The Lower Canada Law Journal.

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APPEALS IN FORMA PAUPERIS.

In the case of *Legault* and *Legault*, 2 L. C. Law Journal, p. 10, it was decided, in March last, that an appeal could not be brought *in formâ pauperis* to the appeal side of the Court of Queen's Bench in Lower Canada, Judge *Mondelet*, however, dissenting, and being of opinion that such appeal should be allowed. About the same time the question of appeals *in formâ pauperis* came up in England, and from the report of the case, *Drennan* v. *Andrew*, Law Rep. 1 Ch. 300, it would seem that the practice on this point has varied. Some of the precedents furnished by the Registrar, and stated in a note to the report, are rather curious.

By 11 Hen. VII. c. 12, poor persons were allowed to sue *in formâ pauperis*. By 23 Hen. VIII. c. 15, a pauper was not to pay costs, if he was unsuccessful, but was to suffer *other punishment* in the discretion of the judge. Accordingly the common form of the order allowing a poor person to sue *in formâ pauperis* contained this clause: "But if the matter shall fall out against the plaintiff, he shall be punished with whipping and pillory." There are many orders of the time of Queen Elizabeth which contain this clause; and there was one instance, in 1596, in which Sir Thomas Egerton (afterwards Lord Chancellor *Ellesmere*) ordered a *female* pauper plaintiff to be flogged. At this time no suitor could regularly appeal from a decree in Chancery. It is said in some of the old orders in the time of Elizabeth, speaking of the Court of Chancery, "from which Court the subject has no appeal." As to persons not paupers, this practice was changed, and their right to appeal established; but as to paupers there appears to have prevailed, as late as 1774, and perhaps later, an idea that a pauper could not appeal. In *Bland* v. *Lamb*, the proposition that a pauper could not appeal is said to have been adverted to *arguendo* by Mr. Pemberton, and condemned by Lord *Eldon*, who is stated to have said "it was a very singular proposition; and that he could not see why, because a party was poor, the Court should not set itself right."

Lord Chancellor *Cranworth*, in *Drennan* v. *Andrew*, directed the petition of appeal to be received. He said there appeared to be some conflict of practice on the point, but he was of opinion that where the common order to sue *in formâ pauperis* had been obtained at any time during the suit, such order was sufficient to carry the pauper through all the stages of the suit; and that in that case, an order for leave to appeal *in formâ pauperis* was unnecessary.

CONTEMPT OF COURT.

To the Editor of the L. C. Law Journal.

The subject of "Contempt of Court" having lately been rather prominently before the Lower Canadian legal world, the following opinion, given by Mr. Erskine, (afterwards Lord High Chancellor) in a letter to a gentleman in high reputation at the bar in Dublin, may probably prove interesting:—

"Bath, January 13th, 1785.

"The right of the Superior Courts to proceed by attachment, and the limitations imposed upon that right, are established upon principles too plain to be misunderstood.

"Every Court must have power to enforce its own process, and to vindicate contempt of its authority, otherwise the laws would be despised; and this obvious necessity at once produces and limits the process of attachment.

"Whenever any act is done by a Court which the subject is bound to obey, obedience may be enforced, and disobedience punished, by that summary proceeding (committal for contempt). Upon this principle attachments issue against officers for contempts in not obeying the process of Courts directed to them as the ministerial servants of the law, and the parties on whom such process is served may in like manner be attached for disobedience.

"Many other cases might be put, in which

it is a legal proceeding, since every act which tends directly to frustrate the mandates of a Court of Justice is a contempt of its authority. But I may venture to lay down this distinct and absolute limitation of such process, viz. That *it can only issue in cases where the Court which issues it has awarded some process, given some judgment, made some legal order, or done some act which the parties against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused to submit to, incited others to defeat by artifice or force, or treated with terms of contumely and disrespect in the face of the Court, or of its minister charged with the execution of its acts.*

"But no crime, however enormous, even open treason and rebellion, which carry with them a contempt of all law, and of the authority of all Courts, can possibly be considered as a contempt of any particular Court, so as to be punished by attachment, unless the act which is the object of that punishment be in direct violation or obstruction of something previously done by the Court which issues it, and which the party attached was bound by some antecedent proceeding to make the rule of his conduct. A constructive extension of contempt beyond the limits of this plain principle would evidently involve every misdemeanor, and deprive the subject of the trial by jury in all cases where the punishment does not extend to touch his life.

"The peculiar excellence of the English government consists in the right of being judged by the country in every criminal case, and not by fixed magistrates appointed by the Crown. In the higher orders of crimes the people alone can accuse, and without their leave, distinctly expressed by an indictment found before them, no man can be capitally arraigned; and in all the lesser misdemeanors, which either the Crown, or individuals borrowing its authority may prosecute, the safety of individuals and the public freedom absolutely depends upon the well-known immemorial right of every defendant to throw himself upon his country for deliverance, by the general plea of 'not guilty.' By that plea, which in no case can be demurred to by the Crown, or questioned by its judges, the whole charge comes before the jury on the general issue, who have jurisdiction co-extensive with the accusation, the exercise of which in every instance the authority of the Court can neither limit, supersede, control, nor punish.

"Whenever this ceases to be the law of England the English constitution is at an end! And its period in Ireland is arrived at already, if the Court of K. B. can convert every crime by construction into a contempt of its authority, in order to punish by attachment."

The above needs no comment. Contempt has never been clearly and precisely defined in the law books, for the simple reason that it is impossible to do so; but what approaches as near as possible to a definition may be extracted from that part of the above letter which is printed in italics.

The question, however, which has seldom, if ever, come up in England, is likely soon to receive the fullest ventilation before the Judicial Committee of the Privy Council, before whom, on the 3d of last November, came up the following case:—

Present—Lord Westbury, *Sir* E. V. Williams, *Sir* J. Colvile, *and Sir* L. Peel.

IN RE LAWRENCE M'DERMOTT.

Mr. Coleridge, Q.C., applied to their Lordships on the part of Lawrence M'Dermott, of Water-street, New Town, City of George-town, British Guiana, the proprietor and publisher of the *Colonist* newspaper, for leave to appeal against certain orders and proceedings of the Supreme Court of Civil Justice of the colony of British Guiana, by which as the conductor of the newspaper he had been committed to prison for a period of six months for an alleged contempt. The learned counsel presented the case as one of peculiarity. The applicant in his petition stated that he was a British subject, and the proprietor and publisher of the news paper mentioned; that for some time past great dissatisfaction had existed as to the proceedings of the Supreme Court, and in reporting the proceedings he had allowed them to be commented upon in the *Colonist* newspaper in respect to the case of one of the officers, Mr. Campbell, who had been compelled to resign his office. Shortly after the 29th of March last he received an order of the Court, setting forth the complaints made, that he should attend on the 4th of April to show cause why an attachment should

not be issued against him for contempt that the petitioner appeared before Chief Justice Beaumont and Mr. Justice Beete, who, without hearing certain objections, adjourned the matter to the 6th of the same month. He again appeared before the Court as directed, and the Attorney-General and Mr. Gilbert were his counsel; and after hearing them he was ordered again to appear on the 10th of the same month, when it was objected that the order made in the matter was irregular. The Court overruled the objection, and offered to allow further time, but his counsel declined to show cause under the order made. Mr. E. C. Ross, the informant, was heard; and the decision was deferred till the 13th of April, on which day the Court, consisting of the Chief Justice Beaumont and Mr. Justice Beete, gave judgment that the petitioner had been guilty of a contempt by publishing matter in the *Colonist* scandalously reflecting on the Court and the administration of justice, and for such contempt he was ordered to be imprisoned in Her Majesty's gaol of George-town for the term of six calendar months. The petitioner further alleged that he was delivered into custody, and applied for leave to appeal to the Queen in Council, and had been refused on the ground that it was not an appealable case. That he had been advised that his only remedy was to appeal to the Privy Council for liberty to appeal, and in his petition he complained of the proceedings as illegal, and prayed an inquiry into the matter as well for the sake of his own character and reputation as for the right and due administration of justice. Mr. Coleridge asked their Lordships to grant permission to the petitioner to appeal, and then the matter could be inquired into.

Lord WESTBURY consulted the other members of the Committee, and said their Lordships would give leave to the petitioner to appeal, but would reserve to themselves the right to consider whether it was allowable.

An order was made to appeal without prejudice to the competency of the appeal. W.

Sir William Bovill, the Solicitor General, has succeeded to the Chief Justiceship of the Common Pleas, in the place of Sir William Erle retired.

CHIEF JUSTICE ERLE.

On the 26th of November last, the Lord Chief Justice presided for the last time in the Court of Common Pleas. At the rising of the Court, the Attorney-General, Sir John Rolt, in the presence of the whole Court and a crowded Bar, addressed the retiring judge on behalf of the Bar. The Attorney-General remarked in the course of his address :

"My Lord, we all feel and desire to acknowledge that, under your presidency in this Court, the great judicial duty of reconciling, as far as may be, positive law with moral justice has been satisfied. The letter of the law that kills, and the mere discretion of the judge, which has been well said to be the law of tyrants, have been alike kept in due subjection. Learning, experience in affairs, wise administration have been so combined that, with the assistance of the eminent judges associated with you on that Bench, the laws of England have been exhibited in their true aspect as the exponent of the rights and duties of her citizens, and the guardian of their liberties. The Court of Common Pleas, under your presidency, my Lord, has attained the just confidence of the suitor, the public, and the profession. But, my Lord, I shall not be forgiven by my colleagues if I stop here. I shall not be forgiven if I fail to express our admiration for the simplicity and elevation of character that have adorned that administration, and our affectionate regard for the private and social qualities, the kindness and the courtesy that have been displayed on the Bench, and in the intercourse of private life. Our homage is due and is paid alike to the worth of the man and the dignity of the judge.

"My Lord, it is no idle ceremony that induces us thus to intrude upon you. We know that your Lordship would, had it been possible, have retired from the Bench to-day without public observation. But it was not possible. There are occasions on which the impulses of the heart must be obeyed; and this was one. The universal feeling insisted on public expression.

"My Lord, it may be right, and since it is your will we endeavour to think it is so, that in the full possession of the greatest judicial

qualities, in the maturity of your faculties, your Lordship should retire from us and leave the active duties of ordinary judicial life. They have, no doubt, been incessant, severe, excessive; but we may be pardoned if we bear in mind that your Lordship is still a member of one of our highest judicial appellate tribunals; and express our hope that the law and the country may still for long years to come, so far as may be consistent with your Lordship's ease and retirement, derive the benefit of your great wisdom and experience."

