The Lower Canada Law Journal.

Vol. II. JUNE, 1867. No. 12.

## THE JUDICIARY OF LOWER CANADA.

The *U. C. Law Journal*, in noticing our reports of the *Ramsay Contempt Case*, takes occasion to make some rather severe reflections upon the Bench of Lower Canada. The purport of its article is, that such a case could hardly have occurred in the Upper Province, the Bench there being in the full enjoyment of the esteem and veneration of the Bar. The article concludes as follows:—

"For our part, indeed, we hope that this unpleasant episode respecting legal life in this Canada of ours may not be further agitated in the English courts, and that however interesting the points in dispute may be in themselves they may be considered settled as they now stand.

"That such a state of things as have resulted in the *cause célèbre* of *Ramsay*, plaintiff in error, v. *The Queen*, defendant in error, exhibits, could not well occur in this part of Canada, we may well be thankful for. That such a boast may be as true of the future as it has been of the past, should be the constant aim and exertion of all those, who, on the bench or at the bar, or in the study of the laws, desire the welfare of their country. The heritage left to us by those able, courteous and high-minded men who set the standard of the profession in Upper Canada cannot be too highly prized; and he who first, whether by his conduct on the bench or at the bar brings discredit upon their teaching, will, we doubt not, meet the universal contempt which such conduct would deserve.

"The bench of Lower Canada is not (with some honorable exceptions) what it ought to be. The conduct of Lower Canada judges has, on more than one occasion, caused Canadians to blush; and we regret to say that people abroad know no distinction between the bench of Upper and Lower Canada, and so in their ignorance cast up on the Bench of Canada, the obloquy which appertains to that of the Lower Province alone."

Hard words need not cause us any concern unless they are true. The question then, is, are these things true?

We think that the majority of the gentlemen holding high judicial office in Lower Canada, will not compare unfavorably with the judges of Upper Canada or any other Province, but we must confess that there are exceptions, and it is these exceptions that have, unfortunately, brought discredit upon our Bench. The judges of England have obtained a wonderful repute for the calm and dispassionate discharge of their functions. Within the last two centuries they have become the pride and boast of the English people, and now it is a thing unheard of, for the faintest suspicion of partiality or prejudice to alight upon their decisions. In Upper Canada, the judges seem to be regarded with almost equal affection and reverence. Why cannot we say the same here?

Many of our readers will probably be able to answer this question quite satisfactorily for themselves, and in putting down the following observations, we are only expressing what is probably patent to all. In the first place, then, we believe that judges have sometimes been unfortunately selected from among men to whom the bench was not the scope of a noble aspiration, who did not regard the judicial office with the respect pertaining to it, who accepted it simply as a retreat from political uncertainties, or the inevitable incumbrance on the enjoyment of an official salary.

Secondly, men have been placed on the Bench, who were involved in pecuniary difficulties. A man may be perfectly honest and upright, though unable to meet his liabilities, but he is not so well qualified for an office of dignity. Lord Abinger was so strongly impressed with the belief that easy circumstances are necessary to keep up the respectability of a barrister, that it is stated he at one time intended to propose a property qualification for members of the bar. £400 a year was, in his opinion, the smallest income on which a barrister should begin. How much more necessary that the judge, who is every day called upon to dispose of cases involving large

pecuniary interests, should have no fear of the bailiff in his house, of executions against his lands—should at least, if not endowed with worldly goods, be able to say that he owes no man anything! We feel bound to add here that our judges are not fairly treated with respect to remuneration. The judicial salaries, especially in the large cities, should at least be doubled, and the retiring pensions should be adjusted on a more liberal footing.

In the third place, men have sometimes been placed on the Bench who had no love for their profession, who lacked a sound judgment, who had not gone through the toil and study necessary to fit them for their high office, and whose private life was far from inspiring respect.

It may be expected by some that we should add to this list, the appointment of politicians. But, in our humble opinion, the appointment of lawyers who have been engaged in political affairs, cannot be condemned, if the record of their political career is fair and honorable, and if they have also been distinguished at the bar. It is but right and reasonable that lawyers of integrity and ability should seek to enter the Legislature, where their opportunities of usefulness are greater and more extended. The real difficulty is, that in Canada politics in the past have been too petty, too selfish, too full of personal animosities. Thus it may happen, that a hot politician of one party is appointed to the Bench, though personally obnoxious to members of the Bar of the opposite camp. We trust that under the new Dominion this will cease to be the case. There is now no excuse for improper appointments, for we have at the bar no lack of men of great attainments, eminently worthy of the judicial seat, and enjoying the esteem and confidence of the bar and the public generally.

We must repeat, in conclusion, that the majority of our judges are not deficient in ability, learning or integrity. No charge of corruption has been made against any of them, and in this respect we are infinitely better off than our American neighbors with their elective judiciary. It may confidently be anticipated that the exceptional cases which have caused a loss of dignity to the Bench, will gradually be eliminated. The community in general and the bar will therefore watch with peculiar interest the appointments soon to be made, for on them will it greatly depend whether the Bench in the Province of Quebec is to assume its proper position.

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## THE BRITISH NORTH AMERICA ACT.

We have received the authorized text of Cap. III, of the present session of the Imperial Parliament: "An Act for the Union of *Ca-*" *nada, Nova Scotia,* and *New Brunswick,* " and the Government thereof; and for pur-" poses connected therewith," which became law on the 29th of March last. We regret that our space will not permit us to give entire this important measure, which, in the words of Mr. McGee, is to be "the last interference of England in our domestic affairs." The following are some of the provisions more directly affecting Lower Canada, and the Judicature.

5. *Canada* shall be divided into four Provinces, named *Ontario, Quebec, Nova Scotia,* and *New Brunswick.*

6. The parts of the Province of *Canada* (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of *Upper Canada* and *Lower Canada* shall be deemed to be severed, and shall form two separate Provinces. The Part which formerly constituted the Province of *Upper Canada* shall constitute the Province of *Ontario;* and the Part which formerly constituted the Province of *Lower Canada* shall constitute the Province of *Quebec.*

11. There shall be a Council to aid and advise in the Government of *Canada,* to be styled the Queen's Privy Council for *Canada;* and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

16. Until the Queen otherwise directs, the seat of Government of *Canada* shall be *Ottawa.*

17. There shall be One Parliament for *Canada,* consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

71. There shall be a Legislature for *Quebec* consisting of the Lieutenant Governor and of two Houses, styled the Legislative Council of *Quebec* and the Legislative Assembly of *Quebec*.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in *Nova Scotia* and *New Brunswick*.

98. The Judges of the Courts of *Quebec* shall be selected from the Bar of that Province.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in *Nova Scotia* and *New Brunswick*), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of *Canada*.

101. The Parliament of *Canada* may, notwithstanding anything in this Act from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for *Canada*, and for the Establishment of any additional Courts for the better Administration of the Laws of *Canada*.

129. Except as otherwise provided by this Act, all Laws in force in *Canada*, *Nova Scotia*, or *New Brunswick* at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick* respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of *Great Britain*, or of the Parliament of the United Kingdom of *Great Britain* and *Ireland*) to be repealed, abolished, or altered by the Parliament of *Canada*, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

## RAMSAY *v.* REGINA.

*To the Editor of the Lower Canada Law Journal:*

Sir,—I presume it was from the same source you learned that the statement made respecting *Driscoll's* case in my argument on the 6th March was totally unfounded, and this piece of secret history, that "if he (Chief Justice Rolland) was not present on every occasion, the sole reason was that he feared to be subjected to fresh insult." The impression the report conveys to the reader will depend a good deal on the reader's intelligence, but the point plainly made by me was that in the Driscoll case, Mr. Justice Rolland took no part in the proceedings. It was never said that he was not on the Bench when the rule issued; but what I said was this, that Mr. Justice Rolland was not on the Bench on the 28th March, when Mr. Justice Aylwin read the famous paper beginning, "The marked misbehaviour of the person who represents the attorney-general &c.," and on the 11th of April when the rule was taken he was on the Bench, but far from presiding as you say, he took no part in the matter, and the rule, which I believe was in Mr. Justice Aylwin's own handwriting, was read by him. As for the reason given for the non-appearance of Chief Justice Rolland on the 28th, I do not believe it. Had he had any such fear it would have operated as strongly on the 11th April as on the 28th March, but to attribute to a childish fear, the forbearance which was evidently dictated by a sense of honour and regard for the judicial oath, is a slander on the memory of an upright and honorable man. Apart from any question of law, no man with the faintest sense of honour or decency would consent to sit as a sworn judge when he could be supposed to have a bias. And so the late Mr. Justice Mondelet would not sit in the Seigniorial Court because he was the owner of Seigniorial property, yet in that case there was no party interested, the matters to be decided being simply abstract questions of law.

I see you also support it as *probable* that dread of further insult prevented Mr. Justice Crosby from sitting in the McDermott case, and you add, "that there is no ground for

supposing that Mr. Justice Crosby deemed himself incompetent." There can be no better ground for such a supposition than the general rule which lays down that no man shall be a judge in his own case. It would be more conclusive for the theme which you seem desirous to support, if you could find a case where a man had sat in his own case. It might perhaps be some answer to the general principle, which seems to be based on the laws of morality, and to the case of the King v Lee, 12 Mod., p. 514, cited by me, which no one has attempted, so far as I know, to answer. The judges of the Court of Queen's Bench, and a certain class of politicians, may twist and turn the matter as they will, but they will never get unprejudiced people to believe, whatever they may think of the abstract merits of the case, that Mr. Drummond was morally justifiable in taking up in the Court where he sat alone a pretended contempt which, if a contempt at all, was a contempt of the whole Court, and which the whole Court for an entire term refused to notice. He may protest that he was not avenging from a place of safety a personal affront; but his protestations will make no converts.

Your obdt. servt.,

T. K. RAMSAY.

Montreal, 12th May 1867.

