The Legal News.

VOL. VI. JUNE 9, 1883. No. 23.

IMPLIED CONTRACT TO PAY AGENT AUTHORIZED TO BET NOT WAGERING.

ENGLISH HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, NOVEMBER 15, 1882.

REED v. ANDERSON, 48 L. T. Rep. N. S. 474.

Where a person authorizes another to bet for him in the agent's own name, an implied request to pay if the bet be lost is involved in that authority; and the moment the bet is made and the obligation to pay it if lost incurred, the authority to pay (if coupled with an interest based on good consideration) becomes irrevocable in law; and it is immaterial that such obligation is not enforceable by process of law, if the non-fulfillment of it would entail serious inconvenience or loss upon the agent.

Action to recover moneys paid to winners on bets made by plaintiff for defendant. The opinion states the facts.

HAWKINS, J. This action was brought to recover £175, the amount of three bets made by the plaintiff in his own name at the request of and for the defendant, and paid by the plaintiff to the winners thereof. The plaintiff is a turf commission agent, and a member of Tattersall's subscription room. The defendant is a licensed victualler at South Shields. According to well-established usage, known to the defendant, a turf commission agent, instructed by an employer to back a horse, backs it in his own name, and becomes himself alone responsible to the layer of the odds, or the person with whom the bet is made; and on the settling day after the event, he receives or pays, as the case may be, rendering his own account to his employer, paying to or receiving from him the balance of moneys won or lost. For some time before the Ascot meeting, 1881, the plaintiff had according to such usage, been in the habit of backing horses for the defendant, of receiving bets won, paying bets lost, sending accounts to the defendant, and paying to or receiving from him the balances thereof. On the Friday of the Ascot meeting (17th June, 1881), the plaintiff being at Ascot received from the defendant a telegram to this effect. "Put me fifty on Limestone, first race; pony all Archer's mounts; fifty Sword Dance, hundred Elf King, Wokingham; hundred Red Rag filly, Castle Stakes. Reply." This telegram, though handed in at South Shields at 12.8 p. m., and received at Ascot at 1.29 p. m., did not reach the plaintiff until 1.40 p. m., at which time the first race for the day, in which Limestone ran, was over, that race having been run at half-past one; for that race, therefore, Limestone could not be backed. The second race of the day was the Wokingham Stakes, which was set down for two o'clock. For that race Sword Dance and Elf King, mentioned in the telegram, and Valentino, ridden by F. Archer, were entered; the plaintiff accordingly, acting on the telegram, backed in his own name Elf King for 100*l.*; Sword Dance for 50*l.*, and Valentino (as one of Archer's mounts) for 25*l.* Neither of these horses won; the consequence was that these bets, to the amount of 175*l.*, the subject of the present action, were lost. At 2.15 p. m., the plaintiff handed in at the telegraph office at Ascot the following message to the defendant: "Nothing done Limestone or Archer's mounts the first race—your message came ten minutes after the race." In this message, which was not delivered to defendant until 3.14 p. m., it will be observed nothing is said about the second race; but at 3.5 p. m., the plaintiff telegraphed the result of that race to defendant in these terms: "Your message received; Viridis won." This was evidently a mistake, for no such animal as Viridis ran in the race. The Wokingham was won by a colt by St. Albans out of Viridis. The mistake however is immaterial. This message was not received at South Shields until 3.35 p. m., and then defendant had received information by telegram from another person of the result of the first two races. On the evening of the same day the defendant repudiated these bets and all liability in respect of them by the following letter to the plaintiff:—"Exchange Vaults, South Shields, 17th June, 1881.—Mr. Read,—I find your message was not handed in before the race for the Wokingham Stakes; I had the result of the race ten minutes before I received your reply. I enclose you the message, which please return to me; they were both handed in at 2.15, that being fifteen minutes after the order of running; so I shall consider I am not on anything for two first races to