The Lord Chief Justice replied as follows:

"Mr. Attorney,—My words in reply must be few. I return my earnest thanks to you and to all whom you represent on this occasion. I have laboured to do justly according to law, and to obey humbly the Power that gave my sense of right. If any duty in which I had part has been well performed, the honour is mainly due to those who in their respective departments have had to co-operate with me in the noble work of administering justice. It is eminently due to the Bar. I have seen a long succession of advocates, and among them men of the highest worth, swaying important interests by their words, always speaking with inflexible integrity, and making the way of duty plain before the judge—men that I delight to think of with confirmed respect and regard. I have happiness in knowing that the estimation of the Bar is well maintained, and I shall ever retain the deepest interest in its honour for the sake of its members and of the public. Above all, I desire that the due share of honour should be given to my brethren of this Court, with whom I have been taking counsel and interchanging mind for years past, to my unspeakable benefit. I may not in their presence say all that I feel towards them, but I cannot refrain from adding that their affectionate help has been the sunshine in my path, and the breath of my judicial life.

"I now take my leave. Though sensible of manifold defects, I still venture to believe that I have devoted the best of my abilities to the duties of my office, unceasingly down to the present time, when I find need for some abatement of work, and your approval seems to sanction the hope that I may not have laboured altogether in vain. Those words of approval pronounced by the Attorney-General in this assembly to-day, are to me a grand support and reward. I am heartily thankful to you for them, and they are endeared to me by the genial kindness of your farewell."

SIR JAMES L. KNIGHT BRUCE.

The Right Hon. Sir James L. Knight Bruce, whose resignation of the high office of Lord Justice of Appeal in Chancery was recently announced, died on the 7th November, at the Priory, Roehampton, at the age of 75. Born in 1791, a younger son of Mr. John Knight, a gentleman of independent property in Devonshire, the late Sir J. Knight Bruce, then Mr. Knight, was, in 1812, admitted a student of Lincoln's Inn, and in 1817 called to Bar. After attending the Welsh circuit for a short time he exchanged the Common Law for the Equity Bar, where his great talents and industry soon secured a large practice. In 1829 he was appointed a King's Counsel, and in 1831 was returned to Parliament for Bishop's Castle. In 1834 he received the degree of D.C.L., "*honoris causâ*," from the University of Oxford. A Conservative in politics he was one of the Counsel heard at the Bar of the House of Lords in 1835 against the Corporation Reform Act. In 1837, the year in which he assumed the additional surname of Bruce by Royal license, he closed his Parliamentary career by an unsuccessful struggle for the representation of the borough of Cambridge; and in 1841, at the age of 50, was raised to the Bench as Vice Chancellor. Ten years later, in 1851, on the creation of the Court of Appeal, Lord Cranworth and Sir J. Knight Bruce were selected as the first Lords Justices. In the following year, upon Lord Cranworth's elevation to the Woolsack, Sir George Turner was appointed as his colleague, and Sir J. Knight Bruce became senior Lord Justice, a position he only resigned a fortnight before his death.

THE TRIAL OF LAMIRANDE.

The following report of the trial of Lamirande is from the London *Daily News*. We may state here that the English Government

declined to take further action in the matter, on the ground that whatever irregularity there may have been in the extradition, was the fault of the Canadian officials, and not of the French detective.

The indictment very shortly set forth that the prisoner had, by fraud and forgery, embezzled various sums of money belonging to the Bank of France, amounting in the whole to 700,000fr. After the reading of the indictment, M. Lachaud, the prisoner's counsel, took a preliminary objection. He handed in written exceptions submitting that the extradition under and by virtue of which the prisoner stood at the bar, ought to be declared null and void as illegally obtained. The document charged that French courts of law were competent to examine the regularity of the extradition of any prisoner brought before them, and that this principle was laid down by the Court of Cassation on May 9, 1845. It then stated the well known facts that pending the argument on a writ of *habeas corpus* before Judge Drummond, in Canada, and after an adjournment had been asked for by the counsel for the Bank of France, Lamirande was fraudulently, and in breach of international law, carried off and sent a prisoner to France; that the order of the Governor-General of Canada, under cover of which the extradition was effected, was obtained by fraud and surprise; and that Judge Drummond, before whom the matter was pending, had subsequently declared judicially that the extradition was illegal.

M. Gast, the advocate-general, denied that the court had anything to do with the legality of the extradition. Its only business was to try the prisoner whom it found before it, no matter how he was brought there. Any irregularity in the extradition was a question between the two governments. Even if the court were to annul the extradition it would be an idle proceeding, in no way beneficial to the prisoner, because he might be arrested *de novo* as he left the bar. There was no law which said, assuming the extradition to have been illegal, that the prisoner was entitled to a safe conduct to the frontiers in order that he might be restored to the *status quo*. Extradition treaties were not made for the benefit of criminals, but for high international purposes, and an accused party, once before a French court, was not competent to argue that his arrest has been illegal.

M. Lachaud, in reply, said that Lamirande had been "stolen" from England.

The President here interrupted him and said —M. Lachaud, I cannot allow that expression; you are not now addressing a jury, and such observations are lost upon the court.

M. Lachaud persisted in the use of the word "stolen," which he said was perfectly borne out by Judge Drummond's judgment, which, out of respect to the court, he would not read, although the court knew what it said. He contended that, according to the Court of Cassation and the doctrine of M. Helie, a great text writer, the court had at least a discretion to consider whether the extradition was legal.

The Court overruled the objection.

An attempt, which was very nearly successful, was then made to entrap Lamirande into a consent to be tried upon all the charges in the indictment. In answer to the first question of the president he said he would consent. But M. Lachaud rising to insist that he did not understand the meaning of the question, the court adjourned for a few minutes to allow him to consult with his counsel. He subsequently said that he wished to profit by all the irregularities of his extradition, and that he would not consent. Thereupon M. Lachaud contended that the triple charge on which he was indicted must be submitted to the jury, namely, forgery, abuse of confidence, and embezzlement. The Court, however, held that in default of his consent he must be tried for the forgery only, that being the only accusation which justified his extradition. The object of M. Lachaud was to have a case for the Court of Cassation on the ground of the want of the prisoner's consent. He now hopes to prove that the charge of forgery is not technically sustainable.

Lamirande, when interrogated by the President, confessed that he had robbed the Bank of France of 704,000fr., that the abstractions were going on for nearly three years, and that every day during that period he submitted to the manager of the Poictiers branch, a falsified balance. His system was to take *rouleaux* of gold and replace the coin by silver pieces in bags, supposed to contain gold. He expressed contrition, especially because his crime tended to throw suspicion upon his respectable chief, M. Bailly. The examination relative to what he had done with the stolen money is interesting.

Q. What did you do with the money?—A. I gave 7,000 fr. to an English interpreter, who, in return, informed against me. Then I am persuaded that I was robbed of three securities of the value of 10,000fr., at London and Liverpool. I was weary; I had passed several nights, as many as nine, I think, at play—for play has been my ruin. Further, I trusted a sum of 6,000 fr. to a Canadian who was going home.

Q. That money has been restored?—A. Yes.

Q. What next?—A. I spent a great deal of money at New York—somewhere about 1,500fr.

Q. But you have upwards of 700,000fr. to account for.—A. I cannot tell what has

become of the money. At New York I had to do with some advocates, to whom I entrusted 191,000frs. I agreed with them that if I did not resist the extradition they would send 135,000fr. for me to make restitution in France.

Q. So that they kept 56,000fr. for themselves?—A. The police agent told me that when he threatened them with prosecution they sent the Bank of France 25,000fr.

Q. You have given back something?—A. Yes, the amount stated in my memorandum.

Q. Go on with your narrative.—A. Before leaving France I gave money to two women.

Q. You are yet a long way off the sum total.—A. Ah, but the money I gave to my American advocates.

M. Lachaud.—They are no advocates.

The President.—Yes, they are New York advocates.

M. Lachaud.—They are not worthy of such a title. They are thieves' accomplices.

Q. Well, now tell us what you have done with the surplus?—A. I cannot without doing an injury to innocent persons.

Q. You must answer. It has nothing to do with the question at issue, but it is a question of morality.—A. I cannot tell.

M. Lachaud.—Will the Court allow me to speak? I have a revelation to make.

The President.—You can make your revelation in your speech, but we cannot ask the prisoner continually whether he agrees with his counsel.

Lamirande.—I refuse to answer.

After some further questions about the debts which the prisoner had paid, M. Lachaud, after rising several times to speak, and being told as often by the president that he must wait until the examination was closed, exclaimed, stretching out a bag of money, I have more than a revelation. I have a fact of importance to the trial which must now be made known. My client tells me that he cannot say what has become of the stolen money for fear of injuring innocent parties. I have in this bag 110,200 fr., of which I now make restitution in Lamirande's name, and hand the money over to the counsel for the Bank.

M. Bourreau (the counsel).—I do not feel authorized to receive it; but here is an officer of the Bank who will take the money and give a receipt.

M. Lachaud.—We do not want a receipt. Here is a restitution. (Great sensation.)

Q. You have still, after all the explanations, 280,000 frs. to account for. What has become of the sum remaining?—A. I cannot say.

Q. I cannot understand what interest you can have in making this restitution, instead of frankly admitting that you had the money, in answer to the question I had just now put to you.

Lamirande.—My counsel waited for a favourable moment.

M. Lachaud.—One word.

The President.—Oh, M. Lachaud, it is unnecessary.

M. Lachaud.—I beg pardon; it is most necessary. The prisoner neither knows when I had this money, nor who brought it to me. My learned friend who is with me, M. Lepetit, and myself alone know. The prisoner confided something to me which led us to use our endeavours to recover some of this money. We have recovered the sum handed over. "Who has the rest?" we ask the prisoner. "I cannot tell you," said he; "I will not bring that person to sit by me at the bar."

M. Lepetit—We alone know where the money came from; the prisoner does not.

M. Lachaud—And I wish to say that I would not have given him the money in prison. We have restored 110,000fr.; I only wish it were in our power to give back the rest.

The President—This leads me to repeat that Lamirande would have done better to have answered candidly when I examined him.

This closed the prisoner's examination. The witnesses called merely proved what was not denied. The sentence was ten years' imprisonment.

BAR OF LOWER CANADA.

Diplomas registered in the Registers of the General Council from the 15th November, 1866, up to the 19th December, 1866.

NAMES.	WHERE ADMITTED.	DATE OF COMMISSION.	DATE OF REGISTRATION.
Archambault F. X.	Montreal...	12 Nov., 1863	12 Dec., 1866
Alary, D.	Montreal...	30 Aug., 1864	14 Dec., 1866
Bellemare, U.	Montreal...	8 May, 1866	21 Nov., 1866
Berthiaume, Aquila	Montreal...	5 Dec., 1864	6 Dec., 1866
Beaupré, Damase	Montreal...	2 June, 1862	14 Dec., 1866
Bourgouin, Nazaire H.	Montreal...	14 Sept., 1863	14 Dec., 1866
Choquet, Ambroise	Montreal...	14 Nov., 1865	15 Nov., 1866
Chabot, Marcil Hubert	Quebec...	5 July, 1864	24 Nov., 1866
Champagne, G. Antoine.	Montreal...	2 Nov., 1858	1 Dec., 1866
Cayley, Mic.	Montreal...	4 Jan., 1864	1 Dec., 1866
Cadoret, J. E.	Quebec...	3 July, 1866	4 Dec., 1866
Carreau, J.P.	Montreal...	2 June, 1862	15 Dec., 1866
Champagne, Charles L.	Montreal...	5 Sept., 1865	15 Dec.. 1866
Desplaines, F. X.	Montreal...	1 May, 1865	27 Nov., 1866
Duggan, J. H.	Montreal...	5 April, 1866	30 Nov., 1866
Daunais, P. Paul	Montreal...	5 Aug., 1865	30 Nov., 1866
Desjardins, T. C. Alph.	Montreal...	2 June, 1862	5 Dec., 1866
DelaRonde, Gaspard R.	Montreal...	7 Dec., 1863	5 Dec., 1866
Desilets, Alfred	Montreal...	14 Dec., 1864	7 Dec., 1866

BAR OF LOWER CANADA.

