IMAGE EVALUATION
TEST TARGET (MT-3)

6"

Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches.
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

© 1991

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [x] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- [x] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [x] Quality of print varies/ Qualité inégale de l'impression
- [ ] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison
- [x] Additional comments:/ Commentaires supplémentaires: Docket title page is bound in as last page in book but filmed as first page on fiche.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
										✓	

The copy filmed here has been reproduced thanks to the generosity of:

Société du Musée
du Séminaire de Québec

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol —▶ (meaning "CONTINUED"), or the symbol ▼ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

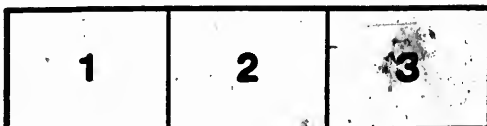
Société du Musée
du Séminaire de Québec

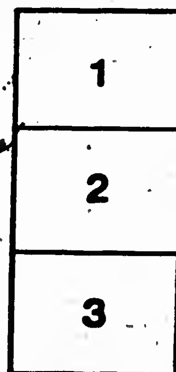
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

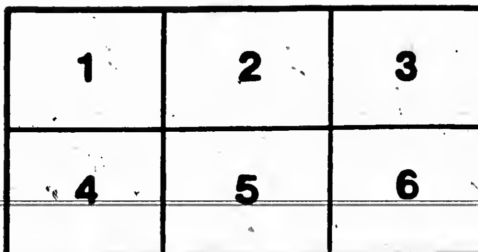
Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole —▶ signifie "A SUIVRE", le symbole ▼ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.







No. 6.

IN THE COURT OF QUEEN'S BENCH.

APPEAL SIDE.

GEORGE B. C. LEVERSON & AL.,

Plaintifs in the Court Below.

APPELLANTS.

AND

JAMES CUNNINGHAM,

Defendant in the Court Below.

AND

JOHN BOSTON.

Mis en cause in the Court Below.

RESPONDENT.

APPELLANT'S FACTUM.

PROVINCE OF CANADA
LOWER CANADA, *to wit*
DISTRICT OF MONTREAL.

In the Court of Queen's Bench.

APPEAL SIDE.

GEORGE B. C. LEVERSON & AL.,

(*Plaintiffs in the Court below.*)
APPELLANTS.

and

JAMES CUNNINGHAM,

(*Defendant in the Court below.*)

and

JOHN BOSTON,

(*Mis en cause in the Court below,*)
RESPONDENT.

Case for the Appellants.

This action, which bore the number 363 in the Superior Court, was begun by a writ of *capias ad respondendum* against the Defendant, to which was joined a *saisie-arrêt avant jugement*, under the latter of which a quantity of jewelry, belonging to Defendant, was seized, and *by the Sheriff* placed under the charge or guardianship of one David Garrick, as his *gardien d'office.*

The Defendant succeeded in setting aside the *capias*, and was let out of gaol; but his efforts to have the *Saise-Arrêt* set aside were unsuccessful, and Plaintiffs subsequently obtained Judgment for the sum of £666 interest and costs, on account of which the Appellants have only received a portion, leaving a balance still due of £448 16s. 2d.

On this Judgment the Plaintiffs took out execution, in order to have the goods so seized and placed in the hands of the guardian, sold, but were met by an opposition on the part of the Defendant, which was set aside for informality.

The Plaintiffs then took out a writ of *venditioni exponas* to cause the goods so seized to be sold. On the day of sale the goods were not forthcoming, and in answer to this writ the Sheriff made the following return: "I hereby certify and return, that I have been unable to proceed to the Sale of the Goods and Chattels already seized in this cause, and mentioned and described in the schedule hereunto annexed marked A, as within commanded, by reason of the said goods and chattels not being produced and represented on the day fixed for the sale thereof, by David Garrick, the guardian named in the original *procès-verbal* of seizure thereof; but in justice to the said guardian, I annex to this return various documents and affidavits, respectively numbered, 1, 2, 3, 4, 5, 6 and 7, which have been filed with me as explanatory of the cause of the non-production of the goods so seized.

(Signed,) JNO. BOSTON, Sheriff.

MONTREAL, 1st August, 1855.

