The Lower Canada Law Journal.

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THE GRAND TRUNK RAILWAY CARTAGE QUESTION.

We have received a copy of the judgment rendered by Mr. Assistant Justice Monk on the 9th December last, refusing the application made to him at the instance of the Attorney General, against the Grand Trunk Railway Company of Canada, for an injunction to restrain that Company from the exercise of the business of common carters within the limits of the city of Montreal. We have not space for more than a brief summary of the judgment which reviewed the pleadings, evidence and authorities at considerable length.

The Grand Trunk Company employ exclusively a Mr. Shedden to collect and deliver freight within and near the city of Montreal. The master carters of the city are excluded from all participation in the business of collecting and delivering for the Grand Trunk; and consequently it was sought to restrain the Company from the exercise of this privilege or monopoly, carried on in this way through the instrumentality of Mr. Shedden. The petition set forth several distinct charges against the Company, viz.: that they transported goods for hire from their depots to and from the stores and residences of the citizens; that they charged tolls for the transport of goods and merchandize from Montreal to places on their line of railway; and that such tolls were uniform and the same whether the goods were carted at the expense of the sender and receiver, by his own carter, or at the expense of the Company; with various other allegations. The conclusions of the petition asked for seven different orders or judgments, viz.: that it should be adjudged and declared:—

"1st. That the Company have exercised a franchise and a privilege not conferred by law.

2nd. That the Company have offended against the provisions of the Act or Acts creating, altering, renewing or re-organizing the said Corporation.

3rd. That the defendants have exceeded the powers, capacities, franchise and jurisdiction conferred upon them.

4th. That the imposition of tolls, including the cartage of the goods and merchandize in and within the limits of the city of Montreal, may be declared illegal, and in contravention of the law.

5th. That the imposition of tolls without the authority of a by-law, approved of by the Governor in Council, &c., be declared illegal.

6th. That it be declared that the defendants carry on the business and occupation of common carters within the limits of the city of Montreal, and that their doing so is illegal.

7th. That the Company be enjoined to abstain from using the occupation of carters within the city of Montreal, and be restrained for carrying goods and merchandize from and to their depots, to and from the residences and stores of the citizens of Montreal."

The defendants met the action by a motion to quash the writ and petition, by a special demurrer, and by three other pleas amounting to the general issue. The reasons assigned in the demurrer were that the allegations of the petition were vague, and the pretended offences not particularized as to time, place or circumstance; that it was not alleged that any person was injured, &c. The motion to quash was rejected on the 26th April, 1865, and proof ordered *avant faire droit* upon the demurrer. A large number of witnesses was examined on both sides. His Honor remarks upon the evidence as follows:—

"After considering this conflicting testimony with great care, I have no hesitation in expressing the opinion that it is proved that the collecting and delivering freight, merchandize, packages, &c., by the Company's carters, is a convenience and beneficial to the public. It must, I think, be obvious to every dispassionate and unbiassed mind, that, if not absolutely necessary to carry on the business of the company, yet that their system in this particular must be highly useful to their customers; and it appears to me, moreover, that this opinion is fully corroborated by the evidence adduced by the defendants."

After noticing at considerable length the authorities and cases cited by counsel, his Honor concluded as follows:—

"I am clearly of opinion that the exclusive employment of any particular carter or

carters by the Grand Trunk is incidental, if not absolutely essential, to their business of common carriers, and that, therefore, the Company does not, in this particular instance, stand charged with an illegal act. This I hold to be true under the facts proved in this case, in so far as this exclusive employment of Mr. Shedden goes. I think, moreover, that this right rests upon principles of the common law. But, by a provision in the Railway Clauses Consolidation Act, the Company are empowered to do all things necessary or requisite for the more effectually fulfilling and carrying out the objects of their charter, and I incline strongly to the opinion that this is one of the means of attaining such a result, impliedly granted to the Company. It has been said that although this course may be essential in other localities, yet that it is not so in the city of Montreal, where hundreds of carters are ready and willing effectually to perform all the cartage in collecting and delivering for the Company. In point of fact, this may be true, but in my view of the law, it is clearly incidental to their business as common carriers, and if so, the Company must, in the administration of the important interests confided to their charge, and in their extended responsible relations to the public, be the sole judges, whether they will follow their present system or revert to the old course of business. They collect and deliver now under special contracts with their customers. In my opinion these contracts are legal, and I cannot declare them illegal. So long as the public at large are not injured, and do not complain, I cannot interfere by injunction as prayed for by the petitioners. The motives of this decision, as embodied in the final judgment of record, will concisely disclose the grounds in law and in fact, upon which my refusal to issue the injunction rests."

The motives of the judgment are as follows:

"Considering that the petitioner has not established by legal and sufficient evidence, such a case of public interest as is required by the statute, authorizing the present proceeding; considering, moreover, that it is not proved by the evidence adduced in this cause that the complainants have suffered or have been directly aggrieved to such an extent as would justify the issuing of an injunction in the present case as prayed by their petition: seeing that it results from the evidence adduced that the fact of collecting and delivering by carters, exclusively employed to that effect by the defendants, is not injurious, but, on the contrary, advantageous to the public; considering that the defendants have the right, as common carriers, and in the prosecution of their lawful business as such, to employ exclusively any carter or carters they may, in their discretion, select to collect from and deliver freight to their customers; and that such exclusive employment of particular carters is not a violation of their charter, inasmuch as the act itself is essential or incidental to their business as common carriers: considering that no injunction can by law issue in this case to restrain the defendants from illegal acts, by and from which the petitioners are not shewn to have been distinctly aggrieved, and which are not, at the same time, proved to be injurious to the public; and considering that none of the individuals or parties using the defendant's road and paying their charges for cartage, have complained in the present case, I, the said Judge, do refuse the said petition with costs."

Messrs. Stuart, Q. C., Roy, Q. C., and Dorion, Q. C. Counsel for the Petitioners; Mr. Ritchie, Counsel for the Defendants.

LIABILITY OF MUNICIPALITIES.

A decision was rendered on the 31st Oct. last, in the Circuit Court at Sherbrooke, by Mr. Justice Sicotte, in the case of Harvey *v.* Municipality of Hereford, holding that Municipal Corporations are not liable for the acts of their agents, but that these agents are alone responsible for their own acts. The following are some extracts from the judgment:—

"The plaintiff complains that the Municipality of Hereford, by their Secretary, agents and servants, caused, prior to Feb. 1861, taxes to be assessed upon lot No. 9, Township of Hereford, as land belonging to a private person, and not to the Government and that the land was sent up from the Secretary of this local municipality to the Secretary of the County to be advertised for sale for unpaid taxes; that the land was sold for taxes and purchased by him for $3.85, and that he took the deed after the expiration of the two years. Subsequently the same land was advertised for sale by the Crown, and to prevent the ejection of one Washburn, to whom plaintiff had sold the land, he, the plaintiff, was obliged to buy it from Government for $120. The plaintiff further alleges that by reason of the negligence and the irregularities of the Corporation of Hereford, their agents and servants, in causing this land belonging to the Government to be sold as the land of indi-

viduals, he was led into error, and by the failure of defendant to defend plaintiff from trouble, he suffered to the amount of $84.

The defendant by a demurrer denied the right of the plaintiff to claim any damage from the Municipality of Hereford under the circumstances. Two questions are raised by the demurrer, both having an important bearing upon the working of the municipal system. It is pretended that the Municipal Councils are not responsible for the acts of the different officers they appoint, in all cases where the duties of the officers are ordained and prescribed by the Statute, and independent of the municipal bodies..... Has the Statute declared that municipalities are liable to damages for the fact that lands have been valued by the valuators as in the occupation of one party named, and have been assessed, upon this return, for municipal purposes? No: but the Statute directed the Councils to appoint valuators, and prescribed the duties of the latter in a very imperative manner, independent of any orders and instructions of the municipalities. The valuators are, for the purpose of valuation, the officers of the law, which is superior to the body directed to appoint..... Purchasers must ascertain for themselves if all the requirements of the law have been complied with, and if the land can be sold; all is at their risk. This is the condition of purchasing acres for cents.....The letter of the law as well as the general principles are decidedly against the right of action as claimed by the plaintiff. The action is therefore dismissed with costs."

Sanborn & Brooks, for plaintiff; Felton & Felton, for defendant.

THE CASE OF THE KIDNAPPERS.

A short summary of this memorable case, with an abstract of the remarks of Mr. Justice Meredith at the time final judgment was rendered by the Court of Appeals at Quebec, will be found in the present issue. Few cases that have occupied so large a share of the attention of our tribunals have created so little public excitement. It is hardly going too far to say that the decision at Quebec was received by the public with profound indifference. This lack of interest may no doubt be attributed in a great measure to the conflicting feelings excited by the case. Though any decision which had the semblance of infringing upon the liberty of the subject would instantly kindle the utmost indignation throughout the community, yet in this instance the prisoners being mere mercenary conspirators, who had themselves sought to deprive a refugee of liberty and asylum, no one felt much disposition to see the law strained in their favour, if the law said that they were not entitled to be admitted to bail. On the other hand, the crime of the prisoners was perhaps not viewed with the detestation it deserved, because the refugee himself was not regarded with any of that popular admiration and esteem which some political exiles have attracted. Thus the public mind was to some extent prepared to accept without cavil the decision of a competent Court, whichever side it favoured.

In a legal point of view, however, the case is one of absorbing interest. Able and astute lawyers on the bench and at the bar have taken opposite sides on the questions raised; and the learned counsel by whom the case was conducted, displayed great ability and research in the support of their views. The arguments and judgments, investigating as they did all the cases and authorities on the subject, will throw much light upon the law of bail in all time to come.

But, unfortunately, the value of the final judgment at Quebec as a leading case, has been greatly lessened owing to the diversity of opinion among the members of the Court on the questions submitted for decision. A majority of one in the Court of Appeals is not as satisfactory as could be desired, and might be reversed by a slight change in the members of the Court.

It is not improbable, however, that some change in the law may be made by the Legislature, which will remove the difficulty. The Statutes relating to bail, like too many other parts of our Statute law, are not without serious ambiguities; and it may be deemed advisable, either to remove some of what were anciently called enormous misdemeanors into the class of felonies, or to make exceptions of certain misdemeanors, so as to leave it discretionary with judges to bail persons charged with them.

REMARKABLE TRIALS IN LOWER CANADA.

No. 3. The Beauregard Case.

Among the criminal cases which have occupied a large share of public attention, the trial of Beauregard for the murder of Anselme Charron stands out prominently, both on account of the great number of witnesses examined, the length of the trial, (extending over eight or nine days) and the mysterious circumstances surrounding the commission of the crime. The victim was a well-to-do farmer named Anselme Charron, residing at the Parish of St. Charles, about two and a half leagues distant from the town of St. Hyacinthe, where the murder was committed. The only apparent motive for the murder was the desire to obtain possession of a small sum of money which Anselme Charron carried on his person. Both parties at the time were considerably under the influence of liquor, but though suspicion rested on Beauregard, who was last seen in company with the deceased, it was not till some weeks had elapsed that he was arrested.

The murder was committed on the night of the 2nd of April, 1859, and the circumstances may be briefly traced as follows:—

About nine o'clock in the morning of Saturday the 2nd April, Charron left home with his horse and cart to go to St. Hyacinthe, which, as we have already stated, was situated at a distance of two and a half leagues. A little boy, a nephew of his, stated at the trial, that on the morning of that day, he saw the deceased dressing in his room apart, and before he left he went to a small box in which, he kept money, and took out two rolls of paper money which he showed to the boy, as he was in the habit of doing in order to instruct him in the value of bank notes. The first knowledge we have of him at St. Hyacinthe is that he was seen drinking in Ducharme's tavern in the early part of the day. Hence he went to a tavern kept by a man named Guertin, and in this place, Beauregard, the prisoner, was seen kneeling by the side of Charron who was lying on a sofa, and engaged in close conversation with him. A man who owed Charron $25 here joined them, and the three having gone to another tavern, the debtor paid the $25 in the presence of Beauregard. They then went to Laflamme's tavern and had more drink. Among other places visited by Charron that day was the house of a man named Ewing, who paid him $45 in bank notes and quarter dollars. About half past seven in the evening, deceased was seen at Ewing's house taking tea. About eight o'clock, a person with whom Charron had made an appointment for that evening at Laflamme's, saw him standing at the door of another tavern. Charron proposed to him that they should go to Guertin's tavern and have a steak and some oysters. At Guertin's, Beauregard, who appears to have followed Charron with considerable pertinacity, again joined him, and called for liquor, which Charron paid for. Later in the evening, Charron, who was by this time in a state of inebriation, was at Laflamme's, and left that place in company with Beauregard. Some policemen who met them, observed the prisoner holding Charron up by the arm, and asked him where he was going, Beauregard replied, "Don't be alarmed, I will take good care of him." The policeman stationed in the street then observed the two going in the direction of the bridge known as the Biron bridge, and about fifteen minutes after, Beauregard was observed coming back alone, breathing hard and walking fast. One of the policemen meeting him inquired where he had left Charron. The reply was, "Oh! he is quite well, he is getting on swimmingly, like a hat floating on the river." Beauregard then went to Laflamme's tavern and ordered a treat. Before this he did not appear to have had any money. Then he went to Pourrin's and stayed till such time as Pourrin said he must shut up his place. There was nothing to show whither he went then. His daughter stated at the trial that he had not, to her knowledge, gone home that night.

The watch found in the pocket of deceased had stopped at 13 minutes to 11. About this hour a party playing cards at Marchesseau's, on the other side of the bridge, heard cries from the bridge so loud as to attract their attention, and they opened the door, and looked out. The cries did not continue long and the party returned to their cards. On the other side of the river, another party playing cards was also disturbed by cries of murder, and they went out and inquired of their neighbors the cause of the cries. These incidents occurred about the same time close upon eleven o'clock. A gentleman named Nagle also heard cries of murder from the bridge and rushing out went part of the way across the bridge, and thought he saw an object moving away, but was not very sure. Another person who crossed the bridge that night, met a man on it, and it was

proved that Beauregard subsequently asked Guertin if he were not the man whom he met on the bridge, thereby admitting that he had been on the bridge the night in question.

Nine days after Charron disappeared, a friend of his who lived in the same village went to St. Hyacinthe, and ascertaining that Beauregard was the last man seen in company with deceased, sent for him to a tavern, treated him and asked him what became of Charron. The reply was that he did not recollect. The other then said: "One of the policemen saw you and the deceased together; he spoke to you and you answered him." The policeman was sent for, and repeated this statement in the presence of Beauregard; but the latter on being again requested to state what he had done with Charron, reiterated that he forgot. This refusal to answer obviously raised a presumption of guilt.

We now come to the motive assigned for the crime. On the Tuesday preceding the disappearance of Charron, Beauregard had applied to the municipal authorities for a tavern license, and had been refused. He then said that if he had money he would get a license, and on the Monday following, he stated that he had now money enough to get one. Besides this, there were other proofs that he had come into possession of a sum of money.

