The Legal News.

Vol. III. APRIL 17, 1880. No. 16.

PROCEEDINGS UNDER THE INSOLVENT ACT.

The case of *The Queen* v. *Jobin*, to be found in the present issue, shows that the Act repealing the Insolvent Act has been worded so as to permit the escape of a person indicted under its provisions before the repealing Act was passed. This is unfortunate, as it is, of course, to be regretted that those charged with criminal offences should escape trial on objections of a purely technical nature. The Act contains this phrase: "In any case where the estate of an insolvent has been vested in an official assignee before the passing of this Act." The indictment of Jobin having been drawn before the repealing Act was passed, no foresight could have obviated the difficulty which was held by the Court to be fatal, namely, that the indictment did not allege that the estate of the accused had been vested in an official assignee before the passing of the repealing Act. The prosecution could have proved this as a fact, and when the indictment was framed there was no necessity for alleging it. The point is one of considerable nicety, and the accused, in getting the benefit of the ruling, profits by a subtilty not often available under the modern system of criminal procedure. It may be remarked that no motion was made to amend the indictment—a mode of getting over the difficulty which would probably have been sanctioned by the Court, in view of the clause of the Interpretation Act referred to in the note to the report.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

[CROWN SIDE.]

MONTREAL, April 7, 1880.

RAMSAY, J.

THE QUEEN v. JOSEPH KERR et al.

Nuisance—Obstructing the Channel of a Navigable River.

Joseph Kerr, John McLane and Joseph E. Brownell were indicted for that they, on the 22nd day of June, in the year of Our Lord 1879, at the parish of Vaudreuil, in the district of Montreal, unlawfully and wilfully did obstruct the free passage of a certain river, to wit: the Ottawa River, to wit: a certain part of the said Ottawa River there situate, to wit, at the parish of Vaudreuil, the said river being a public and navigable river, by then and there leaving a certain raft composed of railway ties thereon for a long and unreasonable time, to wit, six weeks, and refusing to remove the said raft when thereunto required, and thereby preventing one François Xavier Archambault and others from passing thereon and therein, committing thereby a public nuisance and great injury and prejudice to the said François Xavier Archambault and others as aforesaid, and to the public.

The evidence established that the raft arrived, towed by a steamer, on the 22nd June, and remained till about the 2nd or 3rd of August, by which time it was all removed. It was also proved that the raft was 250 feet long by 150 feet wide, that it almost filled the whole channel of the river between the west shore of the Ottawa River and a small island or shoal, the channel being from high water mark to high water mark only 260 feet in width, and that it absolutely barred the whole available channel, at all events at first. The defence, amongst other things, proved considerable diligence in removing the raft by cribs, beginning the work the day after the arrival of the raft, but that notwithstanding this diligence the whole raft was not removed until the time above mentioned, because of the small space of ground belonging to the Grand Trunk Railway, by which the wood could be landed. The evidence also established that McLean and Brownell came down in charge of the raft, and that the raft was under the control of Kerr, on whose orders the other two defendants acted.

RAMSAY, J., in charging the jury, said: The case is not one which demanded the warm appeals that have been made to the sympathies of the jury, nor is it necessary to examine whether the complainants might have taken any other method to vindicate their rights or not. By the criminal law of England a public nuisance is an indictable misdemeanor, and the offence laid to the defendants' charge is a nuisance, at

all events the defendants have not demurred to the indictment nor sought to quash it. The question then is, have the prosecutors proved their case? Before entering into an examination of the evidence, I shall read you the text of a recognized authority which gives a definition of a nuisance: "Nuisance, *nocumentum* or annoyance, signifies anything that worketh hurt, inconvenience or damage, and nuisances are of two kinds, *public* or *common* nuisances, which affect the public and are an annoyance to all the King's subjects, and *private* nuisances, which may be defined as anything done to the hurt or annoyance of the lands, tenements or hereditaments of another."—2 Russell, 418. The limit to this definition is expressed in a very few words: "But the annoyance or neglect must be of a real and substantial nature."

There are therefore two sorts of nuisances, one which affects or is of a nature to affect *all* Her Majesty's subjects, and another which affects private and individual rights. The former is indictable, the latter is not.

