The Legal News.

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APPEALS FROM THE CIRCUIT COURT.

In appeals from the Circuit Court to the Court of Queen's Bench is it obligatory on the parties to file factums?

The origin of the *factum* or case in our Court of Queen's Bench, as an obligatory proceeding, seems to be a rule of Practice, No. xxi, published by the Provincial Court of Appeals on the 19th of January, 1809.* It is as follows:— "That the cases of the appellant and respondent in each suit and appeal to the number of six on each side, shall from henceforth be filed by the appellant or respondent respectively, in the office of the clerk of this Court, within ten days after the filing of the reasons of Appeal, and be by him distributed to the members of this Court who shall sit for hearing of such suit and appeal, &c."

The authority of the Court of Appeals to make this rule cannot be questioned. See Ord. 27 Geo. III. cap. 4, and 41 Geo. III cap. 7, sect. 16. The rule remained in force till 1849, then the 12th Vict. cap. 37, sect. 16, enacted:—

"That all and every the Laws, which immediately before the coming into force of the Act hereinbefore cited and repealed, were in force in Lower Canada, to govern and direct the proceedings and practice of the Provincial Court of Appeals abolished by the said Act, in so far as they are not repealed or varied by this Act, or by any other Act of this session, or inconsistent with the provisions of such Act or of this Act, shall continue to be in force and shall apply to and be observed in and by the Court hereby established, in the same manner as though they would have applied to and been observed in and by the said Provincial Court of Appeals, if neither the said Act nor this Act had been passed."

Section 17 further enacted:

"That the said Court, shall and may (and it shall be the duty of the Court so to do, within one year from the time when this Act shall come into effect,) make and establish a Tariff of Fees for the officers of the said Court and the Council, Advocates and Attorneys practising therein, and also such rules of Practice as shall be requisite for regulating the due conduct of the causes, matters and business before the said Court or the Judges thereof, or any of them, and in term or out of term, and all process and proceedings therein or thereunto relating; which tariff of fees and rules of Practice the said Court shall have full power and authority to repeal, alter and amend from time to time: Provided always, that no such rule of Practice shall be contrary to or inconsistent with this Act, or any other Act or law in force in Lower Canada, otherwise the same shall be null and void: And provided also, that until such tariff of Fees and Rules of Practice shall be made and duly established by the said Court, the Tariff of Fees and Rules of Practice in force immediately before the coming of this Act into full effect, with regard to the "Court of Appeals for Lower Canada," established by the Act hereinbefore cited and repealed, shall continue to be in force and shall apply to the Court hereby established and the proceedings therein, subject to such amendments and alterations as shall be from time to time made therein by the said Court."

The 12th July, 1850, rules were passed under the authority of the 12 Vict., the 14th of which is as follows:—

"That the cases of the appellant and respondent or plaintiff and defendant in error, in every suit in appeal, or error, to the number of ten (now forty, see rule of 21st June, 1879) on each side, shall be delivered by the

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* See Rules and Orders of Practice for the Court of King's Bench, District of Montreal, February Term, 1811. Amended and augmented till the 20th June, 1823, to which is added the rules and orders of Practice in the Provincial Court of Appeals. Montreal, printed by T. A. Turner, No. 16, Notre Dame street, for Joseph Nickless, book-seller, 1823. It may be interesting to know who were present in the Provincial Court of Appeals when these rules were promulgated. They were: The Hon. Jonathan Sewell, Chief Justice of the Province, the Hon. and Right Rev. the Lord Bishop of Quebec, the Hon. James Monk, Chief Justice of the Court of King's Bench for the District of Montreal.

The Hon. Thomas Dunn,	Jenkin Williams,
Francis Baby,	P. Louis Panet,
James McGill,	P. Amable Debonne,
John Young,	John Richardson.

appellant and respondent, the plaintiff and defendant in error, respectively to the said clerk of this Court," &c.