day, as I cannot stand the messages being sent away after the race is over to say I am on. In haste, I remain, yours respectfully, J.Anderson." In reply to this letter the plaintiff wrote to defendant as follows:—"Dear Sir,—The reason you did not get your message about Elf King, S. Dance, and F. Archer mounts sooner was on account of so many messages being sent about the results of the Wokingham Handicap. The following bets I took for you. I inclose you the names: 100—800 Elf King; Jacob, A. 50—225 S. Dance; Robinson, J. 25—150 Valentino; Masterman." With this letter the plaintiff sent a detailed account of the various bets he had made for the defendant during the Ascot meeting, and of the amounts which he would have to receive from and pay to the defendant. In number there were between fifty and sixty, and the account showed that upon these the defendant's losses, including the bets in question, amounted to 1,420*l.* 0s 5. whilst his winnings were 705*l.* 17*s.* 4*d.* leaving a balance of 714*l.* 3*s.* 1*d.* to be paid by the defendant. The defendant in reply, on the 19th June inclosed a cheque for £539 3*s.* 1*d.*, as being the real balance due, and with regard to the difference, 175*l.*, wrote thus: "I cannot think about paying the other, as I have other people to please as well as myself, and paid for reply, and you say you received message ten minutes too late for first race, but you cannot give any excuse for not answering it until the next race was over. I am quite satisfied that had any of them won I should not have been on." Other correspondence followed, but is not material for the question I have to decide. On the settling day the plaintiff paid the three bets in question to the winners of them. Had he not done so he would have been a "defaulter" within the meaning of the 3d rule of Tattersall's new subscription room; and if upon complaint made to the committee of the room, the committee adjudged him to be so, his membership of the room would thereupon have ceased, and he would have been thenceforward excluded from it, and by the 50th of the rules of racing made by the jockey club, if he had been reported by such committee as being a defaulter in bets, he would until his default had been cleared, have been subject to certain disqualifications mentioned in rule 49 of the rules of racing as to entering and running horses. The consequences of becoming a defaulter would therefore have been very serious to the plaintiff. For the defendant it was contended, first, that the authority to make the bets in question was subject to an express condition that the defendant should be informed by the plaintiff, by telegram delivered at the telegraph office before the race was run, that he was "on;" that is, that the bets had been made on his behalf; secondly, that if there was no such express condition, there was an universal usage and custom importing a condition to that effect into every authority conveyed by telegram to back horses, when a reply was paid: and that inasmuch as no reply telegram was handed in by the plaintiff for the defendant until a quarter of an hour after the race was run, the defendant was entitled to repudiate the bets as he did by his letter. The defendant further insisted that the bets were wagering contracts; that he had never given any authority to the plaintiff to pay them, and even if he had, that authority was revoked before the money was actually paid. I am of opinion, and I find as a fact, that there was no such express condition, nor is there any such usage or custom as contended for. The payment for a reply to a telegram requesting the plaintiff to back the horses, no doubt was an intimation to the plaintiff that the defendant desired to be speedily informed of what had been or what was about to be done on his behalf; but it did not constitute a condition to the plaintiff's authority to make the bets. As a matter of fact, where it can be done, a message in reply is no doubt usually handed in at the office before the race, but no universal custom or usage was established before me making it imperative upon the commission agent to do this as a condition to his binding his customer. Long and unreasonable delay in replying until after the race is run, and the event known, might under certain circumstances afford strong ground for suspecting that in fact the agent did not make the bets on behalf of his customer, and was fraudulently attempting to saddle him with the loss. There is however no evidence before me to justify such an imputation in the present case. It was clearly established to my satisfaction that the bets were made *bona fide* by the plaintiff for the defendant, in pursuance of the telegram, and that the plaintiff paid those bets in discharge of his liability to the persons with whom

