THE LEGAL NEWS.

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The Legal News.

Vol. I. JANUARY 26, 1878. No. 4.

THE LIABILITY OF TELEGRAPH COMPANIES.

An illustration of the difficulty which sometimes occurs in applying the old and well established principles of law to the complications of modern business, is afforded by the case of *Dickson* v. *Reuter's Telegraph Co.*, which recently came before the Common Pleas Division in England, whose judgment has been affirmed by the Court of Appeal. Some of the Judges of English and American Courts seem to have been puzzled as to the light in which telegraph companies should be regarded. Should they be treated as common carriers, and bound by the strict rules applicable to common carriers? That is the view which has been adopted by certain Courts in the United States. Are they merely bailees for reward, liable only for gross negligence to the sender or sendee of the message? That is a modification of the common carrier doctrine, which has been preferred by other American Judges. But the English Courts have accepted neither definition. They exempt telegraph companies from any responsibility not arising directly from contract, and under this rule the Common Pleas Division have rejected the claim of Dickson & Co. against the Reuter's Telegraph Company, though it must be acknowledged that the plaintiffs had suffered a serious injury through a mistake made by the defendants.

It was a case of a telegram being delivered to the wrong party, but neither the sender of the message nor the person to whom it should have been delivered complained of this, but the actual recipient who, assuming that the message was intended for him, took action thereon which involved him in heavy loss. The facts were these. The plaintiffs were merchants at Valparaiso, being a branch of a firm carrying on business under a different style at Liverpool. The telegraph company, defendants, had its chief office in London, with agencies at Liverpool and elsewhere, but not at Valparaiso. They had a system, however, of forwarding the messages of several senders in what is termed a "packed telegram," each message being distinguished by a cipher known to the defendants and their agents, and to the senders. On receipt of the "packed telegrams" by the defendants' agents, the several messages were transmitted to their proper recipients. In December, 1874, the plaintiffs at Valparaiso received a message transmitted by the defendants from Monte Video (where they had an agency), purporting to be an order, from the plaintiffs' Liverpool house, for a large quantity of barley. No such message was, in fact, sent by the Liverpool firm, nor was the message intended for the plaintiffs; but the latter, believing the message to have been duly sent, proceeded to execute the order. The misdelivery of the message was caused by the negligence of an agent of the defendants, and resulted in a serious loss to the plaintiffs, the price of barley having fallen in the market.

It was under these circumstances that the plaintiffs, having undoubtedly been wronged, cast about for a remedy. They could not sue the sender of the message, because he never intended that the plaintiffs should get it, and he could not be held liable, unless the telegraph company could be considered his agents—like a clerk carrying a verbal message for his employer—a view which does not seem to have been entertained anywhere. The plaintiffs, therefore, not being able to sue the sender, tried to make the telegraph company responsible for the consequences of the blunder. The liability of the company was sought to be established on three distinct grounds: First, because they had made to the plaintiffs a statement false to their knowledge, or rather false in this respect, that they might have acquainted themselves with the fact that it was untrue. Second, it was contended that the defendants were liable, upon a suggested analogy between this case and that of *Collen* v. *Wright*, 7 E. & B. 301, in which the rule was laid down, that a person professing to contract for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. And the third and last contention of the plain-

tiffs was that the telegraph company, by the very extent and nature of their business, owe an obligation to the recipient as well as to the sender, and that it is an essential part of their business to be accurate in the delivery of their dispatches.

These three points were severally overruled by the judgment of the Common Pleas Division, since affirmed by the Court of Appeal;—the first on the ground that it is essential that the statement should be false to the defendants' knowledge to make them responsible. In the present case the company were a mere medium for the transmission of messages, and did not hold themselves out as agents of the senders.

The second ground was one of more subtlety. The defendants, it was argued, being the agents of the senders, by their telegram proposed to the plaintiffs to enter into a certain contract. That, it turned out, they had no authority to do; but it was contended that they must be taken to have warranted that they had such authority. The answer to this was that the telegraph company did not hold themselves out as agents of any one, nor did they profess to carry on the business of agents for making contracts. And further, there was no contract express or implied. "Here there is no duty cast by contract," remarked Lord Justice Bramwell, "because there is none; and none by law, for if there were, then the words of the general principle—that no action is maintainable for any statement which causes damage to the person to whom it is made, unless it be fraudulent—would have to be amended by adding to the word 'fraudulent' the words 'or careless'; but no such addition exists."

The third point—the obligation of the telegraph company from the nature of their business to be accurate in the delivery of their messages—was somewhat summarily overruled by the Common Pleas Division. "The proposition," it was remarked in the judgment, "is simply equivalent to this contention, that a telegraph company, having no contract with any individual except the sender, must be supposed to guarantee, towards all mankind, the accuracy and care of all their servants in all parts of the globe wherever they deliver a message, to such an extent at least as that if, through the negligence of any of their servants at any stage of the transmission, a message should be sent to the wrong person, that person, if he acted upon it to his detriment, would have an action."

