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AUTHORITY OF COUNSEL.

The case of *Strauss* v. *Francis*, Law Rep. 1 Q. B. 379, is of considerable interest to the profession as a decision upon the powers of counsel in conducting trials. The point held was that "it is within the general authority of counsel retained to conduct a cause to consent to the withdrawal of a juror, and the compromise being within the counsel's apparent authority, is binding on the client notwithstanding he may have dissented, unless this dissent was brought to the knowledge of the opposite party at the time." The action was brought against the defendant, as publisher of the *Athenæum*, for an alleged libel contained in a criticism on a novel of the plaintiff, styled *The Old Ledger*. The criticism was as follows:—"Our first impression on opening this production was that so many italics and inverted commas were never congregated into the same space before; our last on closing it is that it must be the very worst attempt at a novel that has ever been perpetrated. It cannot even claim the utility of an opiate: its inanity, self-complacency, vulgarity, its profanity, its indelicacy (to use no stronger word), its display of bad Latin, bad French, bad German, and bad English, its perpetual recurrence of abuse, or, as the author more euphemistically expresses it, 'slightly digressive reflections' on great men, living and dead, and wholly unconnected with the subject,—all make the reader more indignant than weary, and how much this means can only be conceived by an operation which few are likely to attempt, and fewer still to achieve, that of reading the book." The plea was, "not guilty."

At the trial before Erle, C. J., Mr. Serjeant Ballantine, for the plaintiff, simply put in the article in question, and proved that it had reference to the plaintiff's novel. Mr. Hawkins, Q. C., for the defendant, read various paragraphs from the novel, which he contended fully justified the criticism. While he was addressing the jury Mr. Ballantine interposed, and a juror was withdrawn by consent, of which course the Chief Justice expressed his approval. The plaintiff subsequently moved to set aside the compromise, and for a new trial, on the ground that the withdrawal of a juror was against his express wish. The judges, however, were all of opinion that the application must be refused. Blackburn, J., remarked:—"Mr. Kenealy (the plaintiff's counsel) has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill, and discretion. Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client." Mellor, J., expressed a similar opinion, observing that "no counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause on the terms which the plaintiff's counsel seems to suggest, viz., without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief. I am quite sure no such limitation of authority was consented to by the counsel on the present occasion; and I think the power to withdraw a juror is strictly within the limits of the conduct of the cause. Nothing can be more to the advantage of a client than that the counsel should have the power to enter into a compromise of this kind, when he finds his own case become desperate, or an overwhelming case made by his adversary."

RETAINERS.

We copy below a singular correspondence which appeared in the *Times*, between Messrs. Shaen and Roscoe, solicitors to the Jamaica Committee, and Mr. Coleridge, Q. C., with reference to the retainer accepted by that gentleman, but objected to by Mr. Rose, repre-

senting Mr. Eyre. However flattering to Mr. Coleridge to have both parties competing for his services, it can hardly be palatable to him to be dictated to, as he appears to have been, by the Attorney General. The first letter was addressed by Messrs. Shaen and Roscoe to Mr. Coleridge:—

"8, Bedford-row, Nov. 2.

"Dear Sir,—In reference to the objection which has been taken by Mr. Rose to the retainer which we have left with you on behalf of the Jamaica Committee, we, of course, have no wish to take any opinion or decision except your own; and in reference to it we venture to submit that the Jamaica Committee, as is well known from its advertisements and other printed papers, consists of Messrs. J. S. Mill, M. P., P. A. Taylor, M. P., treasurer, F. W. Chesson, hon. secretary, and others; and that if they are incapable of retaining counsel, it must, of course, be upon grounds equally applicable to all other voluntary societies.

"As a matter of fact such societies have been constantly in the habit of tendering retainers, which have been as constantly accepted and acted upon by counsel for many years. Some months ago Mr. E. James, Q. C., M.P., and Mr. Fitzjames Stephen accepted retainers on behalf of the Jamaica Committee. It is, perhaps, not altogether immaterial that in this particular case, after we had left the retainer at your chambers, a correspondence ensued in reference to it which resulted in a note from yourself, intimating that you accepted the retainer.

"As a matter of reason it is frequently quite as important to a voluntary association to retain the services of counsel as to a corporate body or an individual. It is unnecessary to do more than refer to the litigation which has of late years been becoming more and more frequent and important, connected with provisional committees for the formation of joint-stock companies. In Chancery, indeed, voluntary associations are every day parties to litigation, as they are also as individual members in the courts of common law. We happen at the present moment to be engaged in a case of considerable importance in Chancery, in which the Bishop of Natal is plaintiff, while the defendants are the Council of the Colonial Bishopric Fund, a voluntary body without any incorporation or legal *status* to distinguish it from the Jamaica Committee.

"If the objection is good, it is good against all voluntary associations, and this would, in fact, outlaw all societies for the promotion of literature, science, and the fine arts, and all clubs, and all the numerous societies which are formed for the express purpose of enforcing certain branches of the law, such as the society for the Suppression of Vice, for the Prevention of Cruelty to Animals, the Society for the Protection of Women, &c.

"Should you deem it advisable that the question shall be submitted to the Attorney General, we shall be glad if you will kindly lay before him this letter as what we have to say on the subject.

We are, dear Sir, yours faithfully,

"Shaen & Roscoe."

To this letter Mr. Coleridge replied as follows:—

"Westminster Hall, Nov. 3.

"Dear Sirs,—I consider your retainer binding, and, for my own part, think there is nothing at all in Mr. Rose's objection. I shall take no steps in the matter, but if I am told by the Attorney-General that I am bound as a matter of professional rule to act for Mr. Eyre, of course I must do so. I can hardly conceive he will tell me so, and I shall not myself ask him any questions. Why, under the circumstances, it is thought the least worth while to contest the matter I cannot understand; but that is no concern of mine.

Believe me to be, your faithful servant,

"J. D. Coleridge."

On learning the decision of the Attorney-General Mr. Shaen wrote the following letter to Mr. Coleridge:—

"November 10.

"Dear Sir,—The Attorney-General has stated it to be his opinion that the retainer of Mr. Rose does, and that the retainer of my firm does not, prevail. I took the liberty of requesting the Attorney-General to let me know the grounds of his opinion, but he declined to do so, saying that such a course was not usual.

"If you consider yourself bound by this opinion I must of course submit, but I respectfully protest, on behalf of my clients, that they ought not, upon unexplained and technical grounds, to lose the benefit of a retainer which has been given and accepted in good faith. I have always understood that the relations between counsel and client were founded, not upon any law of contract, but upon an honourable understanding, and that the etiquette of the Bar, which, I presume, regulates the practice as to retainers, was designed only to protect counsel from conduct unbecoming gentlemen. If I am right in this, I venture to submit that the retainer which was given in the case by my firm forms an honourable understanding which cannot be upset by the offer of a retainer which is substantially that of another committee, who have already requested you in vain to lend them the support of your name. If my retainer is to be upset on account of any peculiarity in its wording, then in the name of the profession I protest against the introduction or the maintenance of unpublished technical rules upon a subject in which they are unnecessary, and for which they are unfitted. If my retainer is to be upset on the ground that such a body as the Jamaica Committee is unable in any form to retain counsel, then in the name of the general public I protest against a doctrine which rests upon no intelligible grounds, which if enforced universally would practically outlaw vast numbers of associations formed to promote the best interests of society, and which is in fact violated by the every day practice of the leaders of the profession.

"I am, dear Sir, yours faithfully,

"WILLIAM SHAEN."

Mr. Coleridge replied as follows:—

"The Athenæum, Nov. 12.

"Dear Sir,—I regret the decision at which the Attorney-General has arrived, but you will remember I told you some time ago that, whatever his decision, I should feel myself bound by it, whether I agreed with it or not. I must adhere to that determination. I cannot set myself against the authority of the head of the Bar in a matter as to which he is the recognized judge. I hope you will see, as plainly as I do, that it is really of extremely little consequence.

"Believe me to be your faithful servant,

"J. D. COLERIDGE.

"Messrs. Shaen and Roscoe."

LEGAL EXPENSES IN ENGLAND.

To the Editor of the LOWER CANADA LAW JOURNAL.

Sir,—I enclose you, 1st, a communication to the *Times*, showing the cost in England of distributing a small sum of money among claimants. In Lower Canada the same distribution would cost less than half the "Fees of taxation of costs" stated in this communication.

I also enclose a Law Report from the same paper, Knight *v.* Wheeler.

From this you will see that, besides two sets of Solicitors, four eminent Counsel are engaged towards settlement of a disputed account of twenty-two pounds odd. The costs on both sides in that case, I am assured, would amount to upwards of a hundred and fifty pounds. In Lower Canada such a case would be disposed of at costs, on both sides, after full contestation, of forty dollars.

To the Editor of the Times.

Sir,—As you inserted a letter in *The Times* of this date, relating to an estate in bankruptcy, I shall be glad if you can find space for the subjoined statement, as such an example of the mode of realizing estates under our present laws in Chancery will, I also think, be of service to the public, by calling the attention of the legal authorities to the subject.

Statement of the accounts, showing the result of a Chancery suit just concluded:—

Receipts.

Proceeds of the sale of real estate and investments of the dividends by the Accountant-General in Chancery			£717 3 10
Payments.			
Plaintiff's solicitor's costs	£449 14 2		
Defendant's solicitor's costs	234 8 4		
			£684 2 6
Fees of taxation of costs	18 5 0		
			702 7 6
Leaving a balance of			£14 16 4

I remain, Sir, yours obediently,

Canonbury, Islington, Dec. 11. J. A.

SECOND COURT.

(Before Mr. Justice KEATING *and a Common Jury.)*

KNIGHT *v.* WHEELER.

Sir R. P. Collier, Q.C., and Mr. R. E. Turner were counsel for the plaintiff; Mr. M. Chambers, Q.C., and Mr. J. O. Griffits for the defendant.

