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THE SUPREME COURT AND ITS CHAMPION.

The *Law Journal*, of Toronto, has essayed a defence of the unusual expressions applied by the Supreme Court to the judgment of our Provincial Court of Appeal in *Grant* v. *Beaudry*, and which were noticed in a previous issue by our correspondent "R." (p. 41). It is obvious, however, that discussion of a question is idle when a controvertist is either totally ignorant of the facts, or wilfully misrepresents them. The champion of the Supreme Court evidently knows nothing about the case of *Grant* v. *Beaudry*, for he states that the Court of Queen's Bench gave "an opinion on a subject "which was not before the Court as a Court of "Appeal, *and had not even been discussed in the "Court below*, and of the existence of which the "Queen's Bench had no judicial notice."—which our readers know to be utterly unfounded. The champion does not appear to have read even the communication to which he professes to reply; for he says: "We perfectly agree "with 'R.' that the judgment of the Supreme "Court will hurt neither the reputation of that "Court nor that of Mr. Justice Gwynne, one of "its brightest ornaments." But what R. said was that the decision of the Supreme Court in *Grant* v. *Beaudry* will not hurt the reputation of the Court of Queen's Bench.

Apart from the obvious fact that the champion is disqualified by ignorance from expressing any opinion on the question, there is no attempt to assail the position taken by "R.," a position which is supported by formal citations of the law. We may, therefore, dismiss without further remark the impotent effort of the champion who, *rabido ore*, has rushed to the defence of the Supreme Court.

But it occurred to us while reading the communication of "R." that something might have been said, which was not said by our correspondent. "R." restricted himself to the pure question of law, as to the discretion of a Court to pronounce upon a point not absolutely necessary to the decision of the cause. But if he had chosen to pursue the subject a little further, what would have been the result? How does the Supreme Court itself stand as to "extra-judicial" opinions? We call its champion as our witness. In March, 1880, referring to the judgments of this Court, the *Law Journal* says:

"The main difficulty that meets one in con-
"sidering some of the judgments of the Supreme
"Court is *upon what grounds does the judgment
"of the Court rest—what is and what is not extra-
"judicial in each particular judgment—and in the
"united result which forms the decision of the
"Court?* Consider for instance *McLean* v.
"*Bradley*, 2 S.C.R. 535. * * * The judg-
"ment as reported emphasizes the want of har-
"mony in the Court, and by consequence
"weakens the authority of its decisions *and
"sows the seeds of future litigation by the diversity
"of opinions expressed on points which are left un-
"determined by the Court, though peremptorily
"and often diversely passed upon by individual
"judges.*"

In *Grant* v. *Beaudry* the Court of Queen's Bench, at the instance of both parties, pronounced an opinion upon the sole question submitted on the merits, and which had been the subject of a long and expensive trial, for the purpose of sparing the parties the cost and inconvenience of further litigation, but it appears that the Supreme Court, if we may believe its champion, *sows the seeds of future litigation* by *its* extra-judicial utterances!

So far we have heard the champion as a witness. Now let us respectfully ask some of the learned Judges of the Court to step into the box. Turning to volume 3 of the Supreme Court Reports, we find at page 576 that a majority of three of the judges of the Court (including Mr. Justice Gwynne), in the well known case of *Lenoir* v. *Ritchie*, expressed an opinion on the right of the Provincial Legislatures to deal with the appointment of Queen's Counsel. The opinion is summarized in the head note to the case, page 576, par. 3, but immediately after we find under No. 4, *per* Strong and Fournier, JJ., the following: "That as this Court ought
"never, except in cases when such adjudication
"is indispensable to the decision of a cause,
"to pronounce upon the constitutional power
"of the Legislature to pass a statute, *there was
"no necessity in this case for them to express an
"opinion upon the validity of the Acts in question.*"
And this *précis* is fully borne out by the re-

marks of the learned Judges reported in the text. So we find not only their champion condemning the Judges of this tribunal "for the "diversity of opinions expressed on points "which are left undetermined by the Court," but two of the learned members of the Court expressed themselves in the same sense on a celebrated occasion; and it may be added that it has been a controverted point among lawyers of the several provinces ever since, whether the opinion expressed by the majority of the Supreme Court on that occasion is of any binding authority.