they were made. The objections of fact therefore fail. This brings me to the consideration of the legal objections to the plaintiff's claim. I am of opinion that neither of them can be sustained. At common law, wagers are not illegal, and before the passing of 8 & 9 Vict., c. 109, actions were constantly brought and maintained to recover money won upon them. The object of 8 & 9 Vict., c. 109 (passed in 1845) was not to render illegal wagers which up to that time had been lawful, but simply to make the law no longer available for their enforcement, leaving the parties to them to pay them or not as their sense of honor might dictate. Accordingly it was by the 18th section enacted in these words: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager." There is nothing in this language to affect the legality of wagering contracts, they are simply rendered null and void, and not enforceable by any process of law. A host of authorities have settled this to be the true effect of the statute. I will mention only one or two. In *Fitch* v. *Jones*, 5 E. & B. 238, it was expressly so decided, Erle, J. saying: "I think that the defendant might without violating any law make a wager. If he lost he might without violating any law pay what he had lost." In *Hill* v. *Fox*, 4 H. & N. 359, the same learned judge said that the parties do not violate any law by making a bet; but the law will not assist the winner in enforcing payment of it. In *Ex parte Pyke; Re Lister*, 38 L. T. Rep., N. S. 923; 8 Ch. Div. 754, I observe the Master of the Rolls, at p. 757, is reported to have spoken of gaming or betting being illegal. I feel sure that the learned judge must have been misunderstood; and in his judgment in *Lynch* v. *Goodwin*, 26 Solicitor's Journal, 509, he expressly stated that a bet was void, but not illegal. But although the law will not compel the loser of a bet to pay it, he may lawfully do so if he please; and what he may lawfully do himself he may lawfully authorize anybody else to do for him; and if by his request or authority another person pays his lost bets, the amount so paid can be recovered from him as so much money paid to his use. In *Rosewarne* v. *Billing*, 9 L. T. Rep., N. S. 441; 33 L. J., C. P. 55; 15 C. B., N. S. 316, the defendant had employed the plaintiff to make in his own name wagering contracts respecting mining shares, and the plaintiff accordingly made them and paid certain differences on such shares, and brought his action to recover from the defendant (his employer) the money so paid. In giving judgment for the plaintiff, Erle, C. J., said: "It is clear that though the defendant was not liable to pay the sums due under these wagering contracts, he might do so if he chose; and if a party loses a wager and requests another to pay it for him, he is liable to the party so paying it for money paid at his request." *Oldham* v. *Ramsden*, 44 L. J. 309, C. P., is to the same effect; so is *Ex parte Pyke; Re Lister*, *ubi sup.*, in which an appeal by the trustee under Lister's bankruptcy against the registrar for allowing a proof by Barrett for money lent and paid by him at Lister's express request in discharge of lost bets at Tattersall's was dismissed by the Court of Appeal. The request or authority to make such payments may be either expressed, or implied from usage or from the nature of the dealings between the parties themselves. If a person authorizes another to bet for him in his own name, an implied request to pay if the bets are lost is involved in that authority. For this too there is abundance of legal sanction. In *Bubb* v. *Yelverton*, 24 L. T. Rep., N. S. 263; L. Rep., 9 Eq. 471; 19 W. R. 739, which was a suit for the administration of the estate of the Marquis of Hastings, deceased, Lord Charles Ker claimed a sum of 850*l.*, for money paid for the marquis for bets made and lost on his account, it was held by Lord Romilly, M. R., that a request to bet implied an authority to pay the bet if lost, and that Lord Charles Ker was entitled to prove against the estate of the marquis for the amount paid; see also *Oldham* v. *Ramsden*, *ubi sup.*, *Rosewarne* v. *Billing*, *ubi sup.*, and lastly, *Lynch* v. *Goodwin*, *ubi sup.* I am not aware that this last case has been reported in any of the regular reports at present. In the present case I find as a fact, that at the time the defendant gave the authority to make the bets, he gave also an implied authority to pay them if they should be lost. The defendant however contended, that assuming wagering contracts not to be illegal, and that a person who employs another to bet gives that other implied