In 1857 all formalities, excepting filing the petition and notice, were done away with in appeals from the Circuit Court, 20 Vic., cap. 44, sec. 68. But sect. 70 provides:—

"That said Court of Queen's Bench may, if it shall deem it expedient for the purposes of justice, order a *factum* or case to be prepared and filed in any such appeal as aforesaid, and may grant such delay and make such rules of practice touching such Appeals, or any class or classes of them, or such rules and orders in each particular case, as the said Court may deem just and right," &c.

The inconvenience of having appeal cases without *factums* was instantly felt. On the strength of this last section, the Court of Queen's Bench published the following rule of Practice:—

"That for the future, in appeals from the Circuit Court, the parties shall each produce a printed factum, in the same manner, within the same delay, and subject to the same penalties as are prescribed and established by the rule concerning appeals from the Superior Court; and the party appellant will not for the future, be obliged to furnish copies of his petition in appeal." [December 6th, 1859.]

The provision of the 20th Vict. was recognized by Statutes (C. S. L. C. cap. 77, sect. 49), and again in the Code of Civil Procedure (Art. 1152), and with the rule of practice has remained unaltered. It is not easy then to see how it can be maintained that in an appeal from the Circuit Court the parties are not obliged to file factums.

R.

FRIENDLY SUITS.

In the case of *Gurney* v. *Bradlaugh*, which came up not long ago before the Queen's Bench Division in England, the judges expressed themselves with some emphasis on the subject of "friendly" suits. As a misconception appears to exist on this head, it may be useful to quote the following note of the case from the *Times*:—

This was a demurrer to a reply of the plaintiff's. The plaintiff is a justice of the peace for the borough of Northampton, and the defendant, Mr. C. Bradlaugh, one of the members of Parliament for that town. The action is brought to recover £500 penalty under the Parliamentary Oaths Act, 1866, because the defendant sat and voted in the House of Commons on February 21 and 22, 1882, without having made and subscribed the oath required. The defendant pleaded that he had made and subscribed the oath before so sitting and voting. The plaintiff replied that the defendant had read from a paper on the day in question, at the table, having first kissed a copy of the New Testament which he had brought with him, signing and leaving such paper. And the plaintiff set out the resolution of the House, of February 7, 1882, "that the defendant be not permitted to go through the form of repeating the words prescribed," and said the defendant performed the acts relied on by him in defiance of such order. To this the defendant demurred, asserting that neither the Act of 1866 nor 1868, nor the Standing Order of the House of Commons of April 30, 1866, required the person swearing to do so in any other form or manner; nor did they require the oath to be administered by the Clerk; and that the known and established laws of the land could not be superseded, suspended, or altered by any resolution or order of the House of Commons, and that the House of Commons in Parliament assembled could not by any resolution or order of themselves create any new privilege to themselves inconsistent with the known laws of the land, and that if such power be assumed by them there can be no reasonable security for the life, liberty, or property of the subjects of this realm.

Mr. Bradlaugh was just proceeding to open his case, when

MR. JUSTICE MANISTY interposed, and said that having carefully read the pleadings he had made up his mind that the Court ought not to hear the case. This action was brought with a view to obtain the opinion of the Court on an abstract question of law raised by a statement of facts. He did not think that enabled the Court to deal with the case. The Court could only decide when the whole facts were before them; and the plaintiff

might have raised the question by taking issue on the statement of defence. He cited the case of "Doe dem. Duntze v. Duntze," 6 C.B., 100, and said some people might think this action was brought for the benefit of the defendant, with no intention of ever enforcing the penalty, *and with a view to get the decision of the Court.*

