The Legal News.

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*THE MONTREAL LAW REPORTS.*

The Montreal Law Reports will be brought to a close with Volume VII of each series. Subscribers will observe that the parts yet to be issued, in order to complete the current volumes, will contain reports of decisions up to the end of the year 1891. The new official reports, about to be published by the General Council of the Bar, will take up the cases from January 1st, 1892, the new reports forming a continuation to Volume VII of each series of the Montreal Law Reports.

*THE LEGAL NEWS.*

In answer to inquiries, the publishers desire to state that the LEGAL NEWS will be continued as heretofore, the official law reports, which are about to replace the Montreal Law Reports, the Quebec Law Reports, and other series of reports, not interfering with the scope of the LEGAL NEWS as a journal published in the interest of the profession. In Ontario, where a similar system of official reports has long been in existence, two journals of an exclusively legal character are sustained by the profession.

The LEGAL NEWS will continue as heretofore to supply:—

Early notes of decisions of the Supreme Court of Canada, of the Court of Exchequer, of the Courts in Quebec, including the minor Courts not comprised in the official series, with occasional United States and other decisions of interest. Also the Privy Council Appeals, with articles, communications, etc.

The LEGAL NEWS for the year 1892 will be issued in an improved form. The number of pages in each issue will be doubled, and the journal will appear twice a month instead of weekly.

Subscriptions will continue as heretofore, four dollars per annum.

RICHARD WHITE,
Managing Director,
Gazette Printing Co.,
Montreal.

When *la grippe* visited this country about two years ago, the bench and bar were among the chief sufferers. Mr. Justice Church, of the Court of Queen's Bench, was prostrated, and his health has been seriously affected ever since. Justices Gill and Pagnuelo, of the Superior Court, as well as a great many members of the profession, were also incapacitated for a time. The report that Mr. Justice Jetté and his family were among the first victims this winter excited much regret. His Honour, happily, is progressing favourably towards recovery, but in the case of his venerable mother the illness proved fatal.

The case of *Union Pacific Railway Co.* v. *Botsford*, which will be found in the present issue, is of considerable interest, more especially as it appears to be the first case in which the question was raised before the Supreme Court of the United States. The point was whether, in an action for personal injuries, the court, before the trial of the cause, can order an examination of the body of the injured person. The majority of the judges of the Supreme Court hold in the negative. Two dissent. The plaintiff, it is admitted, may voluntarily undergo such examination in his or her own interest, but the defendant has no right to prove his defence by procuring an order for the inspection of the plaintiff's body. The principal ground of objection seems to be that the plaintiff should not be forced to submit to an indelicate exposure of person. No judge could give such an order without repugnance. The objection applies chiefly, however, where the plaintiff is a female. But in these days in which female physicians flourish, the objection does not seem to be insuperable. Why should not the examination of female plaintiffs be made by a female physician holding a diploma from a respectable medical college? In our courts the question does not seem to have been much discussed. In a recent case however, in the Superior Court, *McCombe* v. *Phillips*, an order was granted by Mr. Justice de Lorimier, for an examination by a physician of the body of plaintiff's minor child—the object being to obtain a medical report as to the nature of the injuries before the defendant filed his plea.

The Court of Appeal, in England, seems to have solved the Maybrick insurance difficulty in an eminently satisfactory manner. Mrs. Maybrick murdered her husband, and assigned her interest in the insurance on his life to her solicitor. It was contrary to public policy that Mrs. Maybrick or her assignee should profit by her crime. But that reason does not apply to others entitled to a share in the estate. The Court of Appeal has accordingly reversed the judgment of the Queen's Bench Division, which held that the insurance company was not liable to pay the money (see *ante*, p. 379), and while excluding the wife's assignee from any benefit in the insurance, has ordered the amount to be paid to the executors of the estate.

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## SUPERIOR COURT—DISTRICT OF ST. FRANCIS.

SHERBROOKE, Dec. 9, 1891.

*Before* BROOKS, J.

McKENZIE v. CANADIAN PACIFIC RAILWAY Co.

*Railway Act*—51 *Vict. c.* 29, *sect.* 194—53 *Vict. c.* 28, *sect.* 2—*Animals killed on track while straying.*

HELD :—*That cattle are not properly on a highway unless they are in charge of some one; and where cattle escape from the land of their owner, which is situated at a distance from the railway track, and while straying upon the highway, get upon the railway owing to the absence of cattle guards at the point of intersection, and are killed on the track without any negligence on the part of the company, the owner is not entitled to recover damages.*

BROOKS, J.—This is an action for cattle killed upon the railway, half a mile from a crossing where there are no cattle guards. Plaintiff says that defendants by their fault in not having cattle guards were the cause of this accident. It is a peculiar case. The plaintiff lives three quarters of a mile from the railway. It is in evidence that he had not good fences. His cattle got upon the highway, and went down to the railway crossing, and then owing to the want of cattle guards got upon the railway track and were killed. This happened at night. It is not proved that there was any negligence on the part of drivers or engineers. The plaintiff relies upon the case of *Pontiac Railway Co.* v. *Brady*, M. L. R., 4 Q. B. 346, in which, under somewhat similar circumstances, a judgment was given condemning the defendants to pay. This case of the Canadian Pacific Railway Company is under different circumstances however. As a reference to the judgment will show, it was brought under the provisions of the 42nd Vict., the Railway Act of 1879. The first Act says that until such cattle guards and fences are made the Company are responsible for damages done by their trains to cattle and horses on the railway, and the amendment, until this is done they are liable to the occupant of the land etc. But this does not refer to highway crossings. The law now in force is the Railway Act, 51 Vict. c. 29, sec. 194. This is amended by the 53 Vict. cap. 28, sec. 2.