Diplomas registered in the Registers of, the General Council.—*Continued.*

NAMES.	WHERE ADMITTED.	DATE OF COMMISSION.	DATE OF REGISTRATION.
Dubreuil, Jos Feréol......	Montreal...	8 Feb., 1866	11 Dec., 1866
Doran, Dan.	Quebec.....	9 Oct., 1865	11 Dec., 1866
Demers, Am.	Montreal...	7 Dec., 1863	11 Dec., 1866
Desilets, Jos. O..........	Montreal....	6 Nov., 1865	13 Dec., 1866
Demers, Ls. N..........	Montreal...	13 Dec., 1866	13 Dec., 1866
Desjardins, Arthur.....	Montreal...	9 Nov., 1864	15 Dec., 1866
Dorion, Chs.	Montreal...	4 Aug., 1862	18 Dec., 1866
David, Ach.	Montreal...	4 Sept., 1865	18 Dec., 1866
David, Ferdinand.....	Montreal...	19 Dec.	19 Dec., 1866
Foisy, Jos. A	Montreal...	7 Mar.	5 Dec., 1866
Fontaine, A.	Montreal...	7 July	13 Dec., 1866
Geoffrion C. A..........	Montreal...	4 June, 1866	22 Nov., 1866
Girard, F. X	Montreal..	6 April, 1863	24 Nov., 1866
Girouard, D.	Montreal...	2 Oct., 1860	30 Nov., 1866
Garault, M.	Montreal...	21 April, 1859	15 Dec., 1866
Joseph, Jos., Olivier.....	Montreal...	9 Sept., 1864	15 Nov., 1866
Kelly, John P	Montreal...	2 June, 1862	6 Dec., 1866
Lippé, Pierre Samuel.....	Montreal...	3 July, 1865	7 Dec., 1866
Laurier, Wil.	Montreal...	8 Aug., 1865	8 Dec., 1866
Legendre, N.	Montreal...	5 Jan., 1865	11 Dec., 1866
Laferrière, Alex. Aurez	Montreal...	3 July, 1865	11 Dec., 1866
Lawlor, Rich S..........	Montreal...	6 Sept., 1865	13 Dec., 1866
Leblanc, Jos.	Montreal,..	6 April, 1863	17 Dec., 1866
Lachapelle Alphonse..	Montreal...	5 April, 1866	19 Dec., 1866
Mongeau, J. N..........	Montreal...	5 June, 1865	30 Nov., 1866
McConville, Henri Jean.	Montreal...	5 Sept., 1864	5 Dec., 1866
Marsan, An. T..........	Montreal...	14 May, 1864	12 Dec., 1866
Maillet, Ls., Ludger.....	Montreal...	8 Feb., 1866	12 Dec.. 1866
Marcil, Chs.	Montreal...	6 Oct., 1856	14 Dec., 1866
Mathieu, M.	Montreal...	5 Dec., 1865	15 Dec., 1866
Mirault, Gil.	Montreal...	10 Sept., 1862	17 Dec., 1866
Ouimet, A.B. Charles....	Montreal...	27 Sept., 1865	7 Dec., 1866
Parkin, Edw Bradley....	Quebec	5 June, 1866	24 Nov., 1866
Paré, Louis Tréflé......	Montreal...	7 Jan., 1862	17 Dec., 1866
Quesnel, Auguste.......	Three Riv's	3 Nov., 1862	17 Dec., 1866
Rixford, E. Hawkins...	Montreal...	10 Nov., 1865	27 Nov., 1866
Rivard, Sev. Dominique.	Montreal...	6 June, 1859	12 Dec., 1866
Richard, Jos. Urgèle......	Montreal....	5 Feb., 1866	13 Dec., 1866
Robidoux, J. Emery.....	Montreal...	15 May, 1866	15 Dec., 1866
Simard, Jos., Adélard....	Montreal...	22 Nov., 1865	24 Nov., 1866
Thibault, Ch	Montreal...	8 Feb., 1866	21 Nov., 1866
Tranchemontagne, F. R.	Montreal...	5 Jan., 1857	11 Dec., 1866
Truesdell, E.	Montreal...	1 Oct., 1860	13 Dec., 1866

GONZALVE DOUTRE,
Secretary of the General Council.

DIGEST OF ENGLISH LAW.—The following judges and eminent persons have been appointed to be Her Majesty's Commissioners "to inquire into the expediency of a Digest of Law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form, the Law as embodied in Judicial Decisions:"—Baron Cranworth; Baron Westbury; Sir Hugh Cairns; Sir J. P. Wilde; the Rt. Hon. Robert Lowe; Vice Chancellor Wood; Sir George Bowyer; Sir Roundell Palmer; Sir J. G. Shaw Lefevre; Sir Thomas Erskine May; Mr. Daniel, Q. C.; and Messrs. Thring and Reilly, Barristers-at-Law.

SIR HUGH CAIRNS.—The youngest Judge in England is Sir Hugh Cairns, Judge of the Court of Appeal in Chancery, who is in his forty-ninth year.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.—APPEAL SIDE.

MONTREAL, Dec. 7th, 1866.

M'DONALD, (*tiers saisi* in the Court below,) Appellant; and NIVIN ET AL., (plaintiffs contesting in the Court below,) Respondents.

Saisie Arrêt—Deed of Sale by Garnishee declared fraudulent.

M. obtained from all the creditors of D., an insolvent grocer, a subrogation in their rights, and a transfer of the stock. He allowed D. to continue the sale of goods and collection of outstanding accounts on his behalf, but reserved to himself the right to take possession of the stock and premises at any time he pleased. D. made new purchases of goods from N. and others, with M.'s knowledge, and failed to pay for them. M. took possession of the stock, including the new goods, and sold the whole estate to another party. N. having served a *saisie arrêt* upon M.:—

Held, that the sale by M. was in fraud of the new creditors of the insolvent, and that M. must pay the proceeds into Court, to be distributed among said creditors.

This was an appeal from a judgment of the Superior Court, at Montreal, rendered by *Monk*, J., on the 26th January, 1865, maintaining a contestation of the declaration of the appellant as *tiers saisi*, in a cause in which the respondents were plaintiffs, against Robert T. Durrell, defendant. The facts are detailed sufficiently in the remarks of the judges.

BADGLEY, J. Durrell, a former clerk of M'Gibbon, established himself in business as a grocer in May, 1862, and failed early in July, 1863. On the 13th of July, 1863, by deed of cession, he assigned his stock-in-trade, outstanding debts, and unexpired lease, to assignees, for the benefit of his creditors, with power to wind up his estate. On the 31st of July, M'Gibbon, by deed between him, Kinloch, the assignee, the debtor Durrell, and the creditors generally, purchased absolutely the stock and debts of the bankrupt, and took subrogation from his creditors of their several claims against him, in consideration of 7s. 6d. in the £., which he undertook to pay to them. The composition was afterwards paid. On the 31st of August following, by another deed, the appellant, in consideration of $3880 paid by him to M'Gibbon, purchased from the latter all his right, interest and property in Durrell's late stock and debts, as they then were unsold and uncollected, as well as the unexpired portion of his lease; and M'Gibbon specially subrogated the appellant in and transferred to him the creditors' claims against Durrell, with his own, together amounting to upwards of $6000. The appellant made his purchase without any warranty by M'Gibbon, and declared himself satisfied with the goods purchased, as having seen them, and having them in actual possession.

On the 22nd Sept. following, by deed, the appellant constituted Durrell his agent to realize the remaining stock, and to collect the outstanding debts, but for no other purpose, binding Durrell to make weekly payments to him of the moneys received from sales and collections, and reserving to himself the power to take possession and summarily to eject Durrell even without notice, and at any time. He agreed, however, to transfer to Durrell the balance of stock and goods remaining, when Durrell should repay to him the $3880 paid to M'Gibbon, with interest and ten per cent. commission. Durrell ratified the appellant's previous purchase from M'Gibbon, and acknowledged his indebtedness to appellant as his creditor, representing the creditors' claim transferred to him. From the time of the appellant's purchase from M'Gibbon in August, the shop had been kept open in charge of Durrell, whose sign still remained visible as usual, and Durrell went about making purchases in his own name, to enable him to continue the necessary supply of stock, the appellant in some instances making advances in money to assist him in his purchases, in others endorsing his paper. This continued until the business premises were closed by the appellant on the 23rd Dec. following, and during that time it is in evidence that Durrell made purchases at an average of about $800 per month, buying, selling and collecting in his own name, with the knowledge of the appellant. The deed between the appellant and Durrell, as just stated, was executed on the 22nd Sept., and on the 1st Oct. Durrell first purchased goods from the respondents, and continued his purchases until the 31st of that month, when they amounted to upwards of $500, the recovery of which has given rise to these proceedings.

On the 23rd December, the appellant exercised his right, and took absolute possession of the premises, with all its stock of goods, and closed the shop until the 4th January, 1864, when, by deed of that date, he sold and conveyed to Burke all the goods and merchandizes in and about and upon the premises, with also the unexpired lease, in consideration of $2200, which he thereby acknowledged to have received in cash from the purchaser Burke. Durrell became a party to this deed at appellant's request, ratified the sale, and relinquished to Burke all right, if any he had, in the effects sold. This is stated in the deed. At the time of the appellant taking possession of the goods in the premises, and of his sale of them to Burke in his own name as his own property, he knew that Durrell was a bankrupt, that he himself was Durrell's creditor for upwards of $6000 as the representative of Durrell's creditors, and also a further creditor for advances and endorsements for him since the deed between them in September; that he knowingly allowed Durrell in his own name to supplement his selling stock to considerable amounts, during the entire period receiving the proceeds of sales and collections for his own account; that these proceeds came from the appellant's old stock purchased from M'Gibbon

and also from Durrell's purchase of new goods, and from collections of accounts due, and that the sale to Burke necessarily included what may have remained of the original stock unsold, as well as of the new goods and supplementary purchases,—in other words, the goods of the respondents and others from whom Durrell had purchased. As stated, Durrell's purchases monthly averaged about $800, whilst his sales were about $600.

