The Legal News.

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CAPIAS.

An interesting question relating to amendments in actions of capias was presented in the case of *Slater* v. *Belisle*. The plaintiff obtained leave to amend an error in the writ in which the defendant was described by a wrong Christian name; but the affidavit on which the capias issued, and in which the same error occurred, remained in the record without rectification. The majority in Review have overruled the decision of the Judge of first instance, and have held this defect in the affidavit to be fatal. There were two other points in the case. The plaintiff had obtained the immediate return of the writ of capias, in order to effect the amendment in question. The Court holds that under 820 C. P., the defendant alone has the right to apply for the immediate return of the writ. Lastly, the amended writ was served on the defendant only a few days before the return day. It is held by the Court that the usual delay of ten days, required for service of the original summons, ought to have been allowed between service and return of the amended process.

ACTIONS OF DAMAGES.

It is obvious to any one who sees much of the proceedings in our Courts, that actions of damages of one sort or another constitute a considerable portion of current litigation. Apart from the more serious cases arising from accidents and the like, we find every month numerous petty suits in which damages are sought for slander, assault, illegal arrest, capias, attachment, etc., often on grounds purely frivolous. The difficulty of laying down definite rules for the determination of these cases may account to some extent for the frequency with which they are instituted. The case of *Chartrand* v. *Pudney*, in the present issue, affords an apt illustration of the uncertainty which attends such cases. Taking the facts as they are stated by Mr. Justice Mackay, it is somewhat difficult to see why Chartrand should have recovered any damages whatever, for it appears that he was acting in a violent manner and had assaulted several persons; the only error in the case being that the person who charged him with assault was not one of those whom he had actually struck. The mistake made by Pudney in including Chartrand in the number of his assailants was therefore one of the most innocent character, yet the Judge in the Court below condemned him to pay $100 damages, with costs probably amounting to $200 more—obviously a very serious penalty indeed. The Court of Review reverses the judgment, and reduces the damages to $25,—apparently in order to prevent the plaintiff from being punished for having brought an action at all; but although Pudney thus obtains the reversal of a very serious condemnation against him, and was therefore clearly justified in going to Review, he is condemned to pay his own costs in Review. This seems to be making each party suffer equally because the Judge in the Court below gave a wrong judgment; but might not the same reason be urged for dividing the costs in every case in which a judgment is reversed? It seems so impossible to do exact justice between the parties in these cases—to sustain the one in his right of action without unduly punishing the other—that it would probably be preferable to adopt the English rule referred to by Mr. Justice Johnson, and under such circumstances to deny the right of action altogether. That would at least have the merit of discouraging a species of litigation which seldom results in any advantage to either party. If any rule of conduct is to be drawn from the decision in *Chartrand* v. *Pudney*, it is that a person who by an inadvertence has accused the wrong man of an assault, must, if he wishes to escape litigation, not be content merely to rectify his mistake at the earliest possible moment, but must tender a sum of money as amends to the person wrongly charged.

A PRIZE ESSAY.

A prize of 6,900 marks is offered for the best essay on "The Formulæ in the Perpetual Edict of Adrian, in their wording and connection." The competition is open to the world, and the essay, which must be written in Latin, German, English, French or Italian, must be sent in by the 28th of March, 1882, addressed to the Royal Bavarian Academy of Sciences, and bearing,

instead of the author's name, a motto, repeated in a closed envelope containing the author's name. The Savigny Foundation, from which the prize money is derived, is a fund subscribed in commemoration of the great lawyer Von Savigny, the interest of which is applied every two years in a prize for an essay on a legal subject, the judges being the Imperial or Royal Academies of Sciences of Vienna, Munich and Berlin, in rotation.

COURT OF QUEEN'S BENCH.

MONTREAL, June 19, 1880.

Sir A. A. DORION, C. J., MONK, J., RAMSAY, J., CROSS, J.

HOOD (deft. below), Appellant, and BANK OF TORONTO (plffs. below), Respondents.

Contract—Liability of transferee of a business under special deed—Privity of Contract.

