiste came to inform me that Catherine was dying. I went out with him; and when we arrived at the house, she was lying

with one arm on her stomach. The Widow Belisle was present. Catherine was already dead and cold. I remember asking Widow Belisle whether Catherine died in pain. She replied, that she placed her left hand on her stomach, and exclaimed, 'O my God, I am suffocating.' Widow Belisle slept with the deceased, and had given her a cup of ginger tea before going to bed. The next morning, Antoine, who had been absent, came to the house about half-past eight. He remarked, as he came out of the room, after looking at his wife, 'If I had staid at home, my wife would not be dead.' Widow Belisle answered, 'Is it not true that you asked me to come and stay with your wife? He replied in an angry manner, 'No.' He seemed much grieved. Widow Belisle again said to him, 'Did you not tell me to come and sleep with your wife?' He then said, 'If I did, I don't remember.' Doctors Prévost, Larocque and Desjardins made an examination of the body."

The next witness examined was a midwife of St. Jerome, named Adelaide Fortier. Her statement would appear to show that Widow Belisle did not bear a favorable character in the neighbourhood. She said:—

"About half-past twelve in the night of the 18th, Jean Baptiste Desforges came to my house, and asked me to come and see his brother's wife, who was dead. I inquired whether she died alone. He answered, 'No, Widow Belisle was there.' I then refused to have anything to do with the body till the doctors should arrive; because I did not like to hear that she had died while Mrs. Belisle was present."

So far, the evidence of the prisoners' guilt does not appear very conclusive. The circumstances were not irreconcilable with the supposition that Catherine Desforges had died a natural death, and the medical examination made at the time was slight and insufficient. Strong suspicions of violence or death by poison, however, existed among the people of the village. An enquiry was held by Mr. Scott, J.P., and the two brothers Desforges with Widow Belisle, were arrested on the charge of murder. We now come to certain statements or disclosures made by the female prisoner. These were sworn to by one Laurent Beauchamp as follows:—

"While the female prisoner was in jail, I transacted her business. I told her that she could not be bailed out till the doctors had examined the stomach of deceased. Her reply was, 'They cannot find any poison, for there is none.' At the same time, she said to me, 'I will tell you how the matter happened, and then you will know all about it." But I did not listen to her, and went home. About a fortnight afterwards, she resumed the subject, and told me that Catherine did not die naturally, but that she, Mrs. Belisle, was clear from the crime of causing her death. She then informed me that she had not committed the deed, but that she was sleeping by the side of deceased, when another person (whose name the witness was not allowed to state) put a pillow over Catherine's mouth, and sat on it for some time. After this person got off the pillow, deceased gasped a couple of times, and expired. Widow Belisle then went out and roused the neighbors."

The trial was resumed on the 17th of April, when J. B. Belisle, son of the female prisoner, made the following statement:—

"On the 17th of January, I was at the house of my mother, at St. Jerome. Saw there J. B. Desforges. He said he was going, about sunset, to do some little jobs for his brother, who was absent. My mother also informed me that she would sleep at Antoine's house that night. My father died in 1856. Before he died, there were difficulties between him and my mother, on account of Antoine Desforges, who frequently visited at the house. My mother has mentioned to me that it was not she that caused the death of Antoine's wife, but another person (not allowed to be named in Court, but evidently meaning J. B. Desforges.) This person, she said, put a pillow over Catherine's mouth, and sat upon it. My mother said, that while this person was sitting upon the pillow, she felt the limbs of deceased stiffen. My mother further told me, that when she became aware of what was going on, she started up in the bed, and said to the other person, 'O my God! what are you doing there?' The other replied, 'If you don't shut up, I will do the same to you.' My mother then got out of bed, and told the other to light a candle. Catherine then gasped twice, and expired."

Another son of Widow Belisle, Isidore Legault, deposed that he had received the same account from his mother, during a visit which he made to her in jail; and that she had not disclosed the facts sooner because she was in danger of her life. These disclosures confirmed the suspicions already excited and revealed the cause of death. There was also some

evidence respecting the husband's complicity. Frangois Caron, who lived about seven miles from St. Jerome, stated that Antoine came to his house about half-past six in the evening of the 17th and stayed there that night (the night of the murder). In the course of some conversation, he remarked, "I am married to a woman older than myself; but she is often sick, and I have the prospect of being a widower soon, and then I shall marry a younger woman." Another witness, Antoine Beauchamp, deposed to the fact that Antoine Desforges frequently visited the female prisoner at her house. A few days before the death of Catherine, Widow Belisle said to witness, "do you think if Mad. Desforges was to die this week that Antoine would go to my daughter's wedding." The next witness, Frangois Villeneuve, stated he had heard Antoine say if his wife was dead he would easily get another.

The trial was again resumed on Monday, 19th April, when the medical testimony was laid before the jury. Dr. Prévost, one of the medical men who examined the body, stated that he found the left lung filled with blood—much more so than if the death had been natural. The right lung was congested and stuck to the side of the chest. The heart contained black blood. The liver was congested. The stomach contained *calculi*, and the Doctor was not sure whether death had been caused by these *calculi* or by suffocation.

Dr. Craik, of Montreal, had examined the stomach. He found it smaller and redder than usual, but it contained no poison. He examined the body after it had been exhumed. The heart and liver were in a healthy condition. The brain was too much decomposed to be examined. He saw nothing to indicate positively the cause of death. Congestion of the lungs might be attributed to asphixia, but in that case the eyes would be found open, and not shut, as some of the witnesses said those of deceased were. He observed nothing which was irreconcilable with the hypothesis that death had been caused by asphixia, but he did not consider that the examination made by Dr. Prévost was sufficient to ascertain the cause of death with certainty.

Dr. Jones was of opinion, from what he had heard, that death was caused by asphixia. This would produce engorgation of the brain, heart and lungs. But it was difficult to tell the cause with certainty.

On the fourth day of the trial, Mr. Smyth addressed the jury for the defence. He appeared to rely mainly upon the fact that the medical examination did not determine, with any certainty, what had been the cause of death. He further commented upon the good character borne by the prisoners. In support of the latter point several witnesses were called.

We regret that we do not find any record of the charge of Mr. Justice Aylwin, which is said to have occupied three and a half hours in delivery, and which was no doubt characterized by the customary energy and ability of that eminent Judge. The jury, after a deliberation of two hours, acquitted Antoine Desforges, and found the other two guilty, Jean Baptiste, however, being recommended to mercy. On the following day he and Widow Belisle were sentenced to be hanged on the 25th June —a sentence which, notwithstanding a general impression that it would be commuted, was carried out before the Montreal Jail in the presence of a vast multitude.

In reading the records of this trial, one cannot help being struck with the weakness of the evidence on which the conviction was obtained, apart from the disclosures made by the woman, apparently for the purpose of throwing the whole guilt upon her companion. The jury, however, seem to have put little faith in her story as to her own share in the crime, for while they recommended her companion to mercy, a verdict of guilty, pure and simple, was recorded against her. Whether they were influenced by the "callous and stolid expression of countenance" reported to have been preserved by her during the four days' trial, we have no means of determining. All doubt, however, respecting the guilt of the unhappy pair, was fortunately removed by their own confessions before

execution. It was formally announced by the Rev. M. Villeneuve that the female convict had confessed her share in the murder; that she had held the legs of the unhappy Catherine, while Jean Baptiste sat upon the pillow which covered her face. The other convict also confessed his guilt in the presence of the R. C. Bishop, and both convicts repeated the confession on the scaffold. The motive for the inhuman deed was astonishingly weak. Both the brothers Desforges appeared to have indulged in an illicit intercourse with Mad. Belisle, regardless of the existence of their victim, who would appear to have been removed chiefly on account of her presence having become distasteful.

We may add that Antoine Desforges was detained on a charge of poisoning, but, during the next term, (Oct. 9th) Mr. Monk, Q. C., entered a *nolle prosequi*, stating that there was not sufficient evidence to sustain the charge.

NOTICE OF JUDGMENTS.

Among the chronic grievances of the members of the bar, there is perhaps none which is so frequently subject of complaint as the irregular system of rendering judgments which now prevails. There are few lawyers who are not willing to make considerable sacrifice of ordinary engagements for the purpose of being present in Court while judgments are being pronounced. Apart from their natural interest in the decision of their own cases, they are aware that listening to the words of living judges is about the best teaching they can have, and more valuable to them in practice than treble the time spent in study. There are features of the oral judgment which cannot be conveyed to the mind of the reader by the most faithful report. The very tones and gestures of the judge are at times full of meaning, and modify his spoken words. But advocates cannot attend Court every morning during term on a bare possibility of judgments being rendered, and thus they often miss the very day they desire to be present. In the Superior Court some approach to regularity has been made by allotting the last juridical day of the month to judgments. This is good so far as it goes, though open to the objection that there are generally too many judgments to be given on one morning, and the judges who come in last are likely to find the auditory thinned and fatigued by a sitting of two or more hours. The fixing of two days, say the last of the one month and the ninth of the following month, would do away with this objection, and, moreover, enable important cases, not decided on the last of the month, to be disposed of without too long a delay.

But though one day has been set apart in the Superior Court, uncertainty is not thus avoided. Important final judgments are frequently given by a single judge on any day in term without previous notice of time or place. In a quiet nook, rapidly and undisturbed by the too intrusive presence of the bar, the decisions are muttered over in a most unsatisfactory manner, the reasons of the judgment being sometimes very imperfectly stated.

We have been referring chiefly to Montreal in the foregoing remarks, but the same system, or want of system, we understand prevails at Quebec. No day is fixed for the rendering of judgments in Appeal, and it has happened that members of the Montreal bar attending the Court at Quebec for the purpose of hearing the decision of a case in which they were concerned, were obliged to leave without attaining their object, in consequence of the postponement of judgments from day to day. We can easily understand that it may occasionally be difficult to give a lengthened notice of judgment days, but can see no difficulty in giving some notice however short. The notice, too, should not be merely verbal, but in writing and posted in some conspicuous place.

VAGARIES OF JURIES.

The behaviour of some of our petit juries verges at times upon the ludicrous, and does not a little to bring the institution of trial by jury into contempt. Their proneness to acquit in the face of the most convincing proof has often been the subject of remark; but a case occurred at the last

term of the Queen's Bench which presents a jury in a new aspect. In the case of West, tried for larceny on the 26th September, the jury, after rather a lengthened absence, came into Court stating that they found the prisoner guilty of *petty* larceny, and recommended him to mercy. Now neither the counsel for the prisoner, nor the prosecutor for the Crown, nor yet the Court, had made the slightest allusion in the course of the trial to such a charge as petty larceny. Yet some crotchety individual on the jury, eager to display the result of some private legal researches of his own, and unconsciously exemplifying the truth of the maxim about a little knowledge, had actually persuaded his fellow jurors to adopt a verdict in which an attempt was made to draw a distinction which the learned judge presiding assured the jury had long ceased to exist.

THE SEPTEMBER APPEAL TERM.

The last term of the Court of Appeals at Montreal was chiefly memorable for the unanimity which prevailed, not only between the individual members of the Appeal Court, but also between that Court and the Courts below. Out of nineteen cases decided, the judgment of the Court below was confirmed unanimously in *sixteen*, and the appeals dismissed! In only three cases was judgment reversed, and in only one of these cases was there any dissent. This, we believe, almost unprecedented unanimity is no doubt accounted for to some extent by the fact that in consequence of only four judges being present, the more important cases, fifteen in number, were retained *en délibéré*. Nevertheless, the statement recorded above is rather surprising, and, assuming that the appeals dismissed were all unfounded, would seem to indicate a belief on the part of some members of the bar that in appealing even bad cases there is some chance of success.

CORRESPONDENCE.

DÉLIBÉRÉ.

MR. EDITOR—One of the great defects in the practical administration of justice in our Courts, which must have attracted the attention of other practitioners, and perhaps of the public, is the system of *délibéré*.

It is the practice of the Judges in our courts to take almost every cause, even the most trifling, *en délibéré*, as it is called, and the records, after argument, are said to go *en délibéré*, which means into the Judges' *green* bags, a sort of legal purgatory, out of which they emerge often after *months* of *deliberation*. I take it that this *practice*, as a system, is bad; that in most cases, treated thus, no legal difficulty has arisen; then why deliberate? That delays are dangerous and injurious to both suitors and the profession, must be admitted; and unless it can be shown that a *délibéré* is necessary in every cause, to enable the Judge to make a *safe declaration* of the law, let some remedy be found. Our whole system, I think, may be said to be cumbrous and tedious; and, no doubt, an unfitness for promptitude of decision in our *judicial* minds is one of the results of such system, together with this bad habit. Any one of us who has had the opportunity of attending, in England, the *Nisi Prius* and other Courts, must have been struck with the dexterity and despatch with which business is conducted.

The Judges and Bar are ready men. Judges do not hesitate to *declare* the law on the spot; and Counsel must be prepared to dispute the point, or submit. No doubt *their* system and practice make the *ready men*. With us, when we have a "jury trial," I admit that both Judges and Counsel always show preparation. I wish all causes of importance, where facts had to be appreciated, could, with us, be taken before a jury, and abolish that torturing of evidence called *Enquête*, an immoral practice, where all the true features which constitute evidence or truth, are kept from the view of the Judge who eventually decides the cause.

I do not make these remarks without suggesting some relief. Let the Bench and the Bar combine, with a desire of doing good, and a *regard to justice*, and endeavour to promote the despatch of business. Our system of pleadings is special and good enough; an issue is raised prominently in each case, capable of being seen and appreciated promptly. In important cases where new points are raised, let them be reserved for deliberation. Let the Counsel engaged in finally submitting causes for decision,

throw overboard all points on which they do not *rely*, and not argue the causes *à outrance*, as even some of our *veterans* always do—thus consuming the valuable time of the Court.

Let the Judges at *Enquêtes sit in Court* and take notes and direct the evidence, and moderate the length, and prevent repetition, and take some interest in causes at this important stage, which ultimately they have to decide. This duty is shirked terribly by the Bench, with many evil consequences. In the Courts of Review and Appeal, in which the Records are made up and *factums* fyled and in possession of the Judges before the arguments, let it be expected that the Judges should take their seats on the Bench, having made themselves familiar with the causes, and having made up their minds with some precision as to the point or points on which they desire the Counsel engaged to apply themselves; so that Counsel may be directed and controlled by the Bench in the argument, and not allowed to wander over well beaten ground, and often out of the record. Counsel for the defence in the English Courts of Review or Appeal, do not often speak, unless "called upon" by the Court. Why should it be allowed or indulged in with us? This would save much precious time, and, no doubt, help to promote the despatch of business. These remarks, though necessarily confined, reach beyond the interest of the profession, and affect the public. They may be thought worthy of a corner in your next number. Q.

COLLECTION OF TAXES FROM SALES OF REAL ESTATE.

To the Editor of the L. C. Law Journal:

SIR,—Among the many advantages that may result from the publication of your periodical, I think you will readily recognize the importance of bringing under the notice of those concerned useful, practical reforms in the law. Had an equal amount of attention been paid to this subject as has been done to pet theories regarding the organization of the judicature, I venture to say that advantages of almost equal practical value would have been attained by it. If Dr. Adam Smith was right in finding a benefactor to the human race in the man who made two blades of grass grow where one only was before produced, what thanks will he not earn who roots out some of the weeds that choke the healthy growth of our institutions! I hope, therefore, to see the profession contribute, and your journal give a place to, practical suggestions of this kind. Many might be instanced at once. I will begin with one of no great prominence, and yet its value cannot be doubted, viz.: the mode of collecting taxes from sales of real estate when sold under ordinary executions. Public dues are sufficiently onerous without having such burthens greatly augmented by enormously disproportioned costs, conferring really no great benefit on the profession, and yet telling with severity on the proceeds of property.

