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REVUE

DE

Législation et de Jurisprudence.

RÉDACTEURS ET PROPRIÉTAIRES:

MM. S. LELIEVRE ET F. REAL ANGERS.

DEUXIÈME ANNÉE.—5me LIVRAISON.

QUEBEC:

*De l'Imprimerie d'*AUGUSTIN CÔTÉ ET CIE.

1847.

REVUE

DE

LEGISLATION et de JURISPRUDENCE.

VOL. 2. QUEBEC, FEVRIER, 1847. No. 5.

QUEBEC.—QUEEN'S BENCH.

SUPERIOR TERM.

No. 1705 of 1847.

THE CITY BANK, Plaintiff,

vs.

HUNTER, Defendant,

AND

MAITLAND, Garnishee.

The Court will not quash a writ of attachment, because, the jurat of the affidavit upon which it issues being subscribed by the Prothonotary of the Court (the office being held by two persons,) the oath is stated to have been taken "before me."

The Affidavit will not be held bad, by reason of erasures, not mentioned in the jurat, of immaterial words, or of words without which the affidavit is complete.

To obtain a writ of attachment *en main tierce*, it is not necessary in the affidavit to name the Garnishee.

If the protest for non-payment of a promissory note be premature, or if time be given by the holder to the maker, the endorser is discharged; but if, with a knowledge of the protest's having been made, or of the giving of time, he (the endorser) subsequently promise to pay, his liability is revived.

The defendant was sued as the endorser of three promissory notes, viz:

A promissory note for £150 cy., made by one Thomas McCaw, merchant, at Quebec, on the 2nd January 1845, payable three months after date to the defendant or order, for value received; endorsed over by defendant to Messrs. Coyle & Sculthorp, merchants at Montreal, and by them endorsed over to the Plaintiffs:

Another promissory note for £100 cy., made by the said Thomas McCaw, at Quebec, the 2nd January 1845, payable four months after date to the defendant or order, for value received; endorsed over by the defendant to Coyle & Sculthorp, and by them to the Plaintiffs:

A promissory note for £40 18s. cy., made by Coyle & Sculthorp, at Montreal, on the 15th November 1844, payable three months after date to the order of the defendant, for value received, and endorsed over by the defendant to the Plaintiffs.

A writ of *saisie-arrêt* before judgment issued to attach the goods, monies, and effects of the defendant in the hands of Robert F. Maitland, the Garnishee in the cause.

Before pleading to the action, the defendant moved the Court to quash and set aside the *saisie-arrêt*, with costs, and urged, as reasons, that there were erasures in the affidavit upon which it was founded; that the jurat of the said affidavit was subscribed and attested by the signature "Burroughs & Huot," being the signature of the Prothonotary of the Court, whereas the oath was stated to have been taken "before me," that is, before one of the two individuals holding the office of Prothonotary, without stating which; and that no affidavit, which did not make mention of the party in whose hands it was intended to make the seizure, was sufficient to authorize an attachment of goods, monies, chattels, or effects in the hands of any third party, *en main tierce*.

The old printed form of affidavit had been used. In the heading, the pen had been passed through the words "Lower" (Province of Lower Canada) and

"King's" (In the King's Bench) and "Queen's" substituted for and over the latter word: and the words "do abscond, do suddenly intend to depart from the Province" had been in the same manner erased. The allegation that the defendant "was about immedi- "ately to secrete his estate, debts, and effects, with "an intent to defraud his creditors" remained. The affidavit contained no averment respecting a third party, and the jurat was silent as to the erasures.

The Court held the objections not to be fatal, and over-ruled the defendant's motion, with costs.

The defence set up by the defendant consisted of the general issue, and a plea of Perpetual Peremptory Exception in Law, by which he alledged:—

That, after the protest of the two promissory notes made by Thomas McCaw, the Plaintiffs had, in consideration of a certain sum to them paid by the said Thomas McCaw, discharged him the said Thomas McCaw from the payment of the amount of the said two notes, without the consent of him the said Defendant;

That the Plaintiffs had given time to the said Thomas McCaw to pay the amount of the said two notes, without the consent of him the Defendant;

That, after the protest of the promissory note made by Coyle & Sculthorp, the plaintiffs had given time to the said Thomas McCaw, to pay the amount thereof without the consent of the Defendant;

That, for and in consideration of a certain sum paid to the said Plaintiffs by the said Coyle & Sculthorp, the plaintiffs had discharged them the said Coyle & Sculthorp from the payment of the note made by them, without the consent of him the said Defendant:

The exception also contained a plea of payment and satisfaction.

The plaintiffs answered specially and averred, among other things, that after the pretended giving of time, the Defendant, being cognizant thereof promised the Plaintiffs to pay them the amount of the several promissory notes above-mentioned.

Issue having been joined, the parties proceeded to proof, and the evidence adduced disclosed, (the making and endorsing of the notes being admitted) the following material facts, viz:

That the Plaintiffs had, after the protest of the notes declared upon, entered with other creditors of Thos. McCaw, into a deed of composition with him the said Thos. McCaw, executed at Quebec on the 14th July 1845, by which they agreed to take three shillings and six pence in the pound, payable by instalments, and grant him a discharge:

That the promissory notes made by Thomas McCaw had been protested *on* the third day after they had become due:

That the defendant was aware of the arrangement between McCaw and his creditors and afterwards expressed his intention to take up the notes:

That the defendant knew of the protest of the notes (no regular notice was proved) and had afterwards, both in Montreal and Quebec, promised to pay to the plaintiffs the amount of the said notes, and particularly at Quebec, a few days before the issuing of process in the cause, in November 1845.

The cause having been inscribed upon the *Roll de Droit* for hearing upon the merits, the plaintiffs prayed for judgment for the amount of the two promissory notes made by McCaw, with interest from the day of service of process, and for one half of the amount of the note made by Coyle & Sculthorp (the plaintiffs having received on the said note £20 9s.) with interest from the date of protest, and moved for judgment against the garnishee pursuant to his declaration.

On the 30th January 1847, the Court "considering "that the material allegations in the Plaintiffs' declaration had been proved and that it was also established in evidence that, after the making of the "protest of the promissory notes declared upon, and "after the making of the notarial agreement made "and entered into by and between Thomas McCaw "and his creditors, bearing date the fourteenth day "of July one thousand eight hundred and forty five, "the said Thomas Dalkin Hunter, the defendant, with "a knowledge of these antecedent facts, promised the "said plaintiffs to pay them the amount of the said "notes and thereby waived any advantage from "omissions or acts, by reason of which it had been "contended by the defendant that he became discharged from liability on the notes in question," condemned the defendant to pay to the Plaintiffs £272 9s. cy., with interest on £250 from the 7 Nov. 1845, till paid, and on £20 9s. from the 20 Feb. 45, till paid with cost of suit, and ordered the Garnishee to pay over to the Plaintiffs £218 11s. 9d., in accordance with his declaration.

HOLT, for Plaintiffs.

AYLWIN, for Defendant.

TRADUCTION DE LA COUTUME DE PARIS.

A l'approche de l'ouverture des chambres Législatives, il est important d'appeler l'attention publique sur une mesure très importante, à laquelle personne semble n'avoir songé sérieusement: la traduction en anglais de nos lois civiles. En effet, n'est-il pas étonnant que depuis plus de cinquante ans que la Coutume de Paris gouverne les intérêts de colons britanniques, l'on ait négligé de leur en rendre le texte intelligible, en le traduisant dans leur langue. On a

laissé ignorer à la plus grande partie d'entre eux les dispositions légales, qui régissent l'état civil, la condition des personnes, la propriété des choses, les droits des mineurs, le contrat de mariage, le régime de la communauté, les testamens, les successions. Il en est résulté pour beaucoup des mécomptes et des embarras notables, qui n'ont pas peu contribué à soulever des préjugés contre notre système de loi, si différent du système anglais. On ne saurait comprendre comment les hommes les plus intéressés à écarter ces préjugés, en mettant le texte de la loi à la portée de tous, ont négligé un moyen si nécessaire à la conservation de l'une de nos institutions les plus chères. Ceux qui connaissent la supériorité des codes français, et les améliorations qu'on peut si facilement y introduire, en suivant les traces du code Napoléon, conviendront qu'il est plus que jamais temps d'accomplir cette tâche, si nous ne voulons pas nous exposer à perdre un si bel héritage que la France nous a légué, et que l'Empire Britannique nous a conservé. En fesant cet ouvrage, le traducteur, qui devrait nécessairement être un homme versé dans l'étude des lois, devrait indiquer les articles tombés en désuétude, ceux qui ont été soit modifiés soit rappelés par les ordonnances et statuts provinciaux, enfin ceux qui ne sont plus en unisson avec les intérêts coloniaux, et les progrès des sociétés modernes.