This was an action to recover £22 and some odd shillings for laying some paving-stone in front of the defendant's house in the course of the year 1865.

The plaintiff was described to be a surveyor at Mile-end, and the defendant is a banker and brewer at High Wycombe, and the only ques tion was whether the defendant was personally liable, or whether the work was done for the Paving Commissioners of the town of High Wycombe.

The jury returned a verdict for the plaintiff for £20 18s.

A gentleman died here lately. Copy of his will was sent to England to be registered, in order to letters of administration of personal property there being obtained for my client, the executor and administrator named in the will. Such letters have been obtained, of course; but in addition to £116 17 8 to the Proctor at Doctors Commons, [in which, however, was comprehended £50 for stamp duty,] my client had to pay £25 18 8 sterling to Solicitors! All done in this case would have been done in Lower Canada for twelve pounds ten, or under. To be priest-ridden is bad, to be law-ridden is as bad. John Bull is very patient, evidently, or he would reform his lawyers' bills. We, in Canada, have some things to be thankful for.

Yours,

AN ADVOCATE.

Montreal, January 4, 1867.

[In looking over English law reports, the reader is constantly struck with the vastness of the sums incurred as costs. Thus, to take one instance out of many, in *Wentworth* v. *Lloyd*, p. 280 of *Weekly Notes* for 1866, a question came up whether the taxing-master was right in disallowing an item of £72, ($350) being a charge at the rate of fourpence per folio, by a Solicitor, for *reading* certain depositions taken before a special examiner in Australia. The master had allowed a sum of £292 for preparing briefs of the same depositions. The Master of the Rolls thought that the Solicitor was entitled to some payment for reading them, but he reduced the item to £50. As to the £292 for preparing briefs, "that was the ordinary charge!"

While upon this subject, it may be interesting to copy here a rather severe sketch by Bulwer, which recently appeared in *Blackwood*. We, in Lower Canada, have the good fortune not to be subjected to the tedious and degrading tariff of charges between solicitor and client which Bulwer satirises as follows:—

"THE BILL OF COSTS.—When men go to law, I believe that in general they pay little attention to the probable cost of the suit. There is a claim to be advanced, or a right to be defended, or a demand to be resisted, which are quite sufficient to engross all anxiety. Once actually engaged in the process, the game becomes too absorbing to admit of a thought beyond the issue. Gain and *amour propre* get inextricably mingled, and the desire to win rises to a passion. Your lawyer is all this time not merely your agent, he is your affectionate friend, your trusted ally and adviser. You go to him for counsel and guidance, and you go to him besides for encouragement and consolation. He is a sort of well of official sympathy, of which you drink at all hours, happily unmindful the while that every draught of the precious spring is noted down with a corresponding six-and-eight-pence appended to it.

"The day comes, however, when, victor or vanquished, this friend's mission is to cease, and his good offices to terminate. You know that he has done certain things on your behalf, and you remember besides, the warm interest he has vouchsafed you, the numberless little occasions on which he has shown consideration for your feelings, and you recall small traits of attention, that, coming from a class of men the world is so prone to censure and sneer at, actually elevate humanity in your esteem. 'If these things can be done in the green wood,' say you to yourself, 'what may not be expected from archdeacons and deans?' What a shock then is it to your feelings, excited as they are, when this man's bill

of costs comes in, and you find not only are all the formal interviews between you duly recorded and estimated, but every chance meeting, every passing rencontre in the street or the market place, ay, even to little hospitable confabulations over your own sherry in the azure dimness of your own cuban. There they are, all of them, with the formidable title of "Consultation," as if that absurd incident that happened to you at Boulogne, or that little adventure of yours with the widow in Wales, should ever figure in this shape, and come back to your mind associated with a demand for thirteen-and-fourpence. I know of no bitterness to compare with the revulsion of that moment. Never before has human nature appeared to you so mean and so despicable. What! you ask yourself, is this the man you have been associating with, at such a sacrifice to all your tastes and liking? White baiting him at Greenwich, and imposing him upon your friends as a worthy fellow at bottom? for whom you have stooped to what score of meannesses in apologies for this or that in his behaviour? Is this the creature—you call him creature now—whom you have treated as an intimate or an equal; telling him your choicest stories, regaling him with your driest amontillado, and recounting for his edification, those little traits of your early life, which, had it not been for the indolence of your disposition, would have, ere this, made you a Cabinet Minister or a Lord Chancellor? Is this the serpent you have been nursing in your bosom? For a while the whole wide universe seems hateful and repulsive, and you actually dread the commonest intercourse with your fellows, lest your passing greeting or your farewell rise against you in six-and-eightpences." Ed.]

RECENT ENGLISH DECISIONS.

HOUSE OF LORDS.

Corporation—Damages.—The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person, or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished. *Mersey Docks Trustees* v. *Gibbs*, Law Rep. 1 H. L. 93.

Riparian Ownership—Alveus of a running Stream.—The soil of the *alveus* is not the common property of the respective owners on the opposite sides of the river; the share of each belongs to him in severalty, and extends *usque ad medium filum aquæ;* but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream. A fence or bulwark on the bank is allowable; but the *alveus* is sacred. Any encroachment by one proprietor may be resisted by the other; and the onus of proving that the act is *not* an encroachment falls on the party doing it, who is *primâ facie* held responsible. Mere apprehension, without some show of injury, will not ground a complaint; but it is not necessary to obtain or to be guided by scientific opinions. *Per* Lord *Westbury*:—This decision establishes the important principle, that an encroachment on the *alveus* of a running stream may be complained of, without the necessity of proving that damage has been sustained, or is likely to be sustained. *Bickett* v. *Morris*, Law Rep. 1 H. L. Sc. 47.

Will—Gift, original and substitutional.—A testator devised his estate and effects to trustees to pay the proceeds to his wife for life, and "after her decease, to distribute and divide the whole, &c., amongst such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share":—*Held*, that "issue" here meant children; and that the words, "should then be dead leaving issue," meant, should before then have died leaving issue.

Three of the nephews died in the life-time of the testator's widow, two of them without ever having had a child, one of them leaving a daughter. This daughter, likewise, died before the widow:—*Held*, that the gift to the

children was original, not substitutional, and that this daughter, upon her father's death, took a vested interest in the share which, if he had survived, he would have taken. The fact that the gift to the parent was contingent did not affect the nature of the gift to the issue, which was an independent bequest. *Martin* v. *Holgate*, Law Rep. 1 H. L. 175.

PRIVY COUNCIL.

Practice—Appeal.—Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below: upon the allegation, that though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject matter at issue exceeded in value the appealable amount. *Mutusawmy Jagavera Yettara Naiker* v. *Vencataswara Yettia*, Law Rep. 1 P. C. 1.

Insolvency—Partnership—Liability of New Firm for debts of Old.—R., F., and R., partners in business, and dealing with F. S. & Co., took T. and S., clerks in their employment, into partnership with them. The partnership was constituted by deed, to continue for three years; and a balance sheet, showing the liabilities and assets of the existing firm, was drawn up and admitted by all the partners. The new firm continued to trade, up to the period of its insolvency, upon the same footing and with the same books as the old firm—no distinction being made in their payments, or balances, or between the debts or assets of the new, or what was the old firm. F., S. & Co. continued to deal with the new as they had done with the old firm. R., F. & R. having become insolvent, F., S. & Co., creditors to a large amount, proved against the estate of the new firm. R. and B., also creditors of the new firm, proved against their estate: and sought to expunge the proof of F., S. & Co., on the ground that their debt having accrued previous to the new partners being taken in, was due from the old, and not from the new firm:—*Held*, by the Judicial Committee (affirming the judgment of the Supreme Court of Victoria), that there was sufficient proof in the dealings and transactions of the several parties, to show that the new firm on its formation adopted the liabilities of the old firm, and that F., S. & Co. had consented to accept the liability of the new firm, and to discharge the old firm, their original debtors.

The Act 5 Vict., No. 17 (the principal *Insolvent Act* of the colony of Victoria), sec. 39, enacts, "that any creditor who shall have or hold any security or lien upon any part of the insolvent estate, shall, when he is the petitioning creditor, be obliged upon oath, in the affidavit accompanying the petition, and when he is not the petitioning creditor, in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance, &c. And in case any creditor shall hold any security or lien for payment of his debt, &c., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for, the balance after such deduction." *Held*, that this enactment does not destroy the distinction between the joint and separate estate of an insolvent, so as to compel a creditor, holding a mortgage security on the separate estate, to estimate and deduct its value, before he can be allowed to prove against the joint estate. *Rolfe* and *The Bank of Australasia* v. *Flower, Salting & Co.*, Law Rep. 1 P. C. 27.

Vice-Admiralty Court—Appeal to Privy Council.—Sec. 23 of the 26 & 27 Vic., c. 24, which limits the time for appealing from the Vice-Admiralty Courts abroad to six months, vests, by the same section, a discretion in the Judicial Committee to admit an appeal not withstanding six months have elapsed. Circumstances showing that there was no wilful laches in not lodging petition of appeal in the Registry of the High Court of Admiralty within the prescribed time, and that the delay arose from the parties waiting a decision on a pending appeal, which involved a similar question, held sufficient for the exercise of the discretion vested in the Judicial Committee, to admit an appeal under that section, upon payment o

the costs of the application, and giving security for further costs. *Cassanova* v. *Regina*, Law Rep. 1 P. C. 115.

Letters Patent—Prolongation of Term.—To entitle a patentee to a prolongation of the term of Letters Patent, he must satisfactorily establish the amount of his profits.—A patentee did not manufacture or sell the patented article (ship anchors), but granted licenses to ironsmiths to manufacture, from whom he received royalties. On an application by him for an extension of the term of the Letters Patent, on the ground of inadequate remuneration, the accounts produced of his own expenditure in carrying on the patent being unsatisfactory, and no accounts given of the profits derived by the licensees, a prolongation of the Letters Patent was refused; first, as the patentee's accounts were unsatisfactory; and, secondly, from the patentee having so dealt with his patent rights as to deprive him of the power of showing the amount of profit derived from the working of the patent. *In re* Trotman's Patent, Law Rep. 1 P. C. 118.