In this position of things, the respondents sued Durrell and obtained judgment against him on the 12th January, the action having been instituted before the appellant's sale to Burke, and the judgment was followed up by writs of *saisie-arrêt* in the hands of the appellant and of Burke, on the 27th of the same month. The *tiers saisis* duly appeared and declared that they had nothing belonging to Durrell, and owed him nothing. The declaration made by Burke has not been contested, he having paid for his purchase, as shown in his deed; but the respondents contested the appellant's declaration, alleging fraud practised by the appellant against the creditors of Durrell generally, and against the respondents specially, and requiring the appellant to account for the $2200 received in cash from Burke, or to pay them their debt. Issue was thereupon joined, and evidence adduced. It is from the record and from the written and oral evidence contained in it, that the preceding statement has been drawn, and it will be apparent that the appellant's pretension to retain exclusive possession of the whole amount of the cash received from Burke, must be tested by his own acts, by which the fair and honest rights of the parties will be settled.

The appellant well knew the insolvency of Durrell, from the date of the latter's assignment to assignees for the benefit of his creditors. He knew that he was Durrell's creditor for the amount of his previous indebtedness to his former creditors, and also to himself for his later advances and endorsations. He knew that he allowed Durrell, the insolvent, to appear as the actual shopkeeper, and to make supplementary purchases for the shop, which was actually under his own control. He knew that he was receiving from Durrell's sales and collections money, not only received from the old stock, which was clearly and honestly the property of the appellant, but also from the new stock of goods purchased, which was in no way his, and which from the record he had no right to control; and finally he knew that he took into his possession not only the remains of his own unrealized stock, but also all that remained unrealized of the supplementary goods, which were clearly claimable by Durrell's new creditors, and converted the whole to his own profit. There can be no doubt of this, because the appellant himself admits the fact, and says on *faits et articles*, "that he realized by his sale to Burke, from those goods, &c., sold to him, $2200, which, with goods bought by himself from Durrell, and with money previously received from him, paid him, appellant, for the sum he paid M'Gibbon, ($3880), and also for advances made by him to Durrell in payment of goods (purchased by Durrell), also for rent of store, assessments, &c."

Now, although the appellant might justly claim the proceeds of his own stock, he could not honestly or legally, in the face of Durrell's insolvency, appropriate to himself, and for his own advantage, the supplementary goods purchased by Durrell from others, nor retain the $2200 to himself alone. That money manifestly represents the rights of other creditors of Durrell as well as of the appellant, which he cannot hold without fraud, and therefore that money should in fairness and justice be brought into Court, to be acted upon in the interest of Durrell's creditors, according to their legal rights. The judgment of the Court below is quite equitable in that respect, but must be corrected in the figure of $2400 to $2200, and with the addition that the appellant be adjudged to pay to the respondents the costs of the contestation raised by them against his declaration as *tiers saisi*, upon the said writ of attachment; and, finally, the whole with the costs of this appeal, which is dismissed.

MONDELET, J., *dissenting*. The only question is whether the sum of $2,200, which was paid to M'Donald by Burke for the stock of Durrell, should be distributed among the creditors of Durrell. I do not think that this

money should go to the creditors, for this reason:—Nivin and others became creditors of Durrell subsequently to the purchase of the stock and debts by M'Donald; therefore, in my opinion, they have no right to this money. I have been altogether at a loss to understand on what principle the majority of the Court are disposed to allow Nivin and other creditors to take possession of this money, when the transfer to M'Donald from M'Gibbon was anterior to their becoming creditors. I am of opinion that M'Donald acted in good faith in these transactions, and I have been unable to see any reason for making him pay the $2,200 into Court. I have therefore to dissent from the judgment.

Drummond, J. I must say that I had some doubts about pronouncing a judgment in the absence of Burke; but it appears to me, after reflection, that Burke has no interest whatever in the case, because no attempt has been made to assail his title. The object of the plaintiffs is simply to get from the hands of M'Donald the sum of $2,200, which, as one of Durrell's creditors, he has appropriated to himself.

Aylwin, J. I can only say, in the language made use of many years ago by Sir Alexander Stuart, this is a case of stinking fraud. I shall say nothing more.

Judgment confirmed, (except as to error in the amount, which was corrected) Mondelet, J., dissenting.

A. & W. Robertson, for the Appellant.

Popham, for the Respondents.

PRESIDENT et SYNDICS de la Commune de la Seigneurie de la Baie St. Antoine, (defendants in the Court below,) Appellants; and LOZEAU et vir, (plaintiffs in the Court below,) Respondents.

Communal Land—Droit d'usage of timber.

Question as to the right of defendants to cut timber on certain communal land.

Held, that the *droit d'usage* (which is a proprietary right like a *usufruit*) *de tous les arbres et bois de haute futaie* on the *lisière de bois* in question, belonged to the plaintiff, and that the defendants merely possessed the *terrain ou fonds* of the land.

This was an appeal from a judgment of the Superior Court, rendered at Sorel, on the 19th of October, 1861, condemning the defendants to pay £5 damages, for having cut timber on a certain *lisière de bois*.

Badgley, J. The Sieur Lefebvre, a former proprietor of the Seigniory of St. Antoine, commonly called La Baie du Fêbvre, made a grant to his tenants, sometime before 1724, of a tract of land along the shore of Lake St. Peter, for their common of pasturage, and after his decease, whilst his widow was in possession of the Seigniory, disputes arose between herself and the commoners as to its extent, and as to some other matters connected with it. These disputes were terminated in 1724, and the extent of the common was settled as being " tout le front qui se trouvera depuis les terres que le feu Sieur Lefebvre a acquis ci-devant du Sieur Courval, jusqu'à la Seigneurie Lussaudière ensemble le terrain étant depuis les concessions jusqu'au bord du Lac St. Pierre," including " la lisière de bois qui règne le long du Lac St. Pierre." From that time the record presents nothing to notice with reference to the common until 1822, and during that long interval the commoners used their common, whilst the Seigniors enjoyed, without interruption the *usage de bois* on the *lisière* above referred to. In 1822, the commoners, tenants of the Seigniory, petitioned the Legislature for their incorporation, for the purpose of administering and managing their communal property, and they were in consequence erected into a corporation, by the L. C. Act, 2 Geo. 4, cap. 10, which provided for the nomination of a chairman and trustees from amongst themselves, who were to regulate the affairs of the common, fix its boundaries, settle the number and description of cattle to be put to graze thereon, and the time for grazing, and which assured a right of common to each tenant. In 1824, an additional Act, 4 Geo. 4, was passed, which amended the previous one, and received the royal assent in May of that year. The powers of the chairman and trustees were thereby enlarged; they were authorized to fix the boundaries of the common absolutely, to contract, transact and conclude with all owners of land adjacent to or encroaching on the common, whether owners or Seigniors, upon terms to be mutually agreed upon, for the terminating of all disputes

respecting boundaries, to settle and fix limits, &c. Both Acts contained a special saving clause, whereby the rights of the Sovereign and of all persons were preserved, such only excepted as were particularly mentioned in the Acts. These special Acts had only reference to the common and commoners particularly, and to the purposes for which they were enacted, the regulation, management and use of the communal property, and the final settlement and definition of its limits; but neither in any way interfered with the acquired or vested rights of the Seigniors in the *usage de bois* in the *lisière de bois* above referred to, independently of the rights of the commoners in the *commune* itself. When the latter Act was passed in 1824, the Seigniory was subdivided amongst several proprietors, by purchases of separate portions of it, whereof the largest part belonged to the Demoiselles Lozeau, then minors, and *en tutelle* of their uncle Lozeau.

Whilst this subdivision existed, a deed of transaction, dated the 12th August, 1824, within three months after the coming into operation of the second Act of Parliament, was executed between these several co-proprietors and co-seigniors, of the one part, and the chairman and trustees representing the corporation, of the other part, wherein, after a statement that the old titles of the common were lost, the parties transacted and contracted together, they settled the extent and bounds of the common, as detailed in the deed, almost *in totidem verbis* the same as those given above as of 1724, and which detail was followed by the following express reservation:—"que les dits seigneurs ès-noms et qualités qu'ils y agissaient respectivement, se reservèrent très-expressément tous les arbres et bois de haute futaie seulement, qui se trouveront dans l'endroit communément appelé la lisière de bois, suivant ses sinuosités depuis les terres ci-devant et anciennement acquises par le dit feu Sieur Lefebvre du dit Sieur de Courval, à aller à la dite Seigneurie de Labussandière; le dit bois consistant en plaines, érables, et autres bois formant les sucreries, pour en jouir suivant leurs droits respectivement comme bon leur semblera, excepté les arbres et bois qui se trouveront dans le quart de la dite commune que les dits président et syndics concèderont ainsi qu'ils y sont autorisés; bien entendu toujours que le terrain ou fonds où se trouve le dit bois et arbres sus-réservés appartiendra à la dite commune."

By this deed of transaction the parties thereto were severally maintained in their respective rights, the tenants retaining the property of the communal land, and the seigniors their reserved right and property in the *usage de bois*, and of the trees growing in the *lisière* within the common. Clearly the terms of this deed of transaction were not *ultra vires* of the chairman and trustees, but plainly within their statutory powers, to transact and conclude with the Seigniors; and their declaration of the Seigniors' reserved right of their *usage du bois*, in the *lisière*, which could not be withheld from them, was not a special *stipulation contractuelle*, or contract entered into by the chairman and trustees exorbitant of their powers.

The joint Seigniors subsequently executed a deed of partition amongst themselves, dated 20th June, 1826, for the division amongst them of the Seigniory, according to their respective rights and properties therein; and amongst the divisions thereby established, four were apportioned to the Misses Lozeau, whereof the first was at the N. E. extremity of the line of the common, and the fourth at the S. E. extremity, adjoining the dividing line of St. Antoine and Labussandière; their two other portions, and those of the other proprietors, lying promiscuously between the first and fourth portions. Their fourth lot is described as follows:—"toute la partie de la dite seigneurie qui se trouvera de front, à prendre d'un côté au nord-est à la part de seigneurie du dit Sieur Louis Manseau, à aller aboutir au sud-ouest à la Seigneurie de Labussandière, *avec aussi la part dans la lisière de bois qui est et se trouve au-devant et vis-à-vis la susdite partie de seigneurie.*" It is proper to state here that in the partition deed, to each particular division is appended, as to this fourth one, the same or an equivalent frontage portion of the *lisière de bois* as above.

It is upon this fourth allotment that the trespass is alleged to have been committed, and the damage complained of done. In order

to complete this partition, the several proprietors resolved to have their respective boundaries defined and laid down by an *arpentage* and survey, which was performed by a Provincial Surveyor, who drew not only the several division lines of the respective properties from each other, but also the front lines between them and the common, including the respective portions of the *lisière* in front of each property. These operations are shown in the surveys and *arpentages* for each individual property, and in the general mass of the whole, and also in the surveyors' *procès-verbaux*, all filed of record in this case. The proprietors assented to the operations by affixing their signatures to the several documents of the operations, and the corporation also acquiesced in them, their chairman and trustees also subscribing the same documents. These operations were completed in 1842.

The female plaintiff, by transactions and exchanges with her sister, became the sole owner of their joint allotments, as specified in the partition deed of 1826. She intermarried with the male plaintiff, but with stipulation of contractual *séparation de biens*.

From the record it appears that frequent depredations by individuals had been committed upon the trees growing and standing upon the *lisière de bois* in the plaintiff's allotments, which she did her best to stop by public notifications at the Church door to the tenants generally; but these depredations were made to assume unusual proportions at last by an assembly of the tenants, specially holden on the 29th November, 1858, and called for the express purpose, at which it was resolved by a majority as follows:—" que la Corporation est autorisée à faire bucher 300 ou 400 cordes de bois plus ou moins dans les limites de la dite commune durant la présente hiver, qui seront vendus par la dite Corporation pour le bien générale de tous les propriétaires de droit dans la dite commune;" and it was further resolved to contest " toutes oppositions qui pourraient être placées devant eux par les Seigneurs et autres à cet effet." The chairman of the Corporation, one Gouin, immediately set to work to carry out the resolution of the *habitants*, and put men to cut down the trees on the *lisière de bois*, and particularly a considerable number upon the plaintiff's fourth allotment above described, the wood of which was by the chairman's directions removed and converted to the *bien général des propriétaires* in the common, whereupon she instituted the present action against the Corporation, for £125 damages, for the wood cut and carried away.

The declaration sets out her possession for more than a year and day before this trespass, of the *droit d'usage de tous les arbres et bois de haute futaie* in the said *lisière*, the possession of the said *lisière de bois* by the seigniors for more than forty years, the terms and agreement of the deed of transaction of 12th August, 1824, between the seigniors and the Corporation, the special reservation therein of their right in all the trees in the *lisière*, the terms and effect of the said deed of partition, by the joint seigniors, the plaintiff's particular allotments of the seigniory, and especially the fourth above described, with the portion of the *lisière* in front of it, her possession of that part of the *lisière* by herself and *auteurs* for more than forty years last past, and her present sole title thereto. She then charges the defendants with maliciously and knowingly committing the injury and damage complained of, with intent to damnify her, and her actual damage of £125, for which she prays their condemnation with costs.

The defendants have pleaded, by peremptory exception, that neither the plaintiff nor her *auteurs* ever had or could have any right of usage in the *lisière de bois*, which has always formed part of the common, and that neither she nor they possessed the *lisière* freely, peaceably and publicly; that the commoners have cut and carried away from the common for more than thirty years, *le bois à eux nécessaire*; that the deed of transaction of the 12th August, 1824, was *ultra vires* of the Corporation, and did not nor could confer upon plaintiff and her *auteurs* any *usage de bois* or servitude in the trees and wood; that plaintiff never indicated her proprietary rights before the commissioner appointed under the statute to settle the rights of the commoners in the common, *ergo actio non* and annulment of deed of transaction.

Two special pleadings follow, one by each

party, plaintiff and defendants. The plaintiff, in reply to defendants' plea, specially alleges the feodal and seigniorial rights of herself and *auteurs* over the common, that the said commissioner had no statutory authority over her or her *auteurs*, and that any judgment rendered by him as against her or them, would be of no effect; and then denying finally the allegations of the peremptory exception in general. She concludes that as to her, if it be necessary, the commissioner's judgment should be set aside and her action maintained. The defendants on their part specially reply to her special answer, by demurring to the allegation of feodal right set up by her over the common, which they allege was an onerous not gratuitous grant; wherefore dismissal of her action. Both of these special pleadings are illegal, except as to her general denegation of the defendants' peremptory exception, and should have been dismissed.

A mass of oral testimony followed the pleadings, which may be summed up as follows: that plaintiff and her *auteurs* constantly, publicly and freely enjoyed the right of property and *usage de bois* over all the trees in the *lisière;* that depredations by individuals, some of whom were commoners, some not, were committed upon the trees and wood in contravention of her repeated and annual notifications against such *maraudage;* that the sugaries were *exploités* by the plaintiff or for her use and advantage; that the depredations were the acts of individuals, few in number out of the entire body of the *habitants intéressés*, and never by the latter in general, or as a body of commoners; that even these depredations were neither continuous nor public, and that neither as an unincorporated body, nor as a corporation, had her rights in the *lisière de bois* been interfered with by them previous to the date of the resolution to that effect of 29th November, 1858, under which her wood was cut down and converted to the use of the corporation; that upwards of fifty cords of wood were so taken, to her damage of upwards of £50.

This oral testimony is accompanied by several documents filed in support of the plaintiff's pretensions, some whereof have been already adverted to, and amongst them she has produced a copy of an ancient document, dated in 1724, by which the disputes between the *censitaires* and the then holder of the seigniory appear to have been settled between them. It has not been filed or declared upon as a title of property, nor is it necessary to consider it in that character, but it is available for the plaintiff as documentary evidence. It is the judgment of 1724, rendered by the Deputy of the *Intendant de Justice*, and established the extent and boundaries of the *commune* precisely as they have since continued, for the purpose of the commoners' pasturage, and, after making certain reservations of lesser importance to the Seignior, concludes with this special reservation: "lui reservons en outre tous les arbres étant en la susdite lisière de bois, pour en disposer par elle, ainsi qu'elle en jugera à propos." From that time the commoners' right in the common and the Seignior's right in the *lisière de bois*, have been coincident and co-extensive, and it may not improperly be said, upon a fair examination of the whole case, that the plaintiff has *from that time*, shown a continuous and uninterrupted right and property, as well as possession of her *usage de bois*, down to the institution of her action, with the full and perfect acquiescence of the commoners in that right, through the deed of transaction of 1824, and the *arpentage* of 1842, in connection with the deed of partition of 1826, until the date of their adverse resolution of 1858, in which they impliedly admit the plaintiff's right, by deciding to contest it, and this for the first time. This continuity of right and of possession of itself constitutes in law a *véritable droit*, because the *droit d'usage de bois* is not a servitude, it is a proprietary right like a usufruct. The authors characterise it as a *droit immobilier, un démembrement* of the real property. "*C'est une séparation perpétuelle du droit de jouissance dans les arbres de celui de la propriété*," and rests upon a proprietary right acquiesced in and acknowledged by the Corporation since its existence as such in 1822, and sustained by an uninterrupted possession *non desertée ou abandonnée* by the plaintiff or her *auteurs* during the interval from that year.

The right and property of the defendants

in the communal land, including the land on which the *lisière de bois* is standing, are not questioned by the plaintiff; but they have shown no title to those trees in question, and the trespasses and depredations committed by a few marauders upon the wood in the *lisière* before the date of the resolution of 1858, cannot acquire to the Corporation a right over the plaintiff's property which the Corporation had not previously had, nor justify the claim to prescriptive exclusion of the plaintiff from her *usage de bois*. The defendants have shown none of the legal ingredients required to establish prescription in their own favour, or to divest the plaintiff. Having then no title in themselves, and no possessory or prescriptive right, the act of the defendants complained of by the plaintiff was unjustifiable, and their peremptory exception was therefore properly dismissed, by the judgment of the Court below, which also properly maintained the plaintiff's action. This Court confirms that judgment with costs, and would have been disposed to have extended the amount of the damages thereby awarded, by giving exemplary damages to put a stop to such outrageous proceedings; but taking into consideration that the costs will be heavy, the original judgment will stand unchanged, and we therefore confirm the judgment as it is, with costs against defendants.

DRUMMOND, J. It is proper to say that the Court does not rely upon the old judgment referred to by Mr. Justice Badgley. There is no proof that it is an *ancien document*. I do not look upon it as of any authority whatever.

AYLWIN, and MONDELET, JJ., concurred.

Judgment confirmed.

Olivier & Armstrong, for the Appellants.

Lafrenaye & Bruneau, for the Respondents.

ANGERS, (plaintiff in the Court below,) Appellant; and ERMATINGER ET AL., (defendants in the Court below,) Respondents.

Promissory Note—Payment by Goods.

To an action on a note, Thomas, one of the endorsers, pleaded payment. It appeared that he had furnished the plaintiff with groceries, the accounts for which were stated in the pass-book to have been "settled," but it did not appear that any money passed. The plaintiff having given unsatisfactory replies when examined as to his payments, it was held that the price of the goods must be deducted from the note.

This was an appeal from a judgment of the Circuit Court, rendered at Montreal, by *Monk*, J., on the 30th of December, 1865, by which the plaintiff's claim of $129 was reduced to $24.

BADGLEY, J. This action is upon a promissory note, dated 21st February, 1861, made by one of the defendants in favour of the other, by him endorsed to one Malhiot, and by the latter endorsed to the plaintiff, the holder. It was protested in May following, and was for $135.

The plea to the action is the payment of the note by the payee, who was a grocer at the time of the transactions between the parties, by cash paid and by groceries supplied to the plaintiff. The cash payment was $35, and the amount of goods supplied was $82 88. The plaintiff, by his replication, admitted for the first time the cash payment, which had been omitted to be credited. He likewise admitted his purchase of the groceries supplied to him, as charged, for $82 88; but alleged positively and expressly that he had paid the amount in cash to Thomas, and that his cash receipts were to be found in the pass-book filed by him, in which were entered in detail all his purchases, and also his payments, which were receipted therein by Thomas, under his signature.

The only question in the case, then, taking the plaintiff's admission of the payment of $35, and of the amount charged for his purchases, was the actual payment of the latter by him, and this issue rests upon him to prove in his own favour.

The facts of record are few and simple. Whilst the plaintiff held this note, dated in February, 1861, and protested in May following, and being then the creditor of the defendants for the amount, he commenced to take from Thomas, one of them, a trading grocer, his supply of groceries. His first purchase was on the 11th of December, 1861. On the 24th of the same month, he received from Thomas $35 in cash on account of the note, and continued to supply himself from Thomas' store until the 28th of March, 1863, when his gross purchases amounted to $82 88. He

used a pass book in which the entire purchases were entered at length, and which he produces in support and as evidence of their actual payment by him. The book contains settlements at intervals down to the close of the account, and these are signed by Thomas. In denial of the plaintiff's payments, and in proof that these were mere settlements to be credited on the note, the evidence consists, first, of Tooke, a clerk of Thomas during the time, who was cognizant of the purchases; and, secondly, of the plaintiff himself. The clerk says that no money passed, that he was so told by Thomas, which, of course, is not evidence; but he adds, and swears positively, that no entries of such payments appear in the books, where, doubtless, they would have been found had money really been paid. The purchase of goods ceased on the 28th of March, 1863; the action was instituted in May, 1865, and the *enquête* was taken not long after. The plaintiff was particularly examined with reference to these cash payments alleged to have been made by him, and his long and searching examination has disclosed a considerable amount of equivocation, and a seeming desire not to disclose all the particulars within his knowledge. He is a bill-broker and discounter, and a man of business, but he can give no information in what manner these alleged cash payments were made, the circumstances of the payments, the kind of money he paid in, or how they were made. He affirms that he cannot recollect any of these particulars, but that they must have been made, because the pass-book shows the receipts. Such testimony coming from the party plaintiff, himself interested to support his own case, is far from satisfactory, and raises an apprehension that such equivocations cover reticences against the fact. When it is considered that the grocer's books show no such entry, that no irregularity is imputed to them, that the plaintiff was a business man, well aware of his business transactions, because he refers to his previous business transactions with Malhiot, from whom he received this note; that no long interval of time elapsed after the grocery transactions until the time of his examination, in which his recollections could have been hazed; that he omitted to credit the $35 in cash paid within a few days of his beginning to take these groceries; that he was all along the holder of the note, and the creditor of the grocer during the entire period in which he was supplied by the latter with groceries; that at no time did he apply for payment of the note until the institution of his action in May, 1865, whilst during this time he, the creditor, was actually paying cash out of his pocket for goods, which the creditor conceived he was giving on account of the amount of the note,—such a case is inconceivable in a business, or even a moderately intelligent man; and coupling his own unsatisfactory evidence in support of his positive assertion of his actual payments in money, shown by the alleged receipts in the pass-book, but which, except in one instance only, are entered, not under the form of "received payment," but simply "settled," we are not disposed to interfere with the judgment appealed from, and therefore confirm it with costs of this Court.

