The Lower Canada Law Journal.

Vol. II. APRIL, 1867. No. 10.

## THE RAMSAY CONTEMPT CASE.

We devote a considerable portion of our space this month to the proceedings before the Court of Queen's Bench in the case of Mr. Ramsay. Unless the Judicial Committee of the Privy Council see fit to entertain an appeal, the judgment of our highest Colonial Court is, of course, final and conclusive, and we think it must be conceded that the weight of authority is entirely on the side of the majority. We admit, however, the cogency of Mr. Justice Mondelet's argument. There is something startling in the assertion of our Supreme Court that in certain exceptional cases, called contempts of Court, the same individual may be the accuser, the witness, and the judge, and his judgment final and irreversible. As stating this side of the question, we give here Mr. Ramsay's letter to the Editor of the *Montreal Gazette*, under date March 11th.

"Sir,—You have very properly said that the judgments in my case give cause for alarm to the whole community, and the judgment of Saturday does not tend to allay the apprehension. It will be observed that the question decided is not whether this or that thing is a contempt; but the judges have laid claim to two privileges which are totally incompatible with the liberty of the subject:

1st. That any judge may construe an act either in Court or out of Court, into a constructive contempt of Court.

2nd. That his decision, whether regular or irregular, is not subject to any kind of revision; nay, not even in Error.

In addressing you now I have no other object than to prevent any misrepresentation being attempted as to the true issue—an issue in which I am far less interested than most other people. Had I sought my own ease and convenience, I could possibly have obtained the remission of the fine; but it seemed to me that the question involved should not be so evaded. If the judges collectively arrogate to themselves such privileges as these, the proper remedy is one that shall be of general and not of partial applicability. In a word, if they declare that by law they have powers dangerous to society, why then the law must be changed. To bring about this change the general question must not be lost sight of in the particular. It is not whether under the circumstances the letters complained of ought to be considered a contempt; but whether the complainant can be at once complainant and judge, and this finally, arbitrarily, and without responsibility.

As I shall have other opportunities of entering into the whole merits of this case, it is not now my intention to discuss the various judgments given on the preliminaries of my case; but they have one common feature which I think it right to indicate. All are, and profess to be, exceptions, for which no law is cited, and no serious argument attempted. Contempts, we are given to understand, are cases totally apart from all others—they are not susceptible of definition, and they have no analogies. They are so subtle that no general words will reach them; they are not included in *all* crimes whatsoever, nor I presume in *all* cases whatsoever. Will such a state of things be permitted to outlive for one year the announcement of its existence?"

No one will object to the fullest discussion of the subject, with a view to Legislative interference; but it may here be observed that we have two examples of lawyers modifying the views upheld and expressed in earlier years. One is the judge concerned in this case, who, while Solicitor General, drafted the bill read by Mr. Ramsay in the course of his argument. The other is Mr. Erskine, who, according to Chief Justice Duval, when Lord Chancellor, greatly modified the views contained in the letter cited *ante*, page 145.

The elaborate judgments in this case (especially that of Mr. Justice Badgley) leave nothing to be said, but we find in the *American Law Register* for January, another authority of some interest. Chancellor Kent, under date 13th March, 1826, writes thus to Mr. Livingston, criticizing that gentleman's crim-

inal code for Louisiana: "I am entirely against the abolition of the common-law doctrine of contempts, and your substitute I humbly conceive to be wholly inadequate. Your provision is that all contempts are to be the subject of indictment and trial by jury. Now, I beg leave to say that the jury are wholly incompetent to judge of what is or is not decorous or insulting language to a Court. If a judge was called a blockhead or a fool, one-half of the rude vulgar jurors of the country might think it a very smart, and possibly a very true saying. Besides, the remedy by indictment is *too slow*. Must a judge sit and hear the contempt, and wait six months before the trial in a Criminal Court can afford him redress? Besides, you make no provision for insulting gestures, or looks, or actions. You say that if any person by *words*, or by making a *clamor or noise*, wilfully, &c., he may be removed and punished. So, if he use any indecorous, contemptuous, or insulting *expressions*, in the OPINION OF A JURY, he is to be punished. So, if he obstruct the proceedings of the Court by violence or threats, he shall be fined, &c. Here is all the provision for contempts. All other contempts are abolished, and all these contempts must be tried on indictment, or information, in the usual form. Now, I say you do not reach a thousand nameless, but gross and abominable contempts, that may be offered in Court. The impudent or malicious offender can, Proteus-like, elude all your rattling chains, and insult with impunity. Insults to a court ought to be punished with the celerity of lightning, and here you wait the slow process of indictment for an open insult to the bench. I never would accept a judicial office under any government, if I was to be left so naked and defenceless as you in this chapter leave the Louisiana judges. It is by far the most exceptionable, the most distressingly exceptionable, part of the penal code."

A case recently before the Court of Common Pleas in England, cited below from the "Law Reports," shows that the English judges do not coincide with Mr. RAMSAY'S views as the recusation of the judge who complains of the contempt. We shall notice McDermott's case, (Law Rep. 1 P. C. 260,) in our next issue.

*Officer—Interest in the Justices sitting upon the Inquiry.*—A clerk of the peace having received fees to which the justices thought he was not entitled, they withheld a portion of his salary, and upon a mandamus unsuccessfully resisted his claim, and thereby incurred costs, for the payment of which the quarter sessions made an order, which it was the duty of the clerk of the peace to enter on the records of the Court and certify to the county treasurer for settlement. The clerk of the peace, conceiving that the order was illegal, because no full bill of costs had been brought before the Court, and also because he thought the costs were not such as ought properly to be charged upon the county-rate, but should have been paid by the justices who by disputing his claim had improperly incurred them, declined to record the order or to give the necessary certificate. The quarter sessions thereupon referred it to the finance committee, to consider and report what ought to be done under the circumstances; and upon their report a charge was preferred against the clerk of the peace, in the name of the county treasurer, of having "misdemeaned himself in the execution of his office." The matter was heard before the justices at the next court of quarter sessions, and they unanimously found that the clerk of the peace had been guilty of the offence charged against him, and adjudged him to be dismissed from his office, and appointed the defendant to succeed him. In an action by the clerk of the peace, for money had and received, to try the defendant's right to the fees of the office:—*Held*, that the justices in quarter sessions, being a competent tribunal to hear and determine the charge, and having determined it, this Court could not question the propriety of their decision; and that no such interest appeared in the justices, or in any of them, as to disqualify them from acting as judges in the matter. *Wildes* v. *Russell*, Law Rep. 1 C. P. 722. [In the course of the argument and judgment in this very interesting case, several observations were made having some bearing on the recent contempt case, *The Queen* v. *Ramsay*. Mr. Bovill, in showing cause against a rule for a new trial, argued that the judgment of a competent tribunal,

good upon the face of it, could not be impeached in the way attempted. He referred to *Carus Wilson's* case (7 Q. B. 984, 1015), an order of commitment for contempt of the Royal Court at Jersey. Mr. Bovill further observed: "The fact of some of the justices present when the matter was heard being members of the committee at whose instanee the charge was preferred, cannot affect the validity of the proceeding. *In every case of commitment for contempt, the tribunal ordering the commitment is in some sense deciding in its own case.*" Willes, J., in the course of his opinion, remarked upon this subject: "As to the other point, that they (the justices) were both prosecutors and judges, I cannot bring myself to feel any doubt. As well might it be said that a judge who sees an offence committed before him, and directs a bill to be sent up to the grand jury, ought to withdraw from the bench when the charge comes to be tried. I cannot regard the justices who, so to speak, took notice of the alleged contumacy, and complained of it and suggested the prosecution, as parties to the proceedings." And Byles, J., observed: "Contumacy to the Court may clearly be punished by the Court itself. This case bears a strong analogy to the ordinary case of a contempt of one of the superior courts. There, the judge himself suggests the contempt, *and it is inquired into before him.* (See the authorities collected in *Ex parte Fernandez*, 10 C. B. (N. S.) 3; 30 L. J. (C. P.) 321.) It would be no objection to a proceeding against an officer of this Court, that it is instituted by order of the Court, although the Court (or a member of it) might have to appoint his successor. *In all cases of contumacy or contempt committed against a court of justice, the proper tribunal to proceed to punishment is the Court itself.*"]

## THE ROYAL INSURANCE CO. v. KNAPP ET AL.

This case has been withdrawn from the Courts. The plaintiffs have compromised the matter by paying the thieves $50,000 for the restoration of the stolen property, and the defendants have been discharged from custody. The judgment of Mr. Justice MONK, therefore, stands unreversed. It is to be hoped that some action will be taken for the purpose of enabling the colony to surrender miscreants who abuse the right of asylum, as Messrs. Knapp and Griffin have done. If larcenies to the amount of $1000 and upwards were included in the Extradition Treaty, this class of offenders would be reached, and sent back to receive well-merited punishment.

## THE CONFEDERATE COTTON LOAN.

The following opinion has been obtained from Sir R. P. Collier, the late Solicitor General, respecting the Confederate Cotton Loan.

The question submitted was as follows: "Whether or not merchants and others, on being sued in England by the Government of the United States, for property or money held by them at the termination of the war belonging to the Southern States, may not successfully plead the confederate seven per cent. cotton bonds as a set-off, to the extent of the amount that each defendant may hold of them?" "Opinion. In the event of the United States Government suing in the Courts of this country for debts due, or property belonging to the late Confederate Government, I am of opinion that defendants, who may be holders of Confederate Cotton Bonds, are entitled to set up a counter claim against the U. S. Government in respect of these bonds. The counter claim will be founded on the principle, that if the United States assert in our Courts claims accruing to them through their succession to the property and rights of the late Confederate Government, they are bound by the liabilities of that Government."

## COUNTY OF MEGANTIC.

By proclamation, dated March 16th, the periods of holding the terms of the Circuit Court for the County of Megantic, District of Arthabaska, have been altered, and the terms fixed as follows: Three terms, each of five days, to be held at the village of Inverness, from the 13th to the 17th of March, June, and December, both days inclusive.

## BAR OF LOWER CANADA.

The following are the admissions to practice and to study in the District of Montreal, since October, 1866, the date of our last list. It is to be observed that the names of those only are given who have actually received their Diploma *on payment of the fees*. It will be for the Council to see that gentlemen who aspire to the honor of a Diploma, but refuse to pay their fees, do not practice illegally. We may add here that an effort is now being made to enforce payment of arrears of annual subscriptions due by members. The readiest method would be that adopted, we believe, in Upper Canada, viz., render it imperative on attorneys to take out a certificate at the beginning of each year, without which they would be disqualified from practising.