The Court of Appeals held in the case of *McBean & Carlisle*, that the interruption of a private river, not fully navigable, but only floatable, gave rise to an action of damages,—that is to say, that the interruption was a nuisance, whether an indictable one or not, it is not now necessary to determine. In another case, of *Dunning & Girouard*, it was held by the Superior Court, and the judgment was confirmed in Appeal, that mooring a raft in the St. Lawrence for weeks opposite the property of the plaintiff was also a nuisance which gave rise to an action by the proprietor for damages.

Now under this explanation of the law you have to look at the facts that are proved. It is pleasing to be able to say that there is no essential difference between the evidence of witnesses on the part of the prosecution and those of the defence, except as to the distance the raft was pushed from the shore on the day after the arrival of the raft. But perhaps this is not of much importance, for it seems to be satisfactorily proved that the raft filled the whole of the channel that could be used for navigation. Two matters have, however, been put forward on the part of the defence. It was said, firstly, that the great commercial interests of the country required that those bringing down lumber in rafts should have the power to stop in the way this raft had done, that the Grand Trunk Railway required ties and could not conveniently get them in any other way. This argument is not a good one, for if the defendants had a right to block up one channel for weeks, another person with a raft might block up another, and so on till all means of circulation were rendered impossible, and thus the trade would be confined to those parties who came first. This defence then is perfectly illusory and unsound. The next means of defence relied on is that the defendants had used great diligence in breaking up the raft and diminishing the annoyance. This argument is much more plausible than the other, and if it had been shown that the raft took up the position complained of, by stress of weather so irresistible that those conducting it could not have prevented it, then this defence would have been a complete answer to the charge. But in this case the parties took up their position deliberately, and knowing perfectly the result of the proceeding. They were towed into the channel opposite Mr. Lacroix property by a steamer, and it does not appear that there was any reason for their taking up the position they did except that it was the most convenient place for them to lay-to in order to discharge their ties. Under these circumstances this line of defence is no more tenable than the other. Your enquiry is, therefore, as to the naked fact of whether there was a public nuisance or not. As matter of law the voluntary obstructing a channel of a navigable river for weeks, in such a way as to prevent the rest of the public from using it, without being authorized by competent authority, is a public nuisance. Of course you may disbelieve all the witnesses and arrive at the conclusion that there was no raft and no channel, and that the whole story is a fabrication, but if you do not think that, I cannot fancy there can be much doubt as to what your verdict will be. Two letters have been put in to establish some sort of understanding between the parties, but both parties seem to agree that these letters have no influence in the case. Chief Justice Dorion appears to have been satisfied with a sort of half assurance on the part of the chief engineer of the Grand Trunk Railway Company, but Mr. Archambault and Mr. Lacroix were not, and they have continued the prosecution. They had

a perfect right to do this, and it cannot affect your verdict.

The jury found the defendants *Guilty*.

Ramsay, J. It appears that the nuisance is, for the moment, at an end, and the prosecutors having intimated that they only desired to vindicate their rights, and to put a stop to a practice which it seems has been going on for years, the defendants will be admitted to bail on their own recognizances, to appear before this Court on the first day of next term. If between this and then there is no repetition of the offence, the punishment will probably be nominal, but if it be otherwise, the punishment will be sufficiently exemplary to be a lesson to defendants and a warning to others.

Prevost and *Geoffrion* for the prosecution.

Macmaster and *St. Pierre* for the defendants.

COURT OF QUEEN'S BENCH.

[Crown Side.]

Montreal, April, 1880.

The Queen v. Edouard Jobin.

Indictment under Insolvent Act of 1875—*Continuation of proceedings after the repeal of the Act.*

Ramsay, J. This is an indictment (No. 34) under the Insolvent Act of 1875 and the amending Acts. Leave having been granted to the defendant to withdraw his plea of "not guilty," he now moves to quash the indictment.

It is contended by the defendant, firstly: that the Insolvent Acts have been repealed since the accusation was laid, and that the saving clause which reserves *all proceedings* does not include a criminal prosecution. The precise words of the saving clause are the following:—

"Provided, that *all proceedings* under "*The Insolvent Act of* 1875," and the amending Acts, aforesaid, *in any case where the estate of an insolvent has been vested in an official assignee before the passing of this Act*, may be continued and completed thereunder; and the provisions of the said Acts hereby repealed shall continue to apply to such proceedings, and to every insolvent affected thereby, and to his estate and effects, and to all assignees and official assignees appointed or acting in respect thereof, in the same manner and with the effect as if this Act had not been passed."