The body of deceased was found about a month after the murder, at a distance of 15 or 18 arpents from the bridge. On the temples were contusions, and the injuries were stated by the medical men to be multiple, produced by repeated blows, and might have been caused by blows of a skull-cracker, such as Beauregard was proved to have carried about with him. The inference was that the murderer, after inflicting repeated blows on the head of his victim, had thrown him from the bridge into the river. On the body was found altogether only $24, shewing a large deficit in the sum which it was proved that Charron had received on the day of the murder. There was no proof that he had made any payments during the day, nor were any receipts found on his person.

There was some additional testimony of a direct nature given by one Lusignan, a man of ill reputation and a drunkard, who had been made a confidant by the murderer. Very slight importance was attached to this evidence by the Court, and therefore we need not dwell upon it. He stated, however, that Beauregard confessed to him that he had burned certain notes on foreign banks which he had taken from the person of his victim, and it appeared from other evidence that Charron had received such notes during the day.

The trial, which took place at Montreal, in October 1859, before Hon. Mr. Justice Aylwin, extended over a week and caused considerable excitement. The Jury found the prisoner guilty, and he was subsequently executed before the Montreal Jail.

RIGHTS OF DISSENTIENTS.

An important decision has been rendered at St. Johns, by Mr. Justice Sicotte, as to the right possessed by a non resident proprietor in the disposition of his school taxes. The action was brought by the School Commissioners of Lacolle against William Bowman, of St. Valentia. The defendant is the owner of property in Lacolle parish, on which he refused to pay taxes to the Commissioners, claiming the right to apply the amount to the support of the dissentient schools. The Commissioners contended that as he was only a proprietor and not a resident, he was not allowed by law the privilege of dissenting. Judge Sicotte has decided in favor of the defendant: holding that it is the manifest intention of the law, whether the proprietor is or is not a resident, that he should have the right to dissent in the payment of his school taxes.

The following is the summary given by the Journal of Education of this judgment, and of the conflicting decision rendered some time ago by Mr. Justice Short:—

"The question is, whether a non-resident proprietor can or cannot legally declare himself a dissentient.

"The reasons on which Judge Short based his judgment were, if we recollect rightly, as follows: 1st. The word *inhabitant* can only mean a resident, and the law in giving the *inhabitants* forming the religious minority the right of dissent, had in view *residents* only; 2nd, had it been intended to extend this right to non-resident proprietors, a clause to that effect would have been inserted, or the word *rate payer*, which occurs elsewhere in the same Act, would have been employed; 3rdly, the right of becoming a dissentient is purely personal and exceptional, and should not be exercised except within the strict meaning of the law. The object which the latter has in view is to allow the minority of a municipality to send their children to such schools as they shall approve of,—a reason which does not apply to non-residents, who are not supposed to have any children within the municipality.

"The reasons on which Judge Sicotte's judgment rests may be summed up thus: 1st. The word *inhabitant* does not (in the legal and administrative sense) necessarily signify *resident*. Many authorities are cited to show that in the legislation of England and Canada the words *inhabitants* and *proprietors* or *land-holders* are looked upon as synonymous terms. 2nd. The

doubts which have existed in this country, and the lawsuits that have taken place in consequence, show that the word *inhabitant* has not always been held to mean a resident. The hon. Judge also cited (as confirming the view he has taken of the question) the Bill introduced into the Legislative Assembly with the assent of the Department of Public Instruction, and which contemplated a settlement of this point. 3rd. The object which the law has in view in leaving every one free to dispose of his school taxes according to his own convictions being the removal of a source of religious animosity, all clauses of doubtful meaning should, as far as possible, be construed consistently with the attainment of this end; and the concession, like every other immunity favorable to the maintenance of order and the public peace, should be extended rather than restricted in its application. 4th. The proprietor, although he may not be a resident, is nevertheless a member of the municipal body to which the administration of the common interest belongs. He has, without doubt, under the law, a right to be heard and to vote at elections. He is a ratepayer and an elector, and consequently must have the same right as a resident to choose between the two school corporations, that of the majority and that of the minority. 5th. Assuming that the word *inhabitant* is used in the exclusive sense of *resident*, it is intended in the law to confer on residents only the right of forming a dissentient corporation; but this dissentient corporation once formed and established, it cannot have been intended to carry further the distinction between resident and non-resident ratepayers, and thus to deprive the latter of the right of paying their assessments to the corporation representing the religious minority to which they belong."

CORRESPONDENCE.

OUR JUDICATURE SYSTEM.

MR. EDITOR,—I heartily concur in the remarks of your Correspondent Q, in the October number of the Journal, as far as they go, and would now ask permission to make a few suggestions as to the best mode of reforming the evil complained of.

I think every person of experience will admit, that the root of all our difficulties is the system of *Enquête*. The objections to it are manifold,—it is secret, cumbrous, tedious and expensive,—the Judge, who has to determine the case eventually, never sees or hears the witnesses,—and the witnesses themselves rarely or never pronounce the actual language recorded in the depositions. Then the number of depositions in many cases is unnecessarily great. And the *griffonnage* such, in many instances, as to render it almost impossible for the judge to appreciate the true meaning of what is actually recorded.

Now, if the system of *Enquête* in contested causes were entirely abolished, and each case were tried *before a judge*, in the same way that a case would be tried before a judge and jury,—*not here* (for we have unfortunately engrafted on our trial by jury a bastard system of *Enquête*),—but as in England, the United States, Upper Canada, and in fact in every other part of the civilized globe, where the system of trial by jury is practised,—*the judge himself taking full notes of all the essential points of the evidence*,—I venture to assert that justice would be more promptly, more correctly, and in every respect better administered, than it either is or could ever be hoped to be under a system so peculiarly Lower-Canadian as ours is. Not only would the judge have the advantage of seeing and hearing the witnesses, whose testimony he is called upon either to believe or to discard as unworthy of belief, but the witnesses themselves,—instead of uttering their testimony in a semi-secret form and subdued tone in a corner of the Court-room, or it may be even in an advocate's private office,—would have to proclaim their evidence aloud, in the face of the Court and Counsel and the assembled audience. No man, who has ever been called on to discriminate with regard to oral evidence, can fail to admit the value of the latter mode of taking testimony and to stigmatize the former mode as simply barbarous, if not iniquitous. Then we all know, from our own experience in trials by jury here and from what we have seen and heard of the mode of conducting such trials in other countries, that the judge would have the additional advantage of *controlling* the evidence, both as regards its substance and its quantity,—a point of very material moment in the due administration of Justice. I would now suggest in what way, in our own district, our Courts might be organized, to suit our proposed altered condition.

At present we have two classes of cases in the Circuit Court, the appealable and the non-

appealable cases. As the former can be carried to the Queen's Bench direct, without necessitating an intervening appeal to the Superior Court, there appears no sufficient reason for originating them in the Circuit Court; the result being merely to embarrass the efficiency of that Court, which is one essentially summary in its character. All cases of this class ought, I think, to be brought in the Superior Court, subject (as respects costs, either in the Court of original jurisdiction or in appeal), to the tariffs as they presently exist.

The sitting of the several Courts, in Montreal, might be as follows:—The Circuit Court from the first to the fifth of each month except January, July and August. The practice division of the Superior Court from the tenth to the fifteenth of each month, except January, July and August. The Superior Court, for trials before Judges, in three separate divisions, from the seventeenth to the twenty-third of each month, and *in banco* as a Court of Review, from the twenty-fourth to the twenty-seventh of each month, except January, July and August. *And in all cases the Court should be enjoined by Statute to commence business at Ten A.M.*

Under such a system I take it for granted that a considerable number of cases would be adjudged, at the time of trial, without resorting to that senseless practice of taking *en délibéré*. Then as cases either in the practice court or, although submitted for judgment without argument, at trial, may yet require examination by the judge, I would suggest, that, instead of their being taken *en délibéré* as it is called, the judgment should be held to be pronounced on the day it is asked for; in the same way that judgments are frequently pron unced *sauf à reviser*. We should thus rid ourselves of another senseless practice, that of proclaiming a long array of judgments in cases by default or equivalent thereto. Then, as to really contested causes, I would suggest, that there should be two adjournments for judgments in cases that have been tried, namely to the last day of the month in which the Court is held, and to the next juridical day after the Circuit Court, (except in January and July, when the adjournment ought to be to the equivalent day of those months), and an adjournment for judgments by the Court of Review to the juridical day following the one last referred to. In this way, ample opportunity would be afforded, for mature deliberation in the more important cases, and for despatch in those of minor character.

In my proposed arrangements I purposely abstain from suggesting details as to the working beyond our own district, as I prefer to leave their consideration as respects other districts, and specially the country ones, to those who are more familiar with their particular wants.

In bringing these remarks to a close, I beg to invite the criticism of yourself and the members of the profession generally on my project, as my sole object is, to start discussion with respect to the present exceedingly unsatisfactory administration of justice in Lower Canada, and to secure, if possible, a remedy for the evils under which we are suffering.

Q. C.

THE IRISH BENCH.

To the Editor of the L. C. Law Journal.

SIR,—It appears that Lower Canada is not the only country blessed with *effete* judges.

We have suffered much, and truth compels to say that certain judges, political hacks, in times past, have cost the country dearly. At present we are again suffering, witness the lamentable appearance of our highest court, but it appears that in Ireland they are not in a better condition than we are.

In the *London Times* of November 21st., is an article in which it is stated that upon the Commission for the trial of the Fenian prisoners, the three Irish Chief Justices have not been put because of incompetency; they have been passed by. The *Times* says:

"The Irish Bench seldom lacks one or two judges who ought long since to have retired. It was not long ago that the English ideas of the proper administration of justice were shocked by the presence on the Irish Bench of a judge who, in addition to

being past 80 years of age, was afflicted with blindness."

It adds that the Special Commission was resorted to "expressly to prevent the possibility of the Chief Justice of the Queen's Bench occupying the seat which seemed peculiarly his own." It goes on to say:

"It is painful to direct public attention to the infirmities of such a man, or to say anything which may give pain to himself or to his immediate friends and connexions. But it is quite time that truth should be spoken on this subject, and we are only discharging a public duty by drawing atttention to the actual state of things as regards the Head of the Common Law Courts in Ireland." "The result is what may be easily imagined in a Court where the Judge has become unable to direct, to follow, or even to remember the proceedings carried on before him."

Would that the Public Press would speak as openly upon the condition of things in Lower Canada.

It was truly said, in the Blossom case, "an Irish judge is as good as a Canadian judge."

The *Times* concludes its article as follows:—

"We should have been very glad if the Government had relieved us from the very painful duty of pointing out these things, though we can well understand the motives which have hitherto kept them silent. The tenure of office by a judge is a very delicate matter, and no action of Government is regarded with more jealousy than an attempt to create a vacancy in a place of which it has the disposal. But, whatever be the weight of these considerations, they ought manifestly to give way to a sense of what is demanded by public duty. There is no danger in the present day that the subject will suffer by the subserviency of the Judges to the Crown, but there is a great danger that the administration of justice may be occasionally rendered inefficient by the provisions of a law which, while carefully protecting the Judge from undue influence, leaves the subject at the mercy of the evils created by an improper tenacity of office. Few legal reforms would be more easy or more desirable than one which should fix a limit of age beyond which no judicial officer should retain his position. In England such a law is not greatly needed, for the judicial labour is so severe that every man must do his own work, and great vigour of body and mind alone suffices to bear the burden; but where, as in Ireland, it is the pleasure of Parliament to retain a superfluous judicial establishment, some precaution ought to be taken against the natural tendency to retain a place of easy work after the power to do that work has departed."

In Lower Canada we have several such judges, as last referred to, and when we see the stoppage of the administration of justice by reason of this fact we are led to look to the Government for a remedy to the evil; but remedy has been long, and seems likely to be longer delayed.

Your readers will observe, with a certain amount of surprise, that the *Times* has come to propose "a limit of age," such as Englishmen have always had in abhorrence, but such as exists in the United States. Theory has, in the long run, to yield to realities.

Yours,

Montreal, Dec. 8, 1865. T. R. S.

THE LAW OF COPYRIGHT.

A recent decision of the Lords Justices of Appeal in England, in the case of Low *v.* Routledge, in which the Copyright of a novel called "Haunted Hearts" was in question, affirms the important principle that "if an "alien book be first published in England, at "a time, when the author is first residing in "any part of the British dominions, a valid "copyright may be acquired in such book," and consequently that any infringement of that right, such as the Messrs. Routledge were guilty of, was a piracy. Haunted Hearts was published in England while the author was residing at Montreal.

DECEMBER APPEAL TERM, MONTREAL.

Owing to the absence of the Chief Justice, judgment was rendered in eleven cases only during the sitting of the Court of Appeals at Montreal, in December. In eight of these cases judgment was confirmed, and in the other three reversed. In only two cases was there a dissenting judge. In one case the record was sent back to the lower Court, judgment having been prematurely rendered while a petition *en desaveu* remained undisposed of.

ADMISSIONS TO PRACTICE.—The following gentlemen having passed satisfactory examinations before the Board for the District of Montreal, have been admitted to practice:

November 6th 1865.—Joseph O. Desilets, Louis C. Taillon, J.-Bte. Lafleur, John Ronayne, N. W. Trenholme, J. M. P. Comte, J.-Bte. N. Vallée, Aug. Dagenais, E. H. Rixford, Lemuel Cushing, F. Corbeil, A. Choquet.

Dec. 4th 1865.—Michel Matthieu.

Jan. 2nd 1866.—John Francis Leonard.

APPOINTMENTS, ETC.—Mr. R. A. R. Hubert has been appointed to the office of Prothonotary Superior Court and Clerk Circuit Court, Montreal, in the place of Mr. Coffin, deceased. Mr. Ermatinger to the office of Clerk of the Crown, in the place of Mr. Carter, Q. C., who has resumed practice at the bar. Mr. Brehaut has been appointed Police Magistrate for the District of Montreal.

OBITUARY NOTICES.

W. C. H. COFFIN.

William Craigie Holmes Coffin was born at Three Rivers in the month of March 1800. His father was a merchant of Three Rivers and a Legislative Councillor; his mother was of a French family. Mr. Coffin studied law in the office of the late Mr. Justice Pyke, father of the present Deputy Prothonotary, and when Mr. Pyke removed to Montreal in 1818, Mr. Coffin completed his term of study in the office of Sir James Stuart. After being admitted to the bar, he practised for some time at Three Rivers till he received the appointment of Prothonotary at that place. Here he remained till in 1844 he was appointed to the office of Prothonotary at Montreal, his colleagues being Messrs. Monk and Papineau. This appointment he continued to hold up to the time of his death which occurred on the 30th December last.

By earnest and faithful discharge of duty and strict integrity of conduct, Mr. Coffin had gained the respect and esteem of the members of the legal profession and others with whom he was brought into contact in his official capacity, and his decease occasioned a very general feeling of regret.

ARCHIBALD McLEAN.