For the recovery of taxes there ought to be a summary, efficacious and inexpensive means, but no encouragement should be given to their continuing a persistent clog to the security afforded by real estate. Few immoveables are adjudged by the Sheriff to which some trifle of such public dues does not attach. I will instance a claim of the City Corporation for $2, or even a less sum, a privilege on real estate. The costs of the necessary opposition for getting it from the Sheriff would be in all $9.40, besides one per cent on the monies when paid. Multiply this by the number of properties sold in the district during the year and the number of particular taxes that have to be collected. In this way it will be found to amount to a very large sum. Extend it over Lower Canada, and I doubt not it will be shewn that the sum thus wasted in remunerating unproductive labour would go a vast way towards ameliorating the many increased exactions coming to be a charge on the poorest of the community, from the increased cost of legal proceedings in realizing property. The remedy is of the most simple character. Let it be the duty of every City Treasurer and of every Secretary Treasurer of a Municipality, within a certain time before the sale, to furnish the Sheriff with an ac-

count of the amount of such dues containing a simple notice that the same remains unpaid, and that the Corporation or Municipality claims the sum. The Sheriff would return all such demands with his proceedings. They would be collocated without costs or other formality, and be liable to contestation, the same as any other demand. I may hereafter furnish you with further instances.

A.

NOTICES OF NEW PUBLICATIONS.

REVIEW OF THE INSOLVENT ACT OF 1864. Translated from the French. By Désiré Girouard, B.C.L. 1865. Montreal: John Lovell.

The necessity for a Bankruptcy Law had long been under consideration. It was discussed by the Press, by Boards of Trade, and by the Legislature. Various measures had been brought forward, but none were carried through. Mr. Abbott, Q.C., a distinguished member of the Montreal bar, while filling the office of Solicitor-General for Lower Canada, made the first successful attempt to grapple with the difficulty, and introduced a bill which was favorably received by the House. Notwithstanding the opposition of those who questioned the expediency of a bankrupt act at all, and denounced such legislation as an unwarrantable interference with the rights of creditors, it is now matter of history that Mr. Abbott's Bill, with some alterations and modifications made after his retirement from office, finally became law in 1864.

It was not to be expected that a law which made such great and important changes in our system of procedure should at once work smoothly. Several defects and inconveniences, and still more clauses of doubtful meaning, were discovered and complained of. Many of these ambiguities were subsequently explained in an able commentary on the Act, published by Mr. Abbott. But before this commentary appeared, Mr. Girouard, already favorably known as a writer on legal subjects, commenced a series of annotations on the Act, which were first published in a daily newspaper, but subsequently appeared in pamphlet form. He has since published an English translation which is now before us, and we shall embrace the opportunity to refer briefly to some of the points which he has commented upon.

Mr. Girouard is evidently of opinion that the Act is too favorable to insolvents, and proportionably unsatisfactory to creditors, who, as he remarks on Page 6, "do not find in it the guarantee which was promised, or the simple, short, clear and easily understood dispositions which they ought to understand and be able to apply, without possessing the skill of its author, a man well known to all as thoroughly conversant with the practical affairs of commerce and with the laws relating thereto." Page 17, the author remarks that the Act makes no mention as to whether the creditors are sufficiently authorized to choose a secretary *pro tempore* at their meetings. This is a point which we think could occasion little difficulty, it being one of the first steps at all ordinary meetings to appoint a chairman and secretary. Page 19, Mr. Girouard, differing from Mr. Abbott, contends that according to the obvious construction of the Act, the assignee is to be nominated by the majority in number of the creditors, and not by the majority in number and in value. We fail to see how such a construction can be put upon the clause. In fact, the very words cited by Mr. Girouard, "if any dispute arises at the first meeting of creditors *as to the amount* which any one of the creditors is entitled to represent in the *nomination of an assignee, &c.*," shows that value is one of the elements to be considered.

P. 25, the author condemns the use of the word 'neglect' in the following clause of the Act, "but no *neglect* or irregularity in any of the proceedings antecedent to the appointment of an assignee, shall vitiate an assignment, &c." Mr. Girouard remarks that the use of the word neglect in this connection is immoral in law, and tantamount to the approval of fraud.

On P. 39, the commentator raises a point which would seem likely to occur, though perhaps very rarely. The Act says that any two or more creditors for sums exceeding in the aggregate $500, may make a demand upon the debtor requiring him to make an assignment. Now suppose the trader has only one creditor, a case which Mr. Girouard thinks cannot fail to present itself in actual practice, for it sometimes happens that a trader makes all his purchases and transacts all his business with a single house. If the debtor will not pay, how can the protection of the law be refused to this single creditor? Besides, it may happen in small towns that the claims of the two largest creditors do not together amount to quite $500. Why in such case preclude them from demanding an assignment?

On P. 70, Mr. Girouard points out that there are no instructions in the Act as to how the assignee is to deal with oppositions to the sale of real estate. The assignee's functions resemble those of a sheriff, but as

to the claims of third parties, it would seem that he is also to be a judge. A little further on (P. 78) the author cites from a treatise by Mr. Edgar of Toronto, a passage as to the duties of the assignee. The Act imposes upon assignees, men for the most part destitute of legal knowledge, the onerous duty of deciding disputes as to the admissibility of evidence, &c., points which often perplex the most experienced Judges. This part of the bankrupt system we cannot help regarding as highly dangerous. Assignees possess the most extensive powers. They may be guilty of the most arbitrary acts, and there is hardly any way of controlling them, and in any dispute in which they may be involved, they will generally have the privilege of fighting at the expense of the estate.

Page 99, Mr. Girouard considers the question whether there is a right of appeal from a Judge's order. Under the ordinary statutory law an appeal lies "from any judgment of the Superior Court." Is a Judge's order under the Insolvent Act equivalent to a judgment of the Superior Court? Since the publication of Mr. Girouard's work, this question has been decided in the affirmative by the Court of Review in the case of Johnston v. Kelly, reported in the present number.

Mr. Girouard (P. 100) finds fault with the delays granted to insolvents, it being in their power to extend the time for the first meeting of their creditors. Even the most insignificant notice must be published for two weeks, and the notice to fyle claims for two months.

Page 120, the commentator points out that there is no punishment provided in case the insolvent covers up fraudulent transactions by making away with his books. P. 127, the opinion is expressed that the action *en séparation de corps et de biens* does not require to be advertised like the action *en séparation de biens*, and that this unnecessary publicity will prove a source of pain to the injured wife.

P. 129, Mr. Girouard thinks the wife may be made a witness against her husband under the following clause, "any other person who is believed to possess information respecting the estate or effects of the insolvent, may also be from time to time examined before the Judge upon oath."

Such are some of the points noticed by Mr. Girouard in the course of his commentary. His conclusions are strongly adverse to the new law. He says it is easy to perceive that the Insolvent Act is incomplete and prejudicial to the commerce of the country in general. It opens new doors to fraud, and affords to the bankrupt new means of deception. Moreover, Mr. Girouard thinks that this, like every other bankrupt law, will injure our credit abroad. Canada cannot placard her losses and failures without creating mistrust in the mind of foreign exporters and manufacturers. "Finally," he says, "we think we do not stretch the truth in affirming that a large number of merchants would be satisfied with a few amendments and simple additions to the existing laws, for the sole purpose of defining and punishing fraud and giving to the *cession de biens* its proper and necessary effects. Let the Legislature, by rigorous enactments, endeavour to banish fraud; and in order to do so, let it introduce the presumptions of fraud consecrated by the code of the commercial nations of Europe; let it require from each trader the keeping of regular books of account and authorize the seizure of the same, let it strike without mercy at *séparations de biens* and fraudulent commercial partnerships—the two great plagues of our trade; let it force the *marchande publique* to carry on business under her own name and not under that of her husband, &c."

To a considerable extent we must concur in the foregoing remarks. The Insolvent Act does not appear to have fulfilled the expectations that were formed of it, and a growing dissatisfaction exists in the mercantile community. It will be curious hereafter to observe what dividends have been paid by estates that have fallen into the hands of official assignees. Cases have been brought under our notice where the insolvent would gladly have compounded for 2s. 6d. or more, and yet no dividend has ever been declared by the official assignee. Some of the defects have been remedied by the Bill passed last Session, and the expense of advertising has been materially diminished. Nevertheless we think very important amendments must yet be made, otherwise the day can not be far distant when the expediency of entirely abolishing the Act will be discussed in our Boards of Trade, and in our Legislature.

ADMINISTRATION OF JUSTICE.

This is the title of an anonymous letter which appeared in the *Minerve* on the 21st September last, over the signature "*Quelques Avocats Courageux.*" As this communication attracted considerable attention at the time of its appearance, it may call for a passing notice in a journal devoted to legal subjects, however the propriety of publishing such letter may be questioned. The point which the writer of the letter ap-

parently labours to establish is that through the indolence of some of our judges and the natural infirmities of others, the business of our tribunals has been seriously impeded. He points to the docket of the Montreal Court of Review, on which, in less than a year, the cases have already accumulated to an alarming extent, and expatiates upon the disasters which are thence likely to result to litigants. The correspondent of the *Minerve* also remarks that numerous cases heard by the Court of Appeals have been allowed to remain *en délibéré* from term to term.

Now it may be observed that the judges referred to in the letter have been among the most able and distinguished members of the Bench, and it is the fault of the Legislature if adequate provision has not been made for their honourable retirement from the fatigues of official duty, when growing infirmities and declining health so justly entitle them to repose. As to arrears of business, it is difficult to pronounce any judgment. Human nature is alas but too prone to procrastination, and the occupants of the Bench are not exempt from the common weakness. We have, it is true, occasional bright examples of judges making determined efforts to sweep away arrears. The last Lord Chancellor was able to state on his retirement that not a single case remained to be judged. The late Mr. Justice Story, when compelled by failing health to retire from the Bench, resolved to clear the docket of his Circuit Court, that his successor might enter on his duties without any arrear. The effort, however, in the opinion of his biographer, cost him his life.

That the increasing work of this District demands more assistance can now hardly be denied. The Court of Review has occasioned, and will continue to occasion, a large amount of extra judicial labour. To be thoroughly efficient, moreover, there should be judges enough for this Court to allow three to sit exclusive of the judge who rendered the decision, the revision of which is demanded. Some attention must also be paid to bankruptcy proceedings. Under these circumstances we heartily concur in the recommendation of the *Minerve's* correspondent, that at least two extra judges be forthwith appointed to be resident in this city.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE—JUDGMENTS.

(*September Term*, 1865.)

MONTREAL, Sept. 8, 1865.

PRESENT: Chief Justice DUVAL; Justices AYLWIN DRUMMOND and MONDELET. (Mr. Justice MEREDITH sat in the cases reported below, but was unavoidably absent when judgments were rendered.)

DUPONT *et al.*, (defendants *en garantie* in the Court below) appellants; and GRANGE (principal plaintiff in the Court below) respondent.

HELD—That an *action en declaration d'hypothèque* is a real action, and comes under the class of actions which may be appealed from the Circuit Court, though the sum demanded be less than $100. C. S. L. C., Cap. 77, Sec. 39.

This was an appeal from a judgment of the Circuit Court of Soulanges County. An action *en déclaration d'hypothèque* was brought by the respondent against O. F. Prieur who called in the defendants as his *garants*, and they pleaded to the principal action. The amount claimed being only $77, there arose in the first place the question whether there was any right of appeal. The defendants contended that the case should be put on the *rôle* of appealable cases. This motion was rejected by the Court, and judgment rendered in plaintiff's favor for $50 principal, and two years' interest, along with the current year. From this decision the defendants instituted the present appeal.

DUVAL, Ch. J., said a principle of law of great moment was to be decided in this case. The action being for less than $100 the right of appeal was denied. The answer to this was that there was a *hypothèque*, and it was pretended that this *hypothèque* was a realty. Mr. Justice Meredith and himself dissented from the judgment on the ground that the *hypothèque* was simply an accessory, given for the security of the debt. In his opinion the accessory did not differ from the principal. In one of his earlier treaties, Pothier said that the hypothec was a *jus in re*, but subsequently, with his usual accuracy, he corrected this, and laid down that the hypothec was merely a *jus ad rem*. Marcadé was of the same opinion. The majority of the Court, however, were of opinion that the hypothec was a realty, and therefore maintained the appeal, and reversed the judgment of the Court below.

MONDELET, J., pronounced the judgment of the Court of Appeals, reversing the judgment of the lower court, the principal reason being that the *action hypothecaire* was held to be a real action.

AYLWIN, J., remarked that the principle on which he based his judgment was that in the event of there being a *délaissement*, the subsequent proceeding would undoubtedly be a real proceeding.

DRUMMOND, J.—When there is a property in question, that gives character to the action.

Judgment reversed, Duval C. J., and Meredith J., dissenting.

Moreau, Ouimet and Chapleau for Appel

lants; Doutre and Doutre for Respondent.

GRAND TRUNK RAILWAY, (opposants in the Court below), Appellants; and EASTERN TOWNSHIPS BANK, (plaintiffs contesting in the Court below), Respondents.

HELD—That in Canada the rolling stock of the Grand Trunk and other Railways forms part of the realty, and is not liable to seizure and sale under execution.

This was an appeal from a judgment of the Superior Court, Montreal, dismissing an opposition fyled by the appellants under the following circumstances:—The Eastern Townships Bank sued the Grand Trunk Company on a promissory note for $2,568, dated 1st Feb., 1862, and obtained judgment, 1st Dec., 1862. In January, 1863, execution *de bonis* issued, and a locomotive was seized. To prevent the sale of this locomotive the Grand Trunk Company fyled an opposition *afin d'annuler*, reciting the provisions of the 25th Vic., cap. 56, and claiming the benefit of the Act. The provisions of this Act appropriate towards payment of the debts due by the Grand Trunk, other than bond debts or notarial mortgages, "all monies to be received by the Company from the Province and from the Imperial Government for postal services, and for the conveyance of troops or military stores and munitions of war." The opposition alleged that this Act had been duly accepted and consented to by the necessary number of the bond and shareholders of the Company, at a meeting held in the London Tavern on the 8th August, 1862; that the opposants had not received from the Province the monies earned by them for postal services, and the amount was in dispute between them and the Canadian Government; that the debt claimed by plaintiff was a debt due them before and at the time of the passing of the Act. For the payment of this debt, the opposants said the Bank had no other right than to receive their dividend of the monies or bonds authorized to be issued and appropriated under the Act, and to the balance in 4th preference stock, under the 24th section of the Act. The opposants further alleged that the rolling stock formed part of the road, and was not liable to seizure; that the earnings of the Company were the only assets available to the creditors—first deducting working expenses—but that plaintiffs and other creditors were excluded by the Act from sharing in such balance of earnings. The rolling stock was alleged to be necessary for the working of the road, and mortgaged in favour of the 1st and 2nd preference bondholders to an amount exceeding £8,000,000 stg., and also in favour of the Province. Even if the rolling stock were liable to seizure, it could not be sold unless by consent of the privileged creditors, to whom the proceeds of sale must go. The Company prayed *acte* of their offer to pay in money, bonds and 4th preference stock, with reserve to take other conclusions as soon as the amount due by the Province was finally adjusted and paid. The Bank made answer to this by denying that the Arrangements Act had ever been carried into effect, the consent of the required three-fourths majority not having been obtained. As to the rolling stock being pledged to other creditors, the plaintiffs said that these creditors were not before the Court, and the question of their rights could only be raised by themselves. The opposition having been dismissed in the Court below, the Grand Trunk Company appealed.