Sale of Hull of stranded Ship by auction —Variation of Conditions of Sale—Re-sale.—Action to recover the difference between the original price bid at public auction, and the sum realized upon a re-sale, for the hull of a stranded vessel, sold by the master and purchased by the defendant, upon conditions of sale, which were appended to the memorandum of purchase, and signed after the sale by the defendant's agent on his behalf; which conditions differed materially from those appended to the catalogue of sale, and which were the conditions read out at the auction. The defendant paid the deposit upon the terms of the conditions of sale read at the auction, and took possession of the vessel, without having any formal transfer made to him. The vessel was laden with rice, and was soon afterwards, by order of the Board of Health, destroyed as a nuisance. The defendant having declined to complete the purchase, the vendor resumed possession of the vessel, and re-sold it at a loss. The form of the action was by libel, according to the Roman-Dutch law. The defendant in his answer, among other defences, denied that he had purchased under the conditions appended to the memorandum of sale, and prayed the dismissal of the action with costs; and in reconvention, for payment of the amount of the deposit and damages he had sustained, to the amount of £1,000, for loss of profits and advantages from the vessel, her tackle and implements. The judgment of the District Court was in favour of the plaintiff, the judge of that Court being of opinion, that the defendant purchased on the conditions of sale appended to the memorandum of purchase, and that, according to those conditions, the plaintiff had rightly resumed possession and re-sold the vessel. The Supreme Court (of Ceylon) reversed that judgment, and ordered judgment to be entered for the defendant, being of opinion that the plaintiff having founded his claim upon an agreement which gave, among other things, a right of re-sale, with conditions different from those read at the auction, and having, in consequence, repossessed himself of the vessel and re-sold her, had thereby deprived himself of the right to recover from the defendant, and awarded the defendant the damages claimed by his answer:—*Held*, by the Judicial Committee, 1st, that though the merits of the case were with the plaintiff, neither the judgment of the District or Supreme Court could be sustained, as there was no other agreement between the parties than the one founded on the conditions read out in the auction room at the sale; and that the plaintiff, having sued upon a different contract, was not entitled to recover, and ought to have been non-suited; and, 2nd, that in the absence of any evidence of damage, the defendant was not entitled to judgment for damages:—*Held*, further, that although the act of the plaintiff, in retaking the hull of the ship and selling her was wrongful, and entitled the defendant to bring an action of trover, it did not amount to a recision of the contract. If before actual delivery, the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance which may be still due. The rule applies where there has been a delivery, and the vendor afterwards takes

the property out of the possession of the purchaser, and re-sells it. *Page* v. *Cowasjee Eduljee*, Law Rep. 1 P. C. 127.

Mauritius, Law of—Code Civil, Art. 1384—*Commettant and Préposé, definition of—Master and Servant—Negligence—Fire—Liability for Damage.*—By Art. 1384 of the *Code Civil*, the law prevailing in Mauritius, it is provided that "*Les Maîtres et les Commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés:—Held*, that in order to make the "*commettant*" responsible for damage occasioned by the negligence of the "*préposé*," it is necessary to establish that the "*préposé*" was acting "*sous les ordres, sous la direction et la surveillance du commettant.*" "*Préposé*," in Art. 1384, means a person who stands in the same relation to the "*commettant*" as "*domestique*" does to "*maître*," namely, a person whom the "*commettant*" has instructed to perform certain things on his behalf.—A. hired certain Indians, who were the heads of gangs of labourers, to clear a piece of land of weeds and brushwood at a job price, to be paid to their gangs. Through the negligence of the persons employed, the sparks of a fire kindled on A.'s land set fire to and burnt down a house in the immediate neighbourhood, belonging to B. It was proved in evidence that A. interfered with the work, and directed the Indians where to work:—*Held*, affirming the judgment of the Supreme Court at Mauritius, that A. was the "*commettant*," and the labourers "*préposés*," within the meaning of the Art. 1384 of the *Code Civil*, and that as the fire was occasioned by the men employed by A., he was responsible for their negligence, and liable to B. for the damage sustained by the fire. *Sérandat* v. *Saïsse*, Law Rep. 1 P. C. 152.

Code Civil—Arts. 765, 766—*Irregular Succession.*—The *Code Civil* of France, which is in force in the Island of Mauritius, Liv. III. Ch. IV. *tit.* 1, "*Des successions irrégulières*," Art. 765, provides as follows:—

"*La succession de l'enfant naturel décédé sans postérité est dévolue au père ou à la mère qui l'a reconnu; ou par moitié à tous les deux, s'il a été reconnu par l'un et par l'autre:*" and Art. 766 provides, "*En cas de prédécès des père et mère de l'enfant naturel, les biens qu'il en avait reçus passent aux frères ou sœurs légitimes, s'ils se retrouvent en nature dans la succession: les actions en reprise, s'il en existe, ou le prix de ces biens aliénés, s'il est encore dû, retournent également aux frères et sœurs légitimes. Tous les autres biens passent aux frères et sœurs naturels, ou à leurs descendants.*"

Held, that the word "*descendants*" in Art. 769, is not limited to legitimate descendants, so as to preclude the natural children of a natural brother succeeding to their natural uncle's property.

Held, further, that there is no restriction with respect to the word "descendants" in Art. 766; that natural children are "descendants" within the meaning of Arts. 765 and 766, which constitute a special law for determining the succession of natural children dying without posterity; and that "*postérité*" and "*descendants*" in those Articles are convertible terms.—B., an illegitimate child duly acknowledged, survived his parents, and died domiciled in the Island of Mauritius, of which he was a native, intestate, leaving self-acquired property. He had no legitimate relations, but had two nieces, illegitimate daughters of an only illegitimate brother, who pre-deceased him, by whom they were duly acknowledged, as also by B. One of the nieces died shortly after B., having previously constituted her sister *légataire universelle*. The Government claimed the succession of B.:—*Held*, that the surviving niece was entitled to succeed to B.'s property in preference to the claim of the Government on the ground of bastardy. *Her Majesty's Procureur* v. *Bruneau*, Law Rep. 1 P. C. 169.

EQUITY CASES.

Immoral Purpose.—A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up, at the end of the term, in good repair, and not to use the house as a brothel; and the assignment contained a covenant to indemnify

the lessee from the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee, which was being administered:—*Held*, that the assignment, and everything arising out of it, was so tainted with the immoral purpose, that the plaintiff could not recover. *Smith* v. *White*, Law Rep. 1 Eq. 626.

Construction of Will.—Gift by will of a sum of stock to A. for life, remainder to any wife he might thereafter marry for life or widowhood, remainder to the children of A. absolutely; and in case A. should die *unmarried and without issue*, then, from and after his decease, to B., C., and D., share and share alike, or to such of them as should be living at A.'s death, his, her, or their executors, administrators and assigns absolutely. A. survived B., C., and D., and died a widower, without ever having had a child:—*Held*, that upon the death of A. the representatives of B., C., and D. took the legacy in equal shares. The Court, treating the word "unmarried" as a word of flexible meaning, decided that it here meant "without leaving a widow," in order to give expression to the whole clause. *In re Sanders' Trusts*, Law Rep. 1 Eq. 675.

Copyright—Directory.—The compiler of a directory or guide-book, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry, by adopting and re-publishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself, and the only legitimate use which he can make of previous works, is for the purpose of verifying the correctness of his results. *Kelly* v. *Morris*, Law Rep. 1 Eq. 697.

COMMON PLEAS.

Insurance—Proximate Cause of Loss or Damage.—By a policy of insurance, plate-glass in the plaintiff's shop-front was insured against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises,"—none of the glass being "horizontally placed or moveable." A fire broke out on premises adjoining those of the plaintiff, and slightly damaged the rear of his shop, but did not approach that part where the plate-glass was. Whilst the plaintiff, assisted by neighbours, was removing his stock and furniture to a place of safety, a mob, attracted by the fire, tore down the shop shutters, and broke the windows for the purpose of plunder:—*Held*, that the proximate cause of the damage was the lawless act of the mob, and that it did not originate from "fire, or breakage during removal," within the exception in the policy. *Marsden* v. *City and County Assurance Company*, Law Rep. 1 C. P. 232.

Bill of Lading.—Goods were shipped for Bombay under a bill of lading making them deliverable "to order or assigns." The consignor indorsed the bill of lading in blank, and deposited it with a banker as security for an advance of money, and, on his repaying the sum advanced, the bill of lading was re-indorsed and delivered back to him:—*Held*, that such re-indorsement of the bill of lading to him remitted the consignor to all his rights as against the ship-owners under the original contract; and, consequently, that he was entitled to sue them for a breach, whether occurring before or after such re-indorsement. *Short* v. *Simpson*, Law Rep. 1 C. P. 248.

Negligence—Unfenced Hole.—Upon the premises of the defendant, a sugar-refiner, was a hole or shoot on a level with the floor, used for raising and lowering sugar to and from the different stories of the building, and usual, necessary and proper in the way of the defendant's business. Whilst in use, it was necessary and proper that this hole should be unfenced. When not in use, it was sometimes necessary, for the purpose of ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might at such times, without injury to the business, have been fenced by a rail. The plaintiff, a journeyman gas-fitter, in the employ of a patentee who had fixed a patent gas-regulator upon the defendant's premises, for which he was to be paid provided it effected a certain amount of saving in the consumption

of gas, went upon the premises with his employer's agent for the purpose of examining the several burners, so as to test the new apparatus. Whilst thus engaged upon an upper floor of the building, the plaintiff, under circumstances as to which the evidence was conflicting, but accidentally, and, as the jury found, without any fault or negligence on his part, fell through the hole and was injured:—*Held*, that, inasmuch as the plaintiff was upon the premises on lawful business, in the course of fulfilling a contract in which he (or his employer) and the defendant both had an interest, and the hole or shoot was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him, in suffering the hole to be unfenced. *Indermaur* v. *Dames*, Law Rep. 1 C. P. 274.

