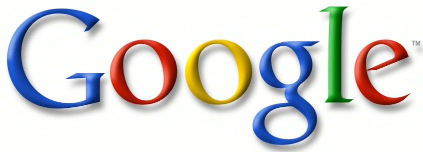

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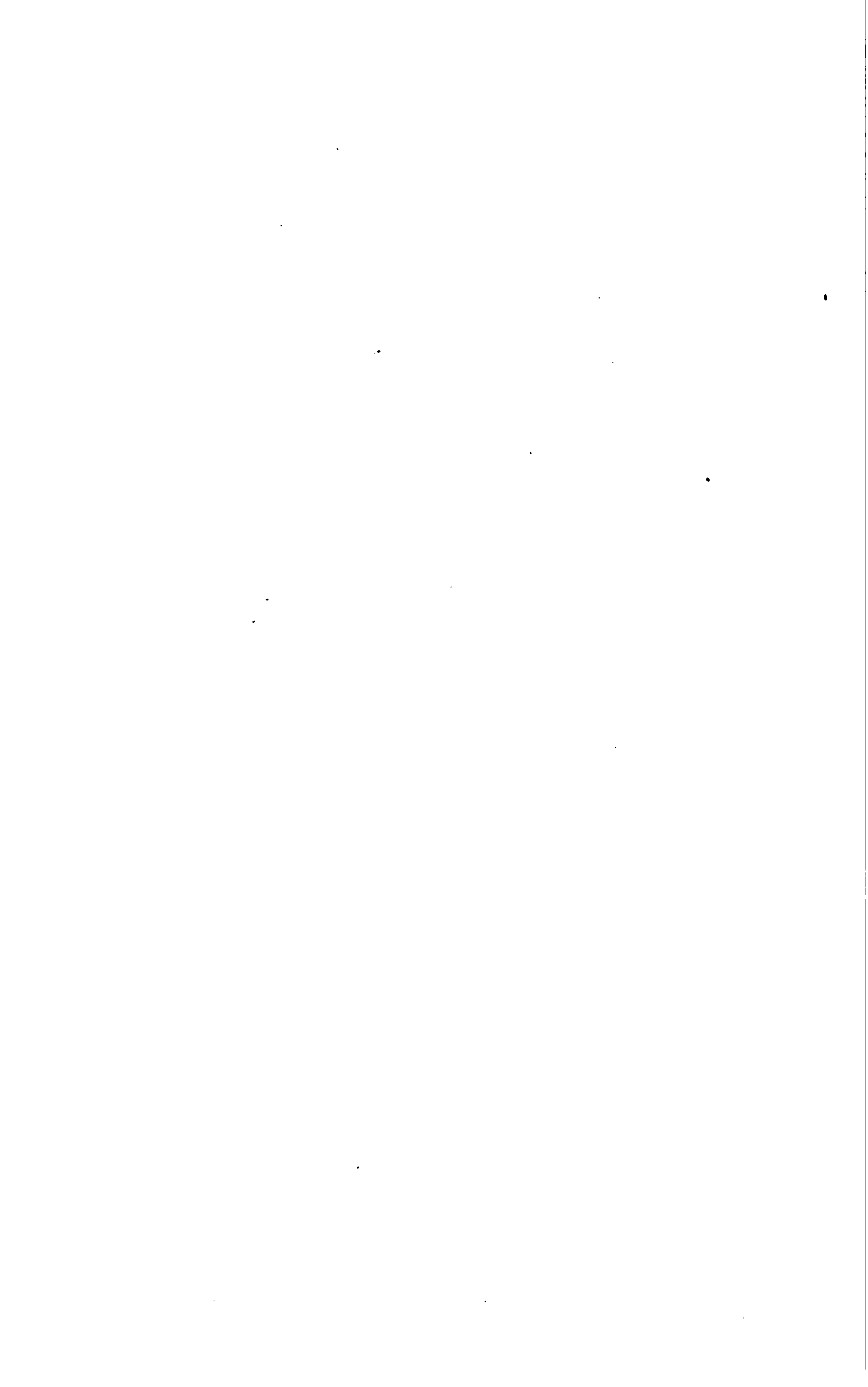

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BY

JAMES KIRBY, D.C.L., LL.D.,

Advocate.

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The Legal News.

VOL. X. JANUARY 1, 1887. No. 1.

The pages of our last issue of the old year had hardly been made ready for the press, when the tidings of a grievous loss to the bench, to the profession, and to the community, came with startling abruptness. While the ink was scarcely dry upon the last proof sheets he had revised, upon the last pages his hand had traced, we were told that Mr. Justice Ramsay was no more. We were asked to realize, if it were possible, that the ever busy hand was cold, that the impetuous brain was at rest, that the masterful personality had yielded to a more potent presence.

In order that our readers may fairly appreciate the fortitude and resolution with which the departed Judge sacrificed needful repose, and even life itself, to a conscientious sense of duty, it is right to state that this was not to him an unlooked for termination of his career. As long ago as 1880 he first indicated to the writer that the end of his life labor was probably not very remote. At that time he had suffered severely in health, and meditated retirement at the end of ten years' service in the Queen's Bench,—a term which would expire in 1883. Subsequently his health improved, and with renewed strength, came reluctance to abandon a post which he was so competent to fill. Within the last two years, however, he was forced to realize at times that the end was probably not far off. In the middle of November last, he said to the editor, more seriously than usual, "I will not be with you much longer; "there is not much more left of me." These forebodings were suggested by the fact that he had recently been visited by more than one sudden and serious attack of illness, forerunners of the last, which carried him off on the morning of the 22nd of December. Physical weakness, however, only spurred him to greater assiduity and earnestness of effort. There was no diminution of mental vigour—on the contrary, some of his latest opinions are pre-eminent for acute reasoning and thorough grasp of the subject.

In addition to his official work, Judge Ramsay devoted a considerable portion of the leisure of the last three years to the preparation of a digest of the decisions of the Court of Appeal, in which he took part during the last thirteen years. This work was originally intended to embrace the period from 1873 to 1883, but the meditated retirement not being carried out, three additional years have been included. Last summer, as if conscious that his time was short, he worked diligently at this task, and the whole was just completed in readiness for the press when he was suddenly called away. Rest much needed was sacrificed to this work, and it happened, unfortunately, that while weakened by illness, and wearied by preparation for the appeal term, he was obliged, in consequence of the sickness of Mr. Justice Monk, to assume the criminal term of the Court, in November, at Montreal. He sat here until the middle of the month, but with diminished energy. On the 15th, the appeal term opened, and without a day's rest, he took his place on the bench, which was reduced, by the absence of two of the judges, to four members. There were important cases awaiting decision, and the preparation of opinions broke into the night. For the first time in twenty years we found him distinctly conscious of over-pressure. Nature cried halt, but a sense of the importance of his duties and of the grave inconvenience which would result from even a temporary absence at that time, forced him to toil on, and he sat until the 27th, and again, in Quebec, from Dec. 1 to Dec. 8. On his return to St. Hugues, on the 9th, he added some final notes to the digest, and was doubtless deeply engaged with the *délibérés*, in order to be in readiness for judgments on the 31st December, when the call came. In a letter received from him a few days before his death, no special reference is made to illness, but the pressure upon the Court of Appeal is touched upon, and the division of the Court into two—a measure which he had always regarded with extreme disfavor, is anticipated as the only practicable remedy. He

had long considered this subject with the utmost earnestness, for to be in arrears in anything was hateful to him. He had failed to secure attention to the suggestions which were the fruit of long and serious study, and his last written words to us are: "The state "of arrears at Montreal is an illustration of "the inconvenience of treating the judicial "office as unimportant. A blockade at Que- "bec will be a second illustration. Most "unwillingly I am coming to the conclusion "that we must have two appeal courts, one "at Quebec, the other at Montreal."

On another page we give a brief notice of his career. Judge Ramsay's life affords ample materials for an interesting memoir, and we should be glad to see some literary friend undertake the task. It is difficult, in a few lines, to give an adequate idea of a life so abounding in diligent and earnest effort. He was not one

"Who to his destined stage, has carried on
"The tedious load, and laid his burthen down,"

but a bright, magnetic presence which illumined the field of his labor, and chased dulness and apathy away. In him the profession has lost an upright and astute expounder of the law, the country has lost a loyal and fearless defender of the principles of good government, his friends have lost more than they are able to measure.

We earnestly hope that the following suggestion of the *Gazette* will be acted upon:—"We venture to suggest to the Government for the vacancy in the Court of Queen's Bench, caused by the death of Judge Ramsay, the name of Strachan Bethune, Q.C. Upon the grounds of service at the Bar and eminent legal ability and experience, his claims are not equalled by any of his *confrères*. Men there are who adorn their profession, who have claims for preferment, who are thoroughly qualified for the distinction, but none so well as Mr. Bethune, the senior practising barrister of Montreal. That his appointment would be hailed with pleasure and satisfaction by the profession, we know from the fact that, several years ago, the Bar petitioned the Government to elevate Mr. Bethune to a judgeship, and the time that has since elapsed has but served to increase his fitness and the public sense of his worthiness of the position. It was in 1843, nearly forty-four years ago, that Mr. Bethune was admitted to practice; the late Judge Ramsay was a student in his office; for twenty-three years he has been a Queen's Counsel, and although now somewhat advanced in the prime of life he is as vigorous and as capable of sustained hard work as many a younger man. It would be a becoming act on the part of the Government to, without delay, confer upon the senior of the Bar the dignity of a judgeship."

THE LATE MR. JUSTICE RAMSAY.

A glorious morning in the dog-days. A plain and unpretending house standing in the midst of some charming scenery. An ample lawn glowing under the intense brilliancy of the summer sunlight. A clump of pines, fine old trees, casting an inviting shade upon the grass near the dwelling. Borders of carefully tended plants gratifying the eye with their varied blooms. Park land, forest trees, and pine groves in the distance. A sturdy, resolute-looking person, in a spotless linen coat, is coming down the steps. Clear and fresh of complexion, his comely countenance at this moment is cheerful, even gay. "Charley," harnessed to a vehicle of very modest appearance, is brought to the door. The man in the white coat, who is talking with extreme animation to a visitor, takes his seat beside the latter in the buggy, and "Charley" is exhorted to faithful activity in making a tour through the surrounding country.