In addition to this return, the Sheriff, "*in justice to the guardian*," as he says himself, filed along with the return five affidavits and three other documents, the substance of which may be summed up in a few words, and which give what, we are not prepared to deny, is a true history of the circumstances which prevented the Sheriff from producing the goods seized as above mentioned. The only question then is, does the Sheriff's explanation relieve him of his legal liability? or does it do aught but say—"I am really the offender"? We think not, but we give it for what it is worth. The

affidavits and documents then relate: that there was another action pending between the same parties, bearing the number 375; that this last-named action was begun by a *Saisie-Arrêt en main tierce*; that, on motion, the Defendant Cunningham had this last *Saisie-Arrêt* set aside, and that immediately thereupon his Attorney got a copy of the Judgment, (to wit document number 2, filed in support of Sheriff's return), with which he hurried up to the office of the Sheriff, and told him that it was a Judgment dismissing the *Saisie-Arrêt*, and that he wanted an order for the delivery of the goods at once. (Be it observed there were no *goods* seized under the "*Saisie-Arrêt en main tierce*," action No. 375). The Sheriff, taking the number from the copy of the Judgment, sent to the seizing Bailiff the order to deliver up the "*several articles and effects*" seized by him and in his custody, to wit: the document number 3, filed by the Sheriff in support of his return.

On this order the goods were delivered up to the Defendant, who, we may presume, did not wait until the Sheriff was undeceived.

The Plaintiffs, in order to make the Sheriff account for these goods, moved for a rule against him; which, after some difficulty, they obtained. The conclusions of that rule were to the effect—that the Sheriff should produce the goods in order that they might be sold, and that in default thereof, he should be imprisoned until he did so.

The Superior Court dismissed this rule, refusing to declare it absolute on the ground that no one could be ordered to do a thing which might be physically impossible, or go to gaol. The goods might be destroyed, said the Judge, and if the Sheriff could only get out of gaol on producing them, it would be equal to condemning him to go to prison for the rest of his days.

In order to meet this difficulty, suggested by the Court, the Plaintiffs again moved for a rule against the Sheriff, offering the additional alternative of *paying the balance due on the Judgment*. The rule was in the following words: "The Court inasmuch," &c., "Doth order the said John Boston, as such Sheriff, to produce the said goods and chattels so seized as aforesaid before this Court, within such time as this Court shall direct, in order that the said goods and chattels may be sold according to law, and in default of the said John Boston so producing the said goods and chattels, he, the said Sheriff, shall be imprisoned and held *contraint par corps*, until he do produce the said goods and chattels, or until he pay to the said Plaintiffs the balance of £448 16s. 2d. currency, with interest on the said sum from the 17th day of October, 1855, still due on the said Judgment, unless cause, &c."

On this proceeding the Plaintiffs were as unfortunate as on the previous one, the Court dismissing the rule with costs. And it is from this Judgment that the present Appeal is brought.

And first we would remark that the addition of the alternative of paying the balance was only a measure of precaution, for it seems to us that the wording of the rule first dismissed was sufficient. To the humane argument of the Court below, the force and value of which, taken alone, we are ready to admit, we answer, that the words of the ordinance make no mention of this inconvenience, (the impossibility of the party in default ever getting out of gaol); that its terms expressly declare that the "gardiens, &c.," are tenus *par corps à la représentation des effets saisis.*" It might also be added that the fears of the learned Judges for the fate of their officer were groundless. By the ancient practice in the Courts in France, the Judges, *sur requête*, restrained the vexatious continuance of imprisonment of a party condemned *par corps*.

If however the views maintained by the Superior Court should prevail here, and that it should be the opinion of this Court that the express terms of the ordinance should be modified in such a manner as to give the party in default an alternative with which it should always be physically possible for him to comply, and so escape the more severe consequences of his fault, then comes the question, "What should that alternative be?"

On the part of the Sheriff it was pretended that the alternative the Appellants should have offered was to pay the *value* of the goods. It was also urged, and with some show of reason, that the Sheriff had nothing to do with the Defendant's obligation, or the balance due upon it, and that it remained for the Plaintiffs to establish that his act had damnified them to the extreme extent of the said balance.