This, we must assume, is good law; but we remain under the impression that the case of Mr. Dickson is one of great hardship. By no fault of his own, or of the senders of the message, he incurred a loss of $7,000. Has he no remedy? Are telegraph companies to be exempted from liability for the consequences of their blunders? An English legal contemporary remarks: "The Court of Appeal saw nothing unreasonable in the present state of things; and though the case was one of much hardship for the plaintiffs, yet, considering the heavy and burdensome results to telegraph companies which would follow from such an obligation, we are certainly inclined to adopt that view of the matter." This strikes us as rather a poor argument. If telegraph companies were held liable, as they might be by Statute, for mistakes, they would simply have to be more careful, or to charge a little more for messages as a sort of insurance to cover losses by mistakes. The business would only be a little more hazardous. There would be less hardship in making companies bear the consequences of an occasional blunder than in visiting them upon private individuals who have no way of protecting or insuring themselves. It may be remarked that the law of libel affords an illustration of a much more stringent rule. The publishers of a newspaper are held liable for a mere error, where the faintest suspicion of malice is absent; as in the recent case of *Larin* v. *White*, decided by the Superior Court at Montreal. Here two persons, each bearing the Christian name of "Charles," were charged with offences before the Recorder, and a newspaper reporter, by error, imputed the more serious offence to the wrong Charles. The publishers, being sued for libel, were condemned in damages, though the error was amply corrected at the earliest moment possible, and no special damages were alleged or proved. See also *Starnes* v. *Kinnear*, 6 L.C.R. 410, where damages were awarded against newspaper proprietors for inserting an advertisement, received in good faith, but which turned out to be untrue. Surely mistakes of this kind are equally or more difficult to guard against than an error in the delivery of a telegraphic message.

JUDGES' NOTES IN PRIVY COUNCIL CASES.

It is generally known that in cases appealed to the Privy Council, the Judges of the Colonial Court are required to transmit to England the reasons stated by them for or against the judgment appealed from. The Rule of Practice by which this is prescribed was made by the Judicial Committee of the Privy Council on the 12th February, 1845, in pursuance of the provisions of the Imperial Statute, 7 & 8 Vict., cap. 69, sec. 11. This Rule, of which we give a copy below, was transmitted to the Chief Justice of Montreal, under direction of the Governor General, by letter from J. M. Higginson, dated Civil Secretary's Office, Montreal, 29th April, 1845. We have heard it stated that Judges who dissent are not required to put their opinions in writing for transmission to the Privy Council; but the Rule quoted below negatives this, and we are not aware of the existence of a later rule. The order is as follows:—

"AT THE COUNCIL CHAMBER,

"*Whitehall*, the 12th of February, 1845.

"By the Judicial Committee of the Privy Council.

"Whereas by an Act passed in the 8th year of Her Majesty's reign, intituled: 'An Act for amending an Act passed in the fourth year of the reign of His late Majesty, intituled: '*An Act for the better administration of Justice in Her Majesty's Privy Council*, and to extend its jurisdiction and powers,' it was enacted that it should be lawful for the Judicial Committee of the Privy Council to make any general Rule or Regulation to be binding on all Courts in the Colonies and other Foreign Settlements of the Crown, requiring the Judges' notes of the evidence taken before such Court on any cause appealed, and of the reasons given by the Judges of such Court, or by any of them, for or against the judgment pronounced by such Court, which notes of evidence and reasons should by such Court be transmitted to the Clerk of the Privy Council within one calendar month next after the leave given by such Court to prosecute any appeal to Her Majesty in Her Privy Council, and such order of the said Committee should be binding upon all Judges of such Courts in the Colonies or Foreign Settlements of the Crown. Now therefore the Lords of the said Judicial Committee of the Privy Council are pleased to order, as it is hereby ordered, that when any appeal shall be prosecuted from any judgment of any Court in the Colonies or Foreign Settlements of the Crown, the reasons given by the Judges of such Court, or by any of such Judges for or against such judgment, should be by the Judge or Judges of such Court communicated in writing to the Registrar of such Court or other Officer whose duty it is to prepare and certify the transcript record of the proceedings in the cause, and that the same be by them transmitted in original to the Clerk of Her Majesty's Privy Council at the same time when the documents and proceedings proper to be laid before Her Majesty in Council upon the hearing of the appeal are transmitted.

"Whereof the Judges of all such Courts in the Colonies or Foreign Settlements of the Crown are to take notice and govern themselves accordingly.

(Signed,) "GREVILLE."

THE LEGAL NEWS.

The success of THE LEGAL NEWS in the first month of publication has been most gratifying, and encourages us to believe that it will continue to progress in public estimation and fill a permanent place in the literature of the country. We are unable to thank individually the many friends who have kindly expressed their appreciation of the LEGAL NEWS, and good wishes for its prosperity. We desire to do so collectively, and we would take the opportunity of remarking that the interest of a work of this character may be greatly increased by contributions from the various Provinces in which it circulates. We hope that the members of the profession and others who receive the journal will bear this in mind, and send us, from time to time, notes of such matters as they deem worthy of record.

REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Montreal, December 21, 1877.

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

LAPIERRE (plff. below), Appellant; and

L'UNION ST. JOSEPH DE MONTREAL (defts. below), Respondents.

Benefit Society—Expulsion of Member—Mandamus.

Held, that a member of an incorporated benefit society is entitled to due notice before he can be expelled for non-payment of dues; and where a member is expelled without notice a writ of mandamus will issue to restore the expelled member, subject to payment by him of arrears due.