DRUMMOND, J., after reviewing the pleadings, observed that the first point—as to the required number of the creditors having assented to the Act—was the point mainly insisted upon at the argument. The other ground, as to the rolling stock forming part of the realty of the road, was barely touched upon. This, however, was the great point, and it was upon this that the decision of the Court would rest. As to the first question, he believed the Company had done something to comply with the Act, but what had been done was done in the very unprofessional—he might almost say slovenly—manner, characteristic of the style in which the business of the Company had been conducted. The professional gentlemen acting for the Company in England had got up papers that were not proper proof of so important a matter. But the Court was called upon to apply the great principle, that in Canada the rolling stock of Railways formed part of the road, and was not liable to seizure. It was true also that this property was mortgaged in favor of other creditors, and even if it could be seized and sold, the proceeds must go to them. But the Court did not consider the question of the property being mortgaged at all. They held that the property was *immeuble par destination* and could not be sold off piecemeal. The law did not allow it, and the law was in this instance perfectly in accordance with reason, with justice, and with sound policy. The locomotive seized in this case was part of the realty of the Grand Trunk Company, and could no more be seized separately than the vats in a brewery, or the burr stones in a mill.

AYLWIN, J., while concurring in the judgment, was of opinion that the Court below was right as to the first point, the certificate of the creditors' consent, produced by the Company, being in his opinion wholly insufficient, and absolutely null and void.

DUVAL, C. J.—The judgment is based upon the ground that the locomotive forms part of the realty. The Court gives no opinion as to whether the Company has complied with the requirements of the law. His honor believed the locomotives formed a part of the road just as much as the wheel formed part of the coach. The fact of an article admitting of being removed was no argument against this. The keys of a house, for example, might easily be taken away, and yet belonged to the house. As to the consent of the creditors, there appeared to be some negligence or clerical blunder in the papers. Matters of this kind, however, were too important to admit of clerical blunders. But fortunately for the Company, the Court pronounced no opinion on this question.

The Chief Justice then observed that Mr. Justice Meredith had requested him to state that he did express an opinion that there was

ample proof in the record of the requirements of the Arrangements Act having been fulfilled, and that he had prepared a written judgment to this effect.

MONDELET, J., observed that the Court was not called upon to decide whether the Company had obtained the required consent.

DRUMMOND, J., added that he did not wish it to be understood from his previous remarks that he pronounced an opinion that the Company had *not* complied with the Act.

Judgment reversed unanimously, and opposition of Grand Trunk maintained.

Cartier and Pominville for Appellants; A. & W. Robertson for Respondent.

SINCLAIR, *et al.*, (plaintiffs in the Court below), appellants, and HENDERSON *et al.*, (defendants in the Court below), respondents.

HELD—That the giving of a promissory note by an insolvent to one of his creditors, for the purpose of inducing him to sign a deed of composition, is a fraud upon the other creditors, and such note cannot be made the ground of an action against the insolvent.

In this case the question arose whether a note given by an insolvent to one of his creditors, for the purpose of obtaining his signature to a deed of composition, can serve as ground for an action. In June, 1861, the defendants became insolvent. A deed of composition was drawn up, in which they bound themselves to pay their creditors 7s. 6d. in the £, by three instalments in six, twelve, and eighteen months, for which instalments they gave their promissory notes, endorsed by Hon. L. Renaud. One of the creditors, Mr. John Sinclair, refused to sign the deed of composition. His claim was $1,123.76, and it was not till the defendants had given him a note for 2s. 6d. in the £ extra that he agreed to sign. This note was for $140.50, payable in two years. When the note came due, it was protested for non-payment, and subsequently endorsed over to Sinclair & Jack, (the first named being a son or Mr John Sinclair) for $75 consideration. It was on this note that the present action was based. The defendants pleaded that by the deed of composition, dated 2nd July, 1861, Mr. John Sinclair agreed to take 7s. 6d. in the £, which composition had been paid. The note bore date 13th June, 1861, a date antecedent to the date of the composition. The plaintiffs answered that the deed was not dated till completed, but that Mr. Sinclair signed before the note was given, and that he did so only on the the express assurance that he was to be paid the 2s. 6d. in addition to the amount of the composition. The Court below sustained the plea, and dismissed the action.

DUVAL, Ch. J., said that by all laws the transaction in question was considered a fraud upon the creditors, giving rise to no action whatever. The English authorities put it upon the broad ground of being a fraudulent act. It had been stated that previous to the Code Napoleon this was not the law in France. This was not correct. The Court entirely concurred in the judgment of the Court below.—Judgment confirmed unanimously.

John Popham for Appellants; Leblanc, Cassidy and Leblanc for Respondents.

CORPORATION OF THE PARISH OF ST. LIBOIRE, (plaintiffs in the Court below,) appellants, and GRAND TRUNK COMPANY, (defendant in the Court below,) respondents.

HELD—That the Grand Trunk Railway Company are not bound by law to construct bridges over points where their track crosses Municipal roads opened after the completion of the Railway.

This was an appeal from a judgment of the Superior Court at St. Hyacinthe, pronounced by Mr. Justice Badgley, dismissing the plaintiffs' action. The question was whether the Company were bound to construct a certain bridge. The railroad crossed a parish road, and the *procès-verbal* ordering the opening of the road, ordered the Company to make a bridge over it of sufficient height to allow the cars to pass underneath. The Corporation alleged that the Grand Trunk had constructed a bridge which terminated on private lands, so that the inhabitants of the parish could not cross the bridge without trespassing on these lands. The parish accordingly brought an action asking that the Company should be ordered to make another bridge, or pay $500, the estimated cost of construction

The defendants excepted on several grounds. They said they must be put *en demeure*, by an Inspector, to do the work, and that the parish could not claim the cost before the work was done. Further, that they could not be called on by law to do such work; that the *procès-verbal* was null, and at most should only have ordered defendants to pay their share of the work in proportion to the value of their property in the parish. Further, that they had made a sufficient bridge, and that the road in question had been opened several years after the track was laid.

The action was dismissed on the ground that the bridge, being a public bridge, should not be made at the sole expense of the Railway Company, but should be contributed to by all proprietors in the Parish. From this judgment an appeal was taken on the ground that the Railway Company were bound to make bridges over crossings, and that they had acknowledged their liability by making one which was insufficient.

DUVAL, C. J.—The opinion of the Court is that there is no law or statute which imposes upon the Grand Trunk any obligation to make a bridge, as the plaintiffs pretend.

Judgment confirmed unanimously.

Dorion & Dorion for Appellants; Cartier & Pominville for Respondents.

CHRISTIE, (defendant in the Court below), appellant; and MONASTESSE, (plaintiff in the Court below), respondent.

Question as to the existence of a servitude, *droit de passage a pied et en voiture*, over defendant's land. Held, that the servitude existed, and that defendant had not kept the passage in good order.

This was an appeal from a judgment rendered by Mr. Justice Loranger in the Superior Court at Montreal, 30th April, 1864. The parties were neighbors in the parish of Contrecœur, and there existed on their properties a reciprocal right of way for vehicles and for persons on foot. The action (*action confessoire*,) was

instituted for the purpose of making the defendant acknowledge this right of passage, and maintain the road in good order, the plaintiff claiming moreover £100 damages. The servitude was established by the predecessors of the parties to the action by notarial deed. The defendant denied that there was any right of passage. He pleaded that no title had been produced by plaintiff; that if the latter had any right at all it was a simple right of way, and he, defendant, had never opposed this right of way. The Court declared that the servitude existed, and ordered the defendant to pay $10 damages.

DUVAL, C. J., said the evidence was very positive in favor of plaintiff as to the condition of the road. It was in very bad order. The Court was also of opinion that plaintiff possessed the right of passage, and that defendant was bound to keep the road in order, which he had neglected to do.

Judgment confirmed unanimously.

Doutre & Doutre for Appellant; Senécal, Ryan & DeBellefeuille for Respondent.

MORRISON *et al.* (defendants in the Court below), appellants; and DUCHARME (plaintiff in the Court below), respondent.

A question as to plaintiff's liability for deteriorations of a Church constructed by him. Held, that the defendants, by receiving the work over, had exonerated the plaintiff from all liability, except the liability which by law attached to him as architect and undertaker; and that the defendants had failed to prove the existence of any *vice du sol* or of *construction* for which the plaintiff could be held liable as such architect or undertaker.

This was an appeal from a judgment of the Superior Court, 30th April, 1864. The plaintiff claimed £306 due under a contract. The defendants were the syndics duly elected to superintend the construction of a church and sacristy in the parish of St. Gabriel de Brandon, and they contracted with plaintiff, 29th March, 1855, to erect certain buildings to be completed 25th December, 1856. The price was £1893.10, payable in instalments. When the work was finished, 25th August, 1858, *experts* were named by the parties to examine it, and on their report, the church and sacristy were accepted and taken over, and the contractor absolved from further liability, with the exception of the guarantee of ten years, or his liability as architect and undertaker. The syndics afterwards, however, refused to meet the instalments as they came due, alleging that they had subsequently discovered defects in the building, that there were various cracks and fissures in the walls, which they said were caused by the improper construction of the foundation; that there were holes in the belfry which allowed the snow and rain to penetrate; that part of one of the walls of the sacristy was on the point of falling, &c., and they claimed £2,000 damages as a set off to plaintiff's demand. The pleas of defendant were dismissed in the Court below by Mr. Justice Smith, and judgment given in plaintiff's favor. The defendants appealed.

DUVAL, C. J., said the Court was of opinion that the judgment of the Court below was quite right. Two persons had made a careful examination of the building, and were of opinion that the defects complained of could have been remedied at first for a few dollars. No objection was made by defendants till a long time after. The contractor had done his work properly, and fulfilled the contract.

Judgment confirmed unanimously.

Lafrenaye and Armstrong for Appellants; Rouer Roy, Q.C., for Respondent.

MARTIN *et al.*, (defendants in the Court below), appellants; and MACFARLANE, (plaintiff in the Court below), respondent.

An action for the amount of a note given in excess of the amount of composition. The defendants pleaded, by *exception peremptoire*, that the note was given before the composition notes and was postdated by plaintiff; and that if it were paid, the plaintiff would receive more than the other creditors. Held, that this plea was no answer to the action.

This was an appeal from a judgment rendered by the Superior Court at Montreal on the 31st May 1864, condemning the defendants to pay the plaintiff the sum of $193.48, amount of a note bearing date 1st February 1862, payable 21 months after date. The defendants pleaded specially that by notarial deed dated 1st Feb. 1862, they made an arrangement with their creditors, including the plaintiff, by which they agreed to compound for ten shillings in the £. That at the date of this composition, plaintiff was in possession of the note sued on, which he had postdated. That if this note were paid the plaintiff would receive more than the other creditors, and equality between them would be destroyed. For these reasons the defendants prayed for the dismissal of the action.

Judgment was rendered by Mr. Justice Smith condemning the defendants to pay the amount on the following grounds: 1st, that defendants had failed to prove that the note sued on was given to plaintiff before the execution of the deed of composition; and 2nd because defendants had not set up any agreement by plaintiff to take the note with the fraudulent intention of inducing the other creditors to sign the deed of composition, but they simply stated that plaintiff thereby received more than the other creditors, which was no answer to the action.

DUVAL, C. J., said the peremptory exception was no answer to the action. There was an important omission to allege fraudulent intent. On this principle, they held the judgment of the Superior Court to be correct.

Judgment confirmed unanimously.

C. & F.-X. Archambault for Appellants; S. Bethune, Q C., for Respondent.

BOVE (defendant in the Court below), Appellant; and MCDONALD *et al* (plaintiffs in the Court below), Respondents.

HELD—That the endorser of a promissory note, tendering the amount to the payee, does not require, and cannot demand any special subrogation, besides the surrender of the note. Further, that the endorser cannot throw upon the payee refusing tender of the amount, the liability for the maker's insolvency unless he have renewed the tender *en justice*.

This was an appeal from a judgment of the Superior Court at St. Johns, in the district of Iberville, 27th Nov., 1863, condemning the defendant to pay plaintiffs the sum of £100, with

interest and costs. The action was brought against the defendant as the universal legatee of one Tugault, who had specially endorsed a note for £100, dated 29th May, 1854, made by Raphaël Chéné and Olivier Hebert in favor of the plaintiffs, payable eight months after date. The defendant pleaded an *exception péremptoire* that Tugault, fearing the insolvency of the makers of the note, tendered to plaintiffs on the 25th Aug., 1856, the amount then due on said note in capital and interest, on condition that plaintiffs should subrogate him in all their rights with respect to said note, and at the same time surrender the note; that plaintiffs had absolutely refused to accede to this demand; that the makers of the note were solvent at the date of the tender, and afterwards became insolvent; and thus in consequence of plaintiffs' refusal, he, Tugault, had lost all recourse against the makers whose insolvency had become complete. The prayer of the plea demanded the dismissal of the action. The answer of Edward MacDonald, one of the plaintiffs, to whom the tender was made, was: "I am ready to receive the amount of this note, but I am not willing to sign any document without taking advice." The judgment of the Court below maintained the plaintiffs' action on the following grounds.—1st, That defendant had failed to prove that at the time of the tender the makers of the note were solvent, and had subsequently become insolvent. 2nd, It was not proved that plaintiffs refused to accept the tender. 3rd, That before taking advantage of plaintiffs' alleged refusal, Tugault should have renewed his tender *en justice*, which he had failed to do.

DUVAL, C. J., considered the judgment of the Court below right. As to the subrogation demanded there was nothing to subrogate. All the plaintiff had to say was, this is a simple promissory note, pay me and I will give it to you. The judgment must be confirmed with costs.

Judgment confirmed unanimously.

Belanger and Desnoyers for Appellant; Bethune, Q.C., for Respondents.

JANE GIFFIN, (defendant in the Court below), Appellant; and ANATHALIE LAURENT, (plaintiff in the Court below), Respondent.

Question of evidence only, as to whether defendant's son acted for himself, or as agent for his mother.

This was an appeal from a judgment of the Superior Court, rendered by Mr. Justice Loranger on the 30th April 1864, condemning the appellant, widow of Henry Duncan, to pay the respondent, widow of David Laurent, the sum of $863, balance of account for goods sold and delivered. The plea was that none of the dealings referred to in plaintiff's account had reference to any business carried on by the defendant, but were solely about the business of John Duncan, her son, who had no authority to deal with plaintiff as agent of defendant. The plaintiff answered specially that the defendant's son acted as her agent under Notarial power of attorney, and bought and received the goods for defendant's benefit. This pretension was sustained by the Court below, and defendant appealed.

DUVAL, C. J., observed that it was entirely a question of fact. The transactions certainly commenced between the deceased Laurent and the husband of the appellant. There could be no doubt that the debt was first contracted by Duncan deceased. After his death the widow gave a power of attorney to her son to continue the business commenced in the name of her husband. In view of these facts alone the widow must be held responsible for her husband's debt. But there was a fact which threw some doubt upon the subject. In the books of the deceased, the name of young Duncan was found as the debtor. The bookkeeper, however, explained this by saying that Mr. Laurent never saw this entry; it was made by the clerk himself without receiving any instructions from Mr. Laurent. Under the circumstances there could be no doubt that the plaintiff had a right to claim the amount of the account from the widow. The judgment must therefore be confirmed.