Though not a Lower Canadian lawyer, a brief notice of the late President of the Court of Appeal in Upper Canada, who died at Toronto on the 24th October last, may not be out of place. He was born at St. Andrews, near Cornwall, in 1791, and was a pupil of Dr. Strachan, the present venerable bishop of Toronto, at the town of Cornwall. After studying law at Toronto, and seeing some active service in the war of 1812, he was admitted to practice in 1813. In 1837 was appointed one of the judges of the Court of King's Bench, and after various changes succeeded to the place of the late Sir John Robinson as President of the Court of Appeal and Error. Before his appointment to the Bench, he represented his native county for several years in the Legislative Assembly of Upper Canada, and was for some time speaker of the House. Though not eminent for legal attainments, his opinions were received with the respect due to experience and impartiality.

IS THE CROWN OBLIGED TO STAMP ITS PROCEEDINGS?

The following case, argued during the September term of the Court of Appeals, Montreal, possesses some interest.

QUEEN *v.* ELLICE.—In this suit, which was an appeal to the Q. B. from a decision of the Superior Court reversing an award of the Provincial Arbitrators, it became necessary to make application for a judge *ad hoc*, Mr. Justice Drummond having recused himself. On the application for the nomination of a judge, the Clerk of Appeals demanded that the application and order should have a stamp affixed. This demand was resisted on the part of the Attorney General, and the Court ordered a hearing on motion on behalf of Appellant, that inasmuch as our Sovereign Lady the Queen is not liable for any duty or tax whatever, that the Clerk of Appeals should be forbidden to ask or exact any tax or fee whatever from Appellant in respect of the said suit, and that he should be obliged to receive all motions, petitions and applications made on the part of Appellant, without any stamp or stamps being affixed thereto.

RAMSAY, in support, said that the obligation to affix stamps was created by section 4, cap. 5, 27 and 28 Vic., and that there were two categories intended to cover every case in which fees were payable under any statute whatever. Subsection, 1 of section 4, referred to those payable into the "Officers of Justice fee fund," and the other into the fund created by the "act to make provision for the erection or repair of Court Houses and Gaols at certain places in Lower Canada."

MEREDITH, J., said that there was no doubt as to the general principle that the Queen was not liable for a tax under a statute, if not specially named, unless some person had a conflicting interest. He wished to know if any one's salary depended on these fees.

RAMSAY was prepared to show that the general principle was such as Mr. Justice Meredith had stated, and he only alluded to the section 4 so particularly to show that there were two

classes of fees, in order to combat any distinction that might be attempted to be established between them.

MONDELET, J., said he had to interpret the statute judicially, and that he found it applied to every one, and that no exception was made as to the Queen.

RAMSAY, to clear away that difficulty at once, would answer the learned Judge by citing 2 *Dwarris*, p. 668, who says, "It is the rule that the King shall not be restrained of a liberty or right he had before, by the general words of an act of Parliament, if the King is not named in the Act." The clause 9 said that these fees should be taxes "payable to the Crown."

AYLWIN, J., cited the maxim *"Ecclesia eccle siam non decimat."*

DUVAL, C. J. The question is simply this, has anybody an interest in the Crown paying these fees?

RAMSAY.—No; The Officers of Justice in Montreal are paid wholly independently of these fees. He was quite prepared to admit. that if an interest had been created in favor of any officer it would be a sufficient reason to make the Crown pay; but there was not now any such right. In conclusion, he would resume that the fee sought to be recovered, belonged to the Officers of Justice fee fund, and that therefore no question could arise as to its being part of an appropriated fund; that by Section 9, these fees formed part of the revenue of the Crown, and that to force the Queen to pay for stamps was to force the Queen to pay the Queen; that Sections 12, 13, 15 and 29 all showed that the Statute did not intend, much less1 eclare, that the rights of the Crown should be cut off; and finally, that the fines for not using stamps were payable totally to the Receiver-General for the general uses of the Province, and the prosecution was to be at the instance of Her Majesty's Attorney or Solicitor-General. In other words, that if the Queen did not pay a tax to the Queen, the Law Officers of the Crown should prosecute the Law Officers of the Crown, and the fines should be paid to the Receiver-General.

MARCHAND, Dep. Clerk of Appeals, resisted the motion. There might be contingent interests in these taxes reaching a certain amount; and at all events the balance of the Officers of Justice fee fund would go to the fund for the erection and repair of Court Houses and goals if it exceeded what was required to pay all the Officers of Justice.

DUVAL, C. J.—But are any of your salaries dependent on these fees?

MARCHAND.—Not directly.

RAMSAY.—We have nothing to do with indirect interests. The only persons who seem to have any interest, are the persons appointed to sell stamps; but their interest can hardly be considered as affecting the question.

DUVAL, C. J.—Certainly not. But what is the rule followed elsewhere as to charging these stamps?

RAMSAY.—They are not charged in the Police Court.

MARCHAND.—I was informed that they were. They are at all events charged.

RAMSAY.—The fees payable by the Crown have always been charged because the Clerk of the Crown had a percentage on them. It was one of the crimes charged to Mr. Delisle that he had charged these things, and it appears that the practice is continued even to the present day; but having been daily in the Police Court for the last three months it is certain that the stamps are not affixed in Crown cases.

The Court took the motion *en délibéré*, and no decision has yet been rendered.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE—JUDGMENTS.

MONTREAL, December 7th, 1865.

PRESENT: Justices Aylwin, Meredith, Mondelet and Loranger

MENECLIER DE MOROCHOND, (defendant in the Court below), appellant; and GAUTHIER, (plaintiff in the Court below,) respondent.

HELD.—*That prescription does not run against the wife's claim for reprises matrimoniales while she is under marital authority.*

This was an appeal from the judgment of Mr. Assistant Justice Monk, rendered 27th Nov., 1864. The action was brought by the plaintiff, Ed. D. Gauthier, as universal usufructuary legatee of Marie F. Gauthier, for the amount of her *reprises matrimoniales* and dower, and also for an account of the community alleged to be subsisting between her and her husband, Meneclier. The judgment awarded the plaintiff $3,023 as the amount of the *reprises matrimoniales*, and $2,242 for what Marie F. Gauthier had inherited from her father, together with $500, the amount of her *douaire préfix*; but held that the community between Meneclier and his wife had been dissolved.

LORANGER J., (who sat in this case as judge *ad hoc* instead of Mr. Justice Drummond) rendered the judgment of the Court of Appeals, unanimously confirming the judgment appealed from, the grounds of which were briefly as follows: By the contract of marriage between Meneclier and his wife, dated 18th July, 1822, it was stipulated that there should be community between them. There was *stipulation de propre des biens de la future* to be established by inventory within fifteen days from the date of the marriage contract. It was, moreover, agreed by the marriage contract that there should be a *douaire préfix* of $500. By judgment of the King's Bench, 8th June, 1826, a separation of property between Meneclier and his wife was pronounced. Madame Meneclier renounced to the community 15th June, 1826, and on the 19th Feb., 1826, the report of the

vraticien establishing the *reprises matrimoniales* at $4,023 was homologated. For this sum, it was held that prescription did not run against Madame Meneclier during the existence of the marriage, and while she was under marital authority. The plea of thirty years' prescription against the wife's *reprises* was therefore dismissed. It was also held that though by his will, dated 4th Nov., 1856, Meneclier constituted his wife his universal usufructuary legatee, with the condition that she was to discharge his debts, nevertheless, in this instance, there had been no confusion in her persen of these debts due her by her husband. By will dated 28th Dec., 1858, Madame Meneclier appointed the plaintiff her universal usufructuary legatee, and the latter had a right to claim the debts due by Meneclier to his wife at the time he died, and her dower as established by marriage contract.

Judgment confirmed unanimously.

Lafrenaye & Armstrong for appellant; Cartier, Pominville & Betournay for respondent.

MONTREAL, December 9th, 1865.

PRESENT: Justices Aylwin, Meredith, Drummond and Mondelet.

SPAULDING *et al.*, (plaintiffs in the Court below), appellants; and HOLMES (defendant in the Court below), respondent.

Petitory action. Dismissed owing to proof of plaintiffs' title not being sufficient.

This was an appeal from a judgment by Mr. Justice Short, dismissing the plaintiffs' action which was instituted for the recovery of a small piece of land in the village of Rock Island, being part of Lot No. 1, 9th Range of the Township of Stanstead. The plaintiffs claimed that this portion of land formed a part of an irregular piece conveyed by Charles Kilborn to one Sylvanus C. Haskell in 1825.

DRUMMOND, J., referred to the description of the property as being extremely vague. The defendant's plea of prescription by ten years' possession in good faith, could not be maintained, as the plaintiffs resided on the other side of the line. After going over the pleadings and evidence at considerable length, his honor came to the conclusion that although the defendant had failed to prove title by prescription, yet as the plaintiffs had not succeeded in proving their title to the land claimed, the judgment dismissing the action was correct.

Judgment confirmed unanimously.

R. N. Hall for appellants; Sanborn & Brooks for respondent.

GUERTIN, appellant; and O'NEIL, respondent.

Record remitted to the lower court because judgment had been prematurely rendered.

DRUMMOND, J.—In this case the Court was not called upon to say anything as to the merits. The respondent brought a petitory action in the Court below, and the attention of the judges had been directed to the fact that the judgment in the Court of original jurisdiction had been pronounced while there was a petition *en desaveu* actually in the record and undisposed of. This petition was regularly made on the 13th October, 1863. The judgment was premature and must be set aside without any opinion being given on the merits of the case. The record must be remitted to the Court below that the petition may be adjudicated on. No rule would be made as to costs.

BOWKER (defendant in the Court below), appellant; and FENN (plaintiff in the Court below) respondent.

HELD.—*That a promissory note is considered to be absolutely paid and discharged, if no action be brought thereon within five years from maturity; and that prescription is not interrupted by an acknowledgment of the debt in writing, or a payment on account within said five years.*

AYLWIN, J., dissenting, said in this case he could not concur in the judgment about to be rendered. The action was brought to recover $391.66, the balance of a promissory note, and $56.30 on an account, making in all $447.96. Judgment was rendered in favour of the plaintiff. The first plea set up prescription against the note, which bore date 15th Sept., 1856, the action being brought 16th July, 1862. The second plea admitted that the defendant had received teeth from the plaintiff to the value of $40, being two of the items charged under date September, 1856, and sought to be recovered; but alleged that this sum, and certain other charges in the account were overpaid by the sum of $50, improperly credited by the plaintiff on the note. That the expenses charged in the account should have been detailed. The plea then alleged that the plaintiff, as agent of the defendant, had agreed to get possession of certain lands in Lima, in the State of New York, under a power of attorney, dated some 8 years previously, but had failed to do so; alleging, also, that damage had accrued to the defendant by the plaintiff's neglect. No evidence was adduced to support these allegations. To the first plea the plaintiff fyled special answers. 1st. Alleging interruption of prescription by acknowledgment to owe and promise verbally and in writing to pay, and that "he had paid the plaintiff monies on account thereof, and on the interest accrued thereon." 2nd. An answer setting up that at the date of the note, the defendant was indebted to the plaintiff in $348.16 for money lent and advanced, goods sold. and interest accrued, and that for such indebtedness he gave the note sued on, which he failed to pay. There had been an examination of the defendant on *faits et articles*. The 62nd question was to this effect: Is it not true that you have within the period of five years immediately preceding the institution of this action, given the plaintiff to understand, in some way or another, that you would pay him the amount due him on the said promissory note? The defendant's answer was: I have written what was in the letter sent by me. I have not made any acknowledgment or promise to pay the note since it was acknowledged, or before, as a pur-

ticular debt or note. This answer, taken with other answers of the defendant, was to his honor's mind perfectly sufficient to establish an acknowledgment of the debt. It was argued, and it would be decided by the majority of the Court, that the prescription was a perfect bar to the action. His honor referred to the case of Russell and Fisher, 4 L. C. Rep. p. 237, Pothier, Traité des Obligations, No. 846, &c., in support of his opinion that the prescription was interrupted by the defendant's promise to pay contained in letters written to the plaintiff.

MEREDITH, J., observed that the case was one of great importance. After giving the subject due consideration, he thought the decisions under the English statute tended rather to embarrass than to aid us in determining the course to pursue under our own law. In this there was nothing surprising, because the two laws are worded so differently as to lead to the belief that the framers of our law, aware of the conflicting decisions under the English statute had determined not to take it as their model, lest the Canadian law should share the fate of the English original. The terms of our statute were in effect that any promissory note, made after 1st August, 1849, shall be held to be absolutely paid and discharged, if no suit or action has been brought within five years. The fact of the maker of the note having paid a part on account during the five years did not tend to weaken the presumption that the whole was paid, when no action was brought within the five years. The respondent tried to interpret the statute as if it contained the words "provided that an acknowledgment or part payment of any note within the five years shall take the note out of the reach of the statute." The law contained no such proviso. His honor was quite aware that a strict interpretation of the terms of our statute might bear hard upon individuals, and it bore hard upon the respondent in the present case: but the remedy was with the Legislature. The conflicting decisions in England showed the danger of stretching the plain meaning of the statute. The court could not avoid holding that the note sued on was absolutely paid and discharged, but judgment would go in favour of the respondent on the open account. The judgment now rendered, his honor remarked, could not serve as a guide in future, as the code would introduce modifications of the law.

DRUMMOND, J., said it was with very great regret that he had come to the conclusion that the action was barred. He looked upon the law as dishonest and immoral, but he had always felt very great apprehension at any endeavor to break through a statute.

MONDELET, J., said he was clearly of opinion that our statute applicable to promissory notes was as stringent as the ordinance with reference to arrears of *rentes constituées*. There was a total extinction of indebtedness. The law was imperative. His honor had some doubt whether the acknowledgment of indebtedness and promise to pay applied directly to the note in question. No decision would be given on the question of *faits et articles*, which arose in the case, as it was not required. Judgment reversed. Judgment for plaintiff for $40, and costs as of an action for that sum, with costs of appeal in favor of appellant.

A. & W. Robertson for appellant; Snowdon & Gairdner for respondent.

MONTREAL ASSURANCE CO., (plaintiffs in the Court below) appellants; and MACPHERSON) defendant in the Court below,) respondent.

HELD—*That service of writ and declaration at a place different from that alleged in the writ to be defendant's domicile, is insufficient.*

This was an appeal from a judgment rendered by Mr. Justice Monk, maintaining an *exception à la forme* fyled by defendant, and dismissing plaintiffs' action. The facts were as follows: The defendant being resident in Upper Canada, the plaintiffs obtained leave under C. S. L. C. Cap. 83, Sec. 63, to have the writ and declaration served there. In the preliminary affidavit, produced on behalf of the plaintiffs, with a view to such service, it was alleged that "the said defendant now resides in the City of Toronto." Besides this the defendant was described in the writ and declaration as "now of Toronto, in the Home District of Canada West." The person making the affidavit of service declared "that I served the within writ of summons and declaration thereto attached on the defendant therein named *at the township of York in the County of York*, in the Province of Upper Canada, by delivering to Mrs. D. L. Macpherson, the wife of said defendant, *at his place of residence, in said township of York*, true copies, &c." The defendant fyled an *exception à la forme*, alleging that the writ of summons was null and void, not having been returned into court within thirty days after service, being the time limited in the endorsement upon the writ. Further, that the affidavit of service showed that the service had been made at a place wholly different from that described in the writ and declaration as the residence and domicile of the defendant. The Court below allowed the plaintiff to amend the endorsement on the writ, and extended the time to forty days, but, holding the service to be insufficient, maintained the *exception à la forme*, and dismissed the action. The plaintiffs appealed from this judgment.