The appeal was from a judgment of the Superior Court, Montreal, RAINVILLE, J., Feb. 1, 1878. The facts which gave rise to the litigation were as follows :—One McMullin, carrying on the business of packing meat under the name of the North American Packing Company, made a contract with Pupin, of Paris, for the delivery of about 150,000 kilograms of boiled beef, and he shipped to Pupin late in February, 1876, about 50,000 kilograms, of the value of $16,143. The respondents then discounted for him a draft on Pupin for $13,943.30, taking as security the bill of lading of the meat so shipped, thus leaving an estimated margin reverting to McMullin of $2,200. Subsequently, about 27th of March, 1876, the appellant bought from McMullin the assets of his business ; and among others this balance of $2,200. Pupin refused acceptance of the draft, and the beef was, in October, 1876, sold for the benefit of the Bank, as holder of the bill of lading, realizing an amount insufficient to pay the advance made by respondents to McMullin. Before the sale respondents claimed payment of the entire draft from appellant, offering back to him the meats they held as security for the draft. The appellant refused to pay it on the ground that he had never undertaken to pay the draft, and had nothing to do with it, his interest being only in the margin of the shipment of meat, after the draft had been paid out of it. The Court below held that Hood was liable for the full amount of the draft, and condemned him to pay it to respondents, without deduction of the amount which respondents had received as proceeds of the boiled beef. The *considérants* were as follows :—

" Considérant que la demanderesse a prouvé les allégations de sa déclaration ;

" Considérant que par l'acte du 27 Mars, 1876, le défendeur a acquis de Edgar McMullin, faisant affaire sous le nom de "The North American Packing Company," son fonds de commerce, sa boutique et son achalandage, ainsi que tous les contrats qu'il avait pu faire, soit en son nom personnel, ou au nom de la dite Compagnie, et nommément le contrat fait avec un certain Pupin, de Paris, France ;

" Considérant que par le dit acte, le dit défendeur était obligé de continuer l'exécution du dit contrat ;

" Considérant que la demanderesse avait fait des avances au dit McMullin sur la garantie de la viande par lui expédiée au dit Pupin, en exécution du dit contrat, par et en vertu d'une traite tirée par le dit McMullen sur le nommé Pupin ;

" Considérant que la dite viande a été refusée par le dit Pupin, et qu'il est prouvé que le défendeur a acquiescé à ce refus, ou a eu occasion d'y répondre et de le contester ;

" Considérant que vis-à-vis le dit McMullen, le défendeur était obligé d'expédier une autre quantité de viande au dit Pupin, de manière à donner droit à la demanderesse de faire accepter par le dit Pupin, la lettre de change donnée par le dit McMullen ;

" Considérant que le dit McMullen est censé, aux termes de l'article 1029 du Code Civil, avoir stipulé en faveur de la demanderesse par l'acte susdit du 27 Mars, 1876, et que la dite demanderesse est en droit d'exercer les actions du dit McMullen contre le défendeur, et que la présente action a l'effet d'éviter un circuit d'actions inutiles, savoir, une action par la demanderesse contre McMullen, et une action *en garantie* par ce dernier contre le défendeur ;

" Considérant que le défendeur a failli de prouver les allégations de son plaidoyer, l'en déboute, et donnant acte à la demanderesse de l'offre qu'elle fait au dit défendeur de lui remettre le connaissement en vertu duquel la dite viande lui a été transportée *en garantie* collatérale des avances qu'elle a faites au dit McMullen

condamne le dit défendeur à payer à la dite demanderesse la somme de $16,263.13, cours du Canada, pour les causes et raisons énoncées dans la déclaration, avec intérêt sur icelle à compter du 15 Août, 1876, et les dépens *distraits*."

The appeal was from the above judgment, on the ground that Hood was in no way liable for the draft, and also insisting that if he were liable, the amount received by the Bank from the proceeds of the beef should have been deducted from it.

Sir A. A. DORION, C.J., said it was evident that Hood had never bound himself to pay the draft. The Bank of Toronto had security on the meat which was in its possession. What was transferred to Hood was the margin that might remain after the Bank had been paid. There was no question of fraud here. His honor, therefore, was of opinion that the Court below was wrong in holding Hood liable for the amount of the draft. The judgment being erroneous, must be reversed.

MONK, J., dissenting, thought that Hood had made himself liable, and he added that Judge Tessier (who was not present at the delivery of the judgment) concurred in this view.