Judgment confirmed unanimously.

A. & W. Robertson for appellant; S. Rivard for respondent, and E. Barnard, counsel.

DOUTRE, *es qualité*, (defendant in the Court below), appellant; and WALSH, (plaintiff in the Court below), respondent.

The respondent, a tenant, asked for the resiliation of a lease on the ground that the house was damp and and not habitable on account of water in the cellar. Held, that this was not good ground for resiliating the lease, inasmuch as the tenant was aware that there was water in the cellar at the time he entered into possession, and nine months subsequently he gave notice that he would keep the house another year.

By the judgment appealed from, rendered in the Circuit Court, at Montreal, on the 29th April, 1865, the plaintiff obtained the resiliation of a lease entered into with defendant on the 10th May, 1864. By this lease the plaintiff rented from the defendant for one year from 1st May 1864, with right to continue the lease for a second year on giving three months' notice previous to the expiration of the first year, a two story stone house at Cote St. Louis. When the plaintiff entered into possession of the premises, in the month of May 1864, there was a small quantity of water in the cellar, but Mr. Daoust, defendant's brother-in-law, who had been occupying the house, having informed him that this would soon disappear, plaintiff did not hesitate to take possession. During the following autumn the water again appeared in the cellar and remained several days. But the plaintiff believing that this water only entered accidentally, did not give the defendant the required notice to terminate the lease, and the absence of such notice caused the lease to run for another year. On the 16th March following, the water entered the cellar to a depth of about four feet. The plaintiff thinking it would disappear, allowed several days to elapse; but finally, seeing it remain, on the 28th March he protested defendant, calling upon him to make a drain, or devise some other means of carrying off the water. The defendant declining to accede to this demand, on the

17th April, 1865, the plaintiff brought an action to resiliate the lease, on the ground that the house was uninhabitable by reason of the water and dampness. Defendant pleaded that the plaintiff, when he leased the house, was aware that there was no sewer to drain the cellar; that there was water in the cellar in the spring of 1864, and also in the following autumn, yet plaintiff had given no notice to terminate the lease. It appeared, moreover, that on the 6th Feb., 1865, plaintiff informed defendant that he was not going to keep the house another year. Thereupon defendant entered into negotiations with other parties, and was about to let the house when plaintiff came to him and said he had changed his mind, and would keep it. The lease being resiliated by a judgment rendered by Mr. Justice Badgley, the defendant appealed.

DUVAL, C. J., observed that the evidence of the plaintiff showed that he had first declined to continue the lease, and then told defendant he had changed his mind and would keep the house. It also appeared that one Troutbeck had been anxious to get the house, and would have rented it had not the plaintiff retained possession. It was also proved that plaintiff, before he leased the house, saw the water in the cellar, and was informed by Mr. Daoust that there was no drain to carry it off. Under these circumstances the plaintiff was not entitled to demand the resiliation of the lease, and the judgment must be reversed.

Judgment reversed unanimously.

Doutre and Doutre for Appellant; Leblanc, Cassidy and Leblanc for Respondent.

PATRICK KIERNAN (plaintiff contesting the opposition of Francis Kiernan in the Court below), Appellant; and FRANCIS KIERNAN (defendant and opposant in the Court below), Respondent.

A lot of land was donated by a father to a son, to provide him with means of living, with the condition that it was not to be alienated or hypothecated during the donor's lifetime. Judgment setting aside a seizure of this land by the father confirmed, but on the ground that his claim had been satisfied.

The appellant in this cause, father of the respondent, complained of a judgment of the Superior Court, rendered by Mr. Justice Smith, maintaining an opposition to the sale of certain land seized by the appellant. This land was given to the respondent by the appellant by deed of donation 9th May, 1843, "to procure him the means of obtaining an honest living, and that the said respondent should not, during the lifetime of him, the said appellant, sell, alienate, or hypothecate the said land or farm." In 1846, the father and son had a lawsuit respecting work done for each other, and a judgment was obtained 25th April, 1848, in favor of the present appellant for £10 3s. 11d. debt, and £38 18s. 3d. costs. Execution having issued, a return of *nulla bona* was made. At this time the son paid his father £15 on account of the judgment; he also did certain work for him, and leased a farm for which he paid a rent in oats. Respondent contended that the judgment was wholly extinguished and compensated by adding these amounts together. On the 29th Nov., 1862, fourteen years after, the appellant, under an execution *de terris*, caused the land to be seized which he had donated to his son in 1843. To this seizure respondent fyled an opposition, setting forth the above facts, and also attacking the seizure itself on the ground of informalities. The opposition was maintained in the Court below on the ground that the property was *insaisissable*, the donation being made on the condition that the donee should not sell, alienate or hypothecate it during the donor's lifetime. From this judgment the plaintiff appealed, contending that this condition in the deed of donation could not prevent the donor himself from seizing it in satisfaction of a judgment.

DUVAL, C. J., was of opinion that the judgment must be confirmed, on the plea of compensation. There were two points; first, that the property was insaisissable. When the father stipulated that the land was not to be alienated, he stipulated in favor of himself. Second, the plea of compensation. This appeared to be sustained by the evidence.

Judgment confirmed unanimously.

Dorion and Dorion for Appellant; C. S. Burroughs for Respondent.

OUELLETTE, (defendant in the Court below), Appellant; and BADEAUX, (defendant in the Court below), and FAUTEUX and MACFARLANE (intervening in the Court below), Respondents.

An action for salary, the employer being insolvent. Held, that a tender of the arrears due, together with one month's salary after the time plaintiff ceased to be employed, was sufficient, though he was engaged for a year, of which four months had not expired.

The plaintiff was engaged as clerk to Mr. P. B. Badeaux, for one year from 1st May, 1860. In December, 1860, Mr. Badeaux became insolvent, and Messrs. Fauteux and Macfarlane were appointed assignees to the estate. The plaintiff left the service of the insolvent in the beginning of December, 1860, and there was then due to him the sum of £8 4s. 8d. On the 31st December, he took out a *saisie-arrêt* before judgment, against the effects of the insolvent, for the sum of £60 6s 4d., viz: £8 4s. 8d. arrears, and the four months next ensuing up to the end of the year's engagement. The assignees intervened, and on the 2nd Jan. 1861 tendered to plaintiff the £8 4s. 8d. arrears, and £10 8s. 4d, for one month after, together with the costs incurred. This tender was subsequently renewed with the plea, and the money deposited. The judgment of the Court below, rendered by Mr Justice Monk 31 May 1861, held the tender to be sufficient, and condemned plaintiff to pay all costs incurred after the tender was made. From this judgment he appealed.

DUVAL, C. J., remarked that this was an action for salary. There was an action for salary, and there was also an action *en dommages*. The judgment of the Superior Court, giving plaintiff his salary up to the time he ceased to work, was correct. Plaintiff had no right to ask for more.

Judgment confirmed unanimously.

Leblanc & Cassidy for appellant; Laflamme, Laflamme & Daly for respondents.

GIRARD (defendant in the Court below), appellant; and HALL, *et al.*, [plaintiffs in the Court below], respondents.

Deed of composition set aside on proof that the creditors were induced to sign by fraudulent representations.

The defendant in this case was a trader doing business at Verchères. In January 1862, he asked his creditors to accept a composition of 5s. in the £. This was refused, and he finally offered 10s. in the £, which was accepted. Subsequently, however, some of the creditors learned that the sale of the defendant's immoveable property was simulated, and also that certain transfers of sums due him were made for the purpose of defrauding his creditors. On hearing this, the plaintiffs, who had signed the deed of composition, took out a *saisie-arrêt* for the remaining 10s. in the £, which had not been paid. Judgment was rendered by Mr. Justice Loranger on the 30th April 1864, maintaining the *saisie-arrêt* on the ground that the defendant had obtained the execution of the deed of composition by fraud, and therefore he could not derive any benefit from it. The defendant then brought the present appeal.

DUVAL, C. J., said unhappily there was no doubt as to the fraud attempted by the defendant. His books of account disappeared and he said they had been burned by his son. Now it was proved that these books had not been burned. The Superior Court was perfectly right in declaring that the composition was null.

Judgment confirmed unanimously.

Dorion & Dorion for appellant; M. E. Carpentier for respondents, and E. Barnard, Counsel.

TAYLOR, [opposant in the Court below], appellant; and BUCHANAN *et al.*, [plaintiffs in the Court below], respondents.

A question as to title of the Portuguese Jews to certain land adjoining that formerly used as a Jewish Cemetery, claimed as forming part of the McTavish estate.

This was an appeal from a judgment dismissing an opposition under the following circumstances. In November 1861, the plaintiffs issued an execution against the "Corporation of Portuguese Jews of Montreal," and seized certain land in the St. Antoine suburb. This land was said to have been acquired by the late David David 31st August, 1797, being part of that left by him to be used as a Jewish burying ground. Some days before the sale, the present appellant fyled an opposition based on two grounds: 1st, a deed of sale by the succession McTavish to Messrs. Fisher and Smith 21st December, 1848, a deed dated 26th Aug., 1845, granting to appellant a third of the McTavish property, and a *partage* of this property on the 23rd August, 1856; 2nd, opposant alleged a possession for thirty years openly and publicly. The plaintiffs replied that defendants had possessed the property for sixty-six years. Judgment was rendered by Mr. Justice Berthelot on the 30th June, 1863, dismissing the opposition for want of proof. It was from this judgment that the opposant appealed.

DUVAL, C. J., said this was a contestation between the appellant, as representing the estate McTavish, and the respondents, on the part of persons claiming land purchased by the late Mr. David for the purpose of forming a Jewish Cemetery. It was contended by the appellant that this property formed part of the McTavish estate. The Court did not think that it formed part of the estate, but that it formed part of this Jewish burying ground. It was true that there was no fence, for the Jews, not requiring the whole of the ground as a cemetery, did not wish to go to the expense of renewing the fence. But the posts were still visible, and the fact of the fence having disappeared, gave the appellant no title to property which did not belong to him. The judgment must, therefore, be confirmed.

Judgment confirmed unanimously.

H. Stuart, Q.C., for Appellant; R. Roy, Q.C., for Respondents.

PATOILLE, [defendant in the Court below,] Appellant; and DESMARAIS, [plaintiff in the Court below], Respondent.

HELD—That the father of a minor may bring an action *en declaration de paternite*, without being appointed tutor *ad hoc* to her.

This was an appeal from a judgment rendered by Mr. Justice Loranger on the 19th Oct., 1864. The plaintiff, as father of a minor daughter, brought an action against the defendant, praying that the latter be declared father of the child to which plaintiff's daughter had given birth, with claims for allowance and damages. The Court condemned the defendant to pay plaintiff the sum of £12 per annum, for the first four years; then £18 per annum till 8th June, 1869, when the mother would attain her majority, with $10 *frais de gésine*. From this judgment defendant appealed on two grounds. 1st, That the action could not be brought by plaintiff in his sole quality of father of the minor. He should be named tutor *ad hoc*. 2nd, That there was no proof that defendant was the father of the child.

DUVAL, C. J., said the Court was of opinion that the judgment must be confirmed. The conduct of the defendant was most disgraceful. He boasted that he made a practice of seducing all the young girls that he came in contact with. The sum awarded was very moderate, and the Court saw no reason to disturb the judgment.

AYLWIN, J., remarked that if the appellant had any character, it was a great pity he ever thought of bringing the case up to that Court.

Judgment confirmed unanimously.

Leblanc, Cassidy and Leblanc, for appellant; Dorion and Dorion for respondent.

CORDNER [plaintiff in the Court below], Appellant; and MITCHELL, [defendant in the Court below], respondent.

Plaintiff leased a house, with a clause prohibiting subletting without his express consent in writing. Held, that the verbal consent of plaintiff's agent to a sub-lease, and the plaintiff's acquiescence in such sub-lease during its entire term, was equivalent to a consent in writing.

This was an action to resiliate a lease on the ground that defendant had infringed a clause

prohibiting subletting without the written consent of the proprietor. See 1 L. C. Law Journal, page 28, where the judgment of the Court of Review is reported.

DUVAL, C. J., said that in this case it was quite evident that the plaintiff had forgotten that there was a clause in the lease giving respondent the right of claiming the extension of the lease for two years longer on giving notice to the lessor. Having lost sight of this clause, the appellant sold the property to another party, and it then became necessary to turn out the respondent if he could. What was the ground taken? That there was a clause prohibiting subletting. Respondent had sublet to Dr. David, who had been in possession of the building for two years, and the plaintiff's agent, Mr. Tuggey, had constantly received the rent from him. Plaintiff was perfectly aware of this fact and never made the slightest objection. Defendant was quite right in asking for an extension of the lease if he wanted it.—Judgment confirmed unanimously.

A. & W. Robertson for appellant; S. W. Dorman for respondent.

RITCHIE *et al.*, [defendants in the Court below], appellants; and WRAGG [plaintiff in the Court below], respondent.

Question of evidence. To an action for rent defendant pleaded that no rent could be recovered inasmuch as the house had been leased with plaintiff's consent for the purpose of keeping a disorderly house. Held, that there was no proof of the plea.

For the judgment of the Superior Court rendered by Mr. Justice Monk in this case, see 1 Lower Canada Law Journal, page 29.

DUVAL, Ch. J., said in this case a person pleaded the infamy of his own character. He would hesitate before he allowed such a plea. Pothier said it was no answer to the action. But the Court expressed no opinion on this, because they had another ground. There was no proof whatever of the fact alleged, viz. that plaintiff knew the purpose for which the house was leased. On the other hand, there was the evidence of Mr. Monk, advocate, in whose office the lease was made. Mr. Monk stated that the female defendant represented that they were going to keep a boarding house. The parties appeared perfect strangers to each other, and Mr. Monk considered at the time that Mr. Wragg had got a first rate tenant. This evidence could not be compared with that offered by the defendants coming forward with a declaration of their own infamy. The judgment maintaining plaintiff's action must be confirmed.

MONDELET, J., wished to be understood as not giving any opinion as to the reception of such a plea. From the evidence, it was sufficiently apparent that the two parties did not know each other. His honor did not wish to say that in any case he would refuse to credit the evidence of such a woman as the defendant, nor did he say that he would credit it. It would depend altogether upon the circumstances

DUVAL, C. J., added that in criminal practice it was usual to charge the jury not to give a verdict, where the evidence of the accomplice was not corroborated. He referred to a case in Upper Canada where the dying declaration of a woman did not agree with her evidence at a trial. Judgment confirmed unanimously.

Perkins & Stephens for respondent.

DEMERS, [intervening in the Court below], appellant; and ST. AMOUR *et al.*, [opposants in the Court below], respondents.

Held—That an intervening party tendering to an opposant the amount claimed by his opposition, must also tender the costs incurred by the opposant in a distinct action in another district, instituted for the same object as that for which the opposition was fyled.

