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POWERS OF BAR COUNCILS.

A case was decided during the December Term of the Court of Queen's Bench at Quebec, which, although disagreeable in its personal aspect, raised an interesting and important question as to the authority of Councils of the Bar in the Province of Quebec over the members of the profession, and also as to the power of the ordinary Civil Courts to interfere with the decisions of Bar Councils. The respondent, Mr. Brassard, had charged Mr. O'Farrell, a member of the Bar of the Quebec Section, before the Council of the Section, with conduct unbecoming the honor and dignity of the profession, in acting on a certain occasion as a constable in a case in which he, Mr. O'Farrell, had been engaged as attorney. The Council of the Bar of Quebec having found Mr. O'Farrell guilty, he obtained a writ of prohibition to restrain their proceedings, and the Superior Court maintained the writ. The case was carried to the Court of Review, and this tribunal, holding that the decision of the Council was subject only to an appeal to the General Council of the Bar, and not to the law courts, decided that the writ of prohibition had issued illegally.

It is a singular feature of this judgment that it apparently assumes to review and reverse not only the judgment of the Superior Court, but also that of the Court of Queen's Bench, the highest provincial tribunal, which had ordered the proceedings in prohibition. The decision of the Court of Review will be found reported in the Quebec Law Reports, vol. 3, p. 33. Mr. Justice Stuart remarked (p. 56): "The law in the clearest manner denies to any Court the right to interfere with the judgment of the Council touching the discipline and honor of that body. The principal features of the act of incorporation are taken from the practice in France, including that main and principal feature that the Bar shall exercise the powers of self-government untrammelled by Courts and with a right of appeal to the General Council from the Council of Sections, as the sole and only remedy. There is then a remedy provided by the law for the members aggrieved by the Council of the Sections which is exclusive of all others, and while that exists the extraordinar remedy by prohibition does not lie. The scop and purpose of the prohibition is to keep inferior Courts within the limits of their own jurisdiction, and to prevent them from encroaching upon other tribunals. The Superior Court itself cannot practice an encroachment upon the tribunal of the General Council, under plea of restraining the Council of Sections."

It was this judgment which was brought under the notice of the Court of Queen's Bench. The judgment of the full Court was rendered last month by Mr. Justice Cross, and in view of the interest which the case possesses for the profession it is worth while to quote the remarks of the Judge *in extenso*, which we do from his Honor's notes. Mr. Justice Cross said:—

"The questions raised in this case are on a writ of prohibition issued out of the Superior Court at Quebec on the petition of O'Farrell, appellant, asking that certain proceedings against him taken at the instance of Brassard, the respondent, as prosecutor before the Council of the Bar, Section of the District of Quebec, be restrained.

"The writ was at first refused, but on an appeal to this tribunal was directed to be issued, did issue accordingly, and on trial and hearing before His Honor Mr. Justice Dorion was maintained by judgment rendered on the 6th of May, 1876. This judgment was afterwards, on the 7th December, 1876, reversed in Review by a Court composed of three Judges. The present appeal seeks to set aside the judgment in Review and to restore the judgment of His Honor Mr. Justice Dorion of the 6th May, 1876.

"The proceedings sought to be restrained were on an accusation framed by the Syndic of the Bar upon a complaint preferred by the now respondent, Brassard, on which he, O'Farrell, was cited before the Council of the Bar to answer to the charge which it contained, accusing him of conduct derogatory to the honor and dignity of the Bar.

"The judgment rendered on this complaint was within the terms of the accusation. It is unnecessary at present to refer particularly to

the terms of the accusation, as they were ample and in excess of the finding.

"The Council found O'Farrell guilty in the terms following:—

"1st. Having about the 26th of May, 1874, been named and sworn as constable at St. Etienne de la Malbaie, which charge he accepted voluntarily, in a prosecution wherein he acted for the complainant in his quality of advocate and attorney, thus cumulating in the same proceedings the functions of advocate and constable, and having on the night of the 26th or 27th May, 1874, accompanied by a dozen of men, as a constable arrested one Joseph Guay in the parish of St. Agnes.

"2nd. Having on the night of the 22nd or 23rd June, 1874, accompanied the bailiff charged with the arrest of one Alexander Murray *dit* Brunoche, of St. Agnes, farmer, and having aided and assisted in making the arrest.

"That he had thereby rendered himself guilty of infractions of the discipline and of actions derogatory to the honor of the Bar and to the dignity of the profession of advocate.

"Brassard, who was prosecutor, and now respondent, appears and supports the proceedings attacked by the prohibition and by the present appeal.

"The primary question raised is, Whether the Section of the Bar really possess the powers they have so assumed to exercise? In other words, Can they justify the assertion of these powers under the act of their incorporation and the amendments thereto?

"By Statute 29 Vic., cap. 27, sec. 3, the Corporation of the Bar are empowered to make by-laws, rules and orders for the interior discipline and honor of the members of the Bar.

"By Sec. 10, Sub-sec. 1, the Council of each Section have power for the maintenance of the discipline and honor of the body, and, as the importance of the case requires, to pronounce, through the Batonnier, a censure or reprimand against any member guilty of any breach of discipline or of any action derogatory to the honor of the Bar; and the Council may, according to the gravity of the offence, punish such member, by suspending him from his functions for any period whatsoever in the discretion of the said Council, not exceeding five years, subject only to appeal to the General Council, as hereinafter provided.

"3rdly. To prevent, hear, reconcile and determine all complaints and claims made by third parties against members of the Bar in the Section in matters connected with their professional duties.

