The Lower Canada Law Journal.

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THE EXTRADITION OF LAMIRANDE.

He who would desire to laud the administration of justice in this land, to speak pleasant things of the energy and vigour of the Bench in carrying out laws and treaties with the purpose of doing substantial justice, or who would fain dwell with well buttered phrase on the manly and upright firmness of public officers in keeping within the limits of their duty, he, we say, who would like to speak or write after this fashion, had better avoid the subject of extradition, and our extradition cases. Some fatality hangs over them, some blunder besets them, some suspicion of crooked dealing ever attends them. The most recent case, that of LAMIRANDE, only furnishes another unfortunate example. We see a man carried from our shores who in the opinion, be it right or wrong, of the judges of our highest Court, is innocent of the crime imputed to him. As far as the individual is concerned, for aught we know, there may be no room for sympathy or commiseration. Unfaithful to the trust reposed in him, fearing to face a jury of his countrymen, betaking himself beyond the seas, and, in the first instance, successfully evading his captors, he is probably as great a culprit as any poor rogue who is really and truly guilty of forgery as defined by our law. But we did not expect to see a counsel learned in the law, and holding high office, attempting to divert attention from the true issue by representations of the worthlessness of the individual, or forgetting that an innocent man may to-morrow be the victim of some hasty and highhanded proceeding, which would seek shelter behind the precedent of LAMIRANDE'S case, if such precedent were permitted by the silence and apathy of the public.

But one practical result seems likely to flow from the unfortunate occurrences of the past few weeks. The privilege of the great writ is to be carefully guarded now, when the fair fame of the country has been tarnished, and when American citizens amongst us talk of placing themselves under the consular flag for protection. Henceforth, some (not all) of our judges have stated, the writ of habeas corpus is to issue immediately, and the prisoner is thus to be brought before the Court.

As a record of a case of no little importance it may be interesting that the facts should be stated, and we accordingly avail ourselves of the statement drawn up by Mr. Justice DRUMMOND, read by him in Chambers on Tuesday, the 28th of August, and subsequently forwarded to His Excellency the Governor General. We also append a letter written to the *Montreal Gazette*, by Mr. RAMSAY, stating the case from an opposite point of view, for the satisfaction of those who may think the Judge's narrative too highly coloured.

The statement of Mr. Justice DRUMMOND is as follows:—

"On the 26th July last a document under the signature of His Excellency the Governor General, purporting to be a warrant for the extradition of the petitioner, issued under the authority vested in his Excellency by the provisions of the statute passed by the Legislature of the United Kingdom of Great Britain and Ireland, in the sixth and seventh years of Her Majesty's reign, intituled "An act to give effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders," setting forth that the said petitioner stood accused of the crime of "*forgery by having, in his capacity of cashier of "the Bank of France at Poitiers, made false en- "tries in the books of the said bank, and thereby "defrauded the said bank of the sum of seven "hundred thousand francs*;" that a requisition had been made to His Excellency by the Consul-General of France in the Province of British North America, to issue his warrant for the arrest of the said prisoner, and requiring all the justices of the peace and other magistrates and officers of justice within their several jurisdictions, to aid in apprehending the petitioner and committing him to jail.

Under this document the prisoner was arrested, and after examination before William H. Brehaut, Esq., police magistrate and justice of the peace, was fully committed to the common jail of this district on the 22nd day of the current month of August.

On the following day, between the hours of 11 and 12 o'clock in the forenoon, notice was given in due form by the prisoner's counsel to the counsel charged with the criminal prosecutions in this district, that he (the counsel for the prisoner) would present a petition to any

one of the judges of the Court of Queen's Bench who might be present in Chambers at one o'clock in the afternoon of the following day, (the 24th) praying for a writ of *Habeas Corpus* and the discharge of the prisoner.

At the time appointed this petition was submitted to me.

Mr. J. Doutre appeared for the petitioner, Mr. T. K. Ramsay for the Crown, and Mr. Pominville for the private prosecutor.

A preliminary objection, raised on the ground of insufficient notice, was overruled. Mr. Doutre then set forth his client's case in a manner so lucid, that I soon convinced myself, after perusing the statute cited in the warrant of extradition, that the warrant itself —the pretended warrant of arrest alleged to have been issued in France—*arrêt de renvoi*— and all the proceedings taken with a view to obtain the extradition of the petitioner, were unauthorized by the above cited statute, illegal, null, and void, and that the petitioner was, therefore, entitled to his discharge from imprisonment.

But as Mr. Pominville, whom I supposed to be acting as counsel for the Bank of France, wished to be heard, I adjourned the discussion of the case until the following morning. I would have issued the writ before adjourning, had the counsel for the prisoner insisted upon it. But that gentleman was no doubt lulled into a sense of false security, by the indignation displayed by the counsel for the Crown, when Mr. Doutre signified to me his apprehension that a *coup de main* was in contemplation to carry off the petitioner before his case had been decided.

On the following morning, Saturday, the 25th of this month, I ordered the issuing of a writ of *habeas corpus* to bring the petitioner before me with a view to his immediate discharge.

My determination to discharge him was founded upon the reasons following.

1st. Because it is provided by the first section of the Act of the British Parliament to give effect to a Convention between Her Majesty and the King of the French, for the apprehension of certain offenders (6 and 7 Vic., ch. 75), that every requisition to deliver up to justice any fugitive accused of any of the crimes enumerated in the said Act, shall be made by an *ambassador of the Government of France, or by an accredited diplomatic agent;* whereas the requisition made to deliver up the petitioner to justice has been made by Abel Frederic Gauthier, Consul General of France in the Provinces of British North America, who is neither an ambassador of the Government of France nor an accredited diplomatic agent of that Government, according to his own avowal upon oath.

2ndly. Because, by the 3rd section of the said statute, it is provided that no Justice of the Peace, or any other person, shall issue his warrant for any such supposed offender until it shall have been proved to him, upon oath or affidavit, that the person applying for such warrant is the bearer of a warrant of arrest or other equivalent judicial document, issued by a judge or competent magistrate in France, authenticated in such manner as would justify the arrest of the supposed offender in France upon the same charge, or unless it shall appear to him that the act charged against the supposed offender is clearly set forth in such warrant of arrest or other judicial document; whereas the Justice of the Peace who issued his warrant against the Petitioner, issued the same without having any such proof before him, the only document produced before him, as well as before me, in lieu of such warrant of arrest or other equivalent judicial documents, being a paper writing alleged to be a translation into English of a French document, made by some unknown and unauthorized person in the office of the counsel for the prosecutor at New York, and bearing no authenticity whatever.

3rd. Because, supposing the said document purporting to be a translation of an *acte d'accusation* or indictment, accompanied by a pretended warrant for arrest and designated as an *arrêt de renvoi*, to be authentic, it does not contain the designation of any crime comprised in the number of the various crimes, for or by reason of the alleged commission of which any fugitive can be extradited under the said statute.

4th. Because by the first section of the said act it is provided that no Justice of the Peace shall commit any person accused of any of the crimes mentioned in the said act (*to wit murder, attempt to commit murder, forgery, and fraudulent bankruptcy*) unless upon such evidence as according to the laws of that part of Her Majesty's dominions in which the supposed offender shall be found, would justify the apprehension and committal for trial of the person so accused, if the crime of which he shall be accused had been there committed.

Whereas the evidence produced against the Petitioner upon the accusation of forgery brought against him before the committing magistrate, would not have justified him in apprehending or committing the Petitioner for the crime of forgery, had the acts charged against him been committed in that part of Her Majesty's dominions where the Petitioner was found, to wit, in Lower Canada.

5th. Because the said warrant for the extradition of the Petitioner, as well as the warrant for his apprehension, does not charge him with the commission of any of the crimes for which a warrant of extradition can be issued under the said statute; inasmuch as in both of the said warrants the alleged offence is

charged against the Petitioner as "*forgery by "having in the capacity of Cashier of the "branch of the Bank of France at Poitiers made "false entries in the books of the Bank, and "thereby defrauded the said Bank of the sum "of seven hundred thousand francs.*"

Whereas the said offence as thus designated does not constitute the crime of forgery according to the laws of England and Lower Canada, for, to use the words of Judge Blackburn when he pronounced judgment concurrently with C. J. Cockburn and Judge Shee, in a case analogous to this (Exparte, Charles Windsor, C. of Q.B., May, 1865), "Forgery is the false making of an instru- "ment purporting to be that which it is not; "it is not the making of an instrument pur- "porting to be that which it is: it is not the "making of an instrumeut which purports to "be what it really is, but which contains false "statements. Telling a lie does not become "a forgery because it is reduced to writing."

The Gaoler's return to this writ of *Habeas Corpus* was that he had delivered over the prisoner to Edme Justin Melin, *Inspecteur Principal de Police de Paris*, on the night of the twenty-fourth instant, at twelve o'clock, by virtue of an order signed by M. H. Sanborn, Deputy Sheriff, grounded upon an instrument signed by His Excellency the Governor General.

It appears that the petitioner thus delivered up to this French policeman is now on his way to France, although his extradition was illegally demanded, and although he was accused of no crime under which he could have been legally extradited; and although, as I am credibly informed, His Excellency the Governor General had promised, as he was bound, in honour and justice, to grant him an opportunity of having his case decided by the first tribunal of the land before ordering his extradition.

It is evident that His Excellency has been taken by surprise, for the document signed by him is a false record, purporting to have been signed on the 23rd instant, at Ottawa, while His Excellency was at Quebec, and falsely certified to have been recorded at Ottawa before it had been signed by the Governor General.

In so far as the Petitioner is concerned, I have no further order to make, for he whom I was called upon to bring before me is now probably on the high seas, swept away by one of the most audacious and hitherto successful attempts to frustrate the ends of justice which has yet been heard of in Canada.

The only action I can take, in so far as he is concerned, is to order that a copy of this judgment be transmitted by the Clerk of the Crown to the Governor General, for the adoption of such measures as His Excellency may be advised to take to maintain that respect which is due to the Courts of Canada and to the laws of England.

As to the public officers who have been connected with this matter, if any proceedings are to be adopted against them, they will be informed thereof on Monday, the 24th day of September next, in the Court of Queen's Bench, holding criminal jurisdiction, to which day I adjourn this case for further consideration."

The following is Mr. RAMSAY'S letter:—

To the Editor of the Montreal Gazette.