The appellant had been expelled from membership in L'Union St. Joseph, an incorporated benefit society, for being in default to pay six months' contributions. The question was whether the member was entitled to notice. The by-law of the society did not provide for notice, the rule applicable to the case being as follows: "When a member neglects for six months to pay his contributions, or the entire amount of his entrance, the society may strike his name from the list of members; thereupon he no longer forms part of the Association. To that end at each regular general meeting, the collectors-treasurers are bound to make known the names of those thus indebted for six months' contributions or for a balance of their entrance fee; and thereupon any member may make a motion that such members be struck from the list of the society's members."

The Superior Court having held notice to be unnecessary, and the expulsion to be legal, the plaintiff appealed.

CROSS, J., for the majority of the Court, pointed out that the rule was not so framed that default of payment for a specified time of itself operated a forfeiture of the rights of membership. In England, prior notice is matter of right; *Rex* v. *Richardson*, 1 Burrows' Rep. 517; *Rex* v. *Mayor of Liverpool*, 2 Burrows' Rep. 734. The same rule had been applied in the United States; 2 Serg. & Rawle, 141. The safest rule, and the one justified by precedents, was to hold that notice is necessary.

Judgment reversed.

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

Mousseau, Chapleau & Archambault, for Respondent.

BEAUCHEMIN *et al.* (defts. below), Appellants; and SIMON (plff. below), Respondent.

Master and Servant—Unjustifiable Discharge—Action for Wages.

Held, that a servant, discharged without sufficient cause before the expiration of his term of hire, cannot, if he sues for wages, claim for more than the portion of the term which has expired at the date of the institution of the action; but, *semble*, he may bring an action of damages for breach of contract, and then the length of the unexpired portion of the term may be taken into consideration in estimating the damages.

Simon, the respondent, was engaged as a skilled workman, and not giving satisfaction to his employers, the appellants, was discharged. He brought an action at once for his wages for the whole term of hire, only a small portion of which had expired. The Superior Court dismissed the action on the ground that the plaintiff's discharge was justifiable, but in Review this decision was reversed, Mondelet, J., dissenting; and judgment went for the plaintiff for the wages of the whole term. The defendants having appealed,

DORION, C. J., for the majority of the Court, considered that the judgment must be reformed. The respondent had sued for his wages for the whole term, but he had not made any proof of damages, except the fact that he was discharged. Under the circumstances he was only entitled to $30.40 for the portion of the term which had expired at the date of the institution of the suit. He could not claim to be paid in advance wages which were not due. But his recourse would be reserved for any further claim which he might be able to establish.

MONK, J., concurring, remarked: I think the rule is settled that where a man claims wages, if he sues for wages he makes wages the measure of his damages, and he must wait until the wages are due. Here the action was brought for wages, and the plaintiff was only entitled to the $30.40 actually due. A variety of reasons may be assigned why he should not recover wages in anticipation. He may die before the term has expired, or in some other way the wages may never become due. If he wishes to recover more than is due, he must allege that he has suffered damage through the breach of contract, and must proceed to prove positively that the amount of damage claimed has been suffered. The distinction is perfectly plain. In the latter case the servant has to show that he tendered his services, and he must also show as a matter of fact that he could not get other employment.

RAMSAY, J., dissenting, considered that a servant unjustifiably discharged may claim his

wages in advance. If the period had elapsed there was very little doubt he might have brought his action for wages as well as for damages: he might have laid his action for damages measured by wages. It was so decided by this Court in *Rice & Boscovitz*. If, then, a man may recover his exact wages as the measure of his damages, why may he not allege that he could not find any other work, and bring his action for the whole term at once? It would be hard to make a man bring an action once a week as the wages accrued.

The judgment was reversed with costs against respondent, "considering that the respondent could not so claim in advance wages which were not due, and which could be the price only of respondent's services, and that under these circumstances the respondent was entitled only to the wages due and accrued when he instituted his action," &c.

Judgment reformed.

Barthe, Mousseau & Brassard for Appellants.
Gauthier & St. Pierre for Respondent.

VOISARD (deft. below), Appellant; and SAUNDERS (plff. below), Respondent.

Lease, action to resiliate—Court—Jurisdiction.

Held, that an action to resiliate a lease, where arrears of rent or damages are also claimed, must be brought in the Superior or Circuit Court according as the amount of rent or damages claimed is within the jurisdiction of the Superior or Circuit Court.

The respondent sued in the Superior Court for $60, viz., $27 for assessments, and $33 for arrears of rent, and he also prayed for the resiliation of the lease. A declinatory exception pleaded by the appellant was rejected. In appeal,

DORION, C. J., considered that the exception should have been maintained. It was no doubt a difficult question, and the decisions had been contradictory, but the interpretation which the majority of the Court put upon the Code and Statute was that where a claim for damages or rent is joined with a demand for the resiliation of the lease, the jurisdiction is determined by the amount of rent or damages claimed, irrespective of the annual value or rent of the premises leased.

TESSIER, J., dissenting, thought that if the rent or annual value was over $200, the action to rescind the lease might properly be brought in the Superior Court, though the amount of rent due or damages claimed by the action might be less than $200. If the action was brought simply to resiliate, the plaintiff was clearly entitled to go to the Superior Court; why then, because he asked something more than the rescission of the lease, should he be compelled to go to the Circuit Court?

MONK, J., also dissenting, did not see how the Circuit Court could resiliate a lease where the annual rent was perhaps a thousand dollars or more, simply because the plaintiff, in addition to the demand for resiliation, asked something which by itself would have come under the jurisdiction of the Circuit Court.