MEREDITH, J., dissenting, said it was contended, on the part of the respondent, that the judgment appealed from must be confirmed, unless it be held that service may be made at a place wholly different from that described in the writ and declaration as the residence and domicile of the defendant. His honor believed it was not impossible to make a legal service of process at a place wholly different from the place described in the declaration as the domicile of the defendant. For it was quite possible that the defendant might change his residence between the issuing of the writ and the service of process, and in such case the service of process would be necessarily made at a place different from that stated in the writ. If the de-

fendant were wrongly described in the writ, he could complain on that ground, but the objection now made was that the service was not made at the place stated in the writ to be defendant's domicile. His honor was of opinion that the service at the defendant's place of residence was sufficient.

DRUMMOND, J., did not think it necessary to pronounce any opinion on the motion to amend the endorsement on the writ, because it appeared to him that the return of service was bad He did not think the respondent went too far in saying that the writ might as well have been served at Gaspé Bay. It might be a hard case, as prescription was obtained against plaintiff's demand, based on promissory notes, but he could not view it otherwise than as a matter of law and practice.

MONDELET, J., was of opinion that the defect in the service could not be overlooked, and that the judgment appealed from was correct.

AYLWIN, J., read the judgment of the Court confirming the judgment appealed from, but making an alteration in the *motifs*, which would now read as follows:—"Seeing that the service of the writ and declaration is insufficient, and is contrary to the 63rd section of 83rd chap. Consol. Stat. L. C., p. 733, the Court doth affirm the judgment."

Judgment confirmed, Meredith, J., dissenting.

Cross & Lunn for appellants; Rose & Ritchie for respondent.

ROTHSTEIN (claimant in the Court below) appellant; and DORION, Atty. General *pro regina* (informant in the Court below) respondent.

HELD.—*That the onus of proof under C. S. C., cap. 17, lies on the claimant to establish that the goods claimed are not liable to forfeiture. 2. That where the forfeiture does not exceed* $200, *the same may be prosecuted in either Circuit or Superior Court.*

This was an appeal from the judgment of the Superior Court, declaring certain goods to be forfeited for contravention of the Customs laws. The appellant was foreclosed in the Court below, and the judgment rendered without proof on either side. The present appeal was brought on the following grounds: 1st. The information was not signed by the attorney general, but by an attorney for the attorney general, which had been held to be a fatal defect in an information. 2nd. The information should have been brought in the Circuit Court, the value of the goods seized being alleged to be $209 only. 3rd. Because no proof had been made of the information. The respondent answered these objections by citing the clauses of the Statute, C. S. C., cap. 17, sec. 73, "If the amount or value of any such penalty or forfeiture does not exceed $200, the same may *also* be prosecuted, sued for and recovered in any County Court or Circuit Court, &c." And as to the burden of proof not being on the informant, the respondent cited sec. 84 of the same statute: "If any goods are seized, &c., the burden of proof shall lie on the owner or claimant of the goods, and not on the officer who has seized and stopped the same, or the party bringing such prosecution."

AYLWIN, J., said it was not correct for an attorney to sign the information as attorney for the Attorney-General. But the objection should have been raised by a proper *exception à la forme*. There was nothing of the kind in the record, and the judgment must be confirmed.

MEREDITH, J., alluded chiefly to the pretension of the appellant that the informant was bound to prove at least that the goods claimed were subject to duty, and were imported into the Province; and that under the English statute, which was nearly the same as our own, in no case could judgment be rendered without proof. His honor was of opinion that the appellant's pretensions were not sustained by the authorities cited, and that in a case such as this it was for the claimant to adduce evidence to establish that the goods are not liable to forfeiture.

Judgment confirmed unanimously.

B. Devlin for appellant; V. P. W. Dorion for respondent.

BRONSDON, (defendant in the court below,) appellant; and DRENNAN, (plaintiff in the court below,) respondent.

HELD.—*That the undermentioned letter was a sufficient and binding guarantee.*

This was an appeal from a judgment rendered by Mr. Justice Smith, in favour of the respondent. The action was brought on the following letter of guarantee which the appellant had given to the respondent for goods to be supplied to the firm of C. F. Hill & Co., consisting of C. F. Hill and J. L. Bronsdon, the latter a son of the appellant:—"Montreal, 11th August, 1860, S. P. Drennan, Esq., Sir, I hereby agree to become security for Messrs. C. F. Hill & Co., for whatever furniture you may trust to their care. (Signed,) J. R. Bronsdon." The declaration set up that under this letter of guarantee the plaintiff consigned to C. F. Hill & Co, large quantities of furniture for which they failed to account in full, and on the 1st July, 1863, a balance of $1534.80 remained due, of which defendant was notified. On the 17th Aug., 1863, plaintiff made a notarial demand on defendant, requiring him to pay within two days, in default whereof he would sue C. F. Hill & Co., at defendant's risk and cost. Defendant did not pay, and plaintiff obtained judgment against C. F. Hill & Co., for $1,382 on which execution was sued out, and return made of *nulla bona* and no lands. The plaintiff then brought this suit against defendant to recover what was due within the terms of the letter of guarantee. The plea was that the document termed a letter of guarantee merely expressed the defendant's willingness to become security, but that plaintiff had never informed defendant that he accepted the letter of guarantee, and nothing was ever done to complete the obligation. Further, that defendant wrote the letter in question on the faith of one James Mathewson becoming security jointly with the defendant, and he had not done so. The judgment of

the Superior Court condemned the defendant to pay $1508, being the amount of the debt, interest and costs in the suit against Hill & Co. From this judgment the present appeal was instituted.

MEREDITH, J., said that after examining the case carefully, the Court was of opinion that the letter in question was a sufficient letter of guarantee; and, secondly, that the evidence was sufficient to show that the debt claimed was for goods delivered under the letter of guarantee.

MONDELET, J., was of opinion that the proof fully established that the furniture would never have been entrusted to C. F. Hill & Co., by plaintiff, except on the faith of the letter of guarantee.

Judgment confirmed unanimously.

Day & Day for appellant; Cross & Lunn for respondent.

McPHEE (plaintiff *par reprise d'instance* in the Court below,) appellant; and WOODBRIDGE (defendant in the court below) respondent.

HELD—*That an action directed against an executor, to recover moneys received by him on account of the estate, must be in the form of an action to account, even though the plaintiff claim but one sum as due to the estate.*

This was an appeal from a judgment of the Superior Court, rendered by Mr. Justice Loranger, dismissing the plaintiff's action. The action was instituted in the name of John Rankin, as curator to the vacant estate of the late Duncan Campbell, against the widow of Dr. Alexander, one of the executors of Duncan Campbell, to recover £1582 said to have been received by Dr. Alexander as executor. There had been three executors, and these executors in 1832 had sold a lot of land for £730, of which £175 was paid down. Two of the executors died, but Dr. Alexander, it was alleged, continued to receive the interest on the balance of purchase money up to 1858, when he also died. The plea of defendant was that she was not liable to plaintiff, because his appointment as curator was null. That the estate of Duncan Campbell was not vacant, he having named universal legatees in his will, to whom the executors jointly were liable to account for their gestion. Rankin having resigned his curatorship, Norman McPhee was appointed curator, and took up the *instance*. The action was dismissed on the ground that universal legatees had been appointed by the will of Duncan Campbell, and there was no proof in the record, that his succession had become vacant, and therefore the nomination of plaintiff as curator must be looked upon as null. From this judgment plaintiff appealed, submitting that the *onus* of proof to establish the nullity of plaintiff's appointment as curator lay upon defendant, and that the action was in reality an action to account, being brought for the only sum due the estate.

DRUMMOND, J., said the Court did not feel called upon to pronounce any opinion on the validity of the plaintiff's appointment as curator. For his own part, it seemed to him that in most cases the curator ought to be looked upon as the legal representative of the estate till the *curatelle* had been set aside. But there might be cases in which it would be evident on the face of the papers, that the appointment had been improperly made. The judgment must be confirmed on the ground that the action was brought for a special sum. An action could not be properly brought against an executor for a special sum of money; for though it might be true that he had received £500, yet he might have spent £10,000. The proper action was an action to account. The judges were all agreed on this point.

Judgment confirmed unanimously.

Cross & Lunn for appellant; A. & W. Robertson for respondent.

OUIMET (defendant in the Court below), appellant; and GAMACHE (plaintiff in the Court below), respondent

Question of evidence.

This was an appeal from a judgment awarding plaintiff £61, for plastering, &c., done to a church. The plea to the action was that the plaintiff had undertaken all the work required to be done for the stipulated price of 13d. per yard, including the Gothic work, &c., which price had been paid to plaintiff. The answer to this was that the plaintiff was entitled to double the ordinary rate for Gothic work. Evidence was adduced, the plaintiff's witnesses stating that the usage was to allow double for Gothic work, and the defendant's witnesses alleging the contrary. Judgment being rendered in favor of plaintiff in the Court below, the defendant appealed.

MONDELET, J., was of opinion that the proof made by plaintiff was not sufficient to establish that he was entitled to double for the Gothic work. The judgment of the Court below must therefore be reversed, and the action dismissed.

Judgment reversed unanimously.

Loranger & Loranger for appellant; L. Ricard for respondent.

GIARD *et al.*, *es qualités* (plaintiffs in the Court below), appellants; and LAMOUREUX (defendant in the Court below) respondent.

HELD—*That when one of the defendants o an action on a promissory note proves that the note has been paid, the action should be dismissed as to both, though the other defendant made default.*

This was an appeal from a judgment of the Court of Review at Montreal on the 25th of January, 1865, reversing a judgment of the Circuit Court at Sorel. The action was brought on a promissory note against the defendants, of whom the respondent was one, by the plaintiffs in their quality of testamentary executors of the payee. One of the defendants, Dandelin, pleaded prescription and payment, but the other (now respondent) made default. The judgment of the Circuit Court at Sorel dismissed the plea of payment raised by Dandelin, but held that the action was barred by the five years' prescription, and dismissed the action

against Dandelin, but condemned the other defendant, Lamoureux, by default. The case was then taken before the Court of Review by Lamoureux, and the Court of Review, holding that the plea of payment had been established, reversed the judgment against Lamoureux and dismissed the action as to him also. The plaintiffs in the suit now brought the case before the Court of Appeals, submitting that a defendant who had made default in the Court below could not avail himself in the Court of Review of a plea which had been made by another defendant and dismissed.

DRUMMOND, J., was of opinion that the plea of payment having been proved by one of the defendants, the other could not be condemned to pay the debt over again.

MEREDITH, J., The fact of the note having been paid should have caused the action to be dismissed as to both defendants. The judgment of the Court of Review must therefore be confirmed. Judgment confirmed unanimously.

Sicotte & Rainville for appellants; Lafrenaye & Bruneau for respondent.

GRAND TRUNK COMPANY (defendants in the Court below), appellants; and CUNNINGHAM (plaintiff in the Court below,) respondent.

HELD—*That a person purchasing from a Railway Company a ticket which is declared to be good for a specified term, enters into a special contract which is at an end as soon as such term has expired; and the holder of a return ticket attempting to return after the expiration of the term for which the ticket was issued may be lawfully ejected from the train, on refusal to pay full fare.*

This was an appeal from a judgment rendered, 31st Dec., 1864, by Mr. Justice Berthelot, rejecting a motion for a new trial. The plaintiff instituted proceedings 6th April, 1863, for $300 damages alleged to have been sustained in consequence of his illegal expulsion from the cars of the Company on the 8th Nov., 1861, while returning from Montreal to Acton Vale where he resided. The circumstances were as follows: On the 6th Nov., 1861, the plaintiff purchased a return ticket from Acton Vale to Montreal and back, for which he paid $2.50, the ordinary fare each way being $1.75. On the ticket was printed, "Good for day of date and following day only." The plaintiff proceeded to Montreal on the 6th Nov., but did not embark on the train to return till the 8th. When the conductor came round, the plaintiff presented his return ticket. The conductor informed him that it was out of date, and read to him his instructions forbidding him to accept return tickets that were out of date. He demanded the full fare for returning, $1.75. The plaintiff refusing to pay, was put off the cars at Charron's Station. The plaintiff having brought an action of damages, the case was tried before a jury. Mr. Justice Smith, who presided, charged the jury that the Company could not make a distinction between passengers, it being proved that on other occasions conductors had accepted return tickets that were out of date. The jury found a verdict for $100 damages. The defendants then moved for a new trial on the ground that the verdict was contrary to the evidence, it being established that there was a special contract that the ticket was good for two days only; and also on the ground of misdirection by the presiding judge. This motion being rejected, the present appeal was instituted.

DRUMMOND, J., after stating the facts of the case, said: The judges of the Court of Appeals are unanimous in taking a different view of the case from the judges of the Court below. We consider that there was a special contract entered into voluntarily between the respondent and the Grand Trunk Company. The former was bound to avail himself of the ticket within the time specified. It is true that no notice was posted up that the rule as to return tickets would be strictly adhered to, but I do not think that it was necessary for the Company to post up a notice of a rule printed on the ticket. I can account for the verdict only by the strange prejudice which some people have against companies—companies without the existence of which we should have to return to a state of barbarism. If a conductor did allow persons on certain occasions to pass on a spent ticket, is the fact of a conductor neglecting his duty any reason why other people should expect to pass on expired tickets?

MONDELET, J., remarked that if the plaintiff's pretensions were maintained, the result would be the constant evasion of a rule which the Company had a right to enforce.

MEREDITH, J., The evidence in this case instead of establishing a *usage* simply establishes the existence of an *abuse*.

AYLWIN, J., pronounced the judgment of the Court—seeing that the verdict was contrary to evidence, and that the presiding judge should have charged the jury to find a special contract, and that the ticket was spent and useless, verdict set aside and a new trial ordered.

Judgment reversed unanimously.

Cartier & Pominville for appellants; Perkins & Stephens for respondent.

INDUSTRY VILLAGE BUILDING SOCIETY (plaintiffs in the Court below), appellants; and LACOMBE, *père*, (defendant in the Court below), and SCALLON (opposant in the Court below), respondent.

Question of evidence as to certain payments.

This was an appeal from a judgment rendered at Joliette by Mr. Justice Bruneau, 18th March, 1861, maintaining the opposition of Scallon, opposant, which had been contested by the plaintiffs, on the ground that Scallon had previously been paid the amount claimed by his opposition.