We apologize to our readers for taking up space which might be devoted to more useful purposes, but we think we have shown that the Supreme Court in expressing, through Mr. Justice Gwynne, the opinion referred to, was really in a remarkable manner, (if its recent opinion be correct) pronouncing its own condemnation. It is not necessary to go further. We see that the champion above referred to charges "R" with disrespect. We leave our contributors, within reasonable limits, to be judges of their own style, and "R" does not need any defence on that head, but it might be added that the quotations from the *Law Journal*, (not, be it remembered, from remarks of correspondents, but from editorial articles) show that the champion can hardly be taken as a model of suavity. Other even more contemptuous expressions abound. For example, referring (in April, 1879) to the proposed abolition of the Supreme Court, the champion said:

"The profession, as a whole, have not that "confidence in it which should appertain to "a court of final resort; for example, there is "hardly a lawyer, in this Province at least, who "would not, on a question of Ontario law, prefer "the opinion of our Court of Appeal, *or even* "*of one of our Superior Courts.* * * * "It is also manifest, that the Court, so far, "has been a disappointment."

And in March, 1880, it discourses in this respectful strain:—

"There are some who think the best way to "improve the Supreme Court would be to im- "prove it off of (*sic*) the face of the earth. We "trust some less heroic remedy may be found, "though the Court certainly has, *both collectively and through some of its members, on several occasions and in various unnecessary ways, endeavoured to commit suicide.*"

NOTES OF CASES.

COURT OF REVIEW.

ONTREAL, March 10, 1883.

TORRANCE, J., DOHERTY, J., & RAINVILLE, J.

McCRAKEN *et al.* v. LOGUE.

Jurisdiction—Appointment of Sequestrator.

A judgment in Chambers appointing a sequestrator is in the nature of a final judgment, and a review may be had upon such judgment.

A sequestrator should not be appointed when one of the parties has title and is in possession; and accordingly, where the defendant was in possession of certain lots under location tickets, and an action was brought to have it declared that the letters patent had been obtained by fraud, &c., an application by the plaintiff for the appointment of a sequestrator, pending the suit, should be refused.

This was an appeal from a judgment of Mr. Justice Macdougall, of the Ottawa District, of date 11th January, ordering the appointment of a sequestrator.

The complaint of the plaintiffs set forth that, in 1876, a license to cut timber on certain lots in the township of Egan was granted to one Henry Atkinson to the exclusion of all others; that on the 10th of October, 1878, Atkinson transferred his rights under said license to plaintiffs; that defendant, in order to deprive plaintiffs of a portion of their rights, obtained the issue of location tickets in favour of Hector Charbonneau, Joseph Laverdure and Joseph Beauregard, for lots 34, 35 and 36 in the 1st and 2nd ranges of Eagle River, in said township; that said persons had no intention permanently to occupy said lots or to obtain letters patent for the same in their favour; that in April and May, 1879, they transferred their rights to defendant, who obtained in his favour letters patent from the Crown on the 17th January, 1882; that the Crown agent refused to renew the licenses as to said lots in favour of plaintiffs; that in the autumn of 1882, defendant cut a quantity of pine logs on said lots, of the value of $2,200; that defendant had obtained the issue of said letters patent by fraud and misrepresentation, as well as the issue of the location tickets to the said Hector Charbonneau and others, and obtaining from them said transfers; that there were upon said lots quantities of pine of the value of $6,200. Plaintiffs

prayed that they might be declared to have been the right owners of the rights and interest granted under the license to Henry Atkinson in, to and upon said lots 34, 35 and 36, and to have been so on the 17th of January, 1882; that the letters patent issued on said last mentioned date under the great seal of the province to defendant, granting to him said lots, be declared to have been obtained by fraud and imposition on the part of defendant; that plaintiffs be declared to be the owners and proprietors of the timber on said several lots; that a writ of attachment issue, &c., to attach said timber; that defendant be ordered to deliver up to plaintiffs said timber, and in default to pay $6,200, &c.

By a petition presented to the judge in chambers on the 11th January, plaintiffs alleged the foregoing facts, and further that defendant had been guilty of fraud and imposition in obtaining the issue of the location tickets in the name of the above three persons, who were mere *prête-noms* for himself, and who were at the time in defendant's employ, one as a bar-tender and the others in positions equally incompatible with that of a *bona fide* settler. That these parties named were used merely to cloak the designs of defendant and to deceive the officers of the Crown; that the lots in question were only fit for lumbering purposes and not for cultivation; that defendant was busily engaged cutting the pine timber on said lots, had constructed shanties thereon, and had men engaged carrying on lumbering operations, and had contracted with one James Maclaren to supply large quantities of pine logs to be taken from these lots. The petition prayed that a sequestrator be appointed to the lots during the suit. The petition was granted. Hence the appeal.