This is Thomas Kennedy Ramsay, a Justice of the Court of Queen's Bench, one of the most remarkable personalities of the time, one of the most versatile and brilliant men who have played a part in the history of our young nationality. This is his home, the manor house of St. Hugues. Time, the Long Vacation. And the domain which he is about to show to his visitor is his seigniory, a residence of which he is passionately fond, —"foolishly fond" is his own expression, but "wisely fond" will say those who know that

the brief moments given to the delights of the farm and garden are his sole recreation from exhausting toil. As the poet has said:

"Here wisdom's placid eye delighted sees
"His frequent intervals of lonely ease."

No hours so sweet as those which he passed here, no scene to him so dear.

By way of preface to a brief notice of his career, we have introduced him in a vacation hour; because at this moment, when we mourn a recent loss, it is the most soothing to dwell upon, and it is the side of his character least known to the many thousands to whom his official dignity made him more or less a familiar figure. It is more pleasant to picture him in the barn fragrant with hay, describing a projected improvement, than leaning back, wearied and irritated by an interminable argument in the Court of Appeal.

Judge Ramsay was born in Ayr, Scotland, on the 2nd September, 1826. His father, David Ramsay, died before the late Justice came of age. His mother, sister of the late General Kennedy, a veteran who distinguished himself on the field of Waterloo—died about eight years ago, at the age of 87. The family came to Canada in 1847, and acquired the seigniory of St. Hugues, which formed part of the fief of the De Ramesays under the French *régime*. There were three sons. One died some years ago. The second entered the order of priesthood in the Roman Catholic Church. Thomas Kennedy, the Judge, was the youngest. He studied law in the office of Messrs. Meredith, Bethune & Dunkin, and was admitted to the bar in 1852. He edited for a time a work called the *Law Reporter*, and afterwards aided in establishing the *L. C. Jurist*. From the beginning of his professional life he was a frequent contributor to the daily press. He was associated with the late Mr. Morin and Mr. L. W. Marchand in *La Patrie*, and at a later period he had editorial charge of the *Evening Telegraph*. In 1859 he was appointed secretary of the Commission for the codification of the civil law, but in 1862, before the commission had nearly completed its labors, he was removed by the new government, on the ground that he had taken part in a political meeting. In 1865 he published an Index to Reported Cases, the best work of its class which has appeared in the province. Soon afterwards he was appointed Crown prosecutor at Montreal, an office which he filled with the utmost assiduity. During this time he represented the Crown in the prosecution of the Fenian raiders, at Sweetsburg, in 1866, and he was concerned in the famous affair of Lamirande's extradition. In 1870 he was appointed an assistant Justice of the Superior Court, but three years later he was elevated to the office of puisné Justice of the Court of Queen's Bench, a position which he retained until his death.

Such are a few of the bare dates in his history. A great deal of his work lives in the pages of the reports, for he was a firm believer in the doctrine that a judge of an appellate court has done but a part of his duty until, as far as time permits, he has put in writing his views upon the legal questions decided. These opinions and judgments were fearlessly presented to criticism, and time will test their value. In diligence of research he was unsurpassed. Several of the judgments prepared under the constant pressure of ever-increasing work involved more than a week's close application. His uprightness and impartiality were beyond question. His closest intimate never formed the faintest hope that the Judge would be influenced by the desire to gratify a friend.

He was a mighty worker; his opinions were not lightly formed. He sifted the case thoroughly, and sometimes it happened that an opinion was written and re-written thrice before it reached its ultimate form.

In controversy he was of the heroic type. He hit hard, with the force and directness of the knight of chivalry. There was nothing underhand in his attack or defence.

In conversation he was bright and sparkling. He had a keen appreciation of character, and in a word or two would hit off the prominent traits of a person with striking effect. He had many warm friends, and as far as our knowledge goes he never quarrelled with a friend or wounded the feelings of a friend, nor was he exacting in his friendships. He could not brook stupidity, and was rather unmerciful in his castigation of it. To stupidity in would-be law-makers he had

special aversion. On the other hand, intellectual merit attracted him, and he was quick to recognize it, even among those to whom upon other grounds he had a dislike. He was a great reader. He usually carried a packet of new books out with him to the country. The walls of his hall and of his rooms were lined with well-selected books, and his knowledge of their contents was very thorough.

We shall merely add for the present a few extracts from an article written for the *Gazette* by a non professional friend, which does justice to some traits of the judge's character:—

"He had resided for a time in France and was as familiar with French as with English. This, and the impetuous industry which was his chief characteristic, soon made him proficient in Roman law. He especially loved the Roman law. It contained what he delighted in—principle argued to conclusions —and this love of abstract principle carried out in daily life in the strictest detail—in politics, in morals, in society, on the Bench—marked his whole career. Logically to its conclusion would he follow every principle. Straight on his way would he go, swerving neither to the right nor to the left; nor did he fear the face of man or the threats of men. There was no power nor influence known to men which could turn him from the plain path of his duty or cause him to hesitate in doing what his conscience dictated to him as right.......

"In a life of ceaseless activity such as his he necessarily came in contact with very many men, but even those who opposed him always esteemed him. No mean thing, no unfair thing, no untruthful thing was ever charged against him. Politics was never to him a trade, for a large portion of his private means was spent in advocating the principles he believed to be true. His strongest political opponents had nothing to lay to his charge. Fair, honest and open in all he did and said, no bitter or unkind feelings were harbored against him. He met his political antagonists in all the relations of private life without embarrassment or rancor. Never was word uttered against the purity of his private life or the integrity of his public career. *Sans peur et sans reproche* he performed his duties—he fulfilled his life. He dropped down dead in harness—laboring to perform his duty—toiling at his *factums*, at his judgments, to the last. May God send us all as unsullied a life and as faithful a death!

"What shall we say of his career upon the bench? Is it not known of all men in this province, French and English, Catholic and Protestant, Rouge and Bleu? Can any one say that they ever feared for anything before his tribunal but for the justice of their own cause? Did it ever enter into the heart of anyone here to think that Judge Ramsay could be moved by any motive but the unswerving love of the right? The whole character of the man rendered it impossible. His keen penetration, his accurate knowledge, his conscientious, painstaking care, were the admiration of the Bar, and if, during the last few months, his failing health may have manifested itself in some impatience with those who tried to trifle away the time of an overwrought man, who now is there who does not mourn for the loss of the unsullied and upright magistrate who was the pride of their profession?

"To those who enjoyed the intimacy of his friendship how can he ever be replaced? In vain does the tear blot the paper—that quick intelligence, that courteous presence, that noble heart can never return. Gentle as a woman, sensitive as a girl, was this man in his heart of hearts as known to the inner circle of his intimate friends. Honor to him was an instinct; he had not to think about it. That which was honorable welled up naturally in his mind. Injustice to him was intolerable and repugnant. In the privacy of his retreat at St. Hugues he spent his time in studying his factums and in reading, with occasional supervision of the farm, which was the one recreation of his life. There occasionally he would invite some congenial friend and spend days and half the nights in keen discussion of questions of history, law or literature, for which his well stocked library afforded ready reference. Mourn for him we may not, for his life's battle has been nobly fought. Mourn for ourselves with selfish sorrow we ever must."

COUR SUPÉRIEURE.

FRASERVILLE, 17 décembre, 1886.

Coram CIMON, J.

HEBERT v. ROSSIGNOL, esqualité.

Droit d'habitation conventionnel de la femme.

JUGÉ :—*Que, si un contrat de mariage stipule qu'avenant le décès du mari, il serait loisible à la femme et à ses enfants de demeurer dans le logement et les dépendances du mari gratuitement pendant sa viduité sans qu'on puisse les déranger en aucune façon, et que, pendant le mariage, le mari vend la seule maison dont il était le propriétaire, et où il logeait à son mariage, et decède ensuite sans laisser ancune maison, ni aucun logement,—la femme a droit d'obtenir des héritiers du mari un logement, ou une somme d'argent par chacun an représentant la valeur annuelle d'un logement de mêmes conditions que celui en vue dans le contrat de mariage.*

CIMON, J. La demanderesse, dame Henriette Hébert, veuve de William Adhémar Heath, allègue que son contrat de mariage du 15 mai 1876, contient la clause suivante : " Avenant le décès du dit Wm. A. Heath, il " serait loisible à la demanderesse et à ses " enfants de demeurer dans le logement et les " dépendances du dit Wm. A. Heath gratui- " tement pendant sa viduité, et sans qu'il " soit permis de les déranger en aucune " façon quelconque, soit pour les changer de " place ou pour autrement les gêner dans la " jouissance des dites dépendances." Puis la demanderesse allègue que le dit Wm. A. Heath logeait, lors de leur mariage, dans une maison dont il était le propriétaire, avec jardin, hangards et autres dépendances dans le village de l'Isle-Verte, valant avec l'ameublement $120 par année, et que, pendant le mariage, le dit Heath a vendu cet immeuble et qu'il est décédé en mars dernier, ne possédant à titre de propriétaire aucun logement ; et la demanderesse demande que les héritiers du dit Wm. A. Heath, qui sont les enfants mineurs dont le défendeur est le tuteur, et qui refusent de lui fournir un logement, soient condamnés à lui payer $125 représentant la valeur d'une année expirant en mars prochain, de jouissance et occupation d'un logement garni dans les conditions ci-dessus.

Le défendeur a produit une *défense au fond en droit*, où il dit qu'il appert à l'action que cette clause du contrat de mariage en est une d'institution contractuelle et à cause de mort, et que le dit Wm. A. Heath n'a laissé à son décès aucune maison où la demanderesse puisse prendre cette habitation, et que la vente faite par le mari, durant le mariage, de sa maison, a éteint ce droit d'habitation ; et le défendeur conclut au renvoi de l'action comme non fondée en droit.

C'est cette *défense au fond en droit* qui est soumise à la décision de cette Cour.

Remarquons de suite que cette clause n'est pas de la nature d'une disposition à cause de mort. " *Avenant le décès* ", c'est-à-dire que c'est à l'avènement de cette condition que la dette de l'habitation deviendra échue ; mais la dette existe dès la date du mariage. C.C. art. 1085 : " La condition ac- " complie a un effet rétroactif au jour auquel " l'obligation a été contractée." C'est une obligation entrevifs que le mari a contractée au mariage; et il en est dès lors devenu le débiteur au cas de predecès, ses biens se sont de suite trouvés chargés de cette dette, et, à sa mort, ses héritiers sont devenus obligés de l'acquitter. Pour pouvoir, à son décès, payer cette dette, le mari était tenu de conserver ce logement et ne pouvait volontairement l'aliéner, au préjudice de la créance de sa femme. C.C., art. 1084, 1087. Expliquons nous davantage.