authority to pay, such authority may be revoked at any time before payment is actually made, and that it was in fact revoked in the present case. Upon the evidence before me, I am of opinion, and find as a fact, that the defendant did not revoke the authority to pay; on the contrary by settling the rest of the account, he seems to me to have confirmed that authority to pay whatever bets were honestly made and lost on his account, and the correspondence satisfies me that he only desired to raise the question whether these particular bets were honestly made or not. Assuming however contrary to my opinion, that there was a revocation in fact, I am of opinion such revocation was inoperative in law. I am not aware that hitherto this point has been judicially decided, although it was shortly mooted in *Rosewarne* v. *Billing*, *ubi sup.* I think it right therefore to state my reasons for the conclusions to which I have arrived. As a general rule a principal is no doubt at liberty to revoke the authority of his agent at his mere pleasure. But there are exceptions to this rule, one of which is that when the authority conferred by the principal is coupled with an interest based on good consideration, it is in contemplation of law irrevocable; that is though it may be revoked in fact, that is to say by express words, such revocation is of no avail. In *Smart* v. *Saunders*, 5 C. B. 895, Wilde, C. J., said: "The result appears to be that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." See also Story on Agency, §§ 476,477. In the present case the authority to pay the bets if lost was coupled with an interest; it was the plaintiff's security against any loss by reason of the obligation he had personally incurred on the faith of that authority to pay the bets if lost; the consideration for that authority was the taking upon himself that responsibility at the defendant's request. Previous to the making of the bets the authority to bet might beyond all doubt have been revoked, but the instant the bets were made, and the obligation to pay them if lost incurred, the authority to pay became, in my judgment, irrevocable in law. In other words the case may be stated thus: If a principal employs an agent to do a legal act, the doing of which may in the ordinary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time gives him an authority if the obligation is incurred to discharge it at the principal's expense, the moment the agent on the faith of that authority does the act, and so incurs the liability, the authority ceases to be revocable. The cases of *Hampden* v. *Walsh*, 33 L. T. Rep. (N. S.), 852; 1 Q. B. Div. 189; 45 L. J. 238, Q. B., and *Diggle* v. *Higgs*, 37 L. T. Rep. (N. S.), 27; 2 Ex. Div. 422, were cited for the defendant in support of his contention that the authority to pay was revocable. These cases do not assist him; they were actions brought against stakeholders to recover back deposits on wagers, and the revocation of the authority to pay over to the winner was before the money was paid over; in each of those cases the stakeholders must be taken to have received the deposits subject to the legal obligation to return them to the depositors if demanded back before payment over. The stakeholder's authority in those cases was coupled with no interest, and his position was unaffected by the revocation. Those cases are therefore not like the present, and do not fall within the exception to the rule I have referred to. The opinion I have expressed as to the irrevocability of the authority to pay lost bets applies only to cases where the agent by the principal's authority makes the bets in his own name so as to be personally responsible for them. If an agent were simply to make bets in the name of his principal, I am far from saying that the principal might not repudiate authority to pay at any time before payment was actually made, for his non-payment of bets made for him, and in his name, would not render his agent liable as a defaulter or subject such agent to loss or obloquy. It is not necessary however to decide this point now. The plaintiff's case may also, as it seems to me, be supported on this ground, that if one man employs another to do a legal act, which in the ordinary course of things will involve the agent in obligations pecuniary or otherwise, a contract on the part of the employer to indemnify his agent is implied by law. See Story on Agency, §§ 337-340, and I think it signifies nothing that such obligation is not enforceable in a court of justice if the non-fulfillment of it would entail serious inconvenience or loss upon the agent,

