The Lower Canada Law Journal.

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THE INSOLVENT ACT.

When the Insolvent Act of 1864 came into force, it was thought that the great number of debtors who took advantage of it was explained by the fact, that there were many traders throughout the country, with old liabilities clinging to them, to whom the new law afforded an escape from their embarrassments. Unfortunately, however, the list of bankrupts shows no falling off, for our table this month includes eighty-eight assignments and seven attachments.

Other causes are evidently at work to keep up the steady march towards insolvency. The chief of these perhaps is that debtors find in the Insolvent Court a too ready means of freeing themselves from the consequences of imprudent speculation, extravagance, or careless management of their affairs. Another reason for the crowd of bankrupts probably is, that few small traders in this Province connect the idea of insolvency with disgrace or dishonor. There can be no doubt that very many of the failures which are daily taking place might be avoided, by industry and careful management, and probably would be, if traders generally had a more scrupulous sense of commercial integrity.

It is tolerably certain, also, that creditors are afraid to press their debtors as in former times. Costs incurred in obtaining judgments being unprivileged, creditors naturally fear to incur legal expenses in prosecuting claims which may be got rid of by an assignment.

Some discussion has recently taken place in the daily press as to the benefits derived from the Act. One writer denounces the law as favoring the dishonest trader, and opening the door to barefaced fraud. This attack has been met by one of the official assignees, who seeks to show that the dishonest trader does not find his path through the Insolvent Court very pleasant and free from thorns. A leading Queen's Counsel has also written several letters on the subject, showing that our Act lacks some of the provisions for the punishment of fraud contained in the English law. We do not propose to enter upon the consideration of this subject at present, but merely append an important decision which we find in our Upper Canada legal contemporary, and which is understood to have caused some dissatisfaction among creditors in that quarter.

In re LAMB, an Insolvent.

Insolvent Act of 1864—*Application by Insolvent for discharge—Fraudulent preference—Neglect to keep proper books of account—Measure of punishment.*

It appeared, on an application by an insolvent for his discharge under the Insolvent Act of 1864, that he had within three months before his assignment paid one of his creditors in full under such circumstances as were considered to amount to a fraudulent preference, and had neglected to keep proper cash books or books of account suitable to his trade. The County Judge granted a discharge suspensively, to take effect four months after the order made.

Upon an appeal from this order by a creditor, the judge in Chambers thought that the judge below had acted with extreme leniency, and though he would not interfere with the order that he made, dismissed the appeal, but without costs.

Remarks upon the breach of duty in not keeping proper books of account, which should be severely punished.

The requirements of the act on debtors asking for discharge should be peremptorily insisted on.

[Chambers, Toronto, Nov. 27, 1866.]

The facts of this case are fully set out in the petition of the creditors of the insolvent, who appealed against the order made by the judge of the County Court of the United Counties of Lennox and Addington, granting to the above insolvent a discharge suspensively, to take effect on 1st February, 1867.

The petition stated:

That the above named insolvent, Thomas Lamb, on the first day of June, in the year of our Lord 1865, made an assignment under the Insolvent Act of 1864, to Henry Thorp Forward, of the Town of Napanee, in the County of Lennox and Addington, Esquire.

That the petitioners were at the time of the said assignment, and previously thereto, and have ever since been, and still are creditors of the said insolvent to a large amount, and duly proved their claim against him before the said assignee within the time and in the manner prescribed by the said Act.

That the insolvent gave notice of his intention to apply to the judge of the County Court of the Counties of Lennox and Addington on the tenth day of August, A. D. 1866, for a discharge under the said Act; and on that day he presented to said judge in his Chambers, in the Town of Napanee, a petition for such discharge by his attorney *ad litem*, which said petition was in the words and figures following, that is to say:

"INSOLVENT ACT OF 1864.

"In the County Court of the Counties of Lennox and Addington.

"*In the matter of Thomas Lamb, an insolvent.*

"The petition of Thomas Lamb, of the Town of Napanee, in the Counties of Lennox and Addington, Merchant,

"Humbly sheweth,—That your petitioner made an assignment under the Insolvent Act of 1864, to Henry T. Forward, Esquire, official assignee, which assignment bears date the first day of June, in the year of our Lord one thousand eight hundred and sixty-five.

"That one year has elapsed from the date of the said assignment, and your petitioner has not obtained from the required proportion of his creditors a consent to his discharge.

"That your petitioner has given notice of his intention to apply for his discharge according to the provisions of the said act, and has complied with all the provisions and requirements of the said act.

"Your petitioner therefore prays that he may obtain an absolute and final discharge under the above mentioned act.

"Dated at Napanee this 10th day of August, A. D. 1866."

That on the said tenth day of August, at the time of the presentation of the said petition, the petitioners appeared, by William Albert Reeve, of the Town of Napanee, Esquire, their counsel, and opposed the prayer of the said petition. Petitioners examined the said insolvent upon oath before the said judge.

That after said insolvent had been so examined and had been cross-examined by his attorney *ad litem*, the said application was adjourned until the tenth day of September, A. D. 1866, to enable the petitioners to produce certain witnesses for the purpose of examining them before the said judge on the said application, and upon the said tenth day of September the said William Albert Reeve did produce certain witnesses before the said judge, and examined them on behalf of the said petitioners touching the affairs of the said insolvent, which said witnesses or most of them were cross-examined by the attorney *ad litem* for said insolvent. [A copy of the examinations of the insolvent and the witnesses was annexed, but the matter of them is sufficiently stated hereafter.]

That after hearing the evidence and the arguments of counsel for the said insolvent, and for the petitioners and other creditors of said insolvent, the said judge of the County Court of the County of Lennox and Addington, on the sixth day of October, A. D. 1866, in presence of counsel aforesaid, delivered his judgment in writing upon the matter of said application as follows:

"In the matter of Thomas Lamb, an insolvent.

"The petitioner made his assignment on 1st June, 1865, and having been unable to obtain a composition and discharge from his creditors, now seeks for an order from the court granting his discharge.

"The prayer of his petition is opposed by several creditors on the grounds of fraudulent retention or concealment of part of his estate, prevarication and false statements in examination, fraudulent preference of particular creditors, and lastly, of deficient books of account.

"On hearing the parties and attentively considering the facts disclosed on the insolvent's examination before me, I see no reason to believe that he has fraudulently concealed or retained any part of his effects, nor do I think that he was guilty of any prevarication or false statements; on the contrary the insolvent's conduct since his assignment seems to me to be fair and honest, and not liable to the censures attempted to be cast upon it.

"There are, however, two charges made against the insolvent respecting his conduct before the assignment to which no answer appears to be given. It is shown that in the month of April, 1865, within less than three months before the assignment, the insolvent being indebted to his shopman, McCan, in $300 for wages and borrowed money, gave him promissory notes of his customers to the amount of $400, in full satisfaction of the debt. There can be no doubt that this transaction was wholly illegal and amounted to a fraudulent preference; however natural it may be for a man pressed by his servant, who was also his creditor, for wages and loans, to satisfy such a claim in the way the insolvent did, yet the provisions of the Insolvent Act of 1864 clearly point out that such a payment is a fraud upon the other creditors.

"The second charge made against the insolvent is, that he did not keep a cash book nor other sufficient books of account suitable to his trade, which is not denied by the insolvent.

"Under these circumstances, although I do not consider with the creditors, that the insolvent should never be discharged at all, yet it seems right that some penalty should be inflicted in consequence of the faults committed by him in the above mentioned instances. I therefore order that his discharge shall be suspended until 1st February, 1867, and will sign an order granting his discharge suspensively to take effect on that day."

That in accordance with the said judgment said judge granted and signed an order bearing date on the said sixth day of October, A D. 1866, as follows:

"INSOLVENT ACT OF 1864.

"In the matter of Thomas Lamb, an insolvent.

"Whereas Thomas Lamb, of the Town of Napanee, in the County of Lennox and Addington, Merchant, made an assignment under the Insolvent Act of 1864, bearing date upon the first day of June, in the year 1865; and whereas after the expiration of one year from the date of the said assignment, having given due notice thereof, and having in all respects complied with the provisions of the said Act, the said Thomas Lamb did on the tenth day of August, in the year one thousand eight hundred and sixty-six, present his petition to me, James Joseph Burrowes, Judge of the County Court of the County of Lennox and Addington, praying for his discharge under the said act, and whereas the said insolvent has undergone a full examination before me touching his affairs.

"Now therefore I, the said judge, after hearing the said insolvent and such of his creditors as objected to his discharge, and all the evidence adduced as well on the part of the said creditors as of the said insolvent, and having duly considered the said allegations and proofs, do hereby according to the form of the said Insolvent Act grant the discharge of the said Thomas Lamb suspensively, and do order that such discharge shall be suspended until and shall go into operation and have effect upon and after the first day of February, in the year one thousand eight hundred and sixty-seven.

"Witness my hand," &c.

The petitioners being dissatisfied with the said order and decision, made an application to a judge of one of the Superior Courts of Common Law, presiding in Chambers in Toronto, to be allowed to appeal from the said order and decision, and on the seventh day of November, A. D. 1866. an order was granted by the Chief Justice of Upper Canada, allowing the petitioners to appeal to one of the judges of the Superior Courts of Common Law in Chambers from the said order.

That since the allowance of the said appeal, and within five days therefrom, the petitioners gave security in the manner required by the said Insolvent Act of 1864, that they would duly prosecute the said appeal, and pay all costs.

The petitioners therefore prayed that the said order and decision of the judge of the County Court of the County of Lennox and Addington might be revised, and the same reversed, and the discharge of the said insolvent, Thomas Lamb, under the said act might be absolutely refused, or that such order be made in the matter as should seem meet.

Osler for the appellants.

Holmested for the insolvents.

No cases were cited by either party.

HAGARTY, J.—The learned judge below considered the insolvent's conduct to be reprehensible in not keeping proper books of account, and suspended his discharge for six months. I do not think it wise to interfere with the exercise of such a discretion on the part of a judge who has heard the examination of the insolvent, and been cognizant of the various proceedings in the case, except in a very clear case in which the appellate jurisdiction is necessarily invoked to prevent an undoubted injustice.

I think that the learned judge acted with extreme leniency, and possibly took a milder view of the bankrupt's misconduct than I should have done, judging wholly from the papers before me. Had he, with his superior opportunities of forming a correct opinion, passed a much more severe sentence, I should certainly not interfere with it on the insolvent's application. I think the insolvent's neglect to keep proper books a most serious breach of duty, causing great possible injury to his creditors, and tending to raise strong distrust of his integrity. The evidence of his being a very illiterate man suggests the only possible excuse, and weighed, I presume, with the learned judge. It might perhaps be said that it was not very prudent for his creditors to trust a man so unfit for the conduct of business or the keeping of accounts with such large quantities of goods on credit. I do not differ from the learned judge's view as to the alleged preference. As to the neglect to keep proper books, I think it would be well always to punish such a breach of duty in a severe and exemplary manner.