Dans l'ancien droit français, il y avait *l'habitation légale*, et *l'habitation conventionnelle* de même que nous avons le douaire légal ou coutumier, et le douaire conventionnel ou préfix. Pothier, habitation, No. 1 : " Quel- " ques coutumes accordent aux veuves, outre " le douaire, *un droit d'habitation*." No. 7 : " On peut définir ce droit, le droit que la loi " municipale accorde à une veuve, outre le " douaire, d'habiter pendant sa vie, ou du " moins pendant sa viduité, dans une des " maisons de la succession de son mari."

Notre code civil n'a pas conservé à la femme ce droit d'habitation légale, excepté pendant les délais qu'elle a après la mort de son mari pour faire inventaire. C.C., art.

1352.—Dans l'ancien droit français, toutes les coutumes n'accordaient pas ce droit d'habitation légale; mais toutes reconnaissaient le droit de convenir dans le contrat de mariage que la femme aurait une habitation aux dépens de la succession de son mari. Ainsi, au No. 31, Pothier dit : " *On peut*, SOIT " DANS LES COUTUMES QUI ACCORDENT AUX VEUVES " UN DROIT D'HABITATION, SOIT DANS CELLES QUI " NE LE LEUR ACCORDENT PAS, *convenir* par le " contrat de mariage que la femme aura son " habitation dans quelqu'une des terres ou " des maisons de son mari, au cas qu'elle " survive. Cette convention se fait de diffé- " rentes manières."

Or nul doute, sous notre code civil, par l'art. 1257, C.C., qui dit : " Il est permis de " faire dans les contrats de mariage toutes " sortes de conventions, même celles qui se- " raient nulles dans tout autre acte entrevifs, " &c., &c.," une telle convention peut aussi se faire de différentes manières.

Pothier, donnant les caractères distinctifs du droit d'habitation légale, de celui qui est conventionnel, dit au No. 19 :—

" Le droit d'habitation—(c'est-à-dire celui " qui résulte seul de la loi, le légal) est un " droit que la coutume n'accorde à la veuve " qu'au temps du décès de son mari. De " même qu'elle ne lui donne ce droit qu'au- " tant qu'il se trouvera quelque maison dans " la succession de son mari, de même elle ne " lui donne ce droit sur une des dites mai- " sons qu'en l'état auquel elles se trouvent. " En cela, ce droit que la loi seule accorde à " la veuve, est différent de celui qu'elle au- " rait stipulé par le *contrat de mariage*. LE " MARI AYANT DÈS CE TEMPS CONTRACTÉ L'OBLI- " GATION *envers sa femme de lui donner après sa* " *mort l'habitation d'une maison*, A CONTRACTÉ " DÈS CE TEMPS ENVERS ELLE *l'obligation de* " *conserver la maison en tel état que la femme* " *puisse jouir de l'obligation qu'il lui a promise:* " *l'héritier du mari succède à cette obligation*, " &c., &c."

No. 37. " Lorsque la maison *déterminée* " par la convention d'habitation *a péri par la* " *faute du mari et le défaut d'entretien*, la " femme est fondée à demander contre l'hé- " ritier du mari une indemnité de la perte " de son droit d'habitation qui en résulte; " car *le mari*, EN CONTRACTANT *par la conven-* " *tion portée au contrat de mariage*, L'OBLIGA- " TION DE DONNER A LA FEMME *l'habitation de* " *cette maison*, A CONTRACTÉ *envers elle* L'OBLIGA- " TION SECONDAIRE DE CONSERVER et entretenir " tellement la maison, qu'il peut remplir à " cet égard son obligation, suivant le prin- " cipe établi en notre *Traité des obligations* " No. 142. En cela le droit d'habitation qui " est formé et qui nait de la convention, est " différent de celui que la loi défère."

No. 38 : " Le droit d'habitation conven- " tionnelle dans les deux espèces ci-dessus, " diffère encore de celui que la loi défère. " Celui-ci n'empêche pas le mari de disposer " librement de ses maisons, la loi ne défé- " rant le droit d'habitation qu'au temps de " la mort du mari, et sur les maisons qui se " trouvent dans sa succession. *Au contraire*, " dans les deux espèces ci-dessus, la maison " ayant été, par le contrat de mariage, déter- " minée et affectée à l'habitation de la fem- " me, *le mari n'a pu par son fait*, PAR UNE " ALIENATION VOLONTAIRE, *préjudicier au droit* " *d'habitation de la femme dans la dite maison ;* " *et la femme peut en conséquence réclamer son* " *droit contre les tiers détenteurs de la dite maison*, " *à moins que l'héritier du mari ne lui donne un* " *équivalent*."

L'art. 1063, du C.C., dit : " L'obligation de " donner comporte celle *de livrer la chose et* " *de la conserver jusqu'à la livraison*."

Ainsi, si la maison, dans laquelle le contrat de mariage stipule un droit d'habitation pour la femme, est la maison où logeait le mari à son mariage, on voit qu'il n'avait pas le droit de la vendre, au détriment de l'*habitation* qu'il s'est obligé de fournir à sa femme, en cas de survie de celle-ci.

Le défendeur ne pourrait dire qu'aucune maison n'a été spécialement déterminée dans le contrat de mariage, car, même dans ce cas, sa position ne changerait pas, ainsi que Pothier le dit au No. 42 :

" Une cinquième espèce est, lorsqu'il est " dit que la future épouse, en cas de survie, " aura, outre son douaire, une habitation, " *sans ajouter dans un des chateaux ou maisons* " *du futur*.

" Cette espèce diffère des précédentes, en ce " que l'habitation stipulée par la femme n'é- " tant pas, dans cette espèce, limitée aux " chateaux ou maisons du mari ; s'il ne se

" trouvait dans les biens du mari aucune " maison qu'on put donner à la veuve pour " son habitation, *l'héritier du mari serait tenu* " *de lui payer par chacun an une somme à la-* " *quelle on arbitrerait que pourrait monter le* " *loyer d'une maison ou d'un appartement con-* " *venable, suivant l'état de la veuve, dans la ville* " *où était le domicile de son mari lors de sa* " *mort.*"

La cour est donc d'avis de rejeter la *défense au fond en droit*, et elle l'est avec dépens.

Défense au fond en droit rejetée.

Chaloult & LeBel, avocats de la demanderesse.

L. V. Dumais, avocat du défendeur.

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*COURT of QUEEN'S BENCH—MONTREAL.**

Illegal arrest and imprisonment — Probable cause—Complaint dismissed for defect of jurisdiction.

HELD:—1. Where the respondent converted to his own use, certain straw bought by him with money furnished to him by the appellant, and intended for the appellant's benefit, that there was probable cause for his arrest.

2. Where a person lays an information before a justice of the Peace, that a crime has been committed, for which such justice has general jurisdiction, and the justice grants a warrant upon which the accused is arrested, but he is afterwards discharged upon the ground that the justice had no authority in that special case, the complainant, if he had probable cause, is not liable in damages for illegal arrest and imprisonment. —*Copeland*, Appellant, and *Leclerc*, Respondent, Jan. 25, 1886, Tessier and Cross, JJ., *diss.*

Quebec Pharmacy Act, 48 *Vict.* (*Q.*,) *ch.* 36, *s.* 8 —*Construction of—Partnership contrary to law.*

HELD (Reversing the judgment in Review, M.L.R., 1 S.C. 485):—That the appellant, who had, during more than five years before the coming into force of the Act 48 Vict. (Q.) ch. 36, practised as chemist and druggist in partnership with his brother, and in his brother's name, was entitled, under sect. 8 of the Act, to be registered as a licentiate of pharmacy. The section in question must be construed as applying to those who have *illegally* practised as chemists and druggists, and it was immaterial whether the appellant had practised in his own name or in a partnership contrary to law, the illegality in either case being covered by the Act.—*Brunet & L'Association Pharmaceutique*, P.Q., Jan. 27, 1886.

* To appear in Montreal Law Reports, 2 Q.B.

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*SUPERIOR COURT—MONTREAL.**

Capias—Emprisonnement illégal—Délit—Prescription de l'action résultant d'un délit.

JUGÉ:—1. Que le fait reproché à un défendeur arrêté sur *capias*, constitue un délit.

2. Que l'action par laquelle le demandeur réclame du défendeur des dommages-intérêts pour arrestation illégale et emprisonnement en vertu d'un *capias*, se prescrit par deux ans.

3. Que cette prescription n'est pas interrompue seulement par l'émanation de l'action, mais par la signification effective de l'action avant l'expiration des deux ans qui suivent la date du jugement rejetant le *capias*.—*Mansfield* v. *Dodd*, Jetté, J., 18 oct. 1886.

Running stream—Tannery—Actionable nuisance—Damages—Injunction.

HELD:—1. That where the proprietor of a tannery, for the purposes of his industry, makes such use of a private water-course as to render the water unfit for domestic purposes and dangerous to health, and to deprive proprietors of land bordering on said stream, of the use and enjoyment of the same, damages will be granted against him.

2. Under the above circumstances, the Court will grant an injunction against such use of stream.—*Weir* v. *Claude*, Johnson, J., Oct. 30, 1886.

Responsabilité des huissiers—C. proc. arts. 22 *et* 36—*Avis d'action—Effet des lois decrétant quels biens peuvent être saisis et ceux qui ne peuvent l'être—C. proc. art.* 556—*Subrogation.*

JUGÉ:—1o. Que l'huissier porteur d'un

* To appear in Montreal Law Reports, 2 S. C.

bref de saisie-gagerie qui signifie d'abord une copie du bref au locataire et qui ne va ensuite saisir que plusieurs jours après, est responsable en dommages au demandeur pour les effets que le locataire a, dans l'intervalle de la signification à la saisie, enlevés de sur les lieux loués et ainsi soustraits au privilége du demandeur;

2o. Que les arts. 22 et 36 du code procédure civile ne s'appliquent pas à cette action en dommages;

3o. Que le privilége du locateur ne porte pas sur les effets qui doivent être, en vertu de l'art. 556, laissés au débiteur à son choix;

4o. Que cet art. 556, tel qu'amendé, s'applique aussi bien aux saisies qui ont lieu pour le recouvrement d'une dette antérieure à cet article qua pour les dettes postérieures;

5o. Que le jugement condamnant, dans ce cas, l'huissier à des dommages, le subrogera pour autant dans la créance du demandeur contre le locataire.—*Michon et al.*, v. *Venne*, Cimon, J., confirmé en révision, 12 juin 1886.