Master and Servant—Negligence of Fellow-servant.—The plaintiff was employed by a railway company as a laborer, to assist in loading what is called a "pick-up train," with materials left by plate-layers and others upon the line. One of the terms of his engagement was, that he should be carried by the train from Birmingham (where he resided, and whence the train started,) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured:—*Held*, that, inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment. *Tunney* v. *Midland Railway Co.*, Law Rep. 1 C. P. 291.

Carrier—Measure of Damages.—The plaintiff sent goods from Manchester by the defendants' railway to his traveller at Cardiff; the delivery of the goods was, through the negligence of the defendants, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits which he would have derived from a sale at Cardiff:—*Held*, that in the absence of notice to the defendants of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay. *Great Western Railway Co.* v. *Redmayne*, Law Rep. 1 C. P. 329.

Breach of Promise of Marriage.—In an action for breach of promise of marriage, where the plaintiff has been seduced by the defendant, it is no misdirection to tell the jury, that, in estimating the damages, they are at liberty to take into their consideration the altered social position of the plaintiff in relation to her home and family, through the defendant's conduct towards her. *Berry* v. *Da Costa*, Law Rep. 1 C. P. 331.

EXCHEQUER.

Shipping—Marine Policy.—In a homeward policy the words "*at and from*" a port named are to be construed in their natural geographical sense, without reference to the expiration of an outward policy "to" the same place, and therefore the policy attaches as soon as the vessel arrives within the port named, and although not *safely moored*.—A vessel insured "*at and from*" Havana was injured by coming into contact with an anchor after entering the harbour, and whilst passing over a shoal up to her place of discharge:—*Held*, that the policy had attached. *Haughton* v. *Empire Marine Insurance Co.*, Law Rep. 1 Ex. 206.

Contract void for Immorality.—One who makes a contract for sale or hire, with the knowledge that the other contracting party intends to apply the subject matter of the contract to an immoral purpose, cannot recover upon the contract; it is not necessary that he should expect to be paid out of the proceeds of the immoral act.—The defendant, a prostitute, was sued by the plaintiffs, coach-builders, for the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment; but the jury found that the plaintiffs knew her to be a prostitute, and

supplied the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men:—*Held*, that the plaintiffs could not recover. *Pearce* v. *Brooks*, Law Rep. 1 Ex. 213.

Negligence—Dangerous Instrument.—The defendant exposed in a public place for sale, unfenced, and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion. The plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within. the machine, whilst another boy was turning the handle which moved it, and his fingers were crushed: *Held*, that the plaintiff could not maintain any action for the injury, the accident being directly caused by his own act. *Mangan* v. *Atterton*, Law Rep. 1 Ex. 239.

Corenant—Nullity of Marriage.—To an action on a covenant made by the defendant in consideration of his daughter's marriage, the defendant pleaded that the marriage was null and void by reason of the impotence of the husband, without stating that it had been avoided by the sentence of any Court, or that either of the parties had elected to treat it as void:—*Held*, a bad plea, on the ground that whether, as between the parties to it, such marriage could or could not be treated as absolutely null and void, it was certainly not open to a third person to make the objection, when neither of the parties concerned had done any act to raise the question. *Cavell* v. *Prince*, Law Rep. 1 Ex. 246.

Contract—Illegality—Wager.—The plaintiff and defendant agreed to ride a race, each on his own horse, both the horses ridden to become the property of the winner:—*Held*, that the contract was void under the statute, as being "by way of gaming or wagering." *Coombes* v. *Dibble*, Law Rep. 1 Ex. 248.

Family Bible.—Entries of pedigree in a family bible or testament, which is produced from the proper custody, are admissible as evidence, without proof of their handwriting or authorship. Baron Martin observed:—"To require evidence of the handwriting or authorship of the entries, is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been." *Hubbard* v. *Lees & Purden*, Law Rep. 1 Ex. 255.

CROWN CASES RESERVED.

Receiving—Joint Indictment.—The 24 & 25 Vic. c. 96, s. 94, which enacts that, "If, upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of the said property," extends to cases where, upon an indictment for a joint receipt, it is proved that the prisoners separately received *the whole* of the stolen property. *The Queen* v. *Reardon and Bloor*, Law Rep. 1 C. C. 31.

Witness—Incompetency.—The evidence of an incompetent witness may be withdrawn from the jury upon the incompetency appearing during his examination-in-chief, although he has been examined previously on the *voir dire* and pronounced to be competent. The prisoner was tried upon an indictment charging him with an assault upon a deaf and dumb girl, with intent to ravish her. The girl had never been instructed in the deaf and dumb alphabet, but an expert in regard to communicating with deaf and dumb persons believed, after testing her, that he was able to understand her signs and gestures, and to make himself understood by her. He was then sworn to interpret, but in the course of the examination he informed the Court that he was satisfied he had been mistaken, as it appeared that the girl answered "yes" to every question, without distinction. The Court then ordered the witness to be removed from the box, and the trial proceeded. The jury having convicted the prisoner on the other evidence, the judge reserved the point as to the propriety of withdrawing the evidence of the girl when she was found to be incompetent. It was held that he had a perfect

right to do so, and the conviction was affirmed. *The Queen* v. *Whitehead*, Law Rep. 1 C. C. 33.

Rape—Idiot—Consent.—Upon an indictment for rape there must be some evidence that the act was without the consent of the woman, even where she is an idiot. In such a case, where there were no appearances of force having been used to the woman, and the only evidence of the connection was the prisoner's own admission, coupled with the statement that it was done with her consent, the Court held that there was no evidence for the jury. *The Queen* v. *Fletcher*, Law Rep. 1 C. C. 39.

PROBATE AND DIVORCE.

Insertion of clause in a codicil by mistake.—Where a codicil had been read over to a capable testatrix, and duly attested by her, the Court refused to exclude from probate certain words inserted in it, and which were not in accordance with the instructions given by her to her solicitor, nor were contained in the draft codicil, which had been read over to and approved by her, although such words were sworn by the solicitor who prepared the codicil to have been inserted without any instructions from her, and by his inadvertence. The Court stated the general rules which, since the Wills Act, ought to govern its action in reference to a duly executed paper, as follows:—"First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Lastly, that the above rules apply equally to a portion of the will as to the whole." *Guardhouse* v. *Blackburn*, Law Rep. 1 P. & D. 109.

Suit for Dissolution of Marriage—Collusion.—On the hearing of a suit by a wife for a dissolution of marriage on the ground of adultery, coupled with desertion, it was shown that the adultery charged and proved, was committed by the husband in fulfilment of a promise previously made by him to the wife, that he would give her an opportunity of obtaining a divorce; that the adultery had been committed in order that it might be proved; that evidence of it had been obtained by means of information supplied to the wife by the husband; and that the wife was acting in concert with the husband to obtain evidence of it by the means indicated by him:—*Held*, that the husband and wife were guilty of collusion. Petition dismissed. *Todd* v. *Todd*, Law Rep. 1 P. & D. 121.

Nullity of Marriage.— In a suit by a woman for nullity, on the ground of the man's impotence, the petitioner's evidence that the marriage had never been consummated was neither corroborated nor contradicted, the medical evidence being consistent both with consummation and non-consummation. It appeared that cohabitation had continued for eight years without complaint on the part of the petitioner, and that the separation was caused by the respondent's ill-treatment of her. The Court found that the charge was not sufficiently proved, and dismissed the petition. *T.* v. *D.*, Law Rep. 1 P. & D. 127.

Mormon Marriage—Polygamy.—Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman, to the exclusion of all others. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the *lex loci*,

and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognize it as a valid marriage, in a suit instituted by one of the parties against the other, for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations. The petitioner in this case was a man who had renounced the Mormon faith and left Utah. But his Mormon wife refused to accompany him, and became the wife of another Mormon. This was the adultery complained of. The Court refused to grant a dissolution of the marriage, observing that the matrimonial law of England is adapted to the Christian marriage, and wholly inapplicable to polygamy. If the matrimonial law of England were applied to the first of a series of polygamous unions, and a Mormon had married fifty women in succession, the Court "might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life." *Hyde* v. *Hyde* and *Woodmansee*, Law Rep. 1 P. & D. 130.

Will.—A will commencing with the words, "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," &c., *held*, not to be contingent upon the event of the testator's death on the journey he was about to take when the will was executed. *In the Goods of Dobson*, 1 P. & D. 88.

Dissolution of Marriage—Cruelty—Drunkenness.—Habitual drunkenness, and a series of annoyances, and extraordinary conduct on the part of the husband, do not constitute legal cruelty. The communication of a venereal disorder to the wife must have been wilful on the part of the husband to establish it as cruelty. But that wilfulness may be presumed from the surrounding circumstances, by the condition of the husband and by the probabilities of the case, after such explanations as he may offer. *Primâ facie*, the husband's state of health is to be presumed to be within his own knowledge; but he may rebut this by his own oath, when admissible as a witness, or by other proof. *Brown* v. *Brown*, 1 P. & D. 46.

QUEEN'S BENCH.

Principal and Agent—Sale by Auction.—An auctioneer, who is authorized to sell goods on the conditions that purchasers shall pay a deposit at once, and the remainder of the purchase money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange; and such payment will not discharge the purchaser. *Williams* v. *Evans*, Law Rep. 1 Q. B. 352.