SIR,—The *Herald* of this morning contains two columns of the report of a pretended judicial proceeding in the Lamirande case, accompanied by a characteristic attack on the Attorney General. It is very plain that the declamation of Mr. Justice Drummond and Mr. Doutre *apropos* of nothing, (for there was no case, and neither of them ventured to move for or take any rule or other proceeding,) was simply intended to give Mr. Cartier's enemies a pretext for abusing him,—so impossible is it, without rectitude of purpose and complete sobriety, to overcome the recollection of political defeat. But my object is not to review or attempt to answer the contradictions and absurdities of these tirades. I feel perfectly satisfied that nothing I can say or write will ever prevent Mr. Justice Drummond from at all times preferring effect to truth; and therefore my explaining to him that to call the giving up of a prisoner on the warrant of the Governor, kidnapping, is simply a naked falsehood, would be pure waste of time. I shall therefore briefly state how and why Lamirande was given up, and from that it will at once be obvious that the outcry of Mr. Drummond and Mr. Doutre is simply beside the question.

We have a treaty with France enforced by an Imperial statute, by which we agree to give up persons accused of certain offences therein enumerated. The procedure is this: The French Government claims the extradition of the accused, and the Governor (in the colonies) issues his warrant, charging all justices, and officers of justice to aid in the capture of the fugitive. On his apprehension, he is brought before the magistrate, who deals with the charge, or who ought to deal with it, precisely as if the offence had been committed here. This being done, the prisoner is either fully committed or he is discharged. If committed, the papers are forwarded to the Government, and the Governor issues his warrant for the extradition of the prisoner, who is at once delivered up, provided there be no other cause (*i.e.*, criminal cause) for his detention. It is an error to suppose that there

is any right of appeal from the decision of the Governor; but if application is made in proper time, a writ of *habeas corpus* may be procured, which would have the effect of bringing the prisoner before the Court or Judge to examine into the cause of his detention. In Lamirande's case no such writ was either granted or issued, and therefore it is positively untrue that the prisoner was in the hands of the Court or Judge, as Mr. Drummond said. Without this writ there was no power known to the law to stop the execution of the Governor's warrant; and this I at once explained to Mr. Justice Drummond in Chambers on Saturday morning, when he first spoke to me on the subject. I then told him that had the Sheriff consulted me, which he did not, I should have advised him to obey the warrant without a moment's loss of time. So unanswerable was this that Mr. Drummond, shifting his ground, said that he had put in a commitment before the removal of the prisoner; but I afterwards found that what he was pleased to call a commitment, was no commitment at all; but an order not to deliver Lamirande up on any warrant whatever. What renders this proceeding doubly ludicrous is that Mr. Justice Drummond was the person most terribly severe upon Mr. Justice Mondelet for his order in the Blossom case; yet when Mr. Mondelet gave that order he was sitting as the Court of Queen's Bench, whereas when Mr. Drummond gave his, he was prowling about the town at night, without any official character whatever, but that of a Justice of the Peace. On Saturday afternoon Mr. Justice Drummond again shifted his ground, and he was pleased to tell me that it was my *duty* to interfere in some way or another, and prevent the Governor's warrant taking effect. For Mr. Justice Drummond's information, let me say that when I seek a guide as to duty, I shall endeavour to select some one more immaculate than him; but in so far as regards the present case, I may add, that I was very unlikely to commit an illegality to prevent the extradition, inasmuch as I highly approve of it.

And now one word as to the prisoner. Lamirande was cashier of the Bank of France at Poitiers, and he there robbed his employers of 700,000 francs (£28,000 stg.,) falsified books and entries (forged as the French court calls it) and fled to the United States. Being arrested there and about to be extradited, he managed to drug his guard and escape to Canada, while his lawyer stole the *arrêt de renvoi*, or French indictment, which formed part of the record before the commissioner. And this is the person for whom Mr. Justice Drummond felt so lively a personal interest as to induce him to abandon the retirement of his home, and endure the fatigue of sitting in Chambers for, I believe, almost the first time since the beginning of vacation. While talking of conspiracy it would be however interesting to learn from Mr. Drummond, at whose invitation he undertook to adjudicate in Lamirande's case. The effort was not unpremeditated, for the interesting fact was duly *heralded* on Friday morning.

Your obedient servant,

T. K. RAMSAY.

Montreal, 27th August, 1866.

The GOVERNOR GENERAL telegraphed by the cable a statement of the case to the COLONIAL SECRETARY, and a private telegram was also sent to solicitors in London, but all efforts to detain LAMIRANDE in England proved unsuccessful, chiefly because there was no Judge in London (vacation having commenced) before whom an application for *habeas corpus* could be made. LAMIRANDE was accordingly taken to Paris.

At the moment of our going to press, Mr. Justice DRUMMOND has thought proper to take proceedings against Mr. RAMSAY, the representative of the ATTORNEY GENERAL, in respect of the above letter, and another which Mr. RAMSAY shortly afterwards wrote to the *Montreal Gazette*. An account of these proceedings we are obliged to reserve till our next issue.

LAW REPORTING.

The new scheme for publishing Law Reports in England, which went into operation on the 1st of January, we have already noticed Subsequently, the Irish Bar appointed a committee to remodel their system of Law Reporting on the principle of the English Law Reports. The committee reported a scheme similar to that of the English Bar. The price of the Reports is to be fixed at three guineas per annum to subscribers, and the committee reckon on having 400 subscribers.

We notice by the last number of the *Upper Canada Law Journal* that a similar move has been made there. The Law Society are to assume the work of publishing the reports, but the expense is to be defrayed in a way which we do not think very desirable. The reports are to be furnished free, but all

practitioners will have to pay an annual contribution to the Law Society, under the authority of an Act passed last Session.

NEW TRIAL FOR FELONY!

To the Editor of the Lower Canada Law Journal:

In the case of *Regina v. Daoust*, reported in this month's number of the Law Journal, the decision seems in my humble opinion one which is to be regretted, inasmuch as it is universally acknowledged to be desirable, in all cases of criminal jurisprudence where there is not some express provincial statutory provision to the contrary, to follow the English precedents and thus keep the laws of the two countries, which relate to criminal matters, as much as possible alike.

Now altho' "it seems hitherto to have been assumed that no new trial could be granted in cases of felony,"* and even Russell in former editions states that it should not be granted; still the later decisions lie the other way, and in the fourth London edition of Russell, brought out last year by Charles Spengel Greaves Esq., Q. C., the opinion given by Mr. Justice Mondelet at Daoust's trial is maintained to be the correct one. At page 213 (Bk: vi. cap: 1,) of this edition it is laid down that "where the defendant has been convicted on an indictment either for felony or for a misdemeanor, a new trial may be granted at the instance of the defendant where the justice of the case requires it;" and most certainly if ever the justice of any case required it it was that of Mr. Daoust.

Speaking of this edition of Russell the "Quarterly Journal of Jurisprudence" for May 1866, (*London, Butterworths, 7 Fleet st.*) says—its "chief value is imparted to it by the editorship of Mr. Greaves, and for this work no one at the bar could present better claims. Some of the most important statutes that have been passed in late years, with the view of amending our criminal procedure and law were framed by his own hands." "In his editorship of this book he has done full justice to his eminent attainments and reputation." "We have in this book a safe and standard treatise on our criminal law."

In Welsby's fifteenth edition of Archbold (1862) the same thing is maintained, and it is there stated that "it was formerly *said* that no new trial could be granted in a case of treason or felony where the proceedings had been regular, but now the Court of Queen's Bench, when the record is before that Court, will in its discretion order a new trial in cases of *felony*, where evidence has been improperly admitted, or where the jury have been misdirected." And surely, if it is a principle that a new trial may be granted "where evidence has been improperly admitted," it is a good deduction from it, that a new trial may be granted where important evidence has been omitted from ignorance of its existence, as in the case under discussion.

The contrary opinion—that there can be no new trial in a case of felony—which Mr. Justice Drummond calls "the old law," was founded upon a *remark not a decision* of Lord Kenyon's, made in *R. v. Mawby, Bart., et al:* 6 *T. R.* 638, when, in granting a new trial for misdemeanor, he said, "In one class of cases indeed, greater than misdemeanors, no new trial can be granted at all," and this has since generally been looked upon as a statement of what the common law was held to be at the time; but Lord Kenyon did not give judgment upon the case of a new trial for felony, and, even if he had, might he not have mistaken the common law? How often do we find the decisions of the first jurisconsults subsequently over-ruled. Mr. Greenleaf has published a volume, compiled with great labour and perseverance, of "over-ruled decisions."

I make these remarks, Mr. Editor, simply because I hold it to be a desideratum that we in Canada should keep pace with the liberal and advanced views of modern English criminal legislators, and in the hope that should the question again be brought before our Courts it may obtain a reconsideration.

IVAN T. WOTHERSPOON.

Quebec, 10th August, 1866.

* Denison and Pearce, C. C. p. 281.

MAGIC AND WITCHCRAFT.

In England, the first law against witchcraft was made under Henry VIII. It was repealed in the following reign, but renewed under Elizabeth. In Lecky's (recently published) "History of the Rise and Influence of the Spirit of Rationalism in Europe," the author writes as follows:—"Soon after the accession of James to the throne of England, a law was enacted, which subjected witches to death on the first conviction, even though they should have inflicted no injury upon their neighbours. This law was passed when Coke was attorney-general, and Bacon a member of parliament; and twelve bishops sat upon the commission to which it was referred. The prosecutions were rapidly multiplied throughout the country, but especially in Lancashire; and at the same time the general tone of literature was strongly tinged with the superstition. Sir Thomas Browne declared that those who denied the existence of witchcraft, were not only infidels, but also, by implication, atheists. Shakespeare, like most of the other dramatists of his time, again and again referred to the belief; and we owe to it that melancholy picture of Joan of Arc, which is, perhaps, the darkest blot upon his genius. Bacon continually inveighed against the follies shown by magicians in their researches into nature; yet in one of his most important works, he pronounced the three 'declinations from religion' to be 'heresies, idolatry, and witchcraft.'"

The description of the tortures inflicted in Scotland on old and feeble women, is deeply painful and revolting. "If the witch was obdurate, the first, and it was said the most effectual, method of obtaining confession, was by what was termed 'waking her.' An iron bridle or hoop was bound across her face with four prongs, which were thrust into her mouth. It was fastened behind to the wall by a chain, in such a manner that the victim was unable to lie down; and in this position she was sometimes kept for several days, while men were constantly with her to prevent her from closing her eyes for a moment in sleep. Partly in order to effect this object, and partly to discover the insensible mark which was the sure sign of a witch, long pins were thrust into her body. At the same time, as it was a saying in Scotland that a witch would never confess while she could drink, excessive thirst was often added to her tortures. Some prisoners have been waked for five nights; one, it is said, even for nine.