That is the law here, and the cattle are improperly upon the highway unless they are in charge of some person. But, it is said by plaintiff, if they are killed at the point of intersection the Company is liable. I cannot read the law in that way. Our Code says that any person may impound any animals found straying. I do not think the Court could hold, under the law as it now stands, that where an animal strays along the highway, and gets on to the track, the Company are to pay. It does seem to me that in the matter of straying animals the proprietors are responsible. Am I or any private individual to allow my cattle to stray upon the railway track? It seems to me that passengers, the travelling public, have some rights. While Railway Companies have great powers given to them, should the whole responsibility for anything that happens through the negligence of others be thrown upon them? As this is the first case of this kind that has come up, I think it should be dismissed without costs, and the judgment will go accordingly.

*H. B. Brown, Q.C.*, for plaintiff.

*R. T. Heneker*, for defendant.

## EXCHEQUER COURT OF CANADA.

Burbidge, J.] [December 9, 1891.

SMITH & PATTERSON, Claimants; and THE QUEEN, Respondent.

*Customs duties—The Customs Act*, R. S. C. c.32, *ss.* 58, 59, 65; 51 *Vic. c.* 14, *s.* 15—52 *Vic. c.* 14, *s.* 6 *Market value—Value for duty—Costs.*

The rule for determining the value for duty of goods imported into Canada, prescribed by the 58th and 59th sections of *The Customs Act* (R. S. C. c. 32) is not one that can be universally applied.

When the goods imported have no market value in the usual and ordinary commercial acceptation of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions.

The *Vacuum Oil Company* v. *The Queen* (2 Ex. C. R. 234) referred to.

2. The goods in question in this case were part of a job lot of discontinued watch-cases, and at the time of their sale for export were not being bought and sold in the markets of the United States. They could be purchased for sale or use there, but only at published prices which were greater than anyone would pay for them.

The claimants bought the goods for export for their fair value, being about half such published prices. They let their agent in Canada know the prices paid, but withheld from him the fact that the purchase was made on the condition that the goods were to be exported. The agent, without intending to deceive the Customs appraiser, represented that the prices paid were those at which the goods could be had in the United States when purchased for home consumption there. The representation was untrue. On the question of the alleged undervaluation the Court found for the claimants, but, because of such misrepresentation, without costs.

*Greenshields*, Q.C., and *R.C.A. Greenshields* for claimants.

*Osler*, Q.C., and *Hogg*, Q.C., for respondent.

Burbidge, J.] [November 28.1891.

GURSHON S. MAYES, Suppliant: and THE QUEEN, Respondent.

*Contract for construction of a public work—Delay in exercising Crown's right to inspect materials—Independent promise by Crown's servant, effect of—Government Railways Act*, 1881.

It was a term in suppliant's contract with the Crown for the construction of a public work that certain timber required in such construction should be treated in a special manner, to the satisfaction of the proper officer in that behalf of the Department of Railways and Canals. By another term of the contract it was declared that the express covenants and agreements contained therein should be the only ones upon which any rights against the Crown should be founded by the suppliant.

The suppliant immediately after entering upon the execution of his contract, notified A., the proper officer of the Department in that behalf, that he intended to procure the timber at a certain place and have it treated there in the manner specified, before shipment. A. approved of the suppliant's proposal and promised to appoint a suitable person to inspect the timber at such place within a given time. The inspector was not appointed until some time after the period so limited had expired, and by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, and was compelled to carry on his work in more unfavourable weather and at greater cost, for which he claimed damages.

*Held*, on demurrer to the petition, that the crown was not bound under the contract to have made the inspection at any particular place, and that in view of the 98th section of *The Government Railways Act*, 1881, and the express terms of the contract, A. had no power to vary or add to its terms or to bind the Crown by any new promise.

The suppliant's contract contained the following clause: "The contractor shall not "have or make any claim or demand, or "bring any action, or suit, or petition against "Her Majesty for any damage which he "may sustain by reason of any delay in the

"progress of the work *arising from the acts of* "*any of Her Majesty's* agents; and it is agreed "that, in the event of any such delay, the "contractor shall have such further time for "the completion of the work as may be fixed "in that behalf by the Minister."

*Held*, that this clause covered delay by the Government's engineer in causing an inspection to be made of certain material whereby the suppliant suffered loss.

*W. Pugsley, Q.C.*, for suppliant;

*W. B. A. Ritchie* for respondent.

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Burbidge, J.] [November 28, 1891.