MONDELET, J., dissenting. In my opinion it is satisfactorily proved that the plaintiff paid for the goods obtained from Thomas. It is not extraordinary that after the lapse of several years, the plaintiff should not be able to give answers respecting the details of these transactions. I think, therefore, the judgment should be reversed.

DRUMMOND, J. I must admit that in concurring in the judgment of the majority, I may be concurring in an act of injustice, because the evidence is not satisfactory on one side or the other. Tooke, the clerk of Thomas, stated that he was certain that the plaintiff never paid any money whatever to Thomas for the goods; but on cross-examination he admitted that he never was present when the receipts were given to the plaintiff; that he knew the receipts were given on account of the note, because Mr. Thomas told him so. He thus leaves us in doubt. The plaintiff might have dispelled that doubt if he had answered like a straightforward man, but his answers are most decidedly unsatisfactory. He says that he has forgotten all about his payments, except that they were made in money. This was exactly the case in which to propose the *serment supplétoire*, and I would have been dis

posed to order the record to be sent back for this purpose. Where a judge is in doubt as to the justice of a judgment, it seems to me that he should confirm it, especially in a case like this, where the judgment tends to liberate a party from an obligation. I therefore concur in the judgment.

AYLWIN, J. This Court has never ordered a reference to the *serment judiciaire*, and therefore I should be extremely unwilling to alter the practice. However, I will say this, that it was highly desirable that there should have been a reference to the *serment judiciaire*, more particularly as in a recent statute there is a clause which authorizes the judges of the other Court to order the *serment judiciaire*, which power formerly did not exist in commercial cases.

Judgment confirmed, MONDELET, J., dissenting.

Lanctot & Laurier, for the Appellants.

Perkins & Stephens, for the Respondents.

Dec. 1, 2, 4, 1866.

FERRIER, (opposant in the Court below,) Appellant, and DILLON, (plaintiff in the Court below,) Respondent.

Practice—Delay in returning Writ of Appeal.

Held, that where the delay in returning a writ of appeal is caused by the neglect of the prothonotary, and not of the party appellant, the latter may nevertheless be condemned to pay the costs of the respondent's motion to have the appeal dismissed, his recourse being by direct action against the prothonotary.

Mr. *Perkins* moved on behalf of the respondent, that inasmuch as the appellant had failed and neglected to return the writ of appeal with the record from the Superior Court, and the return day had passed without the appellant having taken any proceedings, the appeal be declared abandoned and deserted.

This motion was served upon the appellant's attorneys on the 19th of November, 1866, and made in Court on the 1st December following. About this time the record was returned before the Court, and the question of costs on the motion alone remained.

Mr. *Cross*, Q. C., for the appellant, submitted an affidavit of his partner, A. H. Lunn, showing that he had repeatedly applied to the Prothonotary to return the writ of appeal before the Court, with the record and proceedings, and had notified him that a motion had been made to dismiss the appeal, on account of the delay in doing so. The delay was caused solely by the neglect of the Prothonotary, and no costs should be allowed on the motion.

Judgment was given Dec. 4.

AYLWIN, J. In this case we are unfortunately under the necessity of giving the costs against the appellant.

Mr. *Cross*. But against the Prothonotary, not against the party?

AYLWIN, J. How can we condemn the Prothonotary, when he has not been heard before us?

Mr. *Cross*. But the party should not suffer for the neglect of the Prothonotary. It has not been the practice to make the party liable for costs in such cases. At least the Prothonotary should have been served with a copy of the motion.

AYLWIN, J. We have nothing to do with the Prothonotary here. It was not necessary that he should have been served with the motion. Your remedy is by a direct action against him, and I am desirous of seeing the proper remedy taken, as the principle is of the highest importance.

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

The order of the Court was that the respondent take nothing by the motion, save and except as to the costs, which the appellant was condemned to pay to the respondent.

Cross & Lunn, for the Appellant.

Perkins & Stephens, for the Respondent.

Dec. 4, 7.

LES DAMES RELIGIEUSES HOSPITALIERES DE ST. JOSEPH DE L'HOTEL DIEU DE MONTREAL, (defendants in the Court below,) Appellants; and CORPORATION VILLAGE DE ST. JEAN BAPTISTE, (plaintiffs in the Court below,) Respondents.

Appeal—Municipal Act—Amending Act, 24 Vict. c. 29.

Held, that there is no appeal from decisions of the Superior and Circuit Courts, under the Act 24 Vict. c. 29, amending the Lower Canada Consolidated Municipal Act, the

amending statute being an integral part of the original Act.

M. *Ouimet*, for the respondents, moved to reject the appeal taken from a judgment rendered by the Superior Court, on the 29th Sept. 1866. The action was brought, for the recovery of taxes and assessments due to the Municipality, under the Lower Canada Consolidated Municipal Act, C. S. L. C. cap. 24, and under this act the right of appeal from decisions rendered by virtue of it is taken away. In *Groulx* v. *Corporation de la Paroisse de St. Laurent*, (10 Jurist 75, 2 L. C. L. J. 11,) it was held that there is no appeal from a judgment under the Municipal Act. That decision applies here.

M. *Roy*, Q. C., for the appellants. The action is not brought under the Municipal Act of 1860, but under the amending statute, 24 Vic. c. 29. This makes no reference to there being no appeal from decisions under it. The right of appeal must be assumed, unless expressly taken away. The provision in the original Act is not applicable to actions under the amending statute.

M. *Ouimet*, in reply. The amending Act is an integral part of the original statute, and the provision in the original Act, taking away the right of appeal, applies with equal force to decisions under the amending Act.

Judgment was rendered Dec. 7.

Badgley, J. The Court is of opinion that the motion made by the respondents must be granted. The amending statute, after making certain amendments to the original act, enacts (Sec. 30) that the amending act shall be read together with the original act, and there is nothing in it which does away with the exclusion of the right of appeal contained in the original act. Taking, therefore, the two acts together, inasmuch as this Court has no jurisdiction with respect to any judgment of the Circuit or Superior Court rendered in virtue of the original act, so it can have none with respect to judgments under the amending act.

Mondelet, J. The amendment must be considered as an integral part of the original act.

Aylwin, and Drummond, JJ., concurred.

Motion granted.

Roy & Joseph, for the Appellants.

Moreau & Ouimet, for the Respondents.

JONES et al., Appellants; and LEMOINE, Respondent.

Practice—Appeal to Privy Council.

Held, that the delay of six months fixed by Consol. Stat. L. C. cap. 77, sec. 53, during which execution on the judgment is suspended, is not absolute, but directory only, and the Court of Appeal may refuse to order the record to be remitted to the Court below to the intent that execution may be sued out, where the appellant has lodged his appeal before the Privy Council soon after the expiration of the six months.

Mr. *Barnard*, for the respondent, moved that inasmuch as the certificate of the Clerk of the Privy Council, stating that an appeal to the Privy Council of Her Majesty has been instituted, and that proceedings have been adopted on the appeal, was not filed within the delay required by law, and inasmuch as the Deputy Clerk of this Court refuses to transmit the record in this cause to the Court of first instance, he be enjoined to so transmit it forthwith. The object of the motion was to enable the respondent to take execution. The appellant has six months, running from the allowance of the appeal, and the certificate of the Clerk of the Privy Council should be received here within that time. The certificate in this instance, moreover, is not in proper form. So far from stating that proceedings have been had on the appeal, it states that no proceedings have been taken on the appeal, and that the appeal will be dismissed if no proceedings are taken within three months.

Badgley, J. The delay ran from the 9th of March, date of rendering judgment, and expired on the 9th of September. The certificate is dated on the 13th, four days after. In the face of this, I will not interfere to prevent the appellants from proceeding.

Drummond, J. The certificate should be filed here within the six months. I think, however, we have a discretionary power, and that we should not interfere if the parties are pushing on the appeal.

Mr. *Barnard*. The delay is positive and absolute. If the certificate is not filed here within the six months, it is no certificate, and

cannot stop my proceedings. The law was made for the express purpose of putting an end to vexatious delays in the prosecution of appeals before the Privy Council. It is well known that appeals are frequently instituted for the purpose of obtaining delay. The rule in this instance should be as strictly enforced as the fifteen days' rule for appeals from the Circuit Court, which has been held to be absolute.

BADGLEY, J. We cannot count minutes in this manner. The appellants are only three or four days behind time.

DRUMMOND, J. I think the law is decidedly in favour of Mr. Barnard's pretensions, but under the circumstances, as the appellants have taken steps to prosecute the appeal, and must proceed within three months, I think the Court may exercise a discretion.

AYLWIN, J. I have entertained no doubt on this point. The motion is rejected.

DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

Moreau, Ouimet & Chapleau, for the Appellants.

Barnard, for the Respondent.

Dec. 6th, 1866.

THE QUEEN *v.* PAXTON.

Reservation of Questions by Criminal Courts —C. S. L. C. Cap. 77, Sec. 57.

Held, that under C. S. L. C. Cap. 77, Sec. 57, no question of law which has arisen on the trial, can be reserved, unless there has been a conviction.

This was a case reserved by *Drummond*, J., at the September term of the Court of Queen's Bench, sitting on the Crown side. The prisoner, John Paxton, formerly resident in Montreal, had been surrendered by the United States Government, under the Extradition Treaty, on a charge of forgery. He was indicted, at the September term, for feloniously uttering a forged promissory note. His counsel, Mr. *Devlin*, filed a plea that the prisoner, having been extradited on a charge of forgery, could not be tried on any other charge. The Crown demurred to this special plea, and the trial was not proceeded with till the opinion of the full Court should have been taken.

Mr. *Carter*, Q. C., appeared for the Crown, and was proceeding to support the demurrer.

AYLWIN, J. Has there been any trial in this case?

Mr. *Carter*. Not upon this indictment.

MONDELET, J. If there has been no trial, how was the case reserved?

Mr. *Carter*. The reservation was the act of the Court itself, and the counsel on both sides were anxious for a decision on the point.

MONDELET, J. But the statute is positive. Sec. 57, "*When any person has been convicted* of any treason, felony or misdemeanour, at any criminal term of the said Court of Queen's Bench, &c., the Court before which the case has been tried, may, in its discretion, reserve any question of law which has arisen on the trial," &c. There can be no reservation unless there has been a conviction. I remember that the late Chief Justice Sir L. *Lafontaine* refused to hear a case which I had reserved before trial. The Court has no jurisdiction.