for he is not bound to submit to these things for his employer, if by doing that which was in contemplation of both at the time of the employment, he can avoid them, as he can in the case of bets lost, by paying them; and he is not bound, in my opinion, to incur the odium and consequences of repudiating his honorable engagements. As a matter of fact, I find that when the plaintiff in this case was employed to bet there was a tacit agreement on the part of the defendant to indemnify him against all the ordinary consequences of his so doing. In pleading, such a contract of indemnity might in substance be thus described: In consideration that the plaintiff as a turf commission agent would at the request of the defendant, and as his agent, make for him in his, the plaintiff's own name, certain bets, subject to and according to the usage of Tattersall's, the defendant promised that he would indemnify the plaintiff against all the consequences of making such bets according to such usages, etc. Many cases might be cited to show that such a contract, though made with reference to and in contemplation of wagering contracts, is not in itself a wagering contract. See *Bubb* v. *Elverton, ubi supra; Johnson* v. *Lansley*, 19 L. T. Rep. (O. S.) 158 and 168; 12 C. B. 468; *Beeston* v. *Beeston*, 33 L. T. Rep. (N. S.), 700; 1 Ex. Div. 13; 45 L. J. 230, Ex. The result is that if a person employs another to bet for him in the agent's own name, an authority to pay the bets if lost is coupled with the employment, and although before the bet is made the employment and authority are both revocable, the moment the employment is fulfilled by the making of the bet the authority to pay it if lost becomes irrevocable. For the reasons I have stated I am of opinion that the plaintiff is entitled to my judgment for the amount he claims, and I give judgment accordingly. On full consideration I have determined to allow such amendments (if any) in the pleadings as may be necessary to raise all the legal questions involved in the case, in order that it may be determined upon its true legal merits. The costs will follow the event of the action.

Judgment for the plaintiff.

COUR DE REVISION.

MONTRÉAL, 30 Avril, 1883.

Coram SICOTTE, J., DOHERTY, J., RAINVILLE, J.

COSSETTE v. LEDUC.

Maître et serviteur—Responsabilité.

Le maître est responsable à son employé du dommage qui lui advient par suite d'une installation vicieuse des machines ou appareils de son établissement.

La connaissance que l'employé aurait pu avoir du danger n'exonère pas le maître.

Lorsque l'employé a fait ce qu'aurait fait la plupart des hommes, il n'est pas en faute, et il n'y a pas lieu à réduire son indemnité pour négligence contributive.

SICOTTE, J. Dans les édifices servant à l'exploitation de son industrie, le défendeur avait disposé des voies de communication pour les fins du travail à faire. Il est constant que ces dispositions étaient défectueuses et dangéreuses. Cette défectuosité a été cause de l'accident dont le demandeur, un des ouvriers engagés par le défendeur, se plaint, à raison des dommages qu'il a soufferts.

Il y avait apparence de sécurité pour le passage, mais c'était *apparence*, car le demandeur, vaquant au travail commandé, est tombé dans une cuve de tan en ébullition, et il a été gravement brulé et blessé. Ces blessures l'ont rendu incapable de travailler pendant plusieurs mois.

Le jugement attaqué constate que les dommages sont de $250; mais, déclarant qu'il y a eu négligence contributive de la part du demandeur, et procédant par compensation, il n'accorde au demandeur que $125 de dommages.

Ce dernier réclame contre cette compensation, et prétend qu'il n'y avait pas lieu, sous les circonstances, à réduire les dommages, et qu'il n'y avait pas faute ou négligence dans ses agissements.

Le demandeur travaillait depuis quelques jours seulement. Il a fait ce que les autres faisaient; il s'est fié aux voies de communication préparées par le maître; et vaquant aux travaux commandés, il a connu, par l'accident et les souffrances qui en ont été la suite, que le chemin indiqué et suivi n'était pas sûr.

Le maître est-il seul responsable?