ADMISSIONS TO PRACTICE.

| NAMES. | DATE OF EXAMINATION. | DATE OF DIPLOMA. |
|---|---|---|
| Oscar Prévost | 16th Oct., 1866 | 30th Oct., 1866 |
| Magloire Deajardins | 2nd Jan., 1866 | 11th Dec., 1866 |
| Alphonse Houlé | 16th Oct., 1866 | 12th Dec., 1866 |
| Louis N. Demers | 2nd Oct., 1865 | 13th Dec., 1866 |
| Ferdinand David | 17th Dec., 1866 | 19th Dec., 1866 |
| Léon L. Corbeil | 17th Dec., 1866 | 19th Dec., 1866 |
| Arthur B. Longpré | 3rd Jan., 1865 | 5th Jan., 1867 |
| Olivier Augé | 17th Dec., 1866 | 20th Jan., 1867 |
| John A. Bothwell | 17th Dec., 1866 | 15th March'67 |
| Emery Perrin | 16th March'67 | 16th March'67 |
| Guillaume N. L. Beaudry | 16th March'67 | 18th March'67 |
| Moïse Corbeil | 16th March'67 | 21st March'67 |
| Antoine C. H. Prevost | 19th March'67 | 4th April 1867 |
| R. A. Ramsay | 16th March'67 | 4th April 1867 |

ADMISSIONS TO STUDY.

| NAMES. | DATE OF ADMISSION. |
|---|---|
| Ed. Cornwallis Monk | 16th October, 1866. |
| L. A. McConville | 17th December, 1866. |
| Daniel Darby | 17th December, 1866. |
| R. Fisher | 17th December, 1866. |
| F. David | 17th December, 1866. |
| J. A. Ouimet | 17th December, 1866. |
| Wm. de Courcy Harnett | 16th March, 1867. |

## BANKRUPTCY—ASSIGNMENTS.

| NAME OF INSOLVENT. | RESIDENCE. | ASSIGNEE. | RESIDENCE. | DATE OF NOTICE TO FILE CLAIMS. |
|---|---|---|---|---|
| Bedard, Elie | St. Anne de la Pérade | A. B. Stewart | Montreal | Feb. 23rd. |
| Bell, Thomas | Lindsay | S. C. Wood | Lindsay | March 18th. |
| Bellemare, Désiré | St. Rémi, C.E. | A. B. Stewart | Montreal | March 23rd. |
| Bennett, William, individually and as former co-partner (with Geo. Pickup) of Wm. Bennett & Co. | Montreal | T. Sauvageau | Montreal | March 12th. |
| Bergman, Frederick | Hamilton | W. F. Findlay | Hamilton | March 11th. |
| Bernard, Rémi | St. Hyacinthe | T. Sauvageau | Montreal | Feb. 28th. |
| Booth, Henry, jun | St. Catherines | J. R. Armstrong | St. Catherines | March 9th. |
| Branchaud, Norbert, individually and as partner of N. & A. Branchaud, and Branchaud & Frère | St. Cécile, Valleyfield | T. Sauvageau | Montreal | March 5th. |
| Brosseau, Edmond | St. Rémi | T. Sauvageau | Montreal | March 22nd. |
| Bulmer, Thomas | Ingersoll, C.W. | Philip S. Ross | Montreal | March 15th |
| Cameron, Angus | Vankleek Hill, C.W. | John Whyte | Montreal | March 26th |
| Cameron, Donald B. | Windsor | J. McCrae | Windsor | March 20th |
| Campbell, Daniel James | Napanee | W. S. Robinson | Napanee | Feb. 26th |
| Carrier, Ferdinand, doing business as F. Carrier & Co. | Quebec | Wm. Walker | Quebec | Feb. 25th. |
| Clark, John | Township of Fenelon | S. C. Wood | Lindsay | March 9th |
| Clinton, Adam | Woodstock | Jas. McWhirter | Woodstock | March 26th |
| Clinton, James | Tilsonburg | Jas. McWhirter | Woodstock | March 27th |
| Cochrane, Robert | Peterborough | George Bell | Peterborough | March 19th |
| Côte, Télesphore | Quebec | Wm. Walker | Quebec | March 15th. |
| Dansereau, Joseph | Verchères, C.E. | John Whyte | Montreal | Feb. 27th. |
| Delisle, W. H. | Brantford | A. W. Smith | Brantford | March 18th. |
| Dobeop, James | Toronto | Thomas Clarkson | Toronto | March 4th. |
| Duplessis, Thomas Cyroid | Quebec | A. Fraser | Quebec | Feb. 25th. |
| Erly, Thomas | Kingston | John Whyte | Montreal | March 14th. |
| Forbes, Alexander | Hamilton | J. J. Mason | Hamilton | March 13th. |
| Forbes, Thomas | Strathroy | Philip S. Ross | Montreal | Feb. 28th. |
| Fuller, Joseph | Brantford | A. W. Smith | Brantford | Feb. 27th. |
| Garden, William N. | Welland | James McGlashan | Welland | March 18th. |
| Glassford, James | Morrisburg, C.W. | John Whyte | Montreal | March 5th. |
| Grant, William W | Montreal | A. B. Stewart | Montreal | March 4th. |
| Greenlees, Robert | Owen Sound | George J. Gale | Owen Sound | March 19th. |
| Gunn, James | Ingersoll | Jas. McWhirter | Woodstock | March 26th. |
| Gunn & Rutherford | Ingersoll | Jas. McWhirter | Woodstock | March 26th. |
| Hall, John H. | Magog, C.E. | A. M. Smith | Sherbrooke | March 13th. |
| Hall, Lockhart K. | Stanstead | J. L. Terrill | Stanstead | March 1st. |
| Haskett, James and Henry | London | Thos. Churcher | London | March 20th. |
| Harper, Richard | Guelph | E. Newton | Guelph | March 9th. |

ASSIGNMENTS.—(*Continued.*)

| NAME OF INSOLVENT. | RESIDENCE. | ASSIGNEE. | RESIDENCE. | DATE OF NOTICE TO FILE CLAIMS. |
|---|---|---|---|---|
| Higginbotham, Joseph | Sarnia | George Stevenson | Sarnia | March 15th. |
| Hilton, John | Lindsay | S. C. Wood | Lindsay | March 18th. |
| Hogben, Arthur | Toronto | W. T. Mason | Toronto | March 2nd. |
| Hommel, Joseph A. | Stanstead Plain | J. L. Terrill | Stanstead Pl. | March 1st. |
| Howard, Hiley | Hamilton | J. J. Mason | Hamilton | March 6th. |
| Hunter, Isaac | Township of Esquesing | John Lynch | Brampton | March 29th. |
| Jacobs, Joseph E. | London | L. Lawrason | London | Feb. 22nd. |
| Jones, James | Township of Saltfleet | J. J. Mason | Hamilton | March 20th. |
| Joubert, Ambroise David | Montreal | T. Sauvageau | Montreal | March 6th. |
| Kane, John A. | Amherstburg | J. McCrae | Windsor | March 5th. |
| Kégle, Moise | Roxton Falls | Wm. Coote | St. Johns, C.E. | Feb. 22nd. |
| Kerby, William | Guelph | Thos. Saunders | Guelph | March 11th. |
| Kerr, Dawson, jun. | Goderich | S. Pollock | Goderich | March 8th. |
| Kerr, James | Orono | E. A. Macnachtan | Cobourg | March 16th. |
| Kimball, John Freeman | Simcoe | A. J. Donly | Simcoe | Feb. 21st. |
| King, John | Township of Stanley | S. Pollock | Goderich | Feb. 23rd. |
| Korn, Henry | London | L. Lawrason | London | March 11th. |
| Laplerre, Ernest Alphonse | Ottawa | Francis Clemow | Ottawa | Feb. 12th. |
| Leadston, Thomas | Township of Fullarton | Thos. Miller | Stratford | Feb. 25th. |
| L'Ecuyer, Joseph | St. Antoine Abbé | T. Sauvageau | Montreal | March 26th. |
| McCowbrey, John | Sarnia | George Stevenson | Sarnia | March 14th. |
| McDermott, Patrick | Sarnia | George Stevenson | Sarnia | March 4th. |
| McDougall, Robert | Toronto | Thomas Clarkson | Toronto | Feb. 22nd. |
| McEachern, John D. | Township of Minto | Thomas Saunders | Guelph | March 26th. |
| McGarvey, William | Galt | Alex. McGregor | Galt | March 2nd. |
| McGarvey William H. | Petrolia | W. F. Findlay | Hamilton | March 18th. |
| McIntosh, John | Toronto | Thomas Clarkson | Toronto | March 9th. |
| McKenzie, William | Mitchell | Thos. Miller | Stratford | March 25th. |
| McPherson, Robert | Walkerton | W. Collins | Walkerton | March 18th. |
| Major, Charles B. | Hollin, C.W. | A. B. Stewart | Montreal | Feb. 28th. |
| Malloy, Peter Watson | Brampton | John Lynch | Brampton | March 8th. |
| Marsh, George F. | Township of Eldon | S. C. Wood | Lindsay | Feb. 26th. |
| Marston, George Jacob | Ottawa | Francis Clemow | Ottawa | March 2nd. |
| Martin, François | Montreal | T. S. Brown | Montreal | March 11th. |
| Morrow, Henry | Stratford | Thos. Miller | Stratford | March 11th. |
| O'Leary, Jeremiah | Lindsay | S. C. Wood | Lindsay | Feb. 28th. |
| Park, Heron | Magog, C.E. | A. M. Smith | Sherbrooke | March 23rd. |
| Patton, Andrew & Co. | Hamilton | W. F. Findlay | Hamilton | March 8th. |
| Peter, John Sim | Peterborough | James Campbell | Peterborough | March 4th. |
| Ripley, Elijah Henry | West Farnham | John Whyte | Montreal | March 28th. |
| Rogers, Amos | Newmarket | Don. Sutherland | Newmarket | Feb. 28th. |
| Rutherford, John | Embro | Jas McWhirter | Woodstock | March 26th. |
| Ste. Marie, Pierre C. | Longueuil, C. E. | T. S. Brown | Montreal | March 18th. |
| St. Onge, Damase | St. Rémi | T. Sauvageau | Montreal | March 11th. |
| Sanborn, William | Tp. of Waterloo, C. W. | H. F. J. Jackson | Berlin, C.W. | Feb. 26th |
| Simon, Seigmund Henry | Plessisville de Somerset | Wm. Walker | Quebec | March 15th. |
| Smith, Richard | Collingwood | Joseph Rogers | Barrie | March 28th. |
| Smith, Malcolm | Lindsay | S. C. Wood | Lindsay | March 20th |
| Spence, James | Brantford | A. W. Smith | Brantford | March 6th |
| Starr, Milton Hutton | Georgetown, C. W. | Isaac Hunter | Georgetown | Feb. 28th. |
| Stewart, John | St. Johns, C. E | T. S. Brown | Montreal | March 6th. |
| Stoeking, Jared | Hamilton | W. Roberts | Hamilton | March 28th. |
| Summers, Andrew | Summerstown, C. W. | John Whyte | Montreal | Feb. 27th. |
| Symmonds, John | London | Thos. Churcher | London | Feb. 27th. |
| Thomas, John | Picton | N. McL. Bockus | Picton | March 20th. |
| Thompson, William A | Beaverton | James Moffatt | Toronto | March 21st. |
| Trudeau, N. | Township of Roxton | J. L. Lafontaine | Tp. of Roxton | March 16th. |
| Way, Palmer and William | Sarnia | George Stevenson | Sarnia | March 23rd. |
| Webb, Henry F. | Brighton | E. A. Macnachtan | Cobourg | March 7th. |

WRITS OF ATTACHMENT.

| PLAINTIFFS. | DEFENDANTS. | SHERIFF'S OFFICE AT | DATE. |
|---|---|---|---|
| Charles G. Waldron | Jas. R. Haseltine, Richard R. Foote, J. W. Holden, and John M. Gilbert | Chatham, C.W. | Feb. 21st. |
| Adam Brown, Geo. Hamilton Gillespie, and & H. W. Routh | Edward Foley | Goderich | March 11th. |
| Gore Bank | Andrew Eaton and James McWhirter | Woodstock | March 11th. |
| John Boyd and John A. Arthur | Thomas Mulcahy | Barrie | March 9th. |
| James Austin and William Buchnen | Brooke Lamphrey | Guelph | March 11th. |
| William E. Sandford and Alex. McInnes. | Jas. Gunn and Jn. Rutherford | Woodstock | March 19th. |

TESTAMENTARY BREVITY. — One Charles Breusing, the proprietor, in his lifetime, of the music store at No. 701 Broadway, died in 1863, leaving an estate of $35,000, and the following will: "When I die, Regina Kaufman shall have all I leave behind me. C. Breusing. A. Hirsch, M. Hirsch (witnesses)." After some years of litigation the will has been declared to be valid.