This appeal arose in the following manner. On the 25th Nov., 1863, certain immoveable property situated in Grand Ile, Beauharnois County, was seized by one Parent, in satisfaction of a judgment which he had obtained against one Joseph Amiot. The possessor of this property, Amiot, had acquired it from the heirs St. Amour, [of whom the respondents were four] by deed of sale 22nd Jan., 1856, not registered. The part of the purchase money coming to the respondents not being paid by Amiot who was insolvent, the respondents, by an opposition *afin de distraire*, prayed for the rescision of the sale, unless the whole were paid. The appellant, who had a hypothecary claim on the same property, intervened, and tendered opposants the amount of their claim—principal, interest and costs of opposition, with security for the enstalments not yet due. The opposants answered that the tender was insufficient, there being another sum of $48 costs incurred by them in an action taken out against Amiot at Beauharnois for the purpose of setting aside the sale, which sum of $48 had not been included in the tender. The appellant answered that he knew nothing about this sum; it was not mentioned in the opposition, and the tender had been made in exact accordance with the conclusions of the opposition. The opposants replied that the action in question had been taken out after the opposition was fyled; that they had a perfect right to protect themselves, both by opposition and resolutory action. The pretensions of the opposants were maintained in the Superior Court by Mr. Justice Berthelot, and confirmed by the Court of Review. It was from these decisions that the appellant instituted the present appeal.

DUVAL, C. J., rendered the judgment of the Court, confirming the judgment appealed from Judgment confirmed unanimously.

D. Girouard for appellant; Doutre & Doutre for respondents.

Sept. 9th.

LAMERE, *fils et al.* [defendants in the Court below] appellants; and Hon. J. B. GUEVREMONT [plaintiff in the Court below] respondent.

Held—That the petitioners in the case of a contested election are jointly, *not* severally, liable to the sitting member for their half of the Commissioner's fees paid by the sitting member.

This was an appeal from a judgment of the Superior Court, Montreal, condemning the defendants to pay the sum of $490 jointly and severally. This was the amount of the Hon-

Judge Bruneau's account for services as Commissioner, appointed to take cognizance of the contested election of plaintiff as Legislative Councillor for the Laurel division. The plaintiff had paid this account and taken a subrogation of the claim, for which he instituted an action against the defendants and obtained judgment. The defendants raised two points. First, that the Commission being jointly issued at the instance of the petitioners and the sitting member, each of the parties was jointly and severally liable to the Commissioner. Second, that the sitting member having paid the amount to the Commissioner, he had only a right to a contribution from the defendants [Lamère, McNaughton and McCarthy] petitioners, for one-half of the amount so paid, each of the defendants being bound to pay him but one-sixth of the amount, they, in their relation to plaintiff, being joint, and not joint and several, debtors.

DUVAL, C. J., said there was an error in the judgment of the Superior Court. It condemned the petitioners, defendants, to pay the entire amount. This was not correct. The amount must be reduced to $165, being the half of $330, amount transferred, and the condemnation would be jointly, but not *solidairement*. Judgment reformed.

Devlin & Kerr for appellants; Lafrenaye & Armstrong for respondent.

Montreal, Sept. 6th, 1865.

BUNTIN, appellant; and HIBBARD, respondent.

HELD—That an appeal may be had to the Judicial Committee of the Privy Council when the amount involved in the controversy exceeds £500 stg., though the amount actually demanded in the declaration be less than £500.

In this case the judgment was for the sum of $1600, balance of $2800, $1200 having been paid on account before action brought. [See 1 L. C. Law Journal P. 34, where the case is reported.] On a motion made by respondent for leave to appeal to the Privy Council,

DUVAL, C. J., said the judgment of the Court of Appeals set aside the contract, and the plaintiff was ordered to take back his rags, which had been sold for $2800. It was quite evident, therefore, that the controversy was for a sum exceeding £500 stg. On the ground that the judgment expressly set aside the contract, the motion for leave to appeal would be granted.

AYLWIN, J., said he was of a different opinion. The right of appeal depended on the amount of the demand.—Motion granted.

COURT OF QUEEN'S BENCH.

DECEMBER 5TH, 1864.

PRESENT: Duval, Ch. J., Aylwin, Meredith, Mondelet, and Drummond, J.

QUEEN *v.* SAMUEL PERRY.

HELD—That the evidence required by Consol. Stat. Can., Cap. 94, Sec. 26, to corroborate the evidence of an interested witness, cannot be based upon something stated by such witness.

Mr. Johnson, Q.C., for the Crown, stated that the prisoner Perry had been tried on a charge of forgery of a promissory note. The indictment contained two counts. The first charged that the prisoner forged, and the second that he uttered. The name charged to have been forged was Henry Smith. Henry Smith proved so far as he could prove it, that the signature was not his. The prisoner was undefended, and the learned Judge who presided at the trial (Mr. Justice Drummond), reserved the question for the full Court whether the evidence was sufficient to justify a conviction. There was in the first place the evidence of Henry Smith himself, who swore that the signature was not his. The only corroborative evidence was the following: Smith deposed that meeting Perry, he told him the signature was forged. Perry replied "that is no forgery. I saw you sign the note myself one evening that we were at the Cosmopolitan Hotel; a man named Deveau, and another young man were present at the time." The Crown brought up Deveau, and he swore that he had never seen Smith sign the note. Mr. Johnson observed that under cap. 94, Consol. Stat. Canada, sec. 26, no person is to be deemed an incompetent witness in support of the prosecution by reason of any interest which such person may have in respect of any writing, &c., given in evidence, but the evidence of any person so interested shall in no case be deemed sufficient to sustain a conviction, unless the same is supported by other legal evidence.

Mr. Justice Drummond said that he had felt it his duty to reserve this point for the full Bench, especially as the prisoner was undefended. The question was, could Henry Smith, who was only *quasi*-competent as a witness, lay the substratum of the corroborative evidence required by the statute.

The Court took time to consider, but the following (March) term, they unanimously expressed the opinion that the evidence offered in corroboration was wholly insufficient, Deveau merely contradicting something which the interested witness said that the prisoner had said.

SUPERIOR COURT—JUDGMENTS.

MONTREAL, 30th June, 1865.

BADGLEY, J.

EUSTACHE BRUNET *dit* LETANG, *et al.* v. VENANCE BRUNET *dit* LETANG, *et al.*

Notarial Will set aside.—Held, that a will made before a notary and two witnesses under circumstances which rendered it improbable that the testator was in the possession of his faculties, or that the will was dictated by him, cannot be maintained.

This was an action brought by some of the children of Eustache Brunet, the elder, against the other children, claiming their share of the succession of their father. The defendants pleaded that they were in possession of the estate under a will made by the deceased on the 27th of April, 1863, at St. Joachim de la Pointe Claire, before Valois, Notary, and two witnesses. The plaintiff then inscribed *en faux*

against the will, so that the object of the action was in reality to set aside this will.

The case was of considerable interest. The testator married twice. By the first marriage he had two children, and by the second marriage five children, who were all living at the time of his decease. The testator was upwards of seventy-five years of age, and was suffering from throat disease. He was a man who never spoke much; in fact, some of the witnesses stated that he never spoke except in monosyllables, and his taciturnity was not diminished by the throat disease which almost choked him. He had, however, shown ability in making money, the value of his estate being estimated at $60,000. It would appear that the notary, who eventually made the will, exhibited a particular interest in the testator's estate, and urged him upon the subject, and frequently asked him why he had not made a will and settled his estate. On one occasion, before the will was executed, Venance, one of the sons of the second marriage, and who alone lived with his father and mother, the second wife, went to the notary, and told him to come down and make his father's will. The notary went to the house, accompanied by two witnesses, and found the old man lying in such a distressed condition of body that it was impossible to make the will at that time, the witnesses themselves objecting to it, notwithstanding the urgency of the notary, as the testator either could not or would not reply to any of the notary's questions, and the notary was compelled to declare that he could not do it then. Four days after, he was again applied to by Venance, and going back with Venance, he took papers with him and again went to the house with other two witnesses. The notary on entering the sick room, (a miserable apartment not much more spacious than the dimensions of the bed), on which the testator was lying in great agony, inquired of the dying man how he was. To this question there was no answer, or, if there were any answer at all, it was a scarcely articulate "*oui.*" Then the notary informed him that he had come there for the purpose of drawing his will. One of the witnesses said he answered "*oui*" again, after several minutes had elapsed. The notary proceeding to arrange some papers which they supposed was the will, asked the old man how he wanted to dispose of his estate. He replied (according to the evidence,) that he gave to each of his daughters 3,500 *livres ancien cours*. After he had made this declaration, Theodore, another of his sons by the second wife, who, with Venance, was standing at the door near the bed, said, "Celina (one of the daughters) has received 2400 livres (£100) already; that ought to be deducted." The Notary then asked if she was to receive 3,500 livres in addition, and the old man is said to have answered no. This answer was certified by Brisbois, one of the witnesses. Other questions were then put and answered. He is said to have given to Venance an island opposite Pointe Claire; also the residence and emplacement that he owned, indeed the chief and best part of the estate. Having said in one of his answers that he gave it to his son, the notary replied, "you have four sons. There is Eustache, to whom you have given nothing. Do you include him?" The old man seemed confused, and replied that he did not know him. But one of the witnesses said he heard the old man say yes, and the notary said he heard him say to give it to Eustache too. The mind of the dying man was evidently wandering, and he did not remember how many sons he had. After this, there was a discussion with reference to the personal estate, and Venance and the notary are reported to have pacified Theodore with the assurance that his share was safe. Then followed the question among those present as to who should be the executor, and it was agreed that Theodore should act as such.

There was a good deal of contradiction in the testimony, and much of it extremely unsatisfactory, shewing strongly of suggestion to suit the interests of the parties deriving advantage from the will to the exclusion of the others. Another peculiar circumstance was that the order in which the two witnesses swore that the bequests were made differed from the sequence in the will, the order being inverted in the latter, intimating that the will must have been prepared beforehand by the notary at the suggestion of some one not the testator, and the evidence shewing that the marginal notes then written were actually the additions made by the notary, who, as the witnesses said, at each time, wrote a little on the paper. Moreover, the ink with which the marginal notes were written was not the ink with which the will was written, and the ink of the notary's signature also differed from the ink of the body of the will. There was other evidence to shew that the will never could have been made in the house in the manner alleged. None of the witnesses went so far as to state that such was the case. The notary said he was never spoken to by Venance about it, but it was almost certain that he carried it to the house with him, and that it was made according to the instructions of Venance. Taking all the circumstances into consideration, remembering that the old man was sinking at the very door of death, afflicted with a disease that rendered it almost impossible for him to articulate, and that he died a week or ten days after, the conclusion was that the will was a fabrication, that the inscription *en faux* must be maintained, and the will set aside. *Inscription en faux maintained.*

MARIE ODILE MALO *v.* DEMONTIGNY.

Separation de corps et de biens granted on account of cruelty on the part of the husband.

This was an action *en séparation de corps et de biens*, brought by a lady who had reached the age of fifty-three or fifty-four when she married the defendant. Soon after the marriage, the defendant while inebriated frequently committed acts of violence on the person of his wife, so that she was at length forced to leave the house. She expected to inherit some property from her mother, and brought the present action to secure it from her husband. The

violence proved was sufficient. *Separation granted.*

KERRY *et al. v.* SEWELL *et al*, and SEWELL *et al*, plaintiffs *en garantie*, *v.* SMITH *et al*, defendants *en garantie*. 2nd, LAMPLOUGH *et al*, *v.* the same. 3rd, LYMAN *et al*, *v.* the same.

HELD—That when the article sold turns out to be something entirely different, the sale is null, though made by sample.

These three cases all originated in one transaction, and in each case there was a *demande en garantie* against the same parties. In 1864, Messrs. Smith & McCulloch had a consignment of indigo, which they so called, which they sold to Messrs. Sewell, Wetenhall & Reid. The latter, either personally or through brokers, offered this article to various parties. The first application was made to Messrs. Lyman, Clare & Co., to whom they offered it at forty cents a pound. At that time Lyman & Co. did not want indigo. But five or six days after, Messrs. Sewell & Co. returned with a sample and offered it at thirty-five cents a pound. Tempted by the low price, Messrs. Lyman, Clare & Co. bought four or five parcels. In the case of Messrs. Lamplough & Campbell and Messrs. Kerry & Co., the sales were made by brokers. The sales were made by sample, but there was no examination of the samples at the time by any of the purchasers. The bill of parcels in each case specified the article sold to be indigo. Five or six days after it was found that the article was not indigo at all. Though made up for sale exactly like the real article, it was nothing more than common clay coloured with Prussian blue. There was not a particle of indigo in the whole composition. As soon as this was discovered the purchasers applied to Messrs. Sewell & Co., to take back their goods, and on their refusal to do so, the present actions were brought against them, the defendants in turn bringing actions *en garantie* against Messrs. Smith & McCulloch, from whom they had purchased.

Now it was very true that where goods were sold by sample, and where an examination of the sample was made sufficient for the purpose of enabling the purchaser to be satisfied that the goods agreed with the sample, the purchaser would be held. He had made his examination and could not reject his bargain. But where a merchant professes to sell an article, it must be the article itself. It may be a very inferior description of the article, but it must at least be the article which it is held out to be. It is not enough that it is a mere imitation. If a man intends to buy gold, and receives pinchbeck the sale is of no effect. Pothier laid this principle down very clearly. The parties were entitled to recover the amounts which they had paid for the supposed indigo. Judgment for plaintiffs in all three cases. The actions *en garantie* were defective in form, and must be amended before any judgment could be given. The declaration *en garantie* set out the original sale and then the words of the declaration in the principal action, followed by a prayer for judgment. This was not enough. There must be a substantial allegation that the plaintiffs *en garantie* bought this article from defendants *en garantie*, and that it was not the thing it was represented to be; that they had sold it and were prosecuted to take it back or return the price received. Judgment for plaintiffs, and actions *en garantie* to be amended.

MACBEAN *v.* DALRYMPLE.

HELD—That when a creditor leaves a legacy to a debtor, the presumption is that he intends the amount of the bequest to be paid without deduction of the debt.

This was an action to recover a legacy, brought against the universal legatee of the late Mr. William Skakel. The plaintiff had been for many years a very intimate friend of deceased, and some years before the latter died he advanced ums of money to the plaintiff, amounting t £135. There was no difficulty as to this amount. It was advanced by Mr. Staples for the purpose of assisting the plaintiff to purchase two lots of the McGill College property, and to build a house on them. The will contained the following among other clauses:—

"I will and bequeath to William Macbean the sum of £150, he being my particular friend and a distant relation, to be unto him once paid."

By this will Macbean was also elected one of the executors.

At the time this will was made, Mr Macbean had received from the deceased £135. Mr. Macbean sued for £150, the amount of his legacy, and was met by the plea: "You have already received £135; we tender you £15, the amount required to make up the £150." Plaintiff answered that he was entitled to the £150, besides what he had received, which in fact was not loan to him, but gratuity.

The question was, whether the action was maintainable for the £150 over and above the £135. Whether the deceased was justified in giving the plaintiff £150 was not the question here, but whether the sum bequeathed in the will was to be held paid or to be compensated to the extent of £135 by what plaintiff had received. The presumption that arises when a creditor makes a bequest to a debtor is different from that which arises when a debtor leaves a bequest to a creditor. In the latter case it may be presumed that the legacy is intended to discharge the debt. In the former case it may be presumed the creditor would not give the money with one hand if he intended to demand it back with the other. But in addition to this there was extraneous testimony in the shape of a letter written by deceased to the plaintiff, which showed that the money advanced during his lifetime was intended as a gift, the two persons being on most intimate terms. No receipts had been taken by Mr. Skakel for the £135. The defendant was not an heir at law of him, and had received a large universal legacy. Mr. Skakel died a bachelor.

Under all the circumstances judgment must go for plaintiff for the full amount of £150.

MacKay & Austin for plaintiff; Day & Day for defendant.

FILIATREAULT *v.* MCNAUGHTON.