Il serait facile de discourir sur les relations que la justice, comme la loi, font entre le maître

et l'ouvrier. Mais il est aussi bien, sinon mieux, de présenter la doctrine des jurisconsultes, sanctionnée par les tribunaux. Voici comment Laurent (vol. 20, No. 475) l'explique :—"Tous les jours il arrive des accidents dans les fabriques ; l'industrie est comme une bataille, dans laquelle les faibles et les imprudents succombent. La Cour de Lyon a formulé le principe de la responsabilité dans les termes les plus généraux. Il est du devoir des chefs d'établissements industriels de pourvoir complètement à la sûreté des ouvriers qu'ils emploient, et ils sont responsables, à l'égard de ceux-ci, de tous les accidents et dommages qui peuvent provenir, soit des vices de construction ou du défaut d'entretien des machines et des appareils, soit de la négligence ou de l'inhabilité des préposés aux divers services de l'établissement. Ils ne peuvent décliner leur responsabilité qu'en cas de force majeure.

"Il y a une jurisprudence nombreuse sur ces tristes accidents, qui régulièrement coûtent la vie des ouvriers, ou les mettent dans l'impossibilité de travailler. La Cour de Lyon a jugé qu'il y avait responsabilité lorsqu'une administration de chemin de fer, en donnant à un ouvrier, pour le travail dont il est chargé, un outil nouveau dont le maniment est dangereux, ne lui a pas fourni des instructions suffisantes sur la manière de l'employer. L'accident survenu par suite de l'inexpérience de l'ouvrier, est en pareil cas imputable à la négligence du patron. Il y a un vieil adage qui dit que celui qui éprouve un dommage par sa propre faute, n'est pas censé être lésé, c'est-à-dire que quoique lésé, il n'a pas l'action en dommages. L'adage ne reçoit plus d'application, lorsqu'il y a une faute à reprocher à celui par le fait duquel le dommage est arrivé ; quand même la partie lésée serait aussi coupable d'imprudence. Il ne faut point perdre de vue le principe fondamental en cette matière, c'est que la faute la plus légère est une cause de responsabilité ; de là suit que l'imprudence de la victime du fait dommageable n'efface pas la faute de l'auteur, à moins qu'il ne soit établi que cette imprudence est la seule cause du dommage. No. 489. La question de responsabilité présente une autre difficulté :—Quand y a-t-il faute de la part de celui qui éprouve un dommage ? Doit-on appliquer à la partie lésée le principe que l'on applique à l'auteur du fait dommageable ? celui-ci est tenu de la faute la plus légère, de la moindre imprudence, de la moindre négligence ; la sécurité des hommes commande cette rigueur ; entre la victime et le coupable, la justice prend parti pour la victime ; on ne peut pas apprécier avec la même sévérité l'imprudence ou la négligence commise par celui qui est lésé ; il est étranger au fait qui a causé le dommage, ce n'est pas à lui de prendre les précautions nécessaires pour qu'aucun dommage ne soit causé. Il faut donc revenir à la règle générale en matière de faute ; *s'il a fait ce qu'aurait fait la plupart des hommes, on ne peut pas dire qu'il soit en faute.*"

Larombière, art. 1882 et 1883, No. 7.—"Celui qui ne fait pas ce qu'il devait faire, contrevient par cela même à son obligation. C'est, dit l'auteur, ce qu'enseignent les jurisconsultes Paul et Domat."

Thompson "On Negligence," pages 946 et seq.

"The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight ; and if he fails to do so he is guilty of a breach of duty, for the consequence of which, in justice and sound reason, he ought to be responsible. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the master, that the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. He has the right to presume that all proper attention shall be given to his safety. Upon this ground, the English, the Scotch, the American law, all concur.

"In *Patterson* v. *Wallace*, Lord Cranworth says : 'I believe, by the law of England, just as by the law of Scotland, a master employing servants upon any work, is bound to take care that he does not induce them to work under the notion that they are working with good and sufficient tackle, whilst he is employing improper tackle, and, being guilty of negligence, his negligence occasions loss to them.' The same view of the law was taken by Lord Brougham."

"In *Ryan* v. *Fowler*, it was decided 'that the master was responsible to his servant for injuries received from defects in the buildings in which the services were rendered, of which the master knew or ought to have known."