Promissory Note.—"On demand I promise to pay to the trustees of the Wesleyan Chapel, or their treasurer for the time being, £100," is a good promissory note, for there is no uncertainty in the payee, as the trustees alone are to be taken as payees, and their treasurer as their agent only to receive payment. *Holmes* v. *Jaques*, Law Rep. 1 Q. B. 376.

Master and Servant—Second Offence.—A workman entered into a contract with a master to serve him for the term of two years; he absented himself during the continuance of the contract from his master's service, and (under 4 Geo. 4, c. 34, s. 3) he was summoned before justices, convicted, and committed. After the imprisonment had expired, and while the term of service still continued, he refused to return to his master's service, and was again summoned before justices, when he stated that he considered his contract determined by the commitment. The justices found that he *bonâ fide* believed that he could not be compelled to return to his employment, and dismissed the summons:—*Held*, that although the servant had not returned to the service, yet, as the contract continued, he had been guilty of a fresh offence, for which, notwithstanding his conviction and imprisonment, he could be again convicted; and that his *bonâ fide* belief that he could not be compelled to return to his employment did not constitute a lawful excuse for his absence. Shee, J., did not approve of this decision, observing that "the justices ought in such

a case to take into their consideration that the person charged has declined absolutely to return to the service, and punish him once for all." *Unwin* v. *Clarke*, Law. Rep. 1 Q. B. 417.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH (APPEAL SIDE).

Quebec, December Term, 1866.

Coram—DUVAL, C. J., AYLWIN, DRUMMOND, BADGLEY, and MONDELET, JJ.

COOK ET AL., (Defendants in the Court below) Appellants.

VERRAULT, (Plaintiff in the Court below), Respondent.

Licensed Culler—Measurement of Timber.

Held, that a licensed culler, employed by the Supervisor, cannot recover payment for any other measurement of timber than that directed by the statute, even when specially directed by the owner of the timber to measure it in some other way.

This was an appeal from the final judgment rendered in the cause by the Circuit Court, at Quebec, on the 25th April, 1866, by which the appellants were condemned to pay to the respondent $130.40, with interest and costs.

The respondent's action in the Court below was for work and labor, and, more particularly, for the re-measuring with a string 1,156 pieces of waney white pine timber, containing 86,933 feet, at $1.50 per thousand feet.

The appellants pleaded a denial; and that respondent, a duly licensed culler, and attached as such to the Supervisor's Office, had been deputed by the Supervisor to measure such timber; that the charges therefor had been paid to the office; and, moreover, that respondent could not by law claim in his own name any sum of money for measuring appellant's timber.

In answer to the above plea, respondent replied, that he did not claim in his quality of culler to be paid for the work done; but that he had re-measured said timber with a string at appellant's request, after it had been duly measured by "Calliper," the only measurement known to the Statute, and the measurement entered on the books of the Supervisor of Cullers, as required by law; and that he was entitled to be paid for his services performed, wholly distinct from his quality of culler, and not according to the requirements of the statute respecting the measurement of timber, but for another purpose altogether.

The respondent's evidence established the work done, and the value.

It was proved that the only mode of measurement of waney timber recognised by the Supervisor's Office is the one styled "Calliper" measurement, and the Supervisor will not authorize any other mode; nor will he allow to be entered on the books of his office the dimensions of waney timber taken by any other kind of measurement. In his deposition, the Supervisor said:—"If a culler, "or any other person, came to my office with "the dimensions of waney timber, measured "with a string, by string measurement, in "order to have the same entered on the books "of the office, and a specification thereof "made, I should refuse to receive it." It was proved in the case that, although "Calliper" measurement is the one adopted by the Supervisor's Office, and the one which all owners of waney timber must first have performed, in order to comply with the statute and the rules of the Supervisor's Office, yet the trade at Quebec prefer for waney timber the measurement known as "string" measurement; and such timber is nearly always sold by "string" measurement. This was why the appellants engaged the respondent's services to re-measure the timber, which he had previously measured, according to the rules of the Supervisor's Office, by "Calliper" measurement.

Hearn, for the appellants, urged that the respondent's action in the Court below ought to have been dismissed, as under Cap. 46, C. S. C. (An Act respecting the culling and measuring of timber), he being a licensed culler in the employ of the Supervisor, not only could not recover payment for the measuring which he claims to have done, but was subject to a penalty of $400, for having done it without the knowledge and consent of the Supervisor, who alone has the right to sue for payment for work done by the cullers in his service.

Alleyn, for respondent. There is nothing in the law to prevent the respondent from

performing the work for which he now claims to be paid. He had previously, upon the order of the Supervisor of Cullers, measured the timber in question by "Calliper" measurement, and a proper return thereof had been made to the Supervisor's Office and entered in the books of the office.

It was then that the appellants required the respondent to re-measure said timber with a string, as by that measurement appellants sold said timber to Dobell & Co.; and it was absolutely necessary that it should be so measured in the interest of the defendants, so as to enable them to be paid by the purchasers of the timber, Messrs. Dobell & Co., who had bought it to be paid for by string measurement.

In the present instance the respondent did not infringe the law, or act in any way contrary to his duty as a licensed culler, inasmuch as he had performed the work imposed upon him by law, and made a proper return thereof to the office; and in measuring the timber afterwards with a string, he did that which it was necessary for the appellants to have performed in order to sell their timber, and which the Supervisor of Cullers or his office would not officially recognise.

BADGLEY, J. This action is for the recovery, by a licensed culler, of his string measurement, for which he was not paid, done simultaneously by him with the legal measurement by "Calliper," for which he was paid. The defendants had at Quebec a raft of timber which required necessarily to be measured and specified through the Supervisor's Office. They held over, however, making their application to the Supervisor, until the plaintiff's turn for service should come on the office roll, in order to serve him, by giving him a considerable job. He was in due time appointed to the service, and performed the duty by the legally recognized official *calliper* measurement, which he duly reported at the office, and for which he received his full payment; but whilst so employed in this official measurement, he also made the string measurement which he did not report to the office, the payment of which he now claims from the defendants.

According to law and to the enactments of the statute in that behalf, all timber arriving at Quebec must be measured for shipment, and the measurement is required to be done by a licensed culler whose name stands on the Supervisor's list or roll, and who is named to that duty by the Supervisor, when demanded by the owner of the timber. The statutory measurement is by "Calliper," and the results of that measurement, when completed, must be returned to the office of the Supervisor, by whom the specifications of quantities are drawn, and verified by the measuring culler himself. No other measurement is recognized by law; the rates for the measurement are fixed by the statute, and are required to be paid into the office, where the culler is paid therefrom for himself and his assistants, so that no possible collusion could take place between the owner of the timber and the measurer of it.

The defendants procured the plaintiff's service for the measurement as above stated: his order from the office was dated on the 5th September, and was returned to the office with his work done on the 13th October following, and thereupon the specifications were made. The office fees paid by the defendants amounted to £100, of which the plaintiff received £64. No particular time was limited for the doing of the work, which was paid for by the tariff according to the quantity measured. The legislature requires that the measurement should be made by Calliper, and recognizes none other as statutory; the trade sometimes uses the string measurement (*au cordon*), which does not necessitate the act of a licensed culler, and might be made by any competent person. The plaintiff as a licensed culler made the Calliper measurement, and *simultaneously* with that made the string measurement. The Calliper measurement was for the requirements of the law, the string measurement for the requirements of the trade. If the latter were made independently of the former, and after it had been done and returned to the office, it would of course not be obnoxious to the statutory penalties, because in that case the law had been complied with. String measurement then in itself was not illegal, and only became so under particular circumstances.

Now the plaintiff's action, as set out in his declaration, was simply for work and labor, and particularly for remeasuring with a string the mentioned quantity of timber, at $1.50 per M. feet. The defendants denied their liability, and specially alleged that plaintiff was a licensed culler, had been duly deputed to measure the timber and had done so; that the regular charges therefor had been duly paid into the Supervisor's office, and that as such licensed culler he could not by law claim in his own name any money for measuring by string the defendant's timber. To this the plaintiff replied that he did not claim as a culler for the work done; 2d, that he had measured the timber with string at the defendants' request *after it had been measured by 'Calliper,'* and after it was so entered in the supervisor's books, and concluded that he was by law entitled to be paid for the services by him performed distinct from his quality of culler.

This special replication entirely changes the original ground of action, and offers issues different from the assumpsit counts of his declaration. But considering the issues as thus raised of record, three points present themselves: 1. That he had no claim for the work if done in his quality of a licensed culler; 2. That his string measurement was made after the completion by him of the statutory measurement by 'Calliper'; 3. That these services performed by him were distinct from his quality of culler. Now, by setting out these facts the implication of law which he offers is that if these facts are not so as stated by him he can have no right of action. Now it is proved in evidence that he was paid for what he did as a licensed culler, and that the string measurement was made by him *at the same time* as that by "Calliper." His action therefore ought to have been dismissed in the Court below.

The foregoing remarks have been confined to the facts of the case, but if the action be considered in connection with the statute, the same result will be arrived at. In this connection it must be observed that the two measurements were simultaneous, that they were performed by the same person, the plaintiff, a licensed culler duly selected by the Supervisor to perform a legal duty, and that the lumber had not been previously measured by any licensed culler. The 36th sect. of the Statute, Ch. 46 C. S. C., (An Act respecting the culling and measurement of lumber), provides "that any culler licensed under the act, and "not employed by the Supervisor, may engage "or hire himself to merchants, or others, as "a shipping culler; but such culler shall in "no case measure, cull, count, stamp, or "mark any description of lumber, before the "same has been first measured by some licen- "sed culler other than himself, under the di- "rection of the Supervisor, except by the "written permission of the Supervisor, &c., "&c.; and any culler so hired and engaged, "offending against this act shall incur a pen- "alty not exceeding $400, or imprisonment, "&c." By the 37th section, it is further provided that "any culler employed by the Supervisor, who shall privily, and without the knowledge and consent of the Supervisor, or for hire or gain, and without the same being duly entered on the books of the Supervisor, measure, cull, mark or stamp any article of lumber, shall incur a penalty not exceeding four hundred dollars, or imprisonment for a term not exceeding six months, in the discretion of the Court, for each such offence."