MR. JUSTICE WATKIN WILLIAMS thought the case ought to be postponed until both plaintiff and defendant satisfied the Court that this was a *bonâ fide* action for a penalty said to be incurred. He said it was "friendly" from the obvious and studious omissions in the pleadings, and he thought it collusive, as there was neither a plaintiff nor a defendant in the ordinary sense of the words. It was brought to obtain the decision of the Court, and this was a sort of fraud and covin on the Court (which the Court had sometimes punished as a contempt by imprisonment), and such litigation should be stopped till affidavits were filed or some other steps were taken. He cited "Hinkin v. Gerss," 2 Camp., 408, where a feigned issue was raised; also "Cocks v. Phillips," in 1736, where the validity of Mrs. Phillips's marriage and the legitimacy of her issue were sought to be decided on an action on a promissory note for £100; and the case of the Chevalier d'Eon. After argument he might alter his opinion, but he thought the pleadings were purposely drawn in favour of Mr. Bradlaugh, and that, if argued, the case must be decided in his favour, so that the penalty would not be recovered, and it would be futile to protect him from another action for the penalty.

MR. BRADLAUGH felt it would be very impertinent in him after that intimation to obtrude any more observations. He had written to the Speaker, as he thought, after "Stockdale and Hansard," the House might wish to instruct the Attorney-General to appear. But he had received an answer saying the House would not interfere with the proceedings. It was vain to say this was not a friendly suit, as the plaintiff had so stated it to be at a public meeting.

MR. JUSTICE MANISTY.—That is very candid of you, but there is no controversy between you and the plaintiff.

MR. CRUMP wished to say that he was not responsible for the pleadings; but no fact, as far as he knew, had been kept out of them that ought to have gone in. The Speaker had had the pleadings before him, and if he had objected to them would have said so.

GAILLOUX & BUREAU.

The case of *Gailloux & Bureau*, before the Court of Appeal at Quebec, of which a note appeared in our last issue, presented a question of considerable interest, and the judges who had to pronounce upon it were very evenly divided. The decision of Mr. Justice Bourgeois was reversed in Review by Stuart and Caron, JJ., Casault, J., dissenting; and the judgment in Review was confirmed in appeal by Monk, Ramsay and Cross, JJ., Tessier and Baby, JJ., dissenting. So, of the nine judges, five stand in favour of the judgment in appeal, and four against it. The proceeding was against a defendant under C. C. P. 646, for deterioration of a property under seizure. The defendant who had made a *délaissement* in a hypothecary action, had taken away a stable and fence put up by himself, from the property while it was under seizure, and when he was proceeded against under Art. 646, he answered that in his *délaissement* he reserved the right to take away his own improvements. The decision in appeal is to the effect that the reservation was null, and that the defendant came within article 646, C.C.P.

Since our note was published we have received a printed copy of the observations of Mr. Justice Casault who dissented in Review. It appears that his Honour concurred in the opinion that the reservation was null, but he thought that as the surrender had been accepted, though under protest, the sheriff could not sell more than had been surrendered. The following are some extracts from the opinion referred to:—

Je le répète, le défendeur n'avait pas le droit d'enlever ses constructions, et par conséquent ne pouvait pas les exclure du délaissement qu'il faisait du reste; mais le demandeur, au lieu de faire rejeter ce délaissement, l'accepte sous protêt et fait nommer un curateur au délaissement, procède à jugement qui, vu le délaissement, ordonne que l'immeuble hypothéqué sera vendu sur le cura-

teur au délaissement, fait saisir cet immeuble sur le curateur et le fait vendre. Il est vrai qu'après avoir délaissé, le défendeur a obtenu la permission d'opposer à l'action ses impenses, ce qu'il a fait par une exception produite le 19 mars 1881. Après avoir allégué les améliorations par lui faites et qui consistent dans une étable, des latrines, une clôture, une porte de cour au montant le tout de $70.00, il conclut à ce qu'il ne soit condamné à délaisser qu'à la condition d'être maintenu dans son privilége pour cette somme. On comprend difficilement comment il a pu être permis au défendeur de plaider ses impenses et de conclure à ce qu'il ne fut condamné à délaisser qu'à la condition de conserver son privilége pour leur montant, sans révocation préalable du délaissement déjà fait et accepté, et que l'on ait attendu après l'enquête et audition au mérite de l'exception et de l'action tant contre le défendeur que contre le curateur, pour décider que le délaissement et son acceptation ne laissaient pas au défendeur le recours par exception pour ordonner la vente sur le curateur. Le jugement réserve au défendeur son recours à l'ordre pour ses impenses, ce qui prête à croire que le juge ne considérait pas alors le délaissement comme partiel.