Dans la cause de *Holmes* v. *Clarks*, la question de negligence contributive de l'ouvrier fut discutée, et nonobstant la connaissance du danger par ce dernier, il fut jugé contre le maitre, pour les raisons qui avaient déterminé les décisions qu'on vient d'exposer. On lit ces paroles dans le rapport de l'opinion du Juge en chef Cockburn :—"Where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur."

Byles, J., disait, en terminant : "It is said that the verdict exempting the servant from the charge of negligence is inconsistent with the fact that he knew the machinery to be unfenced. But knowledge is only an ingredient in negligence. It may be that the knowledge of the servant induced him to use extraordinary care, which care was yet insufficient to preserve him from accident. Besides, a servant knowing the facts may be utterly ignorant of the risks."

Ces considérations sont en tout point applicables à l'espèce. Nous sommes d'opinion, comme le premier Juge, que le maître est coupable de négligence, et partant responsable. Mais nous ne voyons aucune négligence de la part du demandeur, dans l'accomplissement du travail qui lui incombait. Il a donc droit à une condamnation pour tout le dommage constaté.

Sur ce point, le jugement est modifié et réformé, et le demandeur est condamné à payer, non la moitié seulement du dommage, mais tout le dommage, qui est prouvé être d'au moins $250, et les frais, tant en Cour Supérieure qu'en révision.

J. B. Brousseau, proc. du demandeur appelant.
D. Z. Gaultier pour le défendeur intimé.
F. X. Archambault, conseil.

SUPERIOR COURT.

MONTREAL, May 29, 1883.

Before TORRANCE, J.

BEAUDET et al. v. THE CORPORATION OF THE PARISH OF ST. IGNACE DU COTEAU DU LAC.

Electoral List—Petition for Revision—Complaint in Writing—Resident.

A person paying the rent of a house in which he resides one day in the week is a tenant within the meaning of the Quebec Election Act, 1875, *sec.* 2, *ss.* 5.

PER CURIAM. This is a petition complaining of the removal of the names of the petitioners from the Electoral Lists of the Parish. Objections as to form have been made, namely, that the removal had been by the Council, without the requisite complaints in writing: *Viger et al.* v. *The Town of Longueuil*, 2 Legal News, 267. The objection is good as to the removal of the name of Oscar Dunn. I would further say as to his case that he holds the land on which he seeks to qualify under a lease for over 9 years from the Crown, paying a rent of $300 for the first year, increasing subsequently. Holding this lease, he is like a proprietor, C. C. 569, and therefore should be qualified.

As to the other petitioner, Godfrey L. Beaudet, I find that the petition against him was in form. On the merits, it is objected against him that he is not a tenant, *tenant feu et lieu*, in the words of the Electoral Act of Quebec, 1875, sec. 2, ss. 5. The evidence shows that three or four years ago Beaudet *père* made a donation of moveables, cattle and silver to Beaudet, petitioner; that the latter pays the servants, the house supplies, and is lessee of the house occupied by the family at $80 per annum. He is there generally once a week, coming on Saturday, staying over Sunday and going to Montreal on Monday. At Montreal, he is a bookkeeper throughout the week, occupies a room in the East end at $9 per month, and joins two others in the expense of his board, amounting for his share to $6 or $7 per month. If we look at the French expression "*feu et lieu*," the Dictionary of the Academy says that "*feu* means *un ménage, une famille logée dans une même maison.* Il y a cent feus dans ce village." It is said as a proverb, "n'avoir ni feu ni lieu," meaning "être vagabond et errant ça et là sans aucune demeure assurée." The dictionaries of Larousse and Bescherelle say the same thing. Assuredly the petitioner keeps house at Coteau. Is he also resident there though six-sevenths of his time is passed at Montreal? The English Election Law gives us some light as to what is sufficient residence in England. See 1 O'Malley & Hardcastle, 107, 171, the North Allerton case. Also Taylor & St. Mary, Abbott, Kensington, 6 C. P. 309, where A had a lodging in one place where he resided six days out of seven, and in the other had lodgings where his wife and chil-

dren resided and where he spent one day in seven. This case appears exactly parallel. Also 6 C.P. 312, case of Bond & St. George, Hanover Square.