Procedure—Opposition to judgment by default.

HELD:—That under 46 Vict. (Q.), ch. 26, s. 4, amending C. C. P. 484, an opposition to a judgment by default must be supported by affidavit setting forth that the opposant has a good defence to the action, and that he has been prevented from filing his defence by surprise, fraud or other just and sufficient causes.—*Ross* v. *Dawson et al.*, Jetté, J., Sept. 20, 1886.

Procedure—Opposition to judgment by default—C. C. P. 486—46 Vict. (Q.) ch. 23, s. 4.

HELD:—1. That the opposant, against whom a judgment by default had been obtained after being regularly foreclosed from pleading, not having objected within the ordinary delay to the filing of a contestation in law of his opposition to judgment, but on the contrary, having appeared and been heard on said contestation, could not object afterwards (and more especially when the case was before the Court of Review), that the contestation had been filed too late. C. C. P. 140.

2. An opposition to judgment by default must be supported by affidavit that the defendant has a good defence to the action,—which defence shall be set out in the opposition,—and that he has been prevented from filing his defence by surprise, fraud or other just and sufficient causes.

3. Where the defendant has been regularly foreclosed from pleading, and does not complain of such foreclosure, he is not entitled to file an opposition to the judgment (which is equivalent to a plea to the action), without being relieved from such foreclosure. —*Letourneux* v. *St. Jean*, In Review, Johnson, Papineau, Gill, JJ., Nov. 30, 1886.

UNPROFESSIONAL CONDUCT.

To the Editor of THE LEGAL NEWS:

SIR,—Frequent reference has recently been made in the city papers to matters reflecting upon the conduct of members of our Bar. The presiding Judge of the Circuit Court for the last term, must have been utterly disgusted at the numerous instances of unprofessional practice disclosed to him. If this state of affairs be allowed to proceed unmolested, it is difficult to say where it will end. It is about time that our Council showed a little "backbone" and woke up to the fact that the dignity and reputation of our Bar are at stake, and that they proceeded to inquire into and put down with a strong hand this unfortunate but growing evil.

NEMESIS.

Dec. 27, 1886.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 18.

Judicial Abandonments.

Louis Fréchette, trader, Ste. Madeleine, Dec. 6.

Louis Proulx, carriage-maker, St. Robert, Dec. 13.

John N. Smith, trader, township of Winslow, Dec. 6.

Curators appointed.

Re F. X. Brazeau & Cie.—Kent & Turcotte, Montreal, curator, Dec. 16.

Re Telesphore Coderre, druggist, Montreal.—Seath & Daveluy, Montreal, curator, Dec. 7.

Re Henriette Dubeau, milliner, Montreal.—Seath & Daveluy, Montreal, curator, Dec. 10.

Re Thomas Lavoie, Fraserville. — L. N. Paquet, Fraserville, curator, Dec. 14.

Re N. O. Lebrun, Sorel.—Kent & Turcotte, Montreal, curator, Dec. 3.

Re Nathaniel Michaud, trader, St. Eloi.—H. A. Bedard, Quebec, curator, Dec. 14.

Re Edouard Morin, druggist, Montreal. — David Seath, curator, Dec. 7.

The Legal News.

VOL. X. JANUARY 8, 1887. No. 2.

It is with a sorrowful heart, and a deep sense of bitter and overwhelming personal loss, that we have to record this week the death of another old and valued member of the bench—Mr. Justice Torrance, who departed this life very suddenly on the morning of January 2. Mr. Justice Torrance had been suffering for a few days from an attack of pneumonia, brought on, it is stated, by exposure while acting as pall-bearer at the funeral of his old friend, Judge Ramsay, on December 24. The illness was not supposed to be serious, and he had recovered sufficiently on the following Thursday and Friday to be able to read and write—we received proof-sheets from him on Thursday afternoon—but on Sunday morning, at four o'clock, after rising to take a draught of the medicine which had been prescribed for him, he fell back and in a few minutes breathed his last.

Mr. Justice Torrance has done good and faithful service on the bench during eighteen years. Long versed as a lawyer in mercantile affairs, he brought to his judicial work a profound acquaintance with commercial usage, as well as an intimate knowledge of the science of the law, and these qualifications, combined with painstaking diligence and unswerving conscientiousness, made him pre-eminently a safe and satisfactory judge. The writer succeeded to the vacancy on the editorial committee of the *Jurist*, created by his elevation to the bench eighteen years ago, and during these eighteen years Judge Torrance has been in constant association with our work from week to week,—we might almost say from day to day. Since the establishment of the *Legal News*, and later, of the *Montreal Law Reports*, we have regarded him, as well as Judge Ramsay, almost as a *collaborateur*. During this time, the manuscripts of his judgments have invariably been committed to our hands, and we have had the advantage, and the privilege, of reading with care the thousand opinions which have been the fruit of his labours.

Looking back, at a moment when the sense of personal bereavement is too keen to permit us to express what we would wish to say, three things principally present themselves—over and above that conscientiousness and devotion to duty which were the ruling characteristics of the deceased. The first is, that his decisions have stood the test of appeal remarkably well. Without being able to make actual count, we are under the impression that Judge Torrance has been reversed less frequently than any other Judge of the Superior Court, and in some cases in which he was overruled in appeal, his decision was restored by the Supreme Court of Canada or the Judicial Committee of the Privy Council.

A second point is the brevity and clearness of his judgments. Lucid and concise in his statement of facts, and of the question to be decided, the principle which applied was clearly presented, and the conclusion followed. The gift of brevity without obscurity is an extremely valuable one, more especially perhaps in a court of original jurisdiction working at high pressure, and this gift Mr. Justice Torrance possessed in a remarkable degree.

The third point which presents itself at the moment is his admirable lucidity in dealing with questions of procedure. He did much to evoke order out of the chaos into which our system of procedure was thrown by the crude and badly prepared code of procedure. If he had sat alone as Practice Judge he would soon, by his orderly habit of mind, have built up a clear and consistent system. His decisions are admirably framed, and he shows in a hundred neat and pithy rulings, that he would have made an excellent codifier of the law of procedure.

In Justices Torrance and Ramsay our readers lose two valued contributors. Judge Ramsay, as many of our readers are already aware, was the author of the numerous articles signed "R.", which for years past have appeared in the *Legal News*. When these contributions began there was a question as to the form in which they should appear. Written as they usually were at his retreat at St. Hugues, without opportunity for previous communication with the editor, there was at times too great a divergence of opinion on the questions treated, to admit of their insertion editorially as originally contemplated. On the other hand, there were obvious objections to a parade of personality by a judge holding a high office. A middle course was suggested by us—that the articles should bear a signature which would indicate them as the contributions of a particular writer. Mr. Justice Ramsay, with his wonted straightforwardness, immediately accepted this suggestion, and adopted the initial of his own name. His style was quickly recognized, and he himself never made any secret of the thinly veiled authorship. Judge Torrance did not write for the journal, but he has been in the habit for years past of sending us cuttings of such things in his newspaper readings as he deemed worthy of notice or preservation.

The government, on the eve of a doubtful general election, have a delicate duty to perform in filling three vacancies among the English-speaking judges,—for we regret to say that Mr. Justice Buchanan's health having compelled his retirement, there is a third vacancy on the bench. Every well wisher of his country must pray that our rulers may be guided by a wisdom superior to their own in this difficult and responsible duty. If they fail—if they show that the public interest is subordinate to any other consideration—it is not improbable that punishment will speedily follow. Their course at this moment is anxiously watched by thousands of intelligent and independent electors, and a step in the wrong direction may change the result of a general election. The appointments must, of course, be made immediately.

SUPREME COURT OF CANADA.

EXCHEQUER.]

BERLINQUET v. THE QUEEN.

Petition of right—Intercolonial Railway contract—31 Vic. ch. 13, s. 18—Certificate of engineer — Condition precedent to recover money for extra work — Forfeiture and penalty clauses.

The suppliants engaged by contracts under seal dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorised by 31 Vict. ch. 13) to build, construct and complete sections three and six of the said railway, for a lump sum for section 3 of $462,-444, and for section 6, for a lump sum of $456,946.23.

The contract provided *inter alia*, 1. that it should be distinctly understood, intended and agreed that the said lump sums should be the price of, and be held to be full compensation for all works embraced in or contemplated by the said contracts, or which might be required in virtue of any of its provisions, or by law, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans or specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act intituled, 'An Act respecting the construction of the Intercolonial Railway,' or in the Commissioners or engineer by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alteration in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of 31 Vic. ch. 13. That the works embraced in the contracts should be fully and entirely completed in every particular, and given up under final certificates, and to the satisfaction of the commissioners and engineer, on the 1st of July, 1871, (time being declared to be material and of the

essence of the contract), and in default of such completion, contractors should forfeit all right, claim, &c., to any money due or percentage agreed to be retained, and to pay as liquidated damages $2,000 for each and every week for the time the work might remain uncompleted. That the commissioners, upon giving seven clear days' notice if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense; in such case contractors were to forfeit all right to money due on the works and to the percentage returned.

On 24th May, 1873, the contractors sent to the commissioners of the Intercolonial, a statement of claim, showing that there was due to them a large sum of money for extra work, and that until a satisfactory arrangement be arrived at, they would be unable to proceed and complete the works.

Thereupon notices were served upon them and the contracts were taken out of their hands and completed at the cost of the contractors by the Government. In 1876, the contractors, by petition of right, claimed $523,000 for money *bona fide* paid, laid out and expended in and about the building and construction of said sections 3 and 6, under the circumstances detailed in their petition.

The Crown denied the allegations of petition and pleaded that the suppliants were not entitled to any payment, except on the certificate of the engineer, and that the suppliants had been paid all that they obtained the engineer's certificate for, and in addition filed a counter claim for a sum of $159,982.57 as being due to the Crown under the terms of the contract, for moneys expended by the commissioners over and above the bulk sums of the contract in completing of said sections.

The case was tried in the Exchequer Court by Taschereau, J., and he held that under the terms of the contract, the only sums for which the suppliants might be entitled to relief were, 1st. $5,850, for interest upon and for the forbearance of divers large sums of money due and payable to them, and 2ndly. $27,022.58, the value of plant and materials left with the Government, but that these sums were forfeited under the terms of the third clause of the contract; that no claim could be entertained for extra work, without the certificate of the engineer, and that the Crown was entitled to the sum of $159,953.51 as being the amount expended.