[It seems to us that the material point is whether Mr. Justice ROLLAND abstained from taking an active part in the proceedings against Mr. DRISCOLL, because he deemed himself incompetent. If it was illegal for him to take an active part, was it not equally illegal to sit when the rule issued? We have the best authority for stating that Mr. Justice AYLWIN would not have dealt with the case, unless Mr. Justice ROLLAND had consented to take part, and we see nothing slanderous in supposing that Judge ROLLAND wished to have as little as possible to do with a disagreeable matter. We are far however from advocating the propriety or expediency of the Judge, against whom a contempt has been specially directed, disposing of it alone, whenever such a course can possibly be avoided. On the contrary, we have all along inclined to the opinion that in the present case it was incumbent on the Court of Queen's Bench, which met on the 1st of September last, to take notice of the letters complained of. If the majority of the judges had been averse to taking any steps, then, in our humble opinion, it would have been better to have let the matter rest. In the recent remarkable case in Nova Scotia (which we hope to be able to give next month), where Mr. WALLACE, a barrister, wrote an insulting letter to the CHIEF JUSTICE of the Supreme Court, the judgment suspending Mr. WALLACE was pronounced by the CHIEF JUSTICE himself who, however prefaced his judgment with the words: "The judgment I am about to pronounce is to be taken as the judgment of the whole Court," (Law Rep. 1 P.C. 287.) But while admitting that it is more *becoming*, where an individual judge has been insulted, that he should not move in the matter alone, we have seen nothing to show that such a course is illegal, and it appears to us in some instances (as where a judge is alone in a rural district) almost unavoidable. Ed. L. J.]

## THE LOWER CANADA REPORTS.

The issue of the *Lower Canada Reports* has been suspended since December last, and it is stated on good authority, (though we have seen no official intimation of the fact,) that it will not be resumed. This series of reports was authorized by an Act of the Provincial Legislature, under which a tax of $5 per annum was imposed on members of the bar and various legal functionaries for its support. At this time no citable reports were published in Lower Canada, and the want of them was greatly felt and deplored. The tax, however, did not prove very popular, and has not been collected for several years back. Of late years the cost of preparing and editing the reports has been almost entirely defrayed out of the public monies, the Public Accounts showing that over $2,500 per annum has been paid for this purpose to M. Lelièvre, the late editor. The L. C. Reports comprise sixteen volumes, and contain the valuable reports prepared by one of the most eminent practitioners in Canada, A. ROBERTSON, ESQ., Q. C., one of the Montreal *collaborateurs*.

## BANKRUPTCY—ASSIGNMENTS.

| NAME OF INSOLVENT. | RESIDENCE. | ASSIGNEE. | RESIDENCE. | DATE OF NOTICE TO FILE CLAIMS. |
|---|---|---|---|---|
| Anderson, M. & E. | London | L. Lawrason | London | May 1st. |
| Arthur, William | Goderich | S. Pollock | Goderich | April 16th. |
| Barette, Louis | St. Rémi | A. B. Stewart | Montreal | May 18th. |
| Battle, Matthew | St. Catherines | Alph. S. St. John | St. Catherines | May 1st. |
| Beaudette, J. C., & Co | Plessisville de Somerset | T. Sauvageau | Montreal | May 10th. |
| Belcourt, Ferdinand Napoléon | Ottawa | Francis Clemow | Ottawa | May 21st. |
| Bradford, Arthur Nelson, individually and as partner of Bradford & Mercier | Upton | T. Sauvageau | Montreal | May 2nd. |
| Brown, Johnston | Ottawa | Francis Clemow | Ottawa | April 30th. |
| Carson, Robert W. | Clarke | E. A. Macnachtan | Cobourg | April 27th. |
| Casey, Gilbert S. | Napanee | W. S. Robinson | Napanee | April 18th. |
| Connell, James, Adam, and John | Hamilton | W. F. Findlay | Hamilton | April 29th. |
| Conway, William | Napanee | W. S. Robinson | Napanee | April 22nd. |
| Cornell, John | Hespeler | H. F. J. Jackson | Berlin, C. W. | April 29th. |
| Cornick, Samuel | Dunville | Geo. B. Magee | Dunnville | April 19th. |
| Cusson, Alfred, individually and as partner of Cusson & Vincent, Cusson, Normand & Vincent, and Cusson & Normand | Longueuil, C. E. | John Whyte | Montreal | April 30th. |
| Dewsberry, Isaac | Township of Mono | Wm. Parsons | Orangeville | May 9th. |
| Dolsen, Samuel G. | St. Catharines | Robert Fowlie | St. Catharines | April 15th. |
| Drake, James W. | Walkerton | W. Collins | Walkerton | April 16th. |
| Flindall, Peter James | Trenton, C.W. | A. B. Stewart | Montreal | April 18th. |
| Forcier, Toussaint | Roxton Pond, C.E. | T. Sauvageau | Montreal | May 10th. |
| Gagnon, Pierre | Montreal | T. Sauvageau | Montreal | May 15th. |
| Galbraith, Robert Alexander | Simcoe | A. J. Donly | Simcoe | April 29th. |
| Gallon, James | Lindsay | S. C. Wood | Lindsay, C.W. | May 7th. |
| Gamble, John William | Walkerton | W. Collins | Walkerton | May 15th. |
| Gauvreau, Joseph | Montreal | John Whyte | Montreal | April 20th. |
| Good, Thomas | Colborne | John Holdan | Goderich | May 11th. |
| Green, Eli Owen | London | Thos. Churcher | London | April 29th. |
| Green, George | Wingham | S. Pollock | Goderich | May 18th. |
| Hall, William | Toronto | W. T. Mason | Toronto | April 27th. |
| Hamilton, Alexander | Toronto | John Kerr | Toronto | April 22nd. |
| Hazen, Henry Wilkinson | Simcoe | A. J. Donly | Simcoe | May 6th. |
| Henderson, William | Toronto | Thomas Clarkson | Toronto | May 1st. |
| Hillyer, Edward Scager | Simcoe | A. J. Donly | Simcoe | May 21st. |
| Howard, William | Toronto | Thomas Clarkson | Toronto | April 24th |
| Hutty, Peter | Toronto | Thomas Clarkson | Toronto | May 6th |
| Jondro, William, individually and as member of firm of Wilkey & Jondro | Stanstead | Stephen Foster | Stanstead | May 2nd. |
| Kalar, Francis | Woodstock | Jas. McWhirter | Woodstock | May 6th. |
| Kavanagh, Michael | Ottawa | Francis Clemow | Ottawa | April 29th. |
| Lalonde, Stephen | St. Anicet | T. Sauvageau | Montreal | May 17th. |
| Lamprey, Brook Young | Guelph | E. Newton | Guelph | April 20th. |
| Langellier, Antoine | St. Johns, C. E | T. Sauvageau | Montreal | April 30th. |
| Latrémouille, Denis | St. Jean Chrysostôme | T. S. Brown | Montreal | May 22nd. |
| Lee, William | Compton | A. M. Smith | Sherbrooke | April 17th. |
| Lester, Henry | Hamilton | W. F. Findlay | Hamilton | April 25th. |
| Lindsay, William | Lindsay | S. C. Wood | Lindsay | April 29th. |
| Lynn, William | Sherbrooke | A. M. Smith | Sherbrooke | May 1st. |
| McBride, William and John | London | Thos. Churcher | London | April 23rd. |
| McCullough, John Robert | Township of Darlington | Philip Potter | Tp. Darlingt'n | April 23rd. |
| McDiarmid, Peter | St. Thomas, C. W. | J. Ardagh Roe | St. Thomas | May 20th. |
| Macdonell & McPhaul | Cornwall | John Whyte | Montreal | April 29th. |
| Marcotte, Isaïe and Thomas Poupore | Tp. of Allumette Island | Francis Clemow | Ottawa | April 13th. |
| Moffat, William | Pembroke | Thos. Deacon | Pembroke | May 18th |
| Morrison, W. C. | Toronto | Thomas Clarkson | Toronto | May 11th. |
| Nulty, M., & Sons | Belleville | Geo. D. Dickson | Belleville | May 9th. |
| Paquette, Salveny | Waterloo, C.E. | T. Sauvageau | Montreal | May 4th. |
| Pridham, Richard | Grenville | T. S. Brown | Montreal | April 25th. |
| Rackett, Arthur Henry | Woodstock | Jas McWhirter | Woodstock | May 21st. |
| Reid, Nathaniel | London | Thos. Churcher | London | April 20th. |
| Reeve, Sarah | Toronto | Thomas Clarkson | Toronto | May 7th. |
| Secord, Solomon | St. Catherines | Absalom Foster | St. Catherines | April 20th. |
| Shaw, Levi Allan | Simcoe | A. J. Donly | Simcoe | April 30th. |
| Spring, James | London | L. Lawrason | London | May 15th. |
| Swetman, William | Napanee | W. S. Robinson | Napanee | May 17th. |
| Taggart, John | London | Thos. Churcher | London | April 15th. |
| Teeter, Conrad | Grimsby | P. B. Nelles | Grimsby | May 2nd. |
| Wardlaw, John | Woodstock | Jas. McWhirter | Woodstock | May 15th. |
| Willson, William | Township of Wallace | Thos. Miller | Stratford | May 1st. |
| Wilson John | Township of Fenelon | S. C. Wood | Lindsay | April 29th. |

## AGREEING TO DISAGREE.

In the case of *White* v *Calder*, at New York, recently, the Jury came into Court and stated that they "had agreed to disagree." The Judge refused to receive this statement and sent them back. This was subsequently made a ground of exception in the Court of Appeals, but Chief Justice DAVIES held that it is not error for the judge to refuse to discharge the jury until they have agreed upon their verdict: whether or not to discharge them being a matter for his discretion. It is stated that in a former case, in the Superior Court, the Jury told Mr. Justice BARBOUR in the morning that they had agreed to disagree, and consequently had separated during the night! The Judge administered a reprimand, emphasized by a fine of $500 each, and the suspension of the officer who had allowed them to separate.

## THE COURT OF REVISION AT MONTREAL.

In consequence of the delay in filling up the vacancy occasioned by the appointment of Mr. Justice BADGLEY to the Court of Appeals, and the indisposition of Mr. Justice SMITH, the sittings of the Court of Revision have now been suspended since December last, with the exception of two days, when Mr. Justice LORANGER came to town for the purpose of completing the Bench. A large number of cases have thus been locked up and delayed for many months, and the members of the bar residing in the country districts put to serious inconvenience, in making useless journeys to town to attend the sittings.

EVENLY MATCHED.—In the cause list of one of the New York Courts, on May 4th, appears the case of *Quirk* v *Wylie*. Surely these gentlemen conduct their suit in person.

—The *Pall Mall Gazette* says that one at least of the judges systematically refuses to add to the sentence of death, "May the Lord have mercy on your soul."

—Our notice of the retirement of Mr. Justice AYLWIN is deferred till next month.

