The Legal News.

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TRADERS CONTESTING WRIT OF COMPULSORY LIQUIDATION.

We inserted last week a note of a decision in the case of *Anderson* v. *Gervais*, in which the Court held that it had no jurisdiction to permit a trader, against whom a writ of compulsory liquidation had issued, to continue his trade while the contestation of the attachment was pending. This decision was opposed to one rendered in 1876 in *Fisher* v. *Malo*, Rainville, J., in which it was held that the Judge may, under special circumstances, permit the insolvent to continue his trade. In that case the writ of compulsory liquidation had been quashed, but an appeal had been taken from the judgment. The Court held that the judgment had the effect of giving back to the trader the possession of his effects, and he was allowed to continue his trade while the case was pending in Review. This decision has been followed by the Court of Review in *Anderson* v. *Gervais*, the decision noted last week being reversed. The Court of Review holds that a trader may be allowed to continue his business, pending proceedings to set aside a writ of compulsory liquidation, on giving security to the full value of his stock.

LIABILITY OF PROTHONOTARIES.

In connection with certain recent proceedings affecting an insolvent estate, an interesting question has arisen as to the liability of prothonotaries in issuing special writs, such as *saisies-arrêts* before judgment, or *saisies-conservatoires*. Is a prothonotary bound, on the production of an affidavit, to allow the writ to issue, or is it his duty to examine the affidavit, and determine whether the allegations are sufficient to justify the demand? And again, if it be assumed that he is bound to examine the affidavit, is he responsible for the damages which may have been caused by a seizure based on an insufficient affidavit?

These important questions received considerable attention in a case decided by the Superior Court in Montreal some years ago, and affirmed in appeal. We refer to the case of *McLennan et al.* v. *Hubert et al.*, in which the joint prothonotary was sued in damages under the following circumstances: A sailor, named Marcile, claimed the sum of $7.25 to be due to him for wages, by one Couvrette, captain of a barge, and he made an affidavit of which the following is a literal translation: "That the defendant is indebted to him in the sum of seven dollars and twenty-five cents, being for wages as sailor on board the barge bearing the name of ——, and that said barge is on the point of leaving the Port of Montreal, to go to the United States of America, and that without the benefit of a *saisie arrêt* before judgment to seize and arrest the said barge, its equipment and cargo, the plaintiff will lose his debt and suffer damage." This affidavit was presented to Mr. Papineau, one of the defendants, as joint clerk of the Circuit Court, on the 4th September, 1871, and thereupon he ordered the issue of a writ of *saisie arrêt* before judgment, commanding any bailiff of the Superior Court "to seize and arrest all the goods, debts and effects of Albert Couvrette, barge captain, of the Parish of Ste. Cecile, District of Beauharnois, and particularly a barge and its equipment and cargo; said barge known under the name of "Guard," presently in the Port of Montreal." The seizure was made while the barge "Guard" was one of ten which were being towed by a steamer through the Lachine Canal, and a detention of ten hours was caused to the whole tow. This, it was established, entailed a loss of about three hundred dollars on McLennan & Co., the proprietors of the barges, viz.: twenty dollars for each barge, and one hundred dollars for the steamer. The attachment was quashed by the Court, on the ground that the affidavit did not contain the essential averments required by law for the issuing of a writ of attachment, and the proprietors of the barge then gave the prothonotary notice of an action to recover the damages occasioned to them by the seizure, alleging that the prothonotary had acted "illegally and without reasonable or probable cause."

The action was met in the first place, by a demurrer, alleging that the prothonotary and clerk are bound, on the demand of the plaintiff's attorney, accompanied by an affidavit *serieuse et de bonne foi*, to issue writs of *saisie arrêt*, before

judgment, and others of the same nature, and that they cannot constitute themselves judges of the sufficiency or insufficiency of such affidavit. The demurrer was dismissed, Mackay, J., considering the declaration if proved, sufficient to justify a judgment. From this decision, therefore, it would appear that an action of damages lies for the issue of special writs "illegally, and without reasonable or probable cause."

The defendants also pleaded to the merits, that at the time of the seizure, the question as to whether a seaman had a right to obtain a *saisie conservatoire* for his wages, due on the last voyage, was controverted; and that the defendants had acted in good faith, "*de bonne foi et sans négligence ou impéritie.*" At the *enquête* two of the prothonotaries were examined. One, Mr. Papineau, who has since retired from office, disclaimed any discretion in the matter. He said: "We consider the affidavit as the work of the deponent and the lawyer, *and we do not read it*, considering ourselves responsible only for the jurat and the manner of administering the oath." Mr. Hubert, however, who was also interrogated as to the practice, replied: "Since I have been one of the prothonotaries, I have never, as a general rule, received affidavits for special writs, such as *saisie arrêt* before judgment or revendication, without examining and reading them."

The Superior Court, Torrance, J., dismissed the action, the principal motive being: "considering that the plaintiffs have failed to prove that the *saisie-arrêt* before judgment set forth in the declaration, was issued without any reasonable or probable cause." And the point was further elucidated by the following remarks of the learned judge in pronouncing the judgment: "The function which the prothonotary performed here, may be regarded as a *quasi* judicial one, and in a case of *Carter & Burland*, the Court has already to-day decided that a magistrate is not liable where there is no malice or misconduct on his part. Broom's Maxims show that even inferior magistrates cannot be called into question for a simple error. It is better that an individual should occasionally suffer wrong than that the course of justice should be impeded by constant apprehension on the part of those who have to administer it. The question raised here as to the issue of the *saisie-arrêt* is one upon which different judges have held different views, and is it to be said that a prothonotary is liable because he does not refuse to give out a warrant of *saisie-arrêt* on what at least appeared to be a sufficient affidavit?"