RAMSAY, J. One McMullin, not a party to this suit, carried on business under the name of the "North American Packing Company." He made a contract with a person of the name of Pupin, of Paris, France, to deliver to him 150,000 kilos. of boiled beef. In the winter of 1876 he shipped about 50,000 kilos., which at the contract price would amount to $16,143.36. On the security of the bill of lading of this shipment the respondents discounted the draft of "The North American Packing Co." on Pupin for $13,943.30. Pupin declined to accept the draft, the beef not being of the quality required, and it was sold for £2,054 15s 3d sterling, which was insufficient to pay the draft held by respondents and the expenses connected with the sale. While the result of this transaction was unknown, on the 27th March, 1876, McMullin made a deed with appellant which sets up that he (McMullin) "had commenced a certain business for the packing, canning, and sale of meats in a portable shape, under the name of "The North American Packing Company," and that the appellants "agreed to purchase the said business." The deed then goes on to transfer, 1st. The lease of the premises; 2nd. All the fixtures and plant of the Company, and all the debts due to the company, even those not specially enumerated; "3rd. All existing contracts which have been made by the said Edgar McMullin, either in his own name or in the name of The North American Packing Company, with any person whomsoever, for the furnishing or sale of packed or canned meat, and especially that certain contract made with one P. Pupin, of Paris, France, as detailed in the correspondence between him and the said Edgar McMullin and one Charles N. Armstrong, which has been transferred before the passing of these presents to the said Andrew W. Hood;" and "4th. The good will of the business." The consideration for this transfer is the sum of $42,500, on account of which the said Andrew W. Hood hath paid at and before the passing of these presents the sum of $12,848.26, and the balance, namely, $29,651.74, "the said Andrew W. Hood undertakes to pay the same to the discharge of the liabilities of the said Edgar McMullin, mentioned in the schedule hereunto annexed, marked B."

Among the debts due to the Packing Company especially enumerated is the balance presumed to be due by Pupin on the 50,000 kilos less the draft, that is to say, the sum of $2,206.06. The deed was also supplemented by a schedule B, setting forth the debts of the Packing Company, which appellant was to pay, and which amount to exactly the balance due of the consideration money, that is the sum of $29,651.74. Schedule B makes no mention of any liability on the 50,000 kilos. of beef already sent to France, and in fact no loss, but, on the contrary, a gain was anticipated. It further appears that the appellant took possession and control of the business of the Packing Company, and the respondents specially aver in their declaration that the appellant mixed himself up and took part in the settlement of this particular matter. By the conclusion of their declaration the respondents demanded $16,263.30.

The pretensions of the plaintiffs-respondents are two-fold. First, that the defendant purchased a total business with all its profits; that he specially acquired all "existing contracts," that among these existing contracts was the contract partly executed with Pupin;

that, moreover, the transfer dealt with so much of the contract as was supposed then to exist, that is, as showing a balance in favour of the transferror, but that the very entry in schedule "A" shows that the transaction was to be charged with the draft. Second: That by the acts of the defendant he had so mixed himself up in the transaction that he rendered himself personally liable, and had thereby admitted his responsibility to be that of the original debtor, McMullin.

The appellant, by his pleas, said: 1st—That there was no privity of contract between the appellant and the respondents; 2nd—That the appellant could not be responsible beyond his deed by which he agreed to pay certain specified liabilities; 3rd—That he had a right to take part in the settlement of the transaction with Pupin, inasmuch as he had an interest in the balance, and that his interference went no further than enquiring as to what was being done, and that he had made no promise and assumed no responsibility whatever.

I am not sure whether the law of England as to "privity of contract" is the same as ours; at all events, we have not the advantage of having so compendious a technicality. "*Défaut de lien*" to some extent expresses the idea, but I am inclined to think that we should not hold there was *défaut de lien* in all cases in which it would be held in England that there was want of privity of contract. Be this as it may, by our law "right of action" is coextensive with interest, and consequently we give the immediate action against a third party, if such third party is directly liable to our debtor. Thus a useless *circuit d'actions* is avoided. I think, therefore, that if this transaction be one for which Hood was liable to McMullin, the Bank of Toronto, directly interested in it, can exercise the right of its debtor, McMullin, as against Hood.

It seems to me that the definition of this right aids us in narrowing down the question on the merits, at least from one point of view. If the Bank has a right to sue Hood, it is only because McMullin would have such right. The first question then to be determined, is whether the deed of transfer, as it stands, with its schedules, created an undertaking on the part of Hood to protect McMullin from all that might arise out of the contract with Pupin. If not, I do not see how Hood can be liable for the debt to the Bank. By the terms of the deed already quoted it seems that the whole contract with Pupin was specially included, but it is to be observed that if the schedules, and specially the schedule A, are to be considered as part of the deed, and are to be read as qualifying its terms, it is quite plain that schedule A in the item

"P. Pupin 50,448 kilos boiled beef $16,143.36
Less amount of draft 13,943.30

$2,200.06"

settled that portion of the Pupin contract between Hood and McMullin, and was a warranty to Hood that, so far as that contract had been carried out, the result would be a profit to Hood of $2,200.06. I cannot well see how this schedule can be considered in any other light than as a limitation of the extent to which this particular contract was adopted. To say that it is a totality Hood bought, and that therefore he was liable, is simply to ignore the warranty of the schedule, or to attach to it some other significance. But as to that the contract must speak for itself; it is the law of the parties, and no one can have any right to make it other than they have willed. It seems to me to say, that McMullin sold to Hood all his "existing contracts," but that one had been partly executed and that the known result was a profit. Hood cannot be bound inferentially to what he never could have contemplated, and it can hardly be supposed that he contemplated changing this profit of $2,000 into a loss of $16,000.

With regard to the second point, I don't think there is anything to show that by any subsequent act of his Hood rendered himself liable. Great stress is laid on a letter from appellant of the 19th April. It appears to me that if Hood is not liable under the deed of transfer, his position cannot be altered by his waiving in the name of the Packing Company all objection to the respondents adopting the course they suggest as most beneficial. If it was Mr. Hood the Bank wished to consent, they should have addressed him and not the Packing Company. By addressing the Packing Company, the Bank evidently was seeking to obtain the Company's consent to the delivery

of the meats, unless we were to adopt the suggestion of the appellant, that the Bank desired to get an ambiguous answer from Hood by which to confound him with the Company—a suggestion which cannot be entertained for an instant.

There is still another pretension on the part of the respondents, namely, that McMullin was Hood's partner in the concern, and that, therefore Hood was liable on the draft. I confess I am unable to seize the sequence of ideas. I do not understand how it can be that McMullen, by becoming Hood's partner, even if that were established, should render Hood liable for a past transaction with which he had nothing to do.

The remarks of the learned Chief Justice have suggested one other observation. If Hood were liable to Pupin to supply another 50,000 kilos. to make up the contract, he would not be obliged, therefore, to transfer the bill of lading to the Bank.

The judgment is as follows:—

"Considering that by deed of the 27th day of March, 1876, passed before W. A. Phillips, notary, the appellant purchased from Edgar McMullin the several assets of the said Edgar McMullin described in the said deed and schedules thereunto annexed, constituting the business which the said McMullin was carrying on under the name and style of the North American Packing Company, for and in consideration of $42,500, whereof $12,848.26 were paid at the passing of the deed, and the said appellant agreed to pay the balance of $29,651.74 to the discharge of the liabilities of the said Edgar McMullin mentioned in the Schedule B annexed to the said deed;

"And considering that the amount of the bill of exchange claimed by the present action is not one of the liabilities mentioned in the said schedule, and the said appellant has not by the said deed, nor by any subsequent act, agreed to pay the said bill of exchange, nor assumed any liability in respect of the same, either in favor of the said Edgar McMullin, or of the said respondents;

"And considering that there is error in the judgment appealed from, to wit: the judgment rendered by the Superior Court at Montreal on the 1st day of February, 1878, doth reverse," &c., &c.

Judgment reversed and action dismissed; Monk and Tessier, JJ., dissenting.

Abbott, Tait, Wotherspoon & Abbott for Appellant.

R. & L. Laflamme for Respondents.

COURT OF REVIEW.

MONTREAL, June 30, 1880.

JOHNSON, MACKAY, RAINVILLE, JJ.

CHARTRAND v. PUDNEY.

[From S. C., Montreal.

Damages for arrest where probable cause existed—Mistake as to the person.

The judgment brought under review was rendered by the Superior Court, Montreal, Sicotte, J., March 12, 1880.

MACKAY, J. This is an action of damages for malicious arrest of the plaintiff, and prosecution of him before the Police Court, by the defendant, and the sum of $100 has been awarded to plaintiff, and costs. The action was for $137.

It appears that in June, 1879, there had been a municipal election at St. Vincent de Paul, and, as usual, two parties were struggling at it, the Bellerose party and the Bastien party. The Bastien party was defeated, and Bastien openly and publicly charged the defendant with having been instrumental in defeating it. Pudney going from the poll was therefore knocked down and beaten. He resolved to get righted; but how was he to get exactly at who had beaten him or knocked him down? He charged six persons with the offence. He had good ground to suspect the plaintiff. Chartrand did assault some of those who were disposed to help Pudney, and assaulted some of his own friends, he being drunk. So Pudney in good faith charged the plaintiff with five others with having assaulted him. The plaintiff had assaulted Mr. Bellerose, seizing him by the collar. The plaintiff is not meritorious. Certainly judgment for $25 would be enough. We think that though the plaintiff was discharged on the charge against him, the defendant had not been actuated by malice, but was in good faith, though ultimately the police magistrate, the defendant abandoning the charge against the plaintiff, freed him, plaintiff. Two of the six persons charged were condemned. As regards the others, among them the plaintiff, the defendant was perhaps mistaken.

JOHNSON, J. By the ancient law of this country, our civil rights are governed by the law of France, as it existed at the time of the cession, with such modifications as local, or in some

cases, imperial authority may have introduced. One of these modifications was the introduction of the whole body of the English criminal law. Therefore, though our civil rights depend generally on the ancient law of France, yet what constitutes the right of action for malicious prosecution must be determined by the law giving the right to prosecute. The defendant had a right to set the law in motion, so long as it is not done maliciously, and he merely made a mistake as to the person. If he had made no mistake as to the person I would give no damages at all. He rectified his mistake as soon as he could. He must pay for his mistake, but we condemn him to nominal damages only. In England the plaintiff would have no right of action at all.

Judgment reformed, and condemnation reduced to $25; costs of revision on the parties respectively; costs in the lower Court as in an action above $80 and under $100.

St. Pierre & Co. for plaintiff.

Trudel & Co. for defendant.

COURT OF REVIEW.

MONTREAL, July 8, 1880.

SICOTTE, MACKAY, TORRANCE, JJ.

SLATER v. BELISLE.

[From S. C., Montreal.

Capias—Return of writ in advance of the return day—Amendment of writ without amending affidavit—Service of amended writ and declaration.

TORRANCE, J. (*diss.*) On the 10th of June, 1879, the defendant was arrested under a capias by the name of Alfred Nelson Belisle, his real name being Alfred Napoleon Belisle. The writ was returnable and returned on the 24th June. Immediately after the arrest, or on the 13th June, the plaintiff discovered his mistake in the name, and served a motion on the 13th for the 16th to the defendant, and moved the Court on the 16th that he be allowed to amend the writ and declaration, and this was granted *ex parte* on the 18th June. The defendant appeared on the 25th, and filed an exception *à la forme*, attacking the procedure, both because his name was wrongly given in the affidavit and writ, and because he was arrested in Montreal in this suit when he was already under arrest under another capias at the suit of one McCready. The pretension of Belisle as regards this second objection was that the bailiff has illegally brought him to Montreal under the McCready writ in place of giving him into the custody of the Sheriff of Iberville, where he was domiciled, and that therefore his arrest by plaintiff in Montreal was illegal. Belisle complains of three judgments: 1st. That on the motion to amend; 2nd. That on the exception *à la forme* which was dismissed; 3rd. The final judgment which maintained the capias. I would dismiss his inscription, but I am in the minority. I hold that the motion having been granted, permitting the amendment of writ and declaration, the judgment could not be set aside by an exception *à la forme*. Next, the exception was rightly dismissed, and the final judgment was necessarily what it was. Belisle is now in the record by his right name, and the plaintiff is entitled to have the arrest declared valid.

MACKAY, J. On an affidavit for capias against Alfred *Nelson* Belisle the Sheriff improperly arrested Alfred *Napoleon* Belisle. The plaintiff, before the day for return of the writ, but after Alfred *Napoleon* Belisle's arrest, moved to have the Sheriff ordered to return the writ, and thereupon the plaintiff moved to amend his writ and declaration by giving the names Alfred *Napoleon* Belisle to defendant; and he was allowed to do so. The Court was sitting in Term at the time in the Practice Division. The affidavit remains, and so does the *fiat* for the writ, reading against Alfred *Nelson* Belisle. By the final judgment Alfred *Napoleon* Belisle is condemned, and it is ordered that the capias issued against Alfred *Nelson* Belisle upon the affidavit and fiat against Alfred *Nelson* Belisle do hold.

The question is not whether an affidavit for capias can be amended, but whether upon an affidavit unamended and reading against *John* Smith as it were, *Richard* Smith can be detained and declared subject to further detention; the majority of the Court hold the negative. We know all about amendments, and how even the names of parties, both before Civil and Criminal Courts, can be changed by force of statutes passed for the purpose, allowing such amendment. But we have not to regard them seeing the question before us. The return of the writ, before the day fixed for its return, ought not to have been ordered, for Art. 820 C. C. P. only allows such returns in advance upon demands by defen-

dants. The return day was the 24th of June. Yet on the 18th of June the plaintiff got leave to amend; only after that was the defendant served with the amendment.

There is another question. The writ and declaration have to be served in all cases by a space of ten days before the day fixed for the return. In the present case the writ and declaration (*i.e.* the amended ones) have not been served by that space of time, and the defendant's exception *à la forme*, urging this and the other irregularity, ought to have been maintained. So the defendant (plaintiff in review) succeeds, and the action must be dismissed.

SICOTTE, J., concurred.

The judgment is as follows:

"Considering that the original affidavit, to wit, for capias, swears against Alfred Nelson Belisle, and has never been amended, and that standing as it does unamended it cannot be validated as by the judgment *a quo*, and that the said judgment ought not to have declared the capias good against Alfred Napoleon Belisle;

"Considering further that Alfred Napoleon Belisle has not had service of process (as amended before return day of writ) by the space of time required by the Code of Procedure for service of summons;

"Considering that the exception ought to have been maintained, whereas by the judgment of 18 February, 1880, it has been dismissed;" &c. Judgment reversed, and action dismissed, Torrance, J., dissenting.

L. N. Benjamin for plaintiff.

Duhamel, Pagnuelo & Rainville for defendant.

COURT OF REVIEW.

MONTREAL, July 8, 1880.

MACKAY, RAINVILLE, JETTE, JJ.

THE MUTUAL FIRE INSURANCE CO. OF STANSTEAD v. GALIPUT et al.

[From C. C., St. Francis.

Jurisdiction—Premium note Mutual Insurance Company—Liability of transferee to Company.

The judgment inscribed for review was rendered by the Circuit Court, District of St. Francis, Doherty, J., Dec. 13, 1879.

MACKAY, J. The action is against two defendants, Galiput and Lavoie. They have been condemned jointly and severally to pay the plaintiffs $90 assessments on premium note of defendant Galiput, adopted by Lavoie later.

In July 1874, Joseph Galiput, domiciled in the District of Bedford, applied for insurance and his application was accepted. So he became a partner as it were in the plaintiffs' company having its head office in Sherbrooke, St. Francis district; and he gave a premium note for $300, "payable at Sherbrooke," and became insured for five years for $2,000. Then only was the contract perfected. C.C. 2481. Galiput transferred the policy interest to Lavoie, by consent of plaintiffs, and both bound themselves jointly and severally to pay plaintiffs the note, or assessments on it. Galiput and Lavoie are both made defendants, but Galiput being absent, has never been served with process nor been advertised. Yet he has been condemned jointly and severally with Lavoie. We have no complaint from him but only from Lavoie. He is of Iberville district and has filed an exception declinatory and also pleaded to the merits by *défense en droit* and other pleas. The exception has been dismissed and judgment has gone for the plaintiffs for the amount demanded.

This Court is of opinion that the judgment as regards Lavoie must be confirmed. The cause of action arose at Sherbrooke, and there Galiput and Lavoie promised to pay; and both are liable still, though an alienation has been by Galiput, whereby, if the Company pleased, it might hold the policy to have lost force, against it. Yet the defendants are liable, for they never notified the plaintiff, nor surrendered the policy. Consolidated Statutes L. C., cap. 68, sec. 28, is to this effect: "When any property insured is alienated by sale or otherwise, the policy thereon shall be void, and shall be surrendered to the directors to be cancelled; and upon such surrender the member making it shall receive the note deposited at the time the policy was issued, upon paying his portion of all losses and expenses that have occurred before surrender: "2. But the grantee or alienee, having the policy assigned to him, may have the same confirmed to him for his proper use and benefit, upon application to the directors, and with their consent, within thirty days after such alienation, on giving his note, payable on demand, to the directors for so much of the sum for which the deposit note of the alienor was given, as then remains unpaid; and by such

ratification such alienee shall become entitled to all the rights and privileges, and subject to all the liabilities to which the alienor was subject." Lavoie says it is inconceivable that seeing that Section 28, he can be held, but for a very minute sum, in any the worst event, but we hold against Lavoie upon this part of the case. We may add that supposing we had no such section 28, alienation by the insured would terminate the liability of the insurance company.

JETTE, J., concurred in the judgment on the merits, but dissented on the point raised by the declinatory exception, being of opinion that the declinatory exception should have been maintained.

Brooks & Co. for plaintiffs.
F. O. Belanger for defendant.

SUPERIOR COURT.

MONTREAL, Dec. 23, 1879.

DANSEREAU v. KELLER.

Contract—Agent suing in his own name on contract made with principal.

TORRANCE, J. This is an action to recover the price of goods supplied by Abel Pilon, of Paris, through the plaintiff, who was his Canadian agent. The plaintiff has brought the action in his own name under C. C. 1736. The defendant resists the demand in the name of the plaintiff, whom he alleges not to have been a factor, and cites *Crane* v. *Nolan*, 19 L. C. J. 309, where the plaintiff was held to have been a mere broker, and therefore not entitled to sue for damages for non-fulfilment of contract. That case was different from the present one. Here the plaintiff had the control of the goods and delivered them to defendant who paid him in part and promised to pay the balance to him. The objections now made to the claim are an after-thought and should not prevail. This is the conclusion I had come to a few days ago, but the case of *Doutre & Dansereau** decided this month by the Court of Queen's Bench is in favour of the defendant, and I follow it. Action dismissed.

Ethier for plaintiff.
F. O. Wood for defendant.

* 3 Legal News, p. 22.

RECENT CRIMINAL DECISIONS.

Conspiracy—Each conspirator liable for acts of all.—Every one coming into a conspiracy at any stage of the proceedings, with knowledge of its existence, is regarded in law as a party to all the acts done by any of the other parties, before or afterwards, in furtherance of the common design.—*United States* v. *Sacia*, 26 Int. Rev. Rec. p. 140 ; May 3, 1880.

Homicide—Evidence.—In a trial for murder, the prosecution proved that footprints were found on the premises where the assassination had been perpetrated, and was further allowed, over objection by the defence, to prove that the examining magistrate compelled the defendant to make his footprints in an ash-heap, and that the footprints so made corresponded with those found on the premises where the homicide was committed. It was objected that the evidence was incompetent because violative of the guaranty in the Bill of Rights that "one accused of crime shall not be compelled to give evidence against himself." *Held*, on review of the authorities, that the objection was not well taken, nor the evidence within the inhibition of the Bill of Rights.—*Walker* v. *State*, 7 Tex. App. 245.

Dying declarations.—In order to make the statements of the deceased competent evidence as "Dying Declarations," it must appear that they were made in view of the certainty of death, or almost immediate dissolution. It is not necessary that these apprehensions should be embodied in words to a bystander by the deceased, but it will be sufficient if the danger be so imminent and immediate as to satisfy the judge that the deceased must have been of necessity laboring under an impression of almost immediate dissolution. Dying declarations are also sometimes admissible for the reason that they are admitted on the ground of necessity, and to prevent the effect of a party destroying, by an act of violence, the only one who could testify against him, and thus escape punishment ; but in this class of cases it must appear that the deceased was the only witness of the transaction. When disinterested and unsuspected witnesses are present, this rule does not apply.—*Stewart* v. *State*, 2 Lea 598. (Tennessee Supreme Court.)