HELD—That it is not necessary for a person, when offering a builder the balance due him under a contract to reserve his rights of action against the builder in respect to defects in the building. But if such reserve be made, the builder cannot on this account refuse to accept the balance tendered him.

This was an action for a balance due under a builder's contract. Mrs. Adams entered into a contract with plaintiff for the building of a house. When the whole thing was finished, a certain amount was found to be due to plaintiff. Mrs. Adams tendered him the money through M. Labadie, her notary, but with reserve of her rights under certain protests respecting supposed or alleged defects in the building. Now whether she had made this reserve or not was a matter of very little consequence, as she could always exercise the right of action against plaintiff in respect to those matters. Plaintiff declined to take the money under this reserve. The tender was made in American gold pieces, and was not quite so legal as it might have been. But it was clear that the money was ready for him. Under these circumstances judgment would go for the amount tendered, but (as he had refused to receive this money) without costs.

KELLY *v.* MCGEE.—The plaintiff was the owner of certain lots of land in Chatham. Defendant wishing to purchase, they went over the land together, and the defendant being quite satisfied, the deed was drawn. When the present action was brought for the recovery of the amount of the purchase money, defendant pleaded that there was no loghouse upon the land, and that a certain deduction should be made on this account. Now the defendant must have been perfectly well acquainted with this fact from the first.—*Judgment for plaintiff.*

BLUMHART *v.* BOULE; HUBERT, curator.

HELD—That a wife *separee de biens* must be authorized by her husband to make an opposition to a sale; and that the wife's admission that she was not authorized will invalidate the opposition.

In this case the defendant's property being seized under a writ of execution on a judgment, defendant's wife, M. A. X. Archambault, made an opposition in her own name as *separée de biens* from her husband and authorized by him. Plaintiff answered that she never was authorized by her husband. The parties went to proof, and the lady, being brought up, swore that she was not authorized, and that she did not require any authority from her husband. Unfortunately she had thus proved the exception herself. The difficulty was that upon the face of the opposition, the husband appeared to have come in and authorized her. But it was her own opposition and she said she was not authorized. Now an authorization was necessary; the exception would, therefore, be maintained, and the opposition dismissed with costs.—*Opposition dismissed.*

MONK, J.,

SCOTT *v.* INCUMBENT AND CHURCHWARDENS CHRIST CHURCH CATHEDRAL.

HELD—That an architect is responsible for defects in a building erected by him, though the plans were made by another architect before he assumed charge.

This was an action for Architect's commission, &c. There was no difficulty as to the 3 per cent. charged on the bulk of the outlay, but there were other items in the account which the Church authorities disputed. These sums, however, were of little consequence, inasmuch as the plaintiff was liable for want of skill. It was true he built the Church upon the plans of another architect, but it was his duty, as the work went on, to see what he was about. There was no difficulty as to his liability. The damages occasioned by his want of skill might be opposed in compensation, and the action would, therefore, be dismissed.

Ex parte C. GAREAU, for *certiorari.*

HELD—That a conviction for disturbing the public peace, "in premises off McGill Street," does not come under the Statute.

This was an application on the part of the petitioner to quash a conviction by the Recorder for disturbing the public peace "in premises off McGill street," by using insulting language towards Michael Ryan, constable. The petitioner represented that the alleged offence, which he denied *in toto*, was not committed in the public street at all, but merely a conversation that took place in his own store. Ryan had entered the store on the 20th March last, and requested Mr. Gareau to have the ice removed from the side-walk, as his neighbour was getting his removed. Mr. Gareau (who had been notified in the morning of the same day by another policeman to remove the ice, and who thereupon sent his boy out to do so) answered that it was already commenced, and the boy was then at his dinner. The policeman said it was not commenced. Mr. Gareau told him he lied, and then went with him to the door to point out where the job had been begun. It was here that Ryan said he was insulted by Mr. Gareau, but the book-keeper and another person in the store, who were within a short distance, testified that they did not hear Mr. Gareau make use of any insulting language. The Court was disposed to maintain the pretensions of the petitioner. Premises off McGill Street, simply meant a house on McGill Street, and the alleged offence, therefore, did not come under the terms of the statute. The conviction, too, repeated the same thing "in premises off McGill Street." The conviction was therefore bad, and must be quashed with costs.

MASSON *et al. v.* MCGOWAN, and PETER MCGOWAN, opposant.—This was an opposition to the seizure of real estate. The plaintiffs said the opposant had previously put in an opposition to the sale of the moveable property, which opposition was based on a deed which the Court held to be fraudulent. The same deed being made the basis of the present opposition, the plaintiffs pleaded the former judgment as *chose jugée*. The Court was convinced from the evidence that the deed was fraudulent, and the opposition must be dismissed with costs.

ROWAND *v.* HOPKINS.—A question between the plaintiff and the executor. Plaintiff must render the account as prayed for.

BOUVIER *v.* BRUSH *et al.*—This was an action to set aside a sheriff's sale, on the ground that the advertisements were not regularly made. The Court found that the advertisements had been regularly made as required, and the action would, therefore, be dismissed.

JODOIN *v.* FABRIQUE DE VARENNES.—This was an action against the Fabrique. The plea was that it was the building committee on whom the responsibility lay. There was no difficulty in coming to the conclusion that the building committee were not responsible. The party responsible was the Fabrique. Judgment for plaintiff.

HUNTER *v.* GRANT.—There was nothing in this case to shew the connection between the transfer of the *bailleur de fonds* and the account sued upon. Several instalments payable under the transfer were coming due, but at the time the action was brought none of these instalments were due. His Honor was of opinion that the action must be dismissed with costs.

TARRATT *et al. v.* BARBER *et al.*, and TARRATT *et al. v.* FOLEY.—Applications were made in these cases for a *commission rogatoire* to England. The cases had been inscribed for hearing. The inscription in both cases was premature, and the motion to discharge inscription must be granted in both cases.

SERRE *v.* GRAND TRUNK Co.—This was an action for damages. The plea denied that plaintiff had suffered any damage. The parties went to proof, and the plaintiff brought up three or four witnesses, who estimated the damage at a high figure, but spoke in very vague terms of the nature of the damage. When cross-examined it did not appear that they had paid much attention to the place, but simply looked at it as they passed in the cars. The Court was of opinion that there was no damage proved. Action dismissed with costs.

NORDHEIMER *v.* DUPLESSIS.—This was an action *en revendication* of a piano. The defendant said he purchased it at a judicial sale. The fact of a purchase at a judicial sale was clearly proved. Action dismissed with costs.

COURT OF REVIEW.

Montreal, June 30, 1865.

PRESENT—Badgley, Berthelot and Monk, JJ.

BADGLEY, J.

HART *v.* ALIE, and HART, *tiers saisi.*—A motion had been made by the defendants to discharge the *délibéré* in this case, because it was not indicated in the motion that the appealing had been aggrieved by the judg of the original Court. But it was not nece for the party to tell the Court that he was aggrieved. The fact that he considered himself aggrieved was sufficiently shewn by his asking for revision of the judgment.—Motion rejected with costs.

JOHNSTON *et al. v.* KELLY.

HELD—That a final judgment rendered by a judge, dismissing a writ of attachment under the Insolvent Act of 1864, Sec. 3, Sub. Sec. 6, is subject to review, under 27 & 28 Vic. C. 39, S. 30.

This was a motion to discharge an inscription for review of a judgment dismissing a writ of attachment under the Insolvent Act, on the ground that there was no appeal.

Motion rejected with costs.

CORPORATION SEMINARY OF NICOLET *v.* PARENTEAU *et al.* and ROY, creditor, and TOURGEON *et al.* contestants. This was a case from Sorel. Judgment was rendered upon a distribution of moneys under an execution, and in making up the judgment, the prothonotary had taken the Registrar's certificate, by which he found that Roy had the first mortgage. Judgment below confirmed.

CAIRNS *v.* HALL.—Action in ejectment. Plea that there was tacit reconduction. No proof of plea. Judgment below confirmed.

DUPUIS *v.* BELL.—Plaintiff got a judgment against defendant's daughter, and in the seizure which followed, some misunderstanding occurred in consequence of the guardian being English and not able to speak French, and the bailiff being French and unable to speak English. The bailiff made the guardian responsible for the entire debt, interest and costs. Upon that security bond judgment was rendered in the district of Iberville, condemning defendant. This judgment was clearly contrary to law and must be reversed. Security bond set aside.

VIAU *v.* JUBENVILLE.—In this case there was a difficulty about a balance. A stone building was to be put upon the place where there had been a wooden one. The question came up, was the builder bound to account for the stone on the premises? The usage appeared to be that where the builder is not paid for taking down the old building, he has a right to the stone; but where he is paid, he must account. In this case he was paid $35 for the taking down the old building. Therefore, this item must be deducted.—Judgment reformed.

ATTY.-GENERAL, and GRAND TRUNK Co.—As stated at the time of the argument, the Court did not think it would be right to dismiss the action on the demurrer, and therefore the judgment must be confirmed.

CIRCUIT COURT.

MONK, J.

SCULLION *v.* PERRY *et al.*—The plaintiff, a money lender, lent a sum of money to E. B. Perry for which he took his note. Not being satisfied with the name of Perry, he obtained an endorser. The note, payable two months after date, not being paid at maturity, was protested, and the present action brought against the maker and endorser. The former made default. The endorser, Alport, appeared and said: I never endorsed a note made by E. B. Perry. I endorsed a note of which J. B. Perry was the maker. The name in the protest was E. B. Perry. The peculiarity of the case was that on looking at the name of the maker on

the note, it was impossible to say whether it was E. B. or J. B. He was sued as E. B. Perry and had allowed the case to go by default. The Court might assume, therefore, that his name was E. B. Perry, and assuming this, the protest would be all right. The judgment would, therefore, condemn the endorser, because he had not put in an affidavit under the statute.

DOUTRE *v.* DEMPSEY.—A petition was prepared by a number of bailiffs, and the defendant among others was asked to sign it, and paid 25 cents towards expenses. The plaintiff was employed to present the petition, and now a large bill was rendered, and an attempt made to fasten the responsibility for the whole upon the defendant. This was carrying the matter too far. The defendant had no more to do with it than any of the others, and the action must be dismissed.

BADGLEY, J.

ROCHON *v.* GASPEL.—The defendant was the tenant and occupant of a hotel near the market. Mad. Rochon, who was a widow, took a house in the neighbourhood to be used as an eating-house. This interfered with defendant's profits, and he thought he would put a stop to it by driving her away. So he called her all sorts of names, said she had no right to keep an eating-house there, and insulted and annoyed her in every possible way. Among other things, he used to call out to people going into her house, that she was a bad woman. Now this was not to be allowed under any circumstances, but more particularly when there was nothing to show that there was any truth in the charges. $50 damages would be awarded, with costs as of lowest class appealable Circuit Court.

O'CONNELL *v.* FRIGON.—This case all turned upon the fact of a reference to arbitrators. There was a general consent that the arbitrators should settle the case between them. The two appointed at first named a third, and they proceeded to hear the parties, &c. In the course of their proceedings the City Inspector, Mr. McQuisten, was called before them as a witness, and it was upon his testimony that the case turned. Notes of Mr. McQuisten's evidence were taken, but he was not sworn at all. When the arbitrators fonnd that there was a difference of opinion, Mr. McQuisten went with the notes of his testimony, and swore to them before a commissioner. Now this being the ruling testimony on which the arbitrators made up their mind, it would be irregular to hold their report, made under such circumstances, to be valid. The Court could only come to the conclusion that the report must be set aside. The parties might agree as to whether new arbitrators should be appointed, or the old ones chosen to do the work over again. Report set aside.

SUPERIOR COURT.

SEPT. 25, 1865.

BERTHELOT, J.,

CAMERON *v.* BREGA.

HELD—That in an affidavit for *capias*, the omission of the names of the persons from whom the deponent obtained his information is a fatal defect.

The defendant in this case moved to quash a *capias* on the following grounds: 1st That the place where the debt was contracted was not specified. The Court was not disposed to maintain this objection, as it appeared from the facts set out that the debt was contracted in Lower Canada. 2nd. It was objected that the names of the persons from whom the plaintiff derived his information that defendant was about to abscond, were not stated in the affidavit. It was merely stated that he was informed by two credible persons. This was a fatal omission, and on this ground the *capias* must be quashed with costs.

COURT OF REVIEW.

SEPT. 30, 1865.

PRESENT: Badgley, J., Berthelot, J., and Monk, J.

HUMPHRIES *v.* CORPORATION OF MONTREAL.

HELD—That the Corporation of a city is liable in damages for an accident which occurred in consequence of part of a street being encumbered with building materials to more than half its extent, and not protected by a light at night.

BADGLEY, J.—This was an application for the revision of a judgment of the Superior Court, Montreal. The action was founded upon injuries sustained by the plaintiff, a cab driver, whose vehicle was overturned in a street of the city, at a late period in the evening, when there was no negligence on his part. The circumstances were as follows: A house was being built in a certain street, and the parties building the house encumbered the street not only to half, but to even more than half, its extent with building materials. On the night of the accident the plaintiff was driving his cab, and drove up against a part of these building materials, consisting of large and cumbrous stones. The cab was upset and the horse much injured. The plaintiff's collar bone was broken, his shoulder dislocated, and he suffered much inconvenience, pain and trouble The medical man who attended him states that at the present time, months after the accident, his arm is still weak, and that it is almost impossible for him to use his fingers. The question now arises, was the Corporation guilty of negligence? The evidence shewed that the street was greatly encumbered with stone and building materials. More than that, a little further down and within a few paces of the spot, a large quantity of firewood was lying, so that the carter was obliged to make a turn before reaching the place of the accident. There were no lights in the street that night, and, what was worse, there were no lights at this dangerous spot to protect passengers who might be obliged to go along that way. Not only this, but the street inspector was sick, and the person employed in his place had gone up and down the street for weeks previous, without having done anything to guard against such accident. Under these circumstances the Court must confirm the judgment of the Superior Court which awarded the plaintiff £100 damages.—*Judgment confirmed.*

BANK OF B. N A. *v.* BENOIT.—BADGLEY, J. —A motion was made in this case by plaintiff to reject the motion of defendant for inscription, as being too late. On looking into the record the Court found that this was the case. *Motion granted with costs.*

COWAN *v.* MCCREADY.—BADGLEY, J.,—This was a case from the Circuit Court, Montreal. The defendant, who was building a house, gave it out to be built by contract to two individuals, from the foundation to the roof. The roof was to be covered with a particular material, and this roofing was done by plaintiff. Finding, probably, that he could not get his money from the contractor, he turned round upon the proprietor, defendant in this action, and alleged that the roof was covered at his request. There was no doubt that the roof was covered by the plaintiff, but the testimony of Mr. Brown, the architect, was conclusive to the fact that Mr. McCready never had anything to do with the plaintiff, and would have nothing to do with him about the matter. The engagement was between the plaintiff and Sheehan, the contractor. The judgment of the Superior Court dismissing the plaintiff's action must be confirmed. *Judgment confirmed.*

FABRIQUE OF MONTREAL *v.* BRAULT.

HELD—That the heirs-at-law are liable each for his share only of the pew rent due by, and the charges for interring their parents.