There can be no doubt that no proceeding can be taken under a repealed statute for what was done before, unless there be a saving clause sufficiently explicit to reserve the right, and a prosecution begun before the repeal, but not terminated, does not alter the matter. Nor will a penalty be considered to be reserved by construction. So where the civil code re-enacted the dispositions of the 76th section of the C. S. L. C., cap. 37, with regard to the obligation of Registrars to keep certain books and an index, and failed to re-enact the penalty contained in the statute, the Court of Appeal dismissed a *qui tam* action for the recovery of such penalty. *Montizambert & Dumontier*, Quebec, 6th March, 1877. We have, therefore, to inquire whether the saving clause quoted above is sufficient to reserve the right to a criminal prosecution. It will at once be conceded that the right to indict is virtually swept away, if the right to inflict the punishment does not remain. The form of the clause, in the case before us, strikes one immediately as being extraordinary. At all events, it does not precisely meet the terms of the section under which this indictment is drawn. The section 140 applies to "any insolvent who with regard to his estate," does certain things, whereas the saving clause applies to cases where the estate of an insolvent has been vested in an official assignee before the passing of the Act, and to insolvents affected by *such* proceedings, *i. e.*, proceedings with regard to a vested estate, and to his estate and effects. I asked Mr. Geoffrion how, from the indictment, it could be discovered that the accusation was within the limitation of the law as it now stands. He argued that the indictment was good when drawn, and that it would be a matter of proof that the estate had been vested in an official assignee. This answer appears to me to be hardly satisfactory, for it amounts to this, that in order to sustain the indictment it would be necessary to prove what was not pleaded, namely, that the insolvent's estate had been vested in an official assignee. It is true no foresight of the prosecution could have provided for this, but is it not the conclusion from this that the saving clause does not preserve, in a practical form, the criminal prosecution? If the repealing Act had simply reserved from its operation *all proceedings* begun before it was passed, I should have thought it covered all proceedings, whether civil or criminal, and the authorities cited by Mr. Kerr do not establish, I think, any doctrine contrary to this

view. In the case of the *United States* v. *Mann*, quoted in a note to Potter's Dwarris, p. 157, the reservation was for *suits for penalties and forfeitures*, and this was held not to include a prosecution for an offence punishable by fine and imprisonment. In a case reported, 7 Wheat. p. 551, decided by Chief Justice Marshall, whose opinion is entitled to the highest consideration, from the brevity of the report it is somewhat difficult to seize the distinction. It seems, however, that a temporary Act was passed, and before it expired by limitation, it was repealed, and the Court held "that an offence against a temporary Act, committed after the time it would have ceased to have force of law, cannot be punished after the expiration of the Act, unless a particular provision be made by law for the purpose," and that a proviso in the following words was not sufficient: "Provided, nevertheless, that persons having offended against any of the Acts aforesaid may be prosecuted, convicted and punished as if the same were not repealed, and no forfeiture heretofore incurred by a violation of any of the Acts aforesaid shall be affected by such appeal. "The obvious construction of this clause," said Chief Justice Marshall, "is that the power to prosecute, convict and punish offenders against either of the repealed Acts, remains as if the repealing Act had never been passed. It does not create a power to punish, but preserves that which before existed."

I think, therefore, that the indictment must be quashed, because the proviso is not practically applicable to this criminal prosecution. *Being of this opinion, it becomes unnecessary to examine the other objections taken.

The same objection, of course, applies to indictments Nos. 32 and 33, which are also quashed.

Geoffrion for the private prosecutor.

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

COURT OF QUEEN'S BENCH.

[APPEAL SIDE.]

MONTREAL, Feb. 3, 1880.

SIR A. A. DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

LEDUC (plff. below), Appellant; and THE WESTERN ASSURANCE Co. (defts. below), Respondents.

Insurance (Marine)—Seaworthiness—Burden of Proof—Proof made by statement and protest of Master and adopted by the insured.

The action claimed $1000, insurance on freight in a certain schooner called *Providence*, for a voyage "from Mingan, on the north shore, to Recollect, *via* Cow Bay, Cape Breton, $500, and from Port Recollect to Montreal $500." The alleged loss took place after leaving Cow Bay.