MONDELET, J., said there was no difficulty in the case. The opposant's claim had not been extinguished at the time the opposition was fyled.

Judgment confirmed unanimously.

Pominville & Godin for appellants; Leblanc & Cassidy for respondent.

QUEBEC, 20th Dec., 1865.

PRESENT:—Duval, C. J., Aylwin, J., Meredith, J., Drummond, J., and Mondelet, J.

Ex parte W. W. BLOSSOM.—BAIL FOR MISDEMEANORS.—The Court gave judgment on the application of the prisoner Blossom, to be admitted to bail under the following circumstances: On the 7th Aug., 1865, the petitioner Blossom, and three others, were arrested at Montreal in an attempt to kidnap Mr. George N. Sanders, with the object of transmitting his person within the territory of the United States, a large reward having been offered for his apprehension by the United States Government. The prisoners were regularly committed on the 16th Aug., and at the ensuing term of the Court of Queen's Bench at Montreal, an indictment for conspiracy to kidnap Mr. Sanders, with the usual averments of assault, &c, was found against them, to which they pleaded not guilty, and on the following 4th Oct., they were put upon their trial. This trial lasted from the 4th to the 9th Oct., when the jury was discharged, having been unable to agree, after a deliberation of three days. The prisoners were remanded for a second trial, with a new panel of jurors, which commenced on the 17th October, and continued until the 30th October, the last day of the Sessions, when the second jury was also discharged, having been unable to agree upon a verdict, after a deliberation of nine days.

Upon both trials, Mr. Justice Mondelet, the presiding judge, charged strongly for a conviction, intimating to the jury that the evidence left no room to doubt the prisoners' guilt; and after the discharge of the second jury on the 30th October, he made the following order: "The Court, in consequence of the non-agreement of the jury to a verdict, discharged them, and it is hereby adjudged and ordered that the four prisoners be remanded to the common gaol of this district. And whereas, from the positive evidence adduced at this trial, the said prisoners are not entitled to be bailed, it is adjudged and ordered that they do stand committed to the gaol of this district without bail or mainprise, to stand their trial at the next term of this Court, and not to be discharged without further orders from this Court."

An application was soon after made in Chambers to Mr. Justice Monk, of the Superior Court, to admit the prisoners to bail, but was rejected by that judge on the ground that he had no jurisdiction, the prisoners being detained under an order of the Court of Queen's Bench. At the same time he expressed his own opinion that the prisoners were entitled to be bailed. A fresh application was then made to Mr. Justice Badgley in Chambers, and granted, Judge Badgley being of opinion that the prisoners were of right entitled to be bailed, and that the order did not deprive him of jurisdiction. The prisoners failed to give bail till the writ had lapsed, and a new application on behalf of W. W. Blossom was then made before the Court of Queen's Bench sitting in appeal at Montreal. The Chief Justice was not present, and on the 9th December it was announced that the Court was equally divided on the application. A re-hearing was then ordered to take place at Quebec at the term of the Court of Appeals in that city. On the last day of the term at Quebec, the full Bench of five judges being present, judgment was rendered granting the application of Blossom to be admitted to bail, himself in £500, and two sureties in £250 each, Mr. Justice Aylwin and Mr. Justice Mondelet dissenting. The judgment of record does not disclose the grounds. The following extracts, however, from the opinion of Mr. Justice Meredith, who concurred with the majority of the Court, embrace most of the points which arose in the course of the argument:—

"The offence with which the prisoner stands charged is, it is admitted, a misdemeanor, and by the indictment found against him, he is accused of having conspired with certain other persons 'to steal and carry away one George 'N. Sanders out of the city of Montreal, and 'from out of this Province, where he, the said 'Sanders, was then and there living and re-'siding, into a foreign State, to wit, the United 'States of America, against the will and con-'sent of him, the said George N. Sanders.' Upon this indictment the prisoner has been twice tried, without the Jury being able to agree and the first question to be considered by us is this:—Under the circumstances already mentioned, ought the prisoner to be admitted to bail?

"For the present, I shall leave out of sight the order made by the learned Judge before whom the prisoner was tried, and I shall consider the question, firstly, with reference to the jurisprudence of the Courts in England before the passing of the English Statute 11 and 12 Vic., cap. 42, and at the same time I shall take occasion to notice the authorities placed before us by the learned Crown prosecutor. I shall then consider the question, secondly, with reference to the Statute law of England, from which our own Statute on the subject has been taken; and, thirdly, with reference to our own Statute on the subject.

"Before, however, adverting to the decisions of the English Courts, I desire to quote a provision of our own law, securing to us the benefit of the writ of Habeas Corpus, which makes it our duty to consider with even more than ordinary care the judgments of the English Courts on this subject. I advert to the first section of that law which is as follows: 'all persons com-'mitted or detained in any prison in Lower 'Canada, for any criminal or supposed criminal 'offence, shall OF RIGHT be entitled to demand 'and obtain from the Court of Queen's Bench, 'or from the Superior Court, or any one of the "judges of either of the said Courts, the writ of

'Habeas Corpus with all the benefit and relief 'resulting therefrom, at all such times, and in 'as *full, ample, perfect* and *beneficial* a manner, 'and to all *intents, uses, ends and purposes* as Her 'Majesty's subjects within the *realm of Eng-* 'land, committed or detained in any prison 'within that realm, are there entitled to that 'writ, and to the benefit arising therefrom by 'the common and Statute laws thereof.'

"The foregoing emphatic declaration of the Legislature makes it our duty to inquire whether, at the time of the passing of our Habeas Corpus Act, a subject of Her Majesty within the realm of England, if detained in prison there, under circumstances similar to those under which the prisoner is now detained here, would have been entitled to give bail.

"Sir Matthew Hale, than whom a higher authority cannot be cited, laying down the law upon the subject of bail, says: 'regularly in 'all offences, either against the common 'law or acts of Parliament, that are *below* 'felony, the offender is *bailable*, unless, 1st, he 'hath had judgment, or 2nd, that by some 'special act of Parliament bail is ousted.' Here it is to be observed that the word *bailable* in the foregoing passage is construed by Blackstone, vol. 4, p. 298, as signifying that the party *ought to be admitted to bail;* and it is in that sense that it is generally used by the writers on this subject.

"The rule laid down by Chief Justice Hale was acted upon by the Court of Queen's Bench in the time of Chief Justice Holt, as will be seen on reference to 1 Salkeld, p. 104, where Mariott's case is reported as follows:

"Mariott was committed for forging endorse- "ments upon Exchequer bills, and upon a Ha- "beas Corpus was bailed, because the crime "was *only a great misdemeanor;* for though the "forging the bills be *felony*, yet forging the en- "dorsement is not." This case, decided in 1698, is of itself sufficient to show that the distinction between felonies and misdemeanors with respect to the right to be admitted to bail, is not, as has been contended, an invention of modern times; the truth being that that distinction is to be found in our earliest statutes on the subject."

[Judge Meredith next alludes to the following cases: Queen vs. Tracey, decided in 1705, 6 Mod. Rep., p. 31. The case of John Wilkes, decided in 1768, 19 State Trials, p. 1091. In this case Lord Mansfield said that he knew of no case where a person *convicted of a misdemeanor* had been admitted to bail without the consent of the prosecutor. Rex vs. Judd, Leach Crown Law, p. 484, decided in 1788. In this case the president of the Court of King's Bench in England observed, 'unless it appears upon the face of the commitment that the defendant is charged with *felony*, WE ARE BOUND to discharge him by the Habeas Corpus Act.' Case of Rex *v.* Marks, 3 East Rep. p. 165. Case of Regina *vs.* Badger, 4 Q. B. Rep. Ad. & El. p. 418, in which Lord Denman, as the organ of the Court, speaking of the prisoner and of his offer to give bail, observed: 'Standing charged with a *mis-* 'demeanor, O'Neal claims *the right of every man* 'so charged to be released from prison, and so 'admitted to bail on giving sufficient securities.' Case of the Wakefields, Burke's Trials, p. 376. Lastly the case of Linford and Fitzroy, 66 Eng. C. L. R., p. 242. Judge Meredith continued as follows:—]

"The statement of Lord Denman (in the last cited case) 'that for many years the received opinion and practice has been that all persons accused of misdemeanor whether com mon or otherwise, are entitled to be admitted to bail,' is strongly confirmed by the fact that although we have reason to believe the most diligent search has been made by the learned Crown Prosecutor, not a single case of misdemeanor has been cited in which bail was refused before conviction.....

"I shall now, in connection with the decisions of the English Courts, advert to the more important of the authorities cited by the learned Crown Prosecutor as tending to show that a distinction, under the Statute of Westminster, was made between enormous misdemeanors and common misdemeanors with respect to the right to be admitted to bail. The passage from the 15th Chapter of Hawkins' Pleas of the Crown, doubtless a standard authority, supports the distinction contended for by the Crown in this case; and the opinion of Serjeant Hawkins is quoted approvingly in Chitty's Criminal Law, and in Burns' Justice. It may, however, be observed that the limitation which Serjeant Hawkins suggests should be put upon the general words of the Statute, which are: that persons 'guilty of some other trespass for 'which one ought not to lose life nor member 'are replevinable,' has not the support of Lord Coke's commentary on the same statute, which Matthew Hale says he has transcribed; that the opinion of Serjeant Hawkins is expressed doubtingly, as appears by the words '*sed quere*' added to the most important part of it; that the authorities cited by the learned Serjeant were very old even at the time he wrote, the only reporter referred to by Hawkins being Keilway, of the time of Henry VIII; and that the last case tending to support the distinction made by Hawkins is the Queen *v.* Tracey, decided in the time of Queen Anne..... It is also to be recollected that the opinion of Serjeant Hawkins is founded exclusively upon the statute of Westminster, which is no longer in force in England or in this country; and it does seem to me that no one can interpret our own statute, according to the rules observed by Serjeant Hawkins in interpreting the statute of Westminster, without coming to the conclusion that, at least, no justice of the Peace can refuse bail in a case of misdemeanor.....

"Authorities were also cited as showing that the Court of Queen's Bench, in the plentitude of its power, may exercise an almost unlimited

power as to the admitting of prisoners to bail. But I understand those authorities as establishing that the Court of Queen's Bench may take bail in cases even of the greatest magnitude, but not as declaring that that Court could, consistently with justice, refuse bail in trivial misdemeanors."

[His honor next considers the question as to whether the prisoner ought to bailed with reference to the statute law of England from which our own statute has been taken, and arrives at the conclusion, "that in England under 11 and 12 Vic., Cap. 42, a Justice of the Peace would be bound to accept sufficient bail if offered by any person charged with a misdemeanor, such as that of which the prisoner is accused, *however clear the proof* might be against him." His honor then adverts to the Canadian Act, C.S C. cap. 102. We extract the following :—]

"The last clause of the section (53) is particularly deserving of attention ; it is : 'and *in default* of such person procuring sufficient bail, then such justice or justices may commit him to prison.' Here the default of a person accused 'to procure sufficient bail' is in express terms made the condition upon which it shall be in the power of the justice 'to commit him to prison.' All doubt, however, as to the obligation under our statute of a Justice of the Peace to accept bail from a person accused of misdemeanor seems to me to be removed by the 57th section which contains the words, 'or if the offence with which the party is accused be a misdemeanor, then such justices *shall* admit the party to bail as hereinbefore provided.' This is the provision of our law which makes it obligatory upon Justices of the Peace to accept bail in cases such as the present ; and as has been well observed by Mr. Justice Badgley, 'the section 53 does not regulate the principles of admitting to bail, but determines by whom it may be exercised, namely by one justice.'....

"It has also been contended that the rule making a distinction between felonies and misdemeanors with respect to the right to be admitted to bail is a most unreasonable one, and ought not to be followed by this court. But we know that the distinction between felonies and misdemeanors runs through the whole body of our law, and that we meet it at every stage of the proceedings in bringing offenders to justice... One of the advantages which results from the division of offences into felonies and misdemeanors is that it enables the Legislature to lay down a certain rule with respect to the taking of bail in a large class of cases."....

[His honor proceeds to consider the order made by Mr. Justice Mondelet while presiding in the Court of Queen's Bench, Crown side. We make the following extracts from his observations :]

"If to-morrow the prisoner could make his innocence clear beyond the possibility of a doubt, it would be in vain for him to do so. No judge could give him the benefit of the writ of *habeas corpus*, so as to bail him.... I therefore deem the order objectionable, because for a period of nearly six months, it placed the prisoner, charged with a misdemeanor, but *not* convicted, in the same situation with respect to bail, as if he had been convicted. In this respect I cannot avoid thinking the order unjust, and, so far as I know, it cannot be supported by even a single precedent.....

"I shall conclude by recapitulating the points which I think have been established in the course of the foregoing observations. They are as follows :

1st. That according to the well established jurisprudence of the Courts in England, before the passing of 11 and 12 Vic., chap. 41, prisoners charged with misdemeanors were entitled to be bailed, the words of Lord Denman in the last reported case decided under the old law being, 'for many years the received opinion 'and practice has been that *all* persons accused 'of *misdemeanors* whether *common or otherwise* 'are *entitled* to be bailed.'

2nd. That under the English Statute 11 and 12 Victoria, chapter 42, a Justice of the Peace could not refuse bail in a case such as the present.

3rd. That by our statute, chap. 102, C.S.C., Justices of the Peace are bound to take bail in all cases of misdemeanor.

4th. That this Court, at the close of the term, could not consistently with reason refuse to take bail in any case in which, under the statute, a Justice of the Peace is bound to take bail, the statutory directions to Justices of the Peace having always been regarded by the Courts as "the common landmarks" by which they ought to be guided in deciding applications to be admitted to bail.

5th. That there is nothing in the order of Mr. Justice Mondelet to prevent this Court from admitting the prisoner to bail.

6th. That that order is objectionable as tending to restrain the learned Judge by whom it was made, and all his brother Judges, from the exercise, during vacation, of a power vested in them by law for the protection of the liberty of the subject.

"Considering these points established and bearing in mind, 1stly, that no instance in modern times has been found of any Court in England having refused to accept bail in a case of misdemeanor ; and, secondly, that the prisoner has been tried twice without being found guilty, the conviction has forced itself upon my mind that we cannot, consistently with those rules by which we are usually guided in the administration of justice refuse to admit the prisoner to bail. It is with regret that I have found the Court divided as it is in this case ; but this difference of opinion has been for me an additional reason to examine and weigh with the utmost care the authorities and arguments submitted. I shall add merely that in explaining my views in this

case I have spoken without any reserve of the objections to which, in my opinion, the order of my brother Mondelet is subject. Under any circumstances I think that he would wish me to do so. And I have the less hesitation in doing so in the present instance because whatever doubts may exist as to the other points of the case, there can be none in the mind of any reasonable person as to the motives of that Hon. judge in making the order impugned. He had seen in this case two grave miscarriages of justice, and his object evidently was to prevent the case from ending in a total failure of justice. Moreover, although I express and act upon my own opinion (as I am bound to do whatever may be my respect for the views of others), I do not fail to bear in mind that although the order complained of is opposed to the opinion of the majority of the Court, it nevertheless is fully approved of by my brother Aylwin, than whom there is no one more competent to judge of the matter."