BADGLEY, J.—This was an action brought against a single individual, Joseph A. Brault, for the recovery of the full amount of pew rent, for the pew occupied by his late father in the Parish Church, and also for the full amount of the Church charges for the burial of his parents inside the church. The question did not turn upon the largeness of the amount, but upon the defendant's liability for the whole. If the defendant could be sued at all, he could only be sued as the heir-at-law of the person who owed the rent. Now there were three brothers, heirs-at-law; therefore each was liable for a third only. Then as to the interment charges. The defendant did not make any arrangement with the Church authorities for the interment of his father and mother: he was not present at his father's interment, but assisted at that of his mother, and knew where it would take place, without making any objection. The arrangement made was with the brother of defendant. There was a privilege in favor of the Church charges, but this privilege could only go to the extent for which the individual was liable; and, therefore, defendant could only be held liable for one-third. The Church had not established the existence of any contract with defendant: they sued him as representative of the estate. Under these circumstances, the judgment would be reformed; and the judgment would only go for one-third of the amount claimed, or £36 in all. Judgment reformed.

MCGINNIS *v.* CARTIER and CARTIER opposant.

HELD—That where an opposition to the sale of land is based upon title under a deed of donation manifestly fraudulent, the judgment dismissing such opposition should be *motive* that the deed of donation was fraudulent, and not that the opposition was unsupported by sufficient proof.

BADGLEY, J.—This was an application for revision of a judgment from the District of Iberville. The plaintiff obtained a judgment on the 4th April, 1863, against the defendant on certain mortgage deeds which had reference to some property at St. Athanase, belonging to the defendant, running back to 1830, which were established by the judgment, but the amount not being fixed by the judgment. Although the right of the plaintiff was then settled, the precise amount was afterwards established with the assistance of an *expertise*. It was for this amount so found to be due by defendant to plaintiff, that the latter caused to issue the writ of execution by which the lot of land, the property of the defendant at the date of the judgment, was seized by the Sheriff. On the 7th April, 1863, only three days after the rendering of the judgment, the defendant made an act of donation, by which he transferred the land seized in this case to his two sons, one of whom was a minor and the other of age. The consideration of the donation was to be the support of the father and mother and their two daughters, besides the payment of the mortgage indebtedness of the lot of land. The children donees never disturbed the father in his possession. To the plaintiff's seizure of the lot of land, the opposants fyled an opposition, setting out title under the deed of donation, which was dismissed. The only difficulty about the case was the ground of the judgment at Iberville. The ground assigned was, that because the opposants had not made sufficient proof of their opposition, it must be dismissed. Now this was not the question: the question was the fraudulent deed of donation. The judgment of the Court of Review was in its result the same and confirmatory of the judgment rendered at Iberville, but it was upon the ground that the deed was fraudulent. As the parties had been led astray by the *motivé* of the judgment appealed from, no costs would be allowed.—*Motivé of judgment corrected.*

WALTON *v.* DODDS.

HELD—That where land sold is found to be less than the alleged extent, the consideration money will be proportionably reduced. 2. That where no application is made by the parties of payments, the Court will apply them to the most onerous debt.

BADGLEY, J.—This was an appeal from the district of St. Francis. The action was brought by plaintiff against the defendant to recover a piece of property. The plaintiff agreed to sell to defendant a piece of land measuring so many superficial acres, for which he was to receive a certain sum of money. The testimony was complete to shew that instead of 400 acres, there were only 335. There was another point. The defendant pleaded compensation by services rendered, goods and monies paid, fyling a very long and heavy bill of particulars in support of his pretension. The only question was with reference to three sums of money covered by the plea of compensation. The plaintiff was brought up and questioned respecting these payments, which were admitted

to have been made to him. It appeared [that the parties had made no application of the payments, therefore it was the duty of the Court to make the application to the most onerous debt. This was the mortgage for the unpaid purchase] money. The judgment of the Court would, therefore, be reformed; $80 to be deducted from the amount of the judgment, which had properly reduced the consideration money by a proportionate reduction of the price for the short extent of the land sold.

SMITH *v.* NOAD.

HELD—That in an action of ejectment, where no rent is due, the costs will be taxed according to the amount of the annual rent.

BADGLEY, J.—This was an appeal from the district of Richelieu. The plaintiff entered into a notarial lease with defendant at the rate of £34 a year. At the expiration of the year, the defendant continued in possession of the premises. An action in ejectment having been brought against him, he pleaded that in January or February last, a bargain was entered into between him and plaintiff, by which he was to continue in the house at a rent of £40. It appeared that though there had been some conversation on the subject there had been no bargain. Admitting then that defendant had held over wrongfully, there arose a question of costs: The judgment condemned the defendant to pay the costs of suit, and the costs had been taxed according to the amount of the annual rent. The defendant contended that he should only have been condemned to pay costs of an action of the lowest class Circuit Court, because the Act in amendment of the Lessor and Lessees' Act says the costs are to be taxed according to the amount of the judgment, and if the defendant had owed a month's rent in the present case, he would only have had to pay costs as of the lowest class, Circuit Court.

The Court considered that the judgment was correct, the costs being according to the amount of the rent.—Judgment confirmed, with costs as in an action for £34.

JOHNSON *et al*, *v.* LORD AYLMER.

HELD—That the executors only, and not the usufructuary under the will, can take proceedings to support the rights of the estate. 2. Where a property, supposed to contain minerals, was sold with a stipulation that the purchaser was to cause it to be explored, but without any time for such exploration being fixed; held that the purchaser may await the result of the exploration of an adjoining lot, it being proved by scientific testimony that the working of the latter would indicate what success was to be anticipated in the lot sold.

BADGLEY, J.—This was an appeal under the following circumstances:—Geo. Johnson was the owner of a lot of land at Ascot, and becoming very much excited about the reports of mineral deposits, he endeavoured to make a very large fortune at once without any difficulty. The owner of the adjoining property was a company established in England, and carrying on mining operations to a considerable extent upon it, with Lord Aylmer as their agent. Mr. Johnson, supposing that his land contained mineral deposits, sold it to Lord Aylmer for a period of 99 years. The Court called this a sale, though termed by the parties a lease. This deed made over to Lord Aylmer all the profits to be derived from the mines and minerals, whether silver, gold or copper, that might be found on this land; and the sole consideration was that Mr. Johnson should receive out of the net profits a royalty of one-tenth. There was a stipulation in the deed that the purchaser should proceed to the examination of the ground to ascertain whether there were any mines or not; but there was no time fixed within which this was to be done. The defendant caused a series of explorations to be made, extending over some months, but in October, Mr. Johnson finding that he had not made the great fortune he expected, determined in his own mind that the bargain was not binding at all, and asserting that the mine had been abandoned, he entered into a contract with a notary at Sherbrooke, with whom he bargained for the transfer of all his rights, not only in the lot of land itself, but also in the mines and minerals, the right over which he had conveyed to the defendant. This notary undertook to institute an immediate action against the defendant to rescind the agreement made between Johnson and the defendant. He was to pay $2,000 at once to Johnson, and the balance of the $4,000 at a subsequent period. This consideration money was the consideration for the whole. Shortly after, within a week or two, Mr. Johnson died. By his will he gave his widow the usufruct and enjoyment of all his estate, and he gave to his son the whole of the property that he died possessed of. The present action was now brought by the widow and the universal legatee in their respective testamentary qualities. But they were not the representatives of the estate. The usufructuary had no right to bring an action of this description to set aside a lease or sale. Executors were appointed under the will, to whom administration was intrusted by the testator beyond the year and day, and until the final accomplishment of the will. The executors ought to be parties to this action in some way or other. The estate was in their hands, and not in the hands of the usurfuctuary. As the representatives of the estate till the final fulfilment of the will, it was for the executors to take such proceedings as might be necessary to support the rights of the estate against the defendant. But beyond all this, as already stated, there was no limitation in the lease of the time within which the mines were to be worked. Proceedings had been adopted to explore the adjoining property, and it had been proved by scientific men that the work on the adjoining lot would shew whether there were mineral deposits on the defendant's lot or not; and that it would be useless to lay out money upon the latter till it was seen how the other lot was worked, there being only two veins that need be looked for, and which appeared to run from the one to the other lot of land, diagonally across both. This testimony of scientific men was met on the other side by that of self-constituted miners, one of whom had been a shoemaker, another a small bookseller at Sherbrooke, and so on. Under these circumstances

the plaintiff's action was purely speculative, and the judgment of the Court of original jurisdiction could not be maintained. *Judgment reversed.*

FULLER *v.* GRAND TRUNK COMPANY.

HELD—That a servant has no action of damages against his employer for any injury he may sustain through the negligence of his fellow servants.

BADGLEY, J.—This was a case from the district of St. Francis, which came up for revision under the following circumstances;—The plaintiff for a long period had been an engine driver in the employ of the Grand Trunk Company. He drove a freight train between Montreal and Portland, and went over the road constantly up to the very day of the accident. He was over the road the very day before and saw nothing to complain of; but on the following day when he got to a certain part of the road, the engine and one of the freight cars fell over the embankment, and the plaintiff was very much bruised. He now brought an action for damages. There was no evidence to show any negligence on the part of the Grand Trunk Company. There was nothing to show that they had ever been called upon to make the road good, or to take any precautions respecting it; the plaintiff himself not having made any representation respecting any defectiveness in the road, though he went over the road daily. When taken to Richmond after the accident, and asked by the Superintendent if the road was in bad order, he said he did not think it was. The case involved a principle—as to the right of action of a servant against his master. It had been said that we were to be governed wholly by the French law in this case. Now railways are of recent introduction, and had no existence at the time we derived our legislation from France. It might be assumed that the principles adopted in England where the railway system was greatly elaborated, and the principles which prevailed in the United States, where the system was also much complicated, and which principles, moreover, are much the same as those of the common law as it now exists in France, are the sure principles for our guidance at the present time. The plaintiff in this case was the servant of the Company. He undertook by the fact of his engagement in their service to guarantee himself from all the consequences of his engagement. The road belonged to the Company, but it was in evidence that there were persons of competent skill who had charge of the road, and any application to them would have been attended to. They were equally servants with the plaintiff, and if there was anything wrong, the blame must be on the servants, because they were in charge of the road. The leading case in England was Priestly *v.* Farrell reported in 3 Meeson & Welsby. The judgment went upon the principle that the plaintiff was in the performance of his duty as a servant. Lord Abinger said it was admitted there was no precedent of a servant bringing an action against his master for carelessness of a fellow servant, and, therefore, the Court was at liberty to look to the consequences of establishing such liability. Instances were given, such as that the owner of a carriage would be responsible to his coachman for the harness-maker, &c, which showed the absurdity of such argument. The next case was Hutchinson *v.* York and Newcastle and Berwick R.R., 5 Exchequer Reports, where several servants being employed by the same master, an injury to one occurred through the negligence of the others, and the same principle was followed. See also Barwell *v.* Corporation of Boston, 4 Metcalf's Rep., and Waller *v.* South Eastern R.R., vol. 9, New Series of the Jurist. Following the doctrine established in these cases, the judgment dismissing the plaintiff's action must be confirmed.

TESSIER *v.* BIENJONETTI.

HELD—That a deed of donation of real estate will not be considered fraudulent because the donor had a chirographary creditor, who obtained judgment against him eighteen months after the donation, which was made for good consideration; and the seizure and sale of the land donated in the donee's possession at the instance of the chirographary creditor will be set aside.

BADGLEY, J.—The circumstances of this case were as follows:—On the 29th January, 1861, one Legault made an *acte* of donation before notaries by which he conveyed to the plaintiff certain real estate in Soulanges, for the consideration mentioned in the deed. Tessier at once entered into possession of this land under the deed of donation. While the land was in his possession Bienjonetti, a chirographary creditor of Legault, obtained judgment against the latter in 1862, more than eighteen months after the date of the deed of donation, and during the time the plaintiff was the proprietor and holder of the land. Being only a chirographary debt, there could have been no real hypothecary claim upon the property by virtue of it. In due time execution was issued against the lands and tenements of Legault by Bienjonetti, and this lot of land was seized in the plaintiff's possession, as being the property of Legault. Now it was generally known, and known by the defendant also, that this land did not belong to Legault, but that the plaintiff was its reputed proprietor, and in actual possession of it as such. There could be no doubt that Bienjonetti was aware that the actual possession of the property was in the plaintiff, by virtue of the deed of donation. It would appear that by some mistake or other the plaintiff was too late to make his opposition to the sale, and he attended at the *décret*. The object of his attendance must have been to secure the property from being sold for less than he had paid for it. It was adjudged for £93 to Bienjonetti. Steps were taken by Tessier to prevent any title from being given. No money had been paid by Bienjonetti except the costs of the proceedings. The Court saw no difficulty in the case. The property did not belong to the defendant, and Bienjonetti was not even a mortgagee. At the time the property was sold he had no right or claim whatever against the land itself, or against its then owner. It had been said that the sale or donation was fraudulent, but this was not true, for Bienjonetti was only a chirographary creditor, and the property was only worth about £100, which was more than cov-

ered by Tessier's mortgage upon the land, and by pre-existing mortgages. There was nothing on the face of the record to show that there was any fraud in the matter. The judgment would be confirmed.

SUPERIOR COURT.

MONTREAL, 30th Sept., 1865.

MONK, J.,

WISHAW *v* GILMOUR *et al.*—This was an action for a balance of account. The defendant had produced an account between Mr. Wishaw and Gilmour & Co., by which account it appeared that considerable sums of money had been paid from time to time by Mr. Gilmour to the plaintiff. These payments were no doubt made during the existence of the old firm. A balance remained of £525, which plaintiff contended that he was entitled to receive. Defendants alleged that across the face of the account there was an entry, "*settled in full, A. Heward.*" Plaintiff declared that there was no date to this, but Mr. Heward had been brought up and swore positively to the time. The plaintiff's action must therefore be dismissed with costs.

WATTS *et vir v.* PINSONNEAULT.—This was an action against the defendant for injury done to the property of plaintiffs by defendant's tenants throwing out all kinds of filth on their property. The contradiction of testimony was such that it was utterly impossible to determine whether the dirty water was thrown from the Cosmopolitan Hotel or from the defendant's place. The defendant, however, had stepped in and relieved the Court from all anxiety on this head by acknowledging his responsibility. He had bricked up his windows, and thus rendered the repetition of the offence utterly impossible. He had done more; he had acknowledged his responsibility for the ceiling, and the injury inside the house. He had even gone further. When this action was taken out, the tenant made the repairs, and the defendant had acknowledged the justice of the account and had paid it. The whole case was thus covered. The defendant having obtained leave to plead after default entered against him, and paid all costs up to that time, the action should have been stopped at once. Instead of that the plaintiffs had gone on. The action must, therefore, be dismissed with costs.

CANTIN *v.* VIGNEAU.—The plaintiff had taken out a *saisie-arrêt* against the captain of a boat. It was not the captain of the boat at all, it was the owner. The whole proceeding was full of irregularities, and the *exception à la forme* must be maintained, and the *saisie-arrêt* set aside.

FOULDS *et al. v.* MCGUIRE.—The defendant becoming embarrassed, the plaintiff, one of his creditors, urged him to make a settlement, and they agreed that 50 cents on the dollar was to be the amount of the composition. The plaintiff showed himself very active, sent for the creditors; got them into his office; the defendant was directed to withdraw, and the result of the interview was that the creditors agreed to accept the composition. Now the plaintiff brought his action for the whole amount, saying that he never intended to take 50 cents, because he had other security which he had no intention of abandoning. The Court saw nothing in the evidence to sustain plaintiff's pretensions, and the action must be dismissed.

DEDNAM *v.* WOOD.—An action *en séparation de corps*. The facts were not of a character to admit of much discussion. The prayer of the declaration must be granted.

