The Legal News.

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A STRANGE PORTRAIT.

Once upon a time extraordinary presentments of Canada and Canadian affairs were not uncommon in American journals, but we were under the impression that they were becoming things of the past. Facility of intercommunication is rapidly effecting a wonderful change in the notions which the people of different countries formerly entertained of one another. But the *American Law Review* treats us to some surprising information about ourselves written after the old fashion. The article has reference to Lord Coleridge's change of programme as respects Canada. Our witty contemporary the *Albany Law Journal* referred to this as follows:—"Our "brethren on the Thames and on the St. "Lawrence should remember that Lord Cole- "ridge is not so young as he once was, and "that we, as his hosts, feel bound not to en- "danger his health by any such hyperborean "journeys as the Canadians would gladly tempt "him into. There is no telling where these "Canadians would stop. They might per- "suade his lordship into an arctic exploring "expedition." We relish this fun as much as any of our neighbours, but what is a jest in the columns of our Albany contemporary is proclaimed in sober earnest at St. Louis. The British provinces, we are told, "are the tail "end of an Empire; they are destitute of "distinction in arts, in literature, in agriculture, "in manufactures, and in mechanical inven- "tions."...."They have a vice-regal Court, "with its dudism and low-necked dresses. "They also have a few hereditary titles. "Their courts are modelled in close imita- "tion of the present English system, and they "have justices who would regard it almost a "contempt of court to have an American law "book read to them. They regard us as a sort "of a *koom posh* people, whose judges, legisla- "tors, and public men are universally corrupt, "and who are going to the dogs as fast as pos- "sible...They are trying to build a transconti- "nental railway along the margin of the frozen "zone—not because it is called for by a single "demand of commerce, but because it will pro- "mote a visionary dream of empire. There is "really no hope for their young men; for every "good place in their vast mercantile houses, "and in their educational and civil service, is "filled by young nincompoops imported from "England; and from all the provinces, east and "west, they are making to the States in great "numbers. Canada is like a breeding ground "of migratory arctic birds."

This would be very amusing as an after dinner sally by Mark Twain, but "there is no hope for" the man who seriously believes such ludicrous nonsense. At any rate it would be out of place in a legal journal to try to enlighten a writer, whose law may be very good, but who is so wofully astray in his facts. We do not think it right to devote our space to showing, for instance, that many of the States have been beaten by this "tail end of an empire" in growth of population; that as to agriculture, notwithstanding protective duties, the people of the States are generally willing to pay us our own prices for our butter, our apples, our potatoes, hay, and other products; that our literary men, however "destitute of distinction," are, at any rate, known so well that our neighbours have drawn several of their most brilliant preachers from their ranks: that the transcontinental railway, far from being the prompting of a visionary dream, has gradually gained over to its praise those who, like the London *Times*, most bitterly opposed it a few years ago; that our leading universities have at their head Canadians born, instead of "nincompoops from England;" that the most important offices everywhere, including the judicial bench, are filled by Canadians; that many of those who are "making to the States" are leaving their country for their country's good. All this is outside of our functions as conductors of a legal journal, but we may properly point out the curious blunder of our St. Louis contemporary with regard to the citation of American law books. So far from being considered a contempt of court, we venture to think that the leading writers of the United States — Story, Kent, Parsons, Bishop, Redfield, Cooley and others, as well as the principal State reports, are as much read and as often cited in our courts, and received with as much respect where they are applica-

ble, as they are in the courts of the Union. We do not know where our St. Louis contemporary could have picked up such a wonderful account of us, but we suspect that the writer, if he ever visited Canada, must have fallen into the hands of a Canadian Mark Twain and been very badly stuffed.

JUDICIAL SYSTEMS OF ENGLAND AND THE UNITED STATES.