QUEBEC.—BANC DE LA REINE.

No. 1838 de 1847.

PETIT demandeur,

vs.

LUCAS défendeur.

Congé défaut refusé.

Dans cette cause, le demandeur n'ayant pas fait rapporter son action en cour, le défendeur rapporte sa copie et fait motion pour bénéfice de congé défaut, avec dépens contre le demandeur. Présens: Les Hons. Sir J. Stuart, Panet, Bedard. Le premier était d'avis que le défendeur ne pouvait obtenir congé défaut, qu'après avoir mis le demandeur en demeure de rapporter l'original de la sommation. Les deux derniers concoururent dans le jugement refusant le congé défaut pour d'autres motifs, savoir que le jour du retour, (le 7 Janvier 1847,) la cour ne s'était ouverte qu'à onze heures du soir (1).

QUEBEC.—BANC DE LA REINE.

LANGLOIS et al., vs. VERRET.

Le délai accordé par le cédant à son débiteur par un acte subséquent à l'acte constitutif de la créance, mais antérieur au transport, peut-il être plaidé par exception à une action par le cessionnaire?

Le sept Février 1845, vente par Guenette à Verret par acte authentique, prix de vente £725, payable par l'acte à demande, le même jour convention (contre-lettre) entre Guenette et Verret, par laquelle Guenette donne à ce dernier délai pour le paiement du prix de vente. Subséquemment, juillet 1845, transport par Guenette à Langlois et al., les demandeurs, de £325, partie du prix de vente, de même que s'il était pay-

(1) Vide 2 vol. de la Revue p. 48.

able à demande, sur ce transport, action de la part des cessionnaires pour cette portion du prix de vente a eux transportée, à cette action le défendeur plaide:—

1o. Par exception péremptoire en droit temporaire: la convention ou contre-lettre entre lui et Guenette par laquelle il lui est accordé un délai.

2o. Par exception péremptoire en droit perpétuelle: paiement à Guenette par autant par lui reçu de la compagnie d'assurance du Canada. Les demandeurs attaquent la validité de ces plaidoyers en droit.

Vanfelson pour les Demandeurs.

Par l'exception temporaire du défendeur, il plaide une contre-lettre, au moyen de laquelle il prétend avoir obtenu un délai. Cette contre-lettre est valable quant aux parties entre lesquelles elle est intervenue, mais quant à des tiers elle ne peut produire aucun effet. Domat. liv. III, tit. IV, sec. II, sommaires 14 et 15, p. 280.

1 Journal des Aud, 175, cha. 143, arrêt de Dec. 1633. 5 Journal des Aud 266 cha. 29, arrêt de 1702. Ces arrêts confirment le principe énoncé par Domat.

Nouveau Denizart, vbo. contre-lettre.

Répertoire, vbo. contre-lettre.

Quant à l'exception péremptoire en droit perpétuelle par laquelle le défendeur plaide paiement, elle est insuffisamment libellée en autant qu'il y est seulement dit que Guenette a reçu £450 de la Compagnie d'Assurance du Canada.

Rhéaume pour le Défendeur.

Les autorités citées de la part du Demandeur quant à la validité de la transaction entre Guenette et le défendeur, que les demandeurs qualifient de contre-lettre, ne sont nullement applicables au cas soumis à la cour. Cette transaction n'est pas une contre-lettre, c'est un acte d'atermoiement. Les demandeurs, cessionnaires de Guenette, ne peuvent avoir plus de droits que leur cédant, or leur cédant ayant accordé un délai au défendeur, avant le transport, ils sont liés par l'acte, leur recours est contre le cédant. Le plaidoyer est donc bon.

La cour ordonne que les parties feront respectivement preuve.

IN APPEAL.

1847.

THOMAS WILLIAM LLOYD,

(Adjudicataire and Petitioner in the Court below.)

Appellant,

and

JOHN GREAVES CLAPHAM,

(Defendant in the Court below,)

Respondent.

Held that an adjudicataire who has purchased a farm, together with buildings at Sheriff's sale, cannot claim a reduction of price, because such buildings are not upon the premises: he ought to demand the nullity of the sale. (1).

EXTRACT OF THE CASE OF THE APPELLANT.

In this case, wherein Alexander Carlisle Buchanan was Plaintiff in the Court below, and the said John Greaves Clapham, Defendant, the immoveable property of the Respondent was taken in execution, and on the 10th day of November 1845 was sold by the Sheriff of this District. Among others the following lots were adjudged, the 1st (no 14) to the Appellant for the sum of £400, and the 2nd (no. 15) to John G. Clapham, junior, the son of the Respondent, for £65. These lots are described as follows:

1st. Lot number 14. "The north-west side of lot number twelve, the whole of lots numbers thirteen and fourteen, on which said lot number thirteen there is a mill site called the Falls of Inverness, and the north west half of lot number fifteen in the eleventh range of the Township of Inverness, in the County of Megantic, in the district of Quebec, together with all such houses, barns, stables and other buildings and

(1) This decision seems to be at variance with the jurisprudence of this country and the citations referred to in this report.

improvements on the said above described lots and half lots of land, and all the rights, members and appurtenances to the said premises belonging or in any wise appertaining;"

2nd. Lot number 15. "Lot number nine in the fourteenth range of the Township of Nelson."

It is to be observed that the lot first above described was sold "with all such houses, barns, stables and other buildings and improvements," and that the lot last mentioned is described as a *vacant lot.*

Subsequently to the sale, the Appellant ascertained:

First.—That the lot he had purchased had neither houses, nor barns, nor stables, nor other buildings erected upon the same;

Secondly.—That the lot purchased by John G. Clapham, Junior, the son of the Defendant, had houses, barns, stables and other buildings thereon erected and was otherwise improved.

Upon this, the Appellant, on the 21st of November 1845, presented to the Court below a Petition praying for a reduction of the amount of his adjudication. By this Petition it is alleged that the lots and half lots sold to the Appellant, together with the lot sold to the said John Greaves Clapham, Junior, were well known as forming but one farm or establishment (*une seule ferme ou métairie*), belonging to the Defendant, and having erected upon the same a house, a barn and stable and other appurtenances belonging to the same and necessary for the working out of the said farm so composed of the said lots as aforesaid, but that the description of the same, as given in the Sheriff's advertisement, was erroneous and incorrect, inasmuch as upon the lot of land adjudged to the said Appellant there was no house, barns, stables and other buildings and dependances as stated in the description above mentioned, and inasmuch as, in fact and in truth, the said house, barns, stables and other buildings appertaining to the said farm, and necessary to the working out of the same, were seized and sold together with lot number fifteen, adjudged to John Greaves Clapham for the sum of sixty-five pounds, described as a vacant lot, the said lot number fifteen being contiguous

to and adjoining the lot purchased by the Appellant; and that by reason of the premises, the said Appellant was entitled to a reduction of the price of his adjudication, to wit, to the amount of one hundred pounds.