"The mental and physical suffering of such a process was sufficient to overcome the resolution of many, and to distract the resolution of not a few. But other and perhaps worse tortures were in reserve. The three principal, that were habitually applied, were the pennywinkis, the boots and the caschielawis. The first was a kind of thumbscrew; the second was a frame in which the leg was inserted, and in which it was broken by wedges, driven in by a hammer; the third was also an iron frame for the leg, which was from time to time heated over a brazier. Fire-matches were sometimes applied to the body of the victim. We read in a contemporary legal register, of one man who was kept for forty-eight hours in 'vehement tortour' in the caschielawis; and of another, who remained in the same frightful machine for eleven days and eleven nights, whose legs were broken daily for fourteen days in the boots, and who was so scourged that the whole skin was torn from his body. This was, it is true, censured as an extreme case, but it was only an excessive application of the common torture.

"How many confessions were extorted, and how many victims perished by these means, it is now impossible to say. A vast number of depositions and confessions are preserved, but they were only taken before a single court, and many others took cognizance of the crime. We know that in 1662, more than 150 persons were accused of witchcraft; and that in the preceding year no less than fourteen commissions had been issued for the trials. After these facts, it is scarcely necessary to mention, how one traveller casually notices having seen nine women burning together at Leith in 1664, or how, in 1678, nine others were condemned in a single day. The charges were, indeed, of the most comprehensive order, and the wildest fancies of Sprenger and Nider were defended by the Presbyterian divines. In most Catholic countries, it was a grievance of the clergy, that the civil power refused to

execute those who only employed their power in curing disease. In Scotland such persons were unscrupulously put to death. The witches were commonly strangled before they were burnt, but this merciful provision was very frequently omitted. An Earl of Mar (who appears to have been the only person sensible of the inhumanity of the proceedings) tells how, with a piercing yell, some women once broke half-burnt from the slow fire that consumed them, struggled for a few moments with despairing energy among the spectators, but soon, with shrieks of blasphemy and wild protestations of innocence, sank writhing in agony amid the flames."

"Until the close of the seventeenth century, the trials (in Scotland) were sufficiently common, but after this time they became rare. It is generally said that the last execution was in 1722; but Captain Burt, who visited the country in 1730, speaks of a woman who was burnt as late as 1727. As late as 1773, 'the divines of the Associated Presbytery' passed a resolution declaring their belief in witchcraft, and deploring the scepticism that was general.

"In England, three witches had been executed in 1682; and others, it is said, endured the same fate in 1712; but these were the last who perished judicially in England. The last trial, at least of any notoriety, was that of Jane Wenham, who was prosecuted in 1712, by some Hertfordshire clergymen. The judge entirely disbelieved in witches, and accordingly charged the jury strongly in favour of the accused, and even treated with great disrespect the rector of the parish, who declared 'on his faith as a clergyman,' that he believed the woman to be a witch. The jury, being ignorant and obstinate, convicted the prisoner, but the judge had no difficulty in obtaining a remission of her sentence. A long war of pamphlets ensued, and the clergy who had been engaged in the prosecution, drew up a document strongly asserting their belief in the guilt of the accused, animadverting severely upon the conduct of the judge, and concluding with the solemn words, 'Liberavimus animas nostras.'

"It is probable that no class of victims endured sufferings so unalloyed and so intense. Not for them the wild fanaticism that nerves the soul against danger, and almost steels the body against torments. Not for them the assurance of a glorious eternity, that has made the martyr look with exultation on the rising flame, as on the Elijah's chariot that is to bear his soul to heaven. Not for them the solace of lamenting friends, or the consciousness that their memories would be cherished and honoured by posterity. They died alone, hated and unpitied. They were deemed by all mankind the worst of criminals. Their very kinsmen shrank from them as tainted and accursed."

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

MONTREAL, Sept. 7th.

EVANS, (plaintiff in the Court below) Appellant; and CROSS *et al.*, (defendants in the Court below) Respondents.

Composition—Unfair advantage—Pleading.

To an action on a note, the defendants pleaded an *acte* of composition, alleged to be of later date than the note, to which *acte* the plaintiff was a party, and by which he agreed to take 10s. in the £., and "that by signing said *acte* of composition, the conditions whereof have long since been fulfilled, the plaintiff discharged and released the said defendants from all the claims and rights which the said plaintiff had or might have had, or pretended to have previous to the execution and taking effect of said *acte*."

Held, (*Meredith*, J., and *Duval*, C. J., dissenting) that the plea was sufficient, and that it was not necessary for the defendants to allege that the note sued upon was given to induce the plaintiff to sign the *acte* of composition, or that it secured to him an unfair advantage over the other creditors.

Martin and *Macfarlane* commented upon.

This was an appeal from a judgment rendered by *Smith*, J., in the Superior Court at Montreal, on the 31st of October, 1864, and confirmed by *Smith*, *Berthelot*, and *Monk*, JJ., sitting as a Court of Review, on the 25th of January, 1865. The action was instituted to recover the sum of $213.32, amount of a promissory note made by the respondents in favor of the Appellant, dated May 5th, 1862, and payable twenty four months after date.

The defendants by peremptory exception, pleaded to the following effect: That by an *acte* of composition *sous seing privé*, entered into on or about the 22nd of May, 1862, between the firm of Cross & Park (the defendants) and their creditors, the latter agreed to accept a composition of 10s. in the £. said composition, when paid, to be in full satisfaction and discharge of claims against the defendants. That the plaintiff had signed the *acte* of composition, and thereby discharged the defendants from all claims, including the note sued upon, which being of a date anterior to the taking effect of the composition, came under it and was discharged.

In the Court below the action was dismissed on the ground that the defendants had established that the note sued on by the plaintiff was due and owing before the day of the settlement of the composition, accepted by the plaintiff in full discharge of all sums due and owing by the defendants. This judgment was confirmed in Review, the Court remarking that the note, being dated before the *acte* of composition, was therefore due at the date of that *acte*, and was necessarily included in its operation. From this judgment the plaintiff appealed, submitting that the Court below, in assuming that the note in question was due and owing at the time the composition was effected, and that it fell within its operation, was clearly in error.

MEREDITH, J. In this case I dissent from the majority of the Court, and the Chief Justice (absent through illness) concurs with me. The action is brought upon a promissory note, and the defendants allege that on the 22nd of May, 1862, a deed of composition was executed, and that the note sued upon formed part of the debt compounded for by the plaintiff. The *acte* of composition is in the following words: "The subscribing creditors of Cross & Park, traders, Beauharnois, hereby agree for themselves, their heirs and assigns, to accept from the said Cross & Park, a composition of 10s. in the £., payable with satisfactory security, in equal proportions of six, twelve, and eighteen months, from 20th day of March last past, said composition, when paid, to be in full satisfaction and discharge of our respective claims against them—provided this arrangement be carried into effect on or before the 1st day of June, now next ensuing."

The signature of the plaintiff is subscribed, and it is admitted that the notes given in satisfaction of the composition have been paid. The question then is this: Is the plaintiff's action barred by the deed of composition? The sole evidence of the defendants consists of the deposition of the plaintiff, of which they declare that they take advantage. The statement produced by the defendants at *enquête* shows that the plaintiff's claim amounted to $342.40. The three composition notes of $57.07 each, less interest, amounted to $158.58, and the balance $183.82 was settled for by the note for $213.32, payable at 24 months, which is the ground of this action. The statement concludes with these words: "Settled as above, it being understood that Messrs Cross & Park pay all the costs of suit in cash."

It seems to me as plain from this statement, as anything can be made by figures, that the note sued upon was not included in the debt compounded for, and I think the plaintiff should have had judgment for the amount. But I think it is equally plain that the note sued upon was given to the plaintiff to induce him to sign the *acte* of composition. The plaintiff himself admits that if he recovered the amount of this note, he would have received twenty shillings in the £. for the whole of his claim. I would therefore have been of a different opinion, had the defendants stated in their plea that the note was given to the plaintiff to induce him to sign the composition, and for the purpose of securing to him an unfair advantage over the other creditors. This point has already been decided by the Court in the case of *Martin* and *Macfarlane* (1 L. C. Law Journal, p. 55). There is no such plea in this case, and therefore I think the plaintiff's action should have been maintained.

AYLWIN, J. It is to be observed that there is no attempt on the part of the plaintiff to show that the terms of the agreement have not been faithfully carried out by the defendants. On the contrary, there is conclusive evidence of the fact that every farthing of the composition money has been paid. For, by the terms of the agreement, the defendants were

to pay in cash the costs of the suit which had then been instituted. And it is perfectly clear that they must have paid these costs, because there is no demand made here for them. I think the reasons urged by the appellant for the reversal of the judgment are insufficient, and that the judgment was perfectly correct.

DRUMMOND, J. It is said that the action should be maintained, because the plea is insufficient—because it was not pleaded that the note was given to induce the plaintiff to sign the agreement, by securing to him an unfair advantage over the other creditors. I think, however, the plea is quite sufficient. It is stated clearly "that by signing the said *acte* of composition, the conditions whereof have long since been fulfilled, he (the said John Henry Evans) discharged and released the said defendants from all the claims and rights which the said John Henry Evans had, or might have had, or pretended to have, previous to the execution and taking effect of said *acte*." I am of opinion that this is sufficient. The case of *Martin* and *Macfarlane* was a very different case; there was no plea in that case at all. I concur with the majority here in thinking that the judgment should be confirmed.

MONDELET, J., concurred.

Judgment confirmed, Duval, C.J., and Meredith, J., dissenting.

S. Bethune, Q.C., for the Appellant.

R. C. Cowan, for the Respondents.

BRYSON (plaintiff in the Court below), Appellant; and STUTT (defendant in the Court below), Respondent.

License—Boundary of Limit.

The plaintiff obtained a lease to cut timber upon a location described on the back of the license as follows: "To commence at the mouth of Green's Creek, on the Black River, and extend down six miles on the course South 21o West, and back four miles on the course North, 69o West." The question having arisen as to whether certain timber seized had been cut on this location:—

Held, that the words "down on the course" in the license, meant "down *the Black River* on the course," and that the word "back" meant "back *from the Black River*."

This was an appeal from a judgment of the Superior Court at Aylmer, rendered by *Lafontaine*, J., on the 9th of March, 1865, dismissing the plaintiff's action. The facts were these:—On the 16th of January, 1857, the plaintiff obtained from the Inspector of Crown Timber Licenses at Ottawa, a License to cut Red and White Timber upon a certain location in the vicinity of Black River, one of the tributaries of the Ottawa. The description on the back of the license was as follows:—"To commence at the mouth of Green's Creek, on the Black River, and extend down six miles on the course South 21o West, and back four miles on the course North, 69o West."