We have in this country in our legislation done everything to favour debtors and render the escape from liability as easy as possible to them. It will be well at all events that the very easy requirements of the Insolvent Act on debtors asking for their discharge should be peremptorily insisted on, and proper punishment awarded to any breach of the trader's duties in conducting his business.

I gladly avail myself of the power given me by sub-sec. 6 of sec. 7 of the act, and, while feeling bound to dismiss the appeal, do so without costs.

I think Mr. Lamb's creditors had just ground for feeling indignant at his conduct and opposing his discharge, and endeavouring to have some punishment inflicted upon him.

INSTRUCTIONS AS TO COSTS.

Some difference of opinion has recently arisen respecting the propriety of a judge instructing a jury what damages will carry costs. It has been customary in England for a judge to refuse to instruct a jury on this head. Chief Justice Erle, however, in the recent case of *Athol* v. *Seman*, adopted the contrary course, and gave the information asked for. The *Solicitors Journal* thinks that the best way is to leave the jury in the dark as to the exact consequences of their verdict. This is also the opinion expressed by Baron Bramwell, in another recent case, *Kelly* v. *Sherlock*, Law Rep. 1 Q. B. p. 691. The report informs us that the jury having retired, returned into Court, after an hour and a quarter, saying they could not agree; and one of them inquired what verdict would carry costs. The learned judge (Baron Bramwell) replied, that it was a question which he had discussed with the late Lord Campbell, and the conclusion come to was, that the question was one which ought not to be answered by the judge. It was for the jury to say, if they found for the plaintiff, to what extent he had been damaged, irrespective of the effect the verdict might have on the question of costs. Otherwise they might actually defeat the law. After some further discussion, a juror asked the learned judge to repeat what he had said respecting costs. On which the learned judge said: "The law supposes that you will give such damages as you think are really equivalent to the injury sustained by the plaintiff. And it says, in certain cases, for the prevention of frivolous actions, if the plaintiff does not recover a certain amount, he shall try his action at his own expense. Now it seems to me that you ought to say to yourselves, "we will give a certain amount," but the amount ought not to be regulated by its effect upon the costs. Because it is manifest, if you say we will give a certain sum in the hope it will carry costs, that you thereby defeat the object of the law."

POST OFFICE REGULATIONS.

The *Canada Gazette* of Feb. 23rd contains some instructions to postmasters which are of general interest. A letter is considered prepaid only when the whole postage is prepaid. If only partially prepaid the letter is charged as though sent unpaid, less the amount of stamps on it. Thus, a double letter with a five cent stamp on it is charged *nine cents*, as the postage on it, if sent unpaid, would have been fourteen cents.

The instructions relative to book manuscript and printer's proof may be of service to some of our readers. Authors and others sending book manuscript to printers or publishers, are entitled to have it transmitted by mail at the printed matter rate of one cent per ounce. Proofs sent from printing offices to authors for correction also pass at the rate of one cent per ounce, and may be returned corrected at the same rate.

NOTICES OF NEW PUBLICATIONS.

THE LAW MAGAZINE AND LAW REVIEW.—London, Butterworths. November, 1866, and February, 1867. The contents of the last two numbers of this legal quarterly are full of interest. Among the articles in the November number is one on the case of George William Gordon; another on Judicial Statistics by C.S. Greaves, Esq., Q.C., and a third on the Rank of Queen's Serjeant. The February Number contains an extremely interesting paper on Sir Edmund Saunders and Mr. Serjeant Williams, a notice of the late Sir J. L. Knight Bruce, and another paper on Criminal Procedure by Mr. Greaves, Q. C.

THE AMERICAN LAW REVIEW, January, 1867.—Among the papers in this valuable quarterly is one on Luther Martin, the friend and zealous advocate of Aaron Burr. Martin is a striking instance of the transient nature of forensic fame. Although his very name is now almost forgotten, he was for nearly half a century the most talked of man in Maryland, of which he was for thirty years the Attorney General.

THE AMERICAN LAW REGISTER, January, 1867.—D. B. Canfield & Co., Philadelphia. One of the editors of this monthly Law Magazine is the Hon. I. F. Redfield, author of "The Law of Wills." In a note to one of the Reports, the Hon. Mr. Redfield, referring to the preparation of opinions by judges, remarks. "We have often regretted that our Courts of last resort had not more leisure to prepare their opinions in a similarly satisfactory manner. But it is the curse of our day and generation, that our ablest and most useful men ruin themselves, and fail to serve the public with any acceptance, just because they are pushed beyond their strength and ability; and by attempting to do ten times as much as they can do well, really fail of doing anything to any purpose." This may be very true, but on the other hand abundant leisure is not always productive of careful and painstaking opinions, as some of our readers have probably had an opportunity of observing.

LAW RESPECTING THE BAR OF LOWER CANADA, WITH THE BY-LAWS OF THE GENERAL AND LOCAL COUNCILS.—This a pamphlet of over 120 pages, containing the Act of last session respecting the Bar, and also the by-laws of the General Council, and of the sections of Montreal, Quebec, Three Rivers and St. Francis. The compilation, which will be found very convenient for reference, has been made, we understand, by Mr. Gonzalve Doutre, Secretary of the General Council, who has evidently bestowed great labor and attention upon the task.

CANADIAN SCENERY—DISTRICT OF GASPE.—Montreal, R. Worthington. Those who have any acquaintance with Gaspé and its romantic scenery, will hail with pleasure the appearance of this work. It contains about twenty large sized chromo-lithographs from photographs taken by the author, Mr. Pye, a resident of Gaspé, who, with laudable energy, has surmounted all the obstacles incident to the preparation and publication of the work. The plates are accompanied by letterpress, descriptive of the views and of the District generally, with a full account of the various great fishing establishments. All the spots favored by nature and worthy of a visit from the tourist are carefully noted. The work, which is handsomely printed at Mr. Lovell's establishment, forms a very valuable addition to Canadian literature.

BANKRUPTCY—ASSIGNMENTS.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Allingham, Richard	Napanee	W. S. Robinson	Napanee	Jan. 17th.
Anderson, William	Township of Wallace	Thos. Miller	Stratford	Feb. 18th
Aubertin, Jérémie	St. J. Bte. de Rouville	T. S. Brown	Montreal	Feb. 7th.
Baker, Geo. Alfred	Galt, C. W.	Alex. McGregor.	Galt	Jan. 28th.
Barré, Louis	Lachine	A. B. Stewart	Montreal	Jan. 18th.
Barron, James L.	Stratford	Thos. Miller	Stratford	Feb. 9th.
Baxter, Lewis	Township of Ancaster	W. F. Findlay	Hamilton	Jan. 25th.
Béchard, Joseph	St. Pat. de la Riv. du Loup	Wm. Walker	Quebec	Feb. 6th.
Benoit, Pierre	St. Aimé, C. E.	T. S. Brown	Montreal	Feb. 18th.
Bonhomme, Wilbred	Quebec	A. Fraser	Quebec	Jan. 17th.
Boomhover, Levi E., individ. and as partner of Stoakes & Boomhover	Lacolle	A. B. Stewart	Montreal	Feb. 5th.
Bowman, William L.	Waterloo, C. W.	H. F. J. Jackson.	Berlin, C. W.	Feb. 11th.
Brett, James	Toronto	W. T. Mason	Toronto	Feb. 16th.
Brown, Robert, individually and as partner of W. & R. Brown	Stratford	Thos. Miller	Stratford	Jan. 28th.
Brown, Samuel	Township of Emily	S. C. Wood	Lindsay	Jan. 24th.
Bury, George, individually and as partner of Bury & Hayes	Montreal	A. B. Stewart	Montreal	Feb. 7th.
Carpenter, George Durham	Township of Saltfleet	J. J. Mason	Hamilton	Feb. 4th.
Charity, James Henry	Chatham, C. W.	Richard Monck	Chatham	Feb. 15th.
Cowan, Andrew	Town. of Uxbridge, C. W.	H. T. Johnstone.	Uxbridge	Jan. 22nd.
Crawford, Thos.	Township of Emily	S. C. Wood	Lindsay	Feb. 5th.
David, Maxime Olivier	St. Johns, C. E.	Wm. Coote	St. Johns	Jan. 25th.
Décoteau, Joseph	South Somerset	Wm. Walker	Quebec	Feb. 18th.
Dillen, David M.	Sherbrooke,	A. M. Smith	Sherbrooke	Feb. 18th.
Douglas, Thomas S.	Montreal	A. B. Stewart	Montreal	Feb. 20th.
Dutton, Samuel	London	L. Lawrason	London	Feb. 2nd.
Easton, John	Hamilton,	D. B. Chisholm	Hamilton	Feb. 5th.
Flaws, Robert	St. Mary's.	Thos. Miller	Stratford	Feb. 18th.
Forsyth, Hezekiah C.	Woodstock	Jas. McWhirter	Woodstock	Jan. 26th.
Frechette, J. Bte.	Quebec.	Wm. Walker	Quebec	Feb. 11th.
Freer, Boyd & Co.	Montreal	A. B. Stewart	Montreal	Feb. 15th.
George, Alpheus	Sherbrooke.	A. M. Smith	Sherbrooke	Feb. 7th.
Goodfellow, Adam	Collingwood	John Tyson	Collingwood	Feb. 4th.
Grenier, Louis J.	Sorel	A. B. Stewart	Montreal	Feb. 18th.
Henry, James N.	St. Thomas, C. W.	J. Ardagh Roe	St. Thomas	Feb. 11th.
Hockin, William	Guelph	E. Newton	Guelph	Jan. 18th.
Hockin, William, & Hockin, Samuel	Guelph	E. Newton	Guelph	Jan. 18th.
Hudon, Firmin	Quebec	Abm. Hamel	Quebec	Jan. 24th.
Jagoe, William	Hamilton	J. J. Mason	Hamilton	Feb. 4th.
Johns, John	London	Thos. Churcher	London	Jan. 30th.
Kieran, James	Guelph.	Thos. Saunders	Guelph	Feb. 4th.
King, William	Hamilton	J. J. Mason	Hamilton	Jan. 26th.
Labelle, Jean Baptiste	St. Janvier	T. S. Brown	Montreal	Feb. 6th.
Labosière & Son, Joseph	St. Valentine.	Francis George	Montreal	Jan. 22nd.
Lamoureux, Léandre	Montreal	T. Sauvageau	Montreal	Feb. 21st.
Laporte, Victor	Ottawa	Francis Clemow	Ottawa	Feb. 4th.
Larivée, Louis	Montreal	T. Sauvageau	Montreal	Feb. 14th.
Lemieux, Martial	St. Vincent de Paul	T. S. Brown	Montreal	Feb. 6th.
Lothrop, Galen, jun.	Westbury, C. E.	A. M. Smith	Sherbrooke	Jan. 30th.
Lowell, Richard	Galt	Alex. McGregor,	Galt	Feb. 12th.
McIntee, Alex.	Woodstock	Robert Bird	Woodstock	Feb. 14th.
McKague, Robert	Township of Carden	S. C. Wood	Lindsay, C.W	Feb. 14th.
McKinnon, Angus.	Guelph	E. Newton	Guelph	Jan. 16th.
Manly, Joshua	Toronto	W. T. Mason	Toronto	Feb. 2nd.
Marceau, Louis	Longueuil, C. E.	T. S. Brown	Montreal	Feb. 20th.
Marsh, Abraham	Picton	N. McL. Bockus.	Picton	Feb. 12th.
Mathieu, Edouard	St. Barnabé	T. Sauvageau	Montreal	Feb. 7th.
Mills, Elisha Lyman	Montreal	T. S. Brown	Montreal	Feb. 6th.
Mitchell, William John	Cobourg	E. A. Macnachtan	Cobourg	Jan. 28th.
Moore, Robert	Shakespeare, C. W.	Thos. Miller	Stratford	Feb. 19th.
Morton, Albert	Belleville	Geo. D. Dickson.	Belleville	Jan. 28th.
Mylne, John	London	L. Lawrason	London	Feb. 1st.
Nicol, Peter Murray	Township of Blanahard	Thos. Miller	Stratford	Jan. 28th.
Osler, John	Craigvale	S. Maneers, jun.	Craigvale	Jan. 19th.
Pegg, Nathan	Simcoe	A. J. Donly	Simcoe	Feb. 12th.
Pillar, Lindsay	East Williamsburgh, C. W	T. S. Brown	Montreal	Feb. 20th.
Pratt, Alexander	Cobourg	E. A. Macnachtan	Cobourg	Feb. 1st.
Pridham, Richard	Grenville, C. E.	T. S. Brown	Montreal	Feb. 20th.
Provost, Sophronie	St. Hyacinthe	T. Sauvageau	Montreal	Feb. 9th.
Reid, Nathaniel	London	Thos. Churcher	London	Feb. 5th.
Resther & Son, Ignace,	St. Hyacinthe	T. Sauvageau	Montreal	Feb. 2nd.
Revell, Samuel	Bothwell	Thos. Churcher	London	Feb. 4th.
Riendeau, Alexis, individually and as partner of Riendeau & Co.	St. Rémi	T. Sauvageau	Montreal	Jan. 24th.
Robitaille, Edouard	Quebec	A. Fraser	Quebec	Feb. 11th.
St. Julien, J. B. O.	Papineauville, C. E.	A. B. Stewart	Montreal	Jan 19th.
Scantlion, Francis	Montreal	T. S. Brown	Montreal	Feb. 20th.
Simard, Réné Charles Et.	Quebec	Wm. Walker	Quebec	Jan. 29th.
Stevens, S. & G.	Trenholmville, C. E.	A. M. Smith	Sherbrooke	Feb. 8th.
Stewart, David H.	Mitchell	Thos. Miller	Stratford	Feb. 4th.