The case was taken to appeal, and very ably argued by Mr. Girouard, on behalf of the appellants. It was urged that Mr. Papineau in issuing these special writs, without even taking the trouble to read the affidavits, was guilty of gross neglect, for which, if he was a mere ministerial officer, he was answerable; and, on the other hand, if it were held that he was acting in a judicial capacity, he had exceeded his jurisdiction, and should likewise be held answerable. The judgment, however, was affirmed; the Court holding that although the Prothonotary had apparently acted without sufficient circumspection, yet he had not acted in bad faith, and was, therefore, not accountable.

The principle deducible from this decision seems to be, that while the prothonotary is bound to exercise a certain degree of care, he will not be held liable in damages, unless bad faith or very gross carelessness be proved against him. Perhaps this is the safest rule that could be laid down. If prothonotaries were to be held liable for erroneous judgments, the inconveniences arising from their refusal to act, might be greater than those proceeding from ill-advised or hasty action. They would in cases of difficulty require time to deliberate, and to consult authorities and counsel, and the ordinary difficulties of overcoming official *inertia* would be vastly multiplied. We may remark, in conclusion, that those who wish to see in what cases judges, or those acting in a judicial capacity, are responsible, will find a full examination of the question in the case of *Lange* v. *Benedict*, ante, pp. 337, 341.

According to statistics published in the Boston *Commercial Advertiser*, the number of bankruptcies filed under the late bankrupt law, from the time it went into operation, June 1, 1867, to August 31, 1876, was 103,005, of which 15,151 were in the Eastern States, 24,534 in the Middle States, 22,780 in the Southern States, 40,096 in the Western States, and 433 in the District of Columbia.

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, Nov. 23, 1878.

TORRANCE, J., RAINVILLE, J., JETTÉ, J.

ANDERSON v. GERVAIS, and GERVAIS, Petitioner.

Compulsory Liquidation — Insolvent Continuing Trade Pending Contestation.

Held, that the Court or Judge may permit a trader against whom a writ of compulsory liquidation has issued, to continue his business pending the contestation of the writ, on his giving security for the value of his stock-in-trade and other assets.

The defendant inscribed in Review from the decision noted *ante* p. 566, which refused permission to the insolvent to continue his business while the contestation of the writ of compulsory liquidation, which had issued against his estate, was pending.

The Court reversed the judgment, the reasons being recorded in substance as follows:

"Considering that under Sect. 9 of the Insolvent Act, 1875, the writ of compulsory liquidation is subject as nearly as can be to the rules of procedure in ordinary suits, as to its issue and return, and as to all proceedings subsequent thereto before the Court or Judge;

"Considering that under Sect. 16 of the Act, after the issue of a writ of compulsory liquidation, the assignee holds the property of the defendant only in trust, for the benefit of the insolvent and his creditors, and subject to the orders of the Court or Judge;

"Considering that under Sect. 17 of the Act, the defendant, when he contests the writ of compulsory liquidation issued against him, is obliged to furnish the assignee with a statement of his affairs only within ten days from the date of the judgment rejecting his petition to have the writ quashed, and not within ten days from the service; and that under Sect. 20, the assignee, if the writ is contested, can call a meeting of the creditors only after the contestation is rejected;

"Considering that it results from these provisions, that until judgment is rendered on the contestation of a writ of compulsory liquidation, the defendant is not absolutely divested of the possession of his estate for the benefit of his creditors, but the law gives the assignee only provisional possession thereof, subject to revocation in case the writ of compulsory liquidation is set aside, and that he only holds such property subject to the orders of the Court, or Judge;

"Considering that in such case, and before such adjudication on the merits of the contested writ of liquidation, the assignee can be considered merely as a guardian or depositary, charged with the custody of the defendant's property as well for defendant's benefit as for that of his creditors;

"Considering that in all matters concerning the possession of property seized, the appointment or the discharge of guardians, depositaries or *séquestres*, the Court or Judge has a summary jurisdiction, the exercise of which is limited only by the particular circumstances of the case;

"Considering, in fact, that the defendant in this case has contested the writ of compulsory liquidation issued against him, and that this contestation is still pending;

"Considering that the defendant asks to be put in possession of his property only on giving such security as may be judged sufficient to protect the rights of all interested;

"Considering that the interest of the plaintiff in this cause and the interest of all the other creditors of the defendant in maintaining the seizure of defendant's property, cannot exceed the full value of the defendant's property and assets, and that on such full value being secured by sufficient security, the rights of all interested will be fully protected;

"Considering that to refuse the defendant offering such guarantees the possession of his estate and permission to continue his trade would expose him unjustly to damage, &c."

Judgment reversed, and defendant allowed to continue his trade on giving security for the value of his assets.

Abbott & Co. for plaintiff.

Doutre & Co. for defendant and petitioner.

COURT OF QUEEN'S BENCH.

Quebec, Dec. 3, 1878.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER CROSS, JJ.

BEAUDET, Appellant; and MAHONEY, Respondent.

Appeal from Circuit Court—Factum.