An appeal to the Supreme Court of Canada having been taken by the suppliant, it was:—

Held, affirming the judgment of the Court below, Fournier and Henry, JJ., dissenting, 1st.—that by their contract, the suppliants had waived all claim for payment of extra work; and 2ndly. that the contractors, not having previously obtained from or being entitled to a certificate from the Chief Engineer, as provided in the 18th sec. 31 Vict. ch. 13, for or on account of the monies which they claimed, the petition of the suppliants was properly dismissed. 3rdly. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors, and charge them with the extra cost for completing the same, but that in making up that amount, the Court below should have deducted the sum of——, being the amount awarded as being the value of the plant and materials taken over from the contractors by the Commissioners in June, 1873.

Appeal dismissed with costs.

Irvine, *Q.C.*, and *Girouard*, *Q.C.*, for appellants.

Burbidge, *Q.C.*, and *Ferguson*, for respondent.

PROVINCE OF QUEBEC.]

JONES v. FRASER.

Legacy—Alienation of property bequeathed by testator—Effect of— Partage — Estoppel— Legacy—Construction of.

W. F. by his will, bearing date 11 Feby., 1833, *inter alia*, bequeathed to his illegitimate daughters, M. E. and M., a defined portion of the seigniories of Temiscouata and Madawaska, and the balance of said seigniories

to his sons, W. and E. A short time after making his will, the testator, who was heavily in debt, received an unexpected offer of £15,000 for the said seigniories, and he therefore sold at once, paid his most pressing debts, amounting to £5,400, and the balance of £9,600 was invested by loaning it on the security of real estate.

At his death, his estate appearing to be vacant as regards the £9,600 a curator was appointed.

On the 27th Sept., 1839, the parties entitled under the will, proceeded to divide and apportion their legacies, basing their calculations upon the approximate area of the seigniories bequeathed, and received and collected part of the sums allotted to each by the *partage*.

In an action brought by the respondent against the curator, in order to make him render an account, the Court ordered him to render an account, which he did, and deposited $50,000 and other securities. On a report of distribution being made, F. (the respondent) filed an opposition claiming his share under the will. This opposition was contested by J., the appellant, on the ground, 1st. that the legacies were revoked and that in his capacity of universal legatee to his mother (the legitimate child, he alleged, of the testator and the Indian woman who was *commune en biens*) he was entitled to one half of the proceeds of the said £9,600; and 2nd., that in the event of his claim as to legitimacy and revocation of the legacy being rejected, as by the will the daughters were exempted from the payment of the debts, he, as representing one of the daughters, was entitled to her proportion of £15,000, the net proceeds of the sale.

Held, affirming the judgment of the Court below, that the sale of the seigniories which were the subject of the legacy in question in this cause, had not, considering the circumstances under which it was made, the effect of defeating that legacy. 2. That J. (the appellant), not having, at the death of his mother, repudiated the *partage* to which she was a party, but on the contrary, having ratified it and acted under it, was estopped from claiming anything more than what was allotted to his mother.

The judgment of the Court below held that as the testator declared that his daughters should not be liable for the payment of his debts, the partition as regards them, should be made of the sum of £15,000, the price obtained from the sale of the seignories bequeathed, and not the £9,600 remaining in his succession at his death. On cross-appeal to the Supreme Court of Canada:—

Held, that on the pleadings now before the Court, no adjudication can be made as to the sum of £5,400 paid by the curator for the debts, and that in the distribution of the moneys in Court, all that J. (the appellant) can claim to be collocated for, is the unpaid balance (if any) of his mother's share in the moneys, securities, interest and profit of the said sum of £9,600, in accordance with the *partage* of the 27th Sept. 1839.

Appeal dismissed and cross appeal allowed with costs.

Irvine, Q.C., and *Casgrain*, for appellant.

Pouliot, for respondent.

SUPERIOR COURT.

Sherbrooke, April 30, 1886.

Before Brooks, J.

The Ontario Car Co. v. The Quebec Central Railway Co., and Brandon et al., Oppts.

Railway—Sale of—Bondholders.

Held:—*That the holders of Railway bonds have no right, as such bondholders and hypothecary creditors, to oppose the sale of the railway.*

Per Curiam:—

The opposants say that the plaintiffs having obtained a judgment against the defendants, have caused the sheriff of St. Francis to attach defendants' road and advertize the same to be sold in satisfaction of their judgment. That under 44-45 Vict. chap. 40, the defendants were authorized to issue bonds bearing first hypothèque on their road, and such bonds were privileged without registration. That on the 1st July, 1881, the defendants issued bonds for £556,000 sterling; that the opposants own 129 of said bonds, equal to £12,900 sterling, for which the property of defendants is hypothecated;

that the defendant's road has been declared by the Parliament of Canada a work for the advantage of Canada; that the railway seized is not susceptible of seizure and sale under execution, and the opposants have an interest in opposing, for the following reasons:—That the property is not *in commercio* and not liable to seizure and sale under execution; That the writ and proceedings are null, but without giving any other reason; and pray:—

1st. That the Quebec Central Railway and property seized be declared not liable, in whole or in part, to seizure and sale by ordinary process of law.

2. That the seizure be declared null and the plaintiffs be injoined to refrain from their attempt to sell.

To this the plaintiffs say:—Your opposition is not well founded. We, the plaintiffs, had a right to seize. The railway is *saisissable* and you have no interest in opposing the sale.

By admissions it is proved that on July 1, 1881, the defendants issued 5560 bonds of the value of £100 each, equal to £556,000, pursuant to their charter, 32 Vic., ch. 57; 36 Vic., ch. 47; 38 Vic., ch. 45; 40 Vic., ch. 32; 44-45 Vic., ch. 40; and opposants have £12,900 of these bonds. No other evidence was adduced.

The simple proposition made by opposants is this:—We are owners of the bonds, for the payment of which the defendants' railway is duly hypothecated, and said property is not liable to seizure or sale.

It was urged at the argument that the bonds shewed that a Trust Deed had been executed, by which the railway was vested in trustees for the security of bondholders, but this was not made a part of or referred to in the opposition. There the sole grounds were those above stated, that opposants were hypothecary creditors and had therefore a right to oppose the sale of the realty hypothecated to them.

In the case of *The County of Drummond* v. *The South Eastern Railway Co'y*, 22 L. C. J., p. 25, the seizure was by a mortgage creditor and was sustained (Tessier, J., dissenting), the Court declaring that they did not decide whether it could be done by an ordinary creditor.

In *Wason* v. *The Lévis & Kennebec Ry. Co.*, 7 Q. L. Rep. p. 330, (Stuart, Meredith & Routhier, JJ.) it was held that such railways are liable to seizure and sale by ordinary process of law. Stuart, J., remarked, speaking of the right to issue bonds: "This appears to be an excessive power to run in debt without providing any security for its repayment, and if a railway were held exempt from seizure and sale under execution, the fate of creditors would be hard indeed."

The present case is not that of those reported. It is a party claiming to be an hypothecary creditor, asking, because he is so, that property hypothecated to him should not be sold under execution issued at the suit of a judgment creditor, the judgment based upon an unsecured debt.

The question of public interest is not raised by any public officer, and the deed of trust is not raised in any way, and is not referred to in the opposition.

Is the property of such a nature that it cannot be sold judicially? The Court of Queen's Bench have held that it can be sold under hypothec in the ordinary course. The Court of Review (Quebec) held that it can be so sold at the suit of an ordinary creditor. I see no distinction in law. The railway laws declare that railway companies may become debtors in the ordinary way, may make notes, contracts, etc.

Our *hypothèque* is essentially different from the mortgage of England, Ontario or the United States. It is simply a real right upon the immoveable, 2016, C. C. It gives no title to immoveables. It gives the hypothecary creditor the right to be paid, in preference to other creditors, out of the proceeds of the sale of the immoveables hypothecated. Have opposants, under their opposition, any further right? Certainly, as hypothecary creditors, they have only the right the law gives them, *i. e.*, to take from the proceeds of sale, according to their rank and priority.

Is this property not *in commercio?* It is held by what, in recent times, has become merely a private corporation for speculative purposes, with the sanction of the Legislature so far as giving special powers. Is it to be

said that they may incur obligations and be exempt from the legal consequences of failure to meet them? This certainly would constitute a close corporation. The legal sale to a third party not having corporate powers is provided for by the Dominion Consolidated Railway Act, 46 Vic., chap. 24, s. 14. That such property cannot be sold under ordinary legal process, when such sale is opposed by creditors who simply say, we have a *hypothecary* claim, and consequently, a right to prevent the sale, is a doctrine which this court cannot sanction, especially as it has been declared by our courts that such property is subject to seizure and sale by ordinary process of law.

The opposition is dismissed with costs.

Cooke, for opposants.

W. White, Q.C., counsel.

Ives, Brown & French, for plaintiffs contesting.

COUR SUPÉRIEURE.

[En Chambre.]

FRASERVILLE, 7 décembre 1886.

Coram CIMON, J.

ST. JORRE v. MORIN, & BÉGIN, esqté, oppt.

Cession de biens—Saisie d'immeuble—C. proc. arts. 763 *et suivts*—48 *Vict.* (*Q.*) *ch.* 22.