To this petition the Respondent pleaded the general issue, and a perpetual *Exception péremptoire en droit*, by which latter plea the Respondent alleged the purchase by the Appellant of the lot in question, setting out at length the description contained in the Sheriff's advertisement, and then proceeds to say "that no buildings in particular were specified in the said advertisement, but the said lots and half lots were sold by the said Sheriff and purchased as they then were, and the particular locality and place where the said lots and half lots were situated is well known, the said lots being Township lots and circumscribed by well defined and well known limits, which the said Thomas William Lloyd could have easily seen and discovered, if he had seen fit to examine the same, and which limits in truth and in fact he the said Thomas W. Lloyd, at the time of the said sale, well knew and was acquainted with. And the said Defendant further saith that by the said petition the said Thomas William Lloyd pretends that the price of the said lots and half lots of land ought to be diminished to the extent of the value of certain buildings which never were and which, by the said petition, he the said Thomas W. Lloyd declares never were situated upon the same, and which never were, in truth, sold or purchased by the said Thomas William Lloyd as part of the said lots or half lots, which said pretention of him the said Thomas William Lloyd is wholly and altogether insufficient for him to maintain the conclusion of his said petition."

The Appellant took issue upon these pleadings by general answers and a general replication, and upon a rule obtained by the Appellant it was ordered on the 25th March 1846 that *Arpenteurs experts* should be named in the cause to ascertain: 1st. The extent, metes and bounds of the lot sold to the Appellant, described in the Sheriff's advertisement as no. 14, with also what and how many houses, barns, stables and other buildings were erected upon the same; 2nd

The extent, metes and bounds of the lot sold to the said John Greaves Clapham, described in the said advertisement as lot no. 15, in so far as such an operation might be necessary to establish the line of division between the said lots no. 14 and 15; 3dly. If any and what buildings were to be found upon the said lot no. 14, sold to the Appellant, and what improvements had been made thereon; 4thly. If any and what buildings were to be found upon the said lot no. 15, sold to the said John G. Clapham, and what improvements had been made thereon.

The evidence adduced by the Appellant establishes that the lots in Inverness and the lot in Nelson together make but one farm; that the buildings for the working of this one farm are in Nelson, and that the value of these buildings is one hundred and fifty pounds. The numerous witnesses produced by the Respondent do not contradict the witnesses of the Appellant, on the contrary they corroborate their evidence. It is true that the Respondent's witnesses speak of buildings upon the Inverness lots, but they all speak of them, not as existing, but as having existed, and one of the witnesses gives the reason of this when he states that these buildings were burnt by the Respondent, as they were too much decayed even for cattle to go into.

It appears by the evidence of Von Exter, that, in the first instance, the lots Nos. 14 and 15, were to have been sold as one lot, with houses, barns and other buildings, &c.—subsequently, however, this one lot comprising lots in two different Townships, the division apparent by the Sheriff's advertisement was made, and at the time of the making of this division, it was thought that the buildings of the Defendant were situate upon the lots of Inverness, and they were sold as such. The Defendant was aware that the descriptions were not correct, for he called at the Sheriff's office to inquire whether these descriptions could be altered; he was told not. Are bidders informed of this error? are they told that the lots in Inverness are not the lots upon which the buildings are erected, and that the lot in Nelson is the favored lot? No.—They

are allowed to bid upon a vacant lot as if it were built upon, and *the son of the Defendant*, purchases the lot in Neilson for £65, the buildings on which are worth £150.

It remains to be shown that in law the Appellant has a right to a reduction of the price of sale or adjudication:—

The Court below seems to have thought that in law the Appellant had no right to ask for a diminution of the price, upon the principle, that, in the matter of Sheriff's sales, there is no warranty. This principle is fully admitted, it is the rule laid down by the authors who have commented the French system of Jurisprudence, such as we have it now, and by the commentators of the Code; but the authors make an important distinction, viz: that although the *vente par décret* does not give to the adjudicataire the action *en garantie*, nevertheless he can exercise the action *en répétition* if he cannot obtain possession of that which has been sold, for the whole, if he cannot obtain possession of any part, or for a portion of the price only, if he is deprived of a portion only of the thing sold.

Pothier, Traité de la Procédure Civile, chap. II. sec. 7, in speaking "*de l'effet de l'adjudication*" says:

"Cette vente a cela de moins que les ventes contractuelles, qu'elle ne donne point à l'adjudicataire d'action en garantie, au cas qu'il souffre éviction de de ce qui lui a été adjugé; ce qui peut arriver, y ayant certains droits, comme nous le verrons au paragraphe suivant, que le décret ne purge pas, qui peuvent donner lieu à des évictions.

"Quoique l'adjudicataire n'ait pas en ce cas une action de garantie, il est néanmoins équitable qu'il ait au moins action pour la répétition du prix qu'il a payé, ou en total, s'il souffre éviction du total, ou à proportion de la perte dont il souffre éviction.

"Par notre Jurisprudence, on donne cette répétition contre les créanciers qui ont touché à l'ordre et lorsque l'éviction n'a été que pour partie, il n'y a répétition que pour partie du prix; ce sont les derniers recevants à l'ordre qui sont seuls tenus de cette restitution du prix."

Troplong (De la vente, no. 433) has adopted this opinion of Pothier. After stating that sales by *décret* are made without warranty, he transcribes at length the passage from Pothier above quoted. De Héricourt, in his *Traité de la vente des Immeubles par décrêt*, page 302, XII, edit. 1771, says:

" Mais si l'adjudicataire ne pouvait jouir du bien qui lui a été adjugé, comme si on avait énoncé dans les criées et dans l'adjudication cent arpens de terre, et qu'il n'y en eût que cinquante, il pourrait demander une diminution sur le prix de son adjudication; et si tout le prix avait été distribué aux créanciers, on condamnerait les créanciers derniers colloqués à rendre à l'adjudicataire ce qu'ils auraient touché, jusqu'à concurrence de la somme à laquelle aurait été fixée la diminution."

Ferrière, Dict. de Droit *Verbo* adjudicataire, page 46, col 2; Guyot, Répertoire de Jurisprudence, *Verbo* adjudicataire, 168, col. 2. 16, Duranton, no 265, goes further than the authors above cited. He states that the adjudicataire has the right of *garantie.*

"L'adjudication ne transmet à l'adjudicataire d'autres droits à la propriété que ceux qu'avait le saisi (art. 731, Code de procéd.;) mais l'adjudicataire évincé a droit à la garantie contre le débiteur."

The question is discussed at length by Henrys vol. 5, p. 548 Lib. 4, c. 2, question 85.

The proceedings of the Appellant are not proceedings *en garantie*, he does not call upon the prosecuting creditor or upon the saisi or upon any one else in the cause to guarantee him. He merely asks that out of the amount paid in by him, the value of that which has been sold him, but which has not been delivered, be repaid him. He submits that, under the authorities above cited, he is entitled to the conclusions of his petition and to a reversal of the Judgment dismissing the same.

Extract of the Respondent's Case.

———oooo———

The Appellant became the purchaser, at a Sheriff's Sale, of land situated in the Township of Inverness, Megantic, which was sold, separately, under the following description:—"*The North-West half of lot* "*number twelve*—the whole of *lots numbers thirteen* "*and fourteen*, on which said lot, number *thirteen*, "there is a mill site, called the Falls of Inverness, in "the County of Megantic, in the District of Quebec, "together with *all such* houses, barns, stables, and "other buildings and improvements *as are on the said* "*above described lots and half lots* of land, and all the "rights, members and appurtenances to the said pre-"mises belonging or in any way appertaining." This property was adjudged to the Appellant, in the above terms, for £400, which he subsequently paid to the Sheriff. After the return of the writ of execution the *Adjudicataire*, the present Appellant, appeared before the Court, in the character of a petitioner, and prayed for a diminution of the price to the extent of one-fourth of the whole;—the grounds set forth in his Petition are.—

1st.—That the lands in Inverness, above described, together with lot number nine, in another township, viz., in the adjoining township of Nelson, were known as one farm, with a house, barn and stable, and other dependencies necessary for farming it, and that the above description of the Sheriff is, to use the language of the Petition "incomplète, irrégulière et incorrecte, "en ce que dans l'étendue sus-décrite et adjugée au "dit Thomas William Lloyd, ne se trouve point de "fait la maison, grange, etc., dépendant de la dite "ferme."

2dly.—That some of the buildings, used with the said farm, were upon Lot Number 9, in Nelson, which was sold, separately, at the same time, without its being stated in the advertisement that there were any buildings upon it.