ASSIGNMENTS.—(*Continued.*)

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Stewart, Alex.	Millbank, C. W.	Thos. Miller.	Stratford.	Feb. 18th.
Stroud, Wm. Decker.	Montreal	A. B. Stewart	Montreal.	Jan. 31st.
Taylor, David H., individually and as partner of Brims & Taylor.	Montreal	A. B. Stewart.	Montreal.	Jan. 26th.
Vanderlip, Justus.	Township of Ancaster	W. F. Findlay.	Hamilton.	Jan. 25th.
Vary, Moise.	Montreal	T. S. Brown.	Montreal.	Jan. 30th.
Vitch, William.	Ingersoll	James McWhirter	Woodstock.	Feb. 19th.
Warner, John	Woodstock	Jas. McWhirter.	Woodstock.	Feb. 6th.
Watt, James.	Quebec	A. Fraser.	Quebec.	Jan. 16th.
Watt, Robert	Brantford.	A. W. Smith.	Brantford.	Jan. 30th
Williams, Israel.	Township of Grimsby	J. J. Mason.	Hamilton.	Jan. 21st.

WRITS OF ATTACHMENT.

PLAINTIFFS.	DEFENDANTS.	SHERIFF'S OFFICE AT	DATE.
Alexander Buntin	John Sim Peter.	Peterborough.	Jan. 22nd.
Isaac Buchanan, Adam Hope and Chas. James Hope	Palmer Way and Wm. Way.	Sarnia.	Jan. 12th.
William Burgess, jun.	Wm. Burgess, sen.	Walkerton.	Jan. 23rd.
William Darling and Thomas Darling	Charles B. Major.	Guelph.	Jan. 10th.
Geo. Hunter, Patrick Thomas Duffy and Bradstreet D. Johnston.	John Row	Perth.	Feb. 2nd.
Norris Conrad Peterson.	Francis Woodard and Edwin D. Broughton.	Sarnia.	Feb. 6th.
James Shields.	Emery Blanchard Ried.	Perth.	Feb. 11th.

NOTE.—Among the notices is one by Mr. Barthé, official assignee at Sorel, calling the creditors of Joseph Beauperlant together, for the purpose of advising as to the best means of disposing of the effects found in a *hidden place* in the house formerly occupied by the insolvent.

WAX TAPERS AT FUNERAL CEREMONIES.—Le juge Johnson vient de décider à Waterloo une cause d'une très grande importance.

Un homme fait enterrer à ses frais son frère mort dans la plus grande pauvreté: entre autres choses il fournit les cierges nécessaires au service funèbre, et il emporta les restes chez lui. Le curé les réclama, prétendant que de droit ils lui appartenaient.

Le défendeur dans ses défenses a prétendu: 1o. Que les cierges à demi brûlés lui appartenaient, puisqu'il les avait fournis. 2o. Que tout au plus pouvaient-ils appartenir à la Fabrique, et qu'ainsi le curé ne pouvait les réclamer pour lui-même.

Le demandeur a prouvé la coutume, qui est toute en sa faveur, et appuyé de l'autorité des auteurs, de Jousse en particulier, il a prétendu qu'en cette matière la coutume faisait loi. Le juge lui a donné raison. Le défendeur a été condamné à remettre les cierges ou à en payer la valeur.—*Courrier de St. Hyacinthe.*

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

Dec. 7, 1866.

O'HEIR, (plaintiff in the Court below), Appellant; and LEMOINE, (defendant in the Court below,) Respondent.

Action en bornage.

The plaintiff, claiming under a deed of concession from the Seignior of Sorel, brought an action *en bornage* against the defendant, whose land abutted on that conceded to the plaintiff. It was held that the plaintiff had proved his possession, and a *bornage* was ordered.

This was an appeal from a judgment of the Superior Court for the District of Richelieu, rendered by *Laberge*, A. J., on the 28th of June, 1864, dismissing the plaintiff's action. The action was *en bornage*, brought by the plaintiff as proprietor of a certain gore of land, which he alleged had been conceded to him by

the agent of the Seigniory of Sorel, by deed passed 10th October, 1839. The defendant, whose land abuts on the gore so conceded to the plaintiff, invoked by his plea a possession of thirty years, and prayed that the deed of concession be declared fraudulent. The plaintiff answered specially, denying that there had been any fraud.

On the 30th June, 1863, the Court, having heard the parties, ordered, *avant faire droit*, that a surveyor be named to make a plan of the property in contest. The report of the surveyor was homologated, and on the 24th June, 1864, final judgment was rendered, dismissing the plaintiff's action on the following grounds: That although a concession had been made to the plaintiff's *auteur* of the land in question, yet neither he nor his *auteur* had ever taken such possession as was required by law. Further, that it appeared the defendant had had possession of the land, and therefore the plaintiff had no right to bring an action *en bornage*. From this judgment the plaintiff appealed, submitting that the deed of concession was a valid and sufficient title; that the thirty years' possession of the defendant was not proved; and that he, the plaintiff, had exercised his right of property by cutting wood upon the land, which was still in a wild state. It was also objected that the report of the surveyor went beyond the authority given in the interlocutory judgment, and should have been set aside.

MONDELET, J. We think that the plaintiff has sufficiently proved his possession, and that the judgment must be reversed.

The following is the substance of the judgment as recorded: Considering that the appellant has a right to demand a *bornage*, and that he has made proof of his possession, and that the Court below was in error when, by its interlocutory judgment, it ordered the appointment of a surveyor, *avant faire droit*, to prepare a plan or description of the property; and that there was error in the final judgment dismissing the plaintiff's action, the Court sets aside and annuls said judgments, and orders that a sworn surveyor be named by the parties within fifteen days, or otherwise to be named by the Court, to proceed to draw a dividing line between the respective properties; the respondent to pay the costs of appeal, the costs of the Court below to be reserved.

AYLWIN, DRUMMOND, and BADGLEY, JJ. concurred in the judgment.

J. Armstrong, for the Appellant.

Lafrenaye & Bruneau, for the Respondents.

Dec. 4, 1866.

WOODMAN, Appellant; and GENIER, Respondent.

Defective Return—Record remitted.

The return of service having been found defective by the Court, the record was ordered to be remitted to the Court below, that the parties might be heard on the point raised by the Court.

Appeal from the District of Beauharnois.

AYLWIN, J. The party who is sued as proprietor in possession, and who is mentioned, not only in the declaration, but even in the writ, as one of the defendants, has not been served with a copy of the declaration and writ. We therefore order the record to be remitted to the Court below, in order that the parties may be heard on this point, as to whether the action should be dismissed, or this party be brought in.

BADGLEY, J. Here the doubt has been raised by the Court, and not by counsel. We think that in all cases where the doubt is first raised by the Court, the parties should be heard.

DRUMMOND, J. A form of signification has been prepared in blank, but has not been filled in or signed by the bailiff.

Record ordered to be remitted.

COURT OF REVIEW.

Dec. 22, 1866.

TAYLOR v. MULLIN.

Court of Review, Jurisdiction of.

Held, that the Superior Court, sitting as a Court of Review, has no power under the statute, to revise judgments in cases which are not susceptible of an appeal; that where there is no right of appeal there is no right of revision: and therefore that there is no right of revision with respect to a judgment under the Municipal Act of Lower Canada.

The defendants having inscribed this case for

revision, the petitioner, Taylor, moved that the inscription be rejected, on the ground that the judgment of which the revision was asked, having been rendered under the Municipal Act, was not subject to revision. The right of appeal was expressly taken away by Statute, and it followed that there was no right of revision.

SMITH, J. (dissenting). I am of opinion that the parties are entitled to a revision of the judgment. The question has already come up in several cases, one of which was *Ex parte Spelman*, and the Court refused to permit the case to be inscribed for review, upon the ground that where there is no appeal there is no review. This is a nice expression, but when you come to examine the question, the soundness of the doctrine seems doubtful. The Court of Review is not a Court of appeal. It is still the same Court, the Court of original jurisdiction. The Statute merely suspends the judgment of one judge, till it has been revised by three judges. It has been pointed out to me that I concurred in one of the judgments refusing the right of review. But I did so without looking into the matter, on being told that the statute did not allow it. On examination I find that I must dissent from the doctrine which has been held in several cases here, and also at Quebec.