The defence was that the vessel was unseaworthy at the time the policy attached, that is, before leaving Mingan.

It appeared that the schooner left Montreal, in the spring of 1868, with a cargo of flour, &c., which was discharged at Mingan, and thence the vessel proceeded to Cow-Bay where it was loaded with a cargo of coal. After leaving Cow Bay, the vessel was found to be sinking, and it put into Sydney, but after repairs there it was still unseaworthy, and vessel and cargo were subsequently lost.

The judgment of the Court below, (BELANGER, J.) dismissed the action for the following reasons:—

"Considérant que pour avoir droit d'action contre la défenderesse pour le montant de la police d'assurance émanée en sa faveur le 22 Juin 1868, par la défenderesse, sur le fret de la goélette *Providence* depuis le port de Mingan, jusqu'à Montréal, en passant par Cow-Bay et le Port Recollet *alias* Regollet; et ce, à raison de la perte du dit vaisseau, dans le golfe St. Laurent, le 31 Août 1868: ainsi que le dit montant ($1000) est réclamé dans et par son action en cette cause, le dit demandeur était tenu, par et en vertu de la dite police, de fournir préliminaires

---

* At the argument, the attention of the Court was not directed to the Interpretation Act of 1867 (31 Vic., Cap. 1, Sec. 7, 37thly), in which this disposition exists: "No offence committed and no penalty or forfeiture incurred, and no proceeding pending under any Act at any time repealed, shall be affected by the repeal, except that the proceedings shall be conformable, when necessary, to the repealing Act, and that, where any penalty, forfeiture or punishment shall have been mitigated by any of the provisions of the repealing Act, such provisions shall be extended and applied to any judgment to be pronounced after such repeal." It is evident that this statute does not cover the case decided by the Court; but it would seem to furnish ground for allowing an amendment of the indictment to make it "conformable to the repealing Act," if such amendment had been asked for. See Thirty-fifthly.

mairement à la dite défenderesse la preuve de son intérêt dans le fret ;

"Considérant que le dit demandeur n'a pas établi en preuve qu'il eût, en aucun temps avant l'institution de la présente action, fourni à la défenderesse une preuve quelconque de son intérêt dans le dit fret, malgré que la défenderesse ait, par une de ses défenses, nié formellement l'allégué du demandeur tendant à affirmer qu'il avait effectivement fourni cette preuve préliminaire : et qu'il n'est pas non plus établi en preuve que la défenderesse ait en aucun temps renoncé ni formellement ni implicitement à son droit d'exiger la dite preuve préliminaire ;

"Considérant qu'il est en preuve que le dit demandeur a fait faire à la dite goëlette, au port de Sydney, diverses réparations et changements sans adopter les mesures de prudence exigées en pareils cas ;

"Considérant qu'il n'est pas prouvé qu'avant de faire faire ces réparations et changements à la dite goëlette le dit demandeur ait fait inspecter la dite goëlette par un ou des inspecteurs, ni que les dites réparations et changements ont été faits sous la direction et suivant les spécifications des dits inspecteurs ; et qu'il est prouvé que les dits changements ou modifications dans le dit vaisseau, consistant dans l'abaissement du *centre-board* et sa fixation d'une manière permanente, a pu changer et augmenter les risques assumés par la défenderesse vis-à-vis le demandeur, et a de fait changé et augmenté ces risques au détriment de la défenderesse et sans son assentiment ;

"Considérant que le dit demandeur, en faisant les dits changements dans le dit vaisseau de son propre chef et sans l'assentiment de la défenderesse, a assumé les dits risques et a forfait à ses obligations vis-à-vis de la défenderesse, qui dès lors est devenue déchargée des dits risques : Déboute la dite action du demandeur avec dépens," etc.

RAMSAY, J. (*diss.*) This action arises on an insurance of the freight of the schooner *Providence*. The appellant by his action sought to recover $1000.

It is objected now that there was no proof made to the defendants of plaintiff's interest and title to recover before the institution of the action. There is no special plea to this effect, and plaintiff's interest is clearly established by the record. But defendants say that a special plea was not necessary, because the plaintiff alleged in this declaration that the formality of preliminary proof had been observed. I do not think that the general issue negatives sufficiently the want of preliminary proof. It is a "*fin de non recevoir*," to which attention should be at once directed, and if this is not done it is a waiver of the ground. "*Le défaut d'intérêt et de qualité est un moyen que l'on doit aussi proposer dès l'entrée de cause, etc.*" "*L'exception que l'on tire du défaut d'intérêt et de qualité, s'appelle* FIN DE NON RECEVOIR, *parce qu'elle a pour* FIN, *d'empêcher que l'on ne reçoive celui qui a formé la demande, à discuter si elle est bien fondée, etc.*" 1 Pigeau, p. 163. Perhaps the place and form of this pleading is still more positively indicated by art. 136, C. C. P. "The defendant may plead by peremptory exception," that is, not by preliminary plea within four days, "The non-completion of the time, or the non-fulfilment of the condition upon which the right of action depends." I think therefore that this matter is not fairly in issue in this case.

On the merits the defendants pleaded very specially that the vessel was rotten and unseaworthy, that there was an attempt made to repair her which was totally insufficient, and that she went to pieces from absolute rottenness. It is also pleaded that she was improperly loaded, and in violation of a positive warranty. At the argument, it was further urged that in any case there could only be a condemnation for $500, as the insurance was double, that is, that there were two voyages contemplated, one from "Mingan" to "Port Recollet," and the other from the latter place to Montreal.

The first point therefore we have to examine is whether the vessel was sea-worthy or not at the time she left Mingan. This is purely a question of evidence. There is some controversy as to whether it is for the defendants or the insured to make proof as to seaworthiness. But, if it be held to fall on the plaintiff, the responsibility is very easily removed to the insurer by presumptions arising from general facts, and consequently the question is not generally of any practical importance. The defendants have therefore very properly pleaded specially the facts on which they rely, and particularly that the vessel became a wreck shortly after she left the Port of Sydney where

she had been repaired. On the other hand the plaintiff insists on stress of weather to rebut any presumption arising from these facts. There is a point in the evidence which has to some extent affected the judgment in the Court below, and which was urged upon our attention at the argument, that should be disposed of at once. It is that in making the repairs at Sydney, the centre-board was made fast, and that this was an alteration of the risk. The evidence upon this point is very slight, but even were it stronger, it would not avail defendants, for it is not pleaded. The fastening down of the centre-board can then only affect the case in so far as it constitutes unseaworthiness which is fully pleaded, and if it be considered that unseaworthiness, arising after the commencement of the voyage, and not caused by gross negligence or fault of the assured, can affect the recourse against the insurer.

All positive evidence as to the state of the vessel on leaving Mingan is wanting; but it is proved that the vessel was repaired in Montreal, and appeared sound on examination, that she made out her voyage to Mingan and delivered her Montreal cargo in good condition, so far as we know, to the satisfaction of the shippers. From that she proceeded to Cow Bay, where she had a right to go to load, and took in her cargo there. It was only after that there were any signs of leakage. Now can we presume that because the schooner became leaky the day after she sailed from Cow Bay with a cargo, that she was unseaworthy when she left Mingan. If not, there is no evidence of any kind to establish unseaworthiness at Mingan. Now upon this point really the whole case turns, and it may therefore be as well to examine how far the leaky condition of a vessel shortly after its departure from the place where the insurance begins serves as evidence to establish unseaworthiness. It is clearly only presumption, and one very uncertain in its application. In this particular case any such presumption is repelled by other facts proved and already referred to,—namely, that she had just delivered a cargo of provisions in perfect condition, and that she had made one stage of her voyage—from Mingan to Cow Bay—without difficulty. We are not even told by those who now rely on this sort of presumption what the length of time was between the vessel leaving Mingan and becoming leaky. It does not supplement this deficiency to say that she became leaky shortly after leaving Cow Bay. Perhaps if it had been shown that the running on a rock at Bersimis, or Bellesemis, took place before the departure from Mingan, and that this accident was of a serious character, there might have been something to ground the presumption that at Mingan the schooner was not in a fit state to carry freight. But we know nothing of the position of Bersimis, and very specially we know nothing of the nature of the accident, except the confused statement of the extension of protest, which can only be considered as evidence against plaintiff for the purposes for which it was made. I was not prepared for any difficulty on this point when I wrote the notes from which I am now reading, and therefore I must refer to a few authorities I have collected at rather short notice. Phillips, after mentioning an American case which decided that the protest was evidence against the assured, gives Lord Kenyon's ruling in *Christian* v. *Coomlee*, (2 Esp. 489), deciding it was not evidence; and Phillips adds, that this is the general doctrine, (2 Phillips, 2095). I would also refer to *Senat & Porter* (2 Durnf. & E., p. 158), where the same doctrine is elaborately decided by the whole Court. I understand the argument will be that the master is agent of the assured. We must take care not to be influenced with these slim sayings of general practice. He is his agent as far as may be necessary to make a protest, but he is not his agent to give his *impressions de voyage*. Now the object of the protest is clear and has never varied. It is made for the purposes of notice. In the "Guidon de la Mer" we find its object succinctly expressed. "Perte avenant au navire ou marchandise assurée, le marchand chargeur fera faire son *Delais* par le Greffier, notaire ou Sergent Royal à ses assureurs avec déclaration qu'il espère estre payé des sommes que chacun aura assuré du dit jour en deux mois." p. 206.