Ergo, states the Appellant, I am entitled to a reduction of the price.

To this Petition the Respondent pleaded the general issue and a Perpetual Peremptory Exception, in which it is alledged that the land was advertised for sale "with *only such* buildings as were upon it, and " that the particular locality and place where the said " lots and half-lots are, is well known, the said lots " being township lots, and circumscribed by well " known limits, which the said Thomas William Lloyd " could have readily seen and discovered if he had " seen fit to examine the same, and which limits, in " truth and in fact, he, the said Thomas William " Lloyd, at the time of the said sale, well knew and " was acquainted with, &c."

Issue being joined on these pleadings, the Appellant obtained an order from the Court below, to refer the matter to experts, who were named and who have acted in the matter. Their report is unimpeached and is now before the Court. They state as follows:—

" We found the improvements, on the lot number " 14, described in the Sheriff's advertisement to con- " sist of thirty seven acres, and thirty one perches of " meadow, and pasturing land. Six acres two roods " and thirteen perches of ploughed land and stumped, " and four acres of land chopped down, but not clear- " ed up, forming a superficial extent of improvements " of 47 acres, 3 roods and 4 perches, English measure, " with three houses in a decayed state, one root house " in a state of ruin, one abutment for a bridge, one " dam, the whole upon the Township of Inver- " ness.—We then caused the improvements in 14th " range upon the lot number 9, in the Township " of Nelson, to be measured, described in the Sheriff's " advertisement, as lot No. 15, and found the same to " contain 4 acres and 9 perches of ploughed ground, " 2 acres and 2 roods chopped down, but timber not " removed; 6 acres, 3 roods, 38 perches of land in " stumps, forming an area of improved land, of 13 " acres, 2 roods and 7 perches, with a two-story " wooden house, in a very damaged state, one barn " and stable in a similar state, a small building for a

" cooking-house, a shed at the end of the dwelling-
" house, and a shed, at right angles with the barn and
" stables, and a narrow foot-bridge crossing the River
" Thames."

Many other witnesses, who were examined by the experts, resident within the county, give similar testimony which it is unnecessary to multiply by a repetition.

The evidence establishes:—

1st.—That the property described in the Sheriff's advertisement corresponds, in every particular, with that which was sold to the Appellant and which he has paid for.

2dly.—That the Appellant knew very well what he was purchasing, and if he did not he ought to have known it, because the advertisement itself would have led any man of ordinary prudence to enquire what buildings were upon the premises as *all such* only were to be sold, and, moreover, as the locality of each building was a matter of public notoriety.

3dly.—That the buildings, for which an indemnity is demanded, were not upon the land sold to the Appellant nor advertised so to be.

The respondent also pretended that in law, the adjudicataire was not entitled to a reduction of the price of his adjudication.

The following is the judgment of the court of appeals.

" The court of appeals of Our Lady the Queen now here, having seen and examined the record and proceedings in this cause; and, as well the judgment appealed from, as the matters by the said T. W. Lloyd, the appellant for errors and causes of appeal assigned, having been by the said court now here seen, and fully understood, and having heard the parties by their counsel respectively; and mature deliberation on the whole being had, it is by the said court now here considered and adjudged, that the judgment appealed from in this cause, namely the judgment of the Court of Queen's Bench for the district of Quebec, given and rendered on the fifth day of October one thousand eight hundred and forty six, be and the same is hereby in all things affirmed, with costs to the said John Greaves Clapham the respondent againt the said Thomas William Lloyd the appellant."

QUEBEC.

WEEKLY SESSIONS OF THE PEACE.

Before Daniel McCallum, & R. Alleyn, Esqrs., J. P.

W. FALCONBRIDGE,
Qui tam;
vs.
JOSEPH TOURANGEAU,
Defendant.

Held that the words Commissioners of the Peace and Justices of the Peace, as used in our statute book, are synonimous.

That an information to be tried before *two* Justices of the Peace, is good, though only signed by *one*, (4 Geo. IV, c. 19, s. 7.)

That a permanent statute, repealed by a temporary one, (the new law containing nothing in it that manifests the intention of the Legislature that the repeal shall be absolute,) will revive at the expiration of the temporary act.

The defendant, a Baker, was prosecuted under the Ordinance 17th Geo. III, chap. 10, for having "Baked and sold bread without first entering into the recognizance required by the said Ordinance, to observe the regulations relative to the assize of bread to be made by the Commissioners or Justices of the Peace."

Mr. AHERN, for the Defendant, objected—.

1st. To the Jurisdiction.

2ndly. To the form.

3rdly. To the law of the case.

1st. objection.—In support of the first objection, it was argued, that the Justices now sitting had no jurisdiction in this matter, inasmuch as by the Ordinance referred to in the Information, this offence was triable before two *Commissioners* of the Peace, and not before two *Justices* of the Peace,—two separate and distinct classes of officers, whose duties and jurisdiction were not identical.

2nd objection.—It was argued also, that the Information was defective, and insufficient in point of form, inasmuch as it was only signed by *one* Justice or Commissioner of the Peace, the Ordinance requiring that it should be exhibited to, and signed by *two* Justices or Commissioners.

3rd objection.—Under the third and main objection, it was contended, first.—That the Ordinance 17th Geo. III, cap. 10, upon which this prosecution purported to be based, was no longer in force, it having been repealed by the 55th Geo. III, cap. 5, which substituted other provisions on the same subject, and the 17th section of which enacted, as follows:—"That an Ordinance passed by the Governor, and the Legislative Council of the late Province of Quebec, on the 29th day of March, in the seventeenth year of the reign of our Sovereign Lord George the Third, intituled, "An Ordinance concerning Bakers of Bread in the towns of Quebec and Montreal," be, and the same and every part thereof is hereby repealed." That although the latter Act, which was continued in force from time to time until the 1st May, 1832, was a temporary Act, it nevertheless had the effect of repealing for ever the Ordinance in question; and upon this head Dwarris on Statutes, p. 675, was cited to show that "where a Statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing Statute is spent, unless the intention of the Legislature to that effect is expressed." And secondly.—Because all the powers formerly vested in the Justices of the Peace were by the Incorporation Acts 3rd and 4th Vict. c. 35, s. 43, and 8th Vict. c. 60, s. 8, transferred to, and are now vested in the Corporation of the city of Quebec.

Messrs. CAIRNS and RHEAUME were heard on the same side.

Mr. Ross in answer to the objection to the jurisdiction founded upon the word "Commissioner," contended that the terms "Commissioners of the Peace" and "Justices of the Peace," were synonimous and perfectly identical in their import. That from the year 1717, when the Council for the Province of Quebec commenced its Legislation, up to the year 1784, the term "*Commissioner* of the Peace" was alone used by the Legislature; in support of which he referred to the Ordinances 17 Geo. 3, c. 4, s. 7.—c. 7, s. 4 and

5.—c. 9, s. 3.—c. 10. s. 1 and 2.—c. 11, s. 14.—c. 12, s. 1 and 2.—c. 13, s. 14, 15 and 17.—c. 15, s. 1, 2 and 3.—and 19 Geo 3, c. 3.—20 Geo. 3, c. 4, s. 8. That in the Act 25 Geo. 3, c. 5, the term "*Justice* of the Peace" is found for the first time. That from the year 1784 to the year 1792, when the Legislature of Lower Canada commenced to make laws the terms "Commissioner of the Peace and Justice of the Peace," are used indifferently by the Legislature. In the English version of some of the Acts, they are styled "Justices or Commissioners of the Peace;" while in the French version *of the same Act*, which is law equally with the English, they are called "*Commissaires de Paix.*" In others the single term "Justice of the Peace," of the English version, is rendered in French in the same Act by the term "Commissaire de Paix." In all the Acts having relation to this subject, constant reference is made to the Weekly and General Quarter Sessions of the Commissioners of the Peace and Justices of the Peace indifferently. In support of which the following acts were cited, viz:—24 G. 3, c. 1, s. 6 and 17; 25 G. 3, c. 5, and c. 6, s. 6 and 8; also 25 G. 3, c. 8; 26 G. 3, c. 3; 27 G. 3, c. 3, s. 6, and c. 10; also 28 G. 3, c. 5, s. 23, and c. 6, s. 7; c. 9, s. 6; 29 G. 3, c. 3, s. 7; 29 G. 3, c. 5, and c. 6, 30 G. 3; c. 1, s. 8, and c. 3, s. 1; and c. 6, s. 2; c. 7, s. 3; 31 G 3, c. 3, s. 2; 31 G. 3, c. 4.