## LAW JOURNAL REPORTS.

### PRIVY COUNCIL CASE.

### GUGY *v.* BROWN.

*Advocate conducting his own case—Right to fees.*

*Held*, that an advocate of Lower Canada, acting as attorney of record for himself in a suit to which he is a party, is entitled to the usual "attorney's fees."

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gugy* v. *Brown, from Canada: delivered 1st February*, 1867.

Present:

SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
SIR RICHARD TORIN KINDERSLEY.

This case is an Appeal from the Decree of the Court of Queen's Bench for Lower Canada, dated the 19th of December, 1862. By this Decree a judgment dated the 2nd of November, 1861, of the Superior Court of the District of Quebec, was reversed. That judgment was pronounced by a single judge (Taschereau) on a motion made by the present appellant to review the prothonotary's taxation of a bill of costs which had been submitted to him to be taxed, by the appellant, under a prior judgment of the last-mentioned Court upon a proceeding called "an opposition," awarding him costs as against the respondent generally by the words "avec dépens." The question, and the only question, raised and decided in the two Courts was whether the appellant, who was an advocate and attorney duly admitted therein, and had appeared personally in Court and conducted his own case as attorney on record, was entitled under the said judgment to charge in his bill of costs, and to have allowed, on the taxation thereof against the respondent, certain fees claimed and charged by him in respect of his character of attorney. Judge Taschereau decided in the affirmative; the Court of Queen's Bench in the negative.

The rule for deciding this question, as it was said by C. J. Lafontaine, in Brown *v.* Gugy (11 Lower Canada Reports, 407), must be furnished by reference to the French and not to the English law, because the then existing French law was dominant in Lower Canada when it was conquered in 1759, and consequently that law continues to be dominant there, subject to any alterations which have been introduced by Legislative Acts or other competent authority.

It is necessary, therefore, to inquire what the old French law was with reference to this subject.

On behalf of the appellant several authorities were cited, the principal of which are, "Le Parfait Procureur" (Edition 1705), Pigeau, Ferrière, and Serpillon. These are for the most part stated in the appellant's case, and referred to by Mr. Justice Taschereau in 11 Lower Canada Reports, 484–485. And their Lordships are of opinion, in accordance with the opinions of Mr. Justice Meredith and Mr. Justice Taschereau, that the passages cited from these books constitute a preponderance of authorities in the French law, for allowing fees to an attorney who appears as such in his own case.

But it was argued for the respondent, that the old French law has, at all events, been displaced by modern authorities. It is certainly true that although in the case which is the subject of appeal, when in the Superior Court of Quebec, Judge Taschereau adhered to the old French law, and decided the case accordingly in favor of the attorney's claim (see 11 Lower Canada Reports, 493), yet on three earlier occasions the Court of Queen's Bench decided the contrary, in disregard of that law, and held that an attorney conducting his own case is not entitled. Two of these cases were decided by a majority of three to two Judges, in Brown *v.* Gugy (11 Lower Canada Reports, 401), and Gugy *v.* Ferguson (ibid 409); and a third case of Fournier *v.* Cannon

was cited by Mr. Justice Meredith, in his judgment in the present case (see Record, p. 22), in which he himself and all the other Judges of the Queen's Bench appear to have concurred.

In the judgment now under appeal, Mr. Justice Meredith, although he thought it right to agree with the majority of the Court, declared that his own contrary opinion (expressed in Gugy *v.* Ferguson) still remained unchanged; and Mr. Justice Mondelet agreed in that unchanged opinion, and differed from the other Judges of the Court.

Mr. Justice Aylwin appears to rest his judgment mainly on the argument that the tariff gives fees to attorneys only, and thus in effect denies them to parties who are not attorneys, and that a person who appears in person cannot call himself an attorney. In answer to this it may be observed, that an attorney who conducts his own case, and describes himself on the face of the proceedings not as a party suing or defending in person, but as attorney on record, accepts by that very act all the duties and responsibilities which the practice of the Court imposes on attorneys acting for ordinary clients. Mr. Justice Meredith founds his judgment merely on the propriety of a judge's deferring to the authority of adjudged cases. Mr. Justice Badgley, in substance, takes the same view as Mr. Justice Aylwin, with the addition that he relies on the circumstance that in the case of an attorney appearing for himself, inasmuch as in the proceeding by way of "inscription en faux," the law requires a special procuration from the party to his attorney, as the foundation of the proceeding, there would be an absurdity in taking such a special power of attorney from a man to himself; and further, that the proceeding by way of "distraction de dépens" would not be practicable, because the occasion for it could never arise. But their Lordships are constrained to observe that they cannot understand how these are good reasons for disallowing to the attorney his fees for services performed in the cause as an attorney.

It will be observed that in no one of these judgments is there any dealing with the authorities cited on behalf of the appellant from the old French law books in favour of the attorney's right. The judges do not at all deny that there are such authorities, or attempt to distinguish them. Mr. Justice Duval alone, in his judgment in the earlier case of Brown *v.* Gugy (printed in the appellant's case, page 4), says that the opinion of Serpillon on this point is of little weight, being founded on faulty reasoning only, and quotes a passage from De Jousse, as to the rights of avocates, as a conflicting authority. But Mr. Justice Meredith observed (11 Lower Canada Reports 412), "That authority (De Jousse) is not applicable here in Canada, where advocates are also attorneys. It must be recollected that in France the right of action for fees was not only denied to advocates, but such as claimed them were struck from the Rolls." And this appears to be the only authority which has been cited on behalf of the respondent from the French law books in denial of the attorney's right to fees.

With respect to the argument founded on the Tariff of Fees, the Court of Queen's Bench of Lower Canada is authorized by several statutes to make and establish Tariffs of Fees for the counsel, advocates, and attorneys practising therein. But the object of such a Tariff appears to us to be, not to confer fees on any one, or to deprive any one of them, but simply to fix the amount of them for particular services done by such officers. If at the time of making the Tariff an attorney acting for himself in a cause was, according to the authorities cited by the appellant, entitled to such fees as would have been payable to another attorney acting on his behalf, it surely was not meant by the Tariff to alter the law, and deprive him of such fees altogether, but merely to regulate the amount to be paid to him. On this point their Lordships concur with the view taken by Mr. Justice Meredith in Gugy *v.* Ferguson (11 Lower Canada Reports, p. 418), where that learned judge says, "It is undeniable that the appellant is an attorney, and that he has performed certain services in this cause for which, when performed by an attorney, the Tariff allows certain fees; and I really cannot see anything in the law, or in reason, to prevent the appellant, an attorney, from receiving the fees usually incident to the services which he performed."

But it is intimated in the judgment of C. J. Lafontaine, in Brown v. Gugy, and asserted in the judgment of Mr. Justice Aylwin in the present case, that the practice has been to disallow fees to attorneys conducting their own cases. And if this practice had been shown to be uniform and long-established, it would certainly have gone far to prove that the old authorities were not to be relied on.

But there appears to be some mistake on this subject; for it is said by Mr. Justice Meredith, in Gugy v. Ferguson (11 Lower Canada Reports, 418), "The practice in this country may, I think, be said to be in favour of the attorney. The Prothonotary of the Superior Court, an officer of great experience, informs us that in the time of Chief Justice Sewell fees in such cases were not allowed; but that in the time of Sir James Stuart the practice was to allow them; that the last-mentioned practice has continued ever since; and he has given us a note of four cases in which attorneys appearing in their own cases have been allowed their fees. Under these circumstances I think it doubtful whether any change in the practice as to this matter ought to be made, and that if a change were determined on, it ought to be made so as not to affect pending causes."

Whether the Court of Queen's Bench might lawfully alter the law under the statutory power conferred by the Consolidated Statutes, cap. 77, sec. 15, "to make and establish such rules of practice as are requisite for regulating the due conduct of the causes, matters, and business before the said Court," it is unnecessary to decide; for the Court has in fact made no such rule, nor has the law been altered by any legislative Act, or other competent authority.

We therefore think it was the duty of the judges of the Court to administer the old French law, and that they could not alter it, or decline to apply it, on grounds of supposed expediency, as they appear to have done in the judgment in the present case, and the preceding cases on which that judgment was founded.

For these reasons, their Lordships will advise Her Majesty that it should be reversed.

Their Lordships do not think it should be reversed with costs, because the appellant had a full opportunity of bringing the point before this Committee, and of obtaining their judgment when the former case of Brown v. Gugy was before them (2 Moo. N. S., 341). Had the present appellant then prosecuted his cross appeal, the question which is the subject of the present appeal would have been then decided. His neglect to do so has been the occasion of the costs of this appeal having been incurred; and their Lordships therefore think he ought not to be allowed them.*

## SUPERIOR COURT.

February 28th.

### CAMPBELL v. THE LIVERPOOL AND LONDON INSURANCE COMPANY.

*Insurance—Notice to Insurer of change in occupation of premises insured.*

A policy of insurance contained a clause stipulating, that in the event of any change in the occupation of the premises insured, of a nature to increase the risk, the insured should be bound to give notice thereof to the company in writing. The premises were occupied as a saloon, without notice to the Company. A fire having occurred, and an action being brought on the policy:—

*Held*, that the insured having failed to give notice in writing of the change in the occupation of the premises, could not recover.

*Held*, also, that the insurers alone were the judges as to whether there was a greater or less risk incurred by the occupation of the premises as a tavern or saloon.

This was an action to recover under a policy the loss sustained by fire. The case was tried before *Smith*, J., and a special jury, on the 12th of May, 1866, and a verdict was found in favor of the plaintiff. The plaintiff moved for judgment on the verdict, and the defendants moved to set aside the verdict, and for judgment in their favor *non obstante veredicto*.