It is next argued the captain was dead, and that this admitted the evidence. The death of a witness does not make evidence that which was not evidence before.

Again, we have another pretention as a make-weight. The owner adopted the captain's story in a subsequent protest. I don't think this is a fair argument. Of course, if the assured deli-

berately adopted the captain's version as his own so as to amount to confession, he would be bound by it; but a parrot-like repetition of the captain's narrative has not the characteristics of an *aveu*, and no one reading this protest can suppose the assured has any personal knowledge of what he is speaking of. His protest amounts to this, the captain says so, and no more. The captain does say it, but it does not follow it was true. In addition to this the Bersimis occurrence is an after-thought. The plea, special as to the kind of unseaworthiness complained of, is silent as to this accident. The defendants say "your vessel was rotten." It is now suggested that she was damaged by running on a rock. It is, moreover, a clumsily made argument. We heard nothing of all this at the bar. If then, the schooner were sea-worthy on leaving Mingan, the risk began, and to escape from liability for the loss the defendants must show either gross negligence or direct fault on the part of the assured, to relieve the insurer. In England it has been a question whether when unseaworthiness supervenes, the owners are bound to repair, if it be possible; and the opinion of the judges seems to have been that in order to free the insurer, the conduct of the owners must amount to gross negligence, so as to constitute fraud or fault. Now, can it be said that there was such negligence on the part of Leduc? It is proved that the vessel was twice overhauled, and the last time so repaired as to be pronounced perfectly seaworthy, at a cost of $1,000. It is true, within a day and a half the vessel again sprung a leak, and was abandoned by the crew and lost. If the voyage had begun at Cow Bay, and if there had been no evidence of tempestuous weather, we might have presumed fairly enough that she was unseaworthy at the commencement of the voyage. But the positive proof of the storm that prevailed for days, rebuts even this presumption.

We have, therefore, no proof of unseaworthiness at the commencement of the voyage, no evidence of negligence when the unseaworthiness supervened, and the presumption that she was unseaworthy on leaving Sydney is fully rebutted, even if it were ground, in absence of fault on the part of the insured, to relieve the insurer.

Again, I think there is no evidence to show that the schooner was improperly loaded. There remains, then, only the question of the amount of loss, and first, were there two insurances or one? Secondly, is the loss of freight proved? With regard to the first question, I think that there was not a double insurance, but an insurance on one voyage, with a mere partition as to the risk. Therefore, as the voyage had begun, the risk attached, if there was anything to insure; but it does not appear there was any positive contract, or any specific cargo, on which the insurer could properly rely for the second portion of the voyage. This point could have been made perfectly clear by the appellant, if the fact he now contends for were true. I think, therefore, that he should only recover for the freight from Cow Bay to Recollet, that is for $500 and costs.