Under this license the plaintiff, by *saisie-revendication*, claimed from the defendant 1800 pieces of White Pine timber, valued at £3000, alleged to have been cut upon the above described location during the existence of the license. To this action the defendant pleaded a general denegation, and the parties having gone to proof, the action was dismissed. The judgment of the Court below was as follows: "Considering that the Black River is the Eastern boundary of the limit described in the declaration, and that the Western boundary of the said limit runs parallel to the general bearing of the Black River at a distance of four miles from the said Eastern boundary, and considering that the timber in this cause seized under and by virtue of the Writ of Revendication, was not made upon the timber berth or limit of the plaintiff, it is adjudged that the action of the plaintiff be dismissed with costs."

MONDELET, J. This is a case which has been the subject of much discussion, and I have the misfortune to differ from my colleagues. I have been much perplexed as to the right interpretation of the description in the license. The majority of the Court are disposed to agree with the defendant in taking the words "down on the course" to mean "down *the Black River* on the course;" and the word "back" to mean "back *from the Black River*." If this interpretation be the right one, the timber was not cut on the plaintiff's limit. But I am disposed to take the words in the meaning assigned to them by the plaintiff's witnesses, who speak from

their personal knowledge, and, therefore, I am of opinion to maintain the plaintiff's action.

MEREDITH, J. The whole question turns upon the interpretation to be put upon the license. The case has received a great deal of attention, and after giving it their best consideration, the majority, including the Chief Justice, are of opinion that the judgment is right. I think that a contrary interpretation would deprive the words of their meaning. It was evidently the intention of the Crown Lands Department that the Black River should form the Eastern boundary of the appellant's limit. I may add that the judgment of the Court below clearly meets the justice of the case, for it is plain that the Crown Lands Department did not intend to transfer to the appellant, for a few dollars, timber to the value of £1500.

DRUMMOND, J. I must say that I had great difficulty in interpreting this license, but I think that the interpretation put upon it by the majority of the Court is not only the most just and reasonable, but, as far as I am able to judge from my own experience, the most conformable to the practice and rules of the Crown Lands Department, it being, for obvious reasons, desirable that the limits should be put on the river.

AYLWIN, J., concurred.

DUVAL, C.J., concurred in writing, under 29 & 30 Vic. c. 26, s. 1.

Judgment confirmed, Mondelet, J., dissenting.

P. Aylen, for the Appellant.

J. Colman, for the Respondent.

PREVOST, (defendant in the Court below,) Appellant; and BRIEN *dit* DESROCHERS, (plaintiff in the Court below,) Respondent.

Notice to put a party en demeure—Form of Judgment decreeing performance of obligation.

The plaintiff, lessee, sued his lessor to compel him to fulfil one of the conditions of the lease, under which he was bound to provide materials for keeping the fences in good order. The action was instituted four days after notice in writing had been served upon the lessor, calling upon him to do the work. The judgment condemned the defendant to provide the materials within fifteen days from date of judgment; in default of his so doing, the plaintiff was authorized to provide the materials at the defendant's expense.

Held, that the notice four days before suit was sufficient. *Held*, also, that the judgment was correct in form; that both parties being before the Court, the delay might properly be made to run from date of judgment instead of from date of service thereof.

This was an appeal from a judgment rendered by *Monk*, J., in the Circuit Court at Montreal, on the 30th of June, 1865.

The plaintiff leased from the defendant certain land in the Parish of St. Martin, and he brought the present action for the purpose of compelling his lessor to fulfil one of the stipulations of the lease, viz, that the lessor should supply the lessee with the stakes and rails necessary for keeping the fences in good order. The plaintiff alleged that the fences were in a very bad state, that cattle from the neighbourhood strayed over his land and wasted his grain. He further alleged that he had frequently requested the defendant to furnish him with the necessary fencing materials, but that the latter had failed to comply.

The defendant pleaded that he had not been put *en demeure* to furnish the timber in question till four days previous to the institution of the action; and that he should have been allowed sufficient time to procure the fencing materials.

By the judgment of the Circuit Court, the defendant was condemned to furnish the plaintiff with the necessary fencing within fifteen days from the date of the judgment; and in default of his so doing, the plaintiff was authorized to procure the fencing at the defendant's cost. From this judgment the defendant appealed. The principal reason urged for the reversal of the judgment was that the plaintiff, being bound to put him *en demeure* by written notice to provide the fencing materials, should have allowed a reasonable time to intervene between such notice and the institution of the action, whereas only four days had been allowed.

MONDELET, J., dissenting, was of opinion that the judgment should be reversed.

AYLWIN, J., (also dissenting.) The usual course in a case where the judgment calls upon a party to do something, is to make the delay run from the signification of judgment,

instead of which the delay in this instance is from the date of the judgment. Why has the rule been departed from? If ever there was a case in which this rule ought to have been followed, it was this case; for it appears that the protest or notice calling upon the defendant to furnish the fencing was served upon the 20th of April, and the summons in the present suit was served on the 24th of April, only four days after. Now comes another point. Suppose the judgment of the court below is to be executed; the fifteen days are out, and consequently the respondent is authorized to build the fences at the expense of the Appellant. Supposing this to be done, in what way is the respondent to be paid? The judgment can be carried out only by another action, setting out that whereas on such a day and year he obtained a judgment authorizing him to build the fences at the expense of the Appellant, he is entitled to be reimbursed. How is the cost to be ascertained otherwise? Why did not the judgment order the thing to be done *à dire d'experts*, and thus obviate the necessity for another action? It thus appears that there were two mistakes in the judgment: first, in not stating that the work was to be done within fifteen days from the signification, instead of from the date of the judgment; and, secondly, in not stating that the work was to be done *à dire d'experts*. I therefore think that the judgment should be reversed.

MEREDITH, J. This case was first argued in my absence, and the Court was equally divided. I am of opinion that the judgment is unobjectionable, and that it should be confirmed. The first objection to the judgment is that the delay therein given to the defendant counts from the date of the judgment, and not from the signification. But both parties were before the Court, and the Court granted what it conceived to be a reasonable delay. There was not the slightest injustice to either of the parties in this. Then again, as to the cost of procuring the timber, how was the Court to know what it would cost? The value might increase or decrease according to the state of the market. The judgment simply said to the plaintiff, you may get the materials for making the fence, and then you may demand the cost from the other party. It will be defendant's own fault, if he renders another action necessary, by failing to pay the cost of the material for the fence. The costs must be taxed as in an appealable case of the lowest class, since both parties have proceeded as in an appealable case. No declinatory exception was filed, and the case proceeded to judgment as an appealable case. The costs will therefore be awarded as of the lowest class of appealable cases.

DUVAL, C. J., and DRUMMOND, J., concurred.

Judgment confirmed; AYLWIN and MONDELET, JJ. dissenting.

Doutre & Doutre, for the Appellant.

Dorion & Dorion, for the Respondent.

FAHRLAND, (plaintiff in the Court below,) Appellant; and RODIER, (defendant in the Court below,) Respondent.

Architect—Violation of Contract.

Held, that an architect who, having agreed with the proprietor to superintend the erection of a house, subsequently engages with the contractor to watch over the contractor's interests for a pecuniary consideration, is thereby guilty of a direct violation of his agreement with the proprietor, and cannot recover under such agreement.

This was an appeal from a judgment of the Circuit Court at Montreal, rendered by *Berthelot*, J., on the 26th of September, 1865, dismissing the plaintiff's action. The facts were these:—The plaintiff, Theophile Fahrland, an architect, was engaged by Charles S. Rodier, the defendant, to superintend the erection of a house in St. Antoine Street west, in the city of Montreal, and it was stipulated that he was to receive $100 for his services. It appeared from the evidence that sometime after the erection of the building commenced, the plaintiff obtained from the contractor, Mr. Payette, a promise of $80 for looking after the contractor's interests. The defendant being apprised of this fact, dismissed the plaintiff, and refused to pay him anything for his services. The latter then brought the present action for $100, the amount for which he undertook to superintend the erection of the defendant's house.

The plea was that the plaintiff had violated

his engagement with the defendant, by undertaking, for $80, to protect the interests of the contractor; and that he had, in consequence, been justifiably dismissed.

The action was dismissed in the Court below, on the ground that the proved engagement with the contractor was a direct violation of the plaintiff's previous undertaking to superintend the building in the interest of the proprietor.

The plaintiff appealed from this judgment. His version of the affair, as stated in his answers on *faits et articles*, was as follows:—That the defendant first engaged him without any rate of remuneration being agreed upon, with the understanding that he, the defendant, and the contractor were to bear the expense equally. That as the tariff rate for architects is five per cent, in the absence of any agreement, the plaintiff's remuneration would have been $600, on £3000, the cost of the building. But about the time the work was commenced, the defendant induced him to stipulate to do the work for $100, to be paid by the defendant, leaving the plaintiff at liberty, as he pretended, to make his own arrangements with the contractor. That he subsequently agreed with the contractor for $80; that the defendant was aware of this all along, and merely made use of this fact as a pretext to evade payment of the $100, when the house was nearly finished, and the services of an architect were no longer required.

DRUMMOND, J. We are of opinion that the judgment in this case must be confirmed. Mr. Fahrland was in the position of an advocate who accepts a retainer from both the plaintiff and the defendant. The interests of the proprietor and of the contractor are conflicting, and the architect could not serve both at the same time. We have the assent of the Chief Justice in this case.

MEREDITH, and MONDELET, JJ., concurred.
Judgment confirmed.
Doutre & Doutre, for the Appellant.
J. A. A. Belle, for the Respondent.

September 8th.

OWLER, *et al.*, (defendants in the Court below) Appellants; and Dame HENRIETTE MOREAU *et vir.*, (plaintiffs in the Court below) Respondents.

Lease—Clause prohibiting subletting—Acquiescence—Exception of Guarantee.

The plaintiff's *auteur* leased certain premises with a clause in the lease, that the premises should not be sublet without his consent in writing. The lessee did sublet the premises, and the lessor's agent collected the rent from the sub-tenants for more than a year, without making any objection to the sublease. The heirs of the lessor subsequently sold the property to the plaintiff, and assigned to her their right to have the lease set aside, but without any guarantee. The assignee having brought an action to resiliate the lease:—

Held, that the lessor by receiving the rent from the sub-tenants for more than the period of one year, tacitly sanctioned and acquiesced in the subletting, and abandoned his right to oust the lessee. That the lessor therefore could not confer upon the assignee any right to oust the lessee. That to any action arising out of a violation of the lease subsequent to the assignment, the exception of guarantee could be opposed by the lessee, and as the assignment was stipulated to be without any guarantee, the assignee was bound in law in the same way as his *auteurs* were bound.