# LAW JOURNAL REPORTS.

## COURT OF QUEEN'S BENCH.

APPEAL SIDE.

Dec. 7, 1866.

EASTERN TOWNSHIPS BANK (plaintiffs in the Court below), Appellants; and PACAUD (hypothecary creditor opposing in the Court below), Respondent.

*Practice—Privilege for Costs.*

*Held*, that a chirographary creditor bringing lands to sale is entitled to be collocated by privilege for costs, as in an *exparte* action without *enquête*.

*Held*, also, that the Court of Review, in revising a judgment homologating a report of distribution, cannot order a larger sum to be paid over to an opposant than that awarded to him in the original report, until he shall first have been collocated for said larger sum in a report of distribution duly published.

This was an appeal from a judgment of the Court of Review at Montreal, on the 30th of November, 1864, modifying a judgment of the Superior Court at Sherbrooke, rendered on the 28th of September, 1864. The judgment at Sherbrooke homologated a report of distribution of moneys levied on the lands of the defendants by the plaintiffs, who had obtained judgment on a promissory note. The respondent, a hypothecary creditor, inscribed the case for review at Montreal, and the Court of Review rendered a judgment to the effect that the plaintiffs had no right to be paid their costs of action as privileged costs of distribution. From this judgment the plaintiffs brought the present appeal. The principal grounds of appeal were as follows:—

1. Because the judges sitting in review at Montreal by their judgment at one and the same time made and homologated a new report of distribution, and thereby prevented any party desirous of so doing, from contesting the same, or any collocation therein contained.

2. Because in and by the report of distribution contained in said judgment complained of, the said appellants are not allowed any costs whatever of suit in their action in said Superior Court, though said costs were necessary in order to bring the lands of defendants in said suit to sale, and inured to the benefit of all creditors.

3. The Court of Review had adjudicated upon the rights of third parties not before the Court, and particularly upon the claims of the heirs Gregory, who were creditors for the purchase money of the land in question.

For the respondent it was contended that the judgment of the Court of Review was in accordance with law, and that if it were the custom in the District of Sherbrooke to give a chirographary creditor costs of suit, such custom was an abuse, and should be abolished.

BADGLEY, J. I differ from my colleagues in this case which raises a question of procedure more than anything else. The respondent, a hypothecary creditor and opposant in the Court below, and the appellants, are the only parties in the record, the defendants having made default to appear, and the heirs Gregory not being at any time represented in the case. By the original judgment, the plaintiffs were allowed a considerable amount of costs, as their privileged costs of obtaining judgment and bringing the lands of the defendants to sale. The respondent took the case before the Court of Review, and there the judgment was modified, and the plaintiffs' claim for costs was reduced to costs subsequent to judgment. The heirs Gregory are not parties to this appeal, and must therefore presumably be supposed to have acquiesced in the final judgment of the Superior Court as revised by the Superior Court sitting in review. It is not within the province of this Court to raise objections in the interest of third parties. The appeal is limited to the judgment in review, and the plaintiffs, in urging their own interests, cannot go beyond the legality or illegality of that judgment. It is only with reference to the costs awarded to them that the appellants have any right to complain of the judgment. They claim the costs of an *ex parte* action, besides the costs of execution. But it must be remembered that they are only chirographary creditors, and the practice has long been established in Montreal, that where the claim is not privileged, the costs are not so against a hypothecary creditor. *Lalande* v. *Rowley*, (1 L. C. Jurist, 274.) The practice at Quebec it appears has of late been different, but I think it would have been proper to let the practice continue here as it has been, till the Code of Procedure comes into force and renders the practice uniform. I have therefore to dissent from the judgment about to be rendered.

MEREDITH, J. This case raises two points, first, as to the amount of costs to be awarded to chirographary creditors bringing real estate to sale; and, secondly, as to the course to be pursued by this Court or the Revision Court, in setting aside a report of distribution. There is no doubt that as to the first point different opinions have obtained. The practice here was simply to allow the costs of the fiat for execution, whereas the practice at Quebec has been to allow also the costs of an *ex parte* action. In this case a chirographary creditor brought real estate to sale. This could not be done without first obtaining judgment, and in doing so a certain amount of costs was necessarily incurred. I think the costs of suit awarded in such case should always be confined to the costs of an *ex parte* action; for even if the action has been contested, it does not follow that, if a hypothecary creditor had sued, his claim would have been contested. And there is the same ground for not allowing the costs of an *enquête*, because no *enquête* would have been necessary for a chirographary claim. This is the rule laid down in the Code of Civil Procedure which will soon be in force, and the present case comes from the District of St. Francis where that practice has always obtained. Therefore we allow to the plaintiffs as chirographary creditors bringing real estate to sale the costs of an *ex parte* judgment. We come now to the second point, what is the course to be pursued by this Court when it becomes necessary to set aside a judgment of distribution? Here, I may say that our judgment is that which we think should have been rendered by the Court of Revision. How does the case stand? The respondent, Pacaud, was collocated for a certain amount, afterwards the Court of Review increased the amount collocated to him, but instead of ordering a new report, they ordered the money to be paid to him at once. This is what we think objectionable. Surely, the plaintiffs had a right to contest this award. Suppose they had a *quittance* in their possession. What

we say is this, that the respondent's claim may be good or it may be bad, but in any case it should have stood before the Court a certain time. I say nothing here about the heirs Gregory. I confine my judgment to the two points, the plaintiffs' privileged costs, and the money disappearing before them without their being allowed to say anything about it. We say, let the respondent's claim be collocated in due course of law.

POLETTE, J., sat in this case, but not being able to attend at the rendering of judgment, his opinion, concurring with the majority, was read by the Clerk of the Court.

AYLWIN, J. I entirely concur in what has been stated by the Chief Justice (Meredith) and also in the able opinion of His Honor Mr. Justice Polette.

DRUMMOND, J., also concurred.

The judgment was recorded as follows: The Court...considering that the real estate, the proceeds of the sale of which are now before the Court, was brought to sale at the instance, and at the costs and charges of the appellants, and that the said appellants were and are entitled to be collocated by privilege for their said costs, as in an *exparte* case without *enquete*, and therefore that in the judgment now appealed from, in which the appellants are not collocated for their said privileged costs, there is error; and seeing also that by the said judgment the said respondent is ordered to be paid the sum of $405.30, without his having been previously collocated for the said sum, in a report of distribution made and published, so as to afford to the said appellants, and other parties interested, an opportunity of contesting the claim of the said respondent for the said last mentioned sum of money, and that in this respect also the said judgment is erroneous, doth in consequence reverse the said judgment, to wit, the judgment rendered by the Superior Court sitting in review at Montreal, on the 30th of November, 1864; and this Court proceeding to render the judgment which the Court below should have rendered in the premises, doth order the record in this cause to be remitted to the Superior Court at Sherbrooke, in order that a report of distribution of the moneys levied in this cause may be made and published in due course of law, and that such further proceedings may be had in the premises as to law and justice may appertain, and this Court doth condemn the respondent to pay to the appellants their costs, as well in this Court as in the Court of Revision, and it is lastly ordered that the record be remitted to the Court below.

*Sanborn & Brooks*, for the Appellants.
*E. L. Pacaud*, for the Respondent.

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March 7, 1867

SAMUELS, (plaintiff in the Court below,) Appellant; and RODIER, (defendant in the Court below,) Respondent.

*Lease—Injury to premises by fire—Action by Tenant to be reinstated.*

Where a fire, occurring during the lease, renders the premises leased temporarily uninhabitable, but does not totally destroy them, the tenant is entitled to hold possession, and to resume occupation of the premises as soon as repaired.

A tenant, who is bound by the lease to make all repairs himself, is not bound to repair the premises if seriously damaged by an accidental fire.

This was an appeal from a judgment of the Superior Court rendered by *Monk*, J., on the 20th of September, 1865, dismissing the plaintiff's action with costs.

The action was instituted by the plaintiff, under the Lessor and Lessee's Act, to compel the defendant to restore to the plaintiff possession of a shop and dwelling in Notre Dame Street, Montreal, which the plaintiff had leased from the defendant for five years from the 1st of May, 1861, and of which leased premises, the respondent had illegally resumed possession more than a year before the expiration of the lease. The plaintiff also claimed £150 damages.

To this action the defendant pleaded, 1. An offer on the part of plaintiff to give up the leased premises. 2. That on the night of the 24th of February, 1865, a fire broke out in the interior of the building leased, causing so much damage that the plaintiff left it, and the defendant at once took possession for the purpose of repairing the premises. That the destruction of the shop and dwelling was so

nearly complete as to put an end to the lease, especially as the defendant wished to enlarge, improve, and rebuild the shop and dwelling, so as to receive a higher rent therefor. 3. That the plaintiff had not taken due care of the leased premises, but some time before the fire had negligently suffered them to be inundated with water. That the fire took place through the fault of the plaintiff, or of some one in his employ, and destroyed so much of the interior of the building as to render it untenantable. That plaintiff was a careless tenant, and the circumstances of the fire were such that the Insurance Companies refused to insure the premises anew if the plaintiff remained in possession.

The action was dismissed in the Court below, Mr. Justice *Monk* being of opinion that the plaintiff had failed to establish his case, and particularly that he had not proved that the defendant took possession of the leased premises by force or against plaintiff's will; and further, that under the circumstances the defendant was justified in taking possession of the premises. From this judgment the plaintiff appealed.

AYLWIN, J. I have to differ from the majority in this case. The evidence of Teulon, bookkeeper of Sadlier & Co., shows that in November preceding the fire, part of the stock of Sadlier & Co. was damaged by water coming from the upper story of the plaintiff's dwelling. Teulon went to the plaintiff's store and asked him to pay for the damage, but the plaintiff answered that he was sorry, but it was not in his power to offer compensation; that since he had been in that shop he had been losing money. Teulon looked round his store, but did not consider that it was worth while taking proceedings, as the stock did not appear of sufficient value. The declaration does not say one word about the fire. The plaintiff merely alleges that he had been violently dispossessed of the premises, and claims to be put in possession. There is not a word about repairs being required. It is only by a special answer that the plaintiff alleges that the fire was accidental; that the defendant refused to repair the building, and took possession when the plaintiff temporarily quitted it. This special answer is a complete departure from pleading. It contains allegations which should have been made in the declaration. It should therefore have been set aside. No attempt has been made on the part of the appellant to prove in what way the fire occurred. I am of opinion that even if the declaration had been properly drawn, the judgment should have been confirmed on the evidence.