These enactments are conclusive against this licensed culler, the plaintiff in the cause. The penalties are prohibitory, and prohibitive laws import nullity, even although such nullity be not therein expressed. The respondent's action ought to have been dismissed by the S. C., and the appellants' appeal must be maintained.

Duval, C. J. In concurring with this judgment, I bend to a statute of which I cannot approve. The plaintiff has clearly done work at special request, for which he cannot obtain payment. The "Calliper" measure merchants will neither sell nor purchase by, and yet it is the only means of measurement recognized at the Supervisor of Cullers' Office. I am afraid that of the legislator who framed this law, it must be said—*Quod non voluit dixit.* I therefore concur in the judgment of the Court, though with great reluctance, as I consider it an injustice done to the plaintiff.

Mondelet, J. I was at first about to dissent from the judgment, but like the Hon.

Chief Justice, I feel myself obliged to bend to a statute which I cannot endorse, and to concur in the decision of the Court.

Hearn, Jordan & Roche, for the appellants.

Alleyn & Alleyn, for the respondent.

(I. T. W.)

CIRCUIT COURT.

Quebec, December, 1866.

ROCHETTE v. FORGUES.

Practice—Taxation of Witness.

Held, that any one in public employ is entitled to be taxed as a witness; and if he is a professional man, he must be taxed at the rate which the tariff allows to practising members of his profession.

This was a case which arose out of an objection made to the taxation of M. Leprohon as a witness. If taxed at all, it was urged that he should be taxed simply as a clerk, and not as an advocate; on the ground that being a member of the civil service he lost nothing by attending at Court as a witness; and if he did lose anything, his time should simply be valued as that of an ordinary clerk and not as that of an advocate, inasmuch as he did not practise his profession.

MEREDITH, C. J. This objection has often to my knowledge been urged before, and being anxious now to settle the question, I have consulted with my brother judges to find out their opinion upon it, and we have come to the conclusion, that any gentleman in public employ, attending Court as a witness, ought to be taxed as any other witness is, and if he happens to be a professional man he is entitled to taxation as such; for otherwise some of the most eminent professional men who have ceased to practise, would only be allowed 7s. 6d. a day for giving attendance here, to the detriment of what may be far more important business to them, while others, with half their claim, would receive $4.50.

Taxation ordered accordingly.

(I. T. W.)

SUPERIOR COURT.

MONTREAL, Nov. 30, 1866.

BENSON v. MULHOLLAND AND ANOTHER.

Sale—Deduction for damaged goods—Guarantee as to condition.

The plaintiff sold to the defendants, through a broker, a quantity of iron, which the defendants sent a clerk to examine, and test the *quality* of, before completing the purchase. Nothing was specifically stated by the broker as to the *condition* of the goods, but he sold them as in good order. Subsequently part of the iron was found to be rusty and damaged.

Held, that the plaintiff sold the iron as merchantable and in good order; and that the examination of the *quality*, made by the defendants, did not debar them from their right to claim a deduction for the damaged *condition* of the goods.

This was an action for $448, for goods sold. The plaintiff set out that he, by and through the ministry of Brady, a broker, acting in that behalf for the plaintiff and defendants, at Montreal, on the 31st of August, 1865, contracted and agreed with the defendants, and the defendants contracted and agreed with the plaintiff, to buy and receive from, and to pay for to the plaintiff; and the said plaintiff by the ministry aforesaid did sell, and the defendants did purchase from the plaintiff, the following quantities of iron, and at the following prices, [here followed a list of the bundles of hoop and bar iron] in all £112, payable six months after said date. Whereupon the said Brady, in due course, delivered the usual broker's notes to the said parties, plaintiff and defendants, to wit, the sold note to the plaintiff and the bought note to the defendants. That the plaintiff, under said contract and agreement, in due course delivered to the defendants the said quantity of iron, which was by the defendants duly received, but they, although bound as aforesaid by the said contract to pay for the same, had neglected and refused so to do, although the term of credit allowed by the contract had expired.

The plea admitted that the defendants purchased from Brady, acting as broker for and on behalf of the plaintiff, the quantity of iron mentioned in the declaration; but alleged that at the time the purchase was made, the plaintiff, and said Brady, as such broker, repre-

sented the iron to be in perfect order and merchantable; whereas upon the removal of the iron from the plaintiff's store and the delivery thereof to the defendants at their store, it was discovered that a certain portion of it was not in good order, but was injured and damaged by water and rust, of all which the plaintiff forthwith had due notice. That the portion of the iron so injured and damaged was depreciated in value to an extent of at least $32, and the defendants sustained a loss of at least $32 upon the iron by reason of such injury. The defendants then alleged that they had always been ready to pay the amount of plaintiff's account less $32, and had tendered the same *à deniers découverts*, with costs, before the return of the action, and they brought the money into Court with their plea.

From the evidence it appeared that the iron remained in the plaintiff's store for some time after the sale. When the defendants began to remove it, after a few loads had been taken off the top, it was found that a portion of it was damaged by rust. Brady, the broker, was examined and stated that he did not, as far as he could recollect, say anything as to the condition of the iron, because he understood it to be in good order. If he had known it to be in bad order, he would have stated it. Taylor, the defendants' salesman, went to examine the iron, but he testified that it was merely for the purpose of testing its *quality*, not examining its *condition*.

Monk, J. This is an action for $448, the value of certain iron sold to the defendants, Mulholland & Baker. It appears that in August, 1865, a broker of the name of Brady was instructed by the plaintiff to sell a quantity of iron. Brady went to Mulholland & Baker, and asked them if they would buy it. They sent their salesman to examine it, for the purpose, as they allege, of testing the brand, and as the quality was found to be all right, a sale was concluded. After the iron had remained in the plaintiff's store for some time, the defendants sent for it. The first few loads were in good condition, but the third or fourth load began to look rusty, and it turned out that a considerable part of the iron was damaged by rust. The defendants remonstrated with Benson, had the iron surveyed, and claimed either that the whole lot should be taken back, or that a deduction of $32 should be made for what was unmerchantable. The plaintiff, however, refused to make any deduction whatever, and has now brought his action for the whole amount. The question comes up whether the sale was made under circumstances which exclude the defendants from claiming a deduction for unmerchantable iron. Thomson, the plaintiff's clerk, has been examined, and says he knew the iron was rusty. Brady, the broker, says he knew nothing about the iron being rusty, or he would have mentioned it. So we have a vendor employing a broker to sell a quantity of iron, and saying nothing to him about its being damaged. I am free to admit that if the defendants had bought this iron without the intervention of a broker, and had gone to examine it, it would have been for them to make a sufficient examination of it. But the plaintiff, knowing that the iron was rusty, employed a broker to sell it as in good condition, and as merchantable. Under these circumstances, although the defendants sent a clerk to examine it, yet as his examination is proved to have been merely for the purpose of ascertaining the quality, I think the plaintiff was bound to deliver the iron in good order, and that the defendants are entitled to the deduction which they claim. Their tender, therefore, is declared good and valid, and the plaintiff must pay the costs of the contestation.

A. & W. Robertson, for the Plaintiff.
Abbott & Carter, for the Defendants.

Nov. 30, 1866.

BOURDEAU *v.* GRAND TRUNK COMPANY.

Master and Servant—Damages—Injury caused by Negligence of Fellow-Servant.

Held, that an employee of a Railway Company has no action against the Company for damages, where the injury is caused by the negligence of a fellow-servant, while both are acting in pursuance of a common employment.

This was an action *in formâ pauperis* for $8000 damages, brought by Siméon Bourdeau, a brakeman, formerly in the service of the Grand Trunk Railway Company.

The declaration set out that on the 15th of November, 1863, the plaintiff was employed on one of the trains of the defendants, and while near Island Pond, the cars, owing to a switch being misplaced, took the wrong track and came into collision with another train. The iron railing at the end of the car, where the plaintiff was attending to his duty, was crushed in by the force of the collision, and the plaintiff had both his legs broken. The plaintiff further alleged, that the accident occurred through the negligence of the Company's servants in not attending to the switch, and that the car on which he was standing had been declared dangerous before the date of the accident. That he was confined to hospital, and up to 23d Sept., 1864, the Company paid him $15 per month, being half his ordinary salary, but they had then discontinued this allowance. That he was only thirty years of age, and was disabled for life, and prevented from earning a subsistence.

The defendants pleaded, first, the prescription of six months, and that the accident took place on a line of railway within the United States. But the plea on which the case turned was that the plaintiff had no action against the Company, being an employee at the time, and the accident being occasioned by the negligence of a fellow-employee.

MONK, J. This is an action of damages. The plaintiff was a brakeman, and while the train was near Island Pond, a collision occurred in consequence of a switch having been misplaced. The plaintiff was taken to hospital, and while he remained there the Company continued to pay him half his wages. Finally, he left the hospital of his own accord, and brought the present action. The defendants have pleaded the six months' prescription, and that the accident took place in the United States. But the Court is disposed to decide the case upon the ground, also raised by the pleadings, that the plaintiff cannot recover damages from his employers, the accident having occurred through the negligence of a fellow servant. The plaintiff in entering the service of the Company took the risk of these accidents upon himself. This is the law in England and the United States, and the same rule has been laid down here.

Médéric Lanctot, for the Plaintiff.
Cartier & Pominville, for the Defendants.

[NOTE.—Compare *Fuller* v. *Grand Trunk Railway Company*, 1 L. C. L. J. 68. Several recent decisions in England on the same question will be found in "The Law Reports" for 1866. See *ante*, pp. 135, 178. ED.]

COURT OF REVIEW.

Dec. 31, 1866.

HART *v.* O'BRIEN.