The speeches of Lord Coleridge since his arrival in America have presented little that arrests the attention, still less that merits reproduction. His Lordship is an easy, graceful speaker, and the observations which he has been forced to make on the several occasions, festive or otherwise, on which he has appeared before public assemblies in America as a distinguished guest, are quite in keeping with his reputation as a genial and accomplished man of society, but they are unmistakably common place. It is but fair to add that the Lord Chief Justice is one of the least pretentious of individuals, and that he frankly and modestly ascribes to the kindness and friendship of Mr. Gladstone rather than to his own merits the elevated position which he occupies. In fact, he quite underrates rather than over-estimates his own abilities. But while we have looked in vain for originality or brilliancy in his lordship's speeches, they are at least free from aught that could be regarded as offensive or undignified. The Chief Justice had to listen to a great deal of "tall talk", as, for example, at the formal reception by the N.Y. State Bar Association, Oct. 11, when Mr. Shepard began his introduction of the guest in these terms: "Eng-"land and America are met together; right-"eousness and peace have kissed each other. "Stars of the first magnitude in the legal heav-"ens come into conjunction when to you, sir, "as chief judge of five and a half millions of "freemen, elected thereto according to the "forms prescribed by our Constitution," &c &c. Mr. Shepard could not understand how ridiculously this stuff sounds in English ears; but his lordship was uniformly courteous and accepted with unfailing gravity and good humor all the prodigious compliments lavished upon him. On the occasion referred to, his lordship adverted at some length to the differences in the judicial systems of England and the United States. The following extracts from his speech, which was one of the most elaborate which he has made in America, are of interest:—

"It seems to me that there are one or two other differences, which upon clear, good and entirely uncontradicted evidence, exist between our system and yours. I am told with one voice that our courts in England go faster than your courts in America, and I cannot say with what pleasure an old, narrow-minded insular received the intelligence that in anything—even in a lawsuit—the old country went faster than the new. I am told also—and it seems to be the fact—that the judges in England take the liberty of assuming more the direction of affairs in cases which are tried before them, whether with or without a jury, than the practice of some of your States and the actual statutes in others permit to the judges in this country. It is not for me to express an opinion as to whether you are right or wrong. From our point of view, and in our circumstances, I cannot help thinking we are right; but nevertheless, I am not so presumptuous as to deny that it is very likely that from your point of view, and in your very different circumstances, you may be right, too, because, where the circumstances differ, the conclusions will naturally not be the same. One thing seems to me clear—that in England, with our fewer judges, we dispose, and dispose without arrears, of a very sufficient and satisfactory number of cases; and in this country upon the whole, in many States, and certainly, as I understand, in the courts of the Union, there is a very considerable arrear at the present time.

"You are probably aware that we in England have been engaged for the last ten years, beginning in 1873, when, as attorney-general, I was responsible for passing the Judicature Act through the House of Commons, in endeavoring to cheapen, and simplify and expedite our procedure upon the lines of those salutary statutes which the wisdom of Parliament enacted about thirty years ago (in 1852-54).

"At this moment, a committee, of which I have the honor to be chairman, having reported in favor of certain amendments, the judges have made large alterations in our rules of procedure, which I hope may be beneficial, but which I am not wise enough to undertake to

say will be beneficial; for no man can hope to tell, without practical experience, what will be the real operation of a new Code of Procedure.

"But it was high time that something was done to expedite, and amend and simplify the common law, which deserves all the praise which your chief judge and Mr. Evarts have lavished upon it, and which, some thirty years ago, was in serious danger.

"It had become associated in the minds of many men with narrow technicality and substantial injustice.

"That was not the fault of the common law, but it was the fault, if fault it were, of the system of pleading, which looked at practically, was a small part of the common law, but very powerful men had contrived to make it appear that it was almost the whole of it—that the science of statement was far more important than the substance of the right, and that rights of litigants themselves were comparatively unimportant unless they illustrated some obscure, interesting and subtle point of the science of stating those rights.