MORIN v. THE QUEEN.

*Government railway—Damage to farm from overflow of boundary-ditches—Obligation to maintain same.*

The Crown is under no obligation to repair or keep open the boundary ditches between farms crossed by the Intercolonial Railway in the Province of Quebec.

*Choquette* and *Belcourt* for plaintiff.

*Hogg, Q.C.*, and *Angers* for defendant.

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## *COURT OF QUEEN'S BENCH—MONTREAL.*

*Receipt given through error—Parol evidence.*

*S.* brought suit to compel *V.* to render an account of the sum of $2,500, which *S.* alleged he paid *V.* on the 6th October, 1885, to be applied to *S*'s first notes maturing, and in acknowledgment of which *V*'s book-keeper gave the following receipt:—"Montreal, October 6, 1885. Recd from Mr. D. S. the sum of $2,500, to be applied to his first notes maturing. M. V. (Fred.)" *V.* pleaded that he never got the $2,500, and that the receipt was given by his clerk by error, and that it should be for a case of sealskins, and not for $2,500. The clerk and other witnesses were examined without objection to prove error.

*Held*:—That parol evidence is admissible in commercial matters to prove error in a written receipt given by a clerk, and that the evidence in this case proved error.—*Schwersenski & Vineberg*, Dorion, C. J., Cross, Baby, Bossé, JJ., March 22, 1390.

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* To appear in Montreal Law Reports, 7 Q. B.

*Promissory note—Transfer without endorsement—Warranty—Laches.*

*Held*:—1. Where a note of a third party is transferred for valuable security, being given in payment of goods purchased, and the note is not endorsed by the transferor, a warranty is implied that the maker is not insolvent to the knowledge of the transferor.

2. If it be proved that the maker of the note was insolvent to the knowledge of the transferor, the party who received it is entitled to offer it back and claim the amount from the transferor, without asking for the rescission of the contract *in toto*.

3. Art. 1530, C. C., does not apply to such a case, and there being no time fixed by law for offering back such note, it is in the discretion of the Court to determine whether there was laches, and whether the transferor was prejudiced by the delay.—*Lewis & Jeffery*, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ., June 17, 1875.

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*Pledge of goods for pre-existing debt—Transfer of bill of lading—R.S.Q. 5646.*

*Held*:—That the transfer of goods, then stored in New York, by a debtor apparently solvent, to his creditor, by endorsement of the bill of lading, as security for an antecedent indebtedness as well as for a note at the time discounted by the creditor, is valid, and the creditor may apply the proceeds of the pledge to the antecedent debt, and recover on the note discounted at the time.—*Watson & Johnson*, Dorion, C.J., Tessier, Baby, Bossé & Doherty, JJ., Nov. 27, 1890.

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*Sale of goods—Order obtained by commercial traveller—Acceptance.*

*Held*:—In law, and by the custom of trade, the mere taking of an order for goods by a commercial traveller does not complete the contract of sale so long as the order has not been accepted by the principal. And where the latter refuses to accept the order, and gives notice to the person from whom the order was taken, he is not liable in damages.—*Brock et al. & Gourley*, Dorion, C.J., Baby, Bossé, Doherty, JJ., Nov. 27, 1890.

*Procedure in criminal cases—Writ of error—R. S.C. Ch.* 174, *S.* 265.

*Held*:—That the issue of a writ of error will interrupt a sentence which has been partially undergone before the issue of the writ, and in such case, where the offence is a misdemeanor, the prisoner may be admitted to bail. — *Ex parte Woods*, in Chambers, Cross, J., Oct. 14, 1891.

## COURT OF APPEAL.

LONDON, Dec. 8, 1891.

*Before* LORD ESHER, M.R., FRY, L.J., LOPES, L.J.

CLEAVER ET AL v. THE MUTUAL RESERVE FUND ASSOCIATION. (26 L.J,N.C.).

*Insurance—Policy on life of husband for benefit of wife—Death of husband caused by felonious act of wife—Conviction for murder—Right of husband's executors to sum insured—Right of assignee of wife's interest—Public policy.*

Appeal from a judgment of the Queen's Bench Division upon questions of law raised upon the pleadings (reported 60 Law J. Rep. Q. B. 672).

In October, 1888, James Maybrick effected an insurance on his life with the defendants for 2,000*l*, in favour of his wife, Florence E. Maybrick, and by his will, dated April 25, 1889, appointed the plaintiffs, T. and M. Maybrick, executors of his will. In May, 1889, the husband died, and July 25, 1889, the wife was tried and convicted upon an indictment charging her with the wilful murder of her husband. On August 1 the wife assigned the policy and all her interest thereunder to the plaintiff Cleaver, who was her solicitor, to meet the costs of her defence. Subsequently the sentence of death passed on the wife was commuted to penal servitude for life, and the plaintiff, Cleaver, was appointed administrator of her property under 33 & 34 Vict. c. 23, s. 9. The action was brought by the plaintiffs to recover the amount due on the policy, and the question of law raised on the pleadings was whether if it be proved that the husband died from poison intentionally administered by his wife, that would afford a defence to the action (*a*) as against the plaintiff, Cleaver, as assignee of the policy from the wife; (*b*) as against the plaintiff, Cleaver, as administrator under 33 & 34 Vict. c. 23, s. 9; and (*c*) as against the plaintiffs, T. and M. Maybrick, as the executors of the deceased husband.