JUGÉ:—*Que malgré la cession de biens et la nomination d'un curateur, le créancier peut, en vertu de son jugement, faire saisir et vendre par bref* de terris *l'immeuble cédé par son débiteur dans sa cession de biens.*

En septembre dernier, l'opposant a été nommé curateur à la cession de biens que le défendeur a faite en vertu des arts. 763 et suivants du c. de proc., tels qu'amendés par le statut de Québec 48 Vict., ch. 22. Avis de cette cession de biens et de la nomination du curateur ont été donnés. Cependant, après cela, le demandeur, qui avait obtenu un jugement contre le défendeur, fit émaner contre lui un bref de *fi. fa. de terris* et fit saisir son immeuble qui est annoncé pour être vendu le 14 de ce mois. L'opposant, qui n'est plus dans le délai pour pouvoir produire de plein droit une opposition au shérif, s'est adressé au juge pour avoir permission de produire une opposition où il allègue la cession de biens, sa nomination de curateur et que, par la loi, cette cession de biens investissait le curateur de la propriété et de la possession de cet immeuble qui ne pouvait plus être saisi, et que la saisie est nulle. Le juge a refusé cette permission par le jugement suivant:—

"Considérant que par l'art. 769 du code de proc. (tel que remplacé par 48 Vict., ch. 22, sec. 4) il n'y a que la procédure par voie de saisie-exécution DES MEUBLES qui est *suspendue* et non celle par voie de saisie des IMMEUBLES; considérant que par l'art. 772 du c. de proc. (tel qu'amendé par 48 Vict., ch. 22, sect. 6), le curateur PEUT vendre les immeubles avec la permission du tribunal ou du juge, ou il PEUT être autorisé par le tribunal ou le juge à émettre son mandat adressé au shérif pour saisir et vendre ces immeubles, et alors le shérif agit comme sur un bref *de terris* et toutes les procédures subséquentes à l'émission du mandat se font à la Cour Supérieure; mais considérant que ces modes n'excluent pas le mode ordinaire qu'a le créancier en vertu de son jugement de procéder par bref *de terris* à la saisie et vente des immeubles de son débiteur; considérant que la saisie en cette cause n'a pu l'être *super non domino;* et que l'opposant ne montre aucune raison pour justifier son opposition,

"Nous rejetons, etc."

Permission de produire l'opposition est refusée.

A. Dessaint, avocat de l'opposant.

THE LATE MR. JUSTICE TORRANCE.

Frederick William Torrance, a Justice of the Superior Court for the Province of Quebec, died, rather suddenly, on the morning of Jan. 2. The deceased was a son of the late John Torrance, a merchant well known in Montreal. The Judge was born in Montreal on the 16th July, 1823. He was educated partly in Montreal and partly in Scotland. In 1844 he received the degree of M.A. at the University of Edinburgh, ranking second in the order of proficiency in classics and mathematics in the examination for the degree. He had previously, in 1839-40, followed courses of lectures at Paris, France, at

the Ecole de Médicine, Sorbonne, and the Collége de France. He studied law with the late Duncan Fisher, Q.C., and the Hon. James Smith, subsequently Attorney-General for Lower Canada and a judge of the Superior Court, and was called to the bar in 1848. He was professsor of Roman law in the Law Faculty of McGill University (of which he was afterwards a governor, and from which he obtained the degree of B.C.L. in 1856,) from 1854 to 1870. He was one of the commissioners appointed in 1865 to enquire into the St. Albans raid affair, and was appointed a puisné judge of the Superior Court on August 27, 1868.

THE LATE MR. JUSTICE RAMSAY.

(*Gazette, Montreal, Dec.* 28.)

A meeting of the Bar of Montreal was held in the Court House at 3 o'clock yesterday afternoon. Amongst those present were: Messrs. J. J. Day, Q.C., 'Strachan Bethune, Q.C., W. H. Kerr, Q.C., W. W. Robertson, Q.C., J. M. Loranger, Q.C., J. C. Hatton, Q.C., Gersham Joseph, Q.C., Rouer Roy, Q.C., J. S. Hall, Jr., M.P.P., E. Lafontaine, M.P.P., John L. Morris, A. Branchaud, James Kirby, W. F. Ritchie, C. J. Doherty, J. Ralph Murray, G. B. Cramp, C. C. DeLorimier, Q.C., Denis Barry, C. H. Stephens, W. D. Lighthall, A. R. Oughtred, W. P. Sharpe, A. D. Nicolls, W. S. Walker, R. Dandurand, P. H. Roy, J. P. Sexton, H. J. Hague, H. Lanctot, P. M. Durand, S. A. Lebourveau, and A. E. Poirier.

Mr. Bethune, Q.C., suggested that Mr. Day, Q.C., as the oldest member of the Bar in this district, should take the chair.

The following resolutions were unanimously carried :—

Moved by Mr. S. Bethune, Q.C., Mr. Rouer Roy, Q.C., and Mr. W. W. Robertson, Q. C., and seconded by Mr. Joseph M. Loranger, Q.C., and Mr. A. Branchaud:

That the members of the Bar of the district of Montreal desire to express their profound regret at the death of the late Mr. Justice Ramsay, who by his brilliant talents, varied acquirements and great learning, adorned the Court of Queen's Bench for Lower Canada, of which he was one of the most distinguished members for many years past.

Moved by Mr. P. H. Roy and Mr. Lawrence McDonald, and seconded by Mr. J. C. Hatton, Q.C.:

That, as a token of respect to his memory, the members of the Bar wear mourning for one month.

Moved by Mr. W. H. Kerr, Q.C., Mr. John L. Morris and Mr. C. J. Doherty, and seconded by Mr. E. Lafontaine, M.P.P.:

That the secretary transmit to the family of the late judge a copy of these resolutions, and at the same time convey to them the expression of the deep sympathy of this Bar with them in their affliction.

Moved by Mr. J. Kirby, seconded by Mr. R. Dandurand:

That these resolutions be published in the papers of this city.

Mr. Bethune, Q.C., in moving the first resolution, said: I do not think it is necessary that I should add anything to the words of the resolution. I am sure that we must all feel the very great loss that the Bench, the Bar and the public has sustained by the sudden death of Mr. Justice Ramsay. For my own part, I have always admired him immensely, and when I speak of his brilliant talents, varied acquirements and great learning, I do not think there is a word too much. In short, I have always regarded him as one of our greatest legal minds.

Mr. Kerr, Q.C.—I have very little to add to what has fallen from the lips of my learned friend, Mr. Bethune, excepting to say that I had the advantage of practising for many years in opposition to the late Mr. Justice Ramsay, and I must bear testimony to the fact that we have never had a public prosecutor in Montreal who was at all equal to him. He was most careful and attentive in his duties, and one noteworthy feature was that when he gave his word to a *confrère* that on such a day a trial would come on, you might depend upon it with the most implicit confidence. It is hardly necessary to add anything further with respect to him, excepting to say that his industry was very great, the pains that he took with his cases was unexampled, and so far as his integrity was concerned, although a violent partizan when at the Bar, I do not think that even the breath of suspicion was raised as to the purity of his motives in any of the cases in which he was engaged.

Mr. Day, Q.C.—I need only say that I heartily endorse every word that has been uttered by my two learned friends.

Mr. P. H. Roy, in moving the second resolution, said: After the remarks of the learned gentlemen who have preceded me, there is but little to add. Judge Ramsay's knowledge

of French was remarkable, and he was most distinguished for his impartial conduct on the Bench. In fact, he represented Justice itself, and the youngest member of the Bar could always expect to be protected quite as fully as the oldest.

Mr. J. C. HATTON, Q.C.—I will add nothing, except to endorse what has been so well said by those who have preceded me, and to express my own deep personal regret at the death of Mr. Justice Ramsay.

Mr. JAMES KIRBY, in moving the last resolution, said:—I fully concur in what has been observed by the speakers who have preceded me. There is one fact, however, which, in justice to the memory of the departed Judge, should be mentioned. The event, so sad, so unexpected to the Bar, was not unexpected by the Judge himself. He came to Montreal, on the 1st of November, a tired and sick man, and fully conscious that he might soon be called away. In consequence of the illness of a colleague, he was asked to assume double duty by taking the criminal term of his court out of his turn. Though he felt, and stated to me, that his strength was well nigh spent, he stuck to his post, and was unwilling, even by a day's absence, to interrupt the public business. This fact shows his devotion to duty and his sense of the importance of the judicial office. As has been very truly stated in the article which appeared in the *Gazette*, he dropped down dead in harness, willing to sacrifice himself, rather than that any one should suffer by his absence from his post.

The meeting then adjourned.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 18.

Dividends.

Re Felix Fortin, St. Sauveur. — First and final dividend, payable Jan. 2, 1887, H. A. Bedard, Quebec, curator.

Re N. Mailhot & Cie., Three Rivers.—Dividend, Seath & Daveluy, Montreal, curator.

Re Moore & Co., Montreal.—First and final dividend, payable Jan. 4, 1887, J. C. Beauchamp, Montreal, curator.

Re Senécal & Deslierre.—Dividend, payable Jan. 9, 1887. Kent & Turcotte, Montreal, curator.

Separation as to property.

Sophie Gill vs. Wilfrid C. Boucher, notary, St. Thomas de Pierreville, Dec. 15.

Alvine Célina Marois vs. Joseph Z. Lebel dit Beaulieu, Quebec, Dec. 16.

Marie Louise Ada Roy vs. Louis G. Bourret, physician, St. François du Lac.

Quebec Official Gazette, Dec. 24.

Judicial Abandonments.

Narcisse Anclair, Sorel, Nov. 27.

Joseph Pagé, undertaker, Montreal, Dec. 17.

Curators appointed.

Re Victor L. Côté, Côté & Cie., St. Johns.—Kent & Turcotte, Montreal, curator, Dec. 22.

Re A. Gauthier.—A. A. Taillon, Sorel, curator, Dec. 7.

Re Joseph Jacques, Quebec.—F. Gourdeau, Quebec, curator, Dec. 21.

Re Catherine McEntyre, Montreal.—W. J. O'Malley, Montreal, curator, Dec. 3.

Re Théodule Neveux, Terrebonne.—Kent & Turcotte, Montreal, curator, Dec. 16.

Application for discharge.

Re Emma and Georgiana L'Italien (under Insolvent Act of 1875).—Quebec, Feb. 1.

Dividends.

Re Aubin Duperrouzel, restaurant keeper, Montreal.—Dividend, Seath & Daveluy, Montreal, curator.

Re J. A. Lavigne, trader, Trois Pistoles.—First and final dividend, payable Jan. 7. H. A. Bedard, Quebec, curator.

Minutes transferred.

Minutes, repertory and index of the late E. R. Demers, N.P., Bedford, transferred to Michael Boyce, N.P., Bedford, Dec. 16.

Separation as to property.

Sarah McGinnis v. Robert Mauger, trader, Ste. Adelaide de Pabos, Dec. 18.

GENERAL NOTES.