"Now, I prefer to confirm what I am telling you, by authority much greater than my own, because it might be said, and said with truth, that I was merely condemning a system which I possibly disliked, because I never was very proficient in it. I well recollect to have heard Sir Wm. Erle, who was a great lawyer, who was chief judge of the Common Pleas, and whose name may be known to many of you on this side of the Atlantic—relate a remarkable conversation that took place between a learned baron—a famous man of those days—himself, and a third person, very distinguished in his day, but little remembered in the present: Charles Austin, a man of singular gifts of mind, who devoted himself chiefly to making a fortune, and whose reputation, immense with his contemporaries, is chiefly known to posterity by a striking sketch of him, given in his autobiography. These three men were in a London Club, and the baron said that he had joined in the building of sixteen volumes of *Meeson & Welsby*, and that that was a very great thing indeed for any man to do. Sir Wm. Erle, with more candor than courtesy, replied that it was a fortunate thing there had not been a seventeenth volume of *Meeson & Welsby*, for if there had, the common law would disappear from creation amidst the universal jeers and hisses of mankind, and Charles Austin followed up this observation of Sir Wm. Erle, in this way: he said: 'I have heard you say that before, baron, and suppose there is something in it, but now, in candor—in the palace of truth—do you think that the world, or that England itself, would have been the least worse off if every case in every volume of *Meeson & Welsby* had been decided the other way?' Now, you must not pursue a story, you know, beyond its legitimate conclusion, and what exactly it was that the learned baron answered, I am really unable to say; but it is a comfort to think that those subtleties, if there was any merit in them, have not entirely been banished from the earth, and I am told that there is a State in this progressive Union in which they are, at this moment, as alive as ever, and I venture upon this subject, to make you a practical suggestion.

"You have lately procured, may I say most wisely, a great National Park, into which the beauties and glories of nature, and the strange and eccentric forms which natural objects sometimes assume, may be preserved forever for the instruction and delight of the citizens of this great republic. Could it not be arranged, that with the sanction of the State, some corner in that one State should be preserved, as a kind of pleading park, in which the glories of the *negative pregnant*, *absque hoc*, *replication de injuria*, *rebutter* and *sur-rebutter*, and all the other weird and fanciful creations of the pleader's brain might be preserved for future ages to gratify the respectful curiosity of your descendants, and that our good old English judges, if ever they re-visit the glimpses of the moon, might have some place where their weary souls might rest—some place where they might still find the form preferred to the substance, the statement to the thing stated. I cannot help thinking that that would be a matter worthy of the liberality, of the genius and conservative instincts of the great American public. But it is really, to speak seriously, a great pleasure for me to find that slowly, and if I may say so, with wise hesitancy, you are gradually admitting into your system those changes which we have lately made, as and when they satisfy the needs, the temper, and the genius of your people."

THE GOVERNOR GENERAL.

The present week has been marked by a change of Governor General, but to us an incident of this nature has only social and historical significance. It has less effect upon the money market than a slight attack of indigestion suffered by a railway magnate has upon the susceptible financial pulse of our republican neighbours. The Marquis of Lorne and the Princess Louise leave our shores with the respect and good wishes of all. They have done much during the last five years to dispel the misconceptions about Canada which existed on the other side of the Atlantic. The Marquis of Lansdowne, who has assumed the administration, is of distinguished ancestry, and unblemished reputation. He has already had considerable experience in state affairs, and although he may not have the wit and brilliancy of a Dufferin there can be no doubt that he will fill with dignity and tact the office which he has been pleased to accept. His Excellency speaks with purity both the languages in use in our country. This has been noticed by the daily journals as though it were remarkable that an English peer should speak French with a pure accent. The circumstance is far from unusual among educated Englishmen, and in the case of the Marquis his connection on the maternal side with the Comte de Flahaut makes it quite natural that he should be conversant with the French language.

NEW BOOKS.

INSANITY, considered in its Medico-Legal Relations, by T. R. Buckham, A.M., M.D.—J. B. Lippencott & Co., Philadelphia, Publishers.