The Queen's Bench Division (DENMAN, J., and WILLS, J.) held that upon the ground of public policy the defendants were not liable to pay the sum insured.

The plaintiffs appealed.

*Sir C. Russell, Q.C.*, and *S. Reginald J. Smith* for the plaintiffs.

*The Solicitor-General* (*Sir E. Clarke, Q.C.*) and *Hextall* for the defendants.

Their LORDSHIPS allowed the appeal, being of opinion that the plaintiff Cleaver, as assignee of the policy, was not entitled to recover, inasmuch as it was against public policy that the wife, or anyone claiming through her, should benefit by the contract; but that the rule as to public policy did not apply to the executors of the deceased husband, who were entitled to recover because the trust created in favour of the wife under the provisions of section 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), was destroyed by the wife, and her rights having been forfeited, the executors must deal with the money as part of the deceased husband's estate, and administer it accordingly.

## COURT OF APPEAL.

LONDON, May 5, 1891.

*Before* LINDLEY, L.J., LOPES, L.J., KAY, L.J.

STUART v. BELL.

*Slander—Privileged Communication—Malice.*

Application by defendant for judgment or a new trial after verdict and judgment at the trial before WILLS, J., and a jury, at Leeds.

The action was for slander against B., the mayor of Newcastle. At the time of the slander S. was a valet, with his master at the Mansion House at Newcastle, where his master was staying as guest of B. They had come from Edinburgh, and were going on further visits. While they were at Newcastle the chief constable received from the chief constable of Edinburgh a letter stating that a lady at the hotel at Edinburgh where S. and his master had been staying had lost a gold watch, and suspicion had fallen upon S., but, as the groundwork of

suspicion was very slender, he requested that cautious and careful inquiry should be made to see whether possession of the property could be traced to S., and that, in view that S. might be quite innocent, the inquiry should be so conducted as not to injure him unless evidence of his guilt could be obtained.

The chief constable sent this letter to B., who, just before S. and his master were leaving Newcastle, told the master privately the contents of it. The master shortly after discharged S. on the ground that he could not have in his employ a person on whom any suspicion of dishonesty had fallen.

Wills, J., at the trial told the jury that the communication was not privileged, and the jury found a verdict for S.

Lindley, L.J., and Kay, L.J., held that it was the moral and social duty of B. to inform the master of the suspicion that had fallen upon S., and the occasion was privileged; and, there being no evidence of malice, judgment ought to be entered for the defendant.

Lopes, L.J., was of opinion that B. was not justified, having regard to the very cautious character of the information that he had received, in acting as he had done; that the occasion was not privileged, and the verdict and judgment ought to stand.

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## UNITED STATES SUPREME COURT,

May 25, 1891.

Union Pacific Ry. Co. v. Botsford.*

*Evidence—Physical Examination of Party.*

*The courts of the United States have no power, in an action for personal injuries, to order before the trial an examination of the body of the injured person.*

In error to the Circuit Court of the United States for the district of Indiana.

The original action was by Clara L. Botsford against the Union Pacific Railway Company for negligence in the construction and care of an upper berth in a sleeping car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial. Three days before the trial (as appeared by the defendant's bill of exceptions) "the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence, it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner, the defendant at the time informing the court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition. The court overruled said motion, and refused to make said order, upon the sole ground that this court had no legal right or power to make and enforce such order." To this ruling and action of the court the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of $10,000, sued out this writ of error.

Gray, J. The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the Circuit Court in holding that it had no legal right or power to make and enforce such an order. No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: "The right to one's person may be said to be a right of complete immunity; to be let alone." Cooley, Torts, 29. For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is for the time being privileged from being taken under distress for rent, or attachment on mesne process or execution for

* 11 Sup. Ct. Rep. 1000.

debt, or writ of replevin. 3 Bl. Comm. 8; *Sunbolf* v. *Alford*, 3 Mees. & W. 248, 253, 254; *Mack* v. *Parks*, 8 Gray, 517; *Maxham* v. *Day*, 16 id. 213. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order of process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. In former times the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy or of the identity of a party; or, on an appeal of mayhem, the issue of mayhem or no mayhem; and, in an action of trespass for mayhem, or for an atrocious battery, might, after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, *super visum vulneris*, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, "it is not thought necessary to summon a jury to decide it," because, "the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragable proof;" and therefore "the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone." The inspection was not had for the purpose of submitting the result to the jury, but the question was thought too easy of decision to need submission to a jury at all. 3 Bl. Comm. 331-333. The authority of courts of divorce in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction, and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. *Briggs* v. *Morgan*, 2 Hagg. Const. 324; 3 Phillim. Ecc. 325; *Devanbagh* v. *Devanbagh*, 5 Paige, 554; *Le Barron* v. *Le Barron*, 35 Vt. 365. The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a suppositious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and if she was, to keep her under proper restraint till delivered. 1 Bl. Comm. 456; Bac. Abr. "Bastard, A." In cases of that class the writ has been issued in England in quite recent times. *In re Blakemore*, 14 L. J. Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history. The most analogous cases in England that have come under our notice are two in the common bench, in each of which an order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it. In one of them, decided in 1838, counsel moved for an order that the plaintiff and his witnesses have a view of the building and an inspection of the work done thereon, and stated that the object of the motion was to prevent great expense, to obviate the necessity of calling a host of surveyors, and to