MONDELET, J. I am always disposed to confirm when it is possible to do so, but here I think the reasons of appeal are sufficient to reverse the judgment of the Court below. Samuels is proved to be an honest, industrious man. It cannot be doubted for one moment that the premises became uninhabitable in consequence of the fire, and although Samuels by his lease was bound to make repairs, yet this stipulation in the lease could not be made to refer to the repair of the house after a fire. The damages, however, will be restricted to £50.

BADGLEY, J. The facts of this case are as follows: Samuels leased the premises, a shop with dwelling above, from Rodier, for five years. He took possession and continued his tenancy until the 27th of February, 1865. On the night of the 24th—25th February, 1865, a fire occurred in the shop, which injured it very much, and prevented the defendant's use of it until repaired. The same fire extended to the dwelling above, which was not much injured in itself, except that the windows were broken, a circumstance not conducive to a tenant's comfort during the winter month of February. During his tenancy the defendant laid out $300 in improvements, and during all that time the landlord carefully abstained from breaking the conditions of the lease which specially relieved him from making any repairs. On the 25th of February, Samuels closed the shop entrances, and the stock in the shop, and the household furniture in the dwelling above, remained there until the 29th, when the insurance survey was held. The result of the survey was the payment to Samuels of his insurance, $1000, whilst the landlord secured indemnity to the extent of $600 for damages suffered, including of course in the estimate the injured improvements effected by Samuels.

The landlord took possession of the premises for the purpose of repairing them, and those repairs might have taken four or five weeks. He held the premises from the day after the fire, and at once took precautions as a prudent man to improve his position. His insurance indemnity secured him against any possible loss, but the opportunity was taken to increase his rent. Samuels was to pay £100 per annum during his lease, which wanted fourteen months to complete from the date of the fire. So on the first of March the landlord leased these premises as they were to the neighboring booksellers, Sadlier & Co., for $100 additional to Samuels' rent, and obliged Sadlier to make the repairs if Samuels should require them. This being satisfactorily settled, having received, on the 15th March, a protest and demand from Samuels to repair and give him up the premises, the landlord on the next day, the 16th, returns the complimentary protest by another, in which he distinctly informs his tenant of his intention to retain absolute possession, and to exclude him altogether.

In this state of things Samuels' action is brought for possession of the premises as they were when this adverse possession was taken, on the 27th of February. The plea has set out several facts: First, the plaintiff's offer to give up the premises to the landlord. This has not been proved. Second, that the premises were so much injured by the fire that the defendant took possession to repair. Third, that the destruction of the shop and dwelling was so nearly complete as to put an end to the lease. This has not been supported by proof. Fourth, defendant's wish to enlarge the premises. This is disproved by his own acts. Fifth, that plaintiff was a careless tenant, and reference has been made to injury caused by water in the November previous. But the defendant never took any steps to remove his tenant, and personally made no complaint. All the objections pleaded fail of being substantiated except one: that the defendant took possession of the injured premises *for the purpose of repairs*. The action is in forcible dispossession and ouster, and prays to recover possession of the premises as when they were taken by the landlord. The answer of the defendant is, yes, I did take possession, but I did so for the purpose of repairing them. He then exhibited his purpose and intent by at once leasing them to Sadlier, over Samuels' head, giving Sadlier immediate possession, and a few days after notifying Samuels that he should not re-enter. The plaintiff replies that his abandonment was temporary, that the repairs might be made by the defendant; that the defendant retained wrongful possession, there being fourteen months of the lease to run. The state of the premises was that the stock in the shop was much injured, the large show window, and doors back and front broken, the shelving, counter and drawers injured, the dwelling partially injured in the rear, part of the floor on the underside scorched, and the windows all broken; the walls all remained good, as well as the partitions and ceilings. This condition of premises is what the defendant calls the nearly complete destruction of the shop and dwelling by fire, whereby the lease was ended. It does seem quite clear that this did not constitute a destruction absolute, or an approximate destruction, or any but a very partial injury, which could have been repaired as proved in three or four weeks, and which the defendant by his plea declared it to be his intention to effect. It is true that by the lease the plaintiff was to make all repairs, but this clause surely did not extend beyond what the parties contemplated at the time. They did not contemplate the occurrence of a fire, for in such case the tenant would have been bound to rebuild and reinstate the entire premises, if entirely destroyed. If they did not contemplate this extreme, neither did they the partial loss by fire. The lease shows that the parties contemplated the use and enjoyment of the premises during the period of the lease, during which occupation and enjoyment the tenant was to keep them in order, and if he needed changes or improvements he was to make them himself. It is manifest that there was no such damage as to break the lease, and no such absolute abandonment as to justify the defendant's after determination to possess adversely.

Neither the facts nor law in this case are

intricate or difficult, and the remaining points may be briefly disposed of. Pothier, Louage, No. 194, says that ordinarily "les incendies arrivent par la faute des personnes qui demeurent dans les maisons." When a fire occurs, it is "facilement présumé arrivé par la faute du locataire." This may be taken as true, because if a fire occurs in an occupied house, it can only occur by the negligence or wickedness of the occupants. But Pothier is careful to make his authority or dictum rest upon a presumption, a strong one certainly, but still only a presumption. *Il est facilement présumé*, but in the next line he shows in plain language how this presumption is liable to be set aside: *à moins qu'il ne justifie que l'incendie est arrivé par un cas fortuit.*" The testimony in the case clearly establishes the accidental nature of the fire. Notwithstanding the insinuations of defendant's witnesses, the presumption against the plaintiff has been clearly rebutted.

With these explanations, the question turns upon the loss suffered by the tenant. His lease had fourteen months to run; out of this must be taken the time required for repairs, say one month. What, then, are his damages, and how does he establish them? A number of the most respectable tradespeople in the city have given their testimony in Samuel's favor. They base their calculations of damage upon the supposed results of the defendant's business. They state that he maintained his family and kept up his establishment respectably; and that £250 per annum must have been required to do this. His insurance for stock was $1000, but the value may not have been fully covered. I have had great doubts upon this part of the case; none upon the injustice of the landlord's conduct. Looking at the whole case, the increased rent obtained for the premises for the fourteen months to run, and the plaintiff being kept out of business for want of his premises for that time, I am disposed to concur in reversing the judgment, and allowing the defendant £50 damages, with costs.

DRUMMOND, J. I think the charge made against the plaintiff, of having lighted the fires of destruction in the heart of a sleeping city, is one of those accusations which cannot be too severely censured if unsupported by proof. The fact is that the plaintiff had great difficulty in saving his own life, and his family had to be got out of the second story window. The retention of the premises by the defendant was just as much a forcible dispossession, as if while a man is away at the seaside with his family, some one enters his empty house in the city, and refuses to give up possession. As Mr. Justice Badgley has remarked, the action is what in England would be called an *ouster*. The only difficulty is as to the amount of damages. I would have been disposed to give £150, but in order that a judgment may be rendered in plaintiff's favor, I concur in the judgment giving him £50.

The judgment was *motivé* as follows:

Considering that by a notarial deed bearing date the 25th of February, 1861, the respondent leased to the appellant for five years from 1st May, 1861, to 1st May, 1866, a shop and dwelling house in Notre Dame Street, Montreal, in which the appellant continued to reside and to carry on business as a hatter and furrier until the said premises were injured, and rendered for a time uninhabitable by a fire which occurred therein on the night of the 24th—25th of February, 1865, viz. fourteen months and three days before the expiration of the said lease:

Considering that it is to be inferred from the evidence that the said fire was accidental, and that it is not proved that it was caused either by the act or neglect of the appellant, or of any person in his employ, or residing on the said premises:

Considering that inasmuch as the said fire did not totally the said premises, but merely injured them so as to render them temporarily untenantable, the said appellant still continued to be in the legal possession thereof after the said fire, and left them after having carefully closed them up, with the intention of returning thereto and continuing his business therein, so soon as the respondent had restored them to an equally tenantable condition as they were in on the eve of the said fire, as the respondent was bound by law to do, and could have done within the space of three weeks or thereabouts:

Considering that the respondent within four days from the occurrence of the said fire, viz. on the 1st of March, 1865, without the appellant's permission or consent, illegally took possession of the said premises and leased them, with a certain store adjoining, for nine years from the 1st of May, 1865, to Messrs. Sadlier & Co., for a rent increased by $100 a year, although he, the respondent, admitted by the said lease that the appellant might claim the right of occupying the premises so leased to him as aforesaid until the 1st of May 1866:

Considering that the appellant on the 15th of March, 1865, duly notified the respondent to repair the said premises in order that he, the appellant, might continue his occupation thereof until the expiration of his lease, and that the said respondent informed the said appellant on the next following day that he the respondent had taken possession thereof, and intended thenceforth to withhold them from the appellant:

Considering for all these reasons that the appellant was, at the time of the institution of his action, entitled to be reinstated in possession of the said premises for the remainder of the term of his lease, that the said term having expired during the pendency of his suit, he is entitled to claim damages of and from the respondent for the injury by him sustained through the illegal withholding from him of the said premises by the respondent as aforesaid, and that the appellant had adduced sufficient evidence to enable the Court below to assess such damages:

Considering therefore, that in the judgment of the Superior Court there is error, &c. Judgment reversed, and respondent condemned to pay $200 damages, with costs below as of the Circuit Court, and full costs in this Court.

*Rose & Ritchie*, for the Appellant.
*J. A. A. Belle*, for the Respondent.

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March 6, 1867.

## THE QUEEN v. HENRY GRANT.

*Indictment—Signature.*

*Held*, that it is sufficient if an indictment be signed by the Clerk of the Crown.

This was a case reserved by Mr. Justice *Sicotte* on the 18th of December, 1866, while presiding in the Court of Queen's Bench sitting on the Crown side at St. Johns. The prisoner, Henry Grant, had been put on his trial for stealing from the person and convicted. An objection was raised by his Counsel, *H. Tugault*, that the indictment could only be signed by the Attorney General, Solicitor General, or persons duly authorized by them, and that the indictment in this instance was not so signed.

The signatures to the indictment were as follows:—

"F. H. Marchand, Clerk of the Crown." "Med. Marchand, Advocate, Prosecuting for the Crown."

*T. K. Ramsay* appeared for the Crown but was not called upon. The prisoner was unrepresented by counsel.