The prisoner, W. W. Blossom, was subsequently admitted to bail at Montreal, according to the terms of the judgment.

Mr. Ramsay conducted the case on behalf of the Crown, and Mr. Devlin for the prisoners.

SUPERIOR COURT—JUDGMENTS.

Montreal, 30 Sept., 1865

BADGLEY, J.

ELLIOTT *v.* GRENIER *et uxor.*

HELD—*That a wife séparée de biens is liable not only for the groceries used by the family, but (semble) for small sums lent to the husband, and expended by him in marketing for the family. Further, that she is liable for spirituous liquors used in the house for entertaining friends, as well as for wine and porter; but that she is not liable for a sum loaned to her husband, not used by him for subsistence. Held, also, that pleas of compensation and prescription are entirely inconsistent with an averment of never indebted.*

The plaintiff in this case was a grocer in Montreal and carried on business there from 1854 up to the present time. In 1854 he began to supply Mr. Grenier and his family with groceries. This ran on from 1854 to 1859. Then the plaintiff made up his accounts and found a balance of £119 due on the groceries. For this balance he brought an action against Mr. Grenier and his wife. The wife was qualified as being *séparée de biens*, and they were both put into the case on the ground that the groceries were necessary for the subsistence of Mr. Grenier and his wife, and their family. From 1854 to about the end of 1855, they received from plaintiff a large amount of groceries, in value about £200. In the account were several small sums, amounting to only £6 or £7, advances of money made by Mr. Elliott to Mr. Grenier. Madame Grenier now said, I am liable for my groceries, but I have a very great objection to pay this £6 or £7 advanced to my husband. True, replies the plaintiff, but while the account was running in 1855, your husband paid me £45 by a promissory note, and I apply this in payment of the monies advanced, leaving the balance due on the groceries only. This seemed reasonable enough. But beside this, it was in evidence that these small sums were got by Mr. Grenier to purchase things on the market for the support of the family. As these things went into the stomachs of the defendants, the objection must go for nothing. There was an item of £6 or £7, for a great number of small things which during the course of 5 years amounted to that sum, and which the defendants had very industriously collected out of the general account extending over ten or twelve pages. These items, said Madame Grenier, were not got for the family, and, therefore, she was not liable. Now the evidence showed that these things, such as a half-pound of cheese, crackers, &c., were got by Mr. Grenier for the subsistence of himself and family, as he called at plaintiff's store for them on his way to town, &c. There was, however, a large item of £65, for brandy, whiskey, gin, &c., for which Madame Grenier said she was not liable because she did not drink them. But it appeared that she had obtained a quantity of wine to put into her sauces, which corresponded with the amount charged in the account; that a box of brandy was also brought in from the plaintiff's, and that the remaining whiskey and gin were used in the house for entertaining friends. £65 objected to was a specific objection against spirituous liquors, but included in this was about £8 for a quantity of porter, which article was not objected to under the spirituous liquor denomination, and came under the head of *subsistance*. Besides it was only now at the last moment that all these objections were made. It was proved that Mr. Grenier frequently when passing the plaintiff's shop got a bottle of brandy, which he put into his pocket to take home for the subsistence of himself and family. The remaining part of the account was not objected to. The difficulty seemed to arise out of the credit side of the account. In 1854, Madame Grenier rented to the plaintiff a shop—the shop from which these things were obtained—at £75 a year, and there was an understanding that the rent was to go in payment of the grocery account. In Sept. 1856, before the expiration of two years, she gave the plaintiff a receipt in full for two years' rent (£150), and this money was at once applied in payment of the account. But there was a sum of £50 lent by the plaintiff to Grenier who handed it over to the firm of Murphy & Grenier, this latter being the defendant's son, and living with them during the running of the account. Clearly, this £50 loaned was not subsistence, and Mad. Grenier could not be compelled to pay this amount. Judgment would, therefore, go for the amount claimed, less this £50; but there would be a reservation in plaintiff's favor against Mr. Grenier for this sum.

The pleadings in the case, it must be remarked, were very irregular and contradictory. There was a general denegation denying that the defendants ever got any of the things, and

after this absolute denial of having ever got anything at all from the plaintiff, or being indebted to him, the defendants pleaded compensation and prescription to and against what they asserted had never had any existence, pleas entirely inconsistent with their previous averments. But there was a third plea setting up all the facts, and it was upon this plea that the case was judged.

O'DONAHUE *v.* MORSON.

HELD—*That the surety for an absent tenant has no right of action for the resiliation of the lease, on the ground that the premises are out of repair; and cannot bring any such action in the name of the absent tenant.*

The plaintiff in this case leased from defendant a house in the St. Ann Suburbs, which was not in very good order. After being there for some time, he paid the first quarter's rent without making any objection. Some time after however, he was convicted of having sold liquor without license, and fearing the result of the judgment he went away to parts unknown. Before he went he had sub-let the front half of the upper flat and part of the second flat, and he left the tenants in the house when he went. When the second quarter was entered upon and one month due, the defendant's agent applied for it, but did not get it. In the original lease another party became surety jointly and severally for the payment of the rent, and having been applied to for the money, he thought it would be a very good plan to institute an action in the name of the absent tenant for the resiliation of the lease upon the ground that the roof leaked. But if the surety had a right of action at all he should have brought the action in his own name; the law gives him as such surety no right to plead the personal inconvenience of the tenant for whom he became surety, even if the tenant had suffered such inconvenience. The tenant never complained that the roof leaked, or that the house was in bad order. He paid his first quarter's rent regularly, and would have paid the month's rent of the second quarter, and probably remained to this day but for the conviction. The action must be dismissed with costs.

Ex parte DANSEREAU *v.* CORPORATION OF VERCHERES.

HELD—*That a procès-verbal made by a superintendent without visiting the localities or examining the previous procès-verbaux connected with the work, will be set aside as not entitled to confidence.*

This was an appeal from a *procès-verbal* for building a bridge. By resolutions of the Council, a superintendent was appointed to go and visit the place with all the authority vested in him by his appointment, and make a report. The Court was not disposed to maintain this *procès-verbal*. The superintendent had not performed his duty, had not visited the localities to be affected by his report, had not examined the *procès-verbaux* connected with the work, and himself declared and reported subsequently that if he had seen the *procès-verbaux* he would have made a different report. This declaration made by the superintendent was sufficient to have his report set aside, because no confidence could be placed in a report made under such circumstances. Appeal maintained and *procès-verbal* set aside.

NORDHEIMER *v.* FRASER.

HELD—*That a person who has leased a piano belonging to him, has a right to revendicate it after it has been sold by a third party to cover advances made by such third party to the lessee.*

Held also, that a sale of property pledged for advances must be public and after due advertisement.

The plaintiff leased to one Laidlaw a piano proved to be worth $500, for three months, at $6 a month. In August following Laidlaw applied to Mr. Leeming for an advance upon this piano, telling him it was his. Mr. Leeming without making any inquiry advanced him $200 upon the piano, and afterwards advanced him a further sum of $25, but not upon this piano. Some time afterwards Mr. Leeming's head man of business applied to a manufacturer in town and asked him what he thought the piano was worth. The answer was $200. Now the piano was proved to be worth $500. Mr. Leeming, however, sold the piano to defendant for $200, which was not sufficient to cover the advance and expenses. The question then was, did Mr. Leeming acquire any right of property in the piano by making advances upon it? When Laidlaw went first to Mr. Leeming, the latter proposed to put it under Nordheimer's care, but Laidlaw of course objected to this. Nordheimer had endeavoured to find out where the piano had got to, but it was only just before the action was brought that he found out what had become of the piano. Now as to Mr. Leeming's right to sell this instrument—if sold at all, it should have been sold publicly, and after being properly advertised as the property of Laidlaw. It was only put into Leeming's hands as a pledge, and the public had a right to be notified of the fact. Mr. Leeming not having taken the necessary precautions, cannot deprive Nordheimer of his property. Under these circumstances the *saisie-revendication* must be held good, and judgment given in favor of plaintiff.

MCWILLIAMS *v.* JOSEPH.

HELD—*Where a builder had quarried some stone under a contract, which he afterwards refused to sign, that he was, nevertheless, entitled to be paid for the work done.*

The defendant in this case asked for tenders for building a house, and the plaintiff made a tender. At the bottom of the tender it was mentioned that the work was to be completed within a certain time for a certain sum; and if not completed within the time specified, the sum to be paid was to be less. Defendant told plaintiff to go and sign the contract, but in the meantime he said he might be quarrying stones for the building. The plaintiff began to quarry the stone, but did not sign the contract, and said he would not do so unless he were allowed

to fix his own time. There was, therefore, no contract between the parties. But work had been done by plaintiff, and defendant must pay the value of the stone quarried, less what had been used by plaintiff in building another house. The amount was small. Judgment for plaintiff with costs as of the lowest class, Circuit Court.

McGIBBON *v.* DALTON.

HELD—*That where the rule appointing arbitrators authorizes them to settle the question of costs, the Court will not disturb their award as to the costs.*

An action for work done. The matters in dispute were referred to arbitrators, and in the rule appointing the arbitrators and *amiables compositeurs*, they were specially authorized to decide upon the costs of the case. The action was brought for £56, and the defendant pleaded that he owed only £6; and although the arbitrators awarded plaintiff £20 yet they had left each party to pay his own costs. This would not have been the judgment of the Court, but as the arbitrators had received authority to fix the costs, the parties must abide by the award. Report homologated.

Montreal, 31st October, 1865.

BADGLEY, J.—

LECLAIRE *et al.*, *v.* DAIGLE and RICHARD, opposant, and GIARD, opposant and contesting.

HELD—*That an election of domicile by an opposant at the office of an attorney, must state where the office is situated.*

A writ of execution issued out of this Court, addressed to the Sheriff of Arthabaska, for the sale of defendant's property. The property was seized and sold, and the Sheriff made his return of the moneys to this Court. Thereupon a *projet* of distribution was made; oppositions were fyled and among them was one by Giard, and another by Richard. The report of distribution collocated Richard and thereupon Giard contested his opposition. Richard was resident in Arthabaska, and almost at the last moment his attorney ascertained that a contestation had been fyled here. He now moved that it be rejected for insufficiency of service. Now Richard's opposition did not establish a domicile according to law. It merely elected domicile at the office of his counsel, without stating where this office was. The ordinance required opposants to elect a domicile *à peine de nullité*, but the domicile required by the law was a local habitation, there was none here. The contestant, however, did not take exception to this irregularity, but went into the merits of the opposition; and the contestation, instead of being served on Richard's counsel, was left at the prothonotary's office. The latter, hearing of this almost at the last moment, moved to reject it. The difficulty appeared to have arisen from some difference between the attorneys, and as the Court could not allow the rights of parties to be jeopardized by such differences, there would be an express order rejecting the motion without costs, and giving Richard an opportunity of answering the contestation.

STEPHENS *v.* HOPKINS.

HELD—*That the use of the present tense 'has' instead of the past 'had' under the circumstances stated was good ground for a demurrer.*

This case came up on a demurrer. The action was brought to compel the defendant to remove certain boxes, complained of as a nuisance, from the Prince of Wales' lane, through which he claimed to have a common right of property with the defendant. The defendant demurred to plaintiff's action on several grounds. The plaintiff, a considerable time afterwards, instituted his action, and in his declaration alleged that he went into possession of the premises on the 1st of February last, but he only purchased on the 6th. He further alleged that since the 1st Feb., the defendant or his agent erected these boxes, and that "he *has* no right to erect them," using the present tense instead of the past in his declaration. It was not alleged that he had no right to erect the boxes at the time they were erected. This difficulty, though highly technical, made the demurrer a good demurrer, but the plaintiff would be allowed an opportunity to amend his declaration. Demurrer maintained with costs, and action dismissed, unless the plaintiff chooses to amend his declaration.

BEAUQUAIRE *v.* T. DURRELL, and WM. DURRELL *et al.*, opposants.

HELD—*That the Sheriff cannot suspend proceedings upon an opposition to a venditioni exponas without an order from a judge.*

Judgment was obtained against the defendant in 1837. Execution issued in 1857. Two lots of land were seized, one was sold, and the other remained unsold. On the 2nd Feb., 1860, three years after the execution issued, the defendant died. There was no proceeding of record to render the judgment executory against the heirs, but in 1863 the plaintiff obtained a writ of *venditioni exponas* for the sale of the second lot of land. Upon the issue of this *venditioni exponas*, the opposants, heirs of the defendant, came in by opposition and claimed the land as theirs. The opposition being put into the hands of the Sheriff, he undertook to suspend the proceedings, which the law did not allow him to do, there being no order of the judge, directing him to suspend them. An opposition to a *venditioni exponas*, without such an order of the judge, was no opposition at all, and the sheriff was not bound to take any notice of it. The opposition, therefore, on this ground would be dismissed but without costs; but the parties might obtain an order to suspend upon a new opposition: this opposition dismissed.

GOUGH *v.* GREAVES.

Demurrer maintained to declaration setting up a contract, and (without asking that the contract be set aside) claiming more than was stipulated in the contract.

The defendant in this case, a married man had intercourse with the plaintiff, his servant woman; and a female child was born. The

defendant had the woman sent to the Lying-in Hospital. Subsequently, in October, 1862, he induced her to enter into a notarial agreement, in which it was stated that to avoid scandal and litigation, she was to accept $6 per month till the child should attain the age of 7, in consideration of which she was to forego her claim for damages against the defendant. $12 were paid at the time the deed was passed, and $24 were afterwards acknowledged to have been paid, so that six months were paid in all. But subsequently, the defendant refused to support the child, and for the past two years and a half he had not paid a cent. The plaintiff now was advised at law that the bargain between them was no longer in force, and she was induced to bring an action claiming $10 a month from the time of the child's birth. As the condition of the agreement was that the plaintiff was to forego her claim for damages on his paying the $6 a month regularly, the bargain respecting damages might be considered at an end. But the bargain for the child was $6 a month up to the age of 7, while the plaintiff claimed $10 per month up to the age of 14. This was met by a demurrer on the part of the defendant, stating that plaintiff cannot go beyond the contract. She ought to have prayed that the contract be set aside. The Court, therefore, could not do otherwise than maintain the demurrer, but the defendant would be allowed no costs, and plaintiff would have an opportunity of putting her action in such shape that a judgment could be rendered.

BERTHELOT, J.,

ROBERTS *v.* WEST.

Capias quashed because name of deponent's informant was not disclosed in the affidavit.

In this case the defendant moved to quash the *capias* on the following among other grounds: That the affidavit set out that the defendant had been in the United States, and was immediately about to return there, but did not state the name of the person who gave this information to deponent. It was alleged that the thing was publicly known, and that defendant had entered his name on the books of a hotel as being of New York; but this was not sufficient. Judgment would go quashing the *capias*, because the name of the informant was not given.

GOULT *v.* DUPUIS.