This was an appeal from a judgment of the Superior Court sitting as a Court of Review at Montreal, on the 30th of April, 1866, reversing a judgment of the Superior Court rendered by *Smith*, J., on the 14th of April, 1866.

The action was brought under the Lessor and Lessees' act, to eject the Appellant, William Owler, in consequence of his having sublet the premises leased, contrary to a written clause in the lease, without having first obtained the lessor's consent in writing.

The judgment rendered by *Smith*, J., in the Superior Court, dismissed the action, on the ground that the subletting had been tacitly sanctioned by the lessor.

The facts of the case sufficiently appear from the following note of the judgment in Review (BADGLEY, BERTHELOT, and SMITH, JJ.)

SMITH, J. This is an action of ejectment. In October, 1862, a lease was entered into by the late George Desbarats with the defendant, Owler, of certain premises at the corner of St. Gabriel and St. Thérèse Streets, known as the Odd Fellows' Hall, including the basement, for the term of five years. In this lease

there was a stipulation that Owler should not transfer his interest in the lease without the consent in writing of the lessor. Owler entered into possession in May, 1863, and continued in possession until February, 1864, when he sublet part of the premises to one Pierre Cérat. Mr. Desbarats died in October, 1864. In April, 1865, Owler sublet the rest of the house to one Dorion. After the death of Mr. Desbarats the property was, in 1866, sold by the heirs to the plaintiff. In the deed of sale it was stated that the vendors assigned over to the vendee any right to eject Owler that the heirs themselves possessed. They took care however, not to guarantee anything. It appears, therefore, that the two leases, which were made anterior to the sale, were known both to the vendor and to the vendee. For surely it cannot be pretended that the parties can plead ignorance of these transactions, in the face of the stipulation between them that the vendee should have whatever right the heirs had to eject Owler, and that this right was to be exercised at the vendee's own risk. Under these circumstances how does the law apply? By the common law the lessee is entitled to use the property leased for any purpose that he pleases, so long as he does not commit waste or render the position of the lessor less favourable than it was. Stipulations against subletting, and so forth, are made in favour of the lessor. In this instance the lease contained a clause that the lessee should not assign his lease, and it is an alleged violation of this stipulation that gives rise to the action of ejectment. What was the intention of the lessor in stipulating that his tenant should not assign the lease? He evidently meant that the lease was not to be assigned without his permission; but the moment that the stipulation was waived by the consent of the landlord, then the common law came in, and the parties stood in the same position as though the stipulation was not in the lease. The stipulation as to a consent in writing was a privilege stipulated in favour of the landlord; but he might say if he chose, that he did not want proof in writing. He was the party in whose favour consent was stipulated, and he might dispense with the necessity for such consent. See Dictionnaire Dalloz, under the word *acquiescement*. I think that there is an *acquiescement* clearly shown in this case. The rent was paid to the knowledge of the proprietors. The heirs Desbarats had only the same right that Mr. Desbarats himself had. If he chose to say: "Never mind the consent in writing; pay me the rent, and it will be all right," this was a clear acquiescence. The rent has been paid for years with the perfect knowledge of the agents for the property. Mr. Desbarats never gave a written consent, but he gave a tacit consent which, to all intents and purposes, is equivalent. Under these circumstances, I regret that I cannot concur in the judgment about to be rendered.

Berthelot, J. I am of opinion that the proprietor did not consent to the sub-leasing of the premises. Mr. Stodart, the agent, denies that he had any power from the Desbarats' estate to consent to the sub-leasing. This case differs from that of *Cordner* v. *Mitchell*, for in that case there was something in writing which might be considered equivalent to a commencement of proof of a written consent; but here there is nothing of the kind. The plaintiff's action in ejectment should have been maintained.

Badgley, J. My opinion is that which I formed when I heard the case at the bar. It is necessary to keep in mind the dates. The landlord leased with a strict stipulation in writing that the tenant should not sublet. There is no rule of this kind in the common law to prohibit subletting. The lease was made to Owler on the 8th of October, 1862, for five years from the 1st of May, 1863. On the 17th Feb., 1864, Owler let the basement story of the house to a man named Cérat. We know that so long as Owler did not dispossess himself of the house the law protected the arrangement. Cérat was the tenant of Owler. There was no breach of the contract here, because Owler still remained in actual possession of the premises. Then on the 8th of April, 1865, Owler sub-let the whole remaining portion of the house to one Joseph Dorion, this arrangement to take effect on the 1st May, 1865. The fact of his sub-letting the whole of the premises deprived him of the protection of the law, because he had no longer foothold in

the premises. The contract was absolutely broken by this lease to Dorion. The sale of the property by Desbarats took place on the 19th of Feb., 1866. The terms of the deed show that the parties to it were aware that the defendants were in possession as sub-tenants, but the purchasers by the contract were to have the privilege of ousting them when they pleased. Their knowledge of the sub-tenant's possession was no acquiescence, because they reserved their right to oust them. The only question then is this, did the vendors acquiesce? Did they change the condition of the contract by any act on their part? As I have already stated, there was no infringement of the contract by the lease to Cérat; the breach was the lease to Dorion. Stodart was the mere receiving agent, or collector, of the landlord: he could not bind the landlord in any way, and I can see no acquiescence in the case.

The evidence, it must be remarked, has been taken in a very irregular way. Finlay, who pretends to be the agent of Owler, has been allowed to be examined by a series of interrogatories to which he has answered, yes, yes. On his cross-examination it appeared that he knew nothing about the matter, except that he heard Stodart say nothing against the sub-letting, and this is called an acquiescence! More than this was necessary. We must come to the old rule *nemo facile presumitur renunciare.* Under the circumstances, the judgment of the Court below was wrong, and it must be reversed.

From this judgment the defendants appealed, submitting that there had been a sufficient acquiescence.

Aylwin, J. We are fully of opinion that the judgment of the original Court is right, and that the judgment of the Court of Review is wrong. The judgment of this Court will therefore be in the following terms: "Considering that the respondent has proved by legal evidence, that by the deed of acquisition made by the said Respondent, she did acquire from the estate of the late George Desbarats, the real property therein set forth, and now in the possession of the Appellant Owler and others, mentioned in the declaration in this cause, and that in and by the said deed the said plaintiff did receive also a transfer of the lease by the said estate Desbarats, together with all the rights and privileges of the said estate Desbarats, under the said lease to the said Owler, to exercise all the rights of the said estate Desbarats, in respect thereof, and all rights of the said estate Desbarats to expel the said Owler, in case he had violated the clauses of the *bail,* in respect of having sub-let the said premises.

And further, considering that the said estate of the said George Desbarats, had allowed and tolerated the sub-letting of the said premises by the said Owler, by tacitly sanctioning the said sub-lease, by receiving for a period of more than one year the rent of the said premises without protest, and with a full knowledge of the fact that the said Owler had sub-let the said premises, and had for the period of more than one year approved tacitly thereof; and that by reason thereof he had acquiesced in the said sub-letting, and had thereby abandoned all rights to oust the said Owler from the possession of the property, which became a *droit acquis* in favor of the said Owler; and further, considering that the said estate of Desbarats, could not in law give the said purchaser, to wit, the said plaintiff, any such right, as the same had been abandoned by the said estate, and which was well known to the said purchaser, and considering that by the common law, the rights under the said lease could only accrue to the said plaintiff after she had purchased the same, and for any further violation of the conditions of the said lease and deed, the exception of guarantee could therefore be opposed to the said plaintiff, by the said Owler, and as the said estate Desbarats has stipulated a clause that the transfer of the lease in that respect is *sans aucune garantie,* the said plaintiff is bound in law, in the same way as the *auteurs* of the said plaintiff are bound, &c., the Court reverses the judgment of the Court of Review and confirms that of the Superior Court."

Drummond, J. The only difference between our judgment and that of the Superior Court is with reference to the period to which the acquiescence dates back. The Superior Court

* 1 L. C. Law Journal, p. 58.

was of opinion that the rent had been received from the sub-tenant, with the consent of the proprietor, for more than three years. We are of opinion that this should be reduced to one year.

MONDELET, J., and JOHNSON, J., *ad hoc*, concurred.

Judgment reversed.

McCoy & McMahon, for the Appellant.

Moreau, Ouimet & Chapleau, for the Respondents.

REGINA v. THOMAS MURRAY.

Habeas Corpus—Substitution of a Formal for an Informal Warrant.

Held, that a formal warrant of commitment may be substituted for an informal one; and that the substitution need not be referred to in words in the subsequent warrant, since so long as there is a good warrant authorizing the detention of a prisoner, it does not matter how many bad warrants there are.

Quere as to *certiorari* to Queen's Bench.

The writ of *habeas corpus* had been ordered to issue, and the case now came up on the jailer's return. The petition of the prisoner, Thomas Murray, set forth that on the 6th of July last, he had been imprisoned in the common gaol under and by virtue of a warrant of commitment, before Messrs. Brehaut and Beaudry, which warrant alleged that the petitioner was convicted, "for that he, on the 6th of May last, not being an enlisted soldier, did unlawfully, by words and other means, go about to and endeavoured to persuade Edward Adams, an enlisted soldier in Her Majesty's service, to desert and leave such service against the form of the statute in such case made and provided;" and the petitioner was condemned to pay a fine of £40 Stg. and $6 costs, and also to be imprisoned for six months, and for so long afterwards as the said penalty and costs should remain unpaid.

The petition proceeded to state, that on the 14th of July last, the petitioner presented to the judges of the Superior Court a petition, setting forth his imprisonment, and praying that the warrant of commitment be quashed and set aside. The reasons urged in support of the petition mainly consisted in the fact, that the warrant of commitment did not state upon what day the petitioner was convicted, and hence there was no time specified from which the imprisonment was to run. The application having been made before *Monk*, J., the writ was ordered to issue, returnable before him on the 18th of July. On the 17th of July, before the service of the writ on the jailer, another warrant of commitment was left at the gaol, in which the omission of date was rectified, and this warrant was returned by the jailer with the first warrant of commitment, as a cause of the petitioner's detention, whereupon the petition was rejected.

The prisoner now renewed his application to this Court, alleging that he was imprisoned under two warrants, each committing him for six months, and each condemning him to pay a penalty of £40 and costs. The petition also set out that the second warrant of commitment was bad, because it was not stated therein that it had been substituted for the original warrant.