The judgment of the Court (DUVAL, C. J., AYLWIN, DRUMMOND, BADGLEY, and MONDELET JJ.) was as follows:

"Seeing that the indictment has been signed by the Clerk of the Crown and it is therefore sufficient, it is ordered that the record be returned and remitted to the Court of Queen's Bench for the District of Iberville, to the intent that such further proceedings be there had as to law and justice may pertain in the premises."

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## SUPERIOR COURT.

April 12.

EX PARTE TEMPEST, PETITIONER FOR DISCHARGE.

*Insolvency—Purchase of goods on credit while hopelessly insolvent—Fraudulent preference.*

After the appointment of an assignee in compulsory liquidation, the insolvent cannot retain for his personal expenses moneys paid in to the estate.

A trader who buys goods on credit, impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency. While the vendor on credit takes the risk of the subsequent insolvency of his debtor, he is not supposed to contemplate the escape, or the bankruptcy of

his debtor by reason of a state of insolvency actually existing at the time of the purchase.

The Court will, in the exercise of the discretion which the statute confers upon it, suspend the discharge of a trader who knowing himself to be insolvent and unable to meet his liabilities, conceals the fact and purchases goods on credit, without any reasonable expectation of being able to pay for them.

The discharge of a trader who has granted a fraudulent preference to a creditor, must be absolutely refused.

The examination of an insolvent before the assignee may be used against him by a creditor contesting his discharge.

Monk J. This is an application by William S. Tempest, an insolvent, for his discharge from the Court, under a provision of the Insolvent Act of 1864, which gives him the right to make such application in the event of the requisite proportion of his creditors not consenting to his discharge. In this case, not only do they not consent to it, but a number of them appear and contest his application, and they do so substantially upon three grounds. These are :—

1st. That he fraudulently retained and withheld from the Assignee, moneys belonging to the estate, and especially a sum of $332. 32 ;

2nd. That the firm of Elliott & Co. purchased goods on credit from the Messrs. Thomson, knowing themselves to be insolvent at the time, and concealing the fact from the vendors, *with the intent to defraud them*, Mr. Tempest being a member of that firm at the time, and it being contended that he participated in the alleged fraudulent act; and

3rd. That the firm of Elliott & Co. had given a fraudulent preference to Mr. Herbert Ellwell, by delivering to him all the negotiable paper held by them at the time of their failure ; and also by permitting him to appropriate, in advance, notes not then actually received ; and moreover, that these preferences had been given with Mr. Tempest's full consent and participation.

The questions which arise upon this petition, therefore, are among, and in fact are, the most important which can arise in a similar case, and I may add that they are of paramount importance in the perpetually recurring controversy between debtors and creditors, as to the good faith and legality of the acts of the former, when insolvency is imminent. It may, perhaps, be unnecessary for me to remark to the Counsel concerned for the petitioner, and for the contesting parties, that the Court has examined this case under a deep sense of the responsibility which rests upon its decision, and with a due appreciation of the importance of this matter, as well in regard to the commercial community generally, as to the particular interests of the individuals between whom this contest has arisen. The record discloses with sufficient certainty and clearness the material facts of the case, and which are relied upon by the contesting creditors. Indeed, I may say at once and without hesitation, that with the exception of one or two incidental points of, perhaps, minor importance, and upon which there is some dispute, the counsel differed rather as to the effect of a certain state of facts, not strenously controverted, than as to the exact nature,—the precise character —of the facts themselves. I shall proceed to advert to these facts and to discuss them in the order in which I have stated the propositions to which they apply.

Upon the first point, then, it is alleged, that Mr. Tempest fraudulently retained, and still withholds, from the assignee, the sum of $332. 32c, which he received from debtors to the estate.

Now, as a matter of fact, it would appear he did receive a much larger sum than this, in the interval between the service of the writ of attachment, and the appointment of the assignee. But Mr. Tempest states, and it is, moreover, proved, that the whole of the balance, and perhaps a portion of the very sum in question, was applied to the purposes for which it was remitted to the insolvents ; namely, to aid in retiring paper then lying in the banks under discount. There was also a small sum applied to paying insurance on the goods of the firm. But there is a portion of the sum complained of as being withheld, to the retention of which very grave objections may be urged. It is not necessary that I should offer any opinion as to how far those persons who remitted to the insolvents, after the publication of the notice in the Gazette, have relieved themselves from liability by so doing. Their action in this respect appears to have

been admitted—sanctioned in fact—and it was, no doubt, done in good faith, and in the interest of the estate. About two-thirds, however, of the sum in question was retained by the insolvents for their personal expenses.

Now, upon this point the statute is precise, is free from all ambiguity. It expressly provides, that the appointment of an assignee in compulsory liquidation, vests in him all the estate and effects of the insolvent, *from the date of the issue of the writ*, as fully and as completely as if, at that date a voluntary assignment had been made; and a voluntary assignment absolutely vests in the assignee to whom it is made, and from the moment of its execution, all the estate and the assets of the insolvent, of every description. It is plain, therefore, that the insolvents had no right to receive, much less to retain and convert to their own use, the moneys remitted to their firm, after the service of the writ in compulsory liquidation. With these facts and the law before me, I can have no hesitation in deciding that the petitioner, who appears to have taken charge of this money, and from whom a portion of it was obtained by his partner when the latter required it, received it illegally, and that he withholds it from the assignee without the sanction of law. So far the case is clear enough, but the presence of the element of fraud is not so manifest—is not so indisputably established. There does not appear to have been any concealment from the assignee of the fact of the reception of the money, though there was apparently some reluctance at first, to give the details of it. The petitioner seems to have taken advice upon the point, and to have acted upon that advice. And the purposes for which the money was retained, according to the evidence adduced, are undoubtedly as unobjectionable as can be conceived compatibly with the retention of the property of others. Upon this point, therefore, the Court is of opinion that the money was illegally retained, but I do not consider it to be proved that it was so retained fraudulently. And if this were the only point submitted to me, I should probably grant the discharge, but I would suspend it until the money was refunded to the assignee.

The second point is one of the most vital importance to the commercial community; but as I have no precedent, and indeed no previous expression of judicial opinion to guide me, I feel some hesitation in deciding it; and obviously the question is one of considerable difficulty. I have the advantage, however, of a precise detail, a clear description of the facts, chiefly from the Petitioner's own lips, and I am, therefore, not embarrased by controverted matters of fact, which seldom permit the judgment of a court to rest purely and exclusively upon principle.

The circumstances are as follows: In the Spring of 1864, the firm of Elliott & Co., trading at Montreal, was composed of Mr. Elliott and of the Petitioner. At some time previous to that date, a Mr. Rudiger had also been a partner in the firm, and during their connection with him and up to April 1864, there seems to have been great carelessness, or, at all events, little method in the way their accounts were kept. At that time, however, as it would appear, in contemplation of an arrangement with Mr. Ellwell, and of which I shall have occasion to speak hereafter, a trial balance of their books was made, by which it appeared that their assets were deficient above $20,000, and there was then a large indebtedness to the Messrs. Shaw, in England, which did not appear in their books. There were, moreover, other matters which do not clearly appear, and consequently, by reason of the facts just mentioned, Mr. Tempest says "Our position "would have appeared much worse than it "does by the balance sheet." In fact, he states that "by adding to the deficiency exhib- "ited by that sheet, the amount due C. & J. "Shaw, we should appear to be, and were "$50,000 short. Our liabilities were then "about $113,000, our assets, after deduction "of our own accounts, were about $62,000."

In April 1864, then, the firm of Elliott & Co. were in a state of absolute and to all appearance hopeless insolvency. It is true that the debt due the Shaws was not being pressed, and they had reason to believe that the payment of this liability would not be harshly, or speedily enforced, and they secured not only the indulgence, but to some extent, the assistance of Mr. Elwell, who was then a considerable creditor. This double object was attained

by taking Mr. Elwell into their office as a clerk, upon a salary of $1,000 per annum, and by making him a promise that he should retain all their negotiable paper as collateral security for his debt. But these arrangements did not diminish their liabilities, nor do they appear to have been at any time so advantageous, or so decisive, as to secure them any definite temporary immunity from pressure.

During the Summer and Autumn of 1864, the position of the firm does not seem to have materially changed, for by the trial balance sheet of the 31st Dec., 1864, they still appear to have been above $50,000 deficient, taking the Shaw debt into account. And here it is to be remarked, that the partners were kept thoroughly informed of the state of their affairs by monthly balance sheets, made with more or less regularity. These balance sheets appear to have varied but little in their results. About the month of March 1865, news came from England that Mr. Shaw was dead, and that the orders of the firm for Spring goods would not be filled. Upon the receipt of this intelligence, the firm decided to stop payment, and appear to have announced that decision to their creditors about the 18th of that month. A balance sheet was subsequently made, bringing down the balance to the 31st March, 1865, and as that was based upon the actual taking of stock of the effects of the firm, its results may be supposed to approach nearly to accuracy, and to exhibit pretty clearly the real state of their affairs. By the sheet prepared under the circumstances to which I have just adverted, it was shown that the actual deficiency amounted to the enormous sum of $79,990.67, or about $25,000 advance upon the loss or deficiency exhibited by the balance sheet of December 1864. The explanations which the Petitioner has attempted to give of this sudden and disastrous diminution of assets are unsatisfactory—in fact, they leave the matter unexplained. It may be said, however, and indeed it appears so to me, that this rapid change for the worse in the assets of the firm was more apparent than real—that it was caused by, or resulted from, the fact, that in former balance sheets, the balance of their merchandise account was in a great measure, if not entirely, fictitious, from the irregular entries with which it was overlaid and for which it is remarkable. Besides, the bad and doubtful debts seem to have been assumed as worth par. These circumstances combined would seem to afford an approximate explanation of the discrepancy, if I may so term it; while at the same time, they render more assured and more conspicuous the entire and irremediable insolvency of the firm during the year preceding the crash. Notwithstanding this state of affairs, of which they could not have been ignorant, during all this period Elliott & Co. continued their business in the usual way. They bought and sold on credit, and late in the year 1864, they made large purchases from Thomsons & Co., on long terms of credit and which had not matured when they stopped payment. Mr. Elliott states that when he made these purchases, the credit of the firm was excellent; that he gave the vendors no intimation of the actual state of their affairs, and that Mr. Tempest was consulted by him in every case before making the purchases in question.