LAWYERS SHOULD KNOW EVERYTHING.—Some years ago a man in the southern part of the State of New York was tried for killing some wild pigs which belonged to a neighbour. The only witness of the prosecution, who swore to the killing, said he saw the defendant in the act. The young lawyer for the defendant, in cross-examining the witness, asked if the swine made much noise when they were stuck. The witness, to make a most profound impression, turned in his chair and said, "Jedge, I never heard such all fired squealin' in my life." Defendant's counsel at this point addressed the Court and said, "I ask your honour to take judicial notice of the fact that a wild hog never squeals." He did, and the prisoner was acquitted.—*Albany Law Journal.*

TOO BRIEF FOR GRAMMAR.—The shortest chattel mortgage we have seen was the subject of litigation in *Church* v. *M'Leod*, Vt. April 23, 1886, 2 New England Rep. 190. It was in these words: "The six calves for which this note is given is to be Church's until paid for." The document having been recorded in the town clerk's office, pursuant to the statute, the court held that it was constructive notice, and that a purchaser from the mortgagor was liable for a conversion in taking possession and selling one of the calves.—*Daily Law Register.*

The Legal News.

VOL. X. JANUARY 15, 1887. No. 3.

We expected to have been able to announce the judicial appointments in our present issue, but up to Thursday afternoon there is no positive intelligence. As the names of the new judges will probably be given to the public before this number reaches our readers, we shall not say more than that the gentlemen to whom the positions have probably been assigned, stand very high in the profession.

A small error of date occurred in our last issue, with reference to Mr. Justice Torrance. It was said that proof sheets had been received from him on Thursday afternoon. It should have read "Friday," the letter, addressed in his own hand, being postmarked "Dec. 31," the last day of the old year, and less than forty-eight hours before his unexpected decease. The correction may appear unimportant, but knowing his own love of exactitude, which led him on one occasion to write us, pointing out a similar slip, we feel bound to rectify the date.

The *Law Journal* (London), has the following on the subject of the conveyance of the mails:—The Cunard Company have wisely undertaken to carry the Queen's mails pending the decision of the Courts, and, whether or not the Government have a good case against the company on the information filed, it seems clear that the company's ships are bound to carry the mails. By the Post-Office Act, 1837, s. 6, it was provided that "every master of a vessel outward bound to Ceylon, the Mauritius, the East Indies, or the Cape of Good Hope who shall refuse to take a post letter-bag delivered or tendered to him by an officer of the Post-Office for conveyance shall forfeit 200*l*." This penalty was extended in 1841 to the masters of outward-bound vessels generally, and is recoverable on the information of any person by suit in a superior court. Whether the master of the Umbria has incurred this penalty depends on whether the bags were tendered to him, which seems doubtful; but the master for the present snaps his fingers at Acts of Parliament on the broad Atlantic. Meanwhile the Attorney-General's information is filed against his employers, the Cunard Company. No penalty is imposed by the Act on shipowners refusing to carry mails, and although aiding and abetting is provided for by the Act in regard to other Post-Office offences, there is no such provision in regard to refusing ship's letters. If the common law be appealed to, the Attorney-General will have the hard task of showing that ocean-going ships are bound to carry letters in performance of their duty as common carriers. Common carriers are constituted by the custom of the realm, but we have high authority for saying that 'man's control stops with the shore.'

DISTRICT OF OTTAWA — FORMATION OF THE PANELS OF GRAND AND PETIT JURORS.

In the Districts of Montreal and Quebec, the panels of grand and petit jurors are composed of an equal number of persons speaking the English language and of persons speaking the French language; and the Sheriff, in forming the panels, takes alternately a juror of each class from the jury lists.

In the other districts, the panels are formed by taking the names of the number of jurors required, from the jury lists, uninterruptedly and successively, in the order in which they are entered.

In both cases, the panel of grand jurors is composed of twenty-four jurors. The panel of petit jurors is composed in the first case, of sixty jurors, and in the other case, of forty jurors.

The provisions respecting the formation of the panels in the Districts of Montreal and Quebec may, under the authority of Section 36 of the "Jury Act of the Province of Quebec," (46 Vict. ch. 16,) be extended to any other district, by an order of the Lieutenant-Governor in Council, upon the presentment

of the Grand Jury of such District, approved by the presiding Judge, declaring the expediency of such extension.

These provisions were extended on the 18th Dec. 1886, to the District of Ottawa under the following documents:—

Extract from the charge addressed by Mr. Justice Würtele to the Grand Jury, on the 10th Dec. 1886:—

"In Districts in which the population is "composed in part of persons speaking the "English language and in part of others "speaking the French language, the law re-"specting jurors and juries provides for the "formation of the panels of the Grand and "Petty juries with an equal number of per-"sons speaking each language. It is only "right that the half, at least, of the jury "should speak the language of the accused; "and I think that the time has come when "this privilege should be secured to the in-"habitants of this district. To-day the "Grand Jury is wholly composed of jurors "speaking the English language; at the "next term, it may be altogether formed of "persons speaking the French language. I "know that no injustice will arise from this "state of things, and that whatever may be "the language of a Jury, it will act faithfully "and honestly; but I also feel that this state "of things may produce a feeling of disquiet, "if not of mistrust, which it would be well "to obviate. The provision I have men-"tioned would remove the possibility of this "feeling. This provision may be extended "to any district by an order of the Lieuten-"ant-Governor in Council, upon the present-"ment of the Grand Jury of the District, de-"claring that there is expediency for the "extension, where such presentment has "been approved of by the Judge who pre-"sided over the term. I therefore draw "your attention to this matter and submit "it to your consideration."

Extract from the presentment made by the Grand Jury on the 11th Dec. 1886, and approved by the presiding Judge, Mr. Justice Würtele, on the 13th Dec. 1886:—

"The Grand Jurors for the District of "Ottawa respectfully present: That in con-"sequence of some sections of the district "being principally settled by people speak-"ing the English language, and other sec-"tions being principally settled by persons "speaking the French language, it frequently "happens under the mode of summoning "jurors for this court at present practised in "this district, that sometimes nearly the "whole panel consists of persons speaking "the English language only, and at other "times the jurors summoned consist mostly "of persons speaking only the French lan-"guage, and serious inconvenience and de-"lay result therefrom; and the Grand Jury "respectfully request that this Court should "urge upon the Government of this Pro-"vince, to order that the panels of Grand "and Petty Jurors to be summoned before "this Court should be composed one half of "persons speaking the English language and "the other half of persons speaking the "French language."

Order of the Lieutenant Governor in Council, of the 18th December, 1886:—

CHAMBRE DU CONSEIL EXÉCUTIF.

QUÉBEC, 18 décembre, 1886.

PRÉSENT:

Le lieutenant gouverneur, en conseil.

"Attendu, que dans et par la section 36 de "l'acte 46 Vict., chap. 16, il est décrété que "dans les districts de Québec et de Montréal "il doit y avoir vingt-quatre grands jurés et "soixante petits jurés assignés pour servir "devant toute cour de juridiction criminelle, "moitié desquels doit être composée de "personnes parlant la langue française, et "l'autre parlant la langue anglaise; et que "les dispositions de cette section peuvent "s'appliquer à tout autre district par un "ordre du Lieutenant gouverneur en Con-"seil, sur l'adresse du grand jury de ce "district, approuvé par le juge siégeant, "constatant l'opportunité de cette mesure.

"Attendu que le grand jury du district "a présenté à l'honorable Juge Wurtele, "présidant la Cour du Banc de la Reine "siégeant maintenant à Aylmer, une adresse "montrant l'opportunité de faire assigner "les grands et petits jurés, moitié desquels "parlant la langue anglaise et moitié parlant "la langue française, et demandant à la "Cour d'obtenir du gouvernement un ordre "à cet effet;

"Attendu que cette adresse a été approuvée " par l'honorable Juge Wurtele, et qu'il est à " propos d'accéder à la demande susdite ;

" Il est ordonné que les dispositions de la " 36e section du dit acte, 46 Vict., ch. 16, " soient appliquées au district d'Ottawa."

GUSTAVE GRENIER,
Dép. Greffier Conseil Exécutif.

CIRCUIT COURT.

HULL, (Dist. of Ottawa,) Dec. 9, 1886.

Before WURTELE, J.

Ex parte MOFFET, Petitioner, and PAGÉ, Respondent, & CHAMPAGNE, J. P.

Justice of the Peace—Trial—Summary Conviction.

HELD :—*Where a person was charged, under Sect. 59 of the Act respecting malicious injuries to property* (32-33 *Vict. ch.* 22), *with having committed an indictable misdemeanor, and the justice of the peace, after the preliminary inquiry had been conducted as in the case of an indictable offence, convicted the defendant, without trial, of an offence punishable on summary conviction, that the conviction was bad.*

See 9 Leg. News, p. 403, for judgment in the same case, granting a writ of certiorari.

PER CURIAM :—The petitioner complains that he has been aggrieved by a conviction rendered against him, under section 60 of the act respecting malicious injuries to property (32-33 Vict., ch. 22), condemning him to pay a penalty of $10, and the further sum of $15 to the respondent as a compensation for the damage done by him to personal property belonging to the respondent; and the proceedings had before the justice of the peace have been brought before me by means of a writ of certiorari.

The charge made against the petitioner was of having committed an indictable misdemeanor; he was accused, under section 59 of the Act respecting malicious injuries to property, of having committed damage, injury or spoil to certain personal property belonging to the respondent to an amount exceeding $20.00. Under this charge, the petitioner was apprehended and brought before the justice of the peace, and the inquiry ordained for the case of indictable offences was made. It appears, by the record, that the witnesses produced by the prosecutor were examined and cross-examined; but it also appears that the petitioner was not admitted to make a defence to the complaint made against him nor to produce and examine witnesses on his behalf.

After the inquiry, which was made under the provisions of the Act concerning the duties of justices of the peace with respect to indictable offences, the justice of the peace neither committed the petitioner for trial nor discharged him, as he should have done in pursuance of that Act; but he convicted the petitioner of an offence punishable on summary conviction, as if he had had a trial.

It is a fundamental rule, known to all, that no person can be condemned otherwise that according to the law of the land; or, in other words, without due process of law.

The law of the land requires that a person accused of any offence should be heard before he is condemned, and that judgment should only be rendered after trial; and due process of law implies regular judicial proceedings, which require a public charge with regular allegations, an opportunity to answer and a judicial trial.

The petitioner was charged with an indictable offence, and, after the preliminary inquiry, he should have been either discharged or committed for trial, at which he would have full opportunity to answer and defend himself. If he had been accused of an offence punishable on summary conviction, he would have had the right to make full answer and defence to the complaint, and he would have had a regular judicial trial.

In the present case, the petitioner has been condemned without having been heard; he has been condemned without due process of law, and a fundamental principle of the law of the land has been violated.