To this the Appellants answer, this is not an action of damages. Our absolute right is to have these goods in order to sell them, and the penalty you pay for not producing them is that you go to prison until you do so, and it is only as a mitigation of the extreme rigor of the law, that this other alternative is offered to you. You are not to be condemned to pay the balance, but you are to be condemned to go to gaol until you perform your duty, or until you indemnify to the farthest possible extent, those who suffer by your negligence.

Besides this, it is quite apparent that the Plaintiffs could prove no value. The goods never were theirs, and never were in their keeping or possession. The Plaintiffs had no opportunity of even knowing whence they were brought or where they were carried to.

If the law be as the Superior Court decided, the Sheriff is saved from punishment, by the very act which, all agree, rendered him liable in the abstract. He is to escape unscathed, because, he has destroyed the rule by which he pretends his punishment should be measured.

But the case in point is not a singular one. It as often, or nearly as often, happens that the goods seized are not the property of the party who seizes them, that they never were in his possession and that, if the goods no longer existed, he would have no more opportunity of proving their value than the Plaintiffs have in this case.

In this large class of cases, are the securities which surround the Sheriff's office to cease? Is the Sheriff to be told, Sir, these goods are committed to your charge, in default of your producing them when required so to do, you shall be sent to gaol until you do produce them, that is to say, unless you can manage to destroy all evidence of their value. In that case you may do with them what you like, there is no law to punish you for their misappropriation?

To such a question, every one would reply in the negative and ridicule the questioner, and yet, this is, without exaggeration, exactly what the Judgment of the Superior Court tends to establish.

Again, if there was anything in the ordinance to authorize such a conclusion, one might say—it is the law that is in fault. But no, the terms of the ordinance are clear and precise, and practical though severe; yet here they are paralyzed by a piece of sentiment.

On the other hand, the Plaintiffs contend that, if any alternative, other than that supplied by the ordinance, be required, it is the one they have offered—that of paying the balance due on the Judgment. It entirely meets the difficulty which appeared to embarrass the Court the most; while it is not without precedent among the old French *arrêts*, it is analogous to the remedy given by the English statute, (5 Anne, c. 9, s. 4.) against the Sheriff in cases of escape.

But there is another way in which the Appellants have suffered by the Judgment of the Superior Court. That Judgment was premature and rendered *without* cause being shewn against the rule.

It will be remembered that the rule was a rule to show cause, to which the Sheriff asked and obtained leave to answer in writing. He did not question his responsibility in the abstract, and if anything were wanting in the Appellant's rule by their not having given the alternative of paying the *value* of the goods, it was compensated by the Sheriff's answer filed of record. He formally put in issue the value. If value was to be the guide, it was then the duty of the Court to order an *enquête*, and that of the Sheriff to substantiate his excuses by proof. Instead of ordering an *enquête*, the Court dismissed the rule summarily. But it may be urged, it was the duty of the Appellants to demand an *enquête*. We think not. It was the interest of the Sheriff to show cause against the rule. He was bound to show cause on a particular day, which was subsequently extended to a later day, for his convenience. On that later day, it was for him to show cause, or the rule should have been declared absolute. His answer in writing which contained a simple enumeration of facts, which, it was pretended, would allow him to avoid the penalty claimed by the rule, unproved, could avail him nothing.

It appears to us unnecessary to dwell upon the liability of the Sheriff as *guardian*, in all cases but that excepted by the statute, as that point is sufficiently established by the jurisprudence of the country. Still less, shall we dwell on a difficulty raised at argument that the Sheriff cannot, while he is Sheriff, be imprisoned, which is fully answered by the statute, empowering the Coroner to act as Sheriff, when the Sheriff cannot, by reason of interest.

The Appellants, therefore, would respectfully submit:

1st, That the terms of the ordinance should be exactly followed, and the Sheriff, as *gardien*, be *tenu par corps à la représentation des effets saisis*.

2nd, That in case another alternative should be required, that the alternative of paying the balance due on the Judgment be declared sufficient, and

3rd, That even if it be necessary to prove the value of the goods, that it is for the Sheriff, who had them in his custody for months, to do so, and that in such case the record should be returned to the Court below, in order that the parties may have an opportunity of proceeding to *enquête* on their respective pretentions,

Montreal, 15th August 1857

E. D. DAVID,
T. K. RAMSAY,
Attorneys for Appellants.