Le jour même de la vente par le shérif, le 3 juillet 1882, mais avant qu'elle eut été faite, le défendeur a fait enlever l'étable et une pagée de clôture, puis s'est rendu à la vente, y a enchéri et a averti le demandeur avant qu'il s'y soit porté adjudicataire qu'il avait démoli et emporté l'étable et cette partie de la clôture. Le 1er septembre suivant, le demandeur a, après en avoir donné avis au défendeur et aux trois personnes qui avaient démoli pour lui la bâtisse et la clôture, présenté une requête au juge en chambre demandant l'application de l'article 646 C. P. C., et que le défendeur et les autres fussent emprisonnés comme le veut cet article, qui règle que "le saisi ni *aucune autre personne* ne peut "faire aucune coupe de bois ou *dégradation* "quelconque sur les immeubles saisis, à peine "d'un emprisonnement pour un terme n'excédant pas six mois, qui peut être prononcé "par une ordonnance accordée par le tribunal, ou par un juge en vacance."

Le défendeur et les autres n'ont fait qu'une seule réponse, tout en invoquant des moyens différents. Le défendeur dit qu'il n'avait délaissé que l'immeuble sans les bâtisses, que le demandeur a accepté le délaissement et n'a fait saisir et vendre sur le curateur que ce qui avait été délaissé, et qu'il avait été informé avant de se porter adjudicataire que les bâtisses avaient été enlevées, et les trois autres alléguaient qu'ils ont travaillé de bonne foi pour le défendeur qu'ils croyaient propriétaire des bâtisses qu'il leur a fait enlever. Le demandeur a examiné cinq témoins qui prouvent l'enlèvement de l'écurie qui avait été construite par le défendeur et d'une pagée de clôture, entre trois et huit heures du matin, le jour de la vente. Vaillancourt est le seul des trois personnes qui ont fait la démolition qui est prouvé avoir su que la propriété était sous saisie et avoir entendu dire qu'elle devait être vendue ce jour-là. Il admet que le défendeur lui a dit qu'il voulait que la démolition et l'enlèvement fussent complétés avant la vente.

Le jugement a renvoyé la requête avec dépens pour trois raisons: 1ère. Que le délaissement avait été fait par le défendeur sous la réserve des bâtisses par lui construites; 2ème. Que le tiers détenteur a droit d'enlever ses améliorations, s'il peut le faire sans dégrader l'immeuble; 3ème. Que le demandeur n'avait pas indiqué dans sa requête la partie de la clôture que le défendeur avait enlevée, et qu'elle pouvait être la partie appartenant au défendeur et à sa charge entre une autre propriété du défendeur et celle vendue.

La preuve ne justifie pas ce dernier motif. Elle établit que la partie enlevée de la clôture était entre la propriété vendue et une autre propriété n'appartenant pas au défendeur, mais elle ne constate pas qu'elle n'était pas une partie de celle à la charge du voisin, et qui pour cette raison n'aurait pas été un accessoire de la propriété vendue. L'absence d'une allégation positive et d'une preuve certaine sous ce rapport ne permettent pas de faire de cette partie minime de la clôture le sujet de la condamnation des parties incriminées. J'ai déjà exprimé l'opinion que le 2ème motif du jugement n'était pas fondé en loi. Mais je crois que le jugement doit être confirmé pour le premier motif. J'ai dit, il y a un instant, que la condition mise au