The appeal was from a judgment of the Circuit Court. A motion was made verbally by

the appellant, that he should not be held to proceed until he had time to file a factum.

The Court did not think the appellant was entitled to succeed on this motion. A factum is not required in appeals from the Circuit Court, unless it be specially ordered, and the Court will not make such order without some cause shown, and particularly on the part of defendant, the effect of such order being to create a great delay. Parties can always make a factum if they desire it.

Motion rejected.

SUPERIOR COURT.

Montreal, Nov. 30, 1878.

JOHNSON, J.

THE ATTORNEY-GENERAL, *Pro Regina*, v. THE MONTREAL CITY PASSENGER RAILWAY CO., & THE TRUSTEES OF THE MONTREAL TURNPIKE ROADS, *mis en cause*.

Street Railway Company—Nuisance—Exercise of powers under Statute.

A street railway company was authorized by Statute to lay its track "along the highways in the Parish of Montreal" leading into the streets of the city. *Held*, that the Company in laying its track inconveniently close to the property on one side of a highway, and thus apparently favoring the property on the other side, had not exceeded its powers, and an action for the abatement of the alleged nuisance was dismissed.

JOHNSON, J. This is an action for the abatement of an alleged nuisance. The Attorney-General says that the City Passenger Railway Company at a certain part of their track, from the church at Coteau St. Louis, to the station of the Quebec, Montreal and Occidental Railway, have abused and acted in excess of their powers, by laying their track too near the property of the plaintiff; so near, in fact, that neither man nor beast can conveniently use the highway along which the railway runs, to the great injury in particular of the estate of the late Stanley C. Bagg. The plea is that the Railway Company has acted within its powers as well with respect to the municipality of Cote St. Louis, as with respect to the Trustees of the turnpike roads, and that they have done no injury to the party whose interests are said to be more particularly affected. The latter part of the plea opened the door to much evidence that I thought irrelevant at the trial, and I said so—and I still think so, for surely if the Railway Company has acted within its powers, the injury, if any, of an exercise of legal power, should not expose them to take up their track. I therefore do not express any opinion that can affect the result of the case upon the point of injury. The evidence showed that the track was, at the place indicated, put very near indeed to the sidewalk—I should say very inconveniently near. It was also in evidence that this eccentric course was detrimental to the estate in question, and very beneficial to the estate Beaubien on the opposite side of the road, because nobody would buy lots to build on when the first step from their front door would expose them to get their toes cut off on a horse railway: and at the same time the extension of the track to that semi-rural locality was a boon to the class of people likely to live there. All this may or may not have resulted, as was more than insinuated, from the personal influence of the opposite proprietor, who appears to have been an officer of the Turnpike Trust; but I think I can only look at the question of power or no power to run this railway along that highway. That depended on the different statutes:—1st. There was the 3rd Vict., c. 31, of the Special Council, which gave the Turnpike Trustees exclusive control of the turnpike roads, of which this is one; therefore, it became necessary for the C. P. Railway Co. to get the Trustees' permission, which was done. Then all that remains is to see that besides the authority of the Turnpike Trustees the Railway Co. had the power to take their track where they have taken it. Their act of incorporation is the 24th Vict., ch. 84; and the fourth section gives the power not only along the streets of the city, but "along the highways in the Parish of Montreal leading into the said streets, and contiguous thereto, or any of them." Although, therefore, this may be injurious to adjacent proprietors, it would be impossible to hold that the exercise of a right, within the limits of the powers conferred upon them, however inconvenient that exercise may be to one or more individuals, can expose the defendants to undo what the law has authorized them to do. The action is therefore dismissed. I have no power to give costs against the Crown, but the law allows me to recommend that they be paid, and I think the defendants are entitled to their costs, and I see besides

that the Attorney-General has taken security to that effect.

Doutre & Co. for the plaintiff.

Abbott & Co. for the defendants.

LACHAPELLE v. BEAUDOUIN.

Action for Aliments—Toit Conjugal—When Wife may refuse to live with Husband.

A wife who has grounds for demanding *séparation de corps* from her husband and an alimentary allowance, may claim an allowance without asking for separation.

The *toit conjugal* is where the husband resides; but if the husband keeps a concubine in the house, the wife is justified in refusing the offer of a home with him.