Dr. Buckham explains in his preface that the chief objects in view in this work were "to point out the pernicious uncertainty of verdicts in insanity trials, with the hope that by arousing attention to the magnitude of the evil, at least some of the more objectionable features of our medical jurisprudence may be removed; to faithfully call attention to the more prominent causes of that uncertainty; and, with the most friendly feelings for both my own and the legal profession, to criticise severely, and to censure when necessary, not the individuals, but the system which has made insanity trials a reproach to courts, lawyers, and the medical profession." The author supports the "Physical Media theory," *i. e.*, that in this life the mind is wholly dependent for the manifestation of its operations on certain organs of the body designated physical media. Insanity, in his view, may correctly be defined as follows:—"A diseased or disordered condition, or malformation, of the physical organs through which the mind receives impressions, or manifests its operations, by which the will and judgment are impaired, and the conduct rendered irrational." And, as a corollary, it is laid down that insanity being the result of physical disease, it is a matter of fact to be determined by medical experts, not a matter of law to be decided by legal tests and maxims. The medical experts here referred to are those who have made a special study of the subject, not general practitioners, the calling of the latter to give evidence in insanity cases being strongly denounced. We have indicated the scope of the work before us. It is well known that the ordinary tests of insanity have not worked satisfactorily in the past. As an eminent specialist (Dr. Maudsley) has said, "were the issue to be decided by tossing up a shilling it could hardly be more uncertain." Dr. Buckham is entitled to an attentive hearing. He has treated his subject in an interesting manner, all technicalities being avoided, and the time expended in the perusal of his work will not be wasted.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 24, 1883.

DORION, C.J., MONK, RAMSAY, TESSIER and CROSS, JJ.

FLETCHER (plff. below), Appellant, & THE MUTUAL FIRE INSURANCE CO. FOR STANSTEAD & SHERBROOKE COS. (defts. below), Respondents.

Procedure—Jury Trial—Motion for judgment on the verdict.

The motion for judgment on the verdict, in a civil case, can only be opposed by means of a motion for a new trial, a motion in arrest of

judgment, or a motion for judgment non obstante veredicto (422 *C.C.P.*); *and where these motions had been made unsuccessfully by the defendant, and the plaintiff then moved for judgment on the verdict, the findings of the jury must be taken as they stand, and the plaintiff's motion for judgment on the verdict will be granted if the findings of the jury are in his favor.*

The action was brought in the Court below on a policy of insurance for $800. The case was tried before a jury, and a special verdict was found, in the form of answers to 29 questions. The company moved for a new trial, in arrest of judgment, and for judgment *non obstante veredicto*. These motions severally failed. The plaintiff then moved for judgment on the verdict, which was granted by the Court at Sherbrooke. The Court of Review at Montreal set aside this judgment, "considering that the facts of record established that plaintiff was not proprietor of the premises insured by him when he made the insurance, and that by the Consol. Stat. of L. C., ch. 68, s. 25, the policy was void." See 5 Legal News, p. 55. The appeal was from the judgment in Review.

Brown, for the appellant, contended that the Court could not examine the evidence on a motion for judgment on the verdict. There was no case on record where a court had reversed a judgment founded on a verdict, for the reason that the verdict was not supported by the evidence. In the next place it was contended that the appellant was, in fact, the owner when the loss occurred, and that the verdict was in favor of the appellant on this point.

Wm. White, Q. C., for the respondents, contended that the verdict did not entitle the appellant to any judgment. The answer to the question, whether the plaintiff was owner, was "the jurors *think* he was." The verdict really sustained the defence, and the Court of Review was right in setting aside the judgment in favor of the appellant.

RAMSAY, J. It is not very easy to seize the difficulty in this case, which seems to be created by some rigid interpretation of articles of the Code of Procedure.

An examination of the jury process will obviate any difficulty so created, by giving the key to the proper interpretation.

Under the system of the general verdict, there was no difficulty as to the person who had obtained it—the finding was for the plaintiff or for the defendant. The verdict was then checked by one or other of three motions. There was a motion to arrest, or for a new trial, or motion *non obstante*. With the special findings on interrogatories, another difficulty arose—it was as to which party had gained by the verdict. In other words, what was the result of these findings? Now that question can never be affected by the article of the code which says that the motion for judgment on the verdict can only be opposed by the three motions, (Art. 422, C. C. P.) What the article means is this, that if one party has got answers, the logical result of which is to give him a right to the verdict, no one can go behind these findings but by the three motions. In other words, you cannot attack the findings of the jury but in the three ways indicated. Of course, if the delay for taking advantage of these methods is expired the findings must be taken as they stand.