Judgment: "Considering that under Arts. 887 and 1105 C.P.C., actions to rescind a lease must be brought in the Superior or Circuit Court, according as the amount of rent or damages claimed is within the jurisdiction of the Superior or Circuit Court," &c.

Judgment reversed.

Forget & Roy, for the Appellant.
Loranger, Loranger & Pelletier. for the Respondent.

Montreal, Dec. 22, 1877.

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

THE QUEEN v. GLASS.

Embezzlement—General Deficiency.

Held, that a clerk in a bank may be convicted of embezzlement, on proof of a general deficiency supported by evidence of unlawful appropriation, though no precise sum paid by any particular person is proved to have been taken.

On a Reserved Case from the Queen's Bench, Crown side,

RAMSAY, J., remarked that the Court had already decided in the case of Glass that a general deficiency would not support an indictment for larceny; nor would it support an indictment for embezzlement; but the Reserved Case did not turn on that. The question was whether an indictment for embezzlement could not be maintained unless it was proved that a particular sum, coming from a particular person on a particular occasion, was embezzled by the prisoner. There was no doubt here that the prisoner unlawfully appropriated money, and the jury had the whole matter before them.

DORION, C. J., concurring, pointed out the im-

possibility of bringing home to a bank clerk, who perhaps received money from a hundred people in the course of a day, the charge of embezzling any particular sum received from a particular person.

MONK, J., dissenting, thought that the evidence of a general deficiency was not sufficient to support the indictment.

Conviction affirmed.

T. W. Ritchie, Q. C., for the Crown.

Goodhue (*Archibald* with him) for the prisoner.

GILBERT (deft. below), Appellant; and COINDET *ès qual.* (plff. below), Respondent.

Revendication by Judicial Guardian.

Held, that revendication will lie by a judicial guardian to recover possession of property placed in his charge, of which he has been dispossessed. (See *Moisan & Roche*, 1 Legal News, 33.)

The respondent, in his quality of *gardien d'office* in a cause pending in the Superior Court, took out a *saisie-revendication* of a certain steam-engine which had been placed in his charge, and which the appellant had removed by force. The question of law presented was similar to that decided on the same day in *Moisan & Roche* (1 Legal News, 33). The Superior Court (Mackay, J.) maintained the revendication by the guardian. In Appeal, this judgment was confirmed, Tessier, J., dissenting.

DORION, C. J., referred to C. C. 1825, which makes no distinction between a guardian and a sequestrator, and held that the same rule was applicable to both. The guardian was obliged to produce the effects placed in his charge, and if dispossessed of them he must have the right to follow them into whatever hands they had gone.

Judgment confirmed.

Joseph & Burroughs for Appellant.

S. Pagnuelo for Respondent.

MCCORKILL (opposant below), Appellant; and KNIGHT (plff. below), Respondent.

Opposition to seizure of real estate—Fraudulent title.

Held, that a person cannot oppose a seizure of real estate, though the opposition is based on possession, when the opposant's title appears to the Court to be manifestly fraudulent and simulated.

Real estate was seized as being in the possession of the vacant estate of McCorkill, deceased. The appellant, his sister, opposed, setting up title and possession under title.

The respondent, representing a judgment against McCorkill's vacant estate, contested on the ground that the opposant's title was bad in law, and simulated and fraudulent, and that there was no possession on the part of the opposant.

The majority of the Court held that where title was bad in law, and simulated and fraudulent, and where the purchaser had suffered the vendor to act as proprietor, and to be the reputed possessor *animo domini*, she could not maintain an opposition founded on the pretention that the seizure on the curator to the vacant estate was *super non domino et non possidente*, though she had done some acts of possession and the property stood in the books of the municipality in her name. (632 C. P.)

MONK, J., diss., remarked that the Judge in the Court below had not set aside the deeds under which the opposant claimed. It was impossible to view them as an absolute nullity, as the Judge below had done. Moreover, deeds could not be set aside without bringing in the parties interested. The judgment, in his view of the case, should be reversed.

CROSS, J., also dissenting, thought the opposant had possession *animo domini*—such possession as would entitle her to prescribe, and she ought not as opposant to be put in the position of a plaintiff. She should be in the position of a defendant attacked by a revocatory action.

Judgment confirmed.

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

A. & W. Robertson for Respondent.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

Quebec, Dec. 7, 1877.

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

DUFRESNE, Appellant; and DUBORD, Respondent.

Privilege—Hypothec—Donation.

A third party, in whose favor certain charges were established by deed of donation of real estate, brought a hypothecary action against the *détenteur* of the real estate, although there was no express clause in the deed

stipulating a hypothec on the immovable alienated. Arts. 2014 and 2044 C. C. The difficulty was that no legal or tacit hypothec exists, except in favor of married women, under Art. 2029 C.C., in favor of minors and interdicted persons under Art. 2030 C.C., and in favor of the Crown under Art. 2032 C.C.; and again, that such third party had no quality to sue.

In Appeal, the Court, confirming the judgment of the Court of Review (Stuart, J., *diss.*), and by which the judgment of the Superior Court was reversed, held that the action might be brought by the party benefited, and this although the deed did not by an express clause hypothecate the real estate thus given.

Judgment confirmed.

HEARN (deft. below), Appellant; and MALONEY (plff. below), Respondent.

Exception à la forme—Misnomer.

The name of respondent was "Thomas J.," and not "Thomas," as in the writ and declaration. *Held*, confirming the judgment of the Court below, that this was not such a misnomer as to be ground for an exception *à la forme*.

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

GARON, Appellant; and TREMBLAY, Respondent.

Sheriff's Sale—Mortgage Creditor—Opposition en sous ordre.

A purchased a lot of land at Sheriff's sale without paying the purchase money. He subsequently exchanged it with B, who agreed to give to the Sheriff the required security and to pay the mortgages. After security was given to the Sheriff, the property was irregularly sold *à la folle enchère* of A, and again resold by the Sheriff on the second purchaser. B then claimed the proceeds of this sale as the price of his property. C, a mortgage creditor anterior to the first Sheriff's sale, claimed the amount of his mortgage. His opposition was contested by B, and dismissed.

Held, reversing the judgment of the Superior Court, 1st, that as it did not appear that B had paid the mortgage of C, the latter had the right to be paid in preference to B the amount of his mortgage on the monies levied which represented his *gage*. 2nd, that there was sufficient evidence of the insolvency of B to sustain the opposition of C as an opposition *en sous ordre*.

MONK and RAMSAY, JJ., dissenting, were of opinion that there was no allegation of insolvency, and that no evidence, if there was any such, would therefore avail, and consequently that the opposition *en sous ordre* could not be maintained. Art. 753 C. C. P., which is exclusive.

Judgment reversed.

NOTE.—The following cases, also decided at Quebec on December 7 by the full Court, do not require special notice:

NESBITT & GAGNON.—A question of evidence. Judgment reversed.

DAWSON & MCDONALD.—Confirmed.

BERNIER & COURIER.—Clerical error in judgment.—Reformed.

CHALONER & BABY.—Question of evidence.—Judgment confirmed.

In CONNOLLY & THE PROVINCIAL INS. CO., *ante*, p. 33, Monk, J., dissented.

CIRCUIT COURT.

Waterloo, Dec. 12, 1877.

DUNKIN, J.

Ex parte LONG, Petitioner for Certiorari; and BLANCHARD, Respondent.

Circuit Court—Certiorari—C. C. P. 1056, 1225.

Held, that the Circuit Court has no jurisdiction by means of *certiorari* over judgments other than those of Commissioners' Courts or Justices of the Peace; and a writ of *certiorari* to quash the judgment of a District Magistrate was set aside.

Certiorari quashed.

Huntington & Noyes for Petitioner.

A. D. Girard for Respondent.

CURRENT EVENTS.

GREAT BRITAIN.

EXPROPRIATION CASE.—We give below the text of the judgment of the Judicial Committee of the Privy Council, Dec. 10, 1877, dismissing the appeal of Dame Harriet Morrison and others from the judgment of the Court of Queen's

Bench at Montreal in the case of *Morrison et al. v. The City of Montreal.*

Present:—Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER.

Their Lordships are called upon in this appeal to reverse two judgments of the Court of Queen's Bench at Quebec with reference to the amount of compensation to be paid by the respondents, the Corporation of the City of Montreal, to the appellants, as proprietors of certain lands expropriated for the purpose of forming a park, to be called Mount Royal Park.

It appears that, by an Act of the Colonial Legislature, 27 and 28 Vict., cap. 60, the Corporation were authorized to make very extensive improvements in the City of Montreal, and for that purpose to take lands compulsorily. By the preamble it was recited that the then existing law of expropriation led to great delays, and by section 13 a new mode of assessing compensation was provided.

By that section it was enacted that in case the Corporation should not be able to come to an amicable arrangement with the persons interested in the ground or real property required to be taken, as the price or compensation to be paid for the same, the Superior Court of Lower Canada for the district of Montreal, or a Judge thereof, should appoint three competent and disinterested persons as commissioners to fix and determine the price or compensation to be allowed for such land or real property, and that the Court or Judge should fix the day on which the commissioners should commence their operations, and also the day on which they should make their report.

By sub-section 5 of that section, the Commissioners, before proceeding, were to be duly sworn, and they were vested with the same powers and entrusted with the same duties as were conferred by the laws in force in Lower Canada upon experts in reference to appraisements, one of those duties being to view the property to be appraised.

By sub-section 7 it was enacted that it should be the duty of the Commissioners to diligently proceed to appraise and determine the amount of the price, indemnity or compensation which they should deem reasonable, and they were thereby authorized and required to hear the parties and to examine and interrogate their witnesses, as well as the members of the Council and the witnesses of the Corporation; but it was declared that the said examination and interrogatories should be made *viva voce* and not in writing, and consequently should not form part of the report to be made by the said Commissioners. The section then provided that if, in the discharge of the duties devolving upon the Commissioners, there should occur a difference of opinion between them, the decision of two of the Commissioners should have the same force and effect as if all the said Commissioners had concurred therein.

Sub-section 12 was as follows:—

"On the day fixed in and by the judgment appointing the said Commissioners, the Corporation of the said city, by their attorney or counsel, shall submit to the said Superior Court, or to one of the Judges thereof respectively, the report containing the appraisement of the said Commissioners, for the purpose of being confirmed and homologated to all intents and purposes; and the said Court or Judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested, and consequently not open to any appeal."