Ejectment—Act respecting Lessors and Lessees—Occupation by servant.

A gardener was engaged at $30 per month, with the right of occupying a tenement free from rent as long as he should continue to hold the situation, on condition that he should be subject to dismissal at a month's notice. Being found incompetent, he received a month's notice to quit, and was then dismissed, but he refused to leave the tenement. An action being brought under the Lessors and Lessees' Act to eject him :—

Held, that the action was properly brought, the defendant being a lessee within the meaning of the Statute.

This was an ejectment case inscribed for Review, from the Circuit Court, Montreal. The action was instituted by the plaintiff under the Act respecting Lessors and Lessees, against the defendant, who had been his gardener, to eject him from the tenement he occupied, and which he refused to leave on being discharged. The declaration set up that at Montreal, on or about the 20th February, 1866, the defendant, representing himself to the plaintiff to be a skilful gardener, competent to perform all the functions of a first-class gardener, and especially to take care of and manage a green house, and the exotic and other plants and shrubs usually kept in green houses, was engaged at the rate of $30 a month, and in further consideration that the plaintiff would let and lease to him, so long as he should remain in the plaintiff's employ as such gardener and no longer, a certain tenement and property of the plaintiff, to wit, a certain brick tenement two stories high, forming part of the building containing the plaintiff's coach house and stables. That the defendant entered the service and employ of the plaintiff as aforesaid, subject to the said monthly engagement to be determined and ended at the end of any month at the option of the plaintiff, upon his giving defendant

a month's notice of such option, and subject also to the right of the plaintiff under the law of the land to dismiss the defendant, in the event of his being incapable of performing the duties by him undertaken as aforesaid. The declaration further set out that the defendant entered upon his duties on the 1st March, 1866, and that the plaintiff, finding him incompetent, and that he had so mismanaged the greenhouse as to destroy and injure a large number of the most valuable plants, gave him notice in the latter part of September, that he would not require his services after 1st Nov. following, and had accordingly paid and dismissed him on that day, but that the defendant still remained in possession of the premises, and refused to leave. There was a further averment that the occupation of the tenement in question was worth the sum of $10 per month. Conclusion, that by the judgment it be declared that the right of the defendant to the use and occupation of the premises ceased and determined on the 1st November, and that the defendant be ordered to leave the premises, &c., and in default of his so doing, he be expelled therefrom, and his furniture and effects *mis sur le carreau*, and the plaintiff placed in possession.

The defendant demurred on the ground that the case did not fall within the summary jurisdiction of the Court in ejectment. And he also pleaded an exception, setting up substantially the same agreement as that alleged by the plaintiff, but asserting that his engagement was for a year, and denying that he was incompetent, or that there was anything in the terms of his engagement which rendered him liable to be dismissed at a month's notice.

Upon these issues, the demurrer was heard and dismissed, and the parties thereupon proceeded to proof. A great deal of evidence was taken, chiefly as to the competency of the defendant as a gardener. This testimony was of a somewhat contradictory character, but appeared to show that the defendant was not competent to manage a large conservatory like that of the plaintiff. The month's notice to quit was also proved.

On the 6th Dec., 1866, MONK, J., in rendering judgment, said: There can be no question as to the jurisdiction of the Court. The defendant occupied the plaintiff's house as his tenant, and the remuneration he gave for it was his services as gardener, which were partially paid for by that occupation; and his engagement having terminated by his dismissal, his lease terminated also, and he is now holding the premises against the will of the proprietor. As to the right to dismiss the defendant it rests upon two grounds: the agreement that he should leave after a month's warning, and his incompetency; and both these grounds are fully proved. This branch of the agreement is really not denied by the defendant— no general issue having been filed, but merely a demurrer and exception; and it is amply and explicitly proved by the plaintiff. The incompetency of the defendant for the management of the green-house and vinery, has been made equally plain. In fact there is really nothing upon which to rest a case for the defendant. No rent is given, but the defendant must leave the premises,—and the usual period, three days, will be allowed him in which to do so.

The defendant then inscribed the case for review, assigning the following reasons for the reversal of the judgment. 1st, The defendant was not alleged to be the lessee of the plaintiff, but his employee. 2nd, There was nothing in the declaration which disclosed the existence of a lease, or agreement equivalent thereto, as required by the statute under which the action was brought.

Judgment was rendered in review, Dec. 31.

BERTHELOT, J., stated the facts and proceeded to say:—The principal question is whether this action was properly brought under the act respecting lessors and lessees, C. S. L. C., Cap. 40. The 16th section of this act says that "persons holding real property by permission of the proprietor, without lease, *shall be held to be lessees*, and bound to pay to the proprietor the annual value of such property, and their term of holding shall expire on the first day of May of each year, &c., and the person so in occupation shall be liable to ejectment for holding over, &c., or for any of the causes mentioned in this act." In section 1, these causes are enumerated, and sub-section 4 states that the lessor has the right to recover possession of the property

leased, when there is a cause for rescision of the lease, &c., or according to the 16th section when there is no lease. Taking these sections together, I think the plaintiff was justified in bringing his action under this act to eject the defendant, when the latter refused to leave after receiving a month's notice.

SMITH, J. It is evident that the relation of landlord and tenant existed between the parties under the 16th section of the act. This settles the whole case. The defendant's engagement and tenancy having terminated at the expiration of the month's notice, he must go out of the premises.

MONK, J., concurred.

Judgment confirmed.

Abbott & Carter, and *L. N. Benjamin*, for the plaintiff.

Senecal & Ryan, for the defendant.

SUPERIOR COURT.

Dec. 26, 31, 1866.

ROYAL INSURANCE CO. *v.*
KNAPP AND GRIFFIN.

Capias founded on illegal holding of property. —Bonds stolen in a Foreign Country.

Held, that an affidavit for *capias* alleging that the defendants illegally hold, in Lower Canada, property of the plaintiffs, illegally obtained, is sufficient, and that it is of no importance whether the property was stolen or illegally obtained in Canada or in a foreign country.

The defendants, Frank Knapp and James Griffin, having been arrested under a *capias ad respondendum*, moved to quash. The *capias* was issued at the instance of the Royal Insurance Company, a body politic and corporate, "carrying on the trade and business of insurance at Montreal and elsewhere." The affidavit on which the writ issued was made by H. L. Routh, the legal agent and attorney of the Company, and set out that the defendants "are personally and jointly and severally indebted to the plaintiffs in a sum exceeding £10 stg., to wit, in the sum of $214,000 U. S. currency, equal to $155,000 Canada currency, being the amount of the several bonds, coupons of bonds, and securities of the Government of the United States of America, the property of the said plaintiffs, which they the said defendants illegally obtained possession of on the 10th December, and which they now illegally hold in their possession and under their control at the city of Montreal:

[Here follows the description of the bonds and securities.]

"That deponent hath personally demanded from the defendants the restoration of the said bonds and certificates, but they the defendants have wholly refused to restore the same or any part thereof to the plaintiffs, and they the defendants still retain and secrete the same from the plaintiffs, so that the plaintiffs are wholly unable to revendicate or attach said bonds and certificates.

"That the deponent is credibly informed, hath every reason to believe, and doth in his conscience believe that the said defendants are now immediately about to leave the Province of Canada, and abscond therefrom with intent to defraud their creditors and the Royal Insurance Company in particular, and moreover have secreted and are secreting their property with intent to defraud their creditors, and the said Royal Insurance Company, the plaintiffs in this cause, in particular.

"And for reasons of his belief the deponent avers: That the defendants are citizens and subjects of the United States of America, and are merely here in the city of Montreal temporarily; that they have no domicile in Canada, nor do they own any property in Canada, either personal or real; that deponent hath been informed by John S. Young and John Jourdan, both of New York, police detectives, that the defendants are professional thieves, and immediately about to leave the Province of Canada, without any intention of returning thereto; that deponent hath moreover been informed by Anthony B. McDonald, insurance agent, of New York, that the defendants are possessed of the aforesaid bonds and securities, which they refuse to give up to plaintiffs, or to deponent as plaintiffs' agent, and that the defendants are secreting said bonds and securities, and secretly endeavoring to sell and dispose of the same, and convert the proceeds to their own use and advantage, and that unless the said defendants are arrested under a writ of *capias ad resp.*, the said bonds

and securities and the said debt (the value thereof as aforesaid) will be wholly lost to the plaintiffs.

"The deponent saith that without the benefit of a writ of *cap. ad resp.* against the bodies of the defendants, and a writ of attachment, *saisie-arrêt*, for the purpose of seizing and attaching such moveable estate, and effects as may be in the possession of the defendants, the plaintiff will lose said bonds and certificates and said debt (the value thereof as aforesaid) or sustain damage."

This affidavit was made Dec. 20. The defendants appeared separately, and (Dec. 26) severally moved to quash. The motions, which were identical in terms, were to the following effect:

"That the writ of *cap. ad resp.* issued in this cause be set aside and quashed with costs, and the said defendant released from the custody of the Sheriff for the following amongst other reasons:

"1st. Because the affidavit does not disclose any legal and sufficient grounds of debt against the said defendants for which a writ of *capias* could by law be issued.

"2nd. Because it appears from the said affidavit that the said bonds and securities alleged to be the property of the plaintiffs, were obtained at New York on the 10th December instant, and by reason thereof, notwithstanding the illegal holding thereof at Montreal, no writ of *capias* can be issued for or by reason of such illegal holding, because the cause of action did not accrue or arise, and is not alleged to have accrued or arisen, within this district or within this Province.

"3rd. Because even if the said bonds were illegally obtained and held by the defendants, the defendants cannot be held indebted to the plaintiffs in the value of said bonds or securities as alleged in the said affidavit, and were only liable on a special action in damages (which damages are not alleged), or criminally, in case a criminal offence was committed.

"4th. Because the said affidavit and the grounds and reasons in said affidavit set up, are wholly insufficient, and ought so to be declared, and the affidavit set aside, and writ quashed."