"If the duty of the Court here required them to take cognizance of the evidence adduced before the Council, and to reform the finding, they would, in my opinion, be justified in re-stating it in a form more aggravated than it now appears of record, and it would then still be obnoxious to the same test that is now sought to be applied to its validity. The question that comes up to be solved by us is not whether the proof supports the finding, but whether, supposing the proof to be ample, the law authorises any such finding—whether, in fact, any offence whatsoever known to or prohibited by the law, is stated in the judgment, or even in the complaint itself made in this case, against O'Farrell. I entertain no doubt that judicial functions are conferred on the different Sections of the Council of the Bar. Courts are constituted, by their act of incorporation, with the forms and other essentials for the trial of offences, infractions of discipline, and actions derogatory to the honor of the Bar; but how was it to be ascertained what constituted such infractions or derogation? What was lawful before the granting of this charter remained unforbidden by any law after it came into force. The Legislature had no intention to substitute the new tribunal thus erected in the room of any of those existing, having jurisdiction over infractions of the existing laws. In the absence of any such intention, the ordinary existing tribunals are presumed to retain their functions and to be sufficient for their fulfilment. What, then, were to be the duties of the newly created Courts? That question, it seems to me, is answered by reference to Section 3, which gives power to the Corporation to make by-laws, rules and orders for the interior discipline and honor of the members of the Bar. This is a *quasi* legislative authority empowering, not each particular Section for itself but the general body, to define by by-law what should be considered infractions of discipline and actions derogatory of the honor of the Bar; and if they did so, within the bounds of reason and justice, their by-laws would be valid, and the different Sections, through their

Councils, would be the judges of the facts in any complaint brought before them, framed upon the by-laws, specifying the offences. They would be judges under a code of laws framed to give them jurisdiction, and thereupon any party considering himself aggrieved by their judgments, would have no other recourse save an appeal to the General Council.

"The complaint in such case would require a specification of facts constituting the offence as defined by the By-law. The form prescribed for, voting guilty or not guilty, is peculiarly applicable as going to show the intention of the law.

"In the present instance there is a specification of facts, but there is no law to constitute these facts an offence. Mr. O'Farrell very naturally says: 'I was not warned that acting as a constable, or assisting a constable in arresting a person accused of crime, would be considered an offence, and up to the bringing of the complaint against me I considered it not only a proper but a laudable act, and I had this security that I knew there was no law against it; but had the Bar promulgated a By-law declaring it an infraction of discipline, or a degradation of its honor, to assist a common bailiff or constable, I should have been forewarned, and have avoided doing so. As matters stand, I feel that I have done no wrong, have broken no law.' It has been argued that he might have been compelled to act as constable. I concede that the Bar could make no law to punish him for acting by compulsion, but I can see no reason to prevent them from making a By-law to visit with their displeasure members of their Body who may volunteer to assume the lower-class duties of constable, particularly in cases where the same party had acted as attorney or advocate, and to prescribe that such conduct would be held derogatory to the honor of their body. I think that such a By-law would be perfectly within their powers; but without such forewarning prescribed in a legal manner, if to-day they can make a crime of acting as a constable, they may on any future occasion, without rule, and according to caprice, decree some other state of facts to constitute a like offence. If they can do so in regard to a constable, without previous warning, they might as well without such previous warning decree that Mr. O'Farrell should be suspended for acting as Colonel to a Regiment of volunteers.

"I think an analogy may be drawn from the practice in the Courts Martial, and the principles by which these tribunals are guided in their decisions. By reference to Simmons on Courts Martial, I find that Her Majesty was empowered by the Mutiny Act to make articles of war, under certain limitations, for the maintenance of discipline in the army, but there is no such thing as a prosecution for infraction of discipline generally. On the contrary, the articles of war carefully specify what shall be considered infractions of discipline, and prosecutions are required to specify the facts which bring each particular case within the article, of which the facts constitute an infraction; and cases are given where the findings were set aside for want of such specification; as, for instance, the case of Lieut. Imlack, found guilty of ungentlemanly conduct. Thus, the charge has to be supported by a statement of facts, and these facts must bring the case within one of the articles of war, defining the offence. In the present case we have a state of facts, but we have no article or By-law declaring any offence to which the state of facts can apply.

"I apprehend the customs prevailing in England or France, do not much assist by way of precedent. The associations of the Bar there were voluntary organizations and I believe in France, the decrees involved no consequences that could be enforced by compulsion, save that the association struck from their roll whom they chose. This they could do without being accountable to anybody. The Courts, if they chose, being the actual power, could recognise the acts of the Bar, and through courtesy probably did, although not bound to do so. But as a person might be expelled from the society simply because he might have made himself disagreeable to the majority, and was consequently struck off their roll, there was really no power in the Courts to restore him, but the Courts themselves, possessing the power over the Advocates or Barristers, probably, and I believe did, always recognise the discretion exercised by the Bar in excluding those they had disapproved of, provided they deemed the discretion reasonably exercised. Nor is it likely they would without very strong reasons interfere between the Bar and a member they had excluded to permit him to practise against their decision. The difference here seems to be

that the practice in France has been taken and made the basis of a law involving reciprocal duties and obligations, imposing them as compulsory, and creating an authority to enforce them, thus making it obligatory, that such authority should be exercised in a lawful manner, and subjecting it to the control of the higher legal tribunals. The Bar of the Province of Quebec, having chosen to accept a charter of incorporation, and to assume the exercise of judicial functions, thereby conferred upon them, have as a consequence abdicated the right of arbitrary expulsion, and subjected their action to the supervision of the higher tribunals. The status of membership of their body has become a recognised legal right, which it is the duty of Courts to protect, and they will not permit it to be infringed without a valid and sufficient legal cause being shewn for so doing.

"If called upon to express my opinion of Mr. O'Farrell's conduct on the occasion I should make it very strong and decided, but that is unnecessary and uncalled for.

"According to the opinion of this Court the judgment of the Court of Review is to be reversed, and the order for prohibition made absolute, according to the original judgment of the Superior Court on the merits of the case."

Mr. O'Farrell's conduct is not approved by either the Courts or the Council of the Bar. But he gets the benefit of the absence of a by-law. This is more than a technicality. The judgment of the Appeal Court rests upon an important principle, that punishments are not to be awarded for indefinite offences, and especially at the pleasure of the majority of a fluctuating and almost irresponsible tribunal. The Councils of the Bar must not wait until something has been done, and then call it an offence; they must define beforehand what shall be deemed offences. If the Council of one Section choose to make acting as a constable an offence, another might place in the same category participation in the profits of money-lending and discounting, as, for instance, by holding stock in a bank; or the possession of shares in any other trading or manufacturing company, or the buying and selling of real estate as a speculation. A majority of a Council might be found in particular circumstances voting in a very whimsical manner, and it is wise to place some restraint upon their action, by compelling them to define the acts which they intend to punish as crimes.

THE ST. ANDREW'S CHURCH CASE.

In our reference to this case (page 13), it was inadvertently stated that the decision of the Supreme Court was unanimous. This was an inaccuracy; the Chief Justice and Mr. Justice Strong dissented in favor of the respondents, the Minister and Trustees of the Church. The Canadian Judges therefore stood exactly six to six—Justices Johnson, Monk, Sanborn, Tessier, Strong, and Chief Justice Richards for the Church, and Chief Justice Dorion and Justices Ramsay, Ritchie, Taschereau, Fournier and Henry for the pewholder.

REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, December 14, 1877.

Present:—Chief Justice DORION, and Justices MONK, RAMSAY, TESSIER, and CROSS.

THE MONTREAL, OTTAWA & WESTERN RAILWAY Co., (defts. below) Appellants; and BURY (plff. below) Respondent.

Agency—Quantum Meruit—Services in promoting interests of a Railway Company.

B. worked for several years, in a general way, to advance the interests of a railway company; he canvassed for stock, and assisted in the election of city councillors and others who favored the granting of aid to the undertaking. *Held*, that he was entitled to compensation for the value of his services, although he had not been promised any remuneration.

Bury, the respondent, from 1st December, 1870, to 1st July, 1873, rendered certain services to the company, appellants, who were engaged in the construction of a line of railway. The services consisted chiefly in securing the passage of by-laws by the corporation of the city of Montreal, and in certain counties and municipalities along the line of railway, authorizing the subscription of stock in the company, and the granting of bonuses. Bury was a stockholder in the company, and owned property along the proposed line of railway. Action, for value of services rendered. Plea, that Bury never was in the employ of the

company, and was never promised any remuneration for his exertions on its behalf.

The Court below (Mackay, J.) maintained the action for the sum of $2000. The company having appealed,

Ramsay, J., dissenting, would be for dismissing the action altogether. There was no evidence of any engagement or promise of payment by the company. Bury, apparently, wished to be paid for the use of his influence. But he had personal grounds for doing as he did, it being proved that he had real estate to the value of $20,000 in the immediate vicinity of the line of railway.

Dorion, C. J., for the majority of the Court, considered that Bury was entitled to be paid. He worked to promote the prosperity of a company already in existence, not to organize a new company, and the Vice-President testified that his services had been valuable. Too much, however, had been allowed for the work done, and this Court would reduce the amount to $750.

Monk, J., concurring, remarked that there was nothing illegal or immoral in what Bury did, and the value of the services was fully established.

Judgment reformed.

J. M. Loranger for Appellants.

Doutre, Doutre, Robidoux, Hutchinson & Walker for Respondent.

The Ætna Life Insurance Co. (plffs. below), Appellants; and Rooklidge (deft. below), Respondent.

Surety—Novation.

The appellants sent to a local agent a letter in the terms cited below, making an offer which the agent accepted. *Held*, that a new agreement was effected by the letter, and the surety was discharged.

The question was whether a surety had been discharged by a change in the terms of the engagement of the person for whom he was surety. The respondent, Rooklidge, was surety for one Reed, the agent of the appellants at St. John, N.B. The bond was conditioned for $1,000, that Reed should faithfully discharge his duties in soliciting insurances for the company, and should pay over all moneys. On the 30th of November, 1874, the appellants wrote the following letter:—

J. A. Reed, Esq., St. Johns, N.B.

Dear Sir,—By referring to my letter of 21st inst., it will be observed that the old balance due from you is $309.14 United States currency.

If you will remain in New Brunswick during the year 1875, giving your entire energies exclusively to promoting the Ætna Life Insurance Company's business therein, taking pay therefor in the shape of a commission of twenty per cent. on new business procured after January 1st, 1875, together with five per cent. on the renewals of all the Company's business in that Province, as they are collected by you, as specified in your original contract, I will wipe out all the above balance of $309.14, and interest thereon, at the end of said twelve months—that is on December 31st, 1875.

It is understood that you may take the one-third out of the first premiums paid on any new business procured before the 1st of January, 1875, whether it be annually or semi-annually, and whether paid this year or during next, provided they are paid within the Company's rule of sixty days.

Your acceptance or rejection of this offer, expressed in fewest possible words, you will please indicate to me some time previous to the 15th of December, and oblige.

This was followed by a second letter, informing Reed that the balance against him was somewhat greater than mentioned above, but concluding as follows:—"However, it will all go into the one lump and be cancelled on the 31st of December, 1875, if you work the business through on commission during 1875, as stated in my last letter, and keep your accounts square with this office on that basis."

Reed accepted the terms proposed, but continuing to be remiss in his accounts, he was dismissed on the 21st August, 1875, when the deficiency had increased to $830.

The Company having sued the surety, the latter pleaded that there was a new agreement effected by the letter cited above, of which he had no notice, and that he was discharged from liability. The Superior Court, Mackay, J., sustained the plea and dismissed the action as against the surety. On appeal by the Company the judgment was confirmed.

Judgment confirmed.

Trenholme & Maclaren, for Appellants.
A. & W. Robertson for Respondent.

Lalonde *dit* Latreille, (plff. below) Appellant; and Drolet, (deft. below) Respondent.

Contract—Sale—Short Delivery.

By a writing *sous seing privé* L. purchased from D. 2265 cords of wood "as now corded at Port Lewis," for

the sum of $4520, and by the same writing acknowledged receipt of the wood, declared himself satisfied therewith, and discharged the vendor, "*de toute garantie ultérieure.*" The purchaser having measured the wood, found it 423 cords short, and a portion of it rotten. Suit for value of wood not delivered and of the part that was rotten. *Held*, that by the terms of the agreement the sale was *en bloc* and not by the cord, and the purchaser could not recover.

Judgment confirmed.

M. E. Charpentier for appellant.

Duhamel & Rainville for respondent.

THE EASTERN TOWNSHIPS' BANK (plffs. below), Appellants; and MORRILL (one of the defts. below), Respondent.

Amendment of writ—Erroneous description of firm—Exception to the form.

A firm, originally composed of two partners, admitted a third. The change was not registered, and the firm was sued as if composed of the first two partners only. Service was made at the place of business of the new firm. *Held*, that the plaintiffs were entitled to amend the writ by inserting the name of the new partner, and an exception to the form, attacking the amendment, pleaded by the new partner when thus brought into the case, was dismissed.

The appellants sued a firm of H. S. Beebe & Co. on promissory notes. The firm was described as composed of Anson Beebe and H. S. Beebe; but it appeared that a third partner, the respondent Morrill, had been admitted into the firm, though the change had not been registered. The service had been made at the place of business of the new firm. The plaintiffs obtained leave to amend the description of the defendants' firm in the writ, so as to include Morrill's name, and a copy of the amended writ was served upon Morrill personally at the place of business of the firm. Morrill appeared and pleaded an exception to the form, based, among other grounds, upon the alleged insufficiency of the service, the return day of the original writ being past before the service of the amended writ.

The Superior Court at Sherbrooke (Doherty, J.,) dismissed the exception, "considering that the allegations of the said *exception à la forme* are in the nature of an opposition, or protest against the interlocutory judgment of this Court, granting plaintiffs' application to amend the writ of summons in this cause, that plaintiffs' proceedings under and since said amendment are legal and regular, and that the said allegations are irregularly pleaded in this cause, and moreover insufficient in fact and in law." The Court of Review at Montreal reversed this judgment, "considering that the exception *à la forme* filed in this cause is well founded and should have been maintained, and that the plaintiffs' action should have been dismissed with regard to the said John F. Morrill." It was from the latter decision that the plaintiffs appealed.

DORION, C. J., for the Court, held that the original judgment should have been maintained, and that rendered by the Court of Review must, therefore, be reversed. The grounds assigned by the judgment in appeal are as follows:

"Considering that the writ of summons in this cause was properly amended, leave having first been obtained from the Superior Court, by inserting the name of the respondent John F. Morrill, as being one of the partners in the firm of H. S. Beebe & Co., defendants in this cause, and that the amended writ and declaration were duly served on the said respondent;

"And considering that the said respondent has pleaded to the action, and has suffered no prejudice or injury from the said amendment being so made, and that the exception *à la forme* by him filed is not well founded;

"And considering that the appellants have proved the material allegations of their declaration, and the said respondent has failed to prove the allegations of his several pleadings;

"And considering that there is error in the judgment rendered by the Judges sitting in Review on the 30th September, 1876, reversing the judgment by the Superior Court sitting at Sherbrooke on the 6th of April, 1876, and dismissing the appellant's action as against the said respondent John F. Morrill:

"This Court doth reverse and set aside the said judgment of the 30th Sept., 1876, and doth confirm the said judgment rendered by the Superior Court on the 6th April, 1876."

Judgment reversed.

Brooks, Camirand & Hurd, for Appellants.
Terrill & Hackett, for Respondent.

NOTE.—The following appeals, also decided on Dec. 14, do not require special notice:—

BARTHE & BOYER. — Judgment granting the insolvent Boyer his discharge, was confirmed.

MITCHELL & BURKE.—Mitchell having failed to give Burke, his landlord, due notice of his desire to terminate the lease of a house, paid the next year's rent under protest, and then sued the landlord for the amount, on the ground that he had violated his agreement to do his best to obtain a tenant. Judgment dismissing the action was confirmed, the Court holding that there was no proof of fraud on the part of the landlord.

LIONAIS, *es qual.* & WARD.—Judgment for respondent on a note confirmed.

STEWART & EVANS.—Judgment reducing the bill of appellant, an assignee, for services as receiver of an insolvent estate, from $467.73 to $120, was confirmed.

FARMER & DEVLIN *et al.*—Judgment dismissing an action by Farmer to rescind sale of real estate by O'Neil, one of the respondents, to Devlin, was confirmed. O'Neil had previously sold the property to Farmer, but the Court found no proof of collusion on the part of Devlin.

LAVIGNE & VILLARS.—Judgment awarding Villars $132 as the price of six sewing machines sold to Lavigne, was confirmed.

PARKER & LATOUR.—Judgment, awarding respondent $50 damages for gravel carried away by appellant from the beach close to respondent's house, was confirmed.

THE ST. LAWRENCE SALMON FISHING COMPANY & MCKAY.—Judgment condemning appellants to pay respondent a balance of $444.44, in accordance with the report of Mr. Archibald McGoun, accountant named by the Court, was confirmed.

Montreal, Dec. 21, 1877.

Present:—Chief Justice DORION, Justices MONK, RAMSAY, TESSIER, and CROSS.

GRAFFTIS and SLEEPER.

Insolvency—Appeal therefrom—38 *Vict.*, *c.* 16, *s.* 128.

Held, that the term of eight days, within which, under Section 128 of the Insolvent Act of 1875, proceedings in appeal or revision must be prosecuted, applies to judgments in Review as well as to those of the Court of first instance.

Appeal dismissed.

SIMPSON *et al.* (defts. below), Appellants; and YOUNG *et al.* (pltfs. below), Respondents.

Action — Revendication — Sale by Collector of Customs.—31 *Vic.* c. 6, *ss.* 13 & 14.

A collector of Customs, by error, sold by public auction for unpaid duties, goods which had never been taken to the examining warehouse, or kept therein a month, as required by 31 Vic. c. 6. ss. 13 & 14, but had been warehoused by the harbor master for unpaid harbor dues. *Held*, that the sale was a nullity, and action of revendication by the purchasers was dismissed.

The respondents by an action of revendication, claimed 172 crates of bottles and flasks under the following circumstances. The goods came out to Montreal, and were placed on the wharf, but the harbor dues not being paid, the harbor master had the crates taken away and put in a warehouse until the dues should be paid The Collector of Customs, supposing that they had been sent to the Customs' examining warehouse, caused them to be advertised and sold at auction, in the ordinary course, as goods on which the customs duties had not been paid. Meanwhile the agent of the consignors paid the harbor dues, and the goods were left in the warehouse subject to his order. The customs duties were not paid at the time of the sale. The purchasers at the auction sale brought an action of revendication, claiming the goods as their property. The Superior Court declared the *saisie revendication* good and valid, and ordered the defendants (the collector Simpson, and the warehouseman Morin) to give up the property, or pay $2,000 for the value thereof.

In appeal this judgment was reversed by the majority of the Court, (Dorion, C. J., Tessier and Cross, J J.). The sale by the Collector of Customs was held a nullity, the goods never having been in his possession, and not having been kept for a month in the examining warehouse, as required by 31 Vict. c. 6, ss. 13 & 14. The minority of the Court, (Monk and Ramsay, JJ.,) considered that the sale took place under the circumstances contemplated by the law, and that the fact that the goods were not actually in the examining warehouse during the month previous to the sale made no difference.

Judgment reversed.

Geoffrion, for Appellant Simpson.

Durand, for Appellant Morin.

Doutre & Co., for Respondents.

COURT OF QUEEN'S BENCH. — APPEAL SIDE.

Quebec, Dec. 7th, 1877.

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

O'FARRELL, Appellant; and BRASSARD, Respondent.

Powers of Council of the Bar—Unprofessional Conduct—Writ of Prohibitoin.

Held, that a writ of prohibition will lie to restrain the proceedings of the Council of a section of the Bar.

The appellant, an attorney and advocate practising in the District of Quebec, was proceeded against before the Council of the Section of the Bar for the said District on the following accusations:

"1. D'avoir le dit John O'Farrell, le ou vers le 26me jour de Mai dernier, été nommé et assermenté comme constable à St. Etienne de la Malbaie, laquelle charge il accepta volontairement, dans une poursuite où lui, le dit John O'Farrell, agissait pour le plaignant, en sa qualité d'avocat et de procureur, cumulant ainsi dans la même poursuite les fonctions d'avocat et de constable, et d'avoir dans la nuit du vingt-six ou vingt-sept Mai aussi dernier, accompagné d'une douzaine d'hommes, arrêté comme constable susdit, en la paroisse de Ste. Agnes, un nommé Joseph Guay, cultivateur, du dit lieu."

"2. D'avoir le dit John O'Farrell, dans la nuit du vingt-deux au vingt-trois Juin dernier, accompagné l'huissier chargé d'arrêter un nommé Alexandre Murray dit Brunoche, cultivateur, de Ste. Agnes, et d'avoir assisté et aidé à faire la dite arrestation."

The Council of the Section found these charges proved, and that they were infractions of discipline and derogatory to the honor of the bar, and to the dignity and duties of the profession of an advocate, and condemned the appellant to suspension for two months, on the first charge, and one month on the second, and to pay to the respondent Brassard $400.46 costs. The appellant obtained a writ of prohibition, which was set aside in review, (3 Q. R. p. 53). The Court reversed the judgment in Review, holding that the charges in the absence of any By-law, did not disclose any offence. (*Ante* p. 25.)

Judgment reversed.

THE ST. LAWRENCE STEAM NAVIGATION CO., Appellant; and BORLASE, Respondent.

Carrier—Negligence.

Held, that a steamboat company carrying passengers is liable for an accident occurring on the wharf where passengers are landed, to one of its passengers, owing to want of due precaution in not placing lights at night to show where there is danger from a slip constructed in the wharf, and down which the respondent fell, and was seriously injured.

Judgment of Superior Court confirmed.

LAPIERRE, Appellant; and GAGNON, Respondent.

Capias—Waiver of claim to damages.

Held, (reversing the judgment of the Superior Court.) that where a *capias* was taken out under circumstances which might justify a suspicion of unfair dealing, but without sufficient probable cause to justify the issue of the writ, and where the parties, on the matter being explained, settled about the payment of the debt without any reserve, and the defendant is at once released without ever having been taken to gaol, the Court will readily presume that the defendant waived any claim for damages.

Judgment reversed.

BENOIT, Appellant; and PETITCLERC, Respondent.

Capias by vendor—Dissipation of moveables.

Held, that a vendor with his *bailleur de fonds* claim duly enregistered may maintain a *capias* against his debtor, who is dissipating his moveables, without proving in any way that the property hypothecated has depreciated in value so as to render his debt more precarious than at the time of sale.

Judgment of Superior Court confirmed.

NOTE.—Ramsay, J., was not present at the rendering of this judgment, and did not join in it.

MCGREEVY, Appellant; and VANASSE, Respondent.

Evidence.

Action by respondent to recover first instalment of $3000, on obligation to pay $18,000, as being a claim against the North Shore Railroad Company, of which railway appellant was contractor. The respondent was to obtain a resolution from the directors of the Company acknowledging the debt. By his action he averred that the appellant had rendered it impossible for him to obtain this resolution, inasmuch as he abandoned his contract with the Company, which had ceased to exist, the Provincial Government having assumed the line and made a new contract with appellant, by which the latter was to pay all the debts of the extinguished Company. *Held*, (reversing the judgment of the Superior Court) that without proof of the existence of the debt, respondent could not recover.

Judgment reversed.

RICHARD, Appellant; and WURTELE, Respondent.

Capias—Alias Writ.

On the 5th December, 1876, the appellant was arrested on a *capias* issued on the 2nd December, and returnable on the 14th December. Finding that through the delay to execute the writ, a sufficient delay for the return was not allowed, the plaintiff took out an *alias* writ, returnable on the 18th of December. *Held*, (confirming the judgment of the Court below, rejecting the exception *à la forme* filed by the appellant) that the proceeding was valid. Judgment confirmed.

DINNING et al., appellants; and WURTELE et al., respondents.

Injunction—Merchants' Shipping Act.

Held, an injunction will lie under the Merchant Shipping Act of 1854 (Imp.), sect. 65, with regard to a ship to be built or about to be built, enregistered under the provisions of the Act of the Parliament of Canada, 36 Vict. c. 128, s. 36.

Judgment of Superior Court confirmed.

GRENIER, Appellant; and POTHIER, Respondent.

Promissory Note.

Action on a promissory note. Pending suit the note was returned to the drawer, as plaintiff pretended, by mistake for another note of smaller amount, the subject of another suit. The Superior Court maintained plaintiff's pretensions, and this judgment was confirmed in appeal, Ramsay, J., dissenting.

Judgment confirmed.

(In the following cases, heard at Quebec, judgment was rendered at Montreal, Dec. 22.)

CONNOLLY, Appellant; and THE PROVINCIAL INSURANCE COMPANY, Respondents.

Warranty, compliance with—"To go out in tow."

Held, (reversing the judgment of the Court of Review, Quebec,) that the warranty "to go out in tow" in a policy of insurance, without its being specified how far, is complied with by the towing of the vessel out from the wharf where she was lying, the expression not being technical and having no special meaning by usage in the port of Quebec. (Cross, J., diss.)

Judgment reversed.

MOISAN, Appellant; and ROCHE, Respondent.

Held, (reversing the judgment of the Court of Review, Meredith C. J., *diss.*,) that revendication will lie by a judicial guardian to recover possession of property placed in his charge.

TESSIER, J., *diss.*, thought the action did not lie.

CROSS, J., *diss.*, thought the action would lie if the guardian had ever been in possession.

Judgment reversed.

CURRENT EVENTS.

GREAT BRITAIN.

DELAYS OF BUSINESS.—The re-organization of the judicial system in England has not facilitated the dispatch of business. Complaints of the law's delays are very numerous in the daily press, and the *Times* of January 2, reviewing the business of the last two years, has the following:

"The condition of the law lists at the close of the last sittings proves only too clearly that the evils of delay which have been so often complained of during the past year are not of any accidental or passing nature. An account which we publish in another column shows that when the sittings commenced there were 500 causes for trial in London, and of these, with new causes entered, there remained nearly 300 standing over when the holidays commenced. In Middlesex the sittings began with a list of 860; they end with a list of 723 awaiting the labors of the new year, and these latter figures are the more remarkable as nearly 200 of the original 860 were withdrawn when the time of trial approached. In fact, less than 200 were actually tried, and of those standing over for trial at this moment 683 are now, as far as the process of the Courts is concerned, ready for trial, but, judging by the rate of progress made last sittings, should these cases prove even as substantial as the 860 standing for trial in November, they cannot be got through before the commencement of the next Assizes. The remainder of them would then stand over, along with all the causes which may come into existence in the meantime, until the sittings at Easter. Such a state of things produces manifold evils which cannot be long tolerated by the public. The suitor coming in good faith to seek the assistance of the Courts is denied justice until his patience or resources are exhausted. In questions of commercial business, which make the main portion of civil causes, time is often the most important consideration, and the fact that the suitor may have to wait six months or a year before he can have the facts of the simple question of contract on which he relies affirmed by a jury is a direct premium on fraud. There is not only the loss of precious time; there is the danger of evidence passing away, of the death of witnesses, or, if the suitor be able to escape these more serious perils, there is the cost or inconvenience to himself or to his witnesses of securing their attendance after a long interval of time. In great commercial cases an important witness may be here to-day and in New York next month. With a case pending among seven or eight hundred others it is impossible to say with any certainty when the witness's evidence will be required. It is true a Commission may be issued to take evidence in a particular foreign country; but a Commission is an enormous addition to the cost, and the witness may be moving about. But for the witnesses having engagements in different parts of the kingdom there is not even the resource of a Commission, and business arrangements in Liverpool and Glasgow must be made continually subject to disturbance by the

uncertain operation of the Law Courts. Whatever explanation may be given of this delay, one obvious result is to aggravate the mischief of fictitious defences. A just claim is resisted because the wrong-doer knows that by resistance he can at least gain a considerable time, and this may be everything to him. At least it will give him a chance of negotiating and of worrying his adversary into a compromise.

"We have already referred to the large number of cases standing for trial and settled at the last moment. Most of these cases, probably, are simply the efforts of defendants to put off, as long as possible, the necessity of satisfying claims they cannot deny. On the other hand, some of these surrenders arise from the incapacity of the plaintiff to produce any evidence in support of his allegations, and prove even more strongly than the fictitious defences the hardship of delay. Speculative actions are among the worst abuses which can attend a judicial system. It is inevitable that there shall be found a certain number of persons ready to get up cases without much inquiry as to the good faith of the proceedings, trusting to the chances of a compromise to secure some amount of costs if a verdict should prove to be out of the question. The proportion of these speculative cases has been very much diminished by the modern County Court system, but still they exist, and however great a reproach such a class of practitioners may be to the law, they cannot be actually suppressed. Sometimes, indeed, a penniless man with a real substantial grievance makes use of them to bring his case before the Courts. Unable himself to offer security for costs, without connexions to support his assertions, such a suitor would have no attraction for the prosperous, respectable solicitor, whose time would be too well employed for him to enter into the case. His only chance is the speculative enterprise of the more doubtful section of the profession. The possibility of such cases makes it difficult to get rid of such a class, but when, as generally happens, the clients in such cases are unprincipled speculators, it is a very great hardship that if the defendant refuses to become their victim and to compromise, the crisis of his struggle with extortion should be prolonged to one sittings after another before he is able to rest in peace with the knowledge that his assailant has given up the battle and is out of Court. These long delays are a temptation not only to the tricky defendant, but to the speculative plaintiff, and no legal system that is subject to them can be satisfactory to the public, however excellent the laws, and however distinguished the Judges who apply them.

"One of the reasons of this accumulation of business is suggested to be the greater number of cases tried by juries under the provisions of the Judicature Act, with the lengthy examination of witnesses in open court. How far an unlimited power of demanding a jury should be left to suitors in civil cases may be a question. On the one hand there is very much to be said for the theory that the judgment of a man guided by the aid of counsel and by a long experience of judicial inquiry would give, in the majority of cases, results more satisfactory to the public than the verdicts of juries now supply, and there is an obvious saving of time, not only to the suitors in the greater precision with which the Judge is able to deal with the case, but also to the class from which jurors are drawn. On the other hand, the power to call for oral evidence with the right of cross-examination in many cases that would formerly have been dealt with on affidavit, though a cause of increased delay, is beyond question an advantage to the public. Time may be wasted by an abuse or an incompetent use of the power of cross-examination, and Judges may be sometimes found who lose themselves in a mass of details rather than confine counsel to the matter in hand; but these evils would arise just as often under a system of affidavits with speculative deductions. The more direct production of evidence is a reform of which we must not forget the value, though it may be one of the many causes contributing to the great mischief—the length of our law proceedings. That a remedy for that mischief is urgently needed is only too clear, but to find this remedy we should look rather to a re-arrangement of existing machinery than to any upsetting of the general principles on which the Judicature Acts are founded. Those acts introduced changes of such magnitude that their full operation cannot be immediately determined. A frank recognition of the inconveniences which arise is the first condition of improvement, and the figures given as to the last sittings will make it impossible for the most tranquil optimist to deny the evil of which we complain. The principle of reducing the number of Judges sitting *in Banc* might be applied more thoroughly than it has yet been. A fusion of certain jurisdictions still reserved to special divisions of the High Court is another expedient which might add to the judicial power. Though in theory all the Judges of the High Court have equal powers, very large exceptions are made in favor of special kinds of work formerly assigned to those Courts which exist now not as separate Courts, but as divisions of the High Court. These reservations, as of Crown business for the Queen's Bench Division, are just those which, however wise and necessary at the introduction of so great an administrative revolution, may be curtailed as the new system comes into more general working. One of the great requirements of the public to meet which the Judicature Acts were passed was to secure the speedy despatch of legal business. If the result continues to be that while great improvements in principle and method have been secured, the mass of suitors are exposed to additional delays, further changes will be insisted on; but they will be modifications, how-

ever large, of machinery, not an abandonment without longer trial of the principles embodied in the Judicature Acts."

ONTARIO.

It has been rumored that the honor of knighthood was about to be conferred on Chief Justice Moss, of the Court of Error and Appeal of Ontario. The rumor may be due to the fact that the Judge occupying a similar position in the Province of Quebec has been knighted. But there were obvious reasons for the conferring of the distinction in the latter case which do not apply to the newly appointed Chief Justice of Ontario. The report, at all events, seems to have been premature.

Fire Insurance.—In the case of *Benson* v *The Ottawa Agricultural Insurance Co.*, it was held by the Court of Queen's Bench, Ontario where a policy provided if any misrepresentation or concealment of facts was made in the application, the policy should be void, that the omission to state that the premises were situate near and opposite to a blacksmith's shop, was immaterial, and there was no concealment.

UNITED STATES.

Business Before the Supreme Court.—It appears that as in England so in the United States, there is considerable accumulation of business before the higher tribunals. Senator Davis, late a Judge of the Supreme Court, has in contemplation, it is said, a bill looking to the increase of the number of circuit judges, and the establishment of a sort of appellate court in each circuit, with jurisdiction in all causes involving an amount not exceeding $10,000. In an interview with a correspondent of the *N. Y. Times*, Judge Davis said:—"There are now nine Circuit Judges. I propose to increase the Judges to eighteen. It is a popular mistake to think the increase of the number of Judges of the Supreme Bench would expedite matters. It would rather retard them. The only way in which the Supreme Court could expedite matters, would be to have it divided up into sections, one taking this and another that branch of jurisprudence, the decision of each section to be final on the matters submitted to it. An attempt to do this would give rise to the grave constitutional question, whether litigants coming before the Supreme Court of the land are not entitled to the individual judgment of each member of the Bench. I am rather inclined to the opinion that the objection would be well founded."

RECENT ENGLISH DECISIONS.

Company.—In the articles of a company, it was provided that no person should be qualified for director who was not the holder of fifty shares. The board of directors afterwards undertook to elect H. a director, though he had no stock. He attended two meetings and then resigned. In the winding up it was attempted to make him a contributory to the extent of fifty shares. *Held*, that he could not be made a contributory, and that his election was void.—*In re Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Co.*, 5 Ch. D. 705.

Contract.—The defendants by the contract agreed to buy from the plaintiffs 600 tons of rice, to be "shipped" at Madras, in the months of March or April, 1874. 7,120 bags of rice were put on board between the 23rd and 28th of February, and three bills of lading therefor were signed in February. Of the remaining 1,080 bags, 1,030 were put on board February 28, and the rest March 3; and the bill of lading for the 1,080 bags bore the latter date. There was evidence that rice put on board in February was as good as that put on board in March or April. *Held*, that the contract had not been complied with, and the defendants were not bound to accept the rice.—*Bowes v. Shand*, 2 App. Cas. 455.

Evidence.—Life Insurance.—On the 16th April, 1874, the respondent brought an action against the appellants on a policy of insurance of one N., dated 28th September, 1863. N. disappeared in May, 1867, and a sister and brother-in-law testified that none of his family had heard anything of him since that time, but his niece said she had seen him in December, 1872, or January, 1873, when she was standing in a crowded street in Melbourne; that she started or turned to speak to him, but before she could do so he was lost in the crowd. She had told this circumstance to N's. other relations. The jury informed the court that they did not consider this evidence conclusive that she had seen N. Counsel for plaintiff asked the court to instruct

the jury "that there was evidence that N. had been absent seven years without being heard of, and that he had not been heard of, if the niece was mistaken in believing that she had seen him; and if the jury thought she was mistaken, then N. might be presumed dead, having been absent more than seven years without being heard of." This was refused, and the court instructed the jury, *inter alia*, as follows: "You cannot say that a man has never been heard of, when in the first place one of his nearest relations says she saw him within two years; still less when every member of the family states that they heard so. You cannot have any one called who saw him die or saw him buried. You have, therefore, no direct evidence except that he was alive three years ago. You have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of his relatives heard that he was alive." The court added that the presumption of death was removed by the most positive evidence, and finally: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendant." *Held*, by the Court of Appeal a misdirection, and on appeal to the House of Lords the Lords were divided, and the holding of the Court of Appeal remained undisturbed.—*Prudential Insurance Co.*, v. *Edmonds*, 2 App. Cas. 487.

Executors and Administrators.—Bequest of personal property to executors to divide it equally among four persons. Part of the property was at testator's death in three second mortgage bonds of the Atlantic and Great Western Railway Company of America, of uncertain value and rapidly falling. At that time they were worth £153 each. They rapidly fell until fifteen months afterwards two of them were sold for £52 each, and the one remaining unsold was worth at the time of the suit £20. One of the legatees had urged the executors to dispose of the bonds earlier, but the executors said they held them in the honest expectation that they would rise. *Held*, that the executors could not be required to make good the loss.—*Marsden* v. *Kent*, 5 Ch. D. 598.

False Pretences.—Case stated on the conviction of one C. for falsely pretending that he was a responsible dealer in potatoes, and had credit as such, whereby one G. was induced to forward him large quantities of potatoes. The evidence consisted of the following letter from C. to G: "Sir,—Please send me one truck regents and one rocks as samples, at your prices named in your letter. Let them be of good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. P. S.—I may say if you use me well, I shall be a good customer. An answer will oblige, saying when they are put on." *Held*, that the conviction was correct.—*The Queen* v. *Cooper*, 2 Q. B. D. 510.

RECENT UNITED STATES DECISIONS.

Agent.—A promissory note was made to J. S., cashier, or order. *Held*, that the bank of which he was cashier might sue on the note in its own name, without an indorsement by him.—*Garton* v. *Union Bank*, 34 Mich. 279.

2. The owner of property offered to pay a broker a certain sum for selling it. The broker procured parties to treat for the purchase, and the owner gave them time to consider his terms, but before the time was out sold the property to a third party. *Held*, that the broker was entitled to recover the agreed compensation.—*Reed* v. *Reed*, 82 Penn. St. 420.

Animal.—1. Action to recover for the killing of plaintiff's dog by defendant's dog. *Held*, no defence that plaintiff's dog was unlicensed, and might, therefore, by statute, be killed by "any person;" defendant's dog not being a "person."—*Heisrodt* v. *Hackett*, 34 Mich. 283.

2. In an action to recover for injuries suffered by the bite of defendant's dog, the plaintiff may recover on proof that the dog was vicious, and that defendant knew it, without showing that he had ever before bitten any one.—*Rider* v. *White*, 65 N. Y. 54.

Arson.—A servant who sets fire to his master's house, by his master's procurement, for the purpose of defrauding the insurers, is not guilty of arson.—*State* v. *Haynes*, 66 Me. 307.