TORRANCE, J. The want of jurisdiction to entertain this appeal has been objected, and in support of the jurisdiction, the case of *The Heritable Securities Association* v. *Racine*, 2 Legal News, 325, has been cited. In that case we understand the Court of Review upheld the jurisdiction on the ground that the naming of a sequestrator was in the nature of a final judgment, and we concluded to follow that decision

Next, as to the nomination, by C. C. 1824 the Court may, according to circumstances, appoint a sequestrator, and by C. C. P. 876 the Court or judge may make the appointment. By C. C. P. 1038, the suit to annul the letters patent could be brought by any interested party, but this was repealed by 32 Vic., c. 11, s. 33, and the suit must now be in the name of the Crown. (Vide *Pacaud & Rickaby*, 1 Q. L. R. 245: and *Angers & Murray*, 25 L. C. Jur. 208.) The defendant now objects that, having title and being in possession, the sequestrator should not be appointed. Pigeau, 2nd vol., 345, says: "Le séquestre ne peut être ordonné lorsque l'une des parties a titre et lorsqu'elle est en possession." Laurent, vol. 27, Nos. 173 and 178, approves of this doctrine.

The defendant further objects that the titles invoked by plaintiffs, namely, the licenses to cut timber, do not give them any title to the lands over which the sequestrator is appointed. These titles give them at best the right to cut timber on the lands. But the judgment orders the defendant to give the sequestrator free possession of the land and premises in question. Seeing the title of the defendant, and that it is not now attacked by the Crown, and may never be, seeing all the circumstances of the case, we think that the petition for the sequestration should have been rejected, and we accordingly annul the order of the 11th January, and dismiss the petition of plaintiffs.

Judgment reversed.

T. P. Foran, for plaintiff.
R. Laflamme, Q.C., counsel.
L. N. Champagne, for defendant.
J. R. Fleming, counsel.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

RUSSELL et al. v. MAXWELL et al.

Contract—Rescission for failure to comply with terms.

The plaintiffs in Montreal were bound by a contract to pay for the goods supplied by defendants in Scotland upon receipt of invoice and bill of lading. They failed to pay for one lot until 15 days after receipt of bill of lading. Held, that the defendants were justified in cancelling the contract.

This was an action of damages for breach of contract, brought by a Montreal firm against a Scotch firm.

There was no question as to the formation of the contract and its partial fulfilment, or as to its having been cancelled by the Scotch firm.

The important question was whether the Scotch firm was justified in the cancellation.

The agreement was contained in a letter of date 9th July, 1881, written by A. C. Leslie & Co., defendants' agents, setting forth that the goods supplied by defendants to plaintiffs should be paid for by the plaintiffs by their cheque upon the receipt by the plaintiffs of the shipping documents (to wit, invoice and bill of lading). The defendants complained that on or about the 26th August, 1881, they shipped from Glasgow to plaintiffs two lots of iron of the value of £366 8s. 1d stg., and forwarded to plaintiffs through defendants' agents in Montreal, viz., A. C. Leslie & Co., the documents relating to said shipments, which documents Leslie & Co. presented to plaintiffs, and demanded from plaintiffs their cheque in payment of the amount due by them under the contract; the plaintiffs failed to pay for the iron as covenanted, and Leslie & Co., on the 16th September, 1881, wrote defendants to that effect, and defendants on or about the 26th September, received the letter from Leslie & Co., and immediately, by cable and letter, cancelled the balance of the order.

PER CURIAM. The mode in which the plaintiffs made settlements is explained by Alexander C. Leslie and his bookkeeper, William G. McMillan. Leslie says that the first invoice came on the 5th September, and was paid on the 9th. The second and larger shipment arrived on the 8th September, and was paid for on the 23rd September. This was the shipment that caused the whole difficulty. Plaintiffs did not pay till 15 days after the bill of lading had been received. They missed one Allan and one or two Cunard mails. Leslie handed to plaintiffs the documents without receiving the cash, and says that if he had rigidly carried out his instructions he would not have done so. He would not have handed over the documents without receiving from the plaintiffs the cash for them.

The intentions of the defendants were very plain from their letter of 29th September. Witness says they wrote: "Of course you have not parted with the documents." McMillan says that defendants, by their letter of 28th September, cancelled the balance of the contract not then shipped, and that letter on receipt here was read to plaintiffs.

The Court holds that defendants were fully justified in the cancellation of the contract. Authority is not necessary to support this conclusion, but *Withers* v. *Reynolds*, 2 Barn. & Adolphus, 882, appears to be in point.

Action dismissed.

Abbott, Tait & Abbotts for plaintiffs.
Archibald & McCormick for defendants.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

GEDDES v. O'REILLY et vir.

Married woman—Authorization to contract.

A married woman separated as to property cannot bind herself without the authorization of her husband, to pay a real estate agent a commission on the sale of land for her.

The plaintiff was a real estate agent, and claimed from Mrs. Wilson, a married woman separated as to property from her husband, his commission at 2½ per cent. on the sale of land for her. She had signed an authorization to Mr. Geddes without the participation of her husband. It was not proved that he knew of the authorization, but by her marriage contract she had separate administration of her property.

M. M. Tait, Q.C., for the plaintiff, submitted, 1st. That the female defendant had a right to engage the plaintiff to sell her property, and to agree to pay him a commission thereon in the event of such sale, and that Mr. Wilson, her husband, by his acts and deeds sufficiently authorized the female defendant to make such an agreement, and by his acts and deeds ratified and confirmed the same. 3nd. In view of the clauses and conditions of the marriage contract, Mrs. Wilson had a right to engage Mr. Geddes to sell her property and to agree to pay him a commission therefor in the event of sale, as an act of administration, without the special authorization of her husband, seeing she was separated as to property and had the entire administration of her own property under her marriage contract.

Weir, e contra, cited C.C. 177, and *Benjamin et al.* v. *Clark et vir*, 3 L. C. J. 121.

The COURT held that the plaintiff had no case, not having proved authority from the husband.

Action dismissed.

Abbott, Tait & Abbotts for plaintiff.
Quinn & Weir for defendants.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

LULHAM et vir v. THE CITY OF MONTREAL; and THE CITY OF MONTREAL v. THE RECTOR AND CHURCH WARDENS OF CHRIST CHURCH, defendants *en gar.*

Damages—Slippery pavement—Evidence.

Where it was proved that the sidewalk was usually kept in excellent condition, and that the influence of the weather at the time of the accident was specially unfavorable, the action of a person who slipped and sustained injury was dismissed.

This was an action of damages against the City of Montreal for negligence in the care of the pavement of Union Avenue, in consequence of which the female plaintiff, on the 11th January, 1882, fell and broke her hip-bone, and had been permanently crippled.

PER CURIAM. The evidence is contradictory as to the condition of the pavement where the lady fell. Mr. Cordingley, her son-in-law, is positive that no ashes were there that day; had fallen twice himself. On the other hand, the guardians of the church property depose as to their practice to sprinkle ashes. Raphael Lajeunesse, employed at the Medical Hall opposite, deposes as to the care taken by the church officers to sprinkle ashes. John Fenner, driver for Mr. Robertson, Phillips square, says he always noticed the sidewalks of the Cathedral in good order—wet sand and ashes continually put there; passed there a dozen times a day; always in good state, in January every day. Mr. Shelton speaks positively as to the care taken of the sidewalk, and as to its being in a good condition, multitudes passing into and out of the church. He was there every day.

It is important here to inquire what the state of the weather was during this week. Mr. Thomas Davis King kept a record. There was rain on the Sunday previous—namely, on the 8th. Then there was rain and thaw on Monday, followed by frost on Tuesday. On the 11th January, the day in question, there fell eight inches of snow, and there was a strong wind blowing—15 miles per hour. There were here at work climatic influences to affect the condition of the pavements. Against these it was hard to provide. We have no evidence what kind of boots the lady had on when she fell, and whether they were slippery or otherwise. I cannot say here that the negligence of the Corporation is proved, and I dismiss the action. —Vide 72 Maine R., *Smythe* v. *Bangor*, March, 1881.

Action dismissed.

Archibald & McCormick, for plaintiffs.

Roy, Q.C., and *Ethier*, for defendant.

Kerr, Carter & McGibbon, Q.C., for Christ Church.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

ALLISON v. MACDOUGALL.

Gambling contract—Speculation on margin.

A customer deposited money with a broker to be used as "margin" in buying stock for speculative purposes. No delivery of the stock so purchased was intended, the broker's instructions being to realize as soon as a small profit could be made. In consequence of a decline in value, and the margin being thereby exhausted, the broker at one time sold stock at a loss. Held, that no action would lie against the broker under such circumstances, the contract being a gaming contract.

This was an action against a stock broker in Montreal for unduly selling stock in the Montreal Telegraph Company.

The plaintiff complained that he had, about the 12th October, 1881, instructed defendant by letter to purchase for him ten shares of Telegraph stock at and for the price of 127 per cent., and 20 shares of said stock for the price of 128 per cent., and defendant promised to make such purchase, and plaintiff at his request remitted him the sum of $363.29 to enable defendant to make such purchase, and plaintiff instructed defendant to hold the shares subject to plaintiff's order, and to sell when the price should reach 133 per cent.; that at divers times after receiving said sum defendant purchased for plaintiff certain shares of said Telegraph Company and applied said sum in part payment, and did hold said shares subject to plaintiff's orders, but subsequently sold the same without notice to plaintiff; that defendant was guilty of a breach of contract with plaintiff, for which plaintiff reserved his recourse in damages, and further plaintiff had suffered damage to the amount of $363.29; that

defendant had paid him $27.14, leaving a balance of $336.15, which he claimed.

The defendant pleaded that plaintiff never paid and never intended to pay for the said stock, or take delivery thereof, and no delivery was ever made, but the same was bought merely for speculative purposes on borrowed money, with a view to a re-sale as soon as a small profit could be realized, and the money to carry said stock was borrowed by defendant at his own risk, subject to the payment of interest and to his obligation to furnish and keep good to the lender a sufficient margin, to wit, 10 per cent. and upwards, as security for said loan, and plaintiff was bound to supply additional money to keep good the margin and protect defendant against loss on loans on said stock, which was liable to sudden fluctuations in price; that some time before the sale of said stock, plaintiff left his residence at Napanee and did not leave his address with defendant, or appoint any one to represent him. That, shortly after the departure of plaintiff, the stock began to decline until the margin had almost disappeared, and defendant was threatened with serious loss by continuing to carry the stock, and he sold the stock.

PER CURIAM. Our code, Art. 1927, says there is no right of action for the recovery of money or any other thing claimed under a gaming contract or bet. What was the nature of the transactions between plaintiff and defendant? They appear to have begun about the 8th February, 1881, when plaintiff addressed defendant as follows:—"I have been dealing in "stocks for some three years in Montreal, and "as I don't like the party who has been doing "my business, and desire to make a change, I "write you if you would act for me according to "my instructions. I will give you my business "as long as you do it satisfactorily. I note by "the *Star* newspaper you are in the business. "I will allow you same as I pay other brokers. "I wish to deal in Montreal Telegraph stock "only. My idea is to buy after a pretty smart "decline in the stock and sell at a fair advance, not hold long. You may buy 20 "shares at about 125 or better. Wire me when "bought and I will remit you ten or fifteen per "cent. margin as you like. If think safe you "can buy 30 shares, but sell at a fair advance "and send statement. I want you to use your "judgment, as I will place confidence in you." On the 16th March, plaintiff wrote: "Enclosed "find $65 as margin on 25 shares of Tele- "graph stock which you can purchase to-mor- "row if an opportunity offers, but don't go over "129¾; if you can buy less do so. You may "buy 25 shares more if you think it advisable, "but not over 129¾. I think it may drop "lower. This will make 50 shares yet to buy "as per order of to-day. I will remit you all "the money you require to hold margins good "should a break take place; you can sell it at "about *two cents advance* unless market *strong* "and advancing. If it shows a *weakness after* "*the advance takes place*, then *let them have it*, and "wire me as before." Some eight months afterwards, plaintiff, by letter of date 12th October, wrote as follows: "If Montreal Tele- "graph stock reaches 125, buy me fifty shares. "You can buy 40 shares at 126, 10 at 127, 20 at "128, 15 at 129. I have lost so much I want "to try and win some back if it is my luck. I "want you to hold the order good, and act "on it when the first opportunity offers. Hope "you will be able to do something this time. "Look sharp." On the 15th October plaintiff writes: "Gentlemen, enclosed find cheque to "cover margin on stock bought, and provision "in case of decline; make the interest as low "as possible. If the stock goes to 33 sell it "out and we'll buy again. Fill the balance of "order if can at figures I gave you." On the 17th October defendant writes: "We have "your favor of 15th inst., enclosing cheque for "$363. We note your order to sell, and will "keep it before us. The rate for carrying is "six per cent., and it is not likely to be in- "creased unless the money market changes. "We bought ten shares more, all we could get."