DRUMMOND, J. I did not look at the statute at the time, and the question was not raised by counsel; but it seems that I was premature in my reservation of the case.

Mr. *Kerr*, for the prisoner, referred to the English practice under a similar statute.

DRUMMOND, J. Can you find any case under the English law, in which a point was reserved before conviction? If so, I would be disposed to follow it, because it is extremely inconvenient that a party should be compelled to proceed to trial, when the question is whether there should be a trial or not.

Mr. *Kerr* said he had not anticipated any difficulty on this point, and had not looked into the authorities.

The following order was then made by the Court, (AYLWIN, DRUMMOND, BADGLEY, and MONDELET, JJ.):—Seeing that no conviction has been had in this cause, and that therefore the Court now here has no jurisdiction in the premises, it is ordered that the case reserved by the Court of Queen's Bench, sitting on the Crown side at Montreal, and referred to this Court, sitting in error in criminal cases, be returned and remitted to the said Court, to the end that such other proceedings be there had as to law and justice appertain.

Carter, Q. C., for the Crown.

Kerr (representing Mr. *Devlin*), for the prisoner.

[The same order was made on the same day in the case of *Regina* v. *Dunlop*, in which a question of law had also been reserved by *Drummond*, J., before trial.]

SUPERIOR COURT.

LEMOINE *v.* LIONAIS.

June 27th, 1866.

Action to rescind Deed of Sale and Transfer.

Held, that the Court will not proceed to adjudicate upon a demand to annul a deed of sale, where persons interested in such deed have not been made parties to the suit.

That although open possession for a period slightly falling short of the term necessary for prescription is not a legal ground of defence to an action to rescind the deed of sale under which the property has been held, yet a presumption of good faith on the part of the possessor arises from it, which may be regarded in the decision of the case.

That where the sale is made by husband and wife, a *contre lettre*, passed after the sale, between the purchaser and the husband only, which does not contain anything injurious to the interests of the wife, is not illegal.

That a deed of sale cannot be rescinded on the ground of *lésion*, where the amount of the consideration, and the actual value of the property at the time of the execution of the deed, are not fully established.

The facts of this case which has been in litigation for ten years, are set forth in the judgment.

Monk, J. This is an action brought to set aside a sale of certain property, on the 30th October, 1846, from Mr. and Mad. Regnier to Mr. Lionais, the defendant. The plaintiff sues as the *cessionnaire* of Mad. Regnier's rights. He waited till the 29th October, 1856, ten years *less one day* after the sale, and then brought his action. In reading over the allegations of the pleadings, it is painful to contemplate the tone and the force of the language employed, by which fraud, force and violence of every description are charged against Mr. Lionais. It is alleged that he conspired with Mr. Regnier, a profligate husband, to use every means for the purpose of stripping the wife of the latter of all she possessed. It is painful to see a fellow-citizen accused of such monstrous conduct.

The first question is whether the authorization by Mr. Regnier of his wife in the deed of 1846 was void or not. On this question I have, after due examination, come to the conclusion that the authorization given by Mr. Regnier to his wife was perfectly legal. The next question is whether there was any fraud in the deed. I have looked into this question with a great deal of care, and I find no evidence whatever of fraud except in the evidence of Chamilly De Lorimier, Mad. Regnier's son-in-law. Mr. Lionais has been subjected to a cross-examination, unparalleled in my experience for its length and minuteness, going, it may almost be said, into all the incidents of his lifetime; but there is very little in this that has anything to do with the case. As to the sale itself, it is certain that Mr. Lionais, who held certain claims against Mad. Regnier, pressed for payment. At this time Madame Regnier was a person of very considerable means. Though she owed a good deal of money, she had abundant means to pay her debts. She possessed valuable properties, and a large number of *bailleur de fonds* claims. Why, then did she not pay Mr. Lionais? Her son-in-law, Chamilly De Lorimier, a lawyer of long standing, and presumably of mature experience, stated the reason to be that her husband would not authorize her to take any steps to pay Mr. Lionais. Could she not have been authorized by a judge upon a summary petition? Mr. De Lorimier was aware of this, he said, but he did not want to interfere. Mr. Lionais, then, desirous of being paid, took some preliminary steps by *saisie-arrêt*, &c., and this, it is said, was coercion. Then there were *pour parlers* and interviews extending over three or four months. Finally the sale in question from Mr. and Madame Regnier to Mr. Lionais took place. At this time Mr. Beaudry acted as the legal adviser of Mad. Regnier, but he and Mr. De Lorimier state that she agreed to the sale, because she wanted Mr. Lionais to protect her against her husband! Steps were taken to prepare the deed of 1846, now sought to be set aside. Mr. Beaudry, experienced in business and acquainted with law, as representing Mad. Regnier, drew up the deed, and Madame Regnier had it in her possession during several days. Mr.

De Lorimier knew all about the matter, and, besides all this, they took the advice of two of the foremost men in the profession. Now, however, it is pretended that they consulted these gentlemen for the purpose of letting them see how skilfully Mr. Lionais was winding his conspiracy around Mad. Regnier. This is a most extraordinary pretension, and, in fact, utterly absurd. I must say that from the beginning to the end of Chamilly De Lorimier's testimony, it bears on the face of it, the stamp, I will not say of falsehood, but of moral weakness, and contains something so unutterably absurd, that I cannot attach any weight to it. The consideration for the sale, in which Mr. Regnier intervened and authorized his wife, was estimated by the defendant at £4,500. Mr. Lionais undertook to pay £2,000, and also to pay certain debts mentioned in a schedule. It is alleged that this list was a deception, fabricated by Mr. Lionais. But there is no evidence whatever to lead me to this conclusion.

The next point is the *contre lettre* between Mr. Regnier and Mr. Lionais on the 3rd Nov., 1846, three days after the sale. It is said that this was fraudulent; but if Mr. Regnier was interested in the sale, he had a perfect right to enter into a *contre lettre* with Mr. Lionais, provided it contained no stipulation militating in any way against the rights of Mad. Regnier. The document must therefore stand. Thus the grounds of fraud and violence urged for rescinding the sale must fall to the ground.

There is a plea of prescription of ten years. This was rightly dismissed, because, instead of ten years, ten years less one day elapsed. From 1846 to 1854 Mr. Lionais was allowed to live on this property, and to expend large sums in improving it. Then in 1854, Mad. Regnier sold to Mr. Lemoine her rights to have the deed of 1846 set aside. It seems very extraordinary that her advisers, legal and business men, should have allowed her to wait so long, and, in an equitable point of view, this inclines the court to think that they had some doubt about the matter—that they were not sure there was fraud in the sale. Here was Mr. Lionais living like a prince upon this property, and Madame Regnier, as alleged, starving, and finally dying of a broken heart, and for eight years, they never seemed to think Mr. Lionais to be a usurper! This was not human nature—not even Chamilly De Lorimier's nature. Even his lethargic temperament would have been roused up. It is very strange, indeed, that the parties thus allowed the moss of age to grow over their rights, and that then Mr. Lemoine, the *cessionaire*, waited two years more, and, just as the clock was about to strike, and the ten years to expire, he suddenly woke up at the last moment and brought the present action. Although the legal prescription has not been acquired, I have no hesitation in saying that the facts I have mentioned have had great weight with me.

The next point is whether this lady failed to ratify the deed of 1846. Time has almost ratified it for her, but she also took steps for this purpose when she transferred the £2000, due her under it, to J. Bte. Lionais in March, 1853. Supposing this transfer effected by fraud, there is no evidence to satisfy the Court that it vitiated the ratification. But there is more in this case touching the fraud. Mr. Lionais, after he had made the purchase, seems to have been dissatisfied with it, and called upon Mr. and Mad. Regnier to take back the property—the very property which it is pretended he got into his possession by conspiracy with the profligate husband. I have to look at this declaration of his wish, and see whether he was sincere in it, or whether, as the plaintiff pretends, he merely did this to cover up a transaction which he was afraid was not all right. I cannot look into hidden motives. Mr. Lionais may possibly be a man of such consummate rascality as to act thus, but there is no evidence to warrant such a conclusion. But he did more; he brought an action to have the deed set aside, and invoked as a nullity that Madame Regnier, in becoming a party to the deed of sale, neglected to comply with the provisions of the law, which required that a married woman, who wished to dispose of her immoveable property, should first appear before a judge and state that she freely consented to the sale of the property. Mr. and Mad. Regnier appeared in the suit, and allowed the cause to stand. In the meantime a law (12 Vic., Cap. 48) was passed, which de-

clared deeds which had been executed without this formality, to be perfectly valid, and thus Mr. Lionais' cause of action fell to the ground, and he discontinued his action. The Court now comes to the question of *lesion*. On this point, the two questions are, what was the consideration, and what was the value of the property when it was sold? The consideration was estimated at £4,500; but, owing to the length of time that has elapsed, it is impossible for the Court to form any definite conclusion from the evidence as to the value of the property when it was sold. Here again it is the fault of the plaintiff that so long a period has elapsed. It is impossible, therefore, to set the deed aside on the ground of lesion. Next, it is important to look at the consideration given by Mr. Lemoine. He purchased Mad. Regnier's rights to have the deed set aside, for £1075, eight years after the execution of the deed. This shows that he did not look upon the speculation as a very sure one. On the merits, then, the action must be dismissed. There are also technical difficulties which would have required to be removed, had the Court taken a different view of the case. The first is, that there are three or four parties interested in the cause who have not been brought into the record. The second is, that the heirs of Mr. Regnier have not been represented. In this particular the Court has an important piece of evidence. Mr. Regnier transferred his rights under the deed of 1846 to one of the most honorable men in the country, of the highest character and position!! Surely, then, there could have been no fraud connected with this deed, or this gentleman would not have had anything to do with the transaction!! There is, lastly, a plea of *droits litigieux*. There cannot be the slightest doubt that Mr. Lemoine, in purchasing Mad. Regnier's rights to have this deed set aside, purchased a *droit litigieux*. With out wishing to stigmatize the transaction, I must state that this is beyond any doubt. As, however, the Court has decided, on the merits, that the plaintiff really acquired no rights at all, Mad. Regnier having herself no right to have the deed set aside, it is unnecessary by the judgment to pronounce upon the plea of *droits litigieux*.

The following is the recorded judgment.

"The Court having heard, &c., without adjudicating upon the defendants' plea of litigious rights (*droits litigieux*), save and except in so far as the same is adjudged upon and disposed of by the following judgment upon the merits of this cause; and proceeding to render its decision upon the law and the facts as presented for deliberation and final judgment thereon.