JOHNSON, J. This is the case of a married woman *commune en biens* with her husband, who still lives in Montreal, but who, as she says, has left the "*toit conjugal*," and she sues him simply for the support of herself and their child. This leaving what she calls the "*toit conjugal*" and going to live in another house is all that constitutes her ground of action. His defence is that she compelled him by her illtreatment of him and his two children by a former marriage, to go and live elsewhere, and that she keeps the household goods, while he is obliged to find support for the two children and himself, and he nevertheless offers to receive her where he resides. The answer of the wife is one of recrimination, and very serious recrimination. She says he is living with another woman who has taken her place. Now, the first thing I have to observe in this case, is that this is a court of law. It is not a place where parties in any suit, and much less where a husband and his wife, can be permitted to come merely for the sake of saying to each other disagreeable things. We must have distinct notions of what the legal obligations of these two persons to one another really are; we must see a plain principle upon which we are asked to exercise our authority; and nothing precise, no point, no rule, has been distinctly urged by the counsel on either side. I must say I always thought that what this poor woman or her adviser calls the *toit conjugal*, was the husband's roof there he could make her reside; not her roof where she could make him reside. His leaving one spot, and moving to another, might have the effect of making her follow him; but I never heard that it meant he was to come back again at her bidding. In one word, the obligation of the husband is to receive her and supply her with all the necessaries of life, according to their means and condition. This is the text, the very words of the Code (see article 175). More than that, by the same article, "she is obliged to live with her husband, and follow him wherever he thinks fit to reside." Therefore, unless there has been a refusal on his part to do so, she has no action. It must be observed that here she is not asking for a separation, which, no doubt, desertion and adultery, if they are truly alleged, might give her a right to get. The extent of the defendant's obligation is to receive and support her at his house; and there is no refusal, it is said, and therefore no right of action. As to the special answer and the evidence of adultery, that, it is contended, cannot be regarded—and I see there was an objection made to such evidence. In an action for *aliments*, it is urged, she cannot prove adultery; it is irrelevant. If she can't live with her husband, let her take an action *en séparation*. That fact does not give her a right to *aliments*—it gives her only a right to separation. That, at first, seems the sense of the text of the authorities, no doubt; but I will never consent to make an application of authority that seems to me absurd in any particular circumstances. The Code, no doubt, and Pothier (see C. C., Art. 175; and Pothier, Marriage, Nos. 381-2-3), seem to say to this woman: "You are obliged to go and live with your husband." He has even an action to compel her to do so; and she cannot oppose any *mauvais traitements* on his part. That is, no doubt, the law; but it seems to me, in the first place, as regards the mere text of the law, I am obliged to find a meaning in it, and to give it a reasonable application; and I hardly see how, if she can ask for a separation and its concomitant—the means of support—she cannot content herself with asking only a part of what the law gives her—that is, merely the means of support—under circumstances which he has forced upon her. But more than that, when she is told:—"You are obliged to go and live with your husband," she answers substantially:—"He has no home to offer me;" for it amounts to that, if what she says is true, and unless she has the faith of a Mormon. Therefore, though the husband's plea is good to that extent, where he

offers her a home which she is obliged by law to accept under ordinary circumstances, we must see and apply to this case what is Pothier's meaning when he says that if the husband brings his action to make his wife come and reside with him, she cannot oppose his *mauvais traitements*. Pothier, to some extent, discusses the circumstances under which she can refuse; but does not mention the circumstance that arises here. Demolombe, however, discusses Pothier—see Demolombe, vol. 4, Nos. 95, 96, 97—where the whole subject is treated, and from the element in the husband's obligation to treat his wife "*maritalement*," he deduces her exemption from co-habitation with him while he keeps a concubine in the house. I must, therefore, look at the evidence on this head, which I consider relevant as an answer to his offer of a home. There is only one witness, a Mr. Monette, who speaks of it, but there appears no doubt of the fact, and the witness says he knows both the defendant and the woman who lives with him as his wife perfectly well; therefore, I think the wife has a good answer to the defendant's plea, and the marriage not being denied, she must be supported by her husband, and under the proof of his means the judgment will be for $16 a month, including the child of the marriage, payable in advance, with costs of suit. The proof is altogether in favor of the wife's good conduct while they lived together.

Vanasse for plaintiff.

F. L. Sarrasin for defendant.

MR. JUSTICE MILLER ON LEGISLATION AFFECTING THE ADMINISTRATION OF JUSTICE.

[Continued from p. 576.]

A very distinguished friend of mine, a former Associate of the Bench of the Supreme Court, told me this story: His father died when he was very young and left him some $20,000 in personal property, which the executors of the will sold, and they used the money. When he became of age he sued these executors and their sureties in Chancery for an accounting, and for the amount due. The case came to the Court of Appeals of Maryland, which held by a majority of one, that a suit in Chancery could not be maintained, but his remedy was at law. He then brought his action at law, which also came into the Court of Appeals, whose membership had been changed, and which now held that the proper remedy was a suit in Chancery, for an accounting, and after that an action at law might be sustained on the bond. Yet this gentleman is very hostile to the system of procedure by which the principles and remedies of both law and equity are applied in one forum and in the same action as far as they are appropriate to the case.

I am quite aware that in the gradual approach which I have been making to the subject of the Code of Practice or Code of Procedure of this State, the main features of which have been adopted by the Legislatures of two-thirds of the States and Territories of the Union, I am coming to a subject in which there is still a wide difference of opinion; and in regard to which many of the ablest lawyers of this and other States differ with me wholly. Not only so, but I am sensible that it is a sore subject, and one in regard to which men have become partizans with a zeal almost deserving the name of bigotry. But I should have to abandon the rule of a life-time if I did not on this, as I have on all other occasions, express the material convictions of my mind on a subject which lies directly in the pathway of appropriate discussion.

The object of all pleadings in the courts, the object of the courts themselves, is to ascertain the truth in regard to controverted facts, and the law applicable to those facts. If, abandoning any *a priori* discussion of the superiority of the code system, or the common-law system of pleading, for these purposes, we look to the results as they are seen in the reports of cases decided in the higher courts, I think it will be found that a much larger proportion of cases were argued and decided in those courts on mere questions of form in pleadings, and technicalities in practice, which determine nothing of the merits of the cases, while the old forms prevailed, than since they have been abolished. Many, very many causes went to the appellate courts and were there decided, on purely technical questions as to the form of the action, or the form of the plea, which neither touched nor affected the very right of the matter. And while questions of pleading are even under the code system sometimes carried to the Court of Appeal, as

they must be under any system, I venture to say that taking the volumes of reports of all the States which have adopted the Code, and comparing these volumes as to that class of cases before and since its adoption, its advocates will have every reason to be satisfied with the reform.