That sub-section was afterwards amended by the 35 Vict., cap. 32, sec. 7, which contained, amongst other things, the following words:—

"Sub-section 12 of clause 13 of the Act 27th and 28th Victoria, chapter 60, is amended by adding at the end of the said clause the following words, to wit: 'for the purposes of the expropriation;' but in case of error upon the amount of the indemnity only on the part of the Commissioners, the party expropriated, his heirs and assigns, and the said Corporation, may proceed by direct action in the ordinary manner to obtain the augmentation or reduction of the indemnity, as the case may be, and the party expropriated shall institute such action within fifteen days after the homologation of the report of the said Commissioners, and if upon such action the plaintiffs succeed, the Corporation shall deposit in Court the amount of the condemnation to be paid to the party or parties entitled thereto."

By the 32 Vict., cap. 70 (Quebec Statutes) power was given to the Corporation to form a park, to be called "Mount Royal Park," and by section 20 it was enacted that all the land required for the park should be deemed to be within the city, and that all the powers of expropriation possessed by the Corporation of Montreal should extend to it. By section 22, however, an alteration was made as to the mode of appointing the Commissioners to value the property to be expropriated, and it was enacted

that one should be appointed by the Corporation, one by the party whose property should be expropriated, and the third by a Judge of the Superior Court.

Such being the state of the law, the Corporation on the 14th March, 1873, gave notice of their intention to take an estate of which the appellants were the owners, called "The Mount Tranquil Estate." The estate contained 3,543,-104 superficial feet, equal to about 96 arpents and 28-100, and Commissioners were appointed to fix the price or compensation to be paid for the same. The Commissioners were Alexander McGibbon, Esq., on behalf of the Corporation; John McLennan, Esq., appointed by the appellants, and Robert W. Shepherd, Esq., appointed by a Judge of the Superior Court.

There may be a slight difference between a superficial foot in Canada and a superficial foot in England; but it will be sufficiently accurate for the purpose of this case to consider a superficial foot in Canada as equal to a superficial foot in England, and to treat the total quantity of land to be expropriated as amounting to about 81 English acres and a fraction.

On the 26th June, 1873, the Commissioners made a unanimous report by which they fixed $210,000 as the amount to be paid as compensation. On the 5th July, 1873, the report was homologated, and confirmed by the Hon. Mr. Justice Torrance, one of the Judges of the Superior Court, after due proof adduced of the observance of all the formalities and proceedings required by the 27 and 28 Vict., cap. 60, and the 32 Vict., cap. 70.

On the 18th July, 1873, the plaintiffs commenced an action against the respondents in the Superior Court for Lower Canada, alleging in their declaration that, in awarding the sum of $210,000, the Commissioners had fallen into error upon the amount of indemnity, and that they ought to have awarded the sum of $539,920, which was the true value of the property for purposes of expropriation.

The defendants, by their plea, denied that there was any error so far as the plaintiffs were concerned or interested, and alleged that the sum of $210,000 was, and is, in excess of the real value of the property.

The case was tried in the Superior Court by the Hon. Mr. Justice Johnson, who awarded to the plaintiffs the sum of $245,000, in addition to the amount of $210,000 previously paid under the award of the Commissioners. From that judgment the defendants, the present respondents, appealed to the Court of Queen's Bench for the Province of Quebec, and the plaintiffs, the present appellants, presented a cross appeal, seeking to augment the sum awarded to them by the Superior Court by the sum of $429,000, making the total amount $100,000 in excess of the amount claimed by them in their action.

The appeal and cross appeal were heard together, and on the 22nd June, 1876, the Court of Queen's Bench reversed the judgment of the Superior Court and dismissed the action of the plaintiffs. The Hon. Mr. Justice Monk and the Hon. Mr. Justice Ramsay, two of the Judges of the Court of Queen's Bench, dissented from the judgment of the majority of the Judges of that Court.

It was contended on behalf of the respondents that, in order to maintain an action upon the ground of error on the part of the Commissioners in respect of the amount of the indemnity, it must be shown that the award of the Commissioners was erroneous with reference to the evidence which was adduced before them. It has, however, been held in the Court of Appeal in Canada, in the case of *Montreal* v. *Bagg*, 19 Lower Canada Jurist, 136, and also in the present case, one learned Judge only dissenting, that whenever it can be shown that the Commissioners have arrived at a wrong conclusion with respect to the value of the property or the amount of compensation, the party expropriated is entitled to maintain an action to obtain an augmentation of the indemnity. Their Lordships are clearly of opinion that that is the proper construction of the Statute. The construction contended for is wholly inconsistent with the 27 and 28 Vict., cap. 60, sec. 13, cl. 7, by which it was enacted that the examination of the witnesses should not form part of the report of the Commissioners, and also with the 7th section of the 35 Vict., cap. 32, by which the party expropriated is authorized, in the case of error on the part of the Commissioners, to proceed "by direct action in the ordinary manner" to obtain an augmentation of the indemnity, which necessarily includes the right to adduce evidence in support of the action.

The substantial question to be determined in this appeal, therefore, is whether the evidence adduced in the action was sufficient to prove that there was error on the part of the Commissioners as regards the amount of the indemnity awarded by them. In determining that question, their Lordships are of opinion that the prospective capabilities of the land ought to be taken into account, and that for the purpose of this appeal, it may be assumed that some enhancement of price ought to be made upon the ground of the proprietors being obliged to part with their land compulsorily.

It was urged that at the time when the Commissioners made their award it had been determined by the Superior Court that, in valuing land for the purpose of expropriation, the prospective capabilities were not to be taken into consideration; and that, although that decision was reversed on appeal to Her Majesty in Council, the appeal had not been decided at the time when the Commissioners made their reports, and that it must be assumed that the Commissioners did not take into consideration the prospective capabilities.

The Commissioners in their report are silent as to their reasons; but their Lordships, having regard to the evidence adduced before the Commissioners and to the amount awarded by them, viz., $210,000, cannot suppose that the Commissioners excluded from their consideration the prospective capabilities, or the fact that the expropriation was compulsory. Calculating the dollar at 4s., the sum awarded was equal to £42,000, which for 81 acres was at the rate of nearly £520 an acre for the land, which at the time of the expropriation was producing but little, if any, profit.

The $245,000 awarded by the learned Judge in addition to the $210,000 awarded by the Commissioners make a total of $455,000, which at 4s. a dollar is equal to £91,000, or upwards of £1,120 an acre for each of the 81 acres, of which some of the witnesses stated that not more than one-half was fit for building purposes.

The learned Judge held very properly that the only question before him was one of fact, which must be determined by the evidence given in his presence.

The real issue, as it appears to their Lordships, was, was there error on the part of the Commissioners in awarding only the sum of $210,000, and, if so, to what extent were the plaintiffs entitled to an augmentation of it?

The report of the Commissioners, which under the former law would have been final, must, notwithstanding the alteration of the law, be considered correct until it is proved to be erroneous. The onus of proving error on the part of the Commissioners lay upon the plaintiffs. The judgment of the Commissioners, as expressed in their report, was entitled to great weight. It is not in this case merely the judgment of a majority. The report was unanimous, and was one in which the Commissioner appointed by the appellants themselves concurred. Their Lordships are of opinion that it should not be lightly overturned, and that the learned Judge did not give sufficient weight to it. He treated the question before him as he would have done if he had had to assess the amount of compensation in the first instance. He said he must determine it according to the evidence which he had heard, and by which he considered himself to be bound as absolutely as he would be by evidence proving the items of a tradesman's bill.

Treating the subject in that manner, the opinion of the Commissioners had no more weight attached to it than if they had made no report at all. In another part of his judgment the learned Judge remarked:—"I have to judge according to the evidence. As I view the case, the law no more makes me judge of the value of real estate, apart from the sworn evidence before me, than it makes me judge of the value of pork, or flour, or any other thing of which the value is in question before me. In the one case, as in the other, I can only know what is proved. If this evidence is untrue, it was the business of the defendants to contradict it, which they have not done. If it is true, I have done no injustice in acting upon it."

The learned Judge seems to have taken too narrow a view of his functions. It was his duty to make use of his own judgment and experience in deciding whether the opinions of the witnesses were sufficient to outweigh the judgment of the Commissioners. In their Lordships' opinion the learned Judge attached too much importance to the opinions of witnesses, which were chiefly of a speculative character; and they have to observe that the

amount awarded by him exceeded the valuation of some of the claimants' own witnesses.

Their Lordships, therefore, concur with the majority of the judges of the Court of Queen's Bench in the opinion that the judgment of the learned Judge of the Superior Court cannot be sustained. This being so, they are driven to the alternative of either affirming the judgments of the Court of Queen's Bench or of themselves fixing the amount of indemnity which ought to be paid. Notwithstanding the obvious inconvenience of the latter course, they would consider it their duty to adopt it if they saw clear proof that there had been a miscarriage of justice. But having listened with great attention to the arguments of the learned counsel for both parties, and having weighed with great care all the evidence in the cause, they have come to the conclusion that they would not be justified in declaring against the opinion of the majority of the judges of the Court of Queen's Bench that there was error on the part of the Commissioners with regard to the amount of indemnity determined by them.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments of the Court of Queen's Bench and to dismiss this appeal. The appellants must pay the costs of the appeal.

CANADA.

SUPREME COURT.—The Session of the Supreme Court opened at Ottawa, Jan. 21, with an augmented list of causes for hearing. We defer notice of proceedings to next issue.

THE INSOLVENT LAW.—At the annual meeting of the Dominion Board of Trade, at Ottawa, Mr. Andrew Robertson, of Montreal, gave the following figures showing the operation of the Insolvent Act in Canada :—

Years.	Insolvents.	Liabilities.
1872.....	...	$ 6,464,525
1873.....	924	12,334,192
1874.....	966	7,696,765
Total.....		$26,495,482
Or a yearly average of.....		$ 8,831,827
During the last three years there were in		
1875.....	1,968	$28,843,988
1876.....	1,728	25,517,991
1877.....	1,890	25,510,.00
Total.....	5,586	$79,871,979
Or a yearly average of.....	1,862	$26,628,986

Another effort to repeal the Act will probably be made during the approaching session of Parliament.

INDEPENDENCE OF PARLIAMENT.—Several elections have taken place and others are in progress, in Nova Scotia and New Brunswick, occasioned by the resignation of members of Parliament who have inadvertently brought themselves within the reach of sec. 2 of 31 Vict., cap. 25, "An Act further securing the independence of Parliament." The section reads as follows :—

"2. No person whosoever holding or enjoying, undertaking or executing, directly or indirectly, alone or with any other, by himself or by the interposition of any trustee or third party, any contract or agreement with Her Majesty, or with any public officer or department with respect to the public service of Canada, or under which any public money of Canada is to be paid for any service or work, shall be eligible as a member of the House of Commons, nor shall he sit or vote in the same,"

QUEBEC.