HELD.—*That a person ceasing to profess the Roman Catholic religion must notify his curé in writing, in order to be exempted from liability for church dues.*

This was an action for church dues. The plea of the defendant was that he had ceased to be a Roman Catholic, and that being now a Protestant, he was not liable for the amount claimed. To support this plea he desired to adduce verbal evidence. Mr. Justice Monk had rejected this testimonial proof and a motion was now made to revise this ruling. The court believed the ruling to be correct. A person ceasing to be a Roman Catholic must give his *curé* notice in writing. Verbal proof would be too easily obtained. There being no *commencement de preuve par écrit* in this case, the ruling was correct, and the motion to revise must be rejected.

MONK, A. J.,

RANSON *vs.* CORPORATION OF MONTREAL.

HELD.—*That Counsel may be called upon to disclose the place of residence of their clients; but it is optional with them to answer.*

This was a petitory action. In the declaration the plaintiff was described as of the district of Ottawa. Since the institution of the action he had left his residence, and probably the Province, and was not to be found. The defendants were desirous of serving on him a rule for *faits et articles*, and not being sure that interrogatories served at the Prothonotary's office would, in case of the plaintiff's default, be taken *pro confessis*, they made application that the plaintiff's attorney should be called on to declare where his client was. Their intention was, if the attorney stated where the plaintiff was, to send a commission to examine him. While if his attorney refused to state where he was, they believed they would then be justified in serving the interrogatories at the Prothonotary's office. The plaintiff's attorney answered that he could not be compelled to disclose his client's whereabout, and that it would derogate from the authority of the Court to give an order which might be disobeyed with impunity. Further, that the plaintiff had been indicted, true bills found against him, and he was a fugitive from justice; so that it would be a violation of professional confidence to state where he was. With reference to the first point, it certainly seemed to be an extreme exercise of authority to order a counsel to state where his client was. But it had been done in France; and, moreover, the counsel was at liberty to refuse to comply if he pleased. His refusal only put the defendants in a more advantageous position. As to the second objection, it was not, in the opinion of the Court, any breach of professional confidence, and, besides, there was no compulsion in the matter. Rule granted.

GLASSFORD *v.* TAYLOR.

HELD—*That the Superior Court has no power to amend an award of the Board of Revisors of the Montreal Corn Exchange Association. If irregular, it must be set aside in toto.*

This was an action brought upon an award of the Board of Review of the Montreal Corn Exchange Association. This Association had obtained an Act of Incorporation empowering it to provide by By-law for the appointment of arbitrators to whom may be referred controversies relating to commercial matters between the members. From the Arbitrators there was an appeal to the Board of Review, and the award rendered by this Board was deposited in the Superior Court. The Court had no power whatever to touch this award, there being no appeal or *certiorari* allowed. In the present case, the two arbitrators not agreeing a third was named, and subsequently the Board of Revisors gave their award which was deposited in the Superior Court, and a rule taken in due

course calling on the party, against whom the award was rendered, to show cause why the award should not become a judgment. The defendant met this rule by a contestation. Besides minor objections, it was alleged that he had not received written notice from the Board of Review, as the law required. The Secretary was brought up, and said he believed he had given defendant notice, but he did not find any trace of it, and could not remember whether he had done so. The award was therefore bad upon this ground alone. But there was another objection more fatal than this. The award condemned Taylor Bros. to pay certain freight, but the amount which they were to pay was not mentioned in the award at all. The omission might, probably, be rectified by reference to the proceedings: but the Court had no power to add to or subtract from the award; so that being absolutely null in consequence of this omission, the action must be dismissed with costs.

DRAPEAU *v.* FRASER.

HELD.—*That the sheriff must be made a party to an action to set aside a sheriff's sale.*

The question in this case was whether the Sheriff should be made a party to the suit brought to set aside a Sheriff's sale. It was asked by the plaintiff, why bring in the Sheriff? We do not complain of him. Why go to the expense and trouble of including him? There was a good deal of force in this. Upon philosophical grounds it was right; but the Court had to look to the jurisprudence for its guidance In this case it might be urged that the Sheriff must be brought in, because he executed the writ. He was the man who did the wrong, and a copy of the judgment must be served upon him. The mere fact that the judgment of the Court was to be served upon him, and that this judgment went to set aside an act of his, was sufficient ground. But there was another reason for it. The plaintiff complained of the Sheriff's act; he did not say it was fraudulent; but the Sheriff might have a good deal to say about it. There was another ground beyond this. The Sheriff was an officer of the Court. He was ordered by the Court to do a certain thing, viz., to sell the defendant's property in satisfaction of the debt; and he went and sold, not only the defendant's property, but that of other people. He should be brought before the Court to explain this. Further, it was in accordance with the uniform practice of the Court. Widows of Sheriffs had even been brought in after their husbands had died. A practice so uniform could not be considered a useless practice. Therefore, although the case had been allowed to go *exparte*, the Sheriff must be brought in.

COURT OF REVIEW.—JUDGMENTS.

31st OCTOBER, 1865.

PRESENT.—BADGLEY, J., BERTHELOT, J., and MONK, J.

BRITISH AMERICAN LAND CO., *v.* MUTUAL FIRE INSURANCE CO.

HELD—*That a policy of insurance is vitiated by changes increasing the risk, made in the buildings insured without legal notice to the insurers.*

BADGLEY, J.—This was a case from the Circuit Court of the St. Francis District. The action was founded upon a policy of insurance on certain buildings in Sherbrooke, comprising a manufactory and certain detached buildings near the manufactory. After these buildings had been occupied some time, the proprietor thought proper to make certain changes and additions, and, unfortunately, without giving the required notice to the Company. It was true he did intimate verbally to the Secretary-Treasurer of the Insurance Company in conversation that certain changes were being made in the buildings, but there was no notice according to law. There was nothing to show that the Company had ever been made aware of the changes that had taken place. It is a principle of insurance that where changes have been made increasing the risk, and no notice has been given of this increased risk, nor any consent given by the Insurance Company, the insurers are not liable. Unfortunately the fire in this case was found to proceed from the part of the buildings where the changes and additions had been made. There was no doubt, therefore, that the judgment must be reversed and the action dismissed. The original policy had been changed by additional buildings of a more risky character, and these buildings being burned down the Insurance Company could not be held liable upon the policy. Judgment reversed.

MORIN, *fils*, *v.* PALSGRAVE.

HELD—*That in order to bring an action en complainte, the plaintiff should have had actual possession of the property for a year and a day before the institution of his action.*

BADGLEY, J.—This was a case from the District of Richelieu. It was an action *en complainte*, and the legal ground of that action is the actual possession of the plaintiff for a year and a day before the institution of his action. In this case the plaintiff claimed to be in possession of a certain property, but his possession had been interfered with by the defendant, the action not being brought within a year and a day of the *trouble*. The testimony was clear that both the parties had been in possession of the property at different times up to and before the institution of the action. Now the possession should be in the plaintiff alone, and not divided with any one else, otherwise the action *en complainte* could not hold. The parties in this instance had agreed that they would not go upon the land till the case was settled. Under these circumstances the judgment of the Court of the District of Richelieu in favor of the plaintiff must be reversed.

WARD *v.* BROWN and BROWN, opposant.

Deed of donation declared fraudulent, under the circumstances stated.

BADGLEY, J.—This was an appeal from a judgment rendered in the District of Iberville. The plaintiff obtained a judgment, on the 10th May 1863, against the defendant, for a debt due

since 1st August 1861. The opposition was made by the son of the defendant, and the ground of the opposition was that the defendant had made a donation of the property seized to the opposant, his son, in Feb. 1863, whereby the seized property had become the opposant's. The consideration of this donation was the support of the donor and his family, the right of usufruct in the estate being, moreover, reserved by the donor. In the deed it was declared that $1189 had been paid, and the balance, $500, was said to have been received subsequently. The contestation arose on this deed, which, it was alleged, was made with the fraudulent intent of preventing the plaintiff from enforcing the execution of his judgment; that the defendant had transferred not only his real estate, but the whole of his moveables, to his son. There was nothing to show that the defendant's son had ever paid any money for this property, or that the conveyance was anything else than an artifice to protect the defendant's property from the grasp of his creditors. Under these circumstances, the judgment of the Court at Iberville rejecting the opposition must be maintained; but an alteration would be made in the grounds of the judgment. The opposition would be dismissed on the ground that the donation and the transaction between father and son were fraudulent, and not merely on the ground that the opposant had not proved the allegations of his opposition, as stated in the original judgment.

SCATCHERD *v.* ALLAN.

HELD.—*That when the delay for inscribing a case for review would expire on a Sunday, it is prolonged till the next juridical day.*

BADGLEY, J.—This case was brought up on a ruling of the Superior Court of this District. The plaintiff now moved to set aside the inscription for review, on the ground that the notice was not sufficient. The law said that the party seeking to have a judgment reviewed must, within eight days from the date of the judgment complained of, make the required deposit, and inscribe the case. In this instance, the judgment was rendered on the 30th September, and on the 9th Oct. notice of inscription for review was served by defendant's attorney on plaintiff's attorney. On the same day the inscription was fyled in the regular manner, with the deposit. Now the eighth day after judgment rendered was a Sunday, and it was in accordance with the rules of practice that when a delay expires on a Sunday it goes over to the next juridical day. The inscription, therefore, was in time, and the motion must be rejected with costs.

JOHNSON *et al. v.* KELLY.—

HELD—*That in insolvency cases the procedure under the ordinance of* 1667, *requiring the Sheriff to make a procès-verbal to accompany his report, has been superseded by the special procedure introduced by the Insolvent Act of* 1864.

BADGLEY, J.—This was an insolvency case from the Court at Richelieu. It was a case of compulsory liquidation, commenced in the usual manner according to the statute. A writ of attachment was issued from the court addressed to the Sheriff of that district, who acted upon it, and made his return on the return day of the writ. On that day the official assignee in whose hands the Sheriff had placed the estate of the insolvent, applied to the court for a prolongation of the time, in order to enable him to complete his inventory of the estate and effects of the defendant. The return day was the 6th. The official assignee renewed his application for delay, stating the time within which he would be able to complete his report. The court below did not come to any decision upon the applications, but it had come to a final judgment on a technical point based on the procedure under the ordinance of 1667. The objection made by the defendant was that because the Sheriff had not returned a *procès-verbal* under the ordinance of 1667, of his doings under the writ, the writ was bad and must be set aside. But the procedure under the old law had been superseded by the special procedure introduced by the Insolvent Act. The case being one of compulsory liquidation, it was necessary that there should be an act of bankruptcy, and, accordingly, certain allegations were fyled by plaintiffs, supported by affidavit, that an act of bankruptcy had actually taken place. The insolvent did not take any of the proceedings pointed out for setting aside the act of insolvency, and, therefore, the act of bankruptcy stood good on the record. The official assignee had applied for an enlargement of the delay for making his inventory, and it was quite competent for the Court to have extended the time to do so. The defendant then, by *exception à la forme*, objected to the report of the Sheriff, because it was not accompanied by a *procès-verbal* of his doings under the writ, which was followed the next day by a petition of the insolvent to the same effect for the same reason; but as before observed the statute required nothing of the kind from him. It is said that the Sheriff should return with the writ, a report under oath of his action thereon, but it said nothing more. The Sheriff was not to make the inventory; this was the duty of the assignee. The case went on; proof was adduced confirming the act of bankruptcy, and the defendant pleaded by *exception à la forme* exactly the same as if he were pleading in a civil action. Now there was no such course of pleading provided by the act which had substituted a different procedure. The mode there provided was by summary petition, which the defendant had also followed. Finally, the Court at Richelieu had rendered a judgment quashing the writ of attachment on the ground that the return of the Sheriff was not accompanied by a *procès-verbal* under the old system. The Court was wrong in departing from the statutory procedure, and the judgment could not be maintained.

MONK J., did not go to the extent of saying that a *procès-verbal* was unnecessary under the insolvent law. He believed it necessary for the Sheriff to tell the Court precisely what he had done. But in this case he considered that

there was a sufficient return by the Sheriff, and, therefore, he concurred in the judgment.—Judgment reversed.

Snowdon & Gairdner for plaintiffs.

SUPERIOR COURT.

30th November, 1865.

BADGLEY, J.,

MIGNAULT *v.* BONAR.

HELD—*That the celebration by a clergyman of the marriage of a minor without consent of parents, is illegal, and gives ground for an action of damages against the clergyman.*

The plaintiff in this case had been living in the State of New York with his family, but returned to this country a year or two ago and lived in Montreal. His daughter, aged eighteen, who was perfectly well acquainted with the English language, kept company with a man who one day induced her to accompany him for a sleigh drive. To preserve appearances the lady took her younger brother with her in the sleigh, but the man afterwards sent the boy off to the post office, and took the girl to the Rev. Mr. Bonar's private residence, and there in the presence of two persons, sent there for the purpose, a marriage took place, a license being presented by the husband. The name given to the clergyman was not her real name. It was not quite clear that she did not herself sign the register. She said she did not sign it, and she said also that she never had any idea of marrying this man, but that when she got to the Rev. Mr. Bonar's house she was called to stand before the clergyman; that she never made any objection; Rev. Mr. Bonar read something out of a book, which she must have comprehended as she was familiar with the English language read to her, and after it was all over she was told that she was married. As soon as the marriage ceremony was over, her husband took her back to her father's house. The ceremony was all that took place, there not being any consummation of marriage. Now this girl was by law a minor, and her father had never given any consent to the marriage, and, unfortunately for the clergyman, it was true that he asked no questions about her age, or whether there was any consent. The father now brought an action of damages against the clergyman. This was not the first case of the kind that had come before our Courts. There was the case of Laroque *v.* Michon (2 L. C. Jurist, 267) which entailed very heavy consequences on a Catholic priest who married a minor of fifteen, without the consent of her parents. The judgment of the Superior Court in that case dismissed the action on the ground that the marriage of a minor without the consent of her parents did not give rise to an action of damages until proceedings were had to set aside the marriage. The Court of Appeals over-ruled this decision: and held that the clergyman had brought himself within the law, although the marriage had not been set aside. In that case, too, there was a dispensation from the Bishop to do away with the necessity of banns, and this dispensation was taken by the priest in good faith. Nevertheless, the Court of Appeals condemned the priest to pay £100 and costs, and it was only in consideration of his being a poor man, a mere missionary, that they made the amount so small. This Court was bound by the judgment in appeal, and the defendant must be condemned to pay damages. There were circumstances, however, which would mitigate the amount. In the other case the girl was only fifteen, and must have been perceived to be a minor; and she was personally known to the priest. In this case the female was a well formed woman, and at the time of the marriage she knew all that was going on, and it was only after the marriage that she said she was living with her father, and that she was only 18. The ceremony had then been performed; but this was only the civil contract of marriage, not being a Sacrament in the Protestant Church, and the girl had suffered nothing, as there had been no consummation of marriage. The defendant could not escape damages, but taking all the circumstances into consideration, the Court was not disposed to go so far in this case as the Court of Appeals had gone in the other, and the defendant would merely be adjudged to pay $100 damages, with full costs.