There may be those present who will think it a sufficient refutation of this assertion to say: "Look at the volumes of Howard's Practice Reports." One answer to this reference is, that while Mr. Howard calls his volumes "Practice Reports," that term would as fitly apply to any other series of reports as to his. The number of his volumes is swelled by reporting every thing else as well as practice cases. A better answer, however, is found in the fact, that for reasons which I shall give, the new system of pleading has in the courts of New York been far more productive of contests which reach the higher courts than the same system has in any other State where it has been tried.

As I have already said, this State was the pioneer in the introduction of the code system. Here it met its first and fiercest opposition. The very great number of judges who were called to administer it naturally led to differences in construction. All these courts have reporters, and by reason of the complexity of your judicial system almost every section of the Code was made the subject of conflicting decisions.

I take the liberty of saying also, that the principal source of the contests over the Code of Procedure was the hostility of the lawyers and those who then occupied the bench. All of these had been bred as lawyers under a system of pleading very technical, very difficult to understand, which constituted of itself a branch of learning supposed to be very abstruse and very valuable. It was one of the titles to reputation and success in the profession, that a man was a good special pleader. To find, as many of these erroneously supposed, all this learning of a life-time rendered useless was more than human nature could bear with composure.

To see the tyro in the profession, made by this change in the law of pleading, as capable of preparing a good declaration, a good plea, or a good bill in chancery, as the patriarch of the bar, to see his blunders remedied by the simple process of amending the pleading, instead of gratifying his adversary by being turned out of court as a tribute to that adversary's learning, was very provoking.

No system of practice, which the ingenuity of man could devise, would at first work out satisfactory results which should be received with the determined hostility that this was, by the lawyers who had to conform to it and the courts which had to introduce and construe it. The Code, itself, being a first attempt, was not of course perfect. It was undoubtedly too minute in its details, and was, therefore, too voluminous. It undertook to provide specifically on every exigency of the practice, when it would have been wiser, after abolishing all technical forms of action and pleading, and establishing a few general rules in their stead, to have left the courts to perfect the system by the application of those philosophical principles of pleading which are essential to all systems, and which go to make pleading a science. When the prolixity and minuteness of the Code encountered the querulous distrust of the courts and the hostility of a profession which shrinks from innovation as from a plague, it as not to be wondered that it was unpopular. But under all these disadvantages the general system has come to receive the approval of the profession in this State, and I suppose that the number of those who would be willing to abolish the Code of Procedure is small, even in New York. Outside of this State, it has met with as general approval, wherever it has been tried, as any reform in the law can be expected to meet. There were those who opposed the substitution of milder punishment in the long list of crimes once punished by death, including sheep stealing, who thought the abolition of imprisonment for debt was a fatal stroke at the sanctity of contracts. Even now by a slight stretch of conscience in charging fraud, a man who cannot give bail is thrown for an indefinite time into Ludlow street jail, whose only crime is that he cannot pay his debts. Those who have faith in progress, of whom I hope always to be one, in the progress of the race, in the progress of science, in the progress of the science of the law, must make up their minds to encounter the opposition of this class, always

and at all points, where reform is needed or attempted.

Fortunately New York stood almost alone in her cold reception of the system she was the first to inaugurate. The Wells' Code, as it is called, was adopted by the Legislature of Missouri, about the same time that the Legislature of New York enacted the Code, which is attributed mainly to Mr. Field. I am not quite sure if the statute of Missouri is not the older of the two, but since the Legislature of New York was some time in enacting the Code which its commissioners had reported, it is fair to suppose that Judge Wells, who prepared the Missouri Code, had the benefit of the labors of the New York Commission. In other States, while it has been subjected to much modification, the New York Code of Procedure is confessedly the model on which they all are framed, and the value of the reform is scarcely controverted.

As suggestive of the better mode of remedying the old evil, without the too sudden introduction of a full fledged novelty, I take the liberty of reciting how it was done in my State of Iowa. The Legislature having appointed three commissioners to revise and codify its laws, their report was in the session of 1851 enacted into a Code. This entire body of the laws of the State, apart from the common law, was comprised in an octavo volume of 684 pages including index. Chapter 104 was devoted to pleading, and chapter 105 to the trial of causes and its incidents. The chapter on pleading contained 33 sections, and that in regard to trials, 63, and both of them occupied seven pages of the book. The first section declared that all technical forms of action and of pleading are hereby abolished." A few general definitions of the nature of pleading, and provisions for the correction of errors and mistakes followed, and the courts were but to apply to this skeleton the principles of the science of pleading, which are of universal acceptance under all systems of practice. The courts and the lawyers with few exceptions conformed to the change in the proper spirit, and the result is that fewer practice cases are reported in the forty-eight volumes of Iowa Reports than in any equal number of such volumes in the United States. A man who should attempt to make a living by publishing a series of practice reports in that State would have to live on a meagre fare.

What remains for legislation to do in this branch of our inquiry is, the gradual perfection of the work already so far advanced, its introduction into the practice of the States which have not yet adopted it, and into the practice of the Federal courts. By an act of Congress, passed in 1872, the pleading and practice of those courts must conform in actions at law as near as may be to those of the State courts when the former are held. This leaves the pleading and practice in Chancery cases to rest mainly on the system of the High Court of Chancery in England, as it existed prior to our revolution, except as it may be modified by rules established by the Supreme Court.