BERTHELOT, J. The plaintiff brings the present action, as representative of J. C. Frank, for $3,000, amount of insurance effected 4th November, 1861, on a building described in the policy as a four tenement house, situate at the corner of Pinnacle and Front Streets, Belleville, C.W. This build-

* We are indebted to Mr. I. T. Wotherspoon, of Quebec, for a copy of the above judgment.

ing was destroyed by fire on the 13th of January, 1865. The defendants having refused to pay the amount claimed, the plaintiff instituted the present suit on the 7th of July, 1865. Several pleas have been filed, but the one on which the present contestation turns is that by which the defendants invoke the second condition on the back of the policy or contract of insurance. By this condition it is stipulated that in the event of any change in the occupation of the buildings, of a nature to increase the risk, the insured should be bound to give notice thereof in writing to the Company, and to pay an additional premium, in default of which the policy would be null. There is no doubt that such a condition is a part of the contract which must be strictly observed. On this plea the plaintiff has joined issue by answering that there had been no change of occupation of a nature to augment the risk, and that the Company had no right to an additional premium. That after the insurance had been effected several changes of occupation had taken place with the consent of the defendants, among others, that these buildings had been occupied as a vinegar manufactory immediately before their occupation as a tavern, and that the defendants had sanctioned this occupation as a vinegar manufactory, which was more dangerous than a tavern. That the defendants, or their agent at Belleville, Mr. Chandler, knew that the premises in question were occupied as a tavern, and that the insurance was renewed on the 4th November, 1864, on payment of the same premium.

The case was submitted to a jury, on a suggestion of facts embracing the whole contestation, and more especially on the two points which now constitute the only points in dispute, viz., 1st. Whether the occupation of the premises as a tavern increased the risk; 2nd. Whether the defendants, directly, or by Mr. Chandler, their agent at Belleville, had consented to this occupation, so as to preclude them from invoking the second condition above mentioned. Ten of the jury replied to the seventh question, that the premises had been occupied as a vinegar manufactory long before the 4th of January, 1864, and that this risk was as great as that of a tavern. But this cannot serve as a ground for deciding the point raised between the parties, for the Insurance Company might have permitted a vinegar manufactory, or closed their eyes to this fact, and yet have a perfect right to complain of the occupation of the premises as a tavern. The Company alone were the judges as to whether there was a greater or a less risk incurred by the introduction of a tavern, and so long as the Company were not notified of the fact in writing, or did not do anything equivalent to an admission of the change, they preserved their right.

To the 8th question: "Was the Company or its agent, at Belleville aforesaid, notified or aware, before the occurrence of the said fire, and how, of the occupation of the said buildings and premises as a tavern?" ten of the jurors answered, "there is no evidence of the Company having been notified of its being occupied as a tavern, *but we think the agent was aware of it.*" The latter part of this answer is but little satisfactory, and expresses a great deal of doubt in the minds of these ten jurors.

To the 9th question, they replied that the substitution of a tavern for a vinegar manufactory did not increase the risk to an extent to justify an increase of premium. I have already said that it was for the defendants alone to decide, whether the risk was thereby increased or diminished.

The several answers of the jury being in favor of the plaintiff, the defendants have been compelled to move that, notwithstanding the verdict and the answers of the jury, judgment be rendered in their favor. Two questions, of law and of fact, present themselves for decision. On whom did it devolve to determine and to say whether the occupation as a tavern was more dangerous, and gave rise to the payment of an additional premium? The renewal of the insurance by the payment of the premium in November, 1864, should be considered a new insurance effected on that day. A few authorities will show what was the duty of the insured, who must be supposed to have given, or who should at least have given on that day a description and designation stating the new occupation. Pothier, No. 199. "L'obligation que la bonne foi impose aux parties, de ne rien dissimuler de ce qu'elles savent sur

les choses qui sont de la substance du contrat, ne concerne ordinairement que le for de la conscience. Il en est autrement de l'obligation qu'elle impose à chacune des parties, de ne pas induire l'autre *en erreur*, par de fausses déclarations sur les choses qui sont de la *substance* du contrat : celle-ci concerne *le for extérieur*. Ces fausses déclarations peuvent donner lieu, dans le for extérieur, à faire prononcer *la nullité* du contrat." "Cela a lieu quand même l'assuré aurait fait, *sans mauvaise foi*, cette fausse déclaration, *étant lui-même dans l'erreur*. Car il y a cette différence dans tous les contrats *intéressés*, entre le cas auquel l'une des parties ne dit pas ce qui est, et le cas auquel elle dit ce qui n'est pas. Dans le premier cas, elle n'est pas tenue de ne l'avoir pas dit, si elle ne le savait pas ; mais dans le second cas, elle est tenue, si ce qu'elle a dit ne se trouve pas véritable, et a induit l'autre partie en erreur ; *debet prestare rem ità esse ut affirmavit.*"

Boulay-Paty on Emérigon, Vol. 1, pp. 16, 17. "On est coupable de dol vis-à-vis des assureurs non-seulement lorsque, pour se procurer des assurances, ou pour les inviter à se contenter d'une *prime moindre*, l'on affirme ou l'on fait entendre des faits contraires à la vérité, mais encore lorsque l'on dissimule des circonstances graves qu'il leur eut été important de connaitre avant de souscrire la police."

Quenault "Assurances Terrestres," No 374. "L'erreur qui tombe sur la substance de l'objet du contrat est en effet par elle-même une cause de nullité. Or, on doit regarder comme substantielles dans le contrat d'assurance, toutes les circonstances qui peuvent augmenter ou changer les risques dont se charge l'assureur. L'opinion du risque est ce qui détermine le *consentement de l'assureur :* si la spécification de la chose assurée et des risques, faite par l'assuré dans la police, n'en a donné qu'une fausse opinion à l'assureur, l'assurance doit être annullée, *comme n'ayant été consentie que par erreur.*" Lastly, I shall cite from Boudousquié "Traité de l'Assurance contre l'Incendie," No. 111. "L'assuré doit donc déclarer, à l'assureur, la nature des objets qu'il fait assurer, celle des constructions, la destination des bâtimens, les professions qu'on y exerce, les denrées ou matières *hasardeuses* qui y sont renfermés, leur communication, leur rapprochement ou leur réunion avec d'autres bâtimens ou d'autres objets d'un risque plus grave." It was then, by law, the duty of the insured to make known the change of *profession*, or change of occupation which had taken place, at the time of the renewal of the insurance in November, 1864. It was, according to law, for the Insurance Company alone to determine whether they would charge a higher premium for a tavern than for a dwelling or a vinegar manufactory.

And now as to the question of fact and evidence laid before the Jury. It has been clearly proved that the occupation of a house as a vinegar manufactory does not occasion an increase of premium, and consequently no presumption unfavorable to the defendants arises from the fact that they were aware that, previous to the occupation of the premises as a tavern, they had been used for a vinegar manufactory. It has been equally proved, beyond a doubt, by various insurance agents, that the occupation as a tavern invariably causes an increase of premium, and I may add that this is a fact very generally known by all those who have premises to insure.

There only remains the consideration of the pretension that Mr. Chandler, the defendant's agent, was aware or should have been aware on the day he consented to the renewal of the insurance in November, 1864, that the property, or part of the property was occupied by one Crouet as a tavern or saloon, which knowledge, according to the plaintiff's pretensions, would deprive the defendants of the benefit claimed by them from the change of occupation of the premises, and from the absence of any notification in writing to them of this change. On this head we have the evidence of Mr. Chandler, which evidence has not been controverted. Mr. Chandler expresses himself in these terms: "Two or three days after the fire I first heard of the said premises being occupied as a tavern. I swear I never heard of it, never had any intimation of it; did not know of it in any way before. Had Mr. Frank notified me in writing or informed me of a change in the occupation of the said premises, and that there was a tavern there, I

should have charged extra, and notified the office in Montreal of it. I would have charged him, had it been left to myself, 7s 6d extra or 10s, according to the new tariff." This positive statement of Mr. Chandler is to some extent confirmed and strengthened by the testimony of Mr. Frank on the same point: "It is not at all likely that I sent, I may say I never did send, a notice in writing to the Company that the house in question was occupied as a grocery and saloon. I gave no notice in writing to that effect. I think I gave a verbal notice, I would not *positively* swear I did." The continuation of Mr. Frank's testimony on this point shows that he has no recollection of having given such notice, nor of the place where he gave it, and he ended with this expression, "I cannot call the fact to mind at all."

There is, nevertheless, the latter part of the answer of the ten jurors to the 8th question quoted above. This part of that answer is as weak as the part of Mr. Frank's evidence just cited. It is only the sequel to it, for there is nothing in the proof which can justify this answer in the face of the precise testimony of Mr. Chandler on this point.

It is proper to observe that Mr. Chandler, agent of the Company, took exception to the fact that he had not received notice in writing of the new destination or occupation of the premises, in the first conversation which he had after the fire—only a few days after,—with the plaintiff's brother, Mr. A. A. Campbell. The latter reports their conversation on the subject.

From all that has been stated above, we must necessarily come to the conclusion that the defendants, and their agent, Mr. Chandler, had never been notified in writing according to the second condition on the back of the policy; and there is no evidence that Mr. Chandler was aware that the tavern of Crouet had replaced the vinegar manufactory. Even if he had known it, this would not have prevented the defendants from invoking the second condition of the policy, which imposed on the insured a formal obligation to give notice in writing of any change in the premises insured, which was of a nature to increase the risk of the insurers. See Quenault, pp. 62, 63, 64. Nos. 74, 75.

As to the waiver resulting from the Insurance Company making other objections, there was nothing to prevent the defendants from invoking other grounds of objection, according to the principle of French law, that the debtor may at any stage of the case oppose every exception or ground of exception which avails him. Moreover, in the case of Barsalou vs. Royal Insurance Co., L. C. Reports, a pleading of the same kind was admitted and allowed, after the defendants had filed other exceptions which they afterwards abandoned.

Verdict set aside, and judgment for the defendants.

*J. J. C. Abbott, Q. C.*, for the plaintiffs.

*S. Bethune, Q. C.*, for the defendants.

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## COURT OF QUEEN'S BENCH.—Appeal Side.

March 5th.

IRELAND, (plaintiff in the Court below) Appellant; and DUCHESNAY et vir, (*tiers-saisis* in the Court below) Respondents.

*Practice—Husband and Wife—"Party in a cause"—C. S. L. C., cap. 82, sec. 14, 15.*

*Held*, that the husband of a *marchande publique séparée de biens* by marriage contract, who is merely brought into the cause to authorize his wife, is not a "party in a cause" within the meaning of C. S. L. C., c. 82, s. 15, and cannot be examined as a witness for or against his wife.

The rule of law, prohibiting husband and wife from being examined for or against each other in civil cases, suffers no exception in the case where the husband is the agent of his wife, a *marchande publique*, and sole manager of her business under a power of attorney.

This was an appeal from a judgment rendered in the Superior Court at Montreal, by *Berthelot*, J., on the 31st May, 1865, dismissing the plaintiff's contestation of the respondents' declaration on a *saisie-arrêt*.