avoid being considered trespassers. Thereupon one of the judges said, "Then you are asking the court to make an order for you to commit a trespass;" and Chief Justice Tindal said: "Suppose the defendants keep the door shut; you will come to us to grant an attachment. Could we grant it in such a case? You had better see if you can find any authority to support you, and mention it to the court again." On a subsequent day the counsel stated that he had not been able to find any case in point, and therefore took nothing by his motion. *Newham* v. *Tate*, 1 Arn. 244; 6 Scott, 574. In the other case, in 1840, the court discharged a similar order, saying: "The order, if valid, might, upon disobedience to it, be enforced by attachment. Then it is evidently one which a judge has no power to make. If the party should refuse so reasonable a thing as an inspection, it may be a matter of argument before the jury, but the court has no power to enforce it." *Turquand* v. *Strand Union*, 8 Dowl. 201; 4 Jur. 74. In the English Common Law Procedure Act of 1854, enlarging the powers which the courts had before, and authorizing them, on the application of either party, to make an order "for the inspection by the jury, or by himself, or by his witnesses of any real or personal property, the inspection of which might be material to the proper determination of the question in dispute," the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Tayl. Ev. (6th ed.), §§ 502-504. Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. Tayl. Ev. §§ 1588-1595; 1 Greenl. Ev., § 559.

In the case at bar it was argued that the plaintiff in an action for personal injury may be permitted by the court, as in *Mulhado* v. *Railroad*. 30 N. Y. 370, to exhibit his wounds to the jury in order to show their nature and extent, and to enable a surgeon to testify on that subject, and therefore may be required by the court to do the same thing, for the same purpose, upon the motion of the defendant. But the answer to this is that any one may expose his body if he chooses, with a due regard to decency, and with the permission of the court, but that he cannot be compelled to do so in a civil action without his consent. If he unreasonably refuses to show his injuries when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power. *Clifton* v. *U. S.*, 4 How. 242; *Bryant* v. *Stilwell*, 24 Penn. St. 314; *Turquand* v. *Strand Union*, above cited. In this country the earliest instance of an order for the inspection of the body of the plaintiff in an action for a personal injury appears to have been in 1868, by a judge of the Superior Court of the city of New York in *Walsh* v. *Sayre*, 52 How. Pr. 334, since overruled by decisions in General Term in the same State. *Roberts* v. *Railroad*, 29 Hun, 154; *Neuman* v. *Railroad*,, 50 N. Y. Super. Ct. 412; *McSwyny* v. *Railroad Co.*, 7 N. Y. Supp. 456. And the power to make such an order was peremptorily denied in 1873 by the Supreme Court of Missouri, and in 1882 by the Supreme Court of Illinois. *Loyd* v. *Railroad Co.*, 53 Mo. 509; *Parker* v. *Enslow*, 102 Ill. 272. Within the last fifteen years, indeed, as appears by the cases cited in the brief of the plaintiff in error (*Schroeder* v. *Railway Co.*, 47 Iowa, 375; *Turnpike Co.* v. *Baily*, 37 Ohio St. 104; *Railroad Co.* v. *Thul*, 29 Kans. 466; *White* v. *Railway Co.*, 61 Wis. 536; *Hatfield* v. *Railroad Co.*, 33 Minn. 130; *Stuart* v. *Havens*, 17 Neb. 211; *Owens* v. *Railroad Co.*, 95 Mo. 169; *Sibley* v. *Smith*, 46 Ark. 275; *Railroad Co.* v. *Johnson*, 72 Tex. 95; *Railway Co.* v. *Childress*, 82 Ga. 719; *Railroad Co.* v. *Hill*, 90 Ala. 71), a practice to grant such orders has prevailed in the courts of several of the Western and Southern States, following the lead of the Supreme Court of Iowa in a case decided in 1877. The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law. In the State of Indiana the question appears not to be settled. The

opinions of its highest court are conflicting and indecisive. *Kern* v. *Bridwell*, 119 Ind. 226, 229; *Hess* v. *Lowrey*, 122 id. 225, 233: *Railroad* v. *Brunker* (Ind.), 26 N. E. Rep. 178. And the only statute which could be supposed to bear upon the question simply authorizes the court to order a view of real or personal property which is the subject of litigation, or of the place in which any material fact occurred. Rev. Stat. Ind., 1881, chap. 2, § 538.