In cases at law the courts which administer the laws of Congress, and decide in the courts of the Union the rights of American citizens, are governed in their action by thirty-seven different codes of pleading and practice.

The administration of justice would be much improved by a short, a simple, and a uniform Code of Procedure, governing the practice of all the courts of the government of the United States, and legislation to this end is much to be desired.

You may inquire why I have addressed these remarks on the law-making function to you, whose main pursuit in life is to learn what the law *is* and to aid in its administration?

I answer: Because in the work of your profession, unless you sink into the merest routinist, you will be the first to discern the imperfection of the rules by which your action is governed, and to make wise suggestions of remedy; because, individually and collectively, lawyers have in all free governments exercised a larger influence in legislation, than any other class of citizens; and lastly, because I feel well assured that if this Association shall determine with any reasonable approach to unanimity in favor of any reform in the law, and shall urge it with energy, success is sure to follow the effort.

I fear, gentlemen, I have undertaken to cover too much ground for the occasion, and I know I have imperfectly suggested, rather than demonstrated, any of the propositions I have placed before you.

In fact, I have not been able to resist the

temptation to talk with *you* rather than to deliver an essay for *others* to read, and if you have enjoyed the listening with half the pleasure I have had in the talking, I shall feel more than compensated for the little time I have been able to bestow upon this effort to stimulate your interest in a noble cause.

THE PATENT LAWS—THE FIRST AND TRUE INVENTOR.

The recently reported case of *Dalton* v. *The Saville Street Foundry and Engineering Company*, 39 L. T. Rep. N. S. 97, in which the Court of Appeal affirmed a decision of Baron Pollock, is of great practical importance in the law of patents. The case is all the more interesting because it dealt with a question which hitherto had not arisen in a court of law, at any rate in this country. The present action was brought to restrain the defendants from infringing a patent for improvements in machinery granted on the 7th June, 1876, to A, one of the plaintiffs, and B, her assignee. A was widow administratrix of her late husband. The patent in question was granted to her as for a communication made to her by him. In the statement of claim there was an allegation that the invention had been communicated to her by her deceased husband, and that the same was not in use by any other person, but was a new invention as to the public use and exercise thereof within the United Kingdom. The communication of the invention was made to the widow by means of documents found by her among her husband's papers after his death. The defendants demurred on the ground that, on the facts therein stated, A was not, within the meaning of the statutes relating to patents, the first and true inventor of the supposed invention, inasmuch as it was not invented by her, and was not a communication to her from abroad, but by an Englishman residing in England, and that the letters patent were therefore not valid. After an elaborate argument in the court below the demurrer was allowed. Baron Pollock considered, first what was the real construction of the patent itself coupled with the allegation made in the statement of claim. Having come to the conclusion that the communication was made within the United Kingdom, and not in any foreign country, his Lordship remarked: "The true construction of this patent seems to me to be that this is a communication of an invention by some other person during his lifetime to the petitioner who applies for the grant of the patent." It had been argued that, inasmuch as the patent had been *de facto* granted, it ought to be assumed to be good. To this Baron Pollock replied: "Of course if language is used which is capable of two meanings, or if upon any sound construction a grant by the Crown can be supported, it is for the benefit of the individual, and also for the benefit of trade, and it will be the duty of the court to support the grant of the patent. * * But the question here is, whether, upon the face of the patent, there is any sufficient averment that this lady was the 'true and first inventor' of the invention within the meaning of the statute, and whether upon the other hand it is not manifest that she was not the true and first inventor, but merely a person who is in possession of an invention which was communicated to her by a person in this country who was the true and first inventor." The 5th section of the Statute of Monopolies, 21 Jac. c. 3, provides that the statute shall not apply to letters patent for the term of twenty years heretofore made of the sole working and making of any manner of new manufacture within this realm to the first and true inventor of such manufacture. His Lordship held that, inasmuch as A. was not the first and true inventor within the meaning of the statute, the defendants must succeed The plaintiffs accordingly appealed, but, before noticing the arguments in the court above, we may here briefly refer to a few of the reported cases.

One of the earliest cases, with respect to monopolies in general, is contained in Godbolt's Reports, *The Clothworkers of Ipswich case*, p. 252. The masters and wardens of the clothworkers in question brought an action of debt, and declared that the King had incorporated them, and had granted unto them by charter the exclusive right of requiring proof from all who intended to trade as clothworkers or tailors, that they had duly served their apprenticeship. It was agreed by the whole court that the King might make corporations, and grant to them power to make ordinances for the ordering and government of trade, but that thereby they cannot make a monopoly, for that is to take away free trade, which is the birthright of every

subject. It was also resolved that, although such clause was contained in the King's letters patent, yet it is void; but where it is either by prescription or by custom confirmed by Parliament, then such an ordinance may be good, *Quia consuetudo legalis plus valet quam concessio Regalis.* Thus the King granted to the Abbot of Whitney the custody of a port which was, as it were, the key of the kingdom, and therefore the grant was adjudged void, such grant being expressly against the statute of Edw. 3, c. 1. Again, the King granted to B that none besides himself should make ordnance for batteries in the time of war. This grant was also adjudged void. The court then touched upon a distinction which has had the effect of making this case frequently quoted in patent cases. "If a man," it was said, "hath brought in a new invention and a new trade into the kingdom in peril of his life, and consumption of his estate or stock, or if a man hath made a new discovery of anything—in such cases the King, of his grace and favor in recompense of his costs and travail, may grant by charter unto him, that he only shall use such a trade or traffic for a certain time." When the trade has become common, the monopoly ceases. Chief Justice Cook put this case: The King granted to B that he solely should make and carry kerseys out of the kingdom, and the grant was adjudged void.