Looking at all the facts of the case, the Court has no difficulty in saying that plaintiff did not intend to pay for or take delivery of the stock in question. No delivery was made, and the same was bought for speculative purposes on borrowed money, with a view to a sale as soon as a small profit could be realized. No action lies under the circumstances. It may be added that the plaintiff was away from his residence when the stock fell, and defendant only sold to protect himself, and the remittance made by plaintiff for a margin was lost in consequence. The case of *The Bank of Montreal* v.

Macdougall, 28 Upper Can. C. Pleas, 345, cited by plaintiff, does not help this case.

The case of *Fenwick* v. *Ansell*, 5 Legal News, 290, cited by defendant, is directly in point.

Action dismissed.

Weir, for plaintiff.

Dunlop & Lyman, for defendant.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

MCBEAN v. MCBEAN *et al.*

Partnership—Dissolution.

After dissolution of the partnership one partner has no authority to borrow money in the name of the firm for the purposes of the partnership business.

The plaintiff demanded from the defendants $3,488.86 which he said he advanced to them to purchase grain in connection with their business as partners. The defendant Alexander G. McBean denied the liability, and set up that at the dates in question he was not partner with the other defendant Donald G. McBean.

PER CURIAM. The moneys in question were remitted by George McBean to the defendant Donald G. McBean as follows:—$2,485.96 on the 30th June, 1882, $436.27 on the 10th June, and $566 63 on the 7th July. There had been joint ventures between the two defendants as evidenced by an agreement in writing, plaintiff's exhibit No. 1. It terminated on the 10th May, and plaintiff undoubtedly knew of the termination. Donald says that about the 19th May, he made with plaintiff similar arrangements to those which he had previously had with the defendant Alexander G. McBean. Mr. Tait, counsel for Alexander G. McBean, says that Donald had no authority to borrow for the joint account, and I see no right on his part to borrow money to pay the debts of the firm. It has been held that one partner, after dissolution, cannot give a bill or note in the name of the firm even for an antecedent debt; and although such partner is authorized to settle the business of the firm. Story, Partnership, § 322; Pardessus, Société, 3rd vol. pp. 431, 2. Plaintiff made remittances of money to Donald from time to time, and Donald applied this money to meet his liabilities generally whether contracted for plaintiff or otherwise. I think the plaintiff has failed to make out his case against Alexander G. McBean, but he shall have judgment against Donald G. McBean.

Macmaster & Co. for plaintiff.

Abbott, Tait & Abbotts, for A. G. McBean.

COURT OF QUEEN'S BENCH.

(CROWN SIDE.)

MONTREAL, March 16, 1883.

Before RAMSAY, J.

REG. v. MILLOY *alias* DOOLEY.

Evidence—Examination of witness before Justice under 32-33 *Vict., cap.* 30, *s.* 29.

The examination of a witness under 32-33 *Vict., Cap.* 30, *s.* 29, *was held inadmissible where there was no caption to the deposition, as given in form M, to show that a charge had been made against the prisoner, and that he, having knowledge of the charge, had a full opportunity of cross-examining the witness. The test of admissibility is the opportunity given the prisoner to cross-examine, he having knowledge that it is his interest so to do.*