That after the year 1792 the term Justice of the Peace alone continues to be used in the Acts of the Legislature, with this exception that a variety of Acts were passed continuing former Acts of the Governor & Council in which the terms, respectively, of "Commissioner of the Peace," "Commissioner or Justice of the Peace."—"Justice of the Peace" had been used indifferently in the French and English versions, without the slightest indication on the part of the Legislature that in thus gradually adopting the term "Justice" of the Peace, in lieu of "Commissioner" of the Peace, it affixed the slightest difference of meaning to these terms, or that it attached any importance whatever to the change. And among these were cited 35 Geo. 3, c. 7; 39 G. 3, c. 8 and 43 G. 3, c. 6.

That with respect to the form of the Information, namely, that it was only signed by *one* Justice, the Statute 4 Geo. 4, c. 19, was conclusive, as by the 7 section of that act, *one* Justice of the Peace is authorized to receive Informations and issue summonses, and to do all other purely ministerial acts in cases cognizable only before *two* Justices.

That the statute 55 Geo. 3. c. 5, and other statutes continuing it, were all *temporary* acts which expired on the 1st May, 1821. That there were no terms to be found in any one of them disclosing any intention on the part of the Legislature to repeal *absolutely* the Ordinance in question. That no term of this import being found, no such intention could be presumed, as the consequence would be an injury to the public in the absence of all legislative provision in a matter of such vital importance as the size, quality and price of bread. That therefore the authority from Dwarris was inapplicable. That in the same page (675) Dwarris lays down that "by the repeal of a repealing statute, (the new law containing nothing in it that manifests the intention of the Legislature, that the former act *shall continue* repealed,) the original statute is revived." That this point was definitively settled in the year 1828, by the Court of King's Bench, in the cause of Chasseur vs. Hamel, a case perfectly analogous to the present one.

That although the 43d clause of the Incorporation Act, 3 and 4 Vic., c. 35, in a few general words, to be found at the end of the section, vested the City Council with power to make By-Laws "touching or concerning the improvement, cleanliness, health, internal economy, and local government of the city," yet that general power was restrained by the specific powers given to it in the same act and section. Angel and Ames on Corporations, pp. 66 and 267, was cited to shew that when express powers are conferred on corporate bodies, all others are impliedly excluded. But, that in the present instance we had the clear expression by the Legislature itself of its interpretation of this general clause. That upon the principles contended for on the other side, it might be argued, and

with much greater force, that under the terms, " cleanliness," and " health," contained in the general clause in question, the City Council possessed the power of making By-Laws in all matters connected with the establishment of Boards of Health and the protection of the inhabitants from contagious diseases, such measures being naturally supposed to be within the purview of a clause containing such explicit terms, " cleanliness and health;"—yet we find the Legislature itself, very shortly afterwards, in the Act 4 Vic., c. 31, an Act passed expressedly (Preamble) for the purpose of " vesting further powers in the Corporation" (Sect. 18,) in addition to the subjects, matters and things authorised by the Ordinance 3 and 4 Vic., c. 35, to make By-Laws " for establishing Boards of Health," " preserving the inhabitants from contagious disease," &c. That the exposition by the Legislature of its own views was the highest authority which could be invoked, and would be sufficient to supersede any authority from Dwarris, or other writers, even were these adverse to the interpretation contended for on the part of the prosecution. But it has been already shewn that they perfectly coincide on this point.

That the forced interpretation attempted to be given to the 8th section of the 8th Vict., cap. 60, which authorises the Council to make By-laws regulating the trade of Bakers and others, was altogether inadmissible, inasmuch as this would imply a power given to a subordinate chartered body, possessing no power or authority but such as are derived from Statute, and exercising its legislation within a limited sphere, to make a By-Law having the effect of repealing a Statute. That the Provincial Parliament, if it *intended* such a power, would be abdicating its own functions and delegating them to another body, a power never yet conceded to it by any constitutional writer. But that even supposing that the defendant was right in his view of the effect of the legislative enactments referred to, and that the answer of the prosecutor on all the heads embraced within the third objection had failed, the 44th sec. of the 3d and 4th Vict., cap. 35, would still furnish an unsurmountable

bar to all the points made on the part of the defendant. The latter section provides—that the rules, regulations, &c., touching the matters contained in the 43d sec., in force at the passing of that Act, should remain in force until the same should be rescinded, repealed, or altered by the said Council,—and the regulations made by the magistrates in relation to Bakers being produced, and no evidence having been offered of any By-laws having been made by the Council on this subject, the authority of the former still remained unimpugned and unsuperseded, thereby leaving the only point to be determined in this case, to be —whether, upon the expiration of the temporary Act 55, G. 3, c. 5, and the other continuing and like temporary Acts, the Ord. 17, G. 3. cap. 10, revived and became law;—and that for this solitary point, the simple fact of that Ordinance being found in a collection of Ordinances and Statutes recently published under the authority of the Government, was sufficient to warrant Justices of the Peace in presuming it to be the law of the land, leaving to the Defendant his recourse to a higher legal tribunal for redress.

The Court, adopting the view taken by the Counsel for the prosecution, of the law of the case, overruled all the objections, and ordered the parties to proceed to proof. (1).

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(1) This case has since been removed before the court of Q. B., by a writ of certiorari.

LOWER CANADA, DISTRICT OF ST. FRANCIS. } **King's Bench.**

August and September Term 1835.

Before Mr. Justice Bowen,
" " Vallières,
" " Fletcher.

SMITH Plaintiff, *vs.* TERRILL Defendant,

and

PHILLIPPS Opposant.

Held that the non-registration of a deed of conveyance, under the Prov. Stat. 10 and 11 Geo. IV, c. 8; 1st Wm. IV, c. 3 and 2nd Wm. IV, c. 7, does not operate as an absolute nullity, if the subsequent purchaser be not a *bonâ fide* purchaser for a valuable consideration.

This is an Opposition *afin de distraire*, for four lots of land in the township of Durham, of which, (though the whole were advertised) three only have been returned as having been actually seized; the *defendant himself* having, as it is stated in the return, given to the Sheriff the description of them, for the purpose of having them taken in execution, as belonging to him.

The title of the Opposant is as curator to the vacant estate of Thomas Scott, Esq., deceased, to whom the three lots in question appear to have been conveyed by Notarial Instruments of conveyance from Joseph Ellison and William Alkinbrock, both of them dated 1st October, 1802, and which appear to have been executed by Robert Morrough as the Attorney for the alienors, under powers of attorney dated the 3rd and 4th of July, in the same year.

The Opposition is contested by the Plaintiff, who, by his exception, sets up a title in the Defendant to the lots in question as having been purchased by him, and one William Richardson Willard, of one Ezra Dorman, and conveyed by him to them in 1833, and the Excipient alleges that the deeds under which the

Opposant claims in right of the said Scott are null and void, as against the Defendant and Willard, by reason of their not having been duly enregistered under the provisions of the Provincial statutes 10 and 11 Geo. IV, c. 8, 1st William IV. c. 3, and 2nd Wm. IV, c. 7, previously to the conveyance of the said lots to Willard and Terrill, and to the 1st day of May, 1833.

The principal questions which occur in this case are:—

1. Whether the Defendant and Willard have such an interest in the lands as to enable them to take advantage of the non-registration of the Opposant's Title.

2. Whether, supposing the former question to be answered in favor of the party maintaining the seizure, there be not sufficient proof that the Defendant and Willard had at the time of their alleged purchase of Dorman, such notice of the title, or probable title of the representatives of Scott, as will preclude them from objecting to the non-registration of the deeds on which it is founded.