The plaintiff, having obtained a judgment against one William Maume, took out a *saisie-arrêt*, attaching goods and moneys belonging to the defendant in the hands of Marie

Virginie Juchereau Duchesnay, doing business at Montreal, under the name and firm of Cuvillier & Co., and Maurice Cuvillier, her husband, the latter being brought into the cause merely as authorizing his wife. The *tiers-saisie*, on the 10th November, 1863, declared that she owed the defendant nothing, and held no goods belonging to him. The plaintiff contested this declaration, alleging that at the time of the service of the writ of *saisie-arrêt*, the *tiers-saisie* had in her possession certain moneys and effects belonging to the defendant. The *tiers-saisie* answered that the defendant was indebted to her in upwards of $4000. Issue was joined, and the parties proceeded to proof. The plaintiff examined Maurice Cuvillier, husband of the *tiers saisie*, and also one Philip S. Ross, an accountant, who had make an examination of Cuvillier's books. The evidence of Maurice Cuvillier was objected to by the *tiers-saisie*, on the ground that he was not a "party" to the cause, within the meaning of the Statute, being merely brought into the cause to authorize his wife; and it was also objected that he, the husband, could not be examined as a witness against his wife. These objections were overruled in the Court below, but the final judgment in the case, rendered by *Berthelot* J., dismissed the plaintiff's contestation on the ground that the allegations were not proved, and that it had not been established that the *tiers-saisie* owed the defendant anything at the time of the service of the *saisie-arrêt*. The plaintiff appealed.

*Morris*, for the appellant. As to the objection that Maurice Cuvillier should not have been examined, it must be observed that in this case, that gentleman acts under a power of attorney from his wife, manages the business exclusively, and is the only person who can give any information respecting her affairs. If the general rule be applied here, the plaintiff will be deprived of all the advantage which may be obtained by the examination of the party to a suit. *Qui facit per alium facit per se:* in examining the agent in this case, the plaintiff should be considered as examining the wife herself. Lastly, the husband should here be considered as a *témoin nécessaire*, as he is the only witness who can give any information respecting the affairs of the *tiers-saisie*.

BADGLEY, J. In this case the plaintiff, a judgment creditor of one William Maume the defendant, to a considerable amount, attached by *saisie-arrêt* in the hands of Cuvillier & Co., represented by the *tiers-saisie*, Dame Duchesnay, such amount as might be due, and such goods as might belong to the defendant. She made her declaration in the usual course, which the plaintiff specially contested, and upon that contestation the following facts are alleged. The *tiers-saisie* made advances in money and goods to the defendant, Maume, who in return consigned shipments of fish and oil, with the understanding that upon these transactions they were to have a joint interest in the profits. The defendant had had a private account with the *tiers-saisie*, upon which he was largely indebted, and the balance of profit upon the joint account was of course applied by Cuvillier & Co. to reduce his private balance, which was largely against him at the time of the attachment, and left no money due. As to the attachment of goods, the plaintiff has limited the contestation to 600 barrels of herrings, which he alleges the *tiers-saisie* has made away with by fraud and collusion with the defendant. This is the contestation.

The plaintiff has raised the contestation. It is for him to support and prove it, and for this purpose he brings up Maurice Cuvillier, the husband of the *tiers-saisie*, as his witness. This witness was objected to, but was admitted as competent by the Superior Court. We are of opinion that he was not a competent witness in the case. The old rule of law is in force in this country—that a husband cannot give evidence for or against his wife. The clause of our own Statute, C. S. L. C. cap. 82, sec. 14, is precise. Its object was to do away with the exceptions of the old law under the Ordinance of 1667, but in doing so, it explicitly prevents husband and wife from being witnesses for each other. The common law of the land, and that public policy which is part of the common law, preclude such examination of husband and wife. It is true that the 15th section of the same act provides for the examination of any party to the suit as a

witness. It suffices to observe on this point that Maurice Cuvillier is not a party to this suit, that he is only in the suit to authorize his wife, and does not come within this provision. The case is anomalous, however. The wife herself, *séparée de biens* and a *marchande publique*, might be examined, and of course would know nothing, because it is her name alone that is used in the trade, which her husband carries on for her as her agent and attorney, and yet he cannot legally be examined as she might be. But this is the law, and, therefore, we think the evidence of Maurice Cuvillier should have been rejected and dismissed from the record. That being rejected there remains no other evidence in support of the plaintiff's contestation, except that given by Ross, an accountant, who was permitted to examine the books of Cuvillier & Co. This is wholly insufficient to sustain the plaintiff's pretensions, and therefore the judgment must be confirmed.

The following is the substance of the recorded judgment:

The Court.... considering that the said Maurice Cuvillier, the husband of the respondent, is not a party to this cause; considering that the said Maurice Cuvillier has been adduced and given evidence in this cause on behalf of the appellant against his wife, upon the contestation raised by the appellant, notwithstanding the objection by the respondent made *in limine* to the examination of the said Maurice Cuvillier as such witness; considering that by the law in force in Lower Canada, the husband cannot give evidence in civil matters for or against his wife; considering that the objection so made to the examination of the said Maurice Cuvillier should have been maintained by the Superior Court, and that there was error in the allowance of such testimony, this Court doth sustain the said objection, and doth reject from the record of this cause, the deposition made and filed therein by the said Maurice Cuvillier as such witness; and considering that save as aforesaid there is no error in the judgment rendered in this cause by the Superior Court, doth confirm the said judgment with costs.

AYLWIN, DRUMMOND, and MONDELET, JJ., concurred.

*Torrance & Morris*, for the Appellant.

*Cartier, Pominville & Bétournay*, for the Respondents.

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O'CONNOR (defendant in the Court below), Appellant; and RAPHAEL (plaintiff in the Court below), Respondent.

*Cause of Action—Draft—Action for money overpaid—C. S. L. C. cap. 82, sec. 26.*

The plaintiff, residing in Montreal, Lower Canada, received a consignment of flour from the defendant residing in Paris, Upper Canada, against which consignment the defendant drew upon him for $6000. The plaintiff accepted the draft, and paid the money, but the proceeds of the flour were afterwards found to fall short of the $6000. The plaintiff having brought an action at Montreal, in Lower Canada, to recover the deficiency:

*Held*, that the cause of action arose out of the transactions at Montreal, to wit, the acceptance there of the consignment by the plaintiff, the sale of the consignment, the acceptance of the draft, and the overpayment, and that the action was, therefore, rightly brought at Montreal.

This was an appeal from an interlocutory judgment rendered in the Superior Court at Montreal, by *Monk*, J., on the 18th June, 1864, dismissing an *exception déclinatoire* filed by the defendant.

The action was brought under these circumstances: The plaintiff is a produce factor at Montreal, and as such received from the defendant, a miller and trader, residing in Paris, Upper Canada, a consignment of 2000 barrels of flour to be sold on his account. The plaintiff sold the flour at Montreal, but before he had received the proceeds of the sale, the defendant, in anticipation of the money being received by the plaintiff, drew upon him (against the consignment) for $6000. This amount was paid by the plaintiff at Montreal, but the proceeds of the flour falling short of the sum so paid, the plaintiff brought an action for the recovery of the amount overpaid.

By the declaration the plaintiff alleged specially that when he accepted and paid the draft, he was not indebted to the defendant in any sum of money, but the same was drawn against the consignment, and for the sole accommodation of the defendant. By a second count the plaintiff repeated the above statement, omitting the consignor, and stating that

at the time of accepting the draft he had not in his hands any goods or moneys of the defendant.

To this action the defendant pleaded a declinatory exception, alleging that he was wrongly impleaded, inasmuch as he had his domicile in Upper Canada, as appeared by the writ of summons and process in the cause; that moreover it appeared that the cause of debt originated in Upper Canada, and that the action under such circumstances was cognizable only by the tribunals of Upper Canada.

The case was submitted on the following admissions: "The parties admit, but only for the purposes of the issue joined on the *exception déclinatoire*, that the flour referred to in the plaintiff's declaration, was consigned from Paris in Upper Canada, by the defendant to the plaintiff for sale to be made, and that the same was by the plaintiff sold in Montreal; that the draft referred to in the declaration was drawn after said consignment against the said consignment of flour, and that the money sought to be recovered by plaintiff was by him paid upon the said draft at Montreal, and that at all the times mentioned in the plaintiff's declaration, the defendant resided in Upper Canada. That the said consignment, draft or bill of exchange and payment as above mentioned, set forth in the two counts of plaintiff's declaration before the third count thereof, constituted for the purpose of the said exception the sole cause of indebtedness which the plaintiff pretends to claim from the defendant by the present action. That the paper writing herewith filed by the plaintiff, is a true copy of the sold note of the said flour." The declinatory exception being dismissed, the defendant appealed.

*Laflamme, Q.C.*, for the appellant. The whole question was a question of law. That the draft constituted the only cause of indebtedness of the appellant to the respondent was admitted. If so, the only question was and is, to determine: Where is the contract made between the drawer and drawee on a draft? If it be at the place where it is dated and signed, as the appellant asserts, then the judgment of the Court below is unquestionably wrong.

*Ritchie*, for the respondent. The only question in this appeal is, what was the cause of action? The respondent submits that the causes—and the only causes—of action were the receipt by him of the flour, its sale and the overpayment made by him, all at Montreal. The draft is not one of the causes of action—it is merely a piece of evidence of the amount paid. The plaintiff's action is complete without it. The fact that the appellant, for his own convenience, gave an order for payment dated in Upper Canada, is one of no importance as affecting the question of jurisdiction. The liability of the appellant to make good an amount paid for him at Montreal, without consideration, arises out of the relations existing between him and the respondent, as his agent. It was within the jurisdiction of the Superior Court at Montreal that the liability of the respondent as a factor commenced—that his duties as such were performed, and that he paid the sum sought to be recovered by his action in the Court below. The position of the respondent cannot be made worse than it otherwise would have been, merely because an order affording him ready means of proving the payment made by him in Montreal happens to be dated in Upper Canada.

Aylwin, J. This was an action brought in Montreal against the appellant as a person resident at Paris, U. C. The plea is by *exception déclinatoire* to this effect: That the defendant was wrongly impleaded, inasmuch as he had his domicile in Upper Canada, and the cause of debt originated there. But it appears that there has been an admission in these words: (His Honour read the admission stated above.) Now, in consequence of this admission, the question does not arise at all, and therefore the judgment was perfectly right, and must be confirmed.

Drummond, J. I must say that my first impression was that the cause of action arose in Upper Canada, because the draft was signed there; but on looking the case over, and seeing the admissions, it appears clearly to me, that the draft was only incidental, and that the transactions in Montreal really constituted the cause of action.

Badgley, J. In the first place, the consignment in itself only becomes a cause of action when it is received by the consignee,

and even then, the action would be by the consignor against the consignee to account and pay for the goods. This point is not applicable here. In the next place, the mere order for the payment of money, or draft, only becomes contractual upon its acceptance by the drawee here, and its payment here by the latter is necessarily the cause of action, not the mere order in itself from Upper Canada. The draft is mere blank paper till accepted. Then it becomes a contract. It is the payment of the money in Montreal by the drawee for the profit and advantage here of the drawer, which makes up the cause. So that the cause of action being the acceptance here by the drawee, and the payment here by him, in excess of drawer's funds in hand, the plaintiff was right in bringing the action here, and, therefore, the declinatory exception was properly dismissed. My opinion is to confirm the judgment.

MONDELET, J., concurred.

*R. & G. Laflamme*, for the Appellant.

*Rose & Ritchie*, for the Respondent.

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Dec. 5, 6, 1866.