Sir A. A. DORION, C. J., said the majority of the Court were of opinion that it was proved that the vessel was unseaworthy when she left Mingan. If she had been seaworthy then, it would not matter at what point she had become unseaworthy, the guarantee of seaworthiness applying to the place where the voyage commenced, that is at Mingan. It was a rule that a vessel starting on a round voyage must be in such a state of seaworthiness that she does not require any repairs, unless the repairs be necessitated by storms or inevitable accident. If a vessel be in such a state as to require repairs soon after commencing the voyage, the *onus* is on the insured to show that she was seaworthy when she started, and the insured cannot recover if there be no evidence of damage after the voyage commenced. The vessel in this case started from Mingan; there was no proof that she met with any storm between Mingan and Cow Bay. So her sinking condition after leaving Cow Bay raised the presumption that she was unseaworthy when she left Mingan. There was no storm between Mingan and Cow Bay, and yet as soon as she loaded at Cow Bay she began to sink. The onus clearly was on the insured to establish that she was seaworthy when she left Mingan, but he had not proved that. In addition, there was the statement of the captain of the vessel, who was now dead. The captain, after going back to the Magdalen Islands, made a protest as to the reason why he abandoned the ship, and this was signed by him, and by the mate and one of the seamen. The protest did not speak of any

accident to the ship. The captain afterwards came to Montreal, and made an additional declaration before notary, in which it was alleged that after loading at Cow Bay they found that the vessel was sinking, and they put into Sydney and had the vessel repaired. This protest, containing a statement that the vessel went on a rock at Bersimis, was adopted and produced by the owner of the vessel himself, the present appellant. The only question was where was Bersimis? Was it after the risk attached or not? Of course, if it was after the risk had attached, the insured could recover. But if Bersimis was before they came to Mingan, then the damage was suffered before the risk attached, and the vessel being then unseaworthy, the insured could not recover. Now it is well known that Bersimis is a place on the north shore, before you come to Mingan. It was therefore for the owner, appellant, to show that the vessel was seaworthy when she left Mingan; but instead of doing that, he had established that damage was suffered before she touched at Mingan. Even without the protest of the captain and its adoption by plaintiff there was enough to confirm the judgment. But taking also into account the protest, there could be no doubt that the judgment was correct, and must be confirmed; but not on the points stated in the judgment below, viz., first that the preliminary proof was not furnished to the company; and, secondly, that the vessel had become unseaworthy in consequence of imprudence in making changes at Sydney. The majority of the Court put the judgment upon the ground that the vessel was not seaworthy when she left Mingan, and therefore the policy did not attach.

The judgment is as follows:—

"The Court, etc.

"Considering that the schooner "Providence," mentioned in the policy of insurance on which this action is brought, was not seaworthy when she left Mingan, the place of departure for the voyage, the freight of which was insured by the said policy;

"And considering that owing to the unseaworthiness of the said schooner at the time she left the said port of Mingan, the respondents have incurred no liability on the said policy for the loss of freight claimed by the said appellant;

"And considering that for the above reasons, there is no error in the judgment rendered by the Superior Court sitting at Montreal, on the 4th of May, 1878;

"This Court doth confirm the said judgment," &c. Ramsay and Tessier, JJ., dissenting.

Judgment confirmed.

Beique & Choquet for appellant.

S. Bethune, Q. C., counsel.

E. Carter, Q. C., for respondent.

CIRCUIT COURT.

MONTREAL, March 27, 1880.

PREVOST v. JACKSON.

Preliminary Pleas—Waiver.

The defendant pleaded a declinatory exception, an exception *à la forme*, a special answer, and a general denegation.

Plaintiff moved to dismiss the exceptions, urging that the preliminary pleas had been waived by filing pleas to the merits.

JETTE, J., held that filing pleas to the merits is not a waiver of the exceptions where, as in this case, there is a special reservation by defendant of his preliminary pleas. Motion rejected.

Duhamel for plaintiff.

Lambe for defendant.

CIRCUIT COURT.

MONTREAL, April 12, 1880.

BACHLAW v. COOPER et vir.

Liability of wife—Bread delivered at the common domicile for the use of the family.

The plaintiff sued for the price of bread supplied to defendant, *séparée de biens*. It was admitted that the bread was "delivered to the female defendant at her domicile, to wit, the joint domicile of the defendants;" that the price was reasonable; that the bread was consumed by the defendants and their children; that the male defendant was insolvent and unable to provide his wife and children with the necessaries of life.

W. S. Walker, for defendant, cited *Hudon & Marceau*, 1 Legal News, p. 603, as governing the case. The bread was charged to the husband, who had been sued for the price in a previous action.

CARON, J., followed the decision of the Court of Appeal in the case cited by defendant, and dismissed the action on the ground that credit had been given to the husband.

J. & W. Bates for plaintiff.

W. S. Walker for defendant.