3. Whether there be not sufficient evidence before the Court, of fraud and conspiracy on the part of Dorman, Willard and Terrill, to invalidate the title of Terrill, though it might have been good if obtained in a manner consistent with good faith.

The Court perceives, on looking into the first of the before mentioned Statutes that it does not require that any absolute conveyance, previously made shall be enregistered;—it directs only that *Mortgages* or *Hypotheques* in existence antecedent to its passing, shall be so within twelve months afterwards. It was not until the passing of the second of these Statutes, that absolute conveyances, already in existence, were required to be enregistered;—but it is by that Act declared that every legal Instrument except Letters Patent, which shall not be duly enregistered within the time therein specified "shall be utterly void and of no effect whatsoever, *against subsequent purchasers for a valuable consideration*," and the last of those Acts, by which the time limited for enregistration is enlarged to 1st May, 1833, again uses the same expression.

This leads us to the investigation of the Defendant's title. If Willard and Terrill be really *bonâ fide* purchasers for a valuable consideration, according to the legal meaning of that expression, it will follow that they are entitled to insist on the nullity of deeds, under which the Opposant claims as opposed to their title.

It appears that the title of Willard and Terrill attempted to be set up by the Plaintiff, is founded on a conveyance by Lease and Release and a *Contrat de Vente*, purporting to have been executed before a notary and witnesses, from one Ezra Dorman, of a large tract of land, consisting of nearly 80 lots and comprehending in the whole 15000 acres and upwards, in the Township of Durham, in both of which deeds the consideration stated to have been paid for the lands, is £1520, being at the rate of two shillings per acre, and which sum is accordingly acknowledged to have been received by the said Ezra Dorman.—There is, however, no evidence adduced of the payment of this money, or any part thereof, except the testimony of Nathan Barlow, one of the subscribing witnesses to the Lease and Release, who states that there was a sum of about £20, paid in bank notes by Willard to Dorman and that the remainder was to be paid in promissory notes, from Willard and Terrill to Dorman, which were to be signed by them at a future period. These conveyances are dated 21st June, 1833, at which time the whole of the lands comprised in them *were actually under seizure at the suit of Benjamin Hart*, as being the property of Ezra Dorman having been "*turned out*" as it is called, by Dorman himself for that purpose; and could, consequently, not be the subject of a conveyance by Dorman to any person whatsoever.

There are, also filed with these deeds, three other papers purporting to be contracts of sale, signed by one Simon French Rankin, who appears by the evidence, to be a son in law of Ezra Dorman, in the capacity of attorney for different persons, at Dorman's own house, on the 25th of April 1833, five days only, before the expiration of the time allowed by the last Registry

Act, for the Registration of Titles, and which appear to have been registered at Drummondville, 26 miles distant, on the next day, by which the whole of the lands, which are pretended to have been conveyed within less than two months afterwards, by Dorman, to Willard and Terrill, are stated to be conveyed to Dorman. These latter papers are neither notarial instruments nor under seal, and consequently, could have conveyed no title to lands, under the provisions of the 9 and 10 Geo. IV. c. 77. Nor, is there any proof of the powers of attorney, under which they are pretended to have been so signed, or of the title of the persons who are named therein as the vendors and for whom this Simon French Rankin professes to act as attorney.

The whole of the claim, therefore, of Willard and Terrill, to be regarded as purchasers for a valuable consideration, is founded on the mere production of deeds, purporting to be a conveyance from Ezra Dorman, of whose title there is no evidence—or with regard to whom it may rather be said, it sufficiently appears from the papers produced by themselves, that he had no title whatsoever, and it is clearly proved that he never had possession of any part of the premises to which they relate; and the question submitted to the Court, is whether this be in itself sufficient to entitle Willard and Terrill to the privileges of purchasers for a valuable consideration. There, surely can be no difficulty in saying it is not. An instrument purporting to be a conveyance from one who has neither title nor possession, conveys nothing, either by the Laws of England or of France. A person who would claim the privileges and immunities which belong to a purchaser for a valuable consideration, must shew that he is so, and that the person from whom he purchased, had both possession and title, or at the least, that he had the possession and such a semblance of title as might reasonably have induced any one who had applied the ordinary degree of care in the investigation of it, to consider it as good.

The question would stand thus if there were nothing to create a presumption against the validity of the

title of Willard and Terrill, but what appears on the face of the documents produced in support of it. But this is not all. It has always been holden in all questions under the Registry Acts in England, that the *knowledge* of an unregistered title in *any party interested in the property* precludes him from taking advantage of the want of registry of the Deeds, on which it is founded—and it is clear that Willard and Terrill could in no case sustain a plea that they are purchasers for a valuable consideration, without notice of the title of the Opposant, which *latter* allegation *would be essential* to its having any operation as against him. There is distinct evidence before the Court that the whole of the lands pretended to have been purchased by Dorman from the persons for whom Simon French Rankin, his son in-law, pretended to act as attorney, had been for many years, generally known to belong to Mr. Scott, as curator to whose estate, the Opposant now claims, and had, in consequence, been called "*Scott's Lands*," and in particular, that his title had long been known to Dorman, who had, accordingly endeavored to discover such of the representatives of Scott as might be authorised to dispose of those lands, and that these circumstances had also been communicated by him, to Willard and Terrill.

It is also proved, that, notwitstanding such knowledge of the title of Scott and subsequent to such attempts to purchase the lands of his representatives, Dorman having as he thought discovered that the property had become vested in an heiress of Scott's in Italy, who would never acquire a knowledge of her rights, had formed a scheme to induce some other persons whom he knew to have no title, to convey the lands to him under the pretext of their being the proprietors thereof, on condition of his *paying them six pence per acre in case he should succeed* in getting such fictitious title corroborated by a Sheriff's title; and amongst others, this is fully stated by Doctor Leonard Brown, of Dunham, one of the very witnesses called by the Plaintiff in support of the pretended title of the Defendant. It also appears clearly from the evidence adduced, that Willard and Terrill, *knew* as well as

Dorman that there was probably an heiress of Scott, the original proprietor, in Italy, and that with this knowledge, they had thought proper to venture on the speculation, or to speak more properly, to enter into the conspiracy with which they are charged.

The title of Scott now before the Court and under which the Opposant claims is more than 30 years old, during all which period it has not only stood uncontroverted, but has been generally known and recognized, and it appears that the whole of the lands pretended to have been conveyed to Dorman, had in consequence been universally known by the name of their deceased proprietor, whom the Opposant now represents. The title of the Opposant seems, therefore, to be sufficiently established. The whole case on the part of Dorman, Willard and Terrill, presents, on the other hand, a scheme of fraud and iniquity with regard to which as it may probably, be hereafter made the subject of investigation before a tribunal, exercising a different jurisdiction, the Court forbears to enter into further details.

The present duty of the Court is to decide the question immediately before it, and we are clearly of opinion that the judgment must be for the Opposant as to the three lots which appear to have been seized, with costs, against the Plaintiff, at whose instance the seizure was made under the directions of the Defendant himself, and by whom the opposition has been contested.

Judicial Committee of the Privy Council.

Council Chamber Whitehall,
June 21, 1845.

PRESENT:
The Right Hon. Lord Brougham,
The Right Hon. The Vice Chancellor Knight Bruce,
The Right Hon. Dr. Lushington (Jugde of the Admiralty Court.)
The Right Hon. J. Pemberton Leigh (Chancellor of the Duchy of Cornwall.

TOBIN vs. MURISON.

Lord Brougham (1).—This case comes before us from the Court of Intermediate Appeal and Error in Canada, and it seeks to have a Judgment reversed, there given upon an Appeal and Writ of Error from the Court of Queen's Bench in an action brought by the Respondent against the Appellant as Bailee of Sugars delivered to him by the Respondent, and destroyed by a flood of the River St. Lawrence. The ground of the action is the Appellant's negligence in the keeping the Sugars; and first, we may consider the form of the pleadings by which the claim for damages was stated and resisted.