BEAUDRY (plaintiff in the Court below) Appellant; and CORPORATION OF MONTREAL (defendant in the Court below) Respondents.

*Practice—Appeal—Interlocutory Judgment —Inscription* en faux.

*Held*, that a judgment dismissing an inscription *en faux* on a *défense en droit*, is an interlocutory judgment in the cause, and the appeal therefrom should be prosecuted as from an interlocutory judgment.

Motion *nisi causa* on the part of the plaintiff to be permitted to appeal from an interlocutory judgment rendered 30th Nov., 1866, by the Superior Court on a *défense en droit* dismissing the inscription *en faux* filed by the plaintiff, against a certain certificate, dated 9th Feb., 1865, signed by the prothonotary. This certificate stated that the defendants had deposited in the hands of the prothonotary the sum of $2730, for compensation for land, the property of the plaintiff, which the defendants pretended they had acquired by expropriation.

An objection was raised that there was no necessity for obtaining a rule to show cause why a writ of appeal should not be granted, inasmuch as the judgment in question was a definitive judgment. C. S. L. C., cap. 77, sec. 20.

The following was the judgment.

MONDELET, J. I do not exactly dissent. The inscription *en faux* is an incident in the suit, but in this case the *pièce* inscribed against being the foundation of the action, of course when the judgment dismissed the inscription *en faux*, it seems to me it was a final judgment, with respect to the inscription *en faux*. I am told, it makes no difference, since permission to appeal is prayed for. But what I am afraid of is that the line of demarcation between final judgments and interlocutory judgments will be altogether removed.

BADGLEY, J. I think it is a mere *question de mots*. So far as the inscription *en faux* is concerned, it in fact may be the real issue in the case; but the judgment upon the *faux*, though a final judgment upon the *faux*, is not a final judgment in the cause within the technical meaning of the Statute. Therefore, though we call it a final judgment *en faux*, it is nothing more nor less than an interlocutory judgment in the cause. This being so, how are you to proceed? Is there an appeal from it? The Court in *Perrault and Simard*, held that it was appealable, and I have no wish to disturb that judgment, particularly as it is in accordance with my own opinion. The judgment, then, not being a final judgment, you can only come at it as an interlocutory judgment.

AYLWIN, J. We are only giving the same decision that was given fourteen years ago by Justices Stuart and Panet.

DRUMMOND, J. I do not see how a final judgment upon an incident can be considered a final judgment in the cause.

Motion granted, and appeal allowed.

*C. A. Leblanc*, for the Appellant.

*H. Stuart, Q. C.*, for the Respondents.

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[IN ERROR.]

March 6, 7, 8, 9.

RAMSAY, Plaintiff in Error, *v.* THE QUEEN, Defendant in Error.

*Contempt of Court—Recusation of Judge—Writ of Error—Appeal.*

*Held*, 1st. That a judge, who has rendered judgment in a case of contempt of Court, is

not subject to be recused in any subsequent proceedings in the same cause, even where he was the complainant in the cause.

2nd. That no writ of error lies from the judgment in a case of contempt.

Leave to appeal to the Privy Council from these judgments refused, though the Attorney General consented.

This case came up on Writ of Error from a judgment of Mr. Justice Drummond, holding the Court of Queen's Bench, Crown side, at the last term of the said Court, for the district of Montreal, on a rule for a contempt of the Court of Queen's Bench by the plaintiff in error, in publishing two articles in the *Montreal Gazette* of the 27th and 29th of August last. (See *ante*, p. 121.)

It was submitted by the plaintiff in error:

1st. That the rule shows no offence known to the law.

2nd. That even if the rule did set forth a contempt, it was an offence which this Court, as now constituted, had alone the power to take notice of, at its term held from the 1st to the 9th days of September, and that this Court, as constituted, not having taken any notice thereof, the said pretended offence was passed over and condoned, and it was not competent for any single judge of Assize, on the Crown side of this Court, afterwards to take up the said pretended offence, and to deal with it.

3rd. That as no man can be a judge in his own cause, and as Mr. Justice Drummond was himself the complainant, he was precluded from sitting or giving any judgment on the said rule.

4th. That the said rule does not allege that plaintiff in error wrote the said letters in question.

5th. That it is not alleged in the said rule where this pretended contempt was committed, and it does not appear that this Court has any jurisdiction in the premises.

6th. That the said pretended contempt not being in face of the Court, the rule should have been supported by affidavit, which it is not.

7th. That the said pretended rule was not under seal as required by C. S. L. C., c. 77, sec. 73; and the absence of seal in writs and process issuing out of this Court on the Crown side is not covered, as in the case of writs and process issuing out of this Court on the Civil side.

March 6.

PRESENT—Duval, C. J., Aylwin, Drummond, Badgley, and Mondelet, JJ.

Mr. *Ramsay*. Before proceeding to the merits of this case I recuse Mr. Justice Drummond. He is incompetent to sit in this case for two reasons—one statutory and the other derived from general principles. 1st. Because he gave the final judgment in this case in the other Court. On this point the statute is express. By sec. 7, Consolidated Statutes of Lower Canada, cap. 77, it is laid down who shall be the judges of this Court "in appeal and error," while section 8 is in these words: "No judge of the Court of Queen's Bench shall be disqualified from sitting in any case, by the mere fact of his having been a judge of the Court whose judgment is in question, while such case is there pending, *unless he sat in the case at the rendering of final judgment*," &c.

This legislation is doubtless borrowed from the French ideas on the conformation of Courts of Justice, in this respect much more sound in principle than the English common law notions on the subject; for in England a judge may sit in error on his own judgment. But in any case the statute leaves no room for doubt,—the judge who rendered the judgment attacked cannot sit either in error or in appeal. The second point is that Mr. Justice Drummond is the party complainant in the cause. The rule of English law on this point is most decided. Chief Justice Hobart, in the case of *Day* and *Savage*, said that a statute which declared a man should be judge in his own case would not be binding. Coke said the same thing in *Bonhams* case, 8 Co. And so did Lord Ch. J. Holt in the case of the *City of London* v. *Wood*, 1 Strange 674. The general principle too is to be found in the 1st Inst. 141.

[MONDELET, J. Mr. Justice Drummond's name is not in the case.]

No; but it is the same thing, if he be interested, whether his name appears or not. And it does not signify whether the entering of the judgment be a mere form. *The Company of*

*Mercers and Ironmongers of Chester v. Bowker*, 1 *Strange*, 640; nor if the interest be ever so small; it is the inconsistency of the thing the law forbids. *The City of London v. Wood*, 1 Strange, 674. *Hesketh v. Braddock*, 3 Bur. p. 1858, where the judgment of the whole Court was given by Lord Mansfield, p. 1856. Nor is it necessary that the judge be nominally a party, if he have a bias—p. 1855. And the rule applies equally to judges and jurors —p. 1858. And so when the defendant was accused of saying of a Justice of the Peace, "He is an old rogue for sending his warrant for me," C. J. Holt said, "He deserved to be bound to his good behaviour, though it be not proper for that justice to do it; but rather to get one of his brothers to do it for him." *R. v. Lee*, 12 Mod. p. 514. There is no exception to this rule in matters of contempt. In Mr. Driscoll's case, Mr. Justice Rolland, the senior judge, was not on the Bench on the 28th of March, 1854, when Mr. Justice Aylwin took notice of it first. He sat, but took no active part in the proceedings the day the rule was read, and he was not on the Bench at all when the case finally came up.

[AYLWIN, J. Mr. Justice Rolland did take part.]

I read from a report made at the time, which Mr. Justice Drummond admitted to be a good report.

(The entry book was procured, and it maintained Mr. Ramsay's assertion.)

[DUVAL, C. J. Do you know of no case where a judge took notice of an attack on himself out of Court?]

I believe not; but, at all events, he never moved himself to avenge himself. It must be on the motion of a person disinterested, not of the judge himself. I shall now show that a judge cannot act in his judicial capacity if he be a witness. Hacker's case, Kelynge, 12; 5 Howell, St. Tr., 1181, 2; St. Tr. 384; Hawkins, book 2, cap. 46, sec. 84; 1 Chitty, 607. This case is much stronger, for a judge was actually complainant and witness. To pass from the law of the question to the ethical view of the case, what advantage can be gained by the opinion of a judge whose judgment carries no moral weight? What moral weight could Mr. Justice Drummond's judgment in this case carry with it? To say that a judge can move himself to give judgment for himself, is to contradict the terms of his official oath, by which he swears neither by himself nor any "other, privily or apertly, to maintain any plea or quarrel hanging in the Queen's Court, or elsewhere in the country." This case furnishes an example of the dangers of infringing these rules. When Mr. Justice Drummond was Solicitor General, he introduced a bill declaratory of the law of contempt.

[DRUMMOND, J. Is that in the Statute book?]

No, it was dropped, but I intend to show by it that Mr. Solicitor General Drummond, when he had no interest, held in the most solemn way directly the reverse of what he held the other day when he was interested.

Mr. Ramsay read the Bill, which was as follows:

No. 257.—BILL.

"An Act declaratory of the Law concerning contempts of Court in Lower Canada:

"Whereas doubts have arisen as to the powers and jurisdiction of the Courts of Lower Canada in matters of contempt, and it is expedient to remove such doubts;

"Be it therefore declared and enacted, *&c.*, and it is hereby declared and enacted by the authority of the same, that the power of the several Courts of Justice in Lower Canada to issue attachments and inflict summary punishments for contempts of Court, *does not extend, and shall not be construed to extend* to any cases except the misbehavior of any person or persons in presence of the said Courts, or so near thereto as to obstruct the administration of justice—the misbehavior of any of the officers of the said Courts in their official transactions,—and the disobedience of or resistance to any lawful writ, process, order, rule, decree or command of the said Courts by any person whomsoever."

[DRUMMOND, J. That bill was dropped because we all thought in Council that it went too far.]

Of course I cannot know except from what Mr. Justice Drummond says, why it was dropped; but I supposed it was owing to the burning of the Parliament Houses in 1849, two or

three nights after it had been read a first time. It was a very carefully drawn bill, almost in the words of many of the authorities, and I cannot believe it was prepared without care.

[DRUMMOND, J. It was copied from some American acts, and people there regret they had ever been passed.]

Since opinions are to be stated, I think it is a great pity this one had not been passed, for it would have obviated some proceedings which certainly have not been conducive to the interests of justice. I now conclude this preliminary argument, by repeating that Mr. Justice Drummond is incompetent to sit by the statute and from bias.

*C. A. V.*

March 7.

DUVAL, C. J. In this case the statute, instead of being in favor of the plaintiff in error, is against him. We were referred to sects. 7 and 8 of cap. 77, Con. Stat. of L. C., but the law on the subject is to be found in sec. 56. Sections 7 and 8 refer to civil cases, sec. 56 to criminal cases; and the disqualifying condition is not to be found in the latter. The reason of this must be that in criminal cases it was left to be decided by the English law. As for the question of bias, we do not decide anything as to the merits; but we say that if it be a contempt of Court, Mr. Justice Drummond has a right to sit.

AYLWIN, DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

Recusation dismissed.

Mr. Ramsay filed an exception to the judgment, and moved, by consent of the Attorney General, to be allowed to appeal to the Privy Council.