Now what were the issues?

The first issues raised by the pleas are:

That appellant was not owner;

That the property was encumbered otherwise than he had declared;

That there was over-valuation.

Do the findings in fact cover these issues in such a way as to give appellant a right to judgment?

The only point upon which there seems to be the least obscurity is the appellant's title to the property. He has had to make up a title, beginning in a verbal title, but dating back as far as 1872. The policy is in 1874, and in 1872 the property was bought in at public auction for appellant. I don't think now we can go into the question of whether this was properly proved or not.

There is no finding to support the allegation that there was any mis-statement as to the property. "The jurors think he did not conceal facts." They do not know "that the property was encumbered." Again, they distinctly say there was no over-valuation.

As the verdict is not attacked in the only manner permitted by law, and as the findings

are clearly in favor of the appellant I am to reverse, and give plaintiff judgment on his motion.

The judgment is as follows :—

"Considering that the jury sworn to try the present case have, by their answers to the questions submitted to them, found in favor of the appellant, plaintiff in the court below, and that they have assessed the damages which he has sustained by the fire mentioned in the pleadings in this cause at the sum of $600;

"And considering that the motions made by the respondents in arrest of judgment, for judgment *non obstante veredicto*, and for a new trial, had been disposed of when the case was heard before the Superior Court on the motion of the appellant for judgment on the verdict;

"And considering that the said motion, not being opposed in the mode prescribed by article 422 of the Code of Civil Procedure, the appellant was entitled to his judgment on the verdict;

"And considering that there was no error in the judgment rendered by the Superior Court at Sherbrooke on the 18th day of May, 1881, and that there is error in the judgment rendered on the 31st day of January, 1882, by said Superior Court sitting in Review;

"This Court doth reverse the judgment rendered by the said Superior Court sitting in Review on the 31st day of January, 1882, and doth confirm the judgment rendered by the said Superior Court, at Sherbrooke, on the 18th of May, 1881, and doth condemn the respondent to pay the costs as well those in the Superior Court as those incurred in Review and on the present appeal."

Judgment reversed.

Ives, Brown & French for Appellant.
Camirand & Hurd for Respondent.
W. White, Q. C., counsel.

COURT OF QUEEN'S BENCH.

MONTREAL, September 19, 1883.

DORION, C.J., MONK, RAMSAY, CROSS & BABY, JJ.

BENOIT (plff. below), Appellant, & BRAIS (deft. below), Respondent.

Promissory note signed by error—Evidence.

The defendant, sued on a promissory note, pleaded, in the first place, that the signature was a forgery, but subsequently amended his plea, and alleged that he signed the note by error, intending to give a receipt for the amount stated therein. Held, that in the case of an illiterate person who signed by making his mark, this change of defence was not an indication of bad faith, and, the evidence appearing to the Court to sustain the amended plea, the judgment dismissing the action was confirmed.

The action in the Court below was brought upon a promissory note for $710. This note was signed by the defendant with a cross, in the presence of a witness, and was payable on demand with interest.

The plea was that the defendant did not sign the note, and had no reason to do so, seeing that the plaintiff Benoit was at the time his debtor. At the trial it appeared that the defendant Brais had really made his mark on the document produced. He then obtained leave to amend his plea, and pleaded that he is unable to read, and that he signed the paper as a receipt for a sum of $710 paid to him by Benoit.

It appeared that Brais sold a property to Dr. de Grosbois in 1872 for $5,000. Benoit bought the same property from De Grosbois and assumed the payments coming due, which were at the rate of 6,000 francs per annum. On the 1st November, 1874, there were $500 due as principal and $210 as interest, making $710, the amount of the note in question.

The Court below was of opinion that the note sued upon had in fact been given as a receipt for this sum, and the action was accordingly dismissed.