BERTHELOT, J. The statute has expressly taken away the right of appeal in the present case, and I am clearly of opinion that where there is no appeal there is no revision.

MONK, J. I think the question is one of considerable difficulty. The pretension that there is no revision where there is no appeal seems to me to admit of considerable doubt. The Court of Revision is the same Court, and unless there is something which expressly takes away the right of revision, I think that all final judgments should be subject to revision by three judges. All I can say is this, seeing that the rule, that where there is no appeal there is no revision, has been held by the Court at Quebec, and seeing that we have held the same here in two or three cases, and, finally, that Mr. Justice *Berthelot* is as decidedly against the right of revision as the honorable and learned President of the Court is for it, I concur in the rule already laid down, that where there is no appeal there is no revision.

Inscription rejected.

Abbott & Carter, for the petitioner.

Devlin, for the defendant.

SUPERIOR COURT.

Feb. 16, 26, 1867.

ROYAL INSURANCE CO. *v.*

KNAPP AND GRIFFIN.

Capias—Cause of action—Illegal detention of property—C. S. L. C. cap. 87, sec. 8.

Bonds and securities to a large amount were stolen from the plaintiffs by the defendants in the State of New York, without the limits of Canada, and were subsequently brought by them within the Province, and illegally detained there. The defendants being arrested under a *capias*:—

Held, that the cause of action, within the meaning of C. S. L. C. cap. 87, sec. 8, arose in New York, that it existed there wholly and entirely before the defendants reached Canada, and, therefore, that the defendants were not liable to be imprisoned under a *capias*.

This was a petition by the defendants, who had been arrested under a *capias ad respondendum*, to be discharged from custody. [*Vide ante*, p. 189, for the proceedings on the motion to quash, which was dismissed by *Berthelot*, J.]

Robertson, Q. C., for the defendant Griffin. No *capias* can be issued on a liability like this, though there may be a right of action.

In England, by 21 Geo. II., cap. 3, it was enacted that in all cases over £10, *capias* might issue on affidavit of *a right* of action. But in Canada there must be an "indebtedness;" the *capias* and action are distinct; the *capias* may be lost, while the action may remain. No judgment can be cited maintaining a *capias* on a cause of action not founded on indebtedness, or a debt sworn to. In *Beard* v. *Isaac*, in Review, decided 30th May last, a person in Liverpool hired a vessel and cargo, and refused to carry on his contract. A *capias* was issued, charging him with the difference between the rates of freight. Badgley, J., held that in commercial cases, where there is a money loss, on a contract for money value, *capias* would lie. This went far, but not to the length of saying: "You took and converted my property, e. g. my horse, and are

indebted in its value; therefore, I have a right to capias." The illegal holding possession of bonds or any personal property in Canada, if a good ground of capias, must cover the principle of illegal possession and holding of real property too. Real property is as much favored as personal. The capias must be for a debt, and that must be clearly sworn to as a present indebtedness to plaintiff. A capias will not lie by saying: "You attempted to murder me (say in New York); you cut off my arm, therefore, I can capias you. Secondly, there can be no capias on a cause of action arising out of the Province. By the C. S. L. C. p. 810, it is enacted that "the Court or Judge may order any person to be discharged out of custody, if it is made to appear, on satisfactory proof, that the cause of action arose in a foreign country." In the affidavit and declaration there is but one phrase, one sentence, one cause of debt, one cause of action—illegally obtaining possession and illegally holding in Montreal.

Thirdly, the proof establishes the loss of the bonds at New York. They were missed after an interview of defendants with McDonald, plaintiff's agent. But this witness does not swear to the indebtedness of the defendants, or that they took the bonds. Admitting that the bonds were illegally obtained possession of, it must have been at New York. This is shown by plaintiffs' witnesses, and the cause of indebtedness as well as of action arises out of Lower Canada. The "illegal holding in the City of Montreal" is not proved. None of the other witnesses examined say the bonds have been seen in this Province. Mulvahille's statement of what took place in jail is:—I asked him (Griffin) "what have you done with the bonds?" and he answered, "We have got them all right here (Montreal) planted." This the sole evidence, and it is unsupported. Even if it were uncontradicted and the story credible, it would be insufficient. The debt has not been proved, and it should have been clearly proved by the affidavit itself. The plaintiff must clearly show that in this case the Court has jurisdiction. He alleges the secretion of the defendants' effects in the affidavit, but states in it also, that they never had any effects, real or personal. Mr. Routh swears that they are "secreting their estate and effects, with intent to defraud their creditors;" that they are citizens and subjects of the United States—merely here in the city of Montreal temporarily: have no domicile in Canada, nor do they own any property, real or personal, in this Province. But all this is very vague, and could not at all induce the Court to hold the defendants on capias. It was urged that holding in Montreal these bonds, was, as it were, a new cause of action, and, therefore, a capias would lie. But this holding must be traced back to its inception, and will and must continue to be qualified *by the first possession*, whether legal or illegal. If the defendants on the 10th Dec. illegally obtained possession of the bonds in question at New York, there was a commenced illegal holding *there*: the *délit* was complete and the holding commenced there. In other words, the illegal holding commenced at New York, and the coming with the bonds into Canada on the 12th did not change the place of the *délit*; there was the origin of the cause of action founded on the *délit*. So if a contract is made at New York, and the debtor comes to Lower Canada, his debt exists, but the cause of action remounts to the original contract. By using the words of the Consolidated Statutes, "no capias on a foreign cause of action," our statute includes both contracts and *délits* as causes of action, and excludes capias in both cases. It was held in Silverman's case, that where a note was given in Montreal for a debt which originated in the States, no capias lay. The note was held to remount to the place where the debt originated, although it was acknowledged here. Now, why should a liability founded on a *délit* committed at New York not be treated as having originated there, and as "a cause of action" perfected? How can it be pretended that an illegal *holding* of bonds or other personal property (which all admit was the consequence of an alleged illegal obtaining possession thereof at New York) can of itself be treated as a new and independent cause of action, merely by ignoring New York as the place of the *délit*, and alleging a holding in the city of Montreal? The attempt to restrict the whole cause to the holding in *Montreal*, the omission of the place where they were

illegally obtained, arise from the wish to get rid of the statute, which prohibits capias on every contract, *délit*, or other cause of action originating in a foreign country. In case of a foreign *délit* the foreign cause remains; in case of the *délit liability* remains; the action founded on the *délit* or liability remains, but there can be no capias.

Kerr, for the defendant Knapp. Defendants filed petitions for discharge from custody, and examined Mr. Routh as a witness, who admitted that he knew nothing personally of the facts relative to the obtaining possession of the bonds on 10th Dec. by defendants, or their holding them in Canada; that his knowledge thereof was derived from third parties; but he admitted that the alleged obtaining on 10th Dec. was an obtaining in New York; as to the other points in his affidavit, with respect to the defendants leaving Canada and secreting their estate, his information was derived from Captain Young, Chief of the Detective Police in New York, and Mr. McDonald, agent for the plaintiffs in that city. The plaintiffs issued a commission to New York, and thereunder examined Mr. McDonald, Capt. Young and others. By that evidence it may, for the sake of argument, be assumed that on the 10th Dec., at New York, a wrongful taking by the defendants of the bonds in question is established; and that afterwards they (the defendants) sought refuge in Canada. There is no proof that the defendants meditated leaving Canada, or had secreted their property, the evidence of McDonald and Young on those points being hearsay. A person of the name of Mulvahille has been examined, brought up under a writ of habeas corpus from the gaol; he deposes to admissions made by Griffin, as to the manner in which the taking of the bonds from the safe in the insurance office at New York was effected, making Griffin the person who walked about the office whilst Knapp engaged McDonald in conversation; whilst McDonald deposes that it was Griffin who kept him in conversation whilst Knapp walked about the office. Mulvahille moreover declares that Griffin told him the bonds were here. He also says that he told Payette, the gaoler, that he wished to see one of the plaintiff's agents, and that in consequence of such intimation, Mr. Perry, the plaintiff's inspector, called upon him.

The first question for consideration is, whether the affidavit upon which the writ of capias was based, being shown to be the affidavit of a person not having a personal knowledge of defendants' indebtedness to plaintiff,—is not thereby destroyed; and such being the case, whether all the evidence adduced under the commission on that point is not illegal, and should be rejected from the record, and defendants discharged on the ground of want of proof of the existence of a debt by defendants to plaintiffs. Under the clause of the statute, the evidence of such indebtedness in the affidavit must be derived from the personal knowledge of the person making it. An affidavit to the effect "that defendant is personally indebted to plaintiff in a sum of $80, as the deponent has been informed," is insufficient, and a capias issuing thereon would be quashed on motion. [1 Archbold's P., p. 655. Schrœder on Bail, p. 42.] In this case, it is true, Mr. Routh swears positively in his affidavit, to the fact that defendants obtained illegally the bonds, that they now hold them illegally at Montreal, and have refused to deliver them up; but when examined as a witness, he admits that he never saw the bonds, and has no personal knowledge of the facts he has sworn to, save the making the demand to restore. His allegations are founded upon information derived from others, and the affidavit is of no avail, and consequently there is no proof of the existence of any debt. There is no evience that the defendants were about to leave the Province, or that they had secreted their estate, &c., with intent to defraud. By the Capias Act, it is provided, that if a party arrested shows to a judge of the Superior Court on summary petition, that the cause of action for which he has been arrested arose in a foreign country, he shall obtain his discharge from custody. By the plaintiffs it is pretended that it is a matter of no importance in this case where the larceny or wrongful taking of the bonds occurred. That the wrongful detention and refusal to restore them when demanded, wherever the same occur, give rise to the cause of action in the place where such illegal detention is continued, although that place

may not be the same as that wherein the larceny or wrongful taking of the bonds occurred. That consequently, in this case the wrongful detention and refusal to restore having taken place in Canada the cause of action did not arise in a foreign country, although the original larceny or wrongful taking was effected in New York. Defendants pretend that the wrongful taking in New York is the cause of action in this case, and that it consequently arose in a foreign country. It becomes necessary, in the first instance, to establish the meaning of the words "cause of action." In cases of contract it is where the contract was made. (Warren v. Kay, 6 L. C. R. 492; Jackson v. Coxworthy, 12 L. C. R. 416; 1 Fœlix, p. 222; Senecal and Chenevert, 6 L. C. J., p. 46.) But I go even further, and accept "la jurisdiction speciale de l'obligation" of the Roman Commentators as the jurisdiction within which the cause of action on that obligation arose. Immediately upon the commission of a *délit*, or wrongful taking of bonds, arises not only the obligation to restore their value on the part of the thief, but also the right of action in favor of the proprietor to recover the bonds or their value. (Mackeldey Ms., § 482, 485, p. 233, n. (4) (13); 2 Savigny Oblig., p. 46, 449; 8 Savigny D. R., p. 281, 237.) He also cited from Westlake, Private Int. Law, No 108, 114, 247, and Maine's Ancient Law, to show that the forum *delicti* in every case is the forum of the country within which the *délit* was committed. That country was the *lieu* of the *acte obligatoire*, it was there that the obligation was born, and it was there, consequently, that the action arose, for the action is based upon the obligation, and the obligation therefore, is the cause of action. A consequence of the admission of this principle is, that when an action is instituted in the forum domicilii of the debtor, grounded upon the commission of a *délit* in another country, the law of the forum *delicti* controls the case, so that, amongst other things, what would be a justification in the country where the *délit* had been committed, would be a justification in the country where the action is tried. (Lord Mansfield, *Mostyn* v. *Fabrigas*, Cow. 175, 172. In contracts it is laid down that when any difficulty arises with respect to the rate of exchange and interest due thereunder, we are to take into consideration the place where the money is, by the original contract, payable; for wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay in order to remit it to that country. In cases of *délit* the principle is the same, and thus the interest is measured by the rate of the *locus delicti*, and exchange in this case (if judgment were rendered against the defendants) should be so as exactly to replace in New York the bonds wrongfully taken there by the defendants. (Etruis v. East India Co. 1 P. W. 395, 2 Bro. P. C. 382; Westlake, No. 230, 237; Story on Con. of Laws, sec. 307 to 310.) We have, then, previous to the arrival of the defendants in Canada, certain rights acquired by the plaintiffs against them, and certain obligations by them incurred towards the plaintiffs, all springing from the commission by the defendants of a *délit* in New York. The plaintiff, immediately upon the *délit* being committed, had the right of instituting an action similar to the present one against the defendants, not only in the United States, but, according to the principles of international law, wherever the defendants might be found. The obligation incurred by the commission of the *délit* travelled with the defendants wherever they went, and the plaintiffs' right to sue them accompanied them in their travels. But the changes of domicile did not create new obligations towards the plaintiffs or new causes of action against the defendants; so that, in fact, the holding in Montreal and refusing to restore add nothing whatsoever either to the obligation of the defendants or the right of action of the plaintiffs. But by the plaintiffs it is pretended that the holding and refusal here give rise to the cause of action in Canada. But the wording of the plaintiffs' affidavit shows that the illegal obtaining on the 10th Dec. in New York, constitutes a portion of the cause of action, for the illegal holding and refusal to deliver, followed there as a matter of course. But if, on the contrary, the plaintiffs pretend that the original obligation incurred by defendants by the taking of the bonds is extinguished, where and when did such extinguishment occur? if no satisfactory answer be given the

only conclusion to be arrived at is that it is in full force. The argument insisted on by the plaintiffs, that because at common law the passage of thieves with their plunder through a district other than the one wherein the larceny was effected justifies the indictment of the thieves therein for larceny, upon the principle that every fresh removal is a fresh trespass, and that consequently the defendants' flight to Canada with the bonds was a fresh trespass, giving rise to a new cause of action here, cannot be admitted as sound. At common law the general rule is that an indictment can only be presented in the district wherein the crime was committed. The case of the thief removing with his plunder into another district, and being liable there to indictment is one of the exceptions to the rule; but it is founded upon a legal fiction of the common law which extends solely to the boundary of the State within one of the districts of which the larceny was committed, and there dies; for it is clear that no indictment can be presented in Canada for a larceny of bonds effected in the State of New York (2 Russell, p 331-332. 1 Archbold, P. & P., p. 69 and notes.) Under our law no capias can issue in any action the cause of which arose outside of the limits of the Province of Canada, nor can such action be commenced by writ of capias. Can it be pretended that if a party contracts debts in a foreign country, removes into Canada with his estate and effects, and there gives his creditor a promissory note for the debts so due, dated and payable in the Province, upon which note dishonored the payee takes out a capias, that the defendant is not entitled to his discharge from custody upon the ground that the cause of action arose within a foreign country? The case of *Silverman* and *Jones*, decided by Mr. Justice Badgley, is a case in point in favor of discharge. The principle recognized in that case is, that rights which have once accrued, and obligations which have once been incurred properly and well by the appropriate law, are treated as valid everywhere, and that where once an obligation exists, the acts of the party obliged, which if the original obligation had not been in existence would have created one exactly similar, are productive of no effect, but leave the original obligation to be the cause of action between the parties; thus it is necessary, in order to discover the cause of action in this case, to fix the period and the place when and where the original obligation by which the defendants became liable to pay to plaintiff the value of the bonds stolen, as prayed for in the conclusions of plaintiffs' declaration, was incurred. The period and place when and where the defendants so became liable are easily discovered. No one can doubt that the obligation so to pay to the plaintiff the value of the bonds so stolen, was incurred on the 10th Dec. last at New York, and consequently the cause of action in this case arose in a foreign country, and the defendants are entitled to their discharge.

Bethune, Q. C., for the plaintiffs. From the argument as it has been presented on the other side, and more especially from the argument of the learned counsel who has last spoken, I think that some of the points may be taken as admitted. The learned gentlemen do not raise the question that because the depositions disclose a felony, the plaintiffs are therefore debarred of all civil remedy. Consequently, I need not enter into a discussion of that point, though I am prepared to show that whether the facts as established by the evidence disclose a felony or not, the plaintiffs were nevertheless presently entitled to exercise their civil remedy.

Both of the learned counsel have avoided drawing your Honor's attention to the whole of the affidavit of Mr. Routh. They contented themselves with referring to the first paragraph and would not go on to read what follows, though I asked both of them several times to do so. The paragraph immediately following, and which I wished them to read, shows the way in which this debt originated.

First of all, Mr. Routh swears, that on the 10th Dec. last, the defendants illegally obtained possession of the bonds, and that they have them here in Montreal. This is the portion of the affidavit the defendants' counsel read, but the part which follows, and which they abstained from reading, is in these words:—"That deponent hath personally demanded "from the defendants the restoration of the "said bonds and certificates; but they, the "defendants, have wholly refused to restore

"the same or any part thereof to the plain-
"tiffs, and the defendants still retain and se-
"crete the same from the plaintiffs, so that
"the plaintiffs are wholly unable to reven-
"dicate or attach said bonds and certificates."
The cause of debt is simply this: You, Knapp and Griffin, have here in the city of Montreal some $256,000 worth of bonds and securities; they belong to me; you got them into your possession illegally; I say you got them illegally, because I want to negative the supposition that you came by them honestly. The gist of the matter is—and that is our charge,—you have them here in your possession, without lawful title, and retain them against my will, and I challenge you to produce any lawful title you may pretend to have to them. My remedy *in rem* is taken away from me, or rather rendered nugatory, by your action, and, therefore, I want simply the value of my property.

I will now take up a matter of form to which the learned counsel who last spoke alone referred. He said, this proceeding must fall to the ground because fundamentally, a debt must be positively sworn to, and, although Mr. Routh, in his original affidavit has sworn to the debt positively, yet, in his examination under the Petition, he has admitted his information in this respect was merely hearsay. The learned counsel then contended, that the evidence of Mr. McDonald and the other New York witnesses, which was intended to supply this apparent defect, was illegal under the circumstances, and that the mere fact of Mr. Routh not being possessed of positive information, of his own personal knowledge, as to the indebtedness, was fatal to the plaintiff's case. Now, Mr. Routh in his affidavit undertook to swear distinctly and positively that the defendants owed this debt. The affidavit, then, being sufficient in this respect, holds the defendants in custody securely under the writ. They then say they are entitled to be relieved from custody, because what Mr. Routh has sworn is false. On this point my learned friend is technically wrong, for even if Mr. Routh's evidence under the petition has failed to sustain the positive assertion of his affidavit, yet, the issue tendered by the petition being the truth or falsity of the original affidavit, it was competent to the plaintiffs to corroborate Mr. Routh's testimony by other evidence. The only effect of Mr. Routh's admissions as to the hearsay character of his information would be to make out a *prima facie* case for the defendants, and compel the plaintiffs to do what has been done, namely to prove the precise truth of Mr. Routh's original statement. We are relieved from all anxiety on this point, however, for Mr. Routh's affidavit has not been broken down in the way my learned friend tries to make out. For, although Mr. Routh swears that his information was in the main derived from what Mr. McDonald and the New-York detectives told him, yet, in answer to a test question put by Mr. Kerr, whether or not his information was solely derived from other parties, he distinctly states no,—and adds, that although it was so, in the first instance, his conversation with the prisoners in gaol so confirmed him as to the truth of such information, that it enabled him to swear as positively as he had done.

Another point raised by one only of the learned counsel is this he says there is no satisfactory evidence that these men were going to leave the Province. Well, I may answer, they have put in no evidence to prove the contrary. The plaintiffs charge them with being strangers and professional thieves—mere wanderers, having no fixed place of abode, and certainly none here in Montreal,—and that if they once got out of gaol they would immediately leave the Province. Under the issues as tendered by their petition, the defendants were bound to make out at least a *prima facie* case, that this charge was untrue. But they have wholly abstained from adducing any evidence whatever on the point. Then as to the proof that they were really going to leave, I need only refer to the evidence of the New York detective Young, who swears positively to the character of these men, and that he gave Mr. Routh the information which he firmly believed to be true, that the moment the prisoners got out they would never be seen here again. Besides that, we have the evidence of Paxton, who says that these men having been a couple of days in gaol, stated that they confidently expected to be released.

They were originally arrested on the verbal complaint of the New York detectives, and remanded by Mr. Brehaut, the Police Magistrate, until two o'clock in the afternoon of a given day. Whilst in custody, they conversed freely with Paxton and their fellow prisoners in the same ward, and boasted that they knew all about the law, and that they could not be held under the Ashburton Treaty, as the offence was only larceny and not robbery. They got out, and then to their amazement they came back again. The other debtors are surprised to see them return, and then occurs the conversation as to what brought them back. In that conversation they say "Oh! this will be only for a short time. But we were afraid they were going to kidnap us, as somebody else had been kidnapped;"—evidently referring to the case of Lamirande. I only mention these points to show that these men were under the apprehension of being kidnapped, and fully intended, should they have been released, to leave Canada, and thus prevent the possibility of such an occurrence. This makes the case of the plaintiffs in this respect as complete as can be, and, in the absence of any kind of evidence on the other side, to refute it, makes out much more than a mere *prima facie* case on the side of the plaintiffs. In this way I get rid of the two points, which were raised by one only of the defendants' counsel, and which are not really those on which the defendants mainly rely. The true turning point of the present discussion I take to be, whether or not the cause of action arose in a foreign country, and the solution of that question must depend upon the fact whether or not, when Mr. Routh made his affidavit, the bonds and other securities were really here in Montreal. There is to my mind very satisfactory evidence that the defendants are the men who really took the bonds from New York, and that they had them here in Montreal. If I make out this, I make out my case. The pretension of the plaintiffs here, is simply this: you, Knapp & Griffin, have here certain bonds, my property, which you refuse to restore to me, and to which I say you never had any legal title. Supposing you stole them, what does that matter? If you bring them here into Canada, that is a new caption. If the theft is committed in one place, and the thief goes to another, he can be indicted there. This is undoubtedly the law, where the places are within the same sovereignty or government. But the principle of the mere caption is the same, whether the place be or be not under the same sovereignty. Mr. Carter has looked up the authorities on this point, and will cite them to the Court. My simple charge here is, you have got my property, and you have no title to it. I ask you to restore it, and you won't do so. The cause of action, then, is not the stealing of the bonds in New York, but the illegal detention of them here in Montreal. It matters not where the defendants originally got possession of the bonds, it is enough that they have them here; that they have no legal title to them; and that they refuse to restore them. Therefore, all the authorities of my learned friend, Mr. Kerr, as to a foreign debt, fall to the ground. The case is reduced to a mere question of evidence, as to whether or not the defendants really brought the bonds into Montreal. On that point I apprehend there can be no kind of difficulty. The facts as they are proved are these. It is in evidence and proved to a demonstration that on the 10th December last the Royal Insurance Company owned and possessed these bonds; that they were contained in a tin box which was deposited in the vault of the Company at New-York, and that the New York agent, Mr Macdonald, had the key of the box in his pocket. Knapp and Griffin came into the office; one of them, it matters little which, engaged the manager in conversation about a life insurance, while the other walked backwards and forwards in the office. Finally these two men went out,—nobody else came in,—and after they went out the bonds were found to have disappeared. The presumption is certainly very strong that these were the men who took them. One of them immediately takes flight the same day to Canada, the other leaves the next day. In a day or two they are followed by their wives. They all take up their quarters at the Ottawa Hotel in Montreal, and a New York detective who is here looking after other bond thieves—for unfortunately bond robberies have been pretty

frequent of late—telegraphs to detective Young "Knapp and Griffin are here." Mr. Macdonald, the Agent of the Royal Insurance Company in New York, soon after comes here, accompanied by the New York detectives, and he at once recognizes Knapp and Griffin as the two men who had been in the office immediately before the bonds disappeared. The presumption of law clearly is that in fleeing as they did they naturally carried off the booty which they had risked so much to secure. Following up the narrative of events we find that the New York detectives who came on with Mr. Macdonald, recognize these men and have them arrested. The Manager of the Royal Insurance Company here, Mr. Routh, and the New York Agent, are then advised to see the prisoners in gaol, and demand the restitution of the bonds, in the hope that they might be thus induced to make amends, and if not, that their positive refusal to give up the bonds should be established. Mr. Routh, Mr. Macdonald, and Mr. Perry, the Inspector, accordingly visit the gaol. The conversation with the prisoners is sworn to by Mr. Routh and Mr. Macdonald. Paxton, a prisoner who happened to be confined in the same ward, tells us, that the defendants in speaking of their arrest at that time said it was a mere matter of detention; that they expected in a few days to be released. That they knew there was no criminal charge that could get at them, and that the bonds were "planted," and could not be got at. Well Mr. Routh accosts these men, and says, "We have come about these bonds; you had better give them up and get out of this place." They commence by denying that they ever had the bonds at all. Macdonald says one of them got angry, and told Mr. Routh he had no business to come there. Then Knapp remonstrated with the other, and said, "There is no use in getting angry; these gentlemen have come here on business." Treating the affair, then, as a mere matter of business, Knapp says, "What do you value these bonds at?" and thereupon he and Mr. Macdonald go into a minute calculation, establishing some of them to be worth so much and others so much, and he then asks, "What reward are you offering for them?" "Well," says Mr. Routh, "$10,000 has been offered in New-York," intimating that the Company would be very happy to give that sum. Whereupon Knapp exclaims, "Well, gentlemen, you must take us to be God damn fools to give up such a sum for such an amount." Then comes in the additional evidence. We have first the evidence of Mr. Mulvahille, who was confined in the same ward with the defendants, and swears positively as to the conversation between him and Griffin. Grifin said it was better to be there for two months than "up the river for five years." All this time these men were under the impression that their arrest was a mere temporary affair. Mulvahille says that Griffin explained how the whole affair was done, how one of them engaged the "old bloke" (as he called the manager) in conversation about a life insurance, while the other secured the tin box, concealed it under his coat tails, and then walked out of the office. And, in reply to a question from Mulvahille as to where the bonds were, Griffin replied that they were all safe here and were "planted." From Paxton we have somewhat of a similar deposition.

Carter, Q. C., also for the plaintiffs. The first inquiry is as to the nature of the plaintiffs' claim in this case. The Royal Insurance Company is an English institution, having an office in Montreal and a branch in New York. The evidence discloses the fact that the larceny of the bonds constituting the subject matter of the claim was committed in New York, by the two defendants, who immediately sought safety in flight, and, availing themselves of the facilities afforded by our accessible frontier, they took refuge here. The first question to which the Court must direct its attention is one of fact, viz., does the evidence establish that a larceny of the bonds was committed, and whether the defendants were guilty of it? It is contended by the learned counsel, Mr. Robertson, that the evidence fails to establish the fact that the defendants were the guilty parties. I cannot understand how he could assert such a proposition, unless he wishes to ignore all the legal maxims to be found in every work on evidence. If I understand his proposition, it is this—that in a civil case nothing short of direct and positive testimony will suffice. I

shall show by positive authority, that he is in error, and that the distinction, if any, between civil and criminal cases, is to favor the admission of presumptive evidence, as supplying the want of direct proof in civil cases, whereas in criminal cases such evidence, although admitted, is always received with greater caution.

[Mr. Carter cited Best "Principles of Legal Evidence" p. 539; also, the cases of *Armory* vs. *Delanoirie*, 1 Strange, 505, and *Mortimer* vs. *Cradock*, 7 Jur 45.]

Then as to the fact, the evidence consists of not only strong presumptive proof, but positive, as derived from the admissions of the defendants, sworn to by two witnesses. It was proved that both defendants entered the Company's office at New York under pretence of effecting an insurance, and that one of them engaged the attention of the manager in such a manner as to divert his attention from the other. Within fifteen minutes after they had left, the box containing the bonds was missed from the safe. No other person entered the office between the time they left and when the loss was discovered. The defendants left New York the same day, and within a few days after, they are found in Montreal with their wives, changing large sums of money; whereas it is proved that, when in New York, they were in needy circumstances. In support of the position Mr. Carter assumed, he cited the following authority to establish that, the loss having been proved, the sudden flight and the change of circumstances of the defendants, coupled with their presence at the Company's office very shortly before the bonds were missed, constituted complete evidence of their guilt: Best "Pr. Legal Ev.," pp. 564, 568 and 569. Then there was additional evidence afforded by the defendants' avowal of the commission of the crime, and the description given of the way it was accomplished, agreeing precisely with the testimony of the manager as to what took place, to his knowledge, when the defendants were in the Company's office.

The next point to be considered is that urged by Mr. Kerr, who pretends that the affidavit of Mr. Routh has been destroyed by his subsequent examination as a witness. The very reverse is the case. Mr. Routh's examination fully corroborates what is contained in the affidavit he made. The authority cited from Archbold by Mr. Kerr does not apply. It is not pretended that the affidavit is defective, but it is said that Mr. Routh has admitted that his knowledge of the Company possessing the bonds was derived from the New York manager, and was, therefore, hearsay. In point of fact, Mr. Routh, while admitting this, has also said that he was confirmed in his belief of what the manager told him, by what the prisoners said to him, Mr. Routh, when he demanded the bonds from them. Assuming even that Mr. Routh had not seen the defendants before their arrest, if the affidavit was otherwise perfect, the question is not what means of knowledge had the deponent, upon whose affidavit the capias issued, but whether the material allegations were true. Take, for instance, the case of a merchant who makes the affidavit of a debt being due to him; if he was examined as Mr. Routh was, he would have to admit that he had no personal knowledge of the sale and delivery which was made by his clerks. But would Mr. Kerr pretend that in that case the capias would fail? Certainly not; the statute requires that the defendant should establish that there was no existing debt, as the sole question is one of fact, does the defendant owe or not?

MONK, J. You need not dwell any longer on that point.

The only question which remains for me to discuss, and in fact the only point worthy of consideration, is whether the cause of action arose in a foreign country. The whole of Mr. Kerr's argument is chiefly directed to this point, and his pretension is, that in cases of *délits* under our civil law, the right to a civil remedy accrues the moment the injury has been committed, and consequently that the cause of action arises where it has originated. In support of this pretension he has cited several authorities, many of them having no application, and others establishing a principle which favours the right contended for by the plaintiffs, that their remedy by civil action exists. It was contended by Mr. Robertson that the civil remedy could not be exercised. Upon this important point, the defendants'

counsel could not agree. There can be no doubt that Mr. Robertson is in error, and I will presently establish that Mr. Kerr commits the mistake of carrying his proposition to an extent which his authorities do not justify.

MONK J., addressing Mr. Robertson—Do you deny the right of the plaintiffs to exercise their civil remedy?

Mr. *Robertson.* I do.

Mr. Kerr. I do not; I admit that the civil remedy exists.

Mr. Carter. We may, then, take it for granted Mr. Robertson remains alone in his opinion. It is a question that can admit of no doubt. It is a remedy recognized in Criminal Courts, as well as at other tribunals, as your Honor must be aware, that even in criminal cases power is given to a Judge, after conviction, to order restitution. Then as to the other point, it is urged that the cause of action depends upon the place where the wrong was first committed. This I deny, as the real cause of action in this case is the fact that the defendants are here in Canada in possession of plaintiffs' property, and withhold it, refusing to restore it. It is a principle of the common law that the owner may follow his property, and every new jurisdiction into which the thief carries it is a fresh caption. This doctrine is applied even to criminal cases, so that the offence is regarded as repeated—as a new taking (*cepit*), and a new cause of prosecution established, altogether independent of the original taking. Mr. Carter cited, in support of this proposition, 1 Hawk. ch. 49, sec. 52, Rex *vs.* Parkin, 1 Moody C. C., and authorities cited in the note. In this case the plaintiffs complain that the defendants hold their bonds, and are converting them to their own use. It is the conversion which is the gist of the action. In support of the latter proposition, Mr. Carter cited 2 Selwyn, Nisi Prius, p. 1389.

As regards the remedy, we are to be governed by our law, which recognizes the right of arrest in civil cases. This is the general rule. There are exceptions, and it is for the defendants to show that they come within the operation of one of them. This brings us to the consideration of what cases the statute was intended to except from its operation. The only reasonable interpretation of the statute is to hold that foreign debts mean such liabilities resulting from contracts where the implied assent of both parties may be invoked, as controlling their engagements, and the consequences resulting from them. But no such construction could be put upon our statute as that contended for by defendants' counsel to cover the case in question, so as to afford immunity to thieves stealing in New York and seeking safety with their booty by sudden flight into Canada, and then withholding the property from the real owner, and refusing to restore it. The true doctrine is, that the withholding and conversion of the bonds was a continuance of the injury, giving rise each day to a fresh cause of action. There was here a marked distinction to be made between those *délits* which, being of a personal nature, received their consummation and completion where the injury was inflicted, and the larceny of property, to which the common law applied another rule which is recognized by all systems of jurisprudence, viz: the right of the owner to claim his property or its value wherever he finds it.

Mr. *Kerr*, in reply. 2 Selwyn, 1389, cited by Mr. Carter, although it cannot be regarded as bearing upon the present case, has been referred to as proving the position taken that in cases of trover, the original finding is matter of inducement, the conversion being the gist of the case. From that authority Mr. Carter argues that the conversion only took place at Montreal, where the demand to restore was made and refused. Can it be pretended that, in opposition to the citations from Savigny and the other commentators upon the civil law, which all prove conclusively that the *délit*, in this case the wrongful taking or larceny of the bonds, is the source of the obligation of the defendants, this citation from Selwyn, writing on the common law upon trover, is to prevail, and the original taking is to be looked upon as mere matter of inducement?

But taking it for granted that my learned friend is serious in referring to Selwyn, I am prepared to show that the quotation he has given has really no reference to this case, no bearing upon its merits. My learned friend says, in this case the conversion took place in

Montreal, the secreting, the demand to restore, and the refusal, all prove the conversion here, and consequently as the conversion is the gist of the action, the cause of action arose here. I, on the other hand, pretend that when there is a wrongful taking, followed by a carrying away of the goods of another who has the right of immediate possession, that is of itself a conversion. 1 Chitty on Pleading, 153. Thus in cases of larceny where the property is removed by the thief, there is an immediate conversion of it. Conversion does not necessarily import an acquisition of property in the party converting. In this case, taking it for granted that the bonds were stolen in New York, the conversion by the defendants took place there on their removing the bonds from the office of the plaintiffs. A demand to restore and refusal are only necessary to establish the conversion in cases where the defendant became, in the first instance, lawfully possessed of the goods, and the plaintiff cannot prove some distinct conversion. Chitty, pp. 156, 157—P. No. 1 (2). For instance in cases of loan or bailment, a demand to restore and refusal are necessary if the lender or bailor cannot show a distinct conversion; but if such distinct conversion is shown there is no necessity for the demand and refusal. In England, then, under the authority cited, the conversion would be held to have taken place at New York. Moreover, why, if the larceny at New York is mere matter of inducement, did the learned counsel insist upon their having so clearly proved that the defendants were the parties who there effected that larceny? Why, if that larceny is a mere matter of inducement, producing no effect upon the case, were they forced to admit that without the evidence of that larceny in New York, given under the commission, the defendants would have been entitled to their discharge, Mr. Routh's affidavit having been destroyed? By the destruction of the affidavit as proof of the defendants' indebtedness, the capias is left without any basis to support it. The plaintiffs have no right with their evidence in reply to satisfy the Court of that which should have been proved by the affidavit. My conclusions are, 1, that Mr. Routh's affidavit on the subject of the defendants' indebtedness has been destroyed, and that it cannot be bolstered up by evidence in reply. 2. That the larceny or wrongful taking in New York on the 10th December last is the cause of action in this case; that it arose in a foreign country; and that, consequently, the defendants are entitled to their discharge.

February 26.

MONK, J. This case has been brought up on two petitions to liberate the defendants from imprisonment, under a *capias ad respondendum*, issued at the instance of the plaintiffs on the affidavit to hold to bail, made by Mr. Routh, and which sets forth in substance:

(Here his honor read the affidavit, which will be found ante, p. 189.)

This affidavit was made on the 20th Dec. On the 26th of the same month the defendants appeared separately, and severally moved to quash because the affidavit did not disclose any legal and sufficient grounds of debt against the defendants, and that the cause of action did not arise within this Province.

Judge Berthelot dismissed both the motions, holding that the defendants were rendered liable by the fact of their being found here with the property in their possession; the owner of stolen property had a right of action against the thief wherever he found him with the stolen property in his possession. In this case it was not material whether the property was stolen here or in New-York.

In this decision of the learned Judge, I entirely concur, both as to the sufficiency of the affidavit *per se*, and as to the right of action against the thief wherever he may be found; nor did I understand the defendants' counsel, in the present instance, to contest very strenuously the right of action merely. I understood them to concede the point, and in any case, I entertain no doubt about the law in that respect. The question here, however, is not as to the right of action, but as to the right of arrest and detention under a writ of *capias ad respondendum*, in the face of the facts proved on these petitions. Keeping this distinction clearly in view, I proceed now to inquire into the merits of the defendants' applications.

Chapter 87 of our Consolidated Statutes provides that "The Court, or any Judge of

"the Court, whence any process has issued "to arrest any person, may, either in Term "or Vacation, order such person to be dis- "charged out of custody, if it is made to appear "on summary petition and satisfactory proof," among other reasons, "that the cause of "action arose in a foreign country." Under this provision of the Statute, the defendants presented each a petition to be discharged from custody, alleging that the cause of action for which the arrest was made, arose in the United States of America and not in Canada; that no such debt as that stated in the affidavit existed; that the defendants were not about immediately to leave the Province of Canada, or to secrete their estate with intent to defraud their creditors; and finally that the averments of the affidavit were untrue.

Upon these petitions, the plaintiffs and defendants proceeded to proof, and it has been, I think, conclusively established, as stated in the affidavit, that on the 10th of December last, the plaintiffs, who had a branch in New York, were possessed at their office in that city, of the bonds enumerated in the affidavit by Mr. Routh; that on that day they lost possession of this property, and that it is still illegally withheld from them.

The first question of fact to be determined is whether the defendants, as is alleged by the plaintiffs, were the parties who fraudulently took the bonds from the plaintiffs' office in New-York. I think it clearly results from the evidence adduced, that on the 10th December the defendants called upon Mr. McDonald, the plaintiffs' agent in New-York, and spoke to him about effecting an insurance upon their lives. The conversation took place in an inner room of the plaintiffs' office, and lasted about twenty minutes, being almost exclusively carried on between Griffin, one of the defendants, and Mr. McDonald During all this time Knapp was walking to and fro, occasionally passing into an adjoining room, where there was a safe or vault, the outer door of which was open, and the inner one closed. In the inner compartment of this safe or vault, was a tin box containing the bonds. The defendants finally left, saying they would call again, and in about twenty minutes after their departure, the agent, McDonald, perceived that the bonds were missing; the box containing them having disappeared.

This occurred early on the 10th, and on the 12th of December, in the forenoon, the defendants arrived in the Ottawa Hotel, in Montreal, and on the 15th of the same month their wives joined them here. The defendants are proved to have been before this time poor men and professional thieves. On the 20th December they were arrested on the *capias* issued in this cause, and immediately previous to their arrest, and while in jail charged with this robbery, they had the following conversation with Mr. Routh, who visited them with Mr. McDonald, to demand the restoration of the bonds. Mr. Routh says:

"I went down to the jail previous to the "making of my affidavit. When I saw them "I told them I had come down about the "bonds; that my advice to them was to give "them up, and get out of that place, the jail; "I think it was Knapp first spoke to me.

"They both denied having stolen the "bonds or having them in their possession. "Afterwards, when the conversation became "more free, Knapp said:—"'We are prison- "ers, and this is not a place to do business in. "We shall soon be released, and may then "call upon you, and deal or do business with "you.'

"He (Knapp) then addressed Mr. Mc- "Donald and had considerable conversation "with him respecting the value of the bonds, "upon which he, Knapp, put his own valua- "tion, and then asked me what reward was "offered for the restitution of the bonds. I "replied, ten thousand dollars. He then said, "'Gentlemen, you must take us for *pretty God* "*damn fools* to give up such an amount for "such a sum.'

"The other defendant, Griffin, first was an- "gry, but afterwards cooled down, and spoke "much to the same effect that Knapp did."

Question by Counsel:—"Did the said "Griffin state he had any bonds in his posses- "sion, or had taken any?"

Answer:—"He did not distinctly say so."

This testimony requires no corroboration, and if it did, that corroboration is furnished by the evidence of McDonald, the New-York

agent. Two men, respectively of the name of Mulvahille and Paxton, were examined by the plaintiffs, and they state that they had a conversation with the defendants in jail. They say the defendants admitted they were the robbers of the bonds, and described, moreover, how the robbery was committed, and that they had the bonds *safely planted here in Canada.*

To this testimony I attach but little importance; it is extremely improbable, and the statements therein made contradict, in some particulars, the evidence of Macdonald, and so far it is unworthy of credit—it may be true or not. In any case, for the purposes of this decision, even admitting it to be true, I do not regard it as material. The remarks, however, of the defendants to Mr. Routh, taken in connection with certain other portions of the evidence adduced, leave no doubt in my mind of the robbery, or by whom it was perpetrated. As I view the testimony, therefore, I find it proved that the defendants abstracted the bonds in question from the plaintiffs' safe in New-York on the 10th December, under the circumstances stated by Mr. Macdonald. On that day they became illegally possessed of this property against the will of plaintiffs, and the probability is they have the bonds still in their possession, or under their control. It is also proved that they refused to restore them to the plaintiffs, or to disclose where they are, so that the plaintiffs might revendicate them, and upon these grounds mainly, if not exclusively, and under these circumstances, the plaintiffs had recourse to the remedy by "*Capias ad respondendum.*"

Now, as to the right of action in this case against the defendants, as before stated, there can be no doubt, and it was also conceded by all the Counsel, except one, Mr. Robertson, for the defendants, that had this robbery been perpetrated in Canada, the remedy by *Capias* would be a proceeding sanctioned by the law. Upon this point I have no opinion to give, and I studiously abstain from pronouncing any judgment in regard to this view of the law. But there is something more in this case, and that which gives rise to the whole, or at least the chief difficulty. I have to decide whether the robbery, the conversion, and first detention of the bonds, having occurred without the limits of Canada, and within the dominions of a foreign State, the defendants are, under our law, upon their refusal to restore the bonds, and their continued and fraudulent detention of them here, liable to imprisonment under *Capias.*

That is the real question to be determined in this case. The clause of the Statute invoked by the defendants, in relation to this point, is to the following effect: It has been quoted in part above, but is reproduced here in order that we may not lose sight of the law we are called upon to interpret and apply. "The "Court, or any Judge of the Court, whence "any process has issued to arrest any person, "may either in Term or in Vacation, order such "person to be discharged out of custody, if it "is made to appear on summary petition and "satisfactory proof, either that the defendant "is a priest or a minister of any religious de- "nomination, or is of the age of seventy years "or upwards, or is a female, *or that the cause "of action arose in a foreign country,* or does "not amount to forty dollars of lawful money "of this Province, or that there was not suf- "ficient reason for the belief that the defend- "ant was immediately about to leave the Pro- "vince with fraudulent intent, where that is "the cause assigned for the arrest, or that the "defendant had not secreted, and was not about "to secrete, his property with such intent, "where that is the cause assigned for such "arrest."

This Statute, though enacting general rules and provisions, applicable to arrest under civil process, it will be seen also clearly enumerates the exceptions, among which is found the case of the *cause of action arising in a foreign country;* and I have simply to determine what, in the present instance, is the cause of action, according to the technical meaning of the words, and where that cause of action arose. The clause of the Statute above cited settles the rest. Now, according to the plaintiffs' own showing, they lost possession of their property by theft or robbery, on the 10th December last, in the City of New York. I think they have also established that the defendants are the robbers—that they fled immediately to Canada,—that they detained the bonds,

—refuse to restore them or disclose where they are. Upon the facts thus established in evidence a civil remedy arises. The plaintiffs seek to recover the value of their property by an appeal to our civil tribunals, and commence their proceedings by arresting the defendants under a "*capias ad respondendum*," and I am to determine what is the cause of action in this case. Is it the illegal taking alone? Is it the conversion or fraudulent detention of the bonds, or is it the refusal to return them or to disclose where they are? Are there so many separate causes of action, or do they, all combined, only constitute one, the same, and the real cause? It seems to me these questions can be answered without much difficulty or hesitation, and I am of opinion that the real cause of action is manifest by the illegal taking, coupled with the conversion or fraudulent detention of the bonds. Their refusal to restore them in Canada is no more, in point of law, than the refusal to pay a debt, contracted in New York. I, of course, view this question as one of law merely, and irrespective of the moral considerations which the facts of the case suggest. All that occurred in Canada, so far as we know, or can suspect, is the *continued* detention of the bonds, and the refusal to restore them. This is not the cause of action in this instance. I may reasonably presume, from the fact that they refuse to disclose where the bonds are, that they have them in their possession, or under their control in Canada,—in other words, that they still fraudulently detain them from the plaintiffs. There can be no doubt but that this fraudulent detention constitutes an important element in the cause of action in this instance, as the refusal to pay a debt forms an essential ingredient in the cause of action arising out of a civil obligation or contract. But even so, did this fraudulent detention of the bonds take its origin in Canada or in New-York? Plainly in the latter place. It commenced there,—was simultaneous with the illegal taking, and it was complete immediately upon the perpetration of the robbery. Thus, the illegal taking —the robbery, if you will, occurred in a foreign State,—the fraudulent detention therefore began, originated there. It may be remarked, moreover, that in regard to the *continued detention* of the bonds, I am left to deal with presumptions. There is no evidence whatever of a conversion of the bonds in Canada, or elsewhere as a matter of fact, though in contemplation of law it may be said that the conversion took place immediately upon the illegal taking. There is no positive proof that these bonds ever were in Canada. I presume they were, and I presume, moreover, that they are still in the possession, or under the control of the defendants. But on the other hand, I have what I may regard as conclusive evidence, as before stated, that the robbery was perpetrated, and the illegal detention commenced in New York,—in other words, that the entire cause of action arose, originated there, and not in Canada. To hold the contrary, in my judgment, would involve us in difficulties not easily overcome, and in propositions not very intelligible as propositions of law. It was strenuously contended by the plaintiffs' counsel that the fraudulent and continued detention of the bonds, coupled with the refusal to restore them, was a new cause of action, arising wherever the defendants went, even if they passed from the dominions of one sovereign state to another. That the mere fact of the defendants being in Canada with their property, under the circumstances disclosed, gave them, the plaintiffs, a right of remedy by *capias*. That although the robbery was perpetrated in New-York, the defendants immediately fled to Canada to consummate the villainy there; and there, where the plaintiffs first found them, and where they first became fully aware of their being the thieves, they have a right to the most rigorous remedy the law has placed at the disposal of a creditor. That robbers are an exceptional class of men, and must be dealt with accordingly in an exceptional manner; that the causes of civil actions arising out of crimes or *délits*, should not be dealt with in the same manner as those resulting from civil contracts; that the "lex fori" and not the "lex loci contractus," or in this case not the "lex loci delicti" governs the remedy; and that by the law of Canada, in a case like the present, arrest on civil process would be one of the means which our Court would sanction in enforcing such remedy. It was also urged that in view of the facts proved, these

defendants should not be allowed to evade the operation of our law upon the grounds set forth by their Counsel, that, in fact, the cause of action to all reasonable intent, and for the purposes of this case, arose in Canada. No doubt there is much force in all this, but as I view the facts before me, these arguments and these generalities are not decisive. What is proved, or may be presumed to have taken place in Canada, with regard to this matter, constitutes no new element in the cause of action. The defendants were liable upon civil process in New-York, if liable at all, to the same extent, and in perhaps the same way, they are liable here. Their coming to Canada makes no change in their original liability, or in the cause of action. I am not aware of any precedents, nor have we much law, except some elementary *dicta*, to guide us in this matter. But having bestowed upon the case very careful attention, I am forced to the conclusion that the whole cause of action in the present instance, before stated, arose in N. Y., that it existed there wholly and entirely before the defendants reached Canada—and that no addition to that cause, nor any modification of it has taken place since their arrival here. Taking this view of the matter reluctantly, but without much hesitation, I feel bound to grant the prayer of the petition, and to liberate the defendants. No doubt it is a hard case. Our statute may be defective, but I think not. In any case, I must take it as I find it. I am only the organ of the law, and as such I am bound to interpret it according to my understanding of it, and to apply its provisions with a strict and scrupulous adherence to its letter, where its language is peremptory and unambiguous. In a case like the present, had it been possible for me to entertain a serious doubt,—could I have found in the words of the statute any uncertainty, or that kind of elasticity, if I may so express it, which would have enabled me, in the conscientious discharge of my duty, to refuse the defendants' application, I should have done so. But as it is, the law, and the facts of the case, however atrocious the latter may be, compel me to decide in their favor.

In conclusion, I would remark that our Legislature having employed a language so intelligible and so decisive, I must assume that the law means precisely what is there so clearly enacted,—no more and no less. And I am of opinion that the letter and the spirit of the law are here in perfect harmony, and that this exemption from arrest on civil process to be found in the statute has not been made without good reason. Were it lawful to arrest foreigners here by *capias*, and to detain them in confinement upon civil liability, arising out of crimes or *délits* alleged to have been perpetrated in foreign States, such a mode of proceeding might lead to incalculable abuse and hardship in individual cases, and might, moreover, be fraught with perilous consequences. I am aware that this is not a case of international law. Neither treaties, nor the mutual comity between nations, come under my consideration. I have nothing to do with either, nor have I to analyze or discuss *ab conveniente, or ab inconveniente* arguments in this matter; my duty is simply to decide a question of municipal law. But in doing so I may state that it is easy to conceive instances where parties might be subjected to long detention upon civil process in Canada, and be afterwards acquitted of the criminal charge in the country where the crime was alleged to have been committed. Besides, it would not be difficult to suppose a variety of cases in which false or doubtful accusations might result in flagrant injustice and mischief, unless special provisions existed to avert such consequences.

In my opinion our Legislature has wisely guarded against the possibility of such occurrences, and although, in this case, it is much to be regretted that my decision should come to the relief of vagabonds and professional thieves, under the circumstances proved, yet, on the other hand, I must look to the statute and to the facts established, and not to the character of the defendants.

It would be in the highest degree dangerous for any Court or Judge, without the express, the clearest sanction of the law, to establish a precedent such as that contended for by the plaintiffs. The petitions are, therefore, granted.

S. Bethune, Q.C. and *E. Carter, Q.C.*, for the plaintiffs.

A. & W. Robertson, and *W. H. Kerr*, for the defendants.

[NOTE.—The case was immediately inscribed for Review, the defendants in the meantime being detained in custody.]

CIRCUIT COURT.

Brome Cc., Jan. 26.

EASTMAN *v.* ROLAND ALIAS ROLINS.

Parol testimony was received to prove a verbal agreement extending terms of a written contract filed in the cause, affecting a sum above $50.

Costs were allowed defendant in an action upon a promissory note, upon proof that plaintiff agreed, after the institution of the action, to withdraw the same on payment of debt alone, although the debt was not paid at the rendering of judgment; and under the circumstances, plaintiff's attorney was not allowed *distraction de frais*.

This was an action upon a promissory note for $58. Defendant pleaded, 1st, an agreement by plaintiff to extend time of payment three or six months or longer, previous to the institution of the action; also, a promise on the part of plaintiff to withdraw action and pay his costs; concluding by tender of debt without depositing the same in Court.

Two witnesses were examined to prove plea, under objection of plaintiff's counsel. By one of the witnesses it was proved that plaintiff had agreed between the service of writ and return to withdraw the suit and pay the costs, provided defendant would pay the debt. The debt was not paid, and the action was thereupon returned into Court.

JOHNSON, J., in rendering judgment, said that plaintiff, having agreed to extend the time of payment, must be held to his agreement. Judgment for debt only.

Before the Court rose, upon application of defendant's counsel, costs were awarded against the plaintiff.

J. B. Lay, for the plaintiff.

E. Racicot, for the defendant.

(Reporter's Note.—Plaintiff's attorney by his declaration demanded *distraction de frais*. He submitted this point to the Court, and insisted upon his right for *distraction*, it being personal and vested in him. The Court held the contrary. *Vide Stigny* v. *Stigny*, 2 Rev. de Leg. 120; *Converse and Clark*, 12 L. C. R. 402.—J. B. Lay.)

RECENT ENGLISH DECISIONS.

QUEEN'S BENCH.

Marine Insurance—General Average.—A ship was submerged in deep water with heavy cargo on board; there was a common peril of destruction imminent over ship and cargo as they lay submerged; the most convenient mode of saving ship or cargo, or both, was by raising the ship together with the cargo; the cost of the raising would be an extraordinary expense for the common benefit of both, and the cargo would be liable to general average contribution, and the shipowner would have a lien on the cargo to secure payment of that general average. The ship being insured:—*Held*, that in determining whether or not the ship was a constructive total loss, the amount of general average which would be contributed by the cargo must be taken into account, and the cost of raising the ship calculated as reduced by that amount. *Kemp* v. *Halliday*, Law Rep. 1 Q. B. 520.

Action for Reward—Information leading to apprehension of Offender.—The defendant's shop having been broken into, and watches and jewellery stolen, the defendant advertised, "A reward of £250 will be given to any person who will give such information as shall lead to the apprehension and conviction of the thief or thieves." In about a week, R. having brought one of the stolen watches to the plaintiff's shop, the plaintiff gave information, and R. was apprehended the same day with another of the stolen watches upon him. After two or three days, R., being in custody, told the police that some of the thieves would be found at a certain shop, and there they were apprehended a week afterwards, and subsequently convicted. In an action by the plaintiff for the reward, the jury having returned a verdict for the plaintiff:—*Held*, that the information given by the plaintiff was not so remote as that it could not be said to have "led" to the apprehension of the thieves; and that the judge had properly left the evidence to the jury, pointing out the remoteness of the information. *Turner* v. *Walker*, Law Rep. 1 Q. B. 641.

[This judgment has since been affirmed by the Exchequer Chamber.]