These are the circumstances under which I am called upon to apply the terms of the clause of the Insolvent Act, which provides that a trader who purchases goods on credit, knowing himself to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor, and who shall not afterwards have paid the debt, shall be guilty of fraud. Now it would be idle to deny that some of the elements of fraud contemplated by this clause, and which it regards as essential, are present in these purchases from the Thomsons. It is clear, it is in fact beyond controversy, that, knowing themselves to be unable to meet their liabilities, they purchased goods on credit, concealing from the vendors the fact of such inability, and they have not paid for the goods so purchased. But the question which creates the difficulty in my mind is this; had Elliott & Co. at the time the intention of defrauding the Thomsons?

In answer to this enquiry, it may be stated at once, that there is no proof in the record that when they made these purchases they entertained the deliberate intention of not paying for them; and I do not feel justified in

saying—I cannot say, as a matter of fact, that the impression produced on my mind by a perusal and a careful consideration of the testimony adduced is that they had such an intention. The fact appears to be that they went on with their trade without considering the question how far their actions were likely to result in loss or injury to others, and that, with the knowledge that their affairs were in a ruinous condition—in fact rotten to the core, and that their commercial existence hung by the merest thread, they continued incurring liabilities under cover of a seeming-a delusive prosperity, which they themselves well knew to be utterly groundless. It is with great pain that I consider myself bound to speak in these terms of this case—but I do so conceiving it to be my duty, and believing also that an explicit and decided expression of the views of the Court upon this mode of doing business—this species of conduct, must in the end be beneficial. There can be no evasion, no softening down by mitigating presumptions, in the adjudication of this cause. The facts are before me, they are clear and the law is peremptory, and in view of both, the Court is of opinion, that he who buys goods on credit impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency; and further, that while the vendor on credit takes the risk of the subsequent insolvency of his debtor, he is not supposed to contemplate the escape, or the bankruptcy of his debtor by reason of a state of insolvency actually existing at the time of the purchase; that he who knowing the utter insufficiency of his assets and the impossibility of payment, except from the spoliation of others,—he who in fact incurs liabilities of the description of those under consideration, perpetrates a great wrong in the eye of the law. There may not in such a case be an actual, a palpable intention to defraud any particular individual, but there is so reckless a disregard of the rights of those persons generally with whom he deals, as to render a man who so acts deserving of severe reprobation, and so far as a matter of fact established by the evidence of record, I find the petitioner amenable to censure. Even to this extent, it is not without regret, the Court expresses this opinion of the petitioner's conduct; and in doing so, I may add that I should hesitate to adjudge, upon the evidence before me, that in the purchases in question, there was an intent to defraud the Messrs. Thomson: I incline rather to the belief that there was no such deliberate intention. But even so, I entertain so strong an opinion of the impropriety of the petitioner's conduct in this respect, and also of the disastrous consequences to honest traders of the power of conducting business in this manner with impunity, that if this were the only point in issue between the parties, the Court, in the exercise of the discretion which the statute confers upon it, would mark its reprobation of such conduct by suspending the petitioner's discharge for such period of time as would appear to be an adequate vindication of honesty and of fair dealing.

But the third objection urged in the terms of the Act against the application of the petitioner, seems to preclude the exercise of any discretionary power on my part to relieve him finally from his liabilities. He is charged with having granted or concurred in granting, a fraudulent preference to Mr. Elwell, of whom I have already spoken: That he did so both by handing him over the negotiable paper of the firm in contemplation of insolvency, and by conspiring with him (Mr. Elwell) to enable him to get possession of other negotiable paper which was expected, but not actually received, at the time the creditors of the firm were called together. The circumstances under which the transactions with Mr. Elwell took place are of a very peculiar and exceptional character, and require some description in order that my view of their effect may be fully understood.

About the time of the trial balance of April 1864, Mr. Elwell, as before stated, entered into the employ of the firm of Elliott & Co., and was made acquainted at the time with the unfavorable result shown by that balance, as well as with the additional debt due the Shaws. On the 21st April, 1865, the day of the meeting of creditors previously called, a large number of notes, comprising the entire amount of Bills receivable then held by the firm of Elliott & Co., were stated to be in the

hands of Mr. Elwell, as collateral security for his debt. In the words of Mr. Tempest himself, "all the notes which did not appear by "the Bill book to have been disposed of are in "the hands of Mr. Elwell," except those given to certain firms whom he names. The circumstances under which Mr. Elwell acquired these notes cannot be more clearly described than in the language of the petitioner himself. He says:—

"Being asked who gave the said notes to Mr. Elwell, I say that he has always received them for the last nine or ten months. What I mean is, that whenever they came into our office, they were taken charge of by him in the ordinary course. This has been the regular practice in our office for the last 9 or 10 months, and all the notes appearing by the Bill-book to have been received by us during that time have followed that course. It commenced on the 3rd May, 1864, since which time he kept our bill-book and cash-book, and superintended the keeping of all our other books. We gave him a salary of $1000 a year. It was his particular business to receive, take care of, and enter all cash and bills received, and to see that the other books were kept properly. Nearly all the entries in the bill-book since May 3rd, 1864, are in his handwriting, and also a great number of entries in the cash book during the same period. Since the 1st September last, all the entries in the cash book are by him. The entries in our discount-book since May, 1864, are also nearly all made by him. The notes which appear in the statement A, as being held by him as collateral, were received by him in the same manner as all other notes received in our business since 3rd May, 1864. I swear that I delivered to Mr. Elwell with my own hand, as collateral security for the said debt of $14,328.76, the notes mentioned in this statement A, as being held by him as collateral.

Q. Which of the two statements that you have just made, respecting the reception by Mr. Elwell of the said collateral notes, is the true one?

A. I swear they are both perfectly correct. A few days before we suspended payment, he brought these notes to me in a bundle, which I perfectly understood contained all the notes in the premises, and asked me if I had a large envelope. I took them from him, passed them into a large envelope, sealed it up, wrote his name on it, and handed it back to him. I cannot state the exact date on which this took place, but it must have been either on or after the 20th April last, as I perceive by the bill-book, that the entries of the said notes in the bill-book are made in his own handwriting down to the 20th April inclusive. There was a meeting of our creditors held at our office on the 21st (or thereabouts) of April last, at which meeting there was a discussion about these notes given to Elwell. The writ of attachment was served the next day. I swear that the notes in question were handed over to Mr. Elwell before the day of the meeting of creditors. Mr. Elwell was perfectly aware that we had called a meeting of our creditors for the following day. In fact he knew as much about our business as we did ourselves. To the best of my knowledge and belief the said notes were placed by me in the said envelope as already stated. I think our firm stopped payment about the 18th March last."

If confirmation of this statement made by Mr. Tempest himself were necessary, it is furnished by Mr. Elwell. He declares that he knew during the whole of 1864 that the firm were over $40,000 worse than nothing, and that he was perfectly aware of the stoppage, and of the meeting of creditors that had been called in consequence.

The debt for which the collateral security was given amounted to about $14,000, besides endorsements which Mr. Elwell had given for the accommodation of the firm, and the greater portion of this debt had accrued previous to July, 1864, Mr. Elwell, having as he expressed it, been advancing to them for some years before he entered their employ.

It would appear, therefore, from the statement of the parties to the transaction, that Mr. Elwell received from the petitioner on the eve of the meeting of creditors a large amount of negotiable paper belonging to Elliott & Co., and endorsed by them as collateral security of a pre-existing debt; that when he received it, he, Elwell, knew that the firm was insolvent, and that he would therefore obtain an advantage at the expense of the other creditors; and,

finally, that it was so given to him by the petitioner himself with that intention. These facts would bring the petitioner strictly within the provisions of the Insolvent Act, §8, par. 1 and 4. But it is contended on his behalf that they may be sustained by other circumstances which gave Mr. Elwell a valid title to that negotiable paper before it was handed to him on the 20th April, or at all events, a lien upon it. He alleges that by the terms of his agreement with Elliott & Co., in April, 1864, he was to enter their employ, keep or superintend their books—receive their negotiable paper and the like, with a salary of $1000 per annum and that he was to retain and hold all such negotiable paper as security for his advances to them, as well in the future as those previously made which were considerable; and that in fact the negotiable paper was received and was held by him from the time at which it was received as such security.

This pretension may be considered from two points of view, namely, as to its legality, and then in regard to its truth. If the agreement were proved and had been carried out by the reception by Mr. Elwell, on his own account, of all the negotiable paper of the firm, it is probable that the agreement would have been regarded as a fraud upon the creditors of the firm, in view of the knowledge of Mr. Elwell of the insolvency of Elliott & Co., and of the fact of his debt being pre-existent, to say nothing of the secrecy of the transaction which was calculated to mislead, in fact to deceive third parties, and to lead them into error as to the position and resources of Elliott & Co. But in point of fact, it is not proved that such an agreement, if made, was ever carried into effect. It is true that Mr. Elwell became the clerk of Elliott & Co., and that their negotiable paper passed through his hands; but there is no proof that he ever held it as pledgee until it was delivered to him on the 20th April, 1865, by the petitioner. Previous to that day he took care of it, had it in his charge; namely, in the office of the firm and in their safe, and in a box, in which, though he claimed it as his, he also kept small change, checks and other matters belonging to the firm; while he thus had the custody of this negotiable paper, the firm used it, discounted part of it, and pledged part of it to Moss, Hagar and others, as appears by the Bill-Book, kept by Mr. Elwell, and by the deposition of the petitioner. In fact, so far as can be discovered or ascertained from the record, Mr. Elwell exercised no right of ownership over any part of this negotiable paper, till it had been personally placed in his hands by Mr. Tempest the day before the meeting of creditors. This distinction is indicated by Mr. Tempest himself in the extract from his examination already read, in which the reception of the paper as a clerk, and the delivery of it to him as collateral security, are spoken of as independent occurrences.

Under these circumstances, the Court is clearly of opinion that the possession of Mr. Elwell previous to the 20th of April was that of a clerk merely; without any legal right of lien or other right in the negotiable paper in his custody, as it is above established in evidence; and that he became possessed of it as security for his claim only when it was handed to him on the 20th of April by the petitioner. And I am further of opinion, that the petitioner by so delivering it to him, gave him a fraudulent preference within the meaning and intent of the Act.

There is, moreover, another circumstance somewhat extraordinary connected with this charge of fraudulent preference, and which cannot be passed over without notice. In a species of blotter purporting to contain a list of good debts due to the firm, the amount of those debts was entered as being $7,277.67, while in the statement submitted at the meeting of the creditors they are entered as amounting only to $1,602.05, the deficiency being $5,675.62. This discrepancy is accounted for by Mr. Elwell in the following manner. He says: "I am aware that in statement A, I am charged as having received as collaterals over $9000 of bills receivable, but in this sum was included about $2,000 which I had not received, but which were to be given to me by the defendants when they came. In statement A, therefore, the entry is made as if the bills had been actually received and delivered to me. The accounts were rendered, and the debtors were requested to send down notes for the amount, and I had an under-

standing with the defendants that when they came, they were to be given to me. It is that arrangement which creates the discrepancy between the total amount of good debts as shown by statement A. That discrepancy amounts to $5,675.62 currency, of which notes to the amount of $3,600 were received and are in the bill book, and the remainder are what I was intended to receive. Mr. Tempest, one of the defendants, was aware of all this; Mr. Elliott took very little interest in it." So that if this statement be correct, not only the amount of notes actually on hand, but those that were expected to arrive, were to be given to Mr. Elwell; and to conceal this arrangement from the creditors, these expected notes were entered in the statement submitted to the creditors as if they had been actually received, and a corresponding amount deducted from the good debts. This circumstance, though apparently of minor importance, should not be overlooked in the consideration of this case.

The petitioner seeks to throw the responsibility of this most reprehensible exhibition of accounts upon Mr. Elwell. He states that the account A, in which it occurs, was made out under the direction and personal superintendence of Mr. Elwell, and that he himself did not see it till it was in the hands of the creditors; in fact, that it was not finished when they assembled, and that it was submitted and read without his having an opportunity of making himself acquainted with its contents. He himself has given evidence upon this point, and his statement that he had not seen the account A, before it was shown to the creditors is corroborated by Mr. Elwell and Mr. Douglas, the bookkeeper. But the material question for my consideration is not whether he agreed to the statement A, but whether he agreed to the expected notes being taken to account by Mr. Elwell as if they had been received; and upon this point the evidence appears to bear strongly against the petitioner. Mr. Elwell distinctly states that although the petitioner did not agree to the entry in the form in which it was made, yet he knew all about the transaction itself; and although it was attempted to put the construction upon this statement that it was made as applicable to the arrangement generally with Mr. Elwell, and not to this particular transaction, yet the declaration of Mr. Elwell himself making the distinction between Mr. Tempest's knowledge of the entry, and his knowledge of the fact, combined with the statement of Mr. Elliott's comparative ignorance of it, appears to negative this construction. It is, moreover, scarcely credible that Mr. Tempest, who was the office man of the firm, should not know whether his good debts amounted to $1,500 or to $7,000—and whether Mr. Elwell held notes to the amount of $7,000 or $9,000 as collateral security. Upon the whole, and after a careful consideration of the testimony adduced on this point, I incline to the belief of Mr. Tempest's knowledge of the transaction as embodied in the report submitted to the creditors, and I find it extremely difficult to bring myself to the conclusion that he was ignorant of it.

There were one or two incidental points raised by counsel at the argument which may as well be disposed of, and which require but few remarks and no discussion. It was objected that the state of the affairs of the insolvents as submitted by their books, and the manner in which these books were kept, and the entries made in them, could not be referred to by the contestants, because it was not expressly alleged in the contestation that the books of Elliott & Co. were irregularly or erroniously kept. If, indeed, these matters had been referred to and made the subject of discussion, as constituting a special and substantial ground of objection to the discharge—I should not have bestowed upon them any attention, unless they had been set forth by express allegation. But under the contestation and the issue joined, they are admissible in evidence to show that the firm of Elliott & Co. were insolvent long before they stopped payment, and that, moreover, they were aware of the fact.

It was also objected that the examination of the petitioner could not be made use of as evidence against him on this contestation, but I am clearly of opinion that such a pretension is wholly untenable.

In conclusion, I have only to add, that after a very careful consideration of the law

and all the facts of this case, I am, with much reluctance, forced to the conclusion that this application must be refused, and it is rejected accordingly.

*A. & W. Robertson*, for the petitioner.

*J. J. C. Abbott, Q. C.*, for the creditors contesting.

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April 12.

EX PARTE WATT, PETITIONER FOR DISCHARGE.

*Insolvency—Grounds for refusing discharge.*

Discharge of a debtor under the Insolvent Act refused, where it was proved that he had granted fraudulent preferences, and had traded extensively without capital, though without the intention of committing fraud.

MONK, J. This is also an application for discharge by an Insolvent, and my remarks in the preceding case will apply in great measure to this. In June, 1864, the petitioner, Mr. Watt, purchased from Cuvillier & Co. $13,000 worth of wheat for cash. The purchase was made through Mr. Heward, broker, and bought and sold notes were exchanged. The sale was for cash, but when Mr. Heward called on Mr. Watt for the money, the latter said he could not pay just then. Mr. Heward then went to Mr. Cuvillier who directed him to get Mr. Watt to give his cheque payable on the Monday following, and he would not present the cheque before mid-day. Mr. Watt accordingly gave his cheque payable at the Bank of Montreal; but Mr. Cuvillier presented the cheque an an hour before noon, and there were no funds to meet it. Mr. Watt then found himself obliged to suspend payment, after an unsuccessful attempt to obtain accommodation from the Bank of Montreal. It shows the position in which Mr. Watt was at the time, that the simple fact of presenting the cheque an hour too soon obliged him to suspend. He was carrying on business without any capital, in fact, a gambler, not in a bad sense, but as one trying to make money without any capital. I have no doubt that Mr. Watt intended to pay for the wheat when he bought it, and he is not to be charged with fraud. But such was the state of his affairs that the least thing was sufficient to stop him. His transactions were enormous. I think it the duty of the Court to express disapprobation of such a reckless style of business, supported by accommodation obtained from the banks, and carried on without any capital. Mr. Watt failed for $287,000, and his assets do not appear to amount to anything at all. If there was nothing else in the case, I would have suspended Mr. Watt's discharge for a time, for the purpose of marking the opinion of the Court on such a reckless style of doing business. But there are three grounds alleged in opposition to his discharge. 1st. That he traded extensively, knowing that he had no means. 2nd. That he gave fraudulent preferences. 3d. That he prevaricated in his statements. There does not appear to be any ground for charging him with prevarication. As to fraudulent preferences, this is a thing which there are no means of effectually guarding against. Mr. Watt is charged with having paid $9,500 by fraudulent preference about the time of his failure. He says that in one case he only paid over the proceeds of grain just purchased, but of this there is no proof; and in another instance that he merely returned goods which remained intact, on which the vendor had a lien, and that he consulted Mr. Janes, who was his creditor to the amount of $50,000, and also his assignee, on the propriety of doing so, and obtained his sanction. But the fact of Mr. Janes being a creditor to the amount of $50,000. and assignee, did not qualify him to give an opinion. Under the circumstances, the Court cannot sanction these payments. I do not say that Mr. Watt intended to commit any fraud; on the contrary, I believe he did not. But taking into consideration the very reckless way in which he was doing business, and the fact of these payments made at the time he was about to call his creditors together, I feel bound to refuse his discharge. At the same time, I hope that the creditors will come to some understanding, and themselves consent to give Mr. Watt his discharge.

*Torrance & Morris*, for the Petitioner.

*Cartier, Pominville & Bétournay*, for Cuvillier & Co., contesting.

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## THE BAR OF LOWER CANADA.

### SECTION OF THE DISTRICT OF MONTREAL.

*Annual Report of the Council.*

The Council of this Section of the Bar have to report that the amendments to the Act of Incorporation and to the By-Laws, which were suggested and carried through by this Section during the past year, have proved highly advantageous to the interests of the Bar and to the community generally. More efficiency has been given to the Councils in maintaining the discipline of the members—the duties and powers of the Sections and of the General Council have been more clearly defined—and the standard of qualification in Candidates for admission to study and to practice has been raised—while the funds of the Corporation have been increased by a higher rate of fees on admissions. It is impossible to point out at this time all the good effects of these amendments. They will be more apparent after they have been a few years in operation.

The Council have been enabled to grant to the Library Committee during the year the sum of $350 for the purchase of books. In their report they say, that "by "means of the appropriation of $350 during "the past year, in addition to votes in the two "previous years of $500, making in the ag- "gregate $850, the Committee have been en- "abled to add many valuable works to the Li- "brary. A list of them is to be found in the "Library Room. The cash now in hand is "$205, but orders have been issued for new "books which will more than exhaust this "sum. The details of the application of the "rest will be seen in the annexed statement "of account. A book has been opened for the "entry of suggestions as to the works which "it is desirable to purchase, and the Commit- "tee trust that the means at the command of "the Council may in future allow of a regular "and ample vote—sufficient to maintain and "enlarge so important an adjunct of the "Bar."

The treasurer's report is given below, and compares favourably with former years; the receipts of this year being $2,636 91, against $2,290 46 for last year, while the expenditure this year amounts to $1,826 08, against $1, 422 56 last year. The Council regret, however, to say that the arrears of Bar subscriptions amount in all to at least $1,600. Some of the members in arrear belong to this District, but most of them reside in the other Districts included in this Section, and complain of being taxed so heavily for advantages in which they participate so little. As a remedy for this, the Council respectfully recommend that the Act of Incorporation be so amended that, for the future, the subscriptions of members of this Section residing without the limits of this District be reduced to $2 per annum; and further, that no Member of the Bar be permitted to practice unless he has paid his subscription. This would increase the revenue of the Section, while the burden of supporting the expense of the Bar would no longer be thrown, as it is now, on the few.

The change which has been introduced into the mode of admitting candidates to practice and to study has been found satisfactory. A list of works has been prepared by the Committees, which indicates to the candidate what he is expected to read during his studentship. This has been printed and circulated. The number of candidates admitted to practice during the past year is 28, and to study 30. This is a decrease on former years, as will appear by the following figures:

| | Admission to Practice | To Study |
|---|---|---|
| For the year ending April 30, 1864. | 41 | 53 |
| " " " 1865. | 34 | 49 |
| " " " 1866. | 55 | 29 |
| " " " 1867. | 28 | 30 |

In matters of discipline there has been only one complaint, which has been carried on to judgment, and in that case the defendants were censured by the Batonnier. There were two complaints presented against Members of the Bar, in which the Council did not think that there were sufficient grounds for proceeding, and two others on which proceedings were commenced but discontinued for want of proof.

All which is submitted.

A. ROBERTSON,
*Batonnier*

H. L. SNOWDON,
*Secretary*

MONTREAL, 1st May, 1867.