RAMSAY, J. There is a question of procedure raised on this appeal, which appears to me to have no solid foundation. Appellants complain of a surprise, and that a certain notice of *enquête* for the 7th May, 1880, was originally for the 6th, and that it appears on the face of it to be altered. The attorneys of the appellant are not those of plaintiff in the Court below, and it seems that Mr. Longpré after this, on the 12th May, 1880, accepted service of the notice of hearing on the merits, without any sort of reserve or objection. In addition to this, it is difficult to see what appellant has suffered from this alleged surprise—what more he has to offer to the Court on the point, the whole case being a very simple one. Appellant sued the

Respondent for the amount of a promissory note made in the following terms:

"St. Bruno, 5 Décembre, 1874.

"Pour valeur reçue, à première demande, je promets payer à Adolphe Benoit, la somme de sept cent dix piastres courant, avec intérêt.

"A. M. sa X marque. Brais.

"F. H. N. Berthiaume,
"Témoin."

At first respondent pleaded to this action that he never signed such a note, and that it was a forgery, and he supported this plea by affidavit. Later, he moved to be allowed to amend his defence, and to be permitted to plead that he had signed, by his mark, the note in question, but that he intended to give a receipt for this amount of money. As to the change of means of defence, it is insisted that it is evidence of bad faith, and that the new plea is an admission of the falsity of the former plea, the truth of which was vouched for by affidavit. I cannot draw the conclusion from this change of plea appellant does. It is true that the two pleas are incompatible, but it is to be remembered that the signature to the promissory note was simply the mark of an illiterate person (made, too, by another; Ev. of Berthiaume, pp. 8 and 11), who now says he thought he was signing a receipt. If it be true he was in error as to the nature of the document, it is not wonderful that he should plead that he did not sign a promissory note, and if he pleaded that in good faith, it is no evidence of turpitude that he should swear to it. Deprived of all sensational matter, the case resolves itself into this: did defendant sign the note by error? It is purely a question of evidence.

The evidence adduced by appellant is to me far from tending to give force to his case. The notary Berthiaume, brother-in-law of appellant, knows nothing of the transaction beyond the fact that plaintiff and defendant came and asked him to make a note and that he did it. No money passed, and nothing was said as to where the money came from. This is not very conclusive, it is true, but it is unusual among people of that class, carrying out a transaction before people who knew their affairs generally. On the other hand, respondent persisted in the attempt to establish that he could not have signed the paper in question at St. Bruno, as he was at Montreal on the 5th December, 1874. Again, I cannot consider the evidence of broken conversations with appellant as of any weight. The exact fidelity of the memory as to the words used, is more than questionable. The conversations with Berthiaume are not evidence at all, except in so far as they might affect his character for veracity, for his evidence is really little more than negative.

So far as I can see, the key to the mystery is to be found in the evidence of the appellant. I think it is impossible to believe his story. At the time the note was made, the legal relation between respondent and him was that of debtor and creditor. Now he wishes us to believe that he then, being indebted to respondent in a sum almost precisely, if not precisely the amount of the note, lent him $710, payable on demand with interest, and that he went on paying to respondent and to his son, without ever demanding payment of this demand note. Again, he tells us that he knew of a donation by respondent to his son which was not signified to him; he can't tell how he knew it, and that after that he dealt with the son and not with the father. This is not true. On the contrary, he admits having taken another note from respondent as a protection, and it appears by the action that on the 2nd November, 1875, (nearly a year later than the date of the note sued on), he took another note in notarial form from the respondent for $200, which was afterwards taken as part payment of the account between Benoit and Brais, father or son. We thus find a notable contradiction in appellant's testimony, and evidence of a course of proceeding identical to that followed on the present occasion, according to respondent's pretention.

There is still another point more conclusive. After a great deal of beating about the bush, appellant says that he got the money he lent to respondent from a *dépot* in the hands of Berthiaume, a day before from Berthiaume; and yet he does not venture to ask his brother-in-law one word about this matter, although he was twice examined as a witness. Under these circumstances, I see no reason to reverse the judgment of the Court below.

Judgment confirmed.

Préfontaine & Co. for appellant.

Lacoste & Co. for respondent.

COURT OF REVIEW.

MONTREAL, September 19, 1883.

DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

DOMINION OIL CLOTH Co. (deft. below), Appellant, and MARTIN (plff. below), Respondent.

Evidence—Variation of written contract by parole.

Testimony cannot be received to vary the terms of a written instrument; hence where the defendant, by an agreement in writing, undertook to grind the green furnished by plaintiff in pure linseed oil, the defendant could not be allowed to prove by testimony that the plaintiff verbally requested him to use other materials.

The appeal was from the judgment of the Superior Court, Torrance, J., reported in 4 Legal News, p. 237.

RAMSAY, J. This action arises out of a contract passed on the 22nd February, 1877, between the company, appellant, and the respondent, by which, in effect, the respondent agreed to supply the company appellant with a dry green paint of a specified kind, and to allow the company, appellant, to use his registered trade-mark on the green paint manufactured by the company by grinding in oil. There were stipulations in the contract obliging the company to grind the best linseed oil, to supply appellant with the manufactured paint, and to render to respondent regular monthly accounts. The parties were to settle by bills at four months.

This arrangement was carried on for about two years, when the respondent was led to believe that the company, appellant, had not, and was not carrying out its bargain; that it had not accounted monthly; that it had adulterated the paint so as to injure seriously the value of respondent's trade-mark, and he prayed that the company, appellant, might be enjoined not to use any longer respondent's trade-mark, to remove it from all packages of adulterated paint, and that the company, appellant, should also be obliged to furnish an account or pay the balance due, amounting to $1,000, and also damages to the amountof $5,000.

The appellant, in effect, admitted the contract, but said they had received further directions from respondent, directing them to "mix together certain ingredients by him named, in certain proportions by him indicated, with the view of producing the said green, or an article similar thereto, which said directions of plaintiff were minutely followed," and alleged an account had been rendered by which it appeared that the company owed respondent $72.24, and that the respondent owed the company$127.50; that the company had not used the trade-mark since respondent's protest, and offering to give up any paint they might have on payment of cost of manufacture. The company prayed further compensation of$72.24 by so much of $127.50, and dismissal of the action.

There was also a *défense en fait.*

The Court below found that the company had failed to make monthly returns; that the company did adulterate and sell inferior paint, with respondent's trade-mark; that the company owed respondent a royalty of $72.24; that the respondent owed the company $110.52; that it was not satisfactorily proved that the green was adulterated by directions of the respondent. The judgment was rendered in conformity with these conclusions.

The pleadings admit some adulteration, if not to the extent pretended by respondent, and therefore the first question is to enquire whether there is any legal evidence of the alteration of the contract. By the judgment appealed from, the Court specifically rejects the evidence of Samuel Woods, to the effect that the green was adulterated by the directions of plaintiff. This decision appears to me to be correct. If we take it and the French rule of evidence, verbal evidence is not evidence to vary the terms of the contract if the instructions be looked upon as a contract, and, at any rate, verbal evidence is not admissible to vary the instructions without a *commencement de preuve par écrit.* If we look at it under the English law of evidence, the conditions of a contract connot be altered by parole evidence, without a consideration. Under no rational system could it be tolerated to allow a party to avoid a contract in writing in his own favour by simply saying, "the contract is as you stated, but you told me I might give you an inferior article."

But Mr. Wood's evidence goes beyond the question of adulteration by direction of plaintiff. He admits the adulteration, and says he does not doubt that it was carried to the extent disclosed by the analysis of Dr. Girdwood.

On referring to the plaintiff's exhibit paper 27 of the record, it will be found that the adulteration is from about 22 to 24 parts of the cheaper material, leaving out the calculation as to the oil, the admixture of which was legitimate whatever its value. In other words, there ought only to have been 48.7 parts of sulphate of barytes to 109.5 of the paint as ground in oil, while in reality there were 71.3 parts to 100. It is admitted on all hands that this diminishes the value and the cost of the paint, and that it has damaged the standing of the paint, and for all this the Court, without entering into the question of the smaller value from which it does not appear plaintiff suffered, but treating the whole thing as damages, allowed the plaintiff $250. I see no reason to change this judgment, and I would dismiss the appeal with costs, and also the cross appeal with costs.

Judgment confirmed.

Beique & McGoun for Appellant.
Robertson & Fleet for Respondent.