BADGLEY, J. The writ was returned yesterday, and the return of the jailer, stating the causes of the prisoner's detention, has brought before the Court the two warrants of commitment, under which the jailer says he is detained. Both warrants bear date the same day, and specify the same offence. One ground assigned by the prisoner's counsel is, that there is an informality in the commitment. The second ground is that the two warrants being of the same date, and for the same charge, the jailor would not know on which to detain the prisoner, and therefore his detention is illegal.

With reference to the first point, we are of opinion that the warrant is regular and in due form. The words of the statute have been followed. The charge is enticing a soldier in Her Majesty's service to desert, and the words used in the commitment do not render the charge so uncertain as that the prisoner did not know what he was charged with.

The objection then rests upon the other ground—that there are two warrants. We have been referred to the case of *Re Elmy and Sawyer*, (1st Adolphus & Ellis, p. 843.) In that case the prisoner was convicted in a penalty under an act against smuggling. The act empowered justices to amend any such

conviction or warrant of commitment, whether before or after conviction. Four days after the committal, the warrant (which was defective in point of law) was withdrawn from the jailer's possession, and another warrant substituted, it did not appear by whom. The second warrant was of the same date, and signed and sealed by the same justices as the first, and did not materially vary from it. Application was made for a writ of *habeas corpus*, and a *certiorari* was at the same time issued, to remove into the court the examinations, conviction and other proceedings. It was held in that case that the court could not presume, either from the facts returned or from the warrants, that the second warrant was substituted by the justices as an amendment of the first, in pursuance of the authority given the justices by the act, and the prisoner was discharged. But the judges stated that under the circumstances of the case, the magistrates being authorized to substitute a good warrant for a bad one, the substituted warrant would have been a good one, if it had contained the information that it was so substituted. But this was omitted, and the substituted warrant, moreover, contained new facts. The judges accordingly discharged the prisoner. This was the case relied on by Mr. *Devlin*. But we have another case, *Re Walker et al.*, New Sessions Cases p. 182. Four individuals were committed for a certain offence; a writ of *habeas corpus* was taken out, and the jailer returned that A. and B. were detained in custody under a warrant against them, dated, &c., and C. and D. under a similar warrant of same date. That afterwards whilst they were in custody, four other warrants against A. B. C. and D. individually, for their commitment respectively, were put into his hands. It was attempted to be set up that the original warrants being informal, the new warrants against A. B. C. and D. individually could not be substituted, because though as a general proposition a formal warrant may be substituted for an informal one, the former must be withdrawn and the substitution referred to by words in the subsequent ones. *Re Elmy, supra.* The prisoners should, therefore, be discharged. But it was answered, that if there is a good warrant authorizing the detention of a prisoner, it does not matter how many bad warrants there are: a justice may, pending an action, even on the morning of the trial, draw up a good conviction. The court held that the formal warrants were properly substituted for the informal ones, and being commitments were good on the return sent. The application was rejected.

We think, therefore, the return in this case is a good return. Whatever the first warrant might have been, the second warrant is a good warrant, and the return is good under the circumstances of the case.

With respect to *certiorari* to this Court, individually, I think the right of appeal to the Queen's Bench on *certiorari* has not been taken away by the statute which affects civil cases only. I think that the Court of Queen's Bench, sitting on the criminal side, has not been deprived of any power of issuing *certiorari*. I mention this incidentally only, as the *certiorari* has been spoken of, but it has no connection with the return upon this writ. We have come to the conclusion that the *habeas corpus* must be discharged.

MONDELET, J. If the jailer should not understand that the second warrant is a substituted one, and at the expiration of the first term of commitment, should not discharge the prisoner, then it would be time enough to apply for a *habeas corpus*, and it would be immediately granted. I agree with the remarks of Mr. Justice Badgley as to the writ of *certiorari*.

AYLWIN, J. I concur in the judgment given by the judge in the Superior Court. We are bound to assume, till the contrary has been shown, that there has been a good conviction, and that the magistrate has done everything that was required by law. The petitioner takes nothing by his motion.

DRUMMOND, J., concurred.

T. K. Ramsay, for the Crown.

B. Devlin, for the Petitioner.

COURT OF REVIEW.

April 30.

DESJARDINS *v.* TASSE.

Compensation.

Held, that an account for board, where the debt is easily proved, is a debt *claire et liquide*,

and such as may be offered in compensation to a debt under an obligation.

This was a case from the Circuit Court, Montreal, inscribed for review by the plaintiff. The action was brought by the plaintiff as the legatee of his deceased wife, Theotiste Tassé, claiming the balance due under an obligation for $100, made by the defendant in favour of Theotiste Tassé in 1839. The defendant pleaded that the debt was compensated by an account which he had against Theotiste Tassé for board while she was a girl. It appeared that Theotiste Tassé, who was the defendant's niece, had resided for some time in her uncle's house. This was previous to the date of the obligation.

SMITH, J. The question comes up in this case, whether the debt offered in compensation is *claire et liquide*, and such as can be offered in compensation. The law is that compensation can take place in every case in which the sum due is easily settled. The debt due on the obligation is *claire et liquide*. If the debt due on the account is easily proveable, it can be offered in compensation. In this case, I think, the debt is easily provable, and nearly of the same nature as the plaintiff's claim. Upon this point, therefore, we are against the plaintiff. The only point remaining is whether the debt is proved. To establish this there are three witnesses, who prove that Theotiste Tassé was indebted to her uncle, the defendant, in the sum of £10, for attendance and board. The Court has made a calculation of the amount to be deducted, and judgment is rendered in the plaintiff's favour for the balance due on the obligation with interest, equal to £8; the costs to be those of an action for £15.

MONK, J. This judgment, it must be remarked, is based chiefly on the equity of the case; for Paquette, the person present when the arrangement was made respecting board, and who would have given the best evidence that could have been adduced, has not been examined at all.

BERTHELOT, J., concurred.

Judgment reformed.

M. Garault, for the Plaintiff.

Loranger & Loranger, for the Defendant.

SUPERIOR COURT.

May 21.

DUBORD *v.* LANCTOT.

Information against City Councillor—Necessary allegations—Amendment of Information.

Held, that in an information for the purpose of testing the right of a City Councillor to exercise the office, the petitioner must allege that he is "a citizen qualified to vote at the election of Councillor for some ward of the city," and that it is not sufficient for the petitioner (in this case the unsuccessful candidate) to allege his own qualification for the office of Councillor.

The petitioner, having asked leave to amend the information, by inserting an allegation of his "qualification as a voter:"—

Held, that such amendment could not be allowed, as it would change the substance of the information, and be equivalent to a new information, requiring the issue of a new writ.

BADGLEY, J. The information, or *requête libellée*, in this cause has been presented by the unsuccessful candidate for the office of Councillor for the East Ward of this city, at the civic election for that office, held in February last. The statement of the proceedings had previous to and at the election, has not been complained of, nor the seating of the successful candidate, Mr. Lanctot, upon the ascertainment of the actual votes given, the latter having received 112 votes, and the petitioner 108. The information admits these facts, and also that Mr. Lanctot has satisfied the provisions of the City Charter in taking the oaths required by law, and consequently taken his seat in the City Council, but it objects against him that at the time of his election he was not qualified for election to the office of Councillor, as not being possessed of real or personal estate, or both, within the city, of the value of £500, after payment or deduction of his just debts. It is only necessary to add, as regards this part of the case, that the petitioner has set out in his information his own qualification for the office of Councillor as required by the Charter, which has not been contradicted.

Upon the petition required, presented in this case, supported by affidavit, a writ was issued by the Court, formally requiring Mr. Lanctot to appear and answer to the information, *Requête libellée*, against him, and to show by what authority he exercised or attempted to

exercise the office of Councillor. The writ was issued upon the judgment of this Court to that effect, and I do not, therefore, feel myself justified in adverting to its validity, the more particularly as this now pleaded exception in law has gone beyond the mere issue of the writ. It is possible, however, that after examination of the *Requête* and supporting affidavits, and upon consideration of the section of the Charter applicable to the matter, I might have had some doubt upon the granting of the application. Upon this formal matter, however, I am not called upon to determine, because Mr. Lanctot having pleaded to the information, *Requête*, it is upon his plea in law, or demurrer to the *Requête*, that the contention between the parties has been submitted. It is unnecessary to advert to the two first grounds of legal objection, having reference to the required affidavit in support of the information, but such as the produced affidavits were, they were sufficient for its support, such as it was. The third ground, however, is important, inasmuch as it charges that the information, *Requête*, does not allege that the petitioner was "a citizen of the city of Montreal, qualified to vote at the election of Councillor for some ward of the city." To this objection the petitioner has given the general answer of the sufficiency in law of the allegations contained in his information to obtain the conclusions thereof.

By the 8th section of the 14th and 15th Vic. c. 128, the qualification for a Councillor is fixed, namely, that he shall have been a resident householder within the city for a year next before the election, and also seized and possessed to his own use of real and personal estate, or both, within the said city, free of debts, of the value of £500; and he is also required by the 9th section, to be a natural born or naturalized subject. As already observed, the petitioner has fully and distinctly stated and alleged this his own qualification in his information.

In connection with this part of the case, it is necessary to state that the qualification for the civic voters is settled by the 23rd Vic., c. 72, in the 4th clause of that statute, which provides for their qualification, 1st, as owners of real property within the city of the assessed value of $300 and upwards, or of assessed yearly value of $30 or upwards; 2nd, as tenants or occupants of dwelling houses in the ward for which the election is held, of the same assessed values as above, but requiring the tenant to have been in possession on the then next previous first of January, or a resident householder in the city from at least the next previous first of May, &c.; and 3rd, tenants of warehouses, counting houses, &c., with the special proviso applicable to each, *that none of them shall be entitled to vote at any such election unless he shall, previously to the first of January next before such election, have paid all the civic taxes* due and payable by him. It is objected by Mr. Lanctot that the petitioner has properly stated his qualification for the office of Councillor for which he was a candidate, but that that qualification gives him no power to apply under the statute as he has done here; that he has not stated the voter's qualification, which alone and of itself was essential to justify his application, under the 27th sec. of the 14th and 15th Vic., whereby alone as a qualified voter he can legally question Mr Lanctot's office as Councillor.

The objection is quite correct in fact, inasmuch as the information alleged the Councillor's qualification alone, and does not allege his qualification as a voter.

Now, the 27th section of the 14th and 15th Vic., under which this proceeding has been adopted, specially provides that "to facilitate the decision of cases in which the right of any Corporation officer may be called in question, the Superior Court in term shall, on the information, *Requête libellée*, of any citizen qualified to vote at the election of Councillor, supported by affidavit, &c., and complaining that any person exercises the office of Mayor, Alderman, or Councillor, have power to try and adjudge upon the right of the person so complained of to exercise the office in question, and to make such order, and cause such writ of mandamus to be addressed to the Mayor, Aldermen and Citizens of Montreal, in fact to the Corporation, as to right and justice may appertain, which order or mandamus shall be obeyed by the Corporation and by all other parties, without appeal therefrom."