THE TREASURER IN ACCOUNT WITH THE BAR OF LOWER CANADA, SECTION OF THE DISTRICT OF MONTREAL, FOR THE YEAR ENDING APRIL 30, 1867

DR.

| | |
|---|---|
| To balance 1st May, 1866 | $888 24 |
| " amount of Annual Subscriptions | 720 00 |
| " fees on 36 Diplomas | 506 00 |
| " " on 16 Certificates for admission to study | 80 00 |
| " " on 12 Certificates for admission (under new law) | 240 00 |
| " amount of disbursements on an accusation | 1 17 |
| " arrears of fees on admissions to study & on diplomas | 232 00 |
| " proceeds of sale of By-Laws of the Bar | 9 50 |
| " amount from Secretary of Bar Dinner | 1 00 |
| | $2,626 91 |
| To balance | $800 83 |

CR.

| | |
|---|---|
| By paid to the Library Committee | $250 00 |
| " to the General Council on the order of the Bâtonnier | 250 00 |
| " Salary of Employés, Insurance and other expenses | 1,266 08 |
| Cash in hand | 800 83 |
| | $2,626 91 |

MONTREAL, 1st May, 1867

V. P. W. DORION, *Treasurer.*

OFFICE BEARERS FOR 1867–8

Joseph Doutre, Q. C., *Batonnier;* Rouer Roy, Q. C., *Syndic;* W. W. Robertson, *Treasurer;* Joseph O. Joseph, *Secretary.*

COUNCIL:

A. Robertson, Q. C., S. Bethune, Q. C., R. Mackay, A. Cross, Q. C., R. Laflamme, Q. C., Hon. A. A. Dorion, Q. C., F. Cassidy, Q. C., L. A. Jetté.

LIBRARY COMMITTEE:

R. Mackay, S. Bethune, Q. C., F. W. Torrance, Rouer Roy, Q. C., P. R. Lafrenaye, A. Cross, Q. C., W. F. Gairdner.

## BROUGHAM'S ADVICE TO MACAULAY.

The following letter, written by Lord BROUGHAM to the father of the late Lord MACAULAY, contains valuable suggestions for young men who have selected the Bar for their profession.

"Newcastle, March 10, 1823.

"MY DEAR FRIEND,—My principal object in writing to you to-day is to offer you some suggestions, in consequence of some conversation I have just had with Lord Grey, who has spoken of your son (at Cambridge) in terms of the highest praise. He takes his account from his son; but from all I know, and have learnt in other quarters, I doubt not that his judgment is well formed. Now you, of course, destine him for the Bar; and assuming that this, and the public objects incidental to it, are in his views, I would fain impress upon you (and through you upon him) a truth or two which experience has made me aware of, and which I would have given a great deal to have been acquainted with earlier in life from the experience of others.

"First, that the foundation of all excellence is to be laid in early application to general knowledge is clear; that he is already aware of; and equally so it is (of which he may not be so well aware) that professional eminence can only be attained by entering betimes into the lowest drudgery, the most repulsive labors of the Profession; even a year in an attorney's office as the law is now practised I should not hold too severe a task, or too high a price to pay, for the benefit it must surely lead to; but at all events the life of a special pleader, I am quite convinced, is the thing before being called to the Bar. A young man, whose mind has once been well imbued with general learning, and has acquired classical propensities, will never sink into a mere drudge. He will always save himself harmless from the dull atmosphere he must live and work in, and the sooner he will emerge from it, and arrive at eminence. But what I wish to inculcate especially, with a view to the great talent for public speaking which your son happily possesses, is, that he should cultivate that talent in the only way in which it can reach the height of the art; and I wish to turn his attention to two points. I speak on this subject with the authority both of experience and observation. I have made it very

much my study in theory; have written a great deal upon it which may never see the light and something which has been published; have meditated much and conversed much on it with famous men; have had some little practical experience in it, but have prepared for much more than I ever tried, by a variety of laborious methods—reading, writing, much translation, composing in foreign languages, &c.; and I have lived in times when there were great orators among us; therefore I reckon my opinion worth listening to, and the rather because I have the utmost confidence in it myself, and should have saved a world of trouble and much time had I started with a conviction of its truth.

"1. The first point is this,—the beginning of the art is to acquire a habit of easy speaking; and in whatever way this can be had, (which individual inclination or accident will generally direct, and may safely be allowed to do so,) it must be had. Now, I differ from all other doctors of rhetoric in this—I say, let him first of all learn to speak easily and fluently, as well and as sensibly as he can, no doubt, but at any rate let him learn to speak. This is to eloquence, or good public speaking, what the being able to talk in a child is to correct grammatical speech. It is the requisite foundation, and on it you must build. Moreover, it can only be acquired young; therefore, let it by all means, and at any sacrifice, be gotten hold of forthwith. But in acquiring it every sort of slovenly error will also be acquired. It must be got by a habit of easy writing, (which, as Wyndham said, proved hard reading)—by a custom of talking much in company—by speaking in debating societies, with little attention to rule, and more love of saying something at any rate than of saying anything well. I can even suppose that more attention is paid to the matter in such discussions than to the manner of saying it; yet still to say it easily, *ad libitum*, to be able to say what you choose, and what you have to say, this is the first requisite, to acquire which everything else must for the present be sacrificed.

"2. The next step is the grand one—to convert this style of easy speaking into chaste eloquence. And here there is but one rule. I do earnestly entreat your son to set daily and nightly before him the Greek models. First of all he may look to the best modern speeches, (as he probably has already); Burke's best compositions, as the 'Thoughts on the Cause of the present Discontents;' speech 'On the American Conciliation,' and 'On the Nabob of Arcot's Debt;' Fox's 'Speech on the Westminster Scrutiny,' (the first part of which he should pore over till he has it by heart); 'On the Russian Armament,' and 'On the War,' 1803, with one or two of Wyndham's best, and very few, or rather none, of Sheridan's. But he must by no means stop here. If he would be a great orator, he must go at once to the fountain head, and be familiar with every one of the great orations of Demosthenes. I take for granted that he knows those of Cicero by heart; they are very beautiful, but not very useful, except, perhaps, the 'Milo, pro Ligario' and one or two more; but the Greek must positively be the model; and merely reading it, as boys do, to know the language, won't do at all; he must enter into the spirit of each speech, thoroughly know the positions of the parties, follow each turn of the argument, and make the absolutely perfect and most chaste and severe composition familiar to his mind. His taste will improve every time he reads and repeats to himself, (for he should have the fine passages by heart), and he will learn how much may be done by a skilful use of a few words, and a rigorous rejection of all superfluities. In this view, I hold a familiar knowledge of Dante to be next to Demosthenes. It is in vain to say, that imitations of these models won't do for our times. First, I do not counsel any imitation, but only an imbibing of the same spirit. Secondly, I know from experience that nothing is half so successful in these times (bad though they be) as what has been formed on the Greek models. I use a very poor instance in giving my own experience, but I do assure you that both in Courts of Law and Parliament, and even to mobs, I have never made so much play (to use a very modern phrase) as when I was almost translating from the Greek. I composed the peroration of my speech for the Queen, in the Lords, after reading and repeating Demosthenes for three or four weeks, and

I composed it twenty times over at least, and it certainly succeeded in a very extraordinary degree, and far above any merits of its own. This leads me to remark, that though speaking without writing beforehand, is very well until the habit of easy speech is acquired, yet after that he can never write too much; this is quite clear. It is laborious, no doubt, and it is more difficult beyond comparison than speaking off-hand; but it is necessary to perfect oratory, and, at any rate, it is necessary to acquire the habit of correct diction. But I go further, and say, even to the end of a man's life, he must prepare word for word most of his finer passages. Now, would he be a great orator or no? In other words, would he have almost absolute power of doing good to mankind, in a free country, or no? So he wills this, he must follow these rules.

"Believe me truly yours,

"H. BROUGHAM."

## RECENT ENGLISH DECISIONS.

*Principal and Agent—Extent of Authority —Secret Limit.*—The defendant authorized an insurance broker at Liverpool to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed £100 by any one vessel. The broker, acting in excess of this authority, and without the knowledge of the defendant, underwrote a policy for the plaintiff for £150. The plaintiff was not aware that the broker's authority was limited to any particular sum, but it is notorious in Liverpool that in nearly all cases there is a limit of some sort, which remains undisclosed to third persons, imposed on brokers by their principals. In an action upon the policy:—*Held*, 1st, that the defendant was not liable for the amount underwritten, the broker having exceeded his authority; and, secondly, that the contract whereon the action was founded was not capable of division, and, therefore, that the defendant was not liable to the extent of £100. *Baines* v. *Ewing*, Law Rep. 1 Ex. 320.

*Statute of Frauds—Parol Acceptance.*—A proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds. *Reuss* v. *Picksley*, Law Rep. 1 Ex. 342.

*Statute of Limitations—Acknowledgment.*—The defendant, being indebted to the plaintiff, wrote to the plaintiff, before the debt was barred by the Statute of Limitations, a letter containing these words, "I will try to pay you a little at a time if you let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week":—*Held*, a sufficient acknowledgment in writing within 9 Geo. c. 14, s. 1. *Lee* v. *Wilmot*, Law Rep. 1 Ex. 364.

*Attestation of Will.*—If a testator signs his will in the presence of the attesting witnesses who see him in the act of writing, and they then attest, the attestation is good, although they do not see the signature, and he does not acknowledge it.—The attesting witnesses to a will saw the testatrix writing something on the will before they signed, but they did not see what she wrote, and they did not know that it was a will. When they subscribed their names they did not see the attestation clause, which contained the testatrix's signature, or any of the writing on the will, as the testatrix concealed it from them by holding a piece of blotting-paper over it. There was a full attestation clause in the testatrix's handwriting:—*Held*, that as the witnesses had seen the testatrix write what the Court presumed to be her signature, although they did not see the signature, and she did not acknowledge it to them, the attestation was sufficient. *Smith* v. *Smith*, Law Rep. 1 P. & D. 143.

*Will—Clause following signature.*—A will contained a reference to executors "hereinafter named," but did not appoint executors. A clause appointing executors was written immediately underneath the testator's signature:—*Held*, that the reference in the will was not such a reference to the clause appointing executors as a document in existence at the time of the execution as to incorporate it, or to justify the Court in receiving parol evidence that it was written before the will was signed. *In the Goods of Dallow*, Law Rep. 1 P. & D. 189.

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