The Declaration contained three counts specially charging the Appellant severally, with not duly keeping, not accounting for, and by his negligence occasioning the damage to the goods. The common counts, except those for goods sold and delivered and on an account stated, were added, one of course being for money had and received for the use of the Plaintiff, and one for money lent and advanced by him. A plea amounting to the general issue was pleaded, and the replication after traversing the matter of the plea, appears to make an addition to the matter of the de-

(1) Copy from Mr. Morton's short-hand notes of the judgment.

claration for it avers, that the Appellant, Defendant in the Court below, kept the sugars in a warehouse or store contrary to the Respondent's (Plaintiff's) instructions and charges, in violation of those instructions. It likewise uses language like that of a demurrer, nevertheless, it concludes to the country upon the whole matter, and therefore we cannot doubt, especially after verdict, that no objection can be taken as to a *departure*, which the Appellant (Defendant) might have demurred to, even if there were no new matter pleaded by the replication, but upon the whole and as the strict rules of pleading cannot in this case be enforced, we must consider this additional statement respecting violation of instructions as only a further specification of the charge of negligence in the declaration. That charge in truth forms the whole ground of the action, and the not following instructions may justly be considered as one circumstance, and a material circumstance, tending to shew negligence in the care of Plaintiff's goods. Nothing therefore arises upon the pleadings, except this remark, which is very material to be kept in view. *That there is no breach of contract charged.* The action is not upon the contract, if it had been, then some damages, must have been recoverable, at all events had the breach of contract been proved, after proving what is not even alleged and *certainly not found in the Special Verdict*, that the sugars had been accepted on the foot of the instructions, or in some other way that the Defendant (Appellant) had made himself a party to those instructions as to a contract.

Our attention is next required to the judgment which proceeds upon a special verdict. Now upon this verdict some observations arise. There is no reason to hold that the niceties of our pleadings are applicable to a proceeding in those North American Colonies which are under the French and not the English Law. Those rules may neither govern the pleadings or the verdict, nor the judgment. In short we may assume that no part of the record is subject to them. Nevertheless without adverting to the particulars of our system *three* things must of *necessity* belong to what-

ever proceedings involve a trial by jury. The matter of law and the matter of fact cannot be kept separate without a severance of the two neighbouring provinces of judge and jury; and trial by jury cannot in any intelligible or consistent sense be said to exist, without that distinction of law and fact: the functions of judge and jury must be the same wherever there is trial by jury. A special verdict must be a finding of the facts by a jury from which the court is to pronounce its judgment upon the law. The jury should not leave the facts to the court, or stating the evidence leave its result in point of fact to the court. Yet in the present instance the action being for negligence, the special verdict finds facts and leaves the court to say whether negligence has or has not been proved. Negligence is a question of fact and not of law and should have been disposed of by the jury.

But the objection to this judgment proceeding upon this verdict lies deeper and is more fatal. If the whole matter had been that the court and jury together had drawn an inference which the facts went clearly to support, and if the inference was applicable to the claim or suit of the Plaintiff, we might have found no great difficulty in supporting the judgment although the functions of the court and the jury had not been kept conveniently distinct, and either had encroached upon those of the other. But it does not appear at all clear, but the contrary, that there were either averments or finding in the Plaintiffs favor sufficient to support his contention and to justify the sentence which he has obtained below. He has not alleged that the sugars were accepted by the Defendant on the foot of the Plaintiff's instructions, or that a compliance with those instructions was the condition upon which the bailment was made. He has not shaped his case in that form at all. He has only alleged *negligence* in keeping the sugars, and given among the proofs of that, nay, as the *only* proof, that a direction, as it were, a notice or a warning had a year and a half before the *bailment*, been given by the plaintiff. The letter of May containing many other matters refers to a flood which the Defendant had described in a letter of

the preceding month of April, to which this of May was an answer, and says, no goods of his should remain in so dangerous a situation for the future, that is, by being stored in the river warehouse.

But those who maintain that the neglect of that direction makes the Defendant answerable in damages for the loss sustained, also maintain, nor can they escape from the necessity of maintaining, that whatever might have caused the loss, lightning, earthquake, fire or hurricane, which should have swept away half the stores in Montreal, the Defendant would equally have been answerable for. I say they cannot escape from this, because there is no proof, nor indeed any averment, certainly *no finding*, that the wharehouse was unsafe, or unsuitable for the keeping of goods, or was in any way an unusual place for their custody.

On the contrary it is a fact in the cause (and so found) that the place was one usually so employed, and that the flood was one of unusual occurrence. The neglect therefore consisted in disobeying or not observing the direction.

It must follow, if that alone is sufficient to support the court and the judgment, that this non-feasance or neglect was of itself sufficient to cast on the Defendant, the responsibility for what has happened:—

It is not at all impossible that further proof might have been afforded to show, on the one hand how far the party was negligent, or on the other how far the custody was necessarily such as he gave to the goods. Very possibly there was no other storage for them, and had he not put them there he must have reshipped them to the bailor. Very possibly between the date of the letter and of the bailment, other dealings between the parties had taken place, either by the Defendant storing the Plaintiff's goods in the forbidden warehouse, or, by his carefully avoiding that course. Of all these things we are left uninformed. The result is that we are required to cast upon the Defendant the loss of the goods, because 18 months before, he had been told not to place them where he did place them. That deviation is not a ground sufficient to make him amenable. It is not itself sufficient to con-

stitute *negligence*, which is the ground of the Plaintiff's claim and *the gist of the action*. It is a circumstance, even a material one, but not sufficient to dispose of the case. The position never can be maintained, that all departures from the bailor's instructions is such negligence as gives him a right to cast the loss of his goods upon the bailee. It never can be maintained that every such departure is such negligence as will give a right to recover damages. The loss ought to be more immediately connected with a departure from the instruction. The holding him so liable must extend to the case of his having stored the goods in the very best and safest warehouse in the town. Now he might make himself liable to loss even in that case, but only if he accepted the goods upon the condition, and that in the present case is neither proved by the evidence, nor averred by the pleadings, nor found by the verdict.

The sum of £758 14 8, is proved by the judgment to be due from the Defendant, independently of the damages assessed at £753, though there is no count for an account stated in the declaration, and though this sum is stated in the judgment to be for the balance of accounts, we think it may justly be given, as there are many counts, and this may be referred to the balance remaining unpaid as the sum in one or other of these counts.

The judgment below, therefore, must stand for that sum, and *quoad* the damages assigned a *venire de novo* is to be awarded, reversing *pro formâ* the judgment below, but with leave to both parties to amend the pleadings, if they are so advised, and without prejudice to any question except, so far only, as the *venire de novo* goes.

Vice Chancellor, Knight Bruce.—The pleadings are to be amended on both sides.

Mr. Bliss.—The judgment is reversed as to that portion which relates to the damages.

Lord Brougham.—Reversed as to the £753, affirmed as to the £758.

Vice Chancellor.—Execution may go for that sum.

L. Brougham.—And reserve all questions except so far as the *venire de novo* goes. All we do is to award a *venire de novo.*

Mr. Bliss.—That leaves either party to amend their pleadings as they may think fit.

Vice Chancellor.—An execution may go for that money.

Lord Brougham.—A *venire de novo quoad* any thing except that for which we give judgment.

Vice Chancellor, to Mr. Bliss.—So that you will be prepared for the execution.

Lord Brougham.—For the money that is given for the balance.

Vice Chancellor.—You must try your hand again for the rest.

Lord Brougham.—You must mend your hand.

ANALYTICAL INDEX.

To cases determined in the court of King's Bench for the District of Quebec, from 1822.

(CONTINUATION FROM PAGE 125.)

If a sheriff's sale is interrupted, and no adjudication is made, the contract of sale is imperfect, and the last bidder is not an *adjudicataire.* Baker vs. Young, 1810, no. 128,

The use and occupation of a house creates between the landlord and tenant an implied contract, on which an action in debt or assumpsit can be maintained by the former against the latter. Burns vs. Burrell, 1816, no. 638.

No action lies to recover back a fee paid to counsel: It is a voluntary donation. Bergeron vs. Panet, 1809, no. 53.

An English commission of Bankruptcy operates in Canada as a voluntary contract of assignment. Bruce vs. Anderson, 1818, no. 478.