Mr. Monk for the corporation cited *inter alia* the case of the *Queen* v. *St. Pancras*, 2 L. R. Queen's Bench, 457. Giving to it the fullest consideration, still I think I am justified in holding that the petitioners are entitled to be on the Electoral list of the Parish of Coteau.

Petition granted.

Bisaillon for petitioners.
F. Monk for Corporation.

SUPERIOR COURT.

MONTREAL, May 28, 1883.

Before TORRANCE, J.

HEYNEMAN v. DAVIS.

Procedure—Option of jury trial.

Where the plaintiff has made option of a jury trial, he cannot withdraw it without the consent of the other party.

The plaintiff had made option of a jury trial by his declaration as his right was, and issue was joined accordingly. He now made a motion that his option be cancelled, leaving to defendant the same option if he chose to avail himself of it.

PER CURIAM. This option once made was binding on the other side, and should not be withdrawn or annulled without the consent of the other side.

The Court refuses the motion.

Atwater, for plaintiff.
W. H. Kerr, Q.C., for defendant.

CIRCUIT COURT.

MONTREAL, May 23, 1883.

Before MATHIEU, J.

NELSON v. THE CANADIAN DISTRICT TELEGRAPH COMPANY.

Duty of common carrier if he cannot find the person to whom the goods are to be delivered.

The defendants were a Company who undertook the delivery of parcels and messages. The plaintiff had entrusted them with a parcel addressed to one Beaulieu, a purser on board the Richelieu Company's steamer "Montreal". The message-boy, not finding Beaulieu there, left it with a man in charge of the Richelieu Company's sheds on the wharf. The parcel did not reach its destination, but was lost.

The plaintiff was examined to prove the value, under authority of *Robson* v. *Hooker* (Stephens' Digest I., p. 209, and of 1256 C.C.), the defendant objecting that *Robson* v. *Hooker* came before the Code, which (1677) admitted this oath only to travellers. Constructive delivery was also alleged in defence, and that there was no evidence, especially as to the defendants being common carriers.

For plaintiff, the Code's definition of common carriers in Art. 1666, par. 2, was invoked; and, as to liability, Art. 1675, making them liable "for loss or damage of things entrusted to them," except by fortuitous events, etc. The commentary to this article is found under the similar one, 103 Code de Commerce, Sirey, where it is stated that the carrier must notify the sender and keep the goods or deposit them at the direction of the *tribunal de justice*. The plaintiff's counsel also cited Bédarride, Chemins de Fer, §419, and Chitty (Am. Ed., note to p. 80; pp. 155, 153).

MATHIEU, J. As to receiving the plaintiff's oath, even suppose it cannot be insisted on as *matière de droit*, still the court has a right to so complete the proof. There was sufficient proof that the defendants were common carriers; and they should be condemned, but without costs, as the plaintiff had not furnished them a statement of contents though demanded.

Stephens & Lighthall, for plaintiff.
Girouard, Würtele & McGibbon, for defendants.

GENERAL NOTES.

Chief Justice Sharswood, who recently retired from the Supreme Court of Pennsylvania, died in Philadelphia on the 28th May. The *Albany Law Journal* says he "was one of the most widely known and most respected of American lawyers, not only for his 37 years of judicial service, but for his important contributions to legal literature and the strength and dignity of his character. His mental force had not been abated by a broad general culture, and his capacity to grapple with the affairs of life had not been diminished by the lofty views which he held of his profession. He was at once one of the wisest and one of the ablest magistrates who have adorned the bench of this country, and he belonged to that school—old, indeed, but we hope not passed away—which regards the practice of the law not as a commercial pursuit, but as the noblest and most beneficent occupation of the human intellect. This great man was busy up to the last moment of his laborious life, striving to pay the debt which he thought he owed the profession already so heavily in debt to him."