DUVAL, C. J.: Have you any right of appeal to the Privy Council?

Mr. Ramsay: If I have on the merits, I have on the interlocutory, unless the other party objects. The only reason of the consent of the Court being required in an interlocutory is that cases may not be unnecessarily hung up by appeals which might be decided on the merits. When the competence of the Court is a matter in issue, it seems peculiarly favorable for an appeal, more particularly in cases like this where it is desirable that as little scandal should be caused as possible.

Right to appeal refused, MONDELET, J., dissenting.

When the case was called, Mr. Ramsay moved to discharge the inscription likewise with the consent of the Attorney General. He said that the Court could not interfere, that the Crown was *dominus litis;* if not, who was? It had been declared by the Court that morning that it was not Mr. Justice Drummond. If it was the Queen, she was represented by the Attorney General. In the case of the Queen and Howes, 7 A. and E., it was held by *Denman*, C. J., and four of the judges, that if the Crown did not join in error the prisoner must be discharged. It had always been so held for misdemeanours, and they could not see what else they could decide in a felony.

DUVAL, C. J., said he did not recognize the authority of the Attorney General to abandon a proceeding for contempt.

*Mr. Ramsay.* He can even for a felony; *a fortiori* for a contempt, which is only a misdemeanor.

Motion to discharge inscription refused, MONDELET, J., dissenting.

Mr. Ramsay excepted to the judgment, and moved again to be allowed to appeal to the Privy Council.

Motion refused, MONDELET, J., dissenting.

Mr. Ramsay then proceeded to argue the case on the merits.

[DUVAL, C. J.: There is a preliminary question which should be settled. Have you a Writ of Error in a case of this sort?]

I am quite prepared for that objection. I have only found one case—the Earl of Devonshire, where a Writ of Error was allowed to the House of Lords for a contempt in the King's Palace. But apart from that, our statute is express—C. S. L. C., cap. 77, Sec. 56. It says that there shall be a writ in *all* criminal cases. Here there can be no clashing of clauses, for it is the criminal clause referred to by the Chief Justice this morning. The statute only confirms the common law. None of the authorities say that in cases of contempt there shall be none. And why should there be a distinction? The object of a Writ Error is to examine as to the regularity of the form of the proceedings. The Chief Justice seemed to think yesterday that jurisdiction

might be enquired of as against the higher courts of law even on *habeas corpus*. This seemed to be conceding more than I asked, more than I could agree to. Now, if the proceedings had no kind of form, would they be beyond the reach of the Writ of Error? To take an illustration from the circumstances connected with this very case: Mr. Justice Drummond took a rule before this one. In form it was an order to the Clerk of the Court to issue a rule. I showed it to Judge Drummond, and he asked me if it might be amended, which I consented to, and signed the amendment.

[DRUMMOND, J. This has nothing to do with the case. It was one of those conversations —confidential conversations—which formerly took place between the representative of the Attorney General and the Judges, and bringing it forward now will perhaps put the Judges on their guard.]

If it puts Judges on their guard to prevent them doing what is wrong so much the better; but this observation contains an insinuation against my character which I must answer. It is a most unfounded insinuation that there was any breach of confidence in my allusion to that first rule. How could there be a confidential communication between the Judge and me as to the prosecution of myself? How could there be any secret as to a matter of record? I think it is very unwise of Mr. Justice Drummond to wish to conceal that matter; there was nothing disgraceful to him in the proceeding, and I have only mentioned it as an illustration of such error as might occur in a rule. But since the mention of the particular case is offensive to any one, I shall generalize and say, suppose a rule was of the nature mentioned, could it not be reviewed in error? To take another illustration from this case. Suppose the rule was in no case? Or suppose a seal was required for authentication, and there was no seal? I put my argument in the form of a perfect syllogism. There may be a writ of error in *all* criminal cases. This is a criminal case. My minor is admitted, my major is in two lines of a Statute. It will be for those who try to deprive me of my remedy to establish the exception which is not in the Statute.

The case was taken *en délibéré* on the question of whether a writ of error would lie.

March 9.

MONDELET, J. This case is one of vast importance to the interests of public justice, to the bar, and to the public. Judges, it is true, must be protected in the discharge of their duties; but I cannot see that it is necessary for their protection to put an end to free criticism of their acts. If they are honest, they have no reason to fear free discussion. At the present moment we have not to decide whether or not there has been a contempt of this Court. The only question is as to whether a Writ of Error lies from a judgment for contempt. Some authorities may be cited, perhaps, to show that there is no way of examining a judgment for contempt; but on turning to our Statute (C. S. L. C., cap. 77, Sec. 56) I find that a Writ of Error lies to this Court "in all criminal cases before the said Court on the Crown side thereof, or before any Court of Oyer and Terminer or Court of Quarter Sessions." Now the only question in the case now before us is, is this a criminal case? It must be either a criminal or a civil case? There cannot be any case which is neither the one nor the other. Cases are but of two kinds: civil and criminal, and the Writ of Error lies in both. How then can we create an exception? Is it because there are no cases in the English books? But that cannot control our Statute—the Statute constituting this Court. As for the argument of inconvenience, it will not do for me. It may be inconvenient to have a judgment revised; but it must be likewise very inconvenient to be sent to jail or fined illegally. But is there any such inconvenience? I have nothing to do with the definition of contempt to-day; but if anything is said on that subject I may have something to add. But whatever may be the nature of the offence, how can it be more inconvenient to allow a writ of error in the case of a contempt than of any other offence? To say that in cases of contempt a writ of error lies is not so utterly absurd as some would have us believe, for the Lords of the Privy Council have recently ordered a record in a case of contempt in British Guiana to be sent up on the petition of Laurence McDermott, the publisher and printer of the *Colonist* paper, who had

been condemned to six months imprisonment by the Supreme Court of Civil Justice of the Colony for a contempt. I do not cite this case to show positively that the Lords of the Privy Council have decided that there is a right to appeal in cases of contempt, because they have granted the order without prejudice to the competency of the appeal; but I bring it forward to show that the Privy Council has not laid down the doctrine that is about to be laid down in this case; but on the contrary, in so far as it has judged, it has leaned to a contrary opinion. But what can be the inconvenience of a party condemned coming before the five judges here, instead of being satisfied with the decision of one who may be his enemy, perhaps his political enemy, and asking them to decide whether the condemnation of the one is legal? Are we to answer him and say, not only we shall decide against you, but we won't even hear you? Is he to have no remedy but an impeachment? To say that there is no remedy in this constitutional country seems to me very strange indeed. Besides an impeachment is not a remedy for the injured party. It can only end in the censure or dismissal of the judge. How strangely does this case contrast with one which occurred here some short time ago. * An enormous crime was committed, a crime that might involve the country in war. In that case the Court of Queen's Bench, as in Mr. Ramsay's case, the Court of Queen's Bench—for I will not commit the folly of calling it the judgment of Mr. Justice Drummond—gave an order as to the custody of the prisoners, and yet on *habeas corpus* a judge in Chambers declared that the order of the Court of Queen's Bench was null and void. If this could be done on *habeas corpus*, why not on Writ of Error? If the arbitrary doctrine is to prevail that there is no mode of reviewing a judgment for contempt, what becomes of the right of free discussion, and the liberty of the press? We shall be in the same condition they are in France, for any Judge may say—"Mr. Editor, you shall not write this or that." For myself I want no such privilege; not only as a citizen but as judge I invite the scrutiny of the public eye. If I am honest, I have nothing to fear; and if I am dishonest, the sooner I am found out the better. Apart from the rule laid down in our statute, and which, as I have shown clearly, gives the Writ, I shall show that the same doctrine is laid down by Blackstone.

"A judgment may be reversed *by writ of error*: which lies from all inferior criminal jurisdictions to the Court of King's Bench, and from the King's Bench to the House of Peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper addition to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the Court, or not duly describing where his county court was held; for laying an offence, committed in the time of the late king, to be done against the peace of the present; and for many other similar causes."

Blackstone, like our statute, does not particularize, but it was not necessary for him to do so. It is mathematically included; the whole contains its part, and it is not for me to cut off a segment of the circle, and to say that the whole circle is to be considered less the segment. Mr. Ramsay may have been right or he may have been wrong, but with that I have nothing to do at present. He has at all events done his best to have the judgment reviewed, and he is met by the answer, you have no remedy. In the case of Barsalou, I refused a rule for contempt, for I trembled at the idea of putting an arbitrary restriction on discussion; and if a libel had been published, there was another course—by indictment. I must express my formal dissent from the judgment about to be rendered.

AYLWIN, J. No reported or adjudged case can be found to support the writ issued in this case. It is the first time the Attorney General has consented to the issuing of such writ, and I am of opinion that it issued illegally and must be quashed.

BADGLEY, J. The learned Judge Mondelet

* His honor refers to *Ex parte Blossom*, 1 L. C. Law Journal, 88.

has not confined his attention to the sole technical point submitted for the decision of the Court, but, in the expression of his opinion upon the circumstances and law of the case, has taken the opportunity of enlarging upon the constituents of contempts in general, their relation to society as now constituted, and the law which he considers applicable to them. I cannot coincide in his opinions, and will not diverge from the question before the Court, which is confined within the comprehensive question put to the plaintiff in error by the Chief Justice—have you a Writ of Error in a case of this sort? or, in other words—does a Writ of Error lie in this case? It becomes, therefore, essential to ascertain what the case is, and the limit of the particular controversy, which can only be supplied by the record itself, and it must be examined for that purpose, because the Court cannot be influenced by facts or suggestions beyond it. The completeness of the record is assumed because no suggestion of diminution or falsification has been made. A brief statement of the proceedings of record leading up to the judgment complained of, may be made, only however as explanatory of the subject, but without in any way adjudging upon the facts or incidents themselves upon which that judgment was founded.

In the last criminal term of the Court of Queen's Bench for this district, presided over by a Judge of this Court, the Hon. Judge Drummond, a rule for attachment was issued by the Court against the plaintiff in Error, a member of this bar, and then conducting the Crown business before that Court, for a contempt alleged to have been previously committed by him in the publication under his name, in two numbers of the *Montreal Gazette*, both filed of record, of libellous, insulting and contemptuous statements and language, concerning a Judge of the Court of Queen's Bench, in reference to his judicial conduct in a certain judicial matter before him, in those statements mentioned, and which it was alleged tended to prejudice the administration of justice, &c., &c. The plaintiff in Error appeared to the rule, and after the rejection of his recusation against the presiding Judge, interrogatories were exhibited against him tending to identify him as the author and writer of those statements, but were not responded to, but the plaintiff in Error produced and filed of record, an answer in writing to the rule for attachment, in which he set out a variety of objections in fact as well as law, against the proceeding, the relevancy or pertinency of which objections, it is not at present necessary to inquire into, but declaring that whilst he did not admit his authorship of these statements, he at the same time declared that he did not deny his authorship of them, and after reiterating in his answer certain injurious expressions against the honorable judge with reference to the original proceedings, out of which this affair arose, the plaintiff in error concluded by asserting his right to make those offensive statements.