Considering that the plaintiff hath not by his action assigned and brought into the record of his demand, all the parties interested in the issue and decision of this cause; and particularly among others, that he has not assigned and brought into the case, the heirs or representatives of Madame Monarque, mentioned in the deed of sale and cession of rights of the 30th of October, 1846, as a party to the same, in whose favour the payment of a life-rent was stipulated in and by the said deed; Jean Baptiste Lionais and Dame Henriette Moreau, wife of the defendant, and separated from him as to property, both of whom have become and are pecuniarily interested in the result of this suit, in the manner and form, and to the extent shown and stated in the pleadings and testimony adduced; the Seigniors of the Fief Lagauchetière and the Seigniors of the Island of Montreal, parties interested in certain sums for the commutation of the lands in question in this cause; and, lastly, the heirs or representatives of the late Auguste Regnier, co-vendor with his wife, Marguerite Roy, in the deed of sale of the 30th of October, 1846.

Seeing that ten years, less one day, were allowed to elapse between the date and execution of the deed of sale to the defendant last above mentioned, and the institution of the present action; and that the plaintiff, after he had acquired the alleged rights of Madame Regnier to have the deed of the 30th of October, 1846, annulled and set aside on the grounds of fraud and *lésion*, allowed more than two years to elapse without taking legal proceedings to that effect against the said defendant, who for a period of ten years, less one day, had remained in peaceful and undisturbed possession of the property in question in this cause, and hath during that period in good faith made great, extensive and valuable improvements and ameliorations to and upon the

same; and although such a possession be not a legal ground of defence to the present action, yet from it results a presumption of good faith on the part of the defendant, which cannot be disregarded in the decision of this cause; and in view of the equity of the case, this fact can in no wise aid the pretensions of the plaintiff.

Considering that by the terms and stipulations of the contract of marriage between Auguste Regnier and Marguerite Roy, executed at Montreal by and before notaries, the 6th of July, 1835, Auguste Regnier and Marguerite Roy, future husband and wife, notwithstanding the express exclusion of the legal community, did agree to and with each other, that there should be a conventional and partial community, (*une communauté conventionnelle et partielle*), existing between them, and that this stipulation, in all respects legal and recognized by law, results from the following clause in the aforesaid contract of marriage:—"*Cependant les bénéfices et augmentations appartiendront de plein droit par moitié aux dits futurs époux, et leur sortiront nature de propre, et aux leurs de leur estoc côté et ligne.*"

Seeing that by the contract of marriage aforesaid, between the parties aforesaid, there is to be found no stipulation whereby the future husband and wife should enjoy and appropriate the rents, issues and revenues of their respective properties separate and apart, and consequently that such rents, issues and revenues fall into and become a part of the aforesaid conventional and partial community; and considering that on the 13th of July, 1835, Auguste Regnier and Marguerite Roy were married under the operation of the above recited clause in their contract of marriage; and whereas, in and by a certain deed of sale and transfer, executed before notaries, on the 18th of April, 1838, one Chamilly De Lorimier, and his wife, Christine Rachel Cadieux, sold and transferred to Auguste Regnier and to Marguerite Roy, his wife, all the rights and claims they might have against one Léon Pinsonneault, in regard to certain sales of real estate, which three of the children of the late Pierre Cadieux had before that time made to Pinsonneault, of their share and shares in the half of the Cadieux farm, and which is in question in this cause; which rights and claims had previously been transferred to De Lorimier and wife, the other heirs Cadieux.

And whereas, under and by virtue of the last mentioned deed of sale, the aforesaid Auguste Regnier and his wife became proprietors of the consideration money and the balances thereon of the sales, made by the heirs Cadieux to Pinsonneault, and thereby acquired the right to claim from Pinsonneault the price of three-fourths of the Cadieux farm, by them sold as above mentioned to Pinsonneault, and also the right to enforce a recision of these sales in default of payment of the purchase money by Pinsonneault.

Seeing that the purchase money on these several sales thus acquired by Auguste Regnier and his wife, from Chamilly De Lorimier and his wife Christine Rachel Cadieux, constituted an increase and augmentation of their property (*furent des bénéfices et augmentations*) in the terms of their contract of marriage, and were made and realized during their marriage, and as such fell into the conventional and partial community existing between Regnier and his wife.

Considering that by the deed of sale and transfer of the 30th of October, 1846, executed before notaries, and whereof the recision is sought by the present action, on the ground of fraud and *lésion*, Regnier and his wife sold to Lionais, the defendant, among other properties, real and personal, the aforesaid balances of consideration money by them acquired from Chamilly De Lorimier and wife, and which balances formed a part of the conventional and partial community existing between Regnier and wife, and of which Regnier, as her husband, was the chief and head.

Seeing that by the deed of sale and transfer of the 30th of October, 1846, Regnier and wife sold to the defendant certain real estate, which had fallen into and become part of the conventional and partial community existing between Regnier and his wife.

Considering therefore that the deed of sale of the 30th October, 1846, was made by Regnier and his wife to Lionais not only as persons separated as to property, but also as *communs en biens*, under the partial commu-

nity existing between them, and to the extent of that community.

And whereas the *contre lettre* of the 30th October, 1846, entered into between Lionais and Madame Regnier, was so made and executed to settle and determine definitively the amount and share of purchase money, payable to Madame Regnier by Lionais, under and by virtue of the deed of sale of the 30th October, 1846, which was fixed in and by the said *contre lettre*, at the sum of £4,500.

Seeing that the *contre lettre* of the 3rd of November, 1846, entered into by and between Lionais and Auguste Regnier, had for its object to settle and determine, as far as possible, the share and amount which should become payable to Regnier for his interest in the properties, credits and rights sold and transferred by the deed of sale of the 30th October, 1846, but that from the nature of the stipulations, and the then undetermined and eventual character of the consideration, it was and is difficult, if not impossible, to determine what amount Lionais undertook and promised to pay Regnier.

Considering that the *contre lettre* of the 3rd of November, 1846, between Regnier and Lionais, for the reasons above assigned, was not illegal, or injurious to Madame Regnier's interests, nor did the same in any way vitiate, or render illegal, void or voidable in law, the authorization by Regnier of his wife in the deed of sale of the 30th of October, 1846.

Seeing, moreover, that it does not result from the evidence adduced by the plaintiff, that the defendant, Lionais, either alone or in concert and confederacy with others, practised or employed any menaces, threats or violence, in order to obtain the consent of Madame Regnier to the deed of sale and transfer to Lionais, of the 30th October, 1846.

Seeing that the plaintiff hath not established, by legal and sufficient evidence, any acts of fraud, deception or surprise, alleged and pretended in and by his declaration, to have been employed or practised by Lionais, in reference to the deed of sale and transfer of the 30th October, 1846, but on the contrary the facts proved establish that the parties to that deed, and particularly Madame Regnier and her husband, acted freely and without coercion and restraint, and with full knowledge of the facts, and that in so far as regards the defendant Lionais, there is no proof of surprise or coercion practised by him.

And seeing, moreover, that Madame Regnier entered into and executed the said deed, after full deliberation, was aided by the advice of relatives, and proceeded upon the counsel and advice of eminent lawyers of great experience, and holding a high character and position in their profession.

Seeing, besides, that it clearly results from the testimony adduced, that the defendant Lionais, by divers acts and proceedings subsequent to the date of the deed of sale of the 30th Oct., 1846, and which deed the plaintiff now seeks, by the present action, to set aside, and cause to be rescinded, upon the grounds of fraud and *lésion*, had manifested his desire that the said Regnier and wife should voluntarily annul and rescind the said deed, and retake the property to him sold and transferred by said deed, and that such re-transfer should be made, as proved by the express offers of the said Lionais, upon terms at once liberal and easy for the said Regnier and wife.

Considering that Madame Regnier, with the consent and legal approbation of her husband, on several occasions and by various deeds, subsequently ratified and confirmed the said deed of sale of the 30th Oct., 1846, and particularly by the deed of the 26th June, 1849, nearly three years after the execution of the said deed, whereby Madame Regnier granted to the defendant, Lionais, a considerable delay for the payment of the sum of £2000, part of the purchase money due and payable to her, under and by virtue of the deed of sale of the 30th October, 1846, and also by the deed of transfer dated 31st March, 1853, nearly seven years after the execution of the deed of 30th Oct., 1846, whereby Madame Regnier transferred the aforesaid sum of £2000 to one Jean Baptiste Lionais.

Considering that it is not competent for this Court, in view of the parties to the present action, of those interested, but who are not parties to the same, to enquire into and adjudicate upon the legal effect and validity of acts in which third parties, but who are not impleaded in this cause, have or have had any

pecuniary interest or liability.

And whereas, in addition to fraud, violence and surprise employed by Lionais in obtaining the sale and transfer to him of the 30th Oct., 1846, it is alleged and contended, that the defendant, Lionais, acquired the properties enumerated and described in the deed of 30th Oct., 1846, for a price less by one-half of its real value; that he was guilty of a fraudulent deception as to the price and consideration to be paid for said property, i. e. *lésion* against Regnier and wife, the Court, after careful consideration of the evidence adduced on the part of the plaintiff and defendant, which testimony is of the most contradictory and conflicting character as to the value, on the 30th Oct., 1846, of the property sold to Lionais; and after mature reflection upon the nature of the credits transferred, doth declare and adjudge that the alleged *lésion* is not proved, and that the deed of sale of 30th Oct., 1846, cannot be legally rescinded and annulled, upon the proof adduced in support of this pretension of the plaintiff, inasmuch as it is manifest that the neglected and abandoned condition of the real estate at the time of the aforesaid sale, the unforeseen and advantageous changes which have occurred since that date, and ameliorations since then by the defendant, the doubtful and precarious character of the credits transferred, render it difficult, if not impossible, now, and in the present case, to establish, by legal and sufficient proof, the real value of the property transferred to Lionais at the time of such sale and transfer; and seeing that without such proof it is not competent for this Court to annul or rescind the aforesaid deed upon the ground of *lésion*.

Considering, moreover, that it is difficult to determine what was the real amount of the consideration which the defendant undertook to pay to Regnier and his wife, from the peculiar nature as regards Regnier's share, and also because a portion of the price to be paid was of an aleatory character.

Seeing, moreover, that it appears, by the evidence adduced, that the plaintiff, Lemoine, himself paid only the sum of £1075 for the share of Madame Regnier, that is to say, for more than one-half of the property sold and transferred to Lionais by *acte* of 30th Oct., 1846, the restitution of which is sought by the present action, and for which share Lionais, eight years previously, undertook to pay Madame Regnier the sum of £4500. Considering that for these reasons, and for others above assigned, the present action cannot be maintained, nor the deed of 30th Oct., 1846, rescinded and annulled, the Court hath dismissed and doth hereby dismiss the present action with costs." *

Fleming, for the plaintiff. *Barnard*, counsel.

Leblanc & Cassidy, for the defendant.

RECENT ENGLISH DECISIONS.

HOUSE OF LORDS.

Corporation —Public Improvements.—Where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a company authorized (making due compensation) to take compulsorily the lands of any person for a definite object, may be restrained by injunction from any attempt to take them for another object. *Galloway* v. *Mayor and Commonalty of London.* Law Rep. 1 H. L. 34.

Parol Agreement—Tenancy.—If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. So, if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined. *Ramsden* v. *Dyson*, Law Rep. 1 H. L. 129.

* The case is now before the Court of Appeals.