The Court of Queen's Bench, Appeal Side, sits at Montreal, Jan. 29, for the purpose of rendering judgments.

RECENT ENGLISH DECISIONS.

Company—Forfeiture.—In a notice by the secretary of a company to a shareholder to pay an overdue call or assessment, the latter was notified to pay the call with five per cent interest from the day when the call was voted, or he would forfeit his stock ; whereas the rules of the company prescribed interest in such cases only from the day when the call became payable. *Held*, that such notice was invalid, and no forfeiture took place. *Johnson* v. *Lyttle's Iron Agency*, 5 Ch. D. 687.

Husband and Wife.—O. was a clothier, and lived with his mother, but owned another house near by, where, in 1855, he installed the defendant as housekeeper, and soon after engaged to marry her. In 1861, she began on a small scale the business of fruit preserving. The business gradually increased until it became a large wholesale business. In 1874, O. married her, and went to live with her in the house she had occupied. She had carried on the business before the marriage entirely as her own, with her own means, and kept her own bank account, and at the date of the marriage she had over £1,500 on deposit. The husband's account at the same bank was overdrawn, and without his knowledge she drew from her account and deposited the amount to his to make good the

deficit. After the marriage she continued to carry on the business in her maiden name as before, and he did not in any way interfere with it, but always referred customers to her. He died intestate, and she claimed the business as her own; but his sister applied for administration on it as his. *Held*, that the widow was entitled to the whole capital and stock in trade of the business as her own.—*Ashworth* v. *Outram*, 5 Ch. D. 923.

Injunction.—In a suit by one riparian proprietor against another farther up the stream, for polluting it to the injury of the plaintiff, an injunction was asked for and also an inquiry as to damages. The defendant claimed that only damages should be awarded as in the case of obstruction of light and air. An injunction was granted.—*Pennington* v. *Brinsop Hall Coal Co.*, 5 Ch. D. 769.

2. 18 & 19 Vict. c. 128, § 9, forbids burials within one hundred yards of a dwelling house. The plaintiff applied for an injunction to restrain the defendant from using a field, or any part thereof, as a cemetery, some portion of which field was within one hundred yards of plaintiff's dwelling. It appeared that, in 1865, defendant obtained from the Secretary of State permission so to use his field, but had not been able to act on the permission; that he had recently tried to form a company for the purpose, but had failed; that he did not intend to use any of the land within one hundred yards for burials without the plaintiff's consent; that he had offered to give two months' notice to defendant whenever he proposed to act at all in the matter; and that the defendant had offered to suspend proceedings if the plaintiff would agree not to use any of the field for a cemetery. Bacon, V.C., granted a temporary injunction. *Held*, that the injunction must be dissolved.—*Lord Cowley* v. *Byas*, 5 Ch. D. 944.

RECENT UNITED STATES DECISIONS.

Arbitration.—To a bill to wind up a partnership, it is no defence that the articles of partnership provide for a reference of disputes to arbitration, and that the defendants have always been willing to refer.—*Pearl* v. *Harris*, 121 Mass. 390.

Bankruptcy.—If a collector of taxes has collected taxes and not paid them over to the town, his debt to the town is a fiduciary debt, not barred by a discharge in bankruptcy.—*Richmond* v. *Brown*, 66 Me. 373.

Bigamy.—A married man, whose wife was living, went through the ceremony of marriage with another woman, whom he could not lawfully have married had he been single, he being a negro and she a white person. *Held*, that he was guilty of bigamy.—*People* v. *Brown*, 34 Mich. 339.

Bill of Lading.—Defendants' agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, gave M. bills of lading for the goods mentioned in the receipt, knowing that he intended to raise money on the bills; and plaintiffs advanced money to M. on the security of the bills. *Held*, that the defendants were bound by their agent's act, and estopped to deny the receipt of the goods. (Earl, C. dissenting.)—*Armour* v. *Michigan Central R. R. Co.*, 65 N.Y. 111.

Constitutional Law.—1. A State Legislature has power to fix maximum rates to be charged for the storage of grain in elevators.—*Munn* v. *Illinois*, 94 U.S. 113.

2. Or for the carriage of passengers and goods by rail, though the railroads are owned by corporations, if their charters are granted subject to alteration or amendment.—*Chicago, Burlington, & Quincy R. R. Co.* v. *Iowa*, 94 U.S. 155.

3 A State statute requiring all vessels entering a harbor in the State to pay a tax of three cents per ton, imposes a duty of tonnage, and is therefore unconstitutional.—*Inman Steamship Co.* v. *Tinker*, 94 U.S. 238.

4. A State statute empowering and requiring certain officers, to the exclusion of all other persons, to make a survey of the hatches of all sea-going vessels arriving at a port in the State, *held*, unconstitutional as a regulation of commerce.—*Foster* v. *Master and Wardens of the Port of New Orleans*, 94 U.S. 246.

5. A State statute, forbidding all persons not citizens of the State to plant oysters in the waters of the State, *held*, constitutional.—*McCready* v. *Virginia*, 94 U.S. 391.

6. The United States has the right of eminent domain within the States; but a State cannot exercise it in favor of the United States.—*Darlington* v. *United States*, 82 Penn. St. 382.