After having filed his elaborate answer, he moved to quash the rule upon grounds set out in his motion, which having been rejected by the Court, he subsequently produced and filed of record his declaration in writing, affirming that as the honorable judge had expressed his absence of intention to impute personal misconduct to him in the original matter, he (the plaintiff in error) withdrew his injurious and insulting statements against the honorable judge. This declaration was filed on the 2nd of November, and was succeeded on the following day by the judgment complained of, in which the Court declared the plaintiff in error guilty of contempt, and fined him to the amount of $40, and to remain committed until paid. It is manifest that the proceedings referred to above were in a matter of alleged contempt, that the judgment was rendered upon such contempt, and by a Court of competent jurisdiction entitled to cognizance of such a matter. It may be added that the proceedings were before a Court of Record, acting not according to the common law by a jury, but in a summary manner, according to the common law by attachment.

Upon the particular point submitted to the Court, it is plain that the merits of the contempt do not fall within the province of this Court to express any opinion upon, or whether the publications referred to were libellous or not, or the language contained in them commendable or respectful: at present, our duty

is to determine whether this Writ of Error can lie to examine and consider this conviction of contempt.

Before proceeding to examine the main question, it is right to observe, with reference to some part of the procedure in this case, but only as a matter of professional practice, that when contempt is of such a nature that if the fact which constitutes it be once acknowledged, and the Court cannot receive any further information by interrogatories, there is no necessity for administering them, if the defendant wish to be admitted to make such acknowledgment. Again, when the evidence of a contempt of Court is before the Court and the offence is palpable, a rule to show cause why an attachment should not be issued is unnecessary. In such cases attachments may be issued in the first instance. The practice of taking a rule arose out of a distinction between direct and consequential contempts, and was resorted to when it became necessary to procure evidence not before the Court.

It has also been held that the use of abusive and impudent language towards a Court or any of the Judges thereof, and contained in a petition for a rehearing, signed by the party in proper person and filed with the clerk, is a contempt, and this though he is a licensed attorney.

And it has likewise been held upon the subject of the withdrawal of the offensive statements, that when a writing is so clear of itself as to amount to a libel, the mere affidavit of the defendant that he had no intention of offering any contempt to the Court or Judge will not screen him from punishment. And so Holt on Libel, p. 22, Am. Ed., in which it is said that the Court did not consider the disavowal of the slanderer, as exculpatory; on the contrary, it was declared that the disavowal of any bad intent will not do away with the pernicious tendency or effect of publications reflecting on judicial proceedings, &c., &c.

Leaving these matters of procedure, it would seem to be quite unnecessary to enlarge upon the power admittedly vested in Courts of Justice to commit for contempts, a power which has never been disputed or questioned as being inherent in them under the common law of England; the books are replete with cases of that description, and judgments for contempt are very frequent. Hawkins, in his Pleas of the Crown, says "that for contemptuous words or writings concerning the Court, the party is punished by attachment for contempt;" and he adds, with reference to this last class of cases, "it seems needless to put instances of the kind, so generally obvious to common understandings." Lord Chief Justice Parker says, in reference to libel publications in a newspaper in the form of an advertisement reflecting on the proceedings of justice, that it is "a reproach to the justice of the nation, a thing insufferable and a contempt of Court." Blackstone says that some of the contempts may arise in the face of the Court, others in the absence of the party from it, *inter alia* mentioned by him, "by speaking or writing contemptuously of the Court, or Judges acting in their judicial capacity, &c., *and by anything, in short, that demonstrates a gross want of that regard and respect which when once Courts of Justice are deprived of their authority, so necessary for the good order of the State, is entirely lost among the people.*" Mr. Justice Wilmot, in his very learned and elaborate opinion upon the writ of *habeas corpus*, holds the same view, and maintains "that this power is as ancient as the common law, and the attachment a constitutional remedy." The Courts in the United States, resting upon the common law of England, entertain similar opinions, which will be found set out with great perspicacity in the 2nd vol. of Bishop upon Criminal Law, in which he has given cases and law as to the various kinds of contempt, viz: those committed in the presence of the Court, and those committed out of its presence, under which last head the author cites a case, which will be mentioned here, as somewhat analogous with the one in hand, with the difference that in the American case the language was verbal. The case occurred in Virginia, where one being interested in the event of a pending suit, but not as a party, met the judge proceeding to take his seat on the bench, and on being spoken to by him, responded in substance, "I do not speak to any one who acted so corruptly and cowardly as to attack my character when I was absent and defenceless"—alluding to expressions of

the judge on the trial of the cause at a former term. This was held to be a contempt.

Assuming then the existence of this inherent power in Courts of justice to punish for contempt, is their judgment liable to be controlled by any other Court or Tribunal? As introductory to the answer to this question, it must be observed that in the organisation of the Provincial Judicature, the Court of Queen's Bench has been established by statute as the highest judicial tribunal in Lower Canada, but divided into two jurisdictions separate and distinct the one from the other, the one being constituted on the Civil side a Court of Appeal and error in civil suits, and the other on the Criminal side, being constituted an original Criminal Court for the trial of criminal offences, and also a Court of Criminal Error. As to the Civil side, the Legislature has provided for the disqualification of a judge from sitting in Appeal or Error, if he has sat on the case appealed from at the rendering of the final judgment, but has not extended this disqualification to judges, sitting on the Criminal side upon Criminal Appeal or Criminal Error, who sat in the original Criminal Court. The Court, therefore, as at present personally constituted, is according to the statute, and the proposed recusation by the plaintiff in Error against the judge who judged the contempt has been legally rejected.

It must also be inquired, what is the nature of the judgment or conviction for contempt? It may be briefly answered that it is judgment in execution, and wherein bail may not be taken. This fact, that is, the negation of bail, indicates as well the stringent nature of the judgment in itself as its immediate enforcement upon the party convicted by it. It was held in Brass Crosby's case, 3 Wils. 188, that the adjudication for contempt is a conviction, and the commitment in consequence is execution, and no Court can discharge on bail a person that is in execution by the judgment of any other Court. This doctrine, which has not since been interfered with in England, has also been sustained in the United States, and so held almost in the same words by Story, J., in the case of Kearney in the Supreme Court, 7 Wheat. 43, following Crosby's case, and likewise maintained in many other reported cases. Arguing from the mere reason of the thing, it is a plain consequence, that contempts would necessarily fail of their effect, and the authority of Courts of Justice would become contemptible, if their judgments could in such matters be subjected to revision by any other Tribunal.

It has been very strongly urged that this power itself from its very nature must necessarily be independent of all other tribunals: for if it depends upon another whether a punishment can be inflicted or not, that very dependence defeats and overturns it. The insulted judge must go to law before some other tribunal with every one whom his decision offends, and leaving his own duties in his own Court, must attend upon other Courts and before other judges who may not be disposed to discourage the contempt, and it might happen set aside and quash the proceedings, and arrest or reverse the judgment, and, therefore requiring the renewal of the proceedings to encounter similar difficulties.

Under such a state of law, no one would be afraid to offend; the delay of punishment and the manner and chances of escaping it, would disarm the expected punishment of all its terrors, nor could the insulted Court or Judge ever think of the attempt to cause the infliction of punishment under so many discouragements. It would be idle for the law to have the right to act, if there be a power above it which has a right to resist. In Criminal matters penal law must enforce satisfaction for the present acts and security for the future; in other words it *must have* a remedy and a penalty. How could there be either a remedy or a penalty, if the judgment of contempt was subject to review by any other tribunal?

Apart from this most conclusive reasoning, no reported cases can be found in which other tribunals have interfered with such convictions of other Courts, whilst on the other hand numerous direct authorities are to be found the other way. Brass Crosby's case has already been adverted to, which settled that point many years ago in England, and American authorities are at one with the English decisions. Mr. Justice Blackstone says, "the sole adjudication of contempt and the punishment thereof belongs exclusively and without inter-

fering to each respective Court. Infinite confusion and disorder would follow if Courts could examine and determine the contempt of others." I shall also refer to Hurd on Habeas Corpus at page 412, where he lays it down that the right of punishing for contempt is inherent in all Courts of Justice and essential to their protection and existence. A commitment under such conviction is a commitment in execution, and the judgment of conviction is not subject to review in any other Court unless specially authorized by statute." And in *Morrison* v. *McDonald*, 8 Shep. 550, it was held "that there can be no revision, either by appeal or certiorari, of the judgment of a Court of record for imposing a punishment for a contempt of the Court."

It has been urged that this Court as now formed on the criminal side, having been constituted a Court of Error for criminal matters, has jurisdiction in this case, and is bound to sustain the writ of error here issued. It is quite true that this Court on the criminal side has jurisdiction over all crimes and criminal matters to the extent contemplated by the criminal laws of England introduced and established here by the Imperial Act of 1774, and as since amended by our Provincial legislation. It has also more recently been constituted by statute a Court of Error in all criminal cases before the said Court, on the Crown side thereof, or before any Court of Oyer and Terminer, or Court of Quarter Sessions, and still more recently, it has been authorized to consider and decide reserved questions of law arising in criminal trials, in which any person has been convicted at any criminal term of the said above mentioned Courts, but apart from these later statutory powers, this Court of Queen's Bench has no appellate criminal jurisdiction. By law the Court of Queen's Bench in term, in the exercise of its original criminal jurisdiction, is an independent Court, not subject to the control of this Court sitting in error, except in such cases as are specially within its cognizance by statute or in the exercise of its admitted powers, and hence this Court cannot under the common law of England, from which it derives its chief criminal powers, be made to affirm the legal existence of writs of error in convictions for contempts, simply because no authorities can be found to say that in cases of contempt there is no writ of error. This negative argument is of no force. The legal existence of such a writ requires to be derived from affirmative authorities: but of these there are none, and this Court cannot without such authority of itself initiate such a proceeding.

Archbold, however, tells us, that no writ of error lies upon a summary conviction, and that it only lies on judgments in Courts of Record acting according to the course of the common law. Now, Blackstone lays it down that the proceeding in contempt is in all cases summary before the judge without the intervention of a jury; and it was held long ago in England, and that ruling has since existed in its integrity, "that it was against the nature of a writ of error to lie on any judgment, but in causes where issue might be joined and tried, or where judgment might be had upon demurrer." This was the case of the King *v.* Dean and Chapter of Trinity Chapel, Dublin, 8 Mod. 27, and upon writ of error brought into the House of Lords, all the judges of England being of opinion that the decision was correct, the judgment of the King's Bench was affirmed, 2 Bro. p. c. 554. And Kent upon this doctrine says, "the principle is of immemorial standing: it has stood the test of two centuries as an incontrovertible principle without a precedent or doctrine to oppose it. To overthrow it would be to tear up the common law by the roots." It is therefore fair reason as well as law to hold against the writ of error lying in this case.*

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*Warranty on sale of horse.*—On the sale of a horse the seller signed the following warranty:—"June 5, 1865. Mr. C. bought of Mr. G. G. a bay horse for £90, warranted sound.—G. G. Warranted sound for one month. G. G."—*Held*, that the latter words limited the duration of the warranty, and meant that the warranty was to continue in force for one month only; and that complaint of unsoundness must therefore be made by the purchaser within one month of the sale, *Chapman* v. *Gwyther*, Law Rep. 1 Q. B. 463.

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* To be concluded in the next number.