RAPHAEL *v.* MCDONALD.

HELD—That it is not necessary to allow the ordinary delays with respect to service of declaration at the prothonotary's office, under C. S. L. C., C. 83, Sec. 57.

This was a case in which a *capias* issued, directed to the Sheriff, and to him alone. The Sheriff was directed to take the body of the defendant, and he did so. The defendant was arrested on the 30th April under this *capias*, and on the 7th June, in vacation, service of the declaration was made at the prothonotary's office by a bailiff who returned the certificate of service to the Sheriff, and the Sheriff returned the whole of the proceedings to this Court. Upon this the defendant fyled an *exception à la forme* in which he says, in the first place, that there was no legal service of the declaration at the prothonotary's office, and not only was the proceeding defective in that particular, but the writ was returned into Court three or four days after the declaration was left at the prothonotary's office. As to the first point, the service by a bailiff was a perfectly good service. On the second point, it was contended by the defendant that ten days must elapse between the time the declaration is left at the prothonotary's office and the return of the writ. Now the law specified no delay between the leaving of the declaration and the return of the writ. It merely said, "service of the declaration may be made on the defendant either personally or by being left at the office of the prothonotary or clerk of the Court, at any time within three days next after the service of such writ, if the same have issued in term, or within eight days next after such service if the writ has issued in vacation." C. S. L. C., P. 721. The *exception à la forme* must be dismissed.

CIRCUIT COURT.

MONTREAL, 30th Sept., 1865.

BADGLEY, J.

BRAHADI *v.* BERGERON *et al.*

HELD—That the usual delays for ordinary services must be allowed between service of copy of declaration at the prothonotary's office, and return of the writ in cases of attachment under C. S.L. C., Cap. 83, Sec. 57.

In this case an attachment was issued, and on the 4th May three copies were deposited at the prothonotary's office for the three defendants. Now the writ was returned on the 8th May, so that there were only four days between the service and the return. This service was by virtue of the statute which allows service of the declaration to be made at the office of the prothonotary within three days after ser-

vice of writ in term, and eight days in vacation. The defendants objected to the service on the ground that they were entitled to the five days' delay between service and return prescribed by another clause of the statute. Plaintiff urged that the leaving of a copy at the prothonotary's office might be done at any time before the return of the action, within the three and eight days respectively. The Court was of opinion that there was no difficulty about the case. The language of the law termed this leaving of the copy of the declaration a service, and being a service there must be the same delay allowed as prescribed by the 107th clause for services in general. The time of service must, therefore, be held to be short, and the *exception à la forme* maintained. (See Godfrey *v.* Kitchener, and Ward *v.* Cousine cited as precedents. But see also a ruling by Mr. Justice Monk, in Raphael *v.* McDonald, same day, holding that the usual delays are not necessary with respect to service of declaration.)

RODIER *v.* TAIT.

HELD—That a right of *mitoyennete* cannot be established by mere verbal evidence, when there is no title and the marks on the will do not indicate any such right.

This was an action for the value of a *mur mitoyen*. The plaintiff had acquired certain property on St. Paul Street, the back of which abutted on the property of the defendant, by a high stone wall made to separate the properties. The defendant had built against this wall and made holes in it. The plaintiff said, this is not a *mitoyen* wall; if you want it to be a *mitoyen* wall, I am ready to consent on the price being paid me. Now it was true that division walls were by presumption *mitoyen*. The right of *mitoyenneté*, however, could only be established by title, or by such marks upon the wall itself as would show its *mitoyenneté*. Now there was no title produced, and the pretensions of the defendant rested upon verbal testimony alone, whilst it was proved that the wall was built in such a way that the coping turned down into plaintiff's lot. There being no title or marks the plaintiff's action must be maintained.

CROWN CASES.

COURT OF QUEEN'S BENCH— CROWN SIDE.

MONTREAL, 25th Sept., 1865.

QUEEN *v.* DAOUST.

NEW TRIAL FOR FELONY.

RAMSAY, for the Crown, moved that the Court do proceed with this case, which had been held over from the preceding term, under the following circumstances:—Two indictments for forgery had been found against Mr. Daoust, and a conviction obtained on the first. At the trial on the second indictment, new and important evidence was adduced which satisfied the jury that the prisoner had been authorized to sign the name of the prosecutor, and he was acquitted. An application was then made for a new trial on the first indictment, that the new evidence might be presented. Mr. Justice Mondelet granted this motion, being of opinion that the prisoner should have an opportunity of proving his innocence, and he was held in the sum of $1,000 to appear for trial next term.

AYLWIN, J., said that the Court would not proceed to hear this case. The order given by the Court last term was so novel and extraordinary, that he could not take on himself the responsibility of proceeding. He would, therefore, reserve the point for the opinion of the five judges of the Court of Queen's Bench, and in the meantime the prisoner was admitted to bail in £500 for his appearance at the next term of the Court of Queen's Bench, in appeal, and on the first day of next term of Queen's Bench, Crown side.

QUEEN *v.* FOREMAN.

Oct. 4, 1865.

HELD—That a defect such as the omission of the word 'Company' in an indictment for embezzling funds belonging to the Grand Trunk Railway *Company* of Canada, comes under the class of formal defects which are cured by verdict.

Judge Aylwin being about to pronounce sentence upon the prisoner Foreman, convicted on an indictment for embezzling monies belonging to the "Grand Trunk Railway of Canada,"

CLARKE, for the prisoner, moved for arrest of judgment on the ground that there was no such body incorporated as the Grand Trunk Railway of Canada, and contended that the prisoner could not be sentenced for embezzling money belonging to a Corporation which had no existence.

RAMSAY, for the Crown, said the omission of the word 'Company,' even if fatal, was a formal defect, which was cured by verdict. Besides the prisoner had really suffered no wrong, for if the omission had been objected to earlier, the Court could have ordered the error to be corrected.

AYLWIN, J., said the objection had been made too late. If it had been raised before, the Court would have taken notice of it; but the prisoner had been convicted of having embezzled monies the property of the Grand Trunk Railway of Canada.

Sentence was then pronounced, condemning the prisoner to three years' imprisonment in the Provincial Penitentiary.

(See Consol. Stat. Can. Cap. 99, Sec. 84, as to formal defects which are cured after verdict.)

OCT. 4, 1865.

QUEEN *v.* HOGAN *et al.*

HELD—That on the trial of a misdemeanour, the Crown has the same right to order a juror to stand aside, without showing cause until the panel is exhausted, as in a felony.

RAMSAY for the Crown having ordered a juror to stand aside;

DEVLIN for the prisoners objected, saying that as in a misdemeanour the defence had no peremptory challenge the Crown could not exercise any.

RAMSAY said the Crown never had any peremptory challenge. It could only challenge for cause, with this privilege, that it was not compelled to show its cause, until it appeared that without such jurors the trial could not

proceed. There was not, therefore, any distinction to be drawn between felonies and misdemeanours.

MONDELET, J. overruled the objection.

Oct. 7, 1865.

JOSEPH MESSIER, for *Habeas Corpus*.

HELD—That when a commitment is illegal on its face, the Court will not wait till the committing magistrate has been notified to produce the papers, but will order a writ of *habeas corpus* to issue *instanter*.

Messier, the petitioner, had been committed by a magistrate of St. Hilaire, for threats.

CHAPLEAU, for the prisoner, applied for a writ of *habeas corpus*, on the ground that the warrant of commitment was manifestly illegal, it being nowhere therein stated that the depositions had been taken on oath.

RAMSAY, for the Crown, said the papers were not before the Court. The committing magistrate should have been notified to produce them. This notice was rendered necessary by the terms of the Statute, (C.S.C. Cap. 102, Sec. 63.)

MONDELET, J., after taking communication of the copy of the warrant of commitment, ordered the writ to issue *instanter*.

OBITUARY NOTICES.

HON. MR. JUSTICE MORIN.

The death of Augustin Norbert Morin, a judge of the Court of Queen's Bench and one of the Commissioners for the codification of the laws, occurred at St. Adele, county of Terrebonne, on the 27th July last, in the 63rd year of his age.

Born at St. Michel, in 1803, Mr. Morin was educated at the Quebec Seminary. He studied law under the late Hon. D. B. Viger, and was admitted to the bar of Montreal in 1828. In 1830 he entered Parliament, and from the first his abilities excited the attention of the leaders of the different parties. In 1834 he was deputed by his party to carry to Great Britain their petitions as to the state of the Province, to have them presented through Mr. Viger, and to support that gentleman in the representations he was to lay before the British Government of the condition and grievances of which the Colonists complained. This task he appears to have fulfilled satisfactorily, and in such a manner as to earn the thanks of those who had entrusted him with the charge. In 1842, after the Union of the Provinces, he filled the office of Commissioner of Crown Lands in the Lafontaine-Baldwin administration, for more than a year. At the election of 1844, he had gained so thoroughly the confidence of his countrymen that he was elected by two constituencies—Saguenay and Bellechasse—the latter being the one which he selected. In 1848 he was again returned for the same County, and on the assembling of Parliament was elected Speaker, an office which he held till 1851, when he formed an administration in conjunction with Mr. Hincks, taking the post of Provincial Secretary, and representing the County of Terrebonne. In 1853 he resumed his former office of Commissioner of Crown Lands, which he held till his appointment in 1855 as a Judge of the Superior Court of Lower Canada. In 1859 he was appointed one of those to whom the task of codifying the Civil Law was entrusted. In the "Life of Metcalfe," Kay thus describes Mr. Morin, and though not in all points correct, the description shews the light in which he was viewed by strangers:—

"Mr. Morin is a French Canadian, commissioner of Crown lands. He had been thrown in early life, by the troubles of his country, into the stormy sea of politics; but I believe had followed the law as a profession. His character, as described to Metcalfe, would have fitted well the hero of a romance. With administrative abilities of the highest class, vast powers of application, and an extreme love of order, he united a rare conscientiousness and a noble self-devotion, which in old times would have carried him cheerfully to the stake. His patriotism was of the purest water. He was utterly without selfishness and guile. And he was of so sensitive a nature, and so confiding a disposition, that it was said of him, he was as tender-hearted as a woman, and as simple as a child. But for these—the infirmities only of noble minds—he might have been a great statesman.

J. B. C. DE LORIMIER.

Nous regrettons d'avoir à enrégistrer la mort de Jean Baptiste Chamilly de Lorimier, Ecr., avocat, arrivée sous de bien penibles circonstances.

Ce respectable citoyen était parti de chez lui, rue St. Vincent, mercredi soir, vers 8½ heures, pour aller faire une courte promenade de 10 minutes, comme il en avait l'habitude. Il ne revint pas à la maison, et sa famille inquiéte commenca à faire des perquisitions; la police se mit également aux recherches, car on avait lieu de soupçonner qu'il avait été victime d'un meurtre. Enfin dimanche matin, il fut trouvé dans le canal Lachine, près du pont Wellington. A une enquête, qui eut lieu lundi matin, le jury a rendu un verdict de "noyé accidentellement."

M. de Lorimier était frère de Chevalier de Lorimier, le martyr politique de 37-38, et avait pris lui-même une part active dans ces evènements. Il comptait un grand nombre d'amis, et certes, le concours empressé de plusieurs de nos premiers citoyens qui assistaient hier à ses funérailles témoignait hautement du degré d'estime dont il jouissait parmi ses compatriotes.—*L'Ordre, 26th July*, 1865.

CYRILLE BOUCHER.

This gentleman died very suddenly on the morning of the 9th of October last. He was a member of the Montreal bar, but was chiefly known as a *literateur*, having been a contributor to *L'Ordre* of Montreal, and at the time of his death he wrote for *L'Echo du Cabinet de Lecture Paroissiale*, and other papers.

CYRILLE ARCHAMBAULT.

It is with deep regret that we record the death of Mr. C. Archambault, who was one of those who lost their lives by the boiler explosion on the steamer St. John, near New York, on the 29th October. Mr. Archambault had attained a high standing at the bar. Cut off by a painful death in the full vigour of manhood, his untimely end excited the profound sympathy and regret of the whole community.

APPOINTMENTS, CHANGES, &c.--On the 12th August last the following appointments were gazetted:—

"J. T. Taschereau, Esq., Q. C., to be a Puisné Judge of the Superior Court for Lower Canada, to take precedence next after the Hon. F. G. Johnson. J. U. Beaudry, Esq. Advocate, to be a Commissioner for Codifying the Laws of Lower Canada in Civil matters, in the room of the Hon. A. N. Morin, deceased. The Hon. L. S. Morin, Advocate, to be a Secretary to the Commission for codifying the Laws of Lower Canada in Civil matters, in the room of J. U. Beaudry, Esq., appointed a Commissioner for that purpose.

COMMISSIONS TO THE BAR, DISTRICT OF MONTREAL, FROM 1ST JULY, 1865.

3rd July, 1865.

James M. G. Roney, J. Bte. Sicotte, Benoni, A Longpré, Alexis A. Laferriére, Pierre S. Lippé.

7th August, 1865.

Arthur McMahon.

4th September, 1865.

André B. Chas. Ouimet, Achille David, Arthur Dansereau, Chs. Chamilly de Lorimier, Richard S. Lawlor, Chs. L. Champagne.

2nd October, 1865.

Arthur E. Valois, Jos. O. Turgeon, Andrew Leamy, Louis N. Demers.

MISCELLANY.

LUCUS A NON LUCENDO.—Mr. Roebuck, M. P., appears, like some elsewhere, to have gotten the dignity of Q. C., "learned in the law," though his counsel fees have been infinitessimally small, and his briefs in numbers, or rather number, easy to count. He recently sought to be again returned for Sheffield, and Mr. Foster, a lawyer, spoke against him (Mr. R. present) to the electors. Among other things, according to the *Times* report, Mr. Foster said:

"Mr. Roebuck went the Northern Circuit. He wears a silk gown. (The Chairman.—Who gave it to him?) Now, in the great Northern Circuit I have found in many towns clients who have trusted me; but during the whole course of my experience never but on one occasion did I see Mr. Roebuck in any case whatever. (Laughter.) He got his silk gown, but was that reward given to him because of his merits on the circuit? No: it was given to him because you gave to him that position without which he was nothing, and *with which he got his silk gown*. (Cheers.)

DRUMMOND COUNTY.—A correspondent writing to the *Montreal Gazette*, from Drummondville, under date 8th Aug., 1865, complains of the non-attendance of a Judge to hold the Circuit Court in the county of Drummond. Since the establishment of the Court, only thirteen terms had been held out of twenty-one, and even when the Judge happened to be present, the business of the Court was not ready to be proceeded with on account of the uncertainty that always attended his presence. Three separate times, a whole year had elapsed without a term being held.

THE DEATH PENALTY.—The Zurich Commission, which was appointed for the purpose of drawing up a new penal Code, has decided by nine votes to two against the retention of capital punishment.

BANK OF MONTREAL *v.* REYNOLDS and SPROWL.—This was an action by the Bank against Mr. Reynolds, Sheriff of Ontario County, the maker, and Sprowl, the endorser, for $800, amount of a promissory note, which the Bank had discounted for Reynolds. The defendant pleaded usury; that the note was made payable at Toronto, although discounted at Whitby, to enable the Bank to receive ¼ per cent in addition to the 7 per cent allowed by law, the ¼ per cent being the percentage allowed by law on a 90 days' note payable at any other bank than the one discounting the note. The verdict of the jury was in favor of the Bank. But in another case between the parties, tried the same day with a different jury, the verdict was for the defendants.