RAMSAY, J. The Crown proposes to put in the examination of the deceased in presence of the prisoner as to the circumstances of the the murder of which the prisoner is now on trial, and have it read to the jury as direct evidence of the facts. The production of this examination is objected to on the ground that it was taken in the form of an information and complaint used when the accused is not yet arrested, that is to say, it is taken as though the complainant were seeking a warrant of arrest. It is argued that the Statute lays down a mode of procedure to be followed when the accused appears or is already in custody for this or any other offence, 32 & 33 Vic., c. 30, sec. 29, and that a form (M) is given by which it is prescribed that there must be a caption describing the offence "as in a warrant of commitment," and it is only after depositions are so taken that the Justice is authorized to commit the accused to prison or to bail him. The next section (30) then goes on to say how the justice shall administer the oath, and then continues, "and if upon the trial of the person accused, it be proved upon the oath or affirmation of any credible witness, that any person *whose deposition has been taken as aforesaid*, is dead, or is so ill as not to be able to travel, or is absent from Canada, and if it be also proved that such deposition was taken in presence of

the person accused, and that he, his counsel or attorney, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or before whom the same purports to have been taken; it shall be read as evidence in the prosecution without further proof thereof, unless it be proved that such deposition was not in fact signed by the justice purporting to have signed the same."

The difficulty so far as the Statute is concerned turns on the interpretation of the words "whose deposition has been taken as aforesaid" Do they refer to the previous section or only to the provisions of section 30?

I am of opinion that these words apply to both sections, otherwise the deposition might have no relation to any charge at all, and it might be taken in some civil proceeding, over which a magistrate might have jurisdiction, which is evidently not intended. Nor do I think the objection is lessened by the terms of sec. 58, 32 & 33 Vic., c. 29, which permits the deposition taken in one case to be used in another, for the case is "in the preliminary or other investigation of any charge against any person," and this I think means "charge of any indictable offence." (See Imp. Act 11 & 12 Vic., c. 42, s. 17, and *Reg.* v. *Beeston*, Dears. p. 405). Here it does not appear on the face of the deposition that any charge at all was made against the prisoner, and it appears he must be charged with some offence. (Mr. Greaves, Russ. 893). The great test of admissibility is clearly the opportunity given the prisoner to cross-examine; that is to say, the full right to cross-examine, he having the knowledge that it is his interest so to do. This he cannot have till he is charged with an indictable offence. I attach no importance to the deposition being called an information.

On our Statutes, then, I should have no hesitation in saying that the deposition was inadmissible if it were not for a case of the *Queen & Millar*, decided in New Brunswick, which is much in point. (5 Allen p 83.) If that case had been decided since Confederation I might perhaps have felt myself bound by the decision; but as it only has authority here as written reason, and as it was under a different Statute from that in force here; I cannot defer to it. If the Revised Statute of New-Brunswick is identical with our Act, the learned reporter says it is *substantially* the same, (Ib. Note, p. 93.) I cannot accept the reasoning of the learned judges, more particularly as it appears by the report (5 Allen, p. 92), that the majority of the Court joined in the judgment with great reluctance.

Radborne's case (1 Leach, C. C. 457) seems to have had great weight in the decision in Millar's case, but I do not think Radborne's case decides anything that can be applied to the case before us. We are not told why the deposition was admitted. Garrow for the Crown argued that it was admissible either as a dying declaration, or it was admissible because "anything that was said, either by a prosecutor, a prisoner or witness, in the presence and hearing of each other, although said in common conversation, was admissible evidence in all Courts both criminal and civil." If it was admitted as a dying declaration, it does not apply to the case before us, and if on the ground that whatever is said in presence of the prisoner may be proved, the argument is altogether fallacious. What is said in hearing of the prisoner is not admitted as evidence under oath of what took place before; it is admitted as evidence of how the prisoner acted when accused of guilt. By the production of the deposition it is intended to establish under oath the narrative of the witness who cannot be examined. It may, however, be said that the decision in Radborne's case was cited approvingly in Beeston's case, and that its applicability to that case depends on its being assumed that it, in effect, decided that a deposition where there was no charge might be admitted, and more so therefore when the question was as to the admissibility of the evidence taken on one *charge* in any other *charge*. If this be accepted as the expression of the state of the law after Beeston's case, then the disposition of our Statute 32 & 33 Vic., cap. 29, sec. 58, understates the law in a curious manner. I cannot, however, adopt this view, and I must therefore reject the deposition, although in fact, it appears, the prisoner did ask one question in cross-examination. It must be understood that this decision goes no further than to reject this deposition as taking the place of Nesbitt's narrative under oath of what occurred.

C. P. Davidson, Q.C., and *Ouimet, Q.C.*, for the Crown.

F. D. Monk and *Cornellier* for the prisoner.