A grant of a monopoly may be to the first inventor by the 21 Jac. 1; and, if the invention be new in England, a patent may be granted, though the thing was practised beyond sea before; for the statute speaks of new manufactures within this realm. So that, if it be new here, it is within the statute, for the Act intended to encourage new devices useful to the kingdom: *Edgeberry* v. *Stephens*, 1 Web. P. C. 35. The reporter's note to this case is to the effect that the decision is in accordance with the old common law; and it has been the uniform practice to the present time (1844) to grant letters patent for such inventions, and the Legislature have repeatedly recognized the principle by granting rewards and exclusive privileges to such authors or introducers. As an instance, Lombe's Patent is cited.

In *Beard* v. *Egerton*, 3 C. B. 97, which was an action for an alleged infringement of a patent, the defendants pleaded, that by an agreement made in France between the original inventor and the King of France, the former, for the consideration therein mentioned, assigned the invention to the French Government, and that by virtue of the agreement, and by the laws of France, the invention became vested in the King of France, who thereby became entitled to vend and publish the invention as well in that country as in Great Britian, concluding "wherefore the said letters patent are void." The court held that this plea was bad in substance, inasmuch as it contained no denial of the allegation that the patentee was the true and first inventor within this realm. It was also contended on behalf of the defendants that, inasmuch as the letters patent were granted for an invention communicated to the patentee by a foreigner, the subject of a State in amity with this country, they were void, on the grounds, first, that the patentee was not the true inventor within the meaning of the statute; or, if the patentee was a trustee, then that a patent taken out in England by an Englishman in his own name, in trust for foreigners residing abroad, is void at law. With reference to the first point it was admitted on behalf of the defendants that a person who has learned an invention abroad, and imported it into this country, where it was not known or used before, is the first and true inventor within the statute; but it was argued that, to come within the statute, the person who takes out a patent should be the meritorious importer—not a mere clerk or servant or other agent, to whom the communication was made for any special purpose by the foreign inventor, as for the purpose of enabling him to take out the patent for the benefit of such foreigner. No authority was cited for the distinction. "So far as relates to the interest of the public," said Chief Justice Tindal, "Berry (the patentee) has all the merit of the first inventor. If he has been guilty of any breach of faith in his mode of obtaining the communication, or in the mode of using it in England, he may or may not be made responsible to his employers abroad; but such misconduct seems to have no bearing upon the question—as between him and a stranger—whether the patent is void or valid." The learned reporters point out that it was not suggested that the patent was invalid on the ground of a deceit having been practiced on the Crown by the sup-

pression of the trust. Secondly, no authority was cited in support of the other ground of objection.

Chief Justice Holt and Mr. Justice Pollexfen agreed, in *Edgeberry* v. *Stephens*, 2 Salk. 448, that a grant of a monopoly may be to the first inventor by the 21 Jac. 1, c. 3, and, "If the invention be new in England, a patent may be granted, though the thing was practiced beyond sea before, for the statute speaks of new manufactures within this realm; so that, if they be new here, it is within the statute, for the Act intended to encourage new devices useful to the kingdom, and whether learned by travel or study, it is the same thing." Thus the invention which was the subject of the patent in *Stead* v. *Williams*, 7 M. & G. 818, had been previously put in practice in Russia. And it was also urged in *Beard* v. *Egerton* that *Darcy* v. *Allin*, 11 Co. Rep. 84, and 5 Geo. 2, c. 8, for extending the term of a patent for discovering and introducing the arts of making and working, etc., certain Italian engines for making organize silk, and for preserving the invention for the benefit of the kingdom, show that the law gives as much effect to the introduction as to the invention of a new manufacture. The case of *Edgeberry* v. *Stephens* established the principle that the first introducer of an invention practiced beyond sea shall be deemed the first inventor. In the subsequent case of *Chappell* v. *Purday*, 13 M. & W. 318, Chief Baron Pollock remarked that, "under the statute 21 Jac. 1, c. 3, against monopolies, the 6th section, which leaves as they stood at common law all the letters patent for fourteen years of new manufactures granted to the first inventors, it has been decided that an importer is within the clause, and if the manufacturer be new in the realm, he is an inventor and may have a patent." So, in another case, *Clothworkers of Ipswich*, Godbolt, 252, it was resolved that, if a man has brought in a new invention and a new trade within the kingdom, in peril of his life, consumption of his estate, or the like, or if a man has made a new discovery, in such cases the King of his favor and grace, in recompense of his costs and labor, may grant by charter unto him that he only shall use such a trade or traffic for a certain time, "because at first the people of the kingdom are ignorant, and have not knowledge or skill to use it."