Sureties are not exonerated from their contract by the neglect of the creditor to prosecute the principal debtor. Berthelot vs. Aylwin, 1819, no. 1175.

A notary cannot charge a percentage upon sales of property without a special contract. Bélanger vs. Dénéchaud, 1820, no. 267.

A *simple garantie de fait* in a transport is a warranty of the debtor's solvency at the time of the assignment. Belanger vs. Binet, 1820, no. 547.

A donation in a contract of marriage is not a transfer on which *lods et ventes* are due. Baby vs. Letellier, 1821, no. 285.

The forfeiture of a *bail emphytéotique*, for non-payment of the rent, will not be decreed, if it be proved that before the action was instituted the rent due was tendered and refused. Burns vs. Richards, 1821, no. 717.

A tenant may sublease, if there be no agreement between him and his landlord to the contrary. Cérat vs. Stephens, 1816, no. 278.

No action of damages can be maintained against a tutor for a breach of his contract by which he engaged to marry his *pupil* to the plaintiff. Chabot vs. Morriset, 1812, no. 1.

The contract of a minor is not *nul de plein droit*. Casgrain vs. Chapais, 1820, no. 1147.

The *retrait conventionnel* is not exercised *de droit*. It must be stipulated in the original concession of the estate on which it is claimed. Desprès vs. Fortin, 1811, no. 259.

The Arret of July 1711, respecting contracts of concession is a penal statute. Dubois vs. Caldwell, 1820, no. 92.

One who contracts with commissioners for public works can recover from them such monies as they may have received from government to pay him. Larue vs. Crawford et al., 1819, no. 547.

A sale of the usufruct of a farm for a sum certain, but to be held for a period depending upon an uncertain event, is a contract "*aléatoire*," upon which an action will lie. Lagassé vs. Dionne, 1820, no. 1226.

An action for money paid for the necessary repair of a *mur mitoyen* can be maintained on the implied contract of the co-proprietor of the wall with his neighbour. Latouche vs. Rollman, 1821, no. 1407.

A penalty in a contract is not held to be stipulated damages, unless, upon the face of the contract it is declared to be so. Mure vs. Wiley, 1810, no. 264.

Copartners, parties to a contract, must be co-plaintiffs. Morrogh vs. Huot, 1811, no. 141.

A promise by three jointly and severally, is a promise *solidaire*. McNider vs. Whitney et al., 1817, no. 631.

All parties jointly interested must join in an action *ex contractu*. McLeish vs. Lees, 1818, no. 371.

A bond given for salvage in a court of admiralty in Nova Scotia can be recovered in Canada. Moore vs. Mure, 1818, no. 640.

A contract of sale executed by a tutor on the behalf of his pupil, without an *avis de parens*, is null and void. Normandeau vs. Amblement, 1813, no. 590.

A consignee is liable on an implied contract to pay the freight of goods which he receives. Oldfield vs. Hutton, 1812, no. 5.

Breach of contract insufficiently alledged must be pleaded by exception *à la forme*. Pacaud vs. Hooker, 1811, no. 387.

One who contracts as an agent for the public is not personally responsible. Perrault & Green vs. Baillargé, 1814, no. 321.

One who binds himself with a vendor *solidairement* to defend the purchaser against all claimants is necessarily a *garant formel*. Peltier vs. Puize et al., 1818, no. 885.

A demand of stipulated damages affirms the contract and prevents the recovery of advances. Patterson vs. Conant, 1819, no. 1098.

A promise to pay a protested bill is a waiver of want of notice. Ross vs. Wilson et al., 1812, no. 330.

In an action against two, if it appears that the contract is merely several, no judgment can be given for the plaintiff. Ray vs. Blagdon et al., 1817, no. 49.

Public officers are not responsible on public contracts. Scott vs. Lindsay, 1818, no. 200.

In actions on contract, the contract must be set out in the declaration. Simard vs. Mathurin, 1812, no. 424.

If there be no expressed contract, an action, *quantum meruit*, for work &c., can be supported. Tuzo vs. Jones, 1820, no. 506.

If there be no evidence upon a contract for the sale of moveables, and if there be no tradition, and the articles intended to be transferred are seized in the possession of the vendor, the purchaser cannot maintain an opposition *afin de distraire*. Hunt vs. Perrault et al., 1821, no. 4.

In a contract of marriage, if the parents of one of the future *conjoints* make a donation to both of them of landed estate, *lods et ventes* are not due. Baby vs. Letellier, 1821, no. 285.

A servant engaged by verbal or written contract, and dismissed without cause, is entitled to wages for the residue of the term for which he was engaged and to the value of his board and lodging for the same period. Fortier vs Allison, 1811, no. 276.

A promise to pay seamen's wages on the arrival of the ship is null, if the ship is lost. Woods vs. Higginbotham, 1813, no. 576.

DONATIONS.

oooo

A donation made by a weak and aged person for a small annuity, not exceeding half of the annual income of the property given, may be set aside for fraud, if the inference of fraud be not rebutted by evidence of circumstances which plainly show that it ought not to prevail. Bernier vs. Boiceau, 1813, no. 500.

A donation made to a priest by his *pénitente, à la charge* that he will say 2600 masses for the repose of her soul, is null and void *ab initio.* Fournier vs. Poulin, 1817, no. 373.

Where the *donataire*, by his own act, has rendered it impossible for him to perform a material condition of the donation, it is good cause for resiliation. Lagacé vs. Courberon, 1817, no. 46.

A donation may be resiliated for non-payment of an annuity for which the *donateur* and the *donataire* have stipulated. Migné vs. Migné, 1811, no. 206.

A donation may be enregistered at any time during the life of the *donateur.* Gaulin vs. Carrier, 1809, no. 9.

A donation which provides for the board and lodging of the *donateur* in the house of the *donataire* at his table, does not confine the *donataire* to a residence in the house given by the donation. The *donateur* (if it be not otherwise provided) must accompany the *donataire* to the house which he chooses for his dwelling, or forego the advantage of board and lodging at the *donataires* expense. Gagnon vs. Tremblay, 1818, no. 244.

In the case of a donation by a parent to his child, the tranquillity, the careful aid, and the minute filial attentions, which the parent requires, and naturally seeks to obtain in the decline of life, must necessarily be destroyed by the constant intoxication of the *donataire*, and this being voluntary is a good cause of resiliation. Couture vs Begin, 1819, no. 102.

QUEBEC.—BANC DE LA REINE.

No. 1620 de 1847.

METHOT ET AUTRES

Demandeurs,

vs.

SYLVAIN

Défendeur.

ET

GIBB ET AUTRES

Opposans.

Entre deux créanciers hypothécaires, dont les titres de créance sont subséquens à l'opération de la loi des Bureaux d'enrégistremens, la première en date sera préférée.

Dans cette instance, les demandeurs réclamaient un privilège sur le produit des immeubles vendus en vertu d'un jugement rendu le 15 juillet 1846, et les opposans Gibb et autres en vertu d'une obligation du 4 octobre 1843, portant création d'une hypothèque spéciale sur les immeubles vendus en cette cause. Le jugement ni l'obligation n'avaient été enrégistrés, et le greffier de la cour, considérant les deux parties comme de simples créanciers chirographaires, les avait colloquées par concurrence au marc la livre. D'où contestation de l'ordre de distribution de la part de Gibb et autres, créanciers d'une date antérieure. Ils prétendaient que c'était l'acte authentique et non l'enrégistrement qui créait l'hypothèque, laquelle subsistait indépendamment de l'inscription, dont l'unique effet était d'assurer une préférence à la créance enrégistrée sur celle non enrégistrée. La cour, adoptant cette interprétation de la loi, a jugé que Gibb et autres devaient être colloqués en préférence aux demandeurs. Cette décision est d'une grande importance, en ce qu'elle fixe le sens de l'ordonnance sur une question des plus graves. La question est traitée dans le même sens à la page 64 de ce volume de la *Revue*.

Revue de Legislation et de Jurisprudence.

SOMMAIRE.

5me Livraison.

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