Mr. *A. Robertson, Q. C.*, for the defendant Griffin. The motion to quash is based on the ground that it is not disclosed in the affidavit where the cause of action arose, and because it appears indirectly from the reasons stated in support of the affidavit that the cause of action arose in New York, out of the Province of Canada. Now, it was held by the Court of Appeals in *Bottomley and Lumley*, 13 L. C. R. 227, that a party arrested under a *capias* will be discharged, if it be proved that the cause of action arose in a foreign country. The illegal holding of property in Canada is not ground for a *capias*. The plaintiffs should have seized their property by action *en revendication*, or brought an action of damages, or instituted a criminal prosecution.

Mr. *Kerr*, for the defendant Knapp. The affidavit ought to disclose where the debt was contracted, in order that the Court may be certain that the cause of action, that is, the whole cause of action, arose in Canada. In the present case, so far from the affidavit disclosing that the cause of action arose here, it appears indirectly that the cause of action arose in the State of New York, where the alleged *délit*, the abstraction of the bonds, was committed. The mere holding of the bonds at Montreal may be ground for an action, but not for a *capias*.

Mr. *Bethune, Q. C.*, for the plaintiffs. The defendants would have brought their pretensions before the Court in a more correct form by a petition on which the parties could go to proof. They cannot succeed on a mere motion alleging informality in the affidavit, because the affidavit shows distinctly that the cause of action, namely, the illegal holding of the plaintiffs' property and the refusal to give it up, arose in Montreal. *Bottomley and Lumley* is not in point; for in that case the debt was for goods purchased in England. But in this case the affidavit alleges that the defendants, professional thieves, got possession of the bonds on a certain day, that they have got them in their possession here at Montreal, that the deponent, Mr. Routh, representing the plaintiffs who are described as doing business at Montreal, has personally demanded possession of the bonds, but that the defendants have failed to restore them, and have

secreted them, so that the plaintiffs cannot attach or revendicate them, and all they claim is the value of them, which value is sworn to be so much in U. S. currency, equivalent to a certain amount in Canada money. Are the plaintiffs to be told that under these circumstances they must take out a *saisie-revendication* when the facts sworn in the affidavit show that this remedy would be wholly illusory? As for a criminal prosecution, it could not be sustained under the law as it stands.

Mr. *Carter, Q. C.*, also for the plaintiffs. The real cause of action is the illegal holding of the plaintiffs' property here, and wherever the defendants might transport this property, the plaintiffs would have a perfect right to follow them, and claim the property from them by suit. The removal of the property to Montreal justifies the plaintiffs in considering such removal and illegal holding in Montreal as a fresh and sufficient cause of action arising in Montreal.

Mr. *Robertson*, in reply. The case appears to me to lie within a narrow compass. Was it not for the plaintiffs to show affirmatively where the bonds were obtained? Their omission to show this in the affidavit is sufficient ground for quashing the *capias*.

Judgment was given Dec. 31.

BERTHELOT, J., stated the substance of the affidavit and motion, and continued: The defendants contend that the affidavit is defective, because it does not disclose a sufficient ground of indebtedness, and, further, say that it appears from the affidavit that the bonds were obtained in a foreign country, and even if held here, such holding is not sufficient ground for a *capias*. It is not on a motion to quash that these pretensions can be examined. I have always been of opinion that an affidavit must be radically defective to be set aside on a motion to quash. The Statute has pointed out the proper course to be adopted, namely, by petition and proof. I am of opinion that the affidavit is sufficient. What renders the defendants liable here is the fact of their being found here with the property in their possession. I have examined all the cases cited, and I find none in contradiction with the decision at which I have arrived. The owner of stolen property has a right of action against the thief wherever he finds him with the stolen property in his possession. In the present case it is not material whether the property was stolen here or at New York. Both motions must be dismissed. [His Honor referred in the course of his remarks to *Bottomley* v. *Lumley*, 13 L. C. R. 227; *Cameron* v. *Brega*, 1 L. C. L. J. 65; *Dumaine* v. *Guillemot*, 6 L. C. R. 477; *Redpath* v. *Giddings* (in which the *capias* issued for damages, and a motion to quash was dismissed by *Smith*, J.); and also to Art. 802 of Draft of Code Civil Procedure, suggested in amendment.]

S. Bethune, Q. C., and *E. Carter, Q. C.*, for the plaintiffs.

A. & W. Robertson, and *W. H. Kerr*, for the defendants.

REPORTING EXTRAORDINARY.

In our Courts we are occasionally favored with judgments in which the facts are presented in rather romantic dress. A judge of a poetic or humorous turn may now and then be seduced into highly colored narratives, by the strangeness of the facts presented in evidence; and a reporter might not be without some excuse for reproducing the romantic statement. But in the neighboring republic, the official reporter of the Supreme Court needs no such incentive to fill his volumes with the rhetorical flights of the shilling novel. From a notice in the *American Law Review* of the three volumes recently issued, we find that Mr. Wallace has hit upon a new and peculiar method of reporting, which will be best understood by a few illustrations.

In one case, *Burr* v. *Duryee* nineteen pages and *nine pictures* are devoted to the statement of the case. The arguments are reported in fifteen pages with *twelve cuts*. In the reports of arguments, even the most absurd flights of rhetoric indulged in by counsel are occasionally preserved. In the case of the *Circassian* for instance, there occurs the following:—

"We are engaged in putting down a vast awful and wicked rebellion. We have had no countenance from the British Government, and have been actively and constantly thwarted by the cupidity and wealth of British sub-

jects. But the rebellion *will* be suppressed." In another case, having occasion to say that the question was whether or not the parents were married, he does it as follows:—"This was a narrative sufficiently touching, and quite circumstantial no doubt. But was it true? Was the case one of a marriage solemnised in form, and kept a secret for five-and-twenty years,—a romance, perhaps, discovered only by relatives not enriched, to be a reality,—perhaps a *mésalliance* simply? Or was it one of those less regular relations,—*mutato nomine*, of every day, and out of which men elaborate such infinite vexation for themselves and others from the pure element of the affections—misdirected?" The reports, according to the *Law Review*, abound in fanciful and extravagant passages, of which the above are an example.

BANKRUPTCY.

We begin with the new year to furnish a tabular statement of bankrupt notices, compiled from the Official *Gazette*. We had proposed to include a table of applications for discharge and confirmation of discharge, but found that it would occupy much valuable space, and as the applications are principally to be made in Upper Canada, we doubted the advisability at present of excluding more interesting matter for the sake of inserting the applications for discharge. Should we, however, receive an intimation from any considerable number of our readers of their wish to have these notices, or those for Lower Canada, in tabular form, we shall begin to publish them in the next issue.

ASSIGNMENTS.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Brown, Francis H.	Mariposa	S. C. Wood	Lindsay	Jan. 4
Barbeau, François	St. Remi, C. E.	T. Sauvageau	Montreal	Jan. 8
Booth, Henry, jun.	St. Catherines	J. R. Armstrong	St. Catherines	Jan. 4
Brown, John & Hector	Manilla	Richard Edwards.	Manilla	Jan. 17
Clark, Thomas	Hamilton	J. J. Mason	Hamilton	Jan. 2
Coté, Césaire	Montreal	T. S. Brown	Montreal	Jan. 10
Couture, Pierre	Quebec	Wm. Walker	Quebec	Jan. 11
Davison, Robert	Turnberry	Samuel Pollock	Goderich	Jan. 3
De Laparatz, Louis	Montreal	T. S. Brown	Montreal	Jan. 16
Dudenhoper, William	East Atherly	James Holden	Whitby	Jan. 10
Griffith, Henry	Hamilton	W. F. Findlay	Hamilton	Jan. 3
Gibbs, George	Guelph	Thos. Saunders	Guelph	Jan. 10
Hodgson, Jonathan	Mariposa	S. C. Wood	Lindsay	Jan. 10
Johnson, Chauncey, & E. P.	L'Orignal	J. O. Gates	L'Orignal	Jan. 14
Kerby, Joseph T.	Montreal	A. B. Stewart	Montreal	Jan. 16
Larocque, C. H.	St. George de Henryville	T. Sauvageau	Montreal	Jan. 4
Miller, Walter	Markham	A. Barker	Markham	Jan. 10
Mathieu, Hilaire	La Presentation	T. Sauvageau	Montreal	Jan. 16
McKercher, John	Reach	James Holden	Whitby	Jan. 15
Orr, Wm. E. R.	Dunham	T. S. Brown	Montreal	Jan. 2
Perrault, Zéphirin	Deschambault	A. B. Stewart	Montreal	Jan. 16
Percy, James A.	Cobourg	E A. Macnachtan	Cobourg	Jan. 15
Reid, James, jun.	Lennoxville	John Whyte	Montreal	Jan. 10
Raimond, Joseph	St. Rémi	T. Sauvageau	Montreal	Jan. 8
Senécal, J. B., & Fils	Montreal	T. S. Brown	Montreal	Jan. 16
Sutherland, Jas., of Mitchell & Co.	Toronto	Jas. McWhirter	Woodstock	Jan 2
Tyler, Caldwell J.	Guelph	Thos. Saunders	Guelph	Jan. 9

WRITS OF ATTACHMENT.

PLAINTIFFS.	DEFENDANTS.	PLACE.	DATE.
F. G. Beckett, H. Beckett, sen., and H. Beckett, jun.	David Pease and G. Cumming	Sarnia	Jan. 2
Robert Forster, Arch. Moir, and James Moir	James N. Henry	London	Jan. 5
John Garrett	Hilry Howard	Hamilton	Jan. 4
John Johnstone Clark	Alex. Stewart	Stratford	Jan. 3
Andrew T. Wood and Matthew Leggatt	Andrew Patton, A. M. Patton and C. G. M. Draiske	St. Thomas	Jan. 3