But this is not a question which is governed by the law or practice of the State in which the trial is had. It depends upon the power of the National courts, under the Constitution and laws of the United States. The Constitution, in the seventh amendment, declares that in all suits at common law, where the value in controversy shall exceed $20, trial by jury shall be preserved. Congress has enacted that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," and has then made special provision for taking depositions. Rev. Stat., §§ 861, 863 *et seq.* The only power of discovery or inspection conferred by Congress is to "require the parties to produce the books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," and to nonsuit or default a party failing to comply with such an order. Rev. Stat., § 724. And the provisions of section 914, by which the practice, pleadings and forms and modes of proceeding in the courts of each State are to be followed in actions at law in the courts of the United States held within the same State, neither restricts nor enlarges the power of these courts to order the examination of parties out of court. *Nudd* v. *Burrows*, 91 U. S. 426, 442; *Railroad Co.* v. *Horst*, 93 id. 291, 300; *Ex parte Fisk*, 113 id. 713; *Chateaugay Ore & Iron Co.*, 128 id. 544, 554. In *Ex parte Fisk*, just cited, the question was whether a statute of New York, permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial, was applicable after an action begun in a court of the State had been removed into the Circuit Court of the United States. It was argued that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York. 113 U. S. 717. But this court, speaking by Mr. Justice Miller, held that this was a matter of evidence, and governed by that section, saying: "Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof." "It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel, to extract something which he might use or not, as it suits his purpose." "Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides. There is no place for exceptions made by State statutes. The court is not at liberty to adopt them or to require a party to conform to them. It has no power to subject a party to such an examination as this." 113 U. S. 724. So we say here. The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage or to the statutes of the United States. The Circuit Court, to adopt the words of Mr. Justice Miller, "has no power to subject a party to such an examination as this."

BREWER, J. (dissenting). Mr. Justice Brown and myself dissent from the foregoing opinion. The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages in early days was, compared with later times, limited; and very few of those difficult questions, as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common-law courts to compel a personal examination was, in many cases,

often exercised, and unchallenged. Indeed wherever the interests of justice seemed to require such an examination, it was ordered. The instances of this are familiar, and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange, that if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various States are conflicting. This is the first time it has been presented to this court, and it is therefore an open question. There is here no inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or rudeness, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the court-room, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require, but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries, in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial or dismissing the case. For these reasons we dissent.

Judgment affirmed.

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## *INSOLVENT NOTICES, ETC.*

*Quebec Official Gazette, Dec. 19.*

*Judicial Abandonments.*

Joseph Eugène Dion, trader, Robertson Station, district of Arthabaska, Dec. 17.

Henri Victor Jarry, trader, parish of St. Germain de Grantham, Dec. 10.

Charles Edouard Johnson, trader, village of Warwick, Dec. 11.

Abraham Lilienthal, trader, Montreal, Nov. 30.

Victor Portelance & Co., traders, doing business in Lachevrotière, Dec. 17.

Damase Turgeon and François Xavier Corriveau, traders, Beaumont, Dec. 17.

Joseph Lyon Vineberg, trader, Sherbrooke, Dec. 14.

*Curators appointed.*

*Re* Blais & Lefebvre.—G. H. Burroughs, Quebec, curator, Dec. 14.

*Re* Kenneth Campbell & Co., Montreal.—A. W. Stevenson, Montreal, curator, Dec. 17.

*Re* Geo. A. Crossley, contractor, heretofore doing business in Montreal.—D. Seath, Montreal, curator, Dec. 1.

*Re* Charles Dion, Three Rivers.—Kent & Turcotte, Montreal, joint curator, Dec. 14.

*Re* Abraham Lilienthal.—Henry Ward, Montreal, curator, Dec. 7.

*Re* Alfred Marchessault.—Millier & Griffith, Sherbrooke, joint curator, Dec. 15.

*Re* Damase Martineau.—Millier & Griffith, Sherbrooke, joint curator, Dec. 15.

*Re* Edward McEntyre, Montreal.—J. McD. Hains, Montreal, curator, Dec. 14.

*Re* John D. McFarlane, North Star Mine, Buckingham.—J. McD. Hains, Montreal, curator, Dec. 9.

*Re* Pierre H. Renaud.—J. J. Griffith, Sherbrooke, curator, Dec. 15.

*Dividends.*

*Re* Joseph Becotte.—Second and final dividend, payable Dec. 28, Bilodeau & Renaud, Montreal, joint curator.

*Re* Bouchard & Breton, Quebec.—First dividend, payable Jan. 4, 1892, N. Matte, Quebec, curator.

*Re* J. C. Campbell, Montreal.—First dividend, payable Jan. 7, 1892, Kent & Turcotte, Montreal, joint curator.

*Re* F. M. Deschênes & Son, Quebec.—First dividend, payable Jan. 4, 1892, N. Matte, Quebec, curator.

*Re* G. R. Fabre & Fils.—First dividend, payable Dec. 29, J. M. Marcotte, Montreal, curator.

*Re* Jos. Giroux, hardware merchant, Montreal.—First dividend, payable Jan. 5, 1892, C. Desmarteau, Montreal, curator.

*Re* Lane & Boissonnault, Quebec.—Second and final dividend, payable Jan. 4, 1892, N. Matte, Quebec, curator.

*Re* Louis Lafond, Montreal.—First and final dividend, payable Jan. 5, W. A. Caldwell, Montreal, curator.

*Re* D & J. Maguire.—Final dividend (1-6 of one per cent.), payable Dec. 30, M. Kennedy, Quebec, curator.

*Re* Bernier, Savard & Pepin, St. Sauveur, Quebec.—First and final dividend, payable Jan. 5, 1892, H. A. Bedard, Quebec, curator.

*Re* Ida F. Tenney, Montreal.—First and final dividend, on privileged claims only, payable Jan. 5, 1892, A. W. Stevenson, Montreal, curator.

*Re* Wells & Crossley, Montreal.—First and final dividend, payable Jan. 5, 1892, W. A. Caldwell, Montreal, curator.

*Separation as to property.*

Emerentienne Blouin vs. Louis Zéphirin Joncas, M. P., Quebec, Dec. 11.

Zénaide Poulin, vs. Ovilas alias Avila Duteau, farmer, parish of St. Ephrem d'Upton, Dec. 14.

Marie Philomène Emma Roberge vs. Pierre Arthur Pelletier, trader, parish of St. Ferdinand d'Halifax, Dec. 12.

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## *GENERAL NOTES.*

UNTO THE THIRD GENERATION.—The *Woman's Journal*, of Boston, Mass., says:—"Mrs. Bessie Bradwell Helmer, president of the Association of Collegiate Alumnæ, which has just held its annual meeting in this city, is a graduate of the Union College of Law of Chicago, where the young men of her class elected her valedictorian, and she is now the wife of one of her fellow students. Mrs. Helmer is the daughter of Judge Bradwell of Chicago, and Mrs. Myra Bradwell who has for more than twenty years edited the *Chicago Legal News*. Mrs. Helmer has a beautiful two-year-old daughter. To a jesting inquiry whether this child, who has lawyers for father, mother, grandfather and grandmother, had yet begun to read for the bar, Mrs. Helmer answered, "Not yet. She is already a pleader, however, and a very successful one."

A SCRAMBLE FOR WORK.—What can be in store for the Junior Bar when half-a-dozen readerships at £350 per annum attract 700 applicants?-*Law Times*,(London).

JUDGE (1891). Your age? LADY WITNESS. Thirty years. JUDGE (incredulously). You will have some difficulty in proving that. LADY WITNESS (excitedly). You'll find it hard to prove the contrary, as the church register that contained the entry of my birth was burned in the year 1845.

POLICE RESPONSIBILITY FOR ARRESTS.—A case of public interest occupied His Honour Judge Shand in the Liverpool County Court on October 19, when Mrs. Catherine Whittle sued Detective Jackson, of the Liverpool police force, for damages for false imprisonment. —Mr. Segar, who appeared for the plaintiff, said that on April 7 his client went with her sister to Bunney's shop, in Church Street. She returned by way of Richmond Row, and, after leaving her sister, she was proceeding homewards when she was stopped by Jackson, who asked her if she had been to Bunney's, and, upon her replying in the affirmative, he asked her to show him the contents of her basket and pockets, and she was compelled to allow him to search her. A crowd gathered round her and she felt keenly the indignity of her position. In fact, it gave her such a shock that her health, which was poor at the time, suffered considerably, and eventually a miscarriage was brought on.—Mr. Neale, for the defendant, said that he was prepared to acknowledge that there was no imputation against the plaintiff, the action of the defendant being the result of wrong information.—Mr. Segar said that if the defendant would apologise and pay the costs the matter would end.—Mr. Neale said he was not in a position to pay the costs. It was a question of law whether the defendant, being a constable, was justified in the action he had taken.—The jury found for the plaintiff, damages 20*l.*, and costs were allowed.

PERJURY UNDER DURESS.—The Supreme Court of Mississippi has declared that on indictment for perjury on the trial of a criminal case, it is no defence that defendant was induced to testify falsely by threats against his life, made out of court, and some time before the trial. "The social system would be subverted, and there would be no protection for persons or property, if the fear of man, needlessly and cravenly entertained, should be held to justify or excuse breaches of the criminal laws of the State, and to excuse or justify the crime of perjury:" *Bain* v. *State*, 7 So. Rep. 408.

BICYCLE LAW IN ENGLAND.—A contributory cause to the injury to the horses of the Dorking coach was the sudden appearance of two bicycles. Here we are on safer legal ground than in the case of barbed wire. The Local Government Act, 1888, s. 85, declares

'bicycles, tricycles, velocipedes, and other similar machines', to be carriages within the meaning of the Highway Acts (so as to render any person liable to a penalty for cycling furiously), and further enacts that: (1) Lamps shall be carried by cyclists 'during the period between one hour after sunset and one hour before sun rise,' and (2) that 'upon overtaking any cart or carriage, or any horse, or foot passenger proceeding along the carriage way,' every cyclist 'shall within a reasonable distance from and before passing such cart or carriage, horse, or other passenger, give audible warning' of the approach of the bicycle, &c. If any accident should result from these statutory requirements being disregarded, we have no reasonable doubt that an action would lie against the cyclist disregarding them at the suit of the party injured; and there is some ground for saying, on the authority of *Powell* v. *Fall*, 49 Law J. Rep. Q. B. 428, that an action would lie, even if all the statutory requirements should have been complied with.—*Law Journal.*

ODD NAMES.—The *Green Bag* has culled the following from the reports:

Cookson v. Cock, Cro. Jac. 125. (Very unfilial.)

Gold v. Death, Hobart, 927. (An ancient but futile struggle.)

Beak v. Beak, 2 Swand, 627. (A sharp encounter).

Slack v. Sharp, 8 Ad. & E. 36. (Can plaintiff recover?).

Onions v. Cheese, Lutwyche, 530. (We should think they would disagree).

Commonwealth v. 14 Hogs, 10 S. & R. 393. (Mean! Take one of your size).

Succession of Beer, 12 La. Ann. 698. (Estate in liquidation?)

Gullett v. Gullett, 25 Ind. 337. (Naturally follows "Succession of Beer.")

Funk v. Venus & Ex'rs of Venus, 3 Pa: (We have heard of her, but never of them).

Shirtz v. Shirtz, 5 Watts, 255. (This encounter was to be expected).

Beer v. Hooper, 32 Miss. 246. (Defendant can restrain plaintiff).

651 Chests of Tea v. United States, 1 Paine 499. (The worm will turn; was this the Boston Tea?)

PERSONAL APPEALS BY NATIVES OF INDIA TO THE QUEEN.—In consequence of natives of India having frequently come to England to make personal appeals to her Majesty against the decision of Indian tribunals, the Government of India has issued the following notification: "Whereas much inconvenience has from time to time been caused by the poverty and distress of Indian litigants who have proceeded to England under the impression that their cases will receive the consideration of Her Majesty, the Queen-Empress, it is hereby notified for general information that appeals from the decision of the Indian Courts do not lie in England, except the ordinary appeals to the Privy Council, which are provided for in the Acts of the Governor-General in Council regulating civil procedure, and that no petitioners other than appellants to the Privy Council prosecuting their appeals according to the prescribed rules will obtain any hearing in England from Her Majesty. Petitioners who proceed to England merely waste their money and expose themselves to great inconvenience and hardships, with the risk of being unable ever to return to their native country."

ATHLETES IN THE LAW COURTS.—The recent trial of *Richardson* v. *Davis* will remind anecdote-mongers of the old story of the man who was being thrown from the gallery of the Theatre Royal, Dublin: "Don't waste him,' cried a voice, 'kill a fiddler with him.' Only in the case tried before Mr. Justice Grantham the man was not thrown with the intent of hurting anybody. Plaintiff and his wife went one evening to a music-hall and seated themselves under a net spread across the auditorium; and into this net a gymnast walking on the wire dropped a man whom he was carrying in his arms. The falling body hit plaintiff on the nose. He was afterwards very ill and his eyesight was affected. The jury gave him 45*l* damages. It was pleaded for the defence that the plaintiff had been repeatedly warned not to stand up, but that he had persisted in doing so, and had thus been himself a contributor to the accident which befell him. Such an argument obviously could not hold water. Ethically the mere dropping the man into the net was an offence *contra bonos mores*. The stupid idea was to create an impression among the audience that the man had been accidentally dropped, and consequently to cause alarm. The net was safe enough, no doubt; but had it broken, and the dropped man been killed, would not the wire-walker have been liable to an indictment for manslaughter? It may be granted that to hit a man with a man is occasionally justifiable and even necessary. Turn over Flaxman's wonderful outline illustrations of Homer—he drew them in Rome and got but a guinea apiece for them—and you will find that the heroes of the "Iliad' frequently assaulted each other with each other, although it must have required considerable gymnastic training for a valiant Greek to seize an equally valiant Trojan by one ankle, swing him round, and bang another Trojan with him. Then, again, does not Captain Marryat tell us in 'Peter Simple' how, when the hero and his friend O'Brien escaped from the French prison, they took refuge in the branches of a tree in the Forest of Ardennes, and, an inquisitive gendarme happening to be standing under the tree, O'Brien dropped upon him and killed him? But there was no necessity for the wire-walker to drop the man into the net. It was a piece of stupidly sensational tomfoolery which might have ended fatally.—*George Augustus Sala.*

SOLICITORS AND TOUTS.—Employing 'touts' to bring business to solicitors is so derogatory to the dignity of the profession that the publicity recently given to a case heard at the Brompton County Court, and reported in our last issue, will, we trust, have the effect of checking, if not stamping out, this objectionable practice. Ignorant persons who sustain, or claim to have sustained, injuries in railway or omnibus accidents are the most common victims of the system; and many cases which would probably be settled out of Court, if in other hands, result in costly and vexatious litigation. The most effective remedy is, after all, a sound and healthy professional opinion, and the Incorporated Law Society have a great responsibility in seeing that this is cultivated.—*Law Journal*, (London).

# GENERAL INDEX.

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# INDEX TO REPORTS

AND

# ABSTRACTS OF CASES.