The proceedings therefore, provided for in this section of the Charter have reference ma-

nifestly to the legal tenure of office of the officer complained of, namely and solely the *right* by which he exercises that office, and seems to convey express judicial authority to the Court, as in this case, to try and adjudge by what right Mr. Lanctot exercises the office of Councillor. This provision does not constitute the Superior Court into a tribunal, committee or otherwise, to decide upon the claims of the rival candidates for the civic office in question, as is done in election contests of members of the Assembly before the legislative bodies, where one candidate may be unseated and another seated in his place; on the contrary, the jurisdiction of the Court is strictly legal, and is restricted to try and adjudge upon the *right of the person complained of* to hold and exercise his office. In the discharge of this judicial duty, it is expressly provided by the statute that the preliminary as well as substantial interest of the complainant, in setting the statute in motion against the officer, lies in his being *a qualified voter*: "Any citizen qualified to vote," the law in no part enabling the losing candidate, simply as such, or under his special qualification for election as Councillor, merely, to compel the action of the Court, upon the provision of the statute. As already observed, the duty cast upon the Court is not to decide upon the result of the election as to which of the rival candidates shall be seated in the office, but to adjudge upon the right of the officer *de facto* to exercise his office, if he shall have been found by the Revisors to have received the majority of votes at the election. In this case, the information, or *requête*, is by the unsuccessful candidate for the office of Councillor, as such, and upon his Councillor's qualification only, and not as a qualified voter; therefore not coming within the terms of the statute, which would justify the action of this Court, the demurrer or plea in law must be maintained, and the *requête* dismissed with costs against the petitioner.

After the judgment had been rendered, the complainant's counsel moved the Court to permit the information or *Requête* to be amended by inserting the required *qualification as a voter*, but this was refused upon the ground that the amendment would change the substance of the information altogether, and would in effect be equivalent to a new *Requête*, which would not then be supported by the affidavits produced, and which would necessarily require the adoption of new proceedings and the issue of a new writ, the present writ having issued upon the allegations contained in the *Requête* above, which did not set forth the only qualification, *that of a voter*, upon which it could have issued.

Abbott & Carter, for the Petitioner.

W. Laurier, for the Defendant.

RECENT ENGLISH DECISIONS.

CHANCERY APPEALS.

Light — Lateral Obstruction — Town. — Where a house is in a populous town, the Court will take that fact into consideration, in estimating the damage done by obstructing an ancient light. The Court will not restrain the erection of a building merely because it deprives an ancient window of some portion of light; but will do so when the obstruction is such as to interfere with the ordinary occupations of life. A lateral obstruction may be such a nuisance as to be restrained. Clarke *v.* Clark, Ch. Ap. 16. The plaintiff in this case was the owner of the house, 28, Park Street, Bristol. The defendant was the owner of No. 27. At the back of the plaintiff's house was a room with a large window looking to the south-west into the garden. The wall between the gardens of the houses was on the left hand side of the window, about four feet from it, and about eleven feet high, running in a direction nearly perpendicular to the window. The defendant, in September, 1864, began to erect in his garden some buildings for photography, running parallel to the garden wall, about three feet from it, and from four feet six inches to eleven feet above the wall. These buildings, though not opposite the window, were thus nearly due south of it, and obstructed, to some extent, the light and sun during the winter months. The plaintiff having obtained a decree for an injunction, the defendant appealed, and the Lord Chancellor sustained the appeal and dismissed the bill. The following are some extracts from his Lordship's judgment:—"The question is, whether there has been such an interference with the light and air reaching the plaintiff's

house as to cause material annoyance to those who occupy it. * * * Much must turn on the nature and locality of the windows, the supply of light to which has been interfered with. Persons who live in towns, and more especially in large cities, cannot expect to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country. * * * * That the effect of the defendant's building is to render the plaintiff's room less cheerful, especially during the winter months, I do not doubt. The direct rays of the sun do not now reach it, during that period of the year, for more than about forty minutes in the day, on an average, instead of about two hours and a half. But I cannot think that this is such an obstruction of light as to amount to a nuisance."

Patent—Joint Grantees.—Where a patent for an invention is granted to two or more persons in the usual form, each one may use the invention without the consent of the others. Mathers *v.* Green, Ch. Ap. 29. Lord Cranworth, in reversing the decision of the Master of the Rolls, said: "Is there then any implied contract, where two or more persons jointly obtain letters patent, that no one of them shall use the invention without the consent of the others, or if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine. It would enable one of two patentees either to prevent the use of the invention altogether, or else to compel the other patentee to risk his skill and capital in the use of the invention on the terms of being accountable for half the profit, if profit should be made, without being able to call on his co-patentee for contribution if there should be loss." [The judgment does not appear to have touched on the rights of joint patentees to the profits made by granting licenses; but we apprehend that, in the absence of express contrac, such profits must be equally divided.—Ed. L. J.]

Statute of Frauds—Part Performance.—A landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate:—*Held*, that this constituted a sufficient part performance of the agreement to take the case out of the *Statute of Frauds*, and specific performance was decreed. Nunn *v.* Fabian, Ch. Ap. 35. In this case the lease had actually been engrossed, and several appointments had been made to execute it; and on the last day that an appointment had been made, the proprietor of the property died suddenly. The draft of the lease, in the handwriting of a clerk of deceased's solicitor, was produced. The Lord Chancellor, in delivering judgment, relied chiefly upon the fact that the tenant had paid a quarter's rent at the increased rate stipulated in the lease, and this he thought was a clear part performance.

Copyright—Alien—Temporary Residence within the Realm—Colony—Canada.—An alien friend residing temporarily in any part of the British dominions, and during the time of such residence publishing in England a work, of which he is the author, acquires a copyright under the 5 & 6 Vict. c. 45. And this is the case, although he may be residing in a British colony, with an independent legislature, under the laws of which he is not entitled to copyright. Low *v.* Routledge, Ch. Ap. 42. This was a case of considerable interest. Maria Cummins, a native of the United States, being desirous of acquiring a British copyright for a work of hers, called "Haunted Hearts," transmitted the manuscript to Sampson Low & Co., for publication by them; it having been arranged that she should, prior to such publication, go to Montreal, and continue there until and during the publication of the work in England. Maria Cummins accordingly went to Montreal, and was living there at the time of the publication of "Haunted Hearts" in London, on the 23rd May, 1864. The work was in two volumes, price 16s. In the same month, Routledge & Co., the defendants, brought out a cheap edition of the same work, price 2s., and the plaintiffs filed a bill to restrain the violation of the copyright. It was admitted that the author had acquired no copyright under the *Canadian Copyright Act* (4 & 5 Vict. c. 61), but it was contended by the plaintiffs' counsel, that the Canadian Acts

could not affect her rights under the imperial law. The *Canada Government Act.* (3 & 4 Vict. c. 35, s. 3) enacted that the Canadian Legislature shall have no power to make any laws "repugnant to any Act of Parliament made or to be made." On behalf of the defendants, it was urged that "the expression referred to in the *Canada Government Act*, means that the Canadian Legislature shall make no law repugnant to any imperial Act in existence at the time when such law might be made; but the Canadian Legislature could not be supposed to foresee what Acts the Imperial Legislature might pass at any future time. The *Copyright Act* (5 & 6 Vict. c. 45) cannot by a side wind repeal the *Canadian Copyright Act.* The general words 'all colonies,' in the 2nd section of the English Act, do not include such colonies as have an independent legislature." Sir G. J. Turner, L.J., in delivering judgment, disposed of this argument as follows:—"A more plausible argument on the part of the defendants was this: It was said that by a Canadian statute an alien coming into Canada for the purpose of publishing a work, and publishing it there, would not be entitled to copyright in the work so published; and it was insisted that an alien coming into Canada could acquire only such rights as are given by the law of Canada, and could not, therefore, be entitled to copyright; and some cases were cited in support of this argument. On examining these cases, however, they will be found to decide no more than this: —that as to aliens coming within the British Colonies, their civil rights within the colonies depend upon the colonial laws; they decide nothing as to the civil rights of aliens beyond the limits of the colonies. This argument on the part of the defendants is, in truth, founded on a confusion between the rights of an alien as a subject of the colony, and his rights as a subject of the Crown. Every alien coming into a British colony becomes temporarily a subject of the Crown—bound by, subject to, and entitled to the benefit of the laws which affect all British subjects. He has obligations and rights both within and beyond the colony into which he comes. As to his rights within the colony he may well be bound by its laws, but as to his rights beyond the colony he cannot be affected by those laws; for the laws of a colony cannot extend beyond its territorial limits."

Sale—Nuisance.—H. sold land to persons who were described in the conveyance as copper-smelters and co-partners, and as purchasing for the purposes of the partnership; and who, between the contract and conveyance, nearly completed smelting works on the lands. H. subsequently sold neighbouring land to the Plaintiff, who bought with full notice of the existence of the copper-works. The plaintiff recovered judgment at law, with substantial damages, for injury done to this land by the smoke of the works, and then filed his bill for an injunction. *V. C. Wood* held that the plaintiff's *having come to the nuisance*, did not disentitle him to equitable relief, and that H.'s having sold the site of the works, *with full knowledge that such works would be erected on it*, did not disentitle him, or those claiming under him, to complain of any nuisance which the works might occasion, and his Honour granted an interlocutory injunction: *Held*, on appeal, that the injunction had been rightly granted. Tipping *v.* St. Helen's Smelting Co. Ch. Ap. 66.

Application for Shares—Minute Book—Entry.—A director of a company signed the articles of association as a holder of twenty-five shares, but applied for fifty shares, which was the qualification of a director under the articles. No allotment of shares was made: *Held*, varying the decision of the Master of the Rolls, that he was a contributory for twenty-five shares only.

A resolution was passed at a meeting of directors, reciting a list of shareholders, in which the Appellant, who was a director, was put down for fifty shares. The Appellant was not present at the meeting, and denied all knowledge of the resolution, although he was present at the next subsequent meeting:—*Held*, in the absence of proof that the minutes of the previous meeting were duly read and confirmed at the subsequent meeting (which it appeared was not always done), that the Appellant was not bound by the insertion of his name for fifty shares. Tothill's Case, *In re* Llanharry Hematite Iron Co. Ch. Ap. 85.

Demurrer—Res Judicata.—Demurrer will not lie to a bill on the ground of *res judicata*, unless it avers that everything in controversy as the foundation of relief was also in controversy in the former suit. CRANWORTH, L.C., said: "I could not find, upon looking at all the authorities to which I had recourse, an instance of a demurrer to a bill upon such a ground as a former dismissal. I take it to be so for this reason, that it never can happen without averments, which are not likely to be introduced, that everything that was in controversy in the second suit as the foundation for the relief sought, was also in controversy in the first. That is a very clear principle, and upon that principle I think the demurrer must be overruled." Moss *v.* Anglo-Egyptian Navigation Co. Ch. Ap. p. 108.

Act of Bankruptcy—Fraudulent Assignment.—An assignment by a trader of all his property, as security for an advance of money which he afterwards applies in payment of existing debts, is not necessarily fraudulent within the meaning of the Bankruptcy Acts. In order to make such an assignment fraudulent, the lender must be aware that the borrower's object was to defeat or delay his creditors. Such an assignment cannot be an act of bankruptcy unless it is also void as being fraudulent.

Lord Cranworth observed: "This is an important general question. I do not think there has been any act of bankruptcy here. It appears that Mrs. Colemere, the alleged bankrupt, was carrying on a small business in the beginning of this year. She was no doubt in embarrassed circumstances. How far that was known to others does not appear very clearly, but she applied in the month of April to her solicitor, Mr. *Salter*, to try and effect through him a loan of money. Mr. *Salter* had in his hands £200 belonging to another client of his of the name of *Carsley*, for the purpose of putting it out at interest; and in order to further the views of the client who wanted to borrow, and at the same time the views of his client who wanted to lend, Mr. *Salter* agreed that he would invest £150, part of *Carsley's* money, on loan to Mrs. Colemere, upon an assignment to him of all her stock-in-trade, and all her property, by way of security. Five weeks afterwards, the stock and goodwill of Mrs. Colemere were sold to another person, and she was manifestly insolvent. The Act, 12 and 13 Vic. c. 106, s. 67, says, that if any trader shall make, or cause to be made, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, he shall be deemed to have committed an act of bankruptcy. This was a very old enactment, repeated from time to time in the successive Acts; and it was held that any assignment made by a trader of all his goods was fraudulent, because it prevented him from carrying on his trade, and so, that whenever a trader had assigned all his goods, he had committed an act of bankruptcy. But to this general doctrine a very reasonable qualification has been introduced, that the assignment to be fraudulent must be an assignment, not for the purpose of raising money to enable the trader to go on with his trade, but for the purpose of paying some favored creditor, or making some payments to all his creditors, otherwise than through the Court of Bankruptcy. In either of these cases it is an act of bankruptcy. But if it is for the purpose of enabling him to raise money to go on with his trade, that cannot be called a fraudulent act, as tending to defeat and delay his creditors, for it probably is, or may be, the wisest step he could take to promote the interest of his creditors. Now, in this case I think upon the facts I must come to this conclusion—certainly that Mr. *Carsley* did not know that he was lending this money for any fraudulent purpose of delaying creditors; and I think I must also come to the conclusion that neither was that known to Mr. *Salter*, who was his solicitor, and also the solicitor of Mrs. *Colemere*, the trader. It was said that what was known to the client must have been known to to the solicitor. That must be taken with great qualification. Certainly, when a solicitor is acting for both parties, facts that are important to the matter in hand, and which are known to the solicitor, may be said to be known to both parties; but it is carrying that proposition a great deal further to say that all facts known to the client are to be taken as known to the solicitor; and to say that a fact not connected with the loan of the money, a

mere intention in the mind of the borrower, if it existed, as to how she intended to dispose of the money which she borrowed when she got it, should be known to the solicitor, seems to me to be preposterous. I assent to the doctrine as laid down by Mr Justice *Willes*, which appears to me to be very correctly put: 'A person dealing *bonâ fide* with the bankrupt would be safe. Unless he knows, or from the very nature of the transaction must be taken necessarily to have known, that the object was to defeat and delay the creditors, the deed cannot be impeached.'" *In re* Colemere, Ch. Ap. 128.

EQUITY CASES.

Bill of Exchange—Indorsement "in need" —Notice of Dishonour.—A bill of exchange, the drawer and acceptor of which became bankrupt before it fell due, was indorsed by the *Leeds Banking Company* to Messrs. P., of Liverpool, payable "in need" at a bank in London. When it fell due, it was presented by Messrs. P.'s agent in London at the banks notified for payment by the acceptor and indorser, and dishonoured at both banks. Messrs. P.'s agent then sent notice of the dishonour, by post, to Messrs. P., at Liverpool; and they, by post, sent notice to the liquidator of the *Leeds Banking* Company, which was being wound up. Upon claim against the Leeds Banking Company, under the winding-up, in respect of the bill:

Held, that the indorsement "in need" constituted the bank notified "in need" agents of the indorsers for payment only, and not agents for notice of dishonou rgenerally; and therefore that notice to them of dishonour by the acceptor was not notice to the indorsers. That presentation for payment to an indorser is not *per se* notice of dishonour by the acceptor; and, that the rule allowing a day for each step in presentation and notice applies only as between the parties to a bill, and does not give a dayfor communication between the agent of the holder of a bill and such holder who resides at a distance; and, therefore, the Court disallowed the claim. *In re* Leeds Banking Co. Eq. 1.

Trustee — Liability — Fraud — Solicitor.— A trustee is liable for the loss of a trust fund caused by the fraudulent act of his solicitor, although in employing such solicitor he may have exercised ordinary care and discretion. Bostock *v.* Floyer, Eq. 26. In this case the trustee had handed the sum of £400, trust money, to his solicitor, a person of good character and extensive practice, who professed to invest the sum on a mortgage, and deposited with the trustee a bundle of deeds and documents relating to the title. He, moreover, paid the interest regularly up to the time of his death, ten years afterwards, when it was discovered that he had applied the money to his own use. The Master of the Rolls, Sir J. Romilly, said:—"The case is too clear for argument; the liability of the trustee is a matter of every day occurrence in the Court * * This is simply the case of a person employing his servant to do an act, and the servant deceiving him; and any loss so occasioned must fall on the employer, and not on the *cestui que trust.* Of the two innocent persons, therefore, one of whom must suffer by the wrongful acts of the solicitor, the loss must fall on the trustee who employed him, and did not take all the precautions he might have taken against being deceived. The fund must be replaced with interest at 4 per cent."

Injunction—Board of Health.—An injunction was granted on the 6th of March, restraining a local board of health from causing or permitting sewage, or water polluted therewith, to pass through drains or channels under their control into a river, to the injury of the plaintiff, a miller, residing about three miles below the outfall of the works of the local board. Execution of the order was stayed till the 1st of July. The Company did not, subsequently to the 1st of July, stop the flow of sewage into the river, but alleged that they had not yet succeeded in discovering a mode of deodorizing the sewage—that compliance with the order was practically impossible, without stopping the drainage of the town, which would expose them to hostile proceedings at law and equity, and compel them to infringe an Act of Parliament; that there had been no wilful default, and that a sequestration would be ineffectual, as the property of the board was all public property—injurious to the public,

as preventing the board from discharging their duties—and futile, as it would compel the members of the board to resign:—*Held*, that there had been a gross and wilful contempt, and sequestration ordered to issue. Spokes *v.* Banbury Board of Health, Eq. 42. Vice-Chancellor Wood remarked in his judgment, "that the rights of those who are injured cannot depend upon the question of whether it be one or many who inflict the injury. First, take the case of an individual: see how it would stand, and whether there would not be a deliberate breach of the injunction. Suppose a man, for his own convenience, for the purpose of getting rid of his own sewage, something that annoys him, throws it into his neighbour's yard, or into his neighbour's river, and that he is ordered by the Court not to permit the sewage under his control to pass into his neighbour's river, to his annoyance. Suppose that he afterwards comes here, telling the Court that he has consulted most eminent chemical authorities, and has done the best he can during a long continuance of inquiry, but that he has found out there is no possible mode by which he can deodorize the sewage, or at least that he has not yet arrived at or discovered it, and therefore that he has not ceased to pour that sewage into the river or upon his neighbour's property; that he pours it into the river because he does not find it pleasant or agreeable to retain it; that he means to continue to pour it into the river until he shall find out something that will deodorize it; and then asks the Court to stay its proceedings until that is done. Would not that be a most outrageous breach of the order, and a flagrant contempt, for which the only proceeding the Court could take would be to order committal?"

JUDGE ADVOCATE HOLT.—*Harper's Weekly* of Sept. 22d, rebuts the charge that Judge Advocate HOLT was in league with base men to injure JEFFERSON DAVIS by evidence which he knew to be false. It appears that SANFORD CONOVER (the same, we believe, who made himself notorious in Canada) offered to furnish Mr. HOLT with important evidence of the complicity of DAVIS and CLAY, and was accordingly engaged to collect the testimony. But the depositions thus obtained, when tested, were contradicted by those by whom they purported to have been made, and CONOVER disappeared.

PUNCH'S LEGAL INTELLIGENCE.—We have received numerous inquiries about the Vacation Judge in Chambers. Our legal young man has undertaken to give our readers all the necessary information.

The Vacation Judge is the only Judge left in town during vacation. He is the "last rose of summer left blooming alone, all his pleasant companions are faded and gone."

It is, generally speaking, a punishment (the only one which can be inflicted upon so high a legal functionary) for bad behaviour during term time, and is, evidently, the very opposite of college rustication.

His duties are light, but this is small compensation for the long imprisonment. He spends his time in starting imaginary objections, in taking notes of ideal cases, in making speeches to himself before the looking-glass, and in summing-up!

When tired of this, he plays leap-frog with the chairs, and dashes his wig.

After luncheon, he amuses himself by playing on a small comb through a piece of brown paper. Smoking is strictly prohibited in Chambers, but his Lordship is not unsuccessful in keeping on the windy side of the law, by putting his head out of the window in order to enjoy the fragrant Havannah. At seven o'clock his dinner is brought to him, and after that he is allowed one turn on a barrel-organ. At ten o'clock he sings a little thing of Sir ROUNDELL PALMER'S composition, and retires gracefully to his couch, which has been prepared for him at an earlier hour.

Anybody may look in and see the Vacation Judge, on payment of a small fee to the clerk in the outer office. The Vacation Judge is quite quiet, and will talk to a visitor through the bars of his window, or through the key-hole of his chamber door, with much playfulness and good temper.

Give him a joke to crack and he will evince his gratitude in his own peculiar fashion.

Such, for the instruction of your readers, is the amount of information which I can give you about the Vacation Judge.