délaissement n'y pouvait pas être légalement apposée et que le défendeur n'en pouvait pas excepter les bâtisses par lui érigées, et le demandeur qui pouvait faire rejeter ce délaissement et procéder comme s'il n'eut pas été au dossier, l'accepte comme valable, y fait nommer un curateur, obtient jugement ordonnant la vente sur ce dernier et fait saisir et vendre sur lui. Le curateur ne pouvait pas être mis en possession de plus que ce que délaissé, et on ne pouvait vendre sur lui que ce dont le délaissement et sa nomination l'avaient saisi. Les protestations du demandeur dans sa motion pour nommer le curateur ne changeaient pas le délaissement et n'en pouvaient étendre la portée. Le délaissement de la propriété avant la vente est l'acte du détenteur qui a renoncé à sa chose et l'a donnée: On ne peut pas sans son concours ajouter à cet abandon volontaire ou l'étendre. On peut le considérer comme non avenu et procéder sans y avoir égard s'il n'est pas ce que veut la loi. On peut aussi la faire rejeter du dossier et par une procédure sommaire, une simple motion, mais on ne peut l'accepter, puis prétendre qu'il ne comprenait pas assez et qu'on doit y inclure ce qui en est exclu en termes exprès et formels.

Encore une fois le curateur n'a pu être saisi que de ce que délaissé et rien de plus, et on n'a pu faire saisir et vendre sur le curateur que ce dont il avait été saisi, c'est-à-dire l'immeuble moins les bâtisses construites par le défendeur. Et si ces bâtisses n'étaient pas délaissées et n'ont pas été saisies, le défendeur n'est pas passible d'emprisonnement pour avoir enlevé ce qui n'était pas saisi. Ces remarques s'appliquent également à Vaillancourt. Quant aux deux autres personnes que le défendeur a employées pour faire démolir et enlever l'écurie, l'absence de toute preuve qu'ils savaient que la propriété était sous saisie pourrait servir à les absoudre, s'il n'y avait pas une autre raison. Le code de procédure français ne donne la contrainte par corps que pour les dommages qu'a causés le saisi. Notre code article 646 qui est la reproduction imparfaite de la sec. 29 du ch. 85 des S. R. B. C., étend la punition qu'il décrète à toute autre personne, mais cela doit s'entendre de celles qui font, soit par elles-mêmes, soit par d'autres, des dégradations à la propriété saisie. Ce n'est pas un recours pour les dommages que donne cet article de notre code de procédure. C'est une offense qu'il crée et une peine qu'il inflige. On ne peut être coupable de l'une, ni encourir la peine que lorsque l'on sait que l'on agit sans droit et sans autorité, et non lorsque l'on est qu'employé par quelqu'un que l'on croit exercer ses droits et ne pas excéder son autorité.

HUSBAND AND WIFE.

Some ladies in England appear to have unlimited faith in the resources of the recent Married Women's Property Act. The following report from an English journal, shows how a Mrs. Weldon fared, who had sued her husband for slander in saying that she was insane:

"The Lord Chief Justice—Who appeared on the other side?

Mrs. Weldon—Two or three barristers. (Laughter.)

Mr, Wood Hill—And I am one of them, my lord. (Great laughter.)

Mrs. Weldon—Yes, and Mr. Wood Hill says that this action is not maintainable in *tort* as it has no relation to property, but I say that a woman's reputation is her property.

The Lord Chief Justice—I am afraid that we cannot construe the act in the sense you would wish; it does not relate to character. I dare say, Mrs. Weldon, you have read Shakespeare?

Mrs. Weldon—I have, and I have got it here. I will read the passage—

'Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands,
But he that filches from me my good name
Robs me of that which not enriches him,
But makes me poor indeed.'

The Lord Chief Justice—Yes, 'that not enriches him.'

Mrs. Weldon—Yes; he took away my money and my house, which made him very rich. I only wish I could get rich so easily. (Laughter.)

The Lord Chief Justice here reminded Mrs. Weldon of the provisions of the Act of 1882, declaring that 'except as aforesaid' no husband or wife was entitled to sue one another in *tort*.

Mrs. Weldon—It would be a very good thing if all the women in England knew that. (Laughter.) Then I can't catch him in any way? (Great laughter.)

The Lord Chief Justice—Certainly not in this way. (Renewed laughter.)

Mrs. Weldon—So that a husband can libel his wife or do anything he likes. It is a very good thing that we were not told this before we got married, or else the men would be very badly off. (Great laughter.)

The Lord Chief Justice—Your appeal is dismissed.

Mrs. Weldon—Very well. I don't see that the Married Woman's Property Act is of much good. (Laughter.)"

DUROCHER v. *SARAULT.*

The note of this case on p. 96 was printed as handed to us by one of the counsel, but it appears that the counsel on the other side take exception to the presentation of the case. They write:

"Le rapport indique comme prétention des mis en cause, que le gardien d'office a un droit de rétention sur les effets saisis jusqu'à paiement de ses frais d'enlèvement et de garde. La contestation de la règle ne portait pas sur cette question, déjà décidée à maintes reprises. Nous prétendions que la règle émanée ne pouvait être déclarée absolue parceque les mis en cause n'avaient jamais refusé d'obtempérer à l'injonction du tribunal leur ordonnant de livrer les effets au nouveau gardien; qu'ils avaient toujours été prêts à livrer les dits effets, et qu'ils l'étaient encore à première réquisition du gardien volontaire et aussitôt qu'on leur offrirait l'opportunité de dresser procès-verbal. Le Juge Johnson décide que ce n'est pas au nouveau gardien à faire les démarches nécessaires à sa prise de possession des effets, mais bien au gardien d'office, qui doit même avancer les débourses de transport."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, February 26, 1884.

Before DORION, C.J., MONK, RAMSAY, TESSIER, & BABY, JJ.

LORD et al. (defts. below), Appellants, and DUNKERLY (plff. below) Respondent.

Charter-party—Demurrage—Loading "with all despatch"—Custom of port—Tenders of large steamships.

The stipulation in a charter-party, that the vessel shall be loaded with all despatch, is to be interpreted as meaning according to the custom of the port, which in this case was that vessels should be loaded in their due turn, as reported.

There was evidence that by the custom of the port extra large vessels were loaded by tender; held, that the lighters of such vessels were entitled to be loaded whenever they came into port as though the vessel herself were there; more especially as the lighters were only taking "bunker" coal for the vessel they were attending, i.e., coal for consumption, which by the regulations of the port had precedence over coal for cargo.

The appeal was from a judgment of the Superior Court, Montreal, (Torrance, J.), reported in 3 Legal News, p. 176.

RAMSAY, J. This case presents a great resemblance to the case of *Lord & Elliott*, decided in favour of the appellant in this Court, but which has since been reversed by the Privy Council.* It appears to me that the likeness is only superficial, and that the judgment now to be rendered must turn on a question totally different from that decided by the Privy Council.

The charter-parties in the two cases are not precisely similar, but it is important to consider their differences, as we view this case. Both fixed no specified time for discharging and loading, and both had express stipulations that the charterers should use despatch. In the former case the majority of this Court considered that in a coaling station such as Sydney, where the pier is merely the continuation of the mines, the facilities of the mines had to be considered in giving a fair interpretation to the charter-party. The Privy Council took a different view, and basing their judgment on the answer of Mr. Gisborne that "the facilities of the pier were greater than the production of the mine," they held, that "in consequence of the delay in getting the coals down from the mines, there was not a sufficient supply at the port, by which the loading of the "Hibernia" was delayed. This deficiency of coals was the cause of the "Gresham" not sooner obtaining her cargo." Probably in this case the same question could not arise, for the charter-party contains a stipulation not to be found in the other, namely: That the "Tagus" should load in the usual manner, with a full and complete cargo of coals, which was to be *brought alongside, as is customary at ports of loading and discharge.* There is also no evidence to establish that the facilities of the pier were greater than

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* See 6 Legal News, p. 146.

the production of the mine, or that there was any lack of coal at the mine or at the pier.

But the question of diligence in this case turns upon the regularity of turn. It is contended that lighters or vessels attendant on the "Great Eastern," then employed in laying the Atlantic cable, at a distance of at least 500 miles from the Port of Sydney, had precedence in loading over vessels reported before them. The argument used by Mr. Gisborne is this—the "Great Eastern" was reported before the "Tagus," and her lighters had to be loaded whenever they came into port, just as if they had been the "Great Eastern" herself. Another argument is, that the "Tagus" had no right to her turn till she had discharged all her ballast, which she did not do till the 30th June, and this by the regulations of the port, which are dated the 1st of July, 1873, the day after the "Tagus" was clear of ballast.

There is a manifest contradiction in these arguments. If it be a good reason to say that a ship has no right to her turn till she is quite clear of ballast, then the "Great Eastern" never had a right to turn, for it will scarcely be contended that the "Great Eastern" was without ballast when laying the Atlantic cable several hundred miles from shore. Again, the ballast rule is not shown to be in force, for the reason given, that the date appeared to be the 1st of July because the printers at Sydney work slowly, is simply absurd. A resolution is not dated the day it is printed, but the day it is passed. Further, the rule is without meaning, except in so far as the ballast being on board renders the ship unfit for loading. In this case it is proved, without contradiction, that the "Tagus" was ready to receive cargo on the 16th June, and that it was Mr. Gisborne who told the Captain not to throw out all his ballast.

This, however, is not the point upon which the court considers the case turns. Mr. Gisborne swears that all extra large vessels are loaded by tender, "that it was the custom to load all high vessels and war ships by tender at the port of Sydney. In fact, it is the custom of all ports." Very little evidence on this point will suffice, for it is difficult to see how it could be otherwise, unless all vessels that could not come to the pier, were to be excluded from coaling. Besides, the coal for the "Great Eastern" was not a cargo, it was coal with which to move, and therefore, by necessity, it followed the rule for bunker coal. If there was not a rule of that description in all coaling stations, steamships would come to a stand-still, and the first persons to suffer from such short-sighted policy, would be owners of steamers like Mr. Dunkerly.

The question of turn depends entirely on this. It is true the certificate of the port entry books is not a very satisfactory document, but Mr. Gisborne states that no vessels but the "Great Eastern's" lighters passed before the "Tagus," and the Captain's evidence seems to confirm this. Moreover the appellants have not attempted to show that precedence was given to other vessels.

We are therefore to reverse and to dismiss the respondent's action with all costs.

Tessier, J., dissented.

Judgment reversed.

Kerr & Carter, for appellants.

Lunn & Cramp, for respondent.

SUPERIOR COURT.

[In Insolvency.]

Montreal, December 29, 1883.

Before Papineau, J.

Dillon, petitioner for discharge, and Beard, contestant.

Insolvent Act of 1875—Petition for discharge—Contestation of validity of assignment.

The validity of an assignment in insolvency may be contested on the application of the insolvent for his discharge.

The insolvent presented the usual petition, after the year and a day from his insolvency, for his discharge.

Beard contested on various grounds, among others that Dillon never was or had been a trader; that the proceedings to put him into insolvency were collusive and virtually to permit him to obtain a discharge of his debts.

Dillon demurred to this part of the contestation, alleging it did not constitute a legal ground; that the proceedings to put Dillon into insolvency or their legality or

regularity could not be thus contested; the only remedy was the petition under the Act, within the five days from the insolvency, to set aside the proceedings.

PAPINEAU, J., rejected the demurrer, holding that a creditor was entitled to contest the regularity of the proceedings, on the application for discharge, and if a party had never been a trader or entitled to the benefit of the Act, the Court would not grant him his discharge.

Demurrer dismissed.

Mercier, Beausoleil & Martineau, for the petitioner.

Church, Chapleau, Hall & Atwater, for creditor contesting.

SUPERIOR COURT.

MONTREAL, March 29, 1884.

Before TORRANCE, J.

PROSSER et vir v. CREIGHTON.

Action for malicious prosecution — Essential averments.

1. *It is not necessary, in an action for malicious criminal prosecution, to allege that the justices before whom the plaintiff was brought had jurisdiction.*
2. *It is, however, essential to aver that the prosecution complained of has been terminated.*
3. *Where the plaintiff in such case is a woman separated as to property, it is essential to state in what way she is separated, whether judicially or by ante-nuptial contract.*

This was an action of damages by a married woman separated as to property from, and authorized by her husband, John Napier Fulton, for malicious criminal prosecution. The defendant filed an exception *à la forme*, 1, because no intelligible cause of action was set forth in the declaration; 2, because it does not appear in the declaration how the female plaintiff is separated as to property, whether judicially or by ante-nuptial contract.

PER CURIAM. One of the objections of the defendant appears to be that no jurisdiction is shown by the declaration in the Court or justices before whom the charge was made. This is not material as it has been settled that an action may be supported for a malicious prosecution of a defective indictment and case may be supported for a malicious arrest in a court having no jurisdiction, and therefore it seems not material to allege or show that the justices, &c., had competent authority. 2 Chitty, Pleading, p. 412, note (y), London, 1836.

But there is another objection to the declaration, which is fatal. It does not appear that the prosecution complained of has been terminated. 2 Chitty, p. 411. Also, *Basébé* v. *Matthews and wife*, 2 Common Pleas, 684, A.D. 1867. *Vide* authorities: Fisher's Digest vo. Malicious arrest, 5623-5; Termination of prosecution.

It is also a fatal objection that the separation as to property of the female plaintiff is not set forth with sufficient particularity. Defendant is entitled to know precisely with whom he is dealing, in order to know what his recourse in the future may be. 1 Pigeau, 64 of edition of 1787, says: "On ajoute à l'égard des femmes mariées une troisième chose, qui est que la loi ou leur contrat de mariage leur ait reservé valablement cet exercice, ou que la justice le leur ait rendu; autrement elles ne peuvent le diriger."

Exception maintained.

R. D. McGibbon, for plaintiffs.

Maclaren, for defendant.

GENERAL NOTES.

The new Speaker, says the *St. James' Gazette*, is 54 years of age. Sir Henry Brand, it may be observed, was 57 at the date of his elevation to the chair; so was Mr. Evelyn Denison. The veteran Lord Eversley, who last Friday completed his nineteenth year, had lived but 45 when the Commons of Her Majesty's first parliament chose him to preside over their debates. His immediate predecessor, Mr. Abercromby, had entered on his sixtieth year at the time of his election, being thus considerably older than the gentleman whom he virtually if not theoretically displaced. Sir Charles Manners Sutton had been called to the chair at the age of 37, and retired into private life at the age of 55. Mr. Speaker Abbott was 44 when he entered on his high functions; Sir John Mitford, 52; Addington, 32. The case of Addington is worth noting, for, though an incompetent minister, he was allowed by his opponents to have proved an excellent Speaker. Macaulay thought that if Addington had remained in the chair long enough he would have left a reputation equal to that of Onslow himself. Grenville, on whose resignation Addington was elected, was but 29 when he quitted the chair. The premier whose cabinet he entered was just 30; one of his colleagues, the First Lord of Admiralty, not 33. Arthur Onslow had the Speakership from his thirty-eighth to his seventy-first year. An octogenarian Speaker it would probably be impossible to find in the whole list.