I find that the proceedings contain gross irregularities and that, as the prosecution has not been conducted according to the prescribed forms and solemnities for ascer-

taining guilt, there is reason to believe that justice has not been done.

The Court therefore quashes the conviction.

Conviction quashed.

Achille X. Talbot, for petitioner.

Rochon & Champagne, for respondent.

COUR DE CIRCUIT.

MONTRÉAL, 9 novembre 1886.

Coram OUIMET, J.

DUPONT v. KEROUACK.

Médecin—Services professionnels—Visites—Preuve.

JUGÉ:—*Qu'un médecin appelé pour donner ses soins à un malade est le seul juge du nombre de visites qu'il doit faire au malade; et que dans une action pour service professionnel, il sera cru à son serment pour le nombre et la nécessité des visites faites.*

Le demandeur ayant été appelé à donner ses soins comme médecin à l'enfant du défendeur fit du 7 avril 1886 au 17 juin suivant 55 visites, dont plusieurs de nuit. Il chargea au défendeur $64. Ce dernier ayant refusé de payer cette somme, le docteur intenta la présente action. Le défendeur plaida que le compte était surchargé, que plusieurs des visites étaient inutiles et n'avaient pas été requises par lui, qu'au contraire, elles avaient été faites malgré lui. Le défendeur offrait de confesser jugement pour $30.00.

Le demandeur donna son propre témoignage que toutes les visites qu'il avait faites étaient nécessaires au rétablissement de l'enfant, dont la maladie requérait des soins continuels.

La cour en donnant jugement en faveur du demandeur remarqua que le demandeur ayant été requis par le défendeur de soigner son enfant, devenait le seul juge du nombre de visites qu'il devait lui faire afin de lui faire suivre le traitement qu'il croyait devoir le sauver, qu'autrement le médecin ne pourrait consciencieusement faire son devoir et suivre la marche de la maladie.

Jugement pour le demandeur.

Augé & Lafortune, avocats du demandeur.

Loranger & Beaudin, avocats du défendeur.

(J. J. B.)

COUR DE CIRCUIT.

4 mai 1886.

Coram LORANGER, J.

LES SYNDICS DE LA PAROISSE DE STE. CUNÉGONDE v. FORTE.

Construction d'église—Acte de cotisation des syndics—Homologation par les Commissaires—Chose jugée—Extrait du rôle.

JUGÉ:—1o. *Que dans une action pour recouvrement de répartition pour la construction d'une église, à laquelle action le défendeur a plaidé par une défense en fait, l'extrait du rôle de cotisation dûment certifié est une preuve authentique et suffisante pour obtenir jugement.*

2o. *Que le jugement des Commissaires pour l'érection civile des paroisses et la construction des églises confirmant l'élection des syndics et homologuant le rôle de cotisation fait par les syndics, est un jugement judiciaire ayant entre les syndics et les personnes portées au rôle la force de chose jugée.*

Les demandeurs poursuivirent le défendeur pour $7.58, montant de deux paiements dus sur une répartition faite par les syndics pour la construction d'une église à Ste. Cunégonde, en vertu de laquelle répartition une propriété en possession du défendeur avait été taxée. L'action était en déclaration d'hypothèque. Les demandeurs produisirent un extrait du rôle, un certificat du président des syndics certifiant que la taxe avait été imposée et était dû, et les jugements des commissaires pour l'érection civile des paroisses et la construction des églises confirmant l'élection des syndics et homologuant le rôle de cotisation fait par eux.

Le défendeur plaida par une défense au fond en fait.

A l'audition de la cause, le défendeur produisit, sous réserve de l'objection des demandeurs, un acte de vente de la propriété du shérif de Montréal, à la Société de Construction Mont Royal, et un certificat d'enregistrement établissant que c'était le dernier acte de vente enregistré et demandèrent que l'action fût déboutée, vu que le défendeur n'était pas propriétaire de l'immeuble taxé, mais que cet immeuble appartenait à une société

de construction qui ne pouvait pas être taxée.

Les demandeurs soumirent deux points: 1o Que le défendeur aurait dû plaider spécialement le fait qu'il n'était pas propriétaire au temps de l'imposition de la dite taxe, et en faire la preuve, et qu'en présence d'une défense en fait, l'extrait du rôle de cotisation dûment certifié était une preuve authentique faisant entièrement preuve à l'encontre des prétentions du défendeur; 2o Que de plus le défendeur aurait dû soumettre ces objections au rôle de cotisation devant les commissaires dans les délais fixés par la loi, et les avis publics donnés par les dits commissaires avant l'homologation du dit rôle de cotisation. Que les commissaires en homologuant le rôle avait rendu un jugement qui avait la même force de chose jugée que ceux rendus par les cours de justice, et que ce jugement était final et sans appel entre les syndics et les personnes portées comme propriétaires des immeubles taxées par le rôle de cotisation; 3o Qu'enfin, l'action était en déclaration d'hypothèque, et le défendeur était sans intérêt; s'il n'était pas propriétaire, il n'avait qu'à délaisser la propriété.

Le défendeur prétendit qu'il pouvait plaider quil n'était pas propriétaire, par défense en fait, et que c'était aux demandeurs à prouver qu'il l'était.

Les prétentions des demandeurs furent maintenues par la cour.

Jugement pour les demandeurs pour $7.58 et les dépens.

J. J. Beauchamp, avocat des demandeurs.

Archambault & St. Louis, avocats du défendeur.

(J. J. B.)

TRIBUNAL CIVIL DE LA SEINE (5e Ch.)

2 novembre 1886.

Présidence de M. Auzouy.

Leroux v. Schweitzer.

Bail—Preneur—Commerce—Exploitation—Annexion d'un nouveau commerce—Dommages-intérêts.

Lorsque l'immeuble a été loué en vue de l'exploitation d'un commerce déterminé, le preneur ne saurait y adjoindre un autre commerce non prévu au bail.

Spécialement celui qui a loué une boutique en annonçant qu'il y exercerait la profession de coiffeur, ne saurait, sous peine de dommages-intérêts, annexer à son industrie un commerce de vins dans les lieux loués.

Le Tribunal,

Joint à la demande principale la demande reconventionnelle;

Sur la demande principale:

Attendu qu'il résulte des faits de la cause que, dans la commune intention des parties, Schweitzer n'avait loué à Leroux les lieux qu'il occupe dans l'immeuble de celui-ci que pour y exercer la profession de coiffeur; que cette intention résulte notamment de la clause du bail par laquelle le premier n'était autorisé à faire que des travaux d'agencement nécessaires aux besoins de son industrie; qu'il n'est dès lors pas permis à Schweitzer d'adjoindre à son industrie de coiffeur le commerce de vins qu'il a établi dans les lieux loués; que la veuve Leroux, en sa qualité de propriétaire, est fondée à lui imposer l'exécution du bail et à interdire à ses locataires l'exercice d'un autre commerce que celui de coiffeur; que le dommage résultant pour le demandeur de cette double violation du contrat sera suffisamment réparé par l'allocation des dépens de la demande principale à titre de dommages et intérêts;

Sur la demande reconventionnelle;

Sans intérêt;

Par ces motifs,

Dit que dans la quinzaine du jugement à intervenir Schweitzer sera tenu de cesser l'exploitation de fonds de commerce de marchand de vins et liqueurs par lui exploité dans les dits lieux;

Sinon et faute par lui de ce faire dans le dit délai et celui passé, le condamne à payer à Mme veuve Leroux la somme de 50 francs à titre de dommages-intérêts par chaque jour de retard pendant un mois, après quoi il sera fait droit, etc.

Note.—V. conf. dans des espèces sensiblement analogues: Douai 18 août 1864 (S. 67.2.188—J. du P. 67.712); Paris 26 juillet 1879 (S. 81.2.229—J. du P. 81.1.112); Comp.: Paris 14 mai 1859 (S. 59.2.486—J. du P.59.464—D. 59.2.140).—*Gaz. du Palais.*

JUSTICE DE PAIX DU 1er ARRONDISSEMENT DE PARIS.

18 juin 1886.

M. Carré, juge de paix.

Meifredy v. Compagnie des Omnibus de Paris.

Responsabilité—Accident—Omnibus de Paris—Arrêt obligatoire pour prendre un voyageur.

Les conducteurs d'omnibus à Paris doivent, aux termes de l'art. 23 de l'arrêté de la préfecture de police, affiché dans l'intérieur de chaque voiture, faire arrêter leur omnibus lorsqu'ils en sont requis par les voyageurs ; ils sont responsables des accidents qui surviennent, s'ils n'obtempèrent pas aux signes que leur font à ce sujet les voyageurs.

Nous, juge de paix,

" Attendu que Meifredy réclame à la compagnie des Omnibus une somme de 200 francs, composée de : 1o 130 francs pour honoraires de médecins ; 2o 70 fr. pour détérioration de vêtements ; que la compagnie défenderesse repousse cette réclamation ;

" Attendu que le 28 mars, à onze heures du soir, rue Notre-Dame-de-Lorette, Meifredy, voulant prendre l'omnibus Clichy-Odéon, fit signe au conducteur et l'appela ; que, supposant que ce dernier obéirait immédiatement à ce signe et à cet appel, Meifredy courut vers la voiture et posa un pied sur la première marche ; que l'omnibus n'ayant pas arrêté, Meifredy fit un faux mouvement et tomba sur la chaussée ; que le conducteur ne se préoccupa point de cet accident et des suites qu'il pouvait avoir ; qu'il est établi, aux débats, que le conducteur a vu les signes et entendu les appels ; que l'omnibus n'était pas complet ; qu'en ne faisant pas arrêter l'omnibus, le conducteur a manqué à son principal devoir et commis une négligence qui engage la responsabilité de la compagnie dont il est le préposé ; qu'en ne portant aucun secours à Meifredy, le conducteur a commis une faute qui échappe à notre appréciation et relève des pouvoirs disciplinaires de la compagnie ;

" Attendu que, dans sa chute, Meifredy s'est blessé à l'œil gauche, au bras gauche et aux genoux ; que ces blessures ont nécessité les soins des docteurs Desormeaux et Fillaste ; que les honoraires de ces médecins s'élèvent à 130 fr., et ne sont pas exagérés ;

" Attendu que les vêtements de Meifredy ont été déchirés et tachés ; que leur réparation entraîne une dépense que nous évaluons à 50 fr. seulement ;

" Par ces motifs,

" Condamnons la compagