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HODGE v. *THE QUEEN*..

In reporting the case of *Hodge* v. *The Queen* (7 L. N. 18), the *Criminal Law Magazine*, for May, adds a note by Dr. Francis Wharton, a well-known author. It will be observed that Mr. Wharton takes substantially the same view of the question of imprisonment as was set forth in the article of "R." which appeared in this journal (7 L. N. 49). The following is the note in question:—

The position taken in the opinion of the Privy Council, as above reported, that the power to impose imprisonment, when given in a legislative enactment, implies, in countries subject to the English common law, a power to impose compulsory hard labor is one of great importance. Not only does it involve interesting questions of constitutional and statutory construction in its largest sense, but it applies to all cases of powers to inflict punishment, whether such powers are contained in provincial or state constitutions, or in statutes regulating the action of the Courts in the distribution of penal justice, or in the charters of municipal corporations. I cannot bring myself to think that the decision of the Privy Council, as above given, is right; and I have the less reluctance in expressing this opinion from the fact that the question, as stated by the Court, "was not raised on the rule *nisi* for the *certiorari*," and is not to be "found amongst the reasons against the appeal in the appellate court in Ontario."

1. Unless the power claimed to be exercised is either included from the nature of things, in that imparted, or has been held by settled judicial precedent to be so included, it would be excluded by force of the familiar rule that statutes imposing restrictions or penalties are not to be construed to authorize any restriction or penalty beyond those specifically designated.

2. The careful specification of modes of punishment in the section before us tends to show that each particular term was used in a strictly technical sense. That particular specifications work a contraction of the sense of the specifications within the technical limits, has been often determined. A statute, for instance, making it penal maliciously to injure "horses," might, if the term stood by itself, include the malicious injury of geldings. If, however, the statute should enumerate the objects of protection as "horses, mares and colts," this very specification would be regarded as an exclusion of all objects which, on a more general interpretation of the word, might be regarded as included under the term "horse." It is by the application of this principle that the common law offence of malicious mischief has assumed proportions in most jurisdictions in the United States so much greater than those to which it has been restricted in England. In England, a series of statutes have been adopted imposing severe penalties on the malicious destruction of particular articles of property, *e. g.*, machinery of certain specified classes. It has been, consequently, not illogically held by the English Courts that this specification is more or less an exclusion; and that parliament, by the enactment of these statutes, is to be understood as saying, "No other kind of malicious mischief is to be punished than those specified." It is hard to see why the enumeration, in the statute before us, of three kinds of punishment, "fine," "penalty" and "imprisonment," should not have a similar operation. Each of these terms has its particular technical meaning. A "fine" is a compulsory payment of money. A "penalty" indicates not only this, but the compulsory return of articles stolen. The very enumeration of "fine" and "penalty," as distinguished from "imprisonment," shows that "imprisonment" is not to be so construed as to include either "fine" or "penalty"; and if it does not include either "fine" or "penalty," it is hard to see how it can include any other penal discipline than that which the term "imprisonment" specifically imports. It is on this principle that the judicial application of the limitations in

the constitution of the United States rests. Had that constitution, after giving to Congress legislative functions, stopped, then Congress would have been as absolute as parliament. But the constitution goes on to enumerate the legislative powers given to Congress, *e. g.*, to coin money, to provide for an army and navy; and even the most latitudinarian expositors of the constitution agree that this enumeration restricts the legislative power of Congress to the exercise of these delegated functions.

3. It remains, then, to consider how far the power to impose hard labor is included in the power to impose imprisonment, limited as the latter is from its being made distinguishable, in the statute, from the power to fine and the power to impose a penalty. And the first remark to be made is, that hard labor is not a punishment inflicted at common law as a concomitant to imprisonment. The records of the English criminal courts will be searched in vain for any instance of this cumulation; and the histories of the times, whether coming to us in the guise of annals or of fiction, show that the English prisons were far from being tenanted by persons forced to "hard labor." It was only by force of specific statutes that the "workhouse" was established as a method of employing certain classes of convicts; nor was "hard labor," as a concomitant of "imprisonment," introduced in England until the statutes establishing penal servitude. There was no law until that period authorizing it, and the judges were precluded from imposing it by the clause in the bill of rights (1 W. & M., sess. 2, c. 2, *preamble*,) forbidding the infliction of "illegal and cruel punishments." Hard labor cannot be spoken of as cruel, but, in view of the fact that it was unknown as a common law punishment, it must be regarded in England as "illegal" until authorized by act of parliament."

Mr. Wharton concludes by referring to the rulings of the courts in the United States. This portion of the article we hold over for the present.

SPONGING ON PROFESSIONAL MEN.

In an amusing little book published not long ago, "John Bull et son Ile," the English solicitor's bill of costs comes in for its share of satire. The following little bill is printed as a sample:—

	s.	d.
"To receiving a letter from you and reading it	3.	6.
To writing the answer	3.	6.
To hiring a cab	5.	0.
To thinking of your affair in the cab	3.	6.
To listening to your remarks	3.	6.
To answering them	3.	6.
To meeting your father-in-law and speaking to him of your affair	3.	6.

This is a long way behind many of the old stories of solicitors' bills, with which our readers are no doubt familiar. One of these runs somewhat in this way: A person with a lawsuit on hand was bathing in the sea at Brighton, when he observed the head of his solicitor rise above the water. He immediately hailed him with the inquiry, "Mr. Jones, how is my case getting on?" "Famously," cried Mr. Jones, who immediately dived out of sight, and put an end to the consultation. At a later date the client read in his bill of costs the following item:—

	s.	d.
To conferring with you at the sea-side as to your case	5.	0.

But however much amusement may be extracted from such anecdotes (and lawyers are usually most prodigal in using them), it is well known that professional gentlemen have more or less to protect themselves against those who would use their brains and experience without any acknowledgment. Some of the daily journals have been inclined to gibe at the case of *Cooke* v. *Penfold*, which is noted in the present issue. It seems to us that these writers are geese, and that they are simply producing the *sifflement* which comes most natural to them. What are the facts? Mr. Penfold, a rural gentleman, had been appointed trustee to an estate. He was in doubt as to the legal form of conveyance, and he set out to town for advice. He meets Mr. Brooke in a railway car. He knows him to be a lawyer, and he submits the difficulty to him, and obtains a reply. Mr. Brooke gives an opinion for which Mr. Penfold would no doubt quote him as the authority, and if it were incorrect, Mr. Brooke's reputation would, doubtless, suffer. What was the upshot? The firm of Cooke & Brooke, to which Mr. Brooke belongs, a firm, by the way, practising at Montreal, sent in to Mr. Penfold the very moderate memorandum of charge of $3 for professional advice. Mr.

Penfold is horror-stricken at the presumption of a lawyer, who makes his bread by professional work, charging for an opinion given in a railway car, and engages other counsel to contest the claim. There was incontestably a service rendered and the right to recover for that service was equally incontestable. The individual concerned must be the judge of the propriety of bringing the action. Probably nine out of ten would have dismissed the matter from their thoughts, when payment was objected to, or would have sent Mr. Penfold a receipted account, and have left him to do as he thought proper. But an action being brought, the Judge was guided by his sense of right, and gave judgment for the amount of the account, Mr. Brooke waiving his claim to costs of suit. The incident is useful in putting a check upon the tendency to "dead-head" at the expense of the profession. If people suppose that they can save their dollars by getting opinions on a railway car or across a hotel table, there will always be some mean enough to resort to the artifice.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, May 23, 1884.

Before JETTE, J.

LAMBE es qual. v. THE NORTH BRITISH & MERCANTILE FIRE & LIFE INSURANCE CO.

Powers of Local Legislature—Taxation of Insurance Companies—45 Vict., ch. 22.

1. *The Queen, as the sovereign authority, forms an essential part of the legislatures created by the B. N. A. Act for the government of the Provinces, and the Act* 45 *Vict. ch.* 22 (*Q.*) *was validly passed in the name of Her Majesty.*
2. *The tax imposed on corporations by the said Act is a direct tax, and within the functions of the local legislature.*
3. *The distribution or apportionment of taxation among the various classes of citizens is a matter for the legislature alone to determine.*

The judgment fully explains the grounds of the decision :—

"La cour, etc.

"Attendu que par l'acte de la législature provinciale de Québec, 45 Vict. ch. 22, intitulé: 'Acte pour imposer certaines taxes directes sur certaines corporations commerciales,' il a été décrété que toute compagnie d'assurance acceptant des risques et faisant des affaires d'assurance, en cette province, paierait annuellement, pour une seule branche d'affaires, une somme de $400, pour toute branche additionnelle d'affaires, une somme de $50, et pour chaque bureau, à Montréal ou à Québec, une somme de $100 ; que ces diverses sommes seraient payables le 1er jour juridique de juillet chaque année, à l'Inspecteur des Licences du district de revenu où la compagnie aurait son bureau ;

"Attendu que la défenderesse est une compagnie d'assurance ayant un bureau en la cité de Montréal, et qu'elle y fait des affaires sur la vie et contre le feu ; en sorte qu'elle est passible des diverses sommes sus-mentionnées s'élevant à la somme totale de $550, que le demandeur ès qualité lui réclame comme étant due et payable depuis le 3 juillet 1882 ;

"Attendu que la défenderesse plaide à cette demande par deux exceptions, disant :

1o. Que la loi invoquée n'a aucune existence légale, attendu qu'elle a été irrégulièrement passée au nom de Sa Majesté qui ne fait pas partie de la législature provinciale et n'a aucun pouvoir législatif en cette province ;

2o. Que si cette loi a une existence quelconque elle est dans tous les cas inconstitutionnelle et ne peut affecter la défenderesse ;

(*a*) Parceque cette compagnie n'a pas été créée par la législature provinciale, et qu'elle est duement licenciée par le pouvoir fédéral, pour exercer ses droits ;

(*e*) Parceque la taxe réclamée n'est pas une taxe directe ;

(*i*) Parceque cette taxe n'est imposée que sur certaines classes de la population ; qu'elle ne frappe que les corporations commerciales et non les biens ; et qu'elle ne tombe dans aucune des catégories d'impôts que la législature a le droit de décréter ;

(*o*) Parceque cette taxe constitue une réglementation du commerce ;

(*u*) Enfin parceque cette taxe est de la nature d'une licence.

"Considérant que Sa Majesté, personnification de l'autorité souveraine dans toutes les provinces de l'Empire, fait essentielle-

ment partie des diverses législatures créées pour le gouvernement particulier de ces provinces et que les Lieut.-gouverneurs n'y sont que ses représentants ;

" Considérant en conséquence que la loi invoquée a été valablement passée au nom de Sa Majesté ;

" Considérant que toute personne ou corporation privée, jouissant de droits quelconques dans les limites de la province, y est nécessairement soumise au contrôle de la législature de cette province et aux obligations qu'elle peut imposer pour la contribution de chacun aux charges publiques ; et qu'aucune licence du pouvoir fédéral ne saurait soustraire la défenderesse à ces obligations ;

" Considérant que la taxe réclamée frappe les corporations imposées directement et sans intermédiaire entre elles et le fisc, ce qui est le caractère essentiel et principal de l'impôt direct ;

" Considérant que la répartition de l'impôt sur les diverses classes de citoyens ne saurait être mise en question devant les tribunaux, la législature étant seul juge de l'opportunité de la répartition par elle adoptée ;

" Considérant que rien dans l'acte constitutionnel de 1867 n'enlève aux législatures provinciales le pouvoir de taxer les corporations commerciales ou autres, et que la taxe imposée dans l'espèce, qui est de la nature d'un droit de patente exigé à raison de l'exercice d'une profession ou d'un négoce, est essentiellement dans les attributions de l'autorité législative provinciale ;

" Considérant que la taxe réclamée ne constitue pas une réglementation du commerce dans le sens de l'art. 91 du statut impérial de 1867 ;

" Considérant en conséquence que les exceptions et défenses de la défenderesse sont mal fondées ;

" Les renvoie et condamne la dite défenderesse à payer au demandeur ès qual. la dite somme de $550 courant avec intérêt du 3 juillet 1882, et les dépens distraits," etc.

Judgment for the plaintiff.

Lacoste, Globensky, Bisaillon & Brosseau, for plaintiff.

Kerr & Carter, for defendant.

SUPERIOR COURT.

MONTREAL, May 19, 1884.

Before MATHIEU, J.

DESOLA et al. v. STEPHENS.

Fire in leased premises—Presumption of fault—C. C. 1629—Action to resiliate lease—C. C. 1634, 1660.

Even though the leased premises have become temporarily uninhabitable during necessary repairs occasioned by a fire which has damaged a portion of the premises, the lessee cannot obtain the resiliation of the lease without rebutting the presumption of law that the fire was caused by his fault.

A claim in the lease stipulating that the lessee shall "deliver up the said premises at the expiration of the said lease in as good order as the same shall be found in at the commencement of the present lease, reasonable wear and tear and accidents by fire excepted," is not a waiver on the part of the lessor of the presumption established by Art. 1629, C. C., but merely expresses the provisions of Art. 1632, C. C.

A mere theory as to the origin of the fire will not exonerate the lessee from this presumption ; and in the present case the theory suggested by the evidence would, if proved, establish the lessee's responsibility for the fire in question.

The formal judgment of the court sufficiently explains the questions at issue, and the grounds of the decision.

" La cour, etc.... Attendu que les demandeurs allèguent dans leur déclaration que par bail fait à Montréal le 14 février 1883, devant Maître J. H. Isaacson, notaire, le défendeur leur aurait loué pour le terme de trois années à compter du 1er jour de mai 1883, une bâtisse ayant la façade en pierre de taille et à quatre étages située dans le quartier du centre de la cité de Montréal, à l'encoignure des rues St. François Xavier et St. Paul ; que ce bail fut fait pour le prix de $800 de loyer annuel, payable par trimestre, commençant le premier jour d'août 1883 ; que les locataires s'obligeaient de garnir les lieux loués et de les remettre à l'expiration du bail en aussi bon ordre qu'ils étaient au commencement d'icelui, sauf l'usage et les accidents par le feu qui furent exceptés ; que les demandeurs

prirent possession des lieux loués et payèrent régulièrement leur loyer jusqu'au premier de février 1884; que le matin du dimanche, 23 mars dernier, la dite bâtisse fut sérieusement endommagée par le feu, la fumée et l'eau; que les chassis et les volets du troisième étage de la dite bâtisse ayant été complètement détruits et les soliveaux entre le second et le troisième étage et les planchers de ce dernier étage brulés; que les plafonds et les enduits dans les dits lieux ont été grandement endommagés par le feu et l'eau; que les divisions ont été brûlées et que le mur de côté de la dite bâtisse faisant front sur la rue St. François Xavier est dans une telle mauvaise condition entre le deuxième et le troisième étage résultant du feu qu'il sera nécessaire de le reconstruire; que le dommage fait à la dite bâtisse par le dit incendie a rendu les lieux loués inhabitables, et que même si le défendeur voulait faire les réparations nécessaires elles seraient de nature à rendre les dits lieux inhabitables par les locataires d'iceux et entièrement impropres pour leur besogne; que les demandeurs ont loué la dite bâtisse pour les fins de leur commerce comme fabricants de cigares et marchands de tabac, et qu'ils ont employé et emploient encore environ deux cents hommes y compris des jeunes garçons et des filles pour la manufacture des dites cigares pour une période déterminée et à des gages fort élevés; que les lieux étant inhabitables et entièrement impropres à la besogne des demandeurs ou à aucune autre industrie en raison du dit incendie, de la fumée et de l'eau, les demandeurs sont obligés de se pourvoir sans délai d'une autre bâtisse pour y continuer leur industrie et s'éviter les dommages résultant des engagements qu'ils ont fait avec les dits employés; que les dits demandeurs sont obligés, sous les circonstances, de demander la résiliation immédiate du dit bail vu que les lieux sont inhabitables, et qu'il est impossible au défendeur de faire les réparations nécessaires pendant l'occupation des demandeurs et le tort considérable que ces derniers éprouveraient pendant ces réparations; que les demandeurs ont toujours été prêts à payer au défendeur tout le loyer par eux dû, savoir depuis le premier février dernier jusqu'au 23 mars dernier, date du dit incendie, lequel loyer s'élève à la somme de $114 que les demandeurs ont offert par le ministère de George R. H. Kittson, notaire, le 29 mars dernier, et qu'en même temps ils ont fait notifier le défendeur de leur intention de demander la résiliation du dit bail pour les causes ci-dessus énoncées, et que le défendeur a refusé d'accepter, laquelle somme les demandeurs ont déposé dans le bureau du protonotaire de cette cour en paiement du dit loyer jusqu'à la date du dit incendie, et concluant en demandant acte de telles dites offres, et la résiliation du dit bail du 14 février 1883;

"Attendu que le dit défendeur a plaidé à cette action, disant qu'il est vrai que le 23 mars dernier, il y eut un incendie dans les lieux loués causé par la négligence grossière des demandeurs et de leurs employés; que cet incendie était de peu d'importance et fut promptement éteint et que les dommages en résultant sont peu importants et limités à un étage seulement de la dite bâtisse, et que ni le dommage causé et les réparations nécessaires pour rétablir les lieux loués et les remettre dans le même état et condition où ils étaient avant cet incendie ne sont pas de nature à rendre les lieux inhabitables ou empêcher les demandeurs d'y continuer leur industrie comme ci-devant; qu'immédiatement après l'incendie le défendeur a commencé avec la plus grande diligence à réparer le dommage causé et que ces réparations sont terminées sous peu de jours; que malgré le peu d'importance du dommage et des réparations à faire, les demandeurs étant désireux pour d'autres raisons de laisser les lieux loués, avaient avant le dit incendie fait des arrangements pour louer d'autres prémisses situées sur la rue des Sœurs-Grises, dans la cité de Montréal, et qu'ils ont cherché à trouver un autre locataire pour les lieux loués par eux du défendeur, et qu'immédiatement après le dit incendie ils ont laissé les lieux loués pour occuper cette autre bâtisse, agissant de mauvaise foi et se servant de cet incendie comme d'un prétexte pour laisser les lieux loués et demander la résiliation du bail;

"Considérant qu'il est décrété par l'article 1629 du Code Civil que lorsqu'il arrive un incendie dans les lieux loués il y a présomption légale en faveur du locateur qu'il a été

causé par la faute du locataire ou des personnes dont il est responsable ;

" Considérant que la prétention soumise par les demandeurs que l'incendie dont il est question a été le résultat d'un vice dans le tuyau de gaz, qui servait à chauffer l'étuve pour leur résine ou dans les appuis de ce tuyau, n'est pas suffisamment prouvée, mais qu'il parait plutôt probable que le dit incendie a été causé par l'étuve susdite, soit parce qu'il il n'y aurait pas eu assez d'eau, ou pour quelqu'autre raison, et que cette étuve en tombant après que ses étais furent consumés, aurait brisé le tuyau de gaz ;

" Considérant qu'il est d'autant moins probable que ce soit le tuyau de gaz qui ait été défectueux ou que ses appuis se soient brisés ; que le dit tuyau passait entre le plancher et le plafond, et que la preuve ne fait pas voir qu'il ne fût pas suffisamment appuyé sur le plafond ;

" Considérant que l'étuve susdite devait être entretenue par les dits demandeurs de manière à prévenir tout accident par le feu, et que si cet incendie a été causé par cette étuve, les demandeurs en sont responsables ;

" Considérant que soit que le dit incendie ait été causé par cette étuve, soit qu'il ne l'ait pas été, les dits demandeurs en sont encore responsables aux yeux de la loi, parce que dans le premier cas ils étaient obligés de tenir cette étuve en bon état, de manière à prévenir tout incendie, et que dans le second cas ils n'auraient pas prouvé que la cause de l'incendie ne peut leur être attribuée ;

" Considérant que lorsqu'un incendie a été causé par la faute du locataire, ce dernier ne peut demander la résiliation du bail, parce que les lieux loués seraient inhabitables pendant le temps des réparations ;

" Considérant que la clause qui se trouve dans le dit bail, obligeant les demandeurs à remettre, à l'expiration du bail les lieux loués dans le même état qu'ils étaient lorsqu'ils en ont pris possession, sauf l'usage et les accidents par le feu, ne peut soustraire les demandeurs à la responsabilité résultant d'un incendie que la loi présume avoir été causé par leur faute, en l'absence de toute preuve contraire, vû que cette clause ne parait excepter que les incendies dont le locataire ne serait pas responsable, comme il en est de l'usage ;

" Considérant que les demandeurs ne peuvent non plus se soustraire à la responsabilité qui leur incombe par le fait que le défendeur aurait reçu des compagnies d'assurance le montant des dommages faits à sa bâtisse, et que s'il en était ainsi le défendeur serait privé du prix de la jouissance de son immeuble sans indemnité ;

" Considérant que les défenses du dit défendeur sont bien fondées, et que l'action des dits demandeurs est mal fondée ;

" A maintenu et maintient les défenses du dit défendeur, et a renvoyé et renvoie l'action des dits demandeurs avec dépens, distraits à Maîtres Wotherspoon & Lafleur, avocats du dits défendeur."

Plaintiff's authorities :—

C. C. arts. 1634, 1645 and 1660.

Guyot—Répertoire. Vol. 2, Verbo "Bail," p. 34 ; also paragraph 5, page 35.

Pothier—Louage. Articles 139 et 140, et 147, 149 et suivants.

Dalloz—Jurisprudence générale. Vol. 30, verbo "Louage," page 317, arts. 176 et 180, 181, 183.

Code Napoléon, art. 1724 ; *Brillon* recueil d'arrêts.

Duranton, No. 67 ; *Duvergier*, No. 300 ; *Troplong*, No. 251.

Lambert v. *Lefrançois*. Lower Canada Reports, p. 16.

Defendant's authorities :—

C. C. arts. 1629, 1632 et 1660.

Allis v. *Foster*. 15 L. C. J. 13.

Rapin v. *McKinnon*. 17 L. C. J. 54.

Bélanger v. *McCarthy*. 19 L. C. J. 181.

Séminaire de Québec v. *Poitras*. 1 Q. L. R. 185.

McDougall v. *Hamburger*. 6 L.N. 332.

Marchand v. *Caty* et vir. 2 L. N. 263.

Girard v. *Gareau*. DeBellefeuille, Code Annoté, art. 1629.

Pothier (Ed. Bugnet). Tom. IV, p. 109 ; Louage, No. 309.

Guyot—Répertoire. Vo. "Bail," p. 33, 10e partie, No. 6.

G. Joseph, for plaintiffs.

J. Bates, counsel.

Wotherspoon & Lafleur, for defendant.

SUPERIOR COURT.

MONTREAL, April 29, 1884.

Before JOHNSON, J.

MARTIN v. LABELLE.

Procedure—Execution—C. C. P. 581.

Where the plaintiff omitted to give credit for monies received on account, held, that the defendant was entitled to file an opposition and prevent the sale for more than the amount due.

Money paid by the defendant to the seizing officer to prevent a sale of his effects is money levied within the meaning of C. C. P. 601, and must be returned into court where an opposition is filed.

PER CURIAM. This case is before the court upon two oppositions, both of them contested by the plaintiff. The first is the opposition of the defendant himself, based upon the last part of article 581 C. P. C., which says that if a part only of the debt is paid, the opposition prevents the sale for more than is due; and that is just what is asked by the opposant here now. He says he paid $133.39 on the 11th of December, and he asks that the seizing officer should be ordered to levy the balance only (some $619) remaining due. The facts proved are that on the 11th of December last at 5 p. m., an execution having been issued by the plaintiff, and the seizure made under it, a sum of $133.39 was paid to him, as appears by his receipt written on the back of the writ bearing the apparent date of 13th December, and signed by the plaintiff himself. This receipt, however, was not written on the back of the writ until after the 24th December, as shown by the evidence of the bailiff Dansereau in his cross-examination. On the 24th December, the day before that fixed for the sale, the defendant, there being no retraxit for the sum paid, filed the opposition for a partial annullation of the writ.

The plaintiff contests by saying that when the seizure took place the whole debt was due, and remained due when the bailiff had finished seizing, which is inexact, the proceedings on the seizure terminating only on the 11th in the evening, and the $133.39 being paid during that day. The plaintiff says, further, that the defendant and the guardian were both of them informed that the sale would only take place for the balance. The bailiff, however, admits that he only informed the defendant that he had been instructed to deduct the amount paid at the moment when the opposition was signified to him between 4 and 5 in the afternoon. He admits, however, that the bailiff Darveau had warned him that an opposition was being prepared, and he went to get it at the office of the defendant's attorneys. He admits, further, that he had not then his writ with him; and further still, he admits that on the 24th December the receipt on his writ, signed by plaintiff, as of the 13th December, was not there, but was only put there afterwards. Thus it would appear that if the defendant wanted to prevent his effects from being sold to satisfy what was not due he had to resort to this opposition; and the plaintiff who undertakes to contest it is entirely wrong, and his contestation should be dismissed with costs.

The second opposition is *afin de conserver*, and is made by Kent and Turcotte, to whom all the creditors of the defendant excepting the plaintiff himself had made an assignment. The plaintiff does not contest the quality of the opposants as creditors of the defendant, or as representing the creditors; on the contrary, there is an admission that they are creditors and that the defendant is insolvent, and had made an assignment for the benefit of his creditors. The effect of such an assignment as against non-consenting parties is not, therefore, now in question

It appears by the return of the bailiff that on the 24th December, the defendant by the hands of Kent paid into the bailiff's hands $730, being the balance he could levy; and at that time the opposition *afin de conserver* had been served. This opposition alleges the insolvency and *déconfiture* of the defendant, and asks that the monies levied be brought before the court, and distributed *au marc la livre* among the creditors in the ordinary way. The plaintiff contests this opposition, and he says that true enough this money was paid to the seizing officer by the defendant acting through Kent to avoid a sale of his effects; but he contends that this money is not to be considered monies levied in the sense of the law (art. 601, C.P.C.) That article is: "The monies seized or levied after deducting duties and taxed costs may be paid by the sheriff to the seizing creditor, if no opposition has been placed in his hands; otherwise he must return them into court." The plaintiff must sustain, in order to succeed, that monies paid by a defendant under stress of execution are monies not levied from him. Art. 564, C.P., says that if current money is seized the sheriff must return it with the other monies levied, so that

monies can certainly be levied without a sale. It appears to me that these monies are levied in the sense of the law, otherwise any insolvent debtor could prefer one creditor to another by simply paying the bailiff, on a previous understanding with him to that effect. This was not even a voluntary payment by the debtor. It was money furnished by the creditors of an insolvent. The only question would seem to be: if that is the case, who is to get it? Is it to go, all of it, to the plaintiff? By what right, if the money is before the court, and if there are oppositions, and if the insolvency is there?

I shall maintain this opposition and dismiss the contestation. The only difficulty, a technical one, which I have felt in this matter has been that these monies were never seized or taken in execution at all. In that respect the case differs from the one where money may have been seized and returned into court under article 564 C.P.; but that can make no difference here, because whether they were seized or not, or whether the bailiff would have been bound to seize them if he had found them there on the table, they *are* returned before the court. Whether he could have refused to take the money or not is a point not raised. All we have to do with is the money actually before the court. Whether levied, or merely paid by an insolvent can make no difference to the rights of the creditors now that the money is here; and it can make no difference to the plaintiff if it is the money of a debtor *en déconfiture*.

Archambault & Co. for plaintiff.

Geoffrion & Co. for defendant.

CIRCUIT COURT.

RICHMOND, May, 1884.

Before BROOKS, J.

COOKE *et al.* v. PENFOLD.

Solicitor—Professional advice—Opinion given "en voyage."

A solicitor may recover for consultation and advice given outside of his office.

The plaintiffs brought the present action for $3 for professional services rendered (consultation and advice). The defendant, who combines the callings of Insurance Agent and Assignee, pleaded a general denial.

The defendant when examined in Court admitted the advice, that it was given in answer to questions asked by him, and he did not dispute the charge for the services rendered, but rested his defence on the contention that the consultation in question having taken place in the course of a casual conversation on board of a railroad car on which he and one of the plaintiffs were passengers, there was no right of action. It was elicited that the defendant was at the time actually on his way to Montreal to obtain advice on the point concerning which he consulted the plaintiff.

The COURT in rendering judgment suggested that under the circumstances, as the defendant had not expected to be charged, the plaintiff should waive costs, which was done, and judgment was rendered for the amount of the action accordingly.

Judgment for plaintiff.

C. J. Brooke, for plaintiffs.

Hon. Hy. Aylmer, for defendant.

GENERAL NOTES.

The first and second numbers of the *American Law Journal* have been issued at Columbus, Ohio. These issues promise well. In the first number there is a treatise on Master and Servant, by James M. Kerr. In the second issue Dr. Wharton has an article on the reputation of the deceased in Homicide cases. We welcome our new contemporary to the ranks of legal journalism.

Referring to the Cincinnati riots, the writer in the *Century*, from whom we have already quoted, says, in the June number:—"Out of seventy-one prosecutions for murder and manslaughter in the courts of Hamilton county during the two years ending June 30, 1883, four resulted in acquittal, two in quashed indictments, six in imprisonment, and fifty-nine were still pending. Of such a paralysis of justice the logical results are, first a carnival of crime, and then anarchy. No wonder that the trade of burking had sprung up in Cincinnati, and still less wonder that a desperate populace trampled under foot the laws that had no longer any claim on their respect. If Cincinnati had convicted and punished half, even, of the homicides prosecuted in her courts during the last two years, this riot would never have happened, a fearful loss of property and of life would have been averted, and she would have escaped a blot upon her good name."