Ex parte HERMINE DENIS.

HELD—*That entries in the Registers of Births, Marriages, and Deaths, may be amended by order of the Court on application and due proof.*

This was a case of an Italian who died in Montreal. In the entries of his marriage, of his children's birth, and of his own death, his name was spelt differently. There was now an application to the Court to have the name corrected on the Registers, because he was entitled to certain properties in Italy, and the erroneous spelling might lead to difficulties there. As the facts had been proved, the application would be granted.

MAY *v.* LARUE.

HELD—*That an Insolvent who has allowed the delay of five days prescribed by the Insolvent Act of* 1864, *to elapse, without presenting a petition, will not be permitted to appear afterwards.*

This was an application made on the part of the defendant to be permitted to fyle an appearance in the case. An attachment had issued against the defendant's estate under the Insolvent Act. But the Statute said that the party contesting shall present his petition "within five days from the return day of the writ, but not afterwards." The defendant merely moved to be permitted to fyle an appearance. The time had gone by. With the law so positive, it was impossible to grant this motion. Motion rejected.

BENNING *v.* CANADIAN INDIA RUBBER CO. and HIBBARD INTERVENING.

HELD—*That a residence of a year and a day is not required in order to acquire a domicile.*

The plaintiff moved for security for costs from the intervening party on the ground that he

had no domicile here. The rule as to acquiring domicile by a residence of a year and a day did not apply here. It was in evidence that the intervening party had taken up his residence here and was furnishing his house. The application must be rejected.

BELANGER *v.* GRAVEL.

$100 *damages awarded for assault on a justice of the peace in a magistrate's Court.*

This was an action of damages brought by plaintiff, a colonel in the militia, a Commissioner of small causes and a Justice of the Peace. It appeared that in a case before magistrates, the plaintiff was acting as attorney for a defendant in the case, when the present defendant came up and abused him, charged him with giving wrong judgments, with appropriating to himself the money of the Fabrique, and raised his hand to strike him, at the same time asking him to go out with him and fight. This abusive conduct was wholly unjustified, and, moreover, took place in the presence of a Court held by Justices of the Peace. The defendant must be condemned to pay $100 damages and costs.

HIBBARD *v.* BARSALOU.

HELD—*That a person proving himself to have an interest in the affairs of a Company is entitled to a mandamus to compel the directors to allow him to have communication of the books.*

In this case an application had been made for a writ of mandamus, for the purpose of compelling the directors of the Canadian Rubber Company to allow plaintiff communication of the books of the Company. The application was made to Mr. Justice Berthelot, and he ordered the writ to issue, returnable on the 19th of the following month. He, Mr. Justice Badgley, saw nothing to prevent a judge from ordering, in vacation, a writ to be returned in term, or from ordering in term a writ to be proceeded with in vacation. The Statute said application might be made to the Superior Court, or to a judge of the Court in vacation. The case went on and was met by a motion to quash, by a declinatory exception, and by an exception *à la forme*. Our Statute laid down a particular form of proceeding for *mandamus*. In England a very circuitous procedure was followed, but our Statute had set aside all that. It was declared that when the writ issued, it should not be quashed otherwise than by pleading. The motion to quash must therefore be discharged. With respect to the declinatory exception, there was nothing to decline, and this exception must therefore be rejected. There remained the exception *à la forme*, which embraced all that was urged under the other proceedings, with reference to the right to issue the writ itself. It was true that in England, the Courts had avoided issuing writs of *mandamus*, where public interests were not involved. But our statute had made the *mandamus* a part of our law. It was not, as in England, a thing governed by the Common Law only. The statute pointed out a particular mode of proceeding and gave remedies. The writ was issued by the Judge on petition, or *requête libellée*, supported by affidavit. It was like an ordinary writ of summons, calling upon the party to come in and answer it. The party on whom it was served could only answer it by pleading. In this case, then, the first point was whether the plaintiff had such an interest as to justify him in having access to the books of the Company, as he asks in his petition. His honor thought he had. His rights in the Company had been bought out for $50,000, he was no longer to be president, and he was not to be permitted to establish a rival institution in the colony within three years. During that time he was to receive 10 per cent., or $5000 per annum on his capital, and then further arrangements were to be made. For carrying out these arangements, the plaintiff placed his shares in the hands of Mr. Barsalou individually as a security for the contract that was entered into. But he did not divest himself of his stock in the institution. Had the plaintiff not an interest in this institution if he remained in the same position now as then? His interest could not be denied. He had set up specific grounds for desiring, to look not into all the transactions of the Company, but into the transactions between Messrs. Benning and Barsalou and the Company. At first he had been promised permission, and then he had been refused. This looked as though there was something suspicious to be covered up. The plaintiff having reasonable grounds for complaint was entitled to his *mandamus*. Proof had been made on the exception, which was insufficient, and it would be dismissed.

COLUMBIAN INSURANCE CO. *v.* HENDERSON.

HELD—*That a corporation must give security for costs in cases where the law compels a private individual to give such security.*

In this case a motion was made on the part of the defendant for security for costs. A Corporation could not be exempted from giving security any more than a private individual. The motion must, therefore, be granted.

STEPHEN *v.* STEPHEN.

HELD—*That the proper mode of proceeding to destitute a tutor is by petition.*

This was a petition *en destitution de tutelle*. Various allegations had been made for the purpose of having the tutor destituted. He was said to be insolvent, living upon his minors, taking them to Indiana, exposing them to disease, when for their health they should have been taken to the seaside. All these circumstances together with others alleged, *prima facie* were sufficient to shew that he was not a fit person to be tutor. But the latter demurred on the ground that the proceeding should have been an action at law. Five and twenty records of petitions in similar cases had been sent up, which constituted a sufficient jurisprudence on the subject; but beyond this, it was only necessary to look to the words of the Statute which spoke of annulling the appointment of a tutor upon petition. The demurrer, therefore, must be dismissed with costs.

CLEMENT *et al. v.* LEDUC.

HELD—*That where two wills, exact copies of each other, and made at the same time, by husband and wife, contain the same legacy, the legacy is only payable once.*

This was an action for certain legacies. Old Gilbert Leduc and his wife were married at the end of the last century, and lived together *communs en biens*. Having attained the age of 70, they died within a few months of each other. They had a numerous family, and as the children grew up and married, the old people purchased properties for them or gave them money, and established them in life. In 184i, the old couple thought it better to settle their estate, and they called in Brault, a notary, who made a will for each of them. But these two wills were exactly the same; they contained the same charges, the same conditions, the same usufruct; and were made at the same time and with the same object. In these wills the old people specifically referred to what they had done for their children, then it was stated in each that the testator gave to two of his grand-daughters 3,000 livres, and afterwards made the defendants, their grand-sons, the universal residuary legatees of each testator. After the death of the old man, an inventory was made of his estate, and it was shewn that the property of the community was so charged with debt that it was of little value. Several years passed after this without anything being done by the plaintiffs, the special legatees, except that they had received from the universal residuary legatees their 3,000 livres, as appeared by receipt given by the sisters to the brothers. The grand-daughters now claimed 6,000 livres more, 3,000 under each will. The only question then was this, were these two wills, made at the same time and containing exactly the same words of bequest, to be considered in the nature of a *don mutuel*, or were they to be considered two wills, giving 6,000 livres to each of the grand-daughters, *i. e.*, 3,000 from each of the grand-parents. It was shewn that this would give the grand-daughters twice as much as the daughters had received. Now, the law was this with respect to legacies:—If there were several legacies by the same will, payable to the same person for the same sum, the legacy would be only payable once, unless the legatee proved that the testator intended to make several legacies. But if the legacies were made by different instruments, the sum would be due under each instrument, subject, however, to proof of actual intention. The plea in this case was that the wills were joint wills, and, therefore, there was only one sum due. The wills were exact copies of each other, not made by strangers but by husband and wife, and the only difference seemed to be that the notary preferred to make two wills instead of one. Therefore the Court considered them as a *testament mutuel* upon which only one legacy was due. But the authorities laid down that these inferences might be controverted or established by testimony. Now, in this case, there was the evidence of a woman who was a relation of the parties, and she stated that before the wills were made, the old woman told her they were going to give their grand-daughters 1,500 livres from the two grand-parents together, but on the representations of witness, they increased the joint legacies to 3,000 livres, and after the wills were made, both testators declared the same thing. This testimony was good under the French law, and, therefore, the action would be dismissed.

MCFARLANE *v.* LYNCH & RAPIN *et al.* petitioners.

HELD—*That the sureties of a debtor, who has been ordered to be imprisoned for not fyling a statement, are not discharged till the debtor has been delivered into the hands of the Sheriff under the original writ of Capias ad respondendum.*

The plaintiff having obtained a judgment against Lynch, the usual proceedings were taken to make him fyle a statement; and on his default to comply, the plaintiff took proceedings to have him incarcerated for punishment under the Statute, and he was therefore ordered by the Court to be imprisoned for six months as a punishment. The Sheriff could not find the defendant; but at a subsequent period one of the sureties petitioned the Court for the issue of a *contrainte par corps* against the defendant, who, he said, could now be found, and he was, in consequence, arrested and imprisoned for six months as a punishment. The sureties now said they had done everything the law required, and prayed to be released from the bail bond because the defendant was in jail. But the Court did not consider that the imprisonment of the defendant as a punishment had the effect of discharging the sureties. He had not been delivered into the hands of the Sheriff under the original writ of *capias ad respondendum*. Under these circumstances, the petition in this and two other cases must be rejected with costs.

In re FERON, insolvent.

HELD—*That the wife of an insolvent cannot be examined as a witness by the assignee respecting her husband's affairs.*

In the case of this insolvent the assignee petitioned for the examination of the insolvent's wife under the Act, when it was objected that she could not be examined, there being no law which authorised the examination of a wife respecting her husband's affairs. The case was submitted upon the deposition. It was the opinion of the court that she could not be examined. The clause giving authority to examine "persons" respecting the estate of the insolvent, was copied from 6 Geo. 4, but in the English Act special authority was given to the commissioner to examine the wife. In this country, strange to say, a similar clause was in the bill, but it was struck out in committee and formed no part of the act as it now existed. There was a reason for this. Public policy did not allow domestic incidents to be brought before a court of justice. The ordinary statute law said specially that the wife shall not be a witness for or against her husband. Looking, therefore, at the policy of the law and the fact

of the special clause having been struck out, the Court could not grant the application.—Objection maintained.

DRUMMOND *v.* COMTE *et al.*—(In Chambers.)

HELD—*That a writ of prohibition cannot issue to commissioners appointed by the Corporation for the expropriation of property, at least before their report has come before the Court for adjudication thereon.*

On the 19th of January an application was made to a Judge in Chambers for a writ of prohibition addressed to Mr. B. Comte and other commissioners appointed for the expropriation of property by the Corporation. The writ was allowed to issue, and the case now came up on a demurrer, on the ground that a writ of prohibition could not issue at all to these commissioners who were only *experts*. In England, the writ of prohibition was of a peculiar nature. It was a writ issued out of the Superior Court to inferior Courts, and to them only. It issued out of the Queen's Bench to the Ecclesiastical Courts and other inferior Courts. It was a writ prohibiting these Courts from proceeding. (Bacon's Abridgment, word Prohibition.) The Act 16th and 17th Victoria was passed in England for the purpose of reforming the practice in cases of prohibition, and the necessity of coupling the Crown with these writs was done away with. Bacon laid down that no man was entitled to a writ of prohibition unless he was in danger under some suit pending. Now there was no suit here, but for the purpose of ascertaining the value of property the Corporation were obliged to go before a judge of the court and have commissioners appointed. When the report of the commissioners came before the judge, and he was compelled by law to adjudge upon that report, then would be the proper time to use the writ of prohibition. Looking at the case in this way, the Court was of opinion at the present stage of the proceedings that the demurrer must be maintained and the writ quashed. The same judgment applied to two other cases.

COURT OF REVIEW—JUDGMENTS.

24th November, 1865.

PRESENT: Badgley, J. Berthelot, J., and Monk J.

CORPORATION OF MONTREAL, *v.* RANSON.

HELD—*That a defendant who has been regularly foreclosed will not be allowed to come in and plead, when the plea offered is not considered good.*

BADGLEY, J.—In this case, argued yesterday, we think the parties should have a judgment without delay. The defendant has asked for the revision of an interlocutory judgment by Mr. Justice Monk, rejecting his motion that default be taken off and that he be allowed to plead. The action was brought for the sum of $500 on a lease. The defendant having left his domicile and the province, the usual advertisement was published during two months. Then the defendant appeared by counsel. The vacation of July and August followed. In September the defendant was notified to plead, and was foreclosed in the regular manner. Altogether a delay of six months has elapsed since the return of the action. The defendant, after default had been entered, applied to the Court for permission to plead. The plea offered is to the effect that the Corporation have obtained possession of certain notes in favor of defendant to the amount of $1300, and that they have collected the amount of these notes. I think this is a good plea of compensation to the action, being for monies alleged to have been actually received upon promissory notes his property; surely it is clear enough, and I think, therefore, that the defendant should have an opportunity of going to proof. The application of the defendant is supported by an affidavit of his counsel that it was through the negligence of the latter that defendant was foreclosed. But it is evident there was no surprise in this case. The notices were made in regular form. Under these circumstances the negligence almost amounts to a fault. But I have always been reluctant to allow a party to be injured through the negligence of his attorney, and, therefore, I am of opinion that defendant should be allowed to plead, but only on payment of full costs. It is a question of costs. Otherwise he would be obliged to bring a direct action against the Corporation for the amount of cash received on the notes. My colleagues, however, differ from me, and the judgment will, therefore, be confirmed.

BERTHELOT, J.—I concur with the President of the Court in thinking that a party should not be exposed to injury through the neglect of his counsel. But the plea offered in this case is not, in my opinion, a good plea of compensation. The action is for rent, and I do not think that the allegations of the defendant's plea show the existence of a debt *claire et liquide*, which can be offered in compensation. The defendant's proper course would rather seem to be to bring an action *en revendication* of the notes, or an action *en reddition de compte*.

MONK, J.—If the defendant's plea had seemed to me a good one, I would have been disposed to afford him the relief prayed for. But on looking into it, I was of opinion that it was not one that could be maintained. The motion was therefore rejected by me in the Court below.

Judgment confirmed.

Nov. 30, 1865.

ROWAND *v.* HOPKINS, *ès qualité*.

Judgment ordering an account to be rendered, confirmed.

BADGLEY, J.—This was an action brought against the executor of the estate of Mr. Rowand, deceased, who was a factor of the Hudson Bay Co. There was a question as to whether the plaintiff was entitled to one-third or to one-sixth of the estates claimed, but the judgment of the Superior Court simply ordered the defendant to render an account, because the plaintiff was entitled to an account whether his share was one-sixth or one-third. Now, there was an application for revision. But there was nothing to review in this judgment, and it must be confirmed.