The point was definitely settled in *Nickels* v. *Ross*, 8 C. B. 679, that where a defendant alleges that, before the granting of the patent, the plaintiff represented to the Crown that in consequence of a communication made to him by a foreigner residing abroad, the plaintiff was in possession of an invention, and so obtained letters patent, the plaintiff was entitled to a verdict on the issue joined without any proof that the invention was communicated to him by a foreigner resident abroad, since a person who avails himself of information from abroad is an inventor within the meaning of 21 Jac. 1, c. 3. Upon argument it was conceded that the question was upon which party the burden of proof rested. For the defendant it was argued that *prima facie* all monopolies are void, and it is for a party who seeks to establish a monopoly to bring his case within the exception, and not for the party opposing it to show the contrary. During the progress of the argument, Chief Justice Wilde made an observation to the effect that the circumstance of a person importing a new manufacture, and giving the public of this country the benefit of it, is the basis of the grant of a temporary monopoly to him, and that he was not aware that it ever had been considered necessary that the informant should be a foreigner. The correctness of the latter dictum is the very question upon which the most recent case turns.

It is obvious that none of the above cases are direct authorities upon the question involved in *Dalton* v. *The Saville Street Foundry*. In the Court of Appeal it was argued for the appellant that an English subject rightfully receiving a communication of a new invention from another English subject, was as much entitled to take out a patent for it as if he had received the communication from abroad, and that if a patent so obtained was not valid, the public might lose the benefit of many useful inventions, and great hardship would be inflicted on the representatives of inventors who happened to die before taking out patents for inventions. In the court below it was argued that the Patent Law Amendment Act, 15 & 16 Vict. c. 83, afforded proof that the only declaration an applicant for letters patent is bound to make is that he is in possession of the patent, and that inasmuch as the letters patent prove themselves, the objection taken by the defendants could not be taken on

demurrer, but must be by a writ of *fieri facias*. Baron Pollock, however, asked very pertinently whether the plaintiff contended that, if the letters are good on the face of the grant, no objection can be taken on demurrer—a question which obviously should not be answered in the negative. In the Court of Appeal, which consisted of the Master of the Rolls and Lords Justices James and Thesiger, the question was treated rather as one of novelty than difficulty. "This," said the Master of the Rolls, "is really a mere experiment. From the time of the passing of the statute of James I. to the present time, no one, as far as I know, has contended before in a court of law, much less has any court of law allowed the validity of such a contention, that a communication made in England by one British subject to another British subject can be patented by the receiver of the communication, so as to make the receiver the true and first inventor within the meaning of the patent laws." To the argument that before the time of James I. such patents were valid and allowed, and that the statute merely restricted the duration of the patent and did not destroy the right, his Lordship observed that, "even supposing that it were so, the cases define who are to be considered worthy recipients of the grant of such a monoply, and the definition so given has been followed ever since." Lord Justice Cotton admitted the case to be one of hardship, but agreed with the other Lords Justices in allowing the demurrer. In our opinion, this case points to a defect in our patent laws. Judges, of course, have nothing to do with consequences; they have merely to administer the law as they find it. The question may nevertheless be raised whether it is expedient that plaintiffs in a case like the present should be without any remedy. If a communication made by a foreigner abroad to a British subject entitles the latter to a grant of letters, there are equally good reasons for granting them to the widow or personal representatives of an inventor. The object of the act was to encourage new devices. Can it be said that they have been encouraged in this instance? Doubtless the invention would have been lost altogether had the widow known that she could obtain no valid grant. Members of Parliament who wish to undertake a useful work will find the object of such a search in an endeavor to consolidate and amend the Patent Laws.—London *Law Times*.

CURRENT EVENTS.

CANADA.

ADDRESS TO THE GOVERNOR GENERAL.—On the 30th November, the Montreal Section of the bar presented the following address to the newly appointed Governor General of Canada:—

MAY IT PLEASE YOUR EXCELLENCY:—

The members of the Montreal section of the Bar of Lower Canada beg to approach Your Excellency with the expression of their heartfelt loyalty to Her Most Gracious Majesty the Queen.

They hail the appointment of your Excellency to the Governor-Generalship of the Dominion as a token of Her Majesty's solicitude for the welfare of the Canadian people; and they now recognize in the presence of Her Royal Highness the Princess Louise, the most gratifying proof of Her Majesty's confidence in Her subjects of this side of the Atlantic, conferring upon them the highest honor,

They beg to congratulate Your Excellency on your safe arrival, and to give utterance to the hope that your sojourn and that of Her Royal Highness in Canada, will be productive of pleasure to you both, as it cannot fail to be of benefit to the Dominion.

W. H. Kerr,
Batonnier
P. H. Roy,
Secretary.

His Excellency replied as follows.—

To the Members of the Montreal Section of the Bar of Lower Canada—

GENTLEMEN,—I am glad to receive from members of the Bar of Montreal this loyal address, and am confident that in giving a welcome to me, you express your attachment to the principles which govern the Monarchy, and the spokesmen of feelings which animate those who follow the profession of the law throughout the Provinces of Canada. No one is more gratified to appreciate our ancient laws than the members of the legal profession whose office it is to advocate their operation or to enforce their decrees. I rejoice to receive from such a body of gentlemen the assurance of their satisfaction with the appointment made to my high office by her Majesty, and I ask you to accept my thanks.

LORNE.

Montreal, 30th November, 1878.

GENERAL NOTES.

It is related of Judge Walter T. Colquitt, an old-time justice of the Georgia Supreme Court, that he once condemned a man to be hanged, preached a sermon, reviewed the militia, married two couples at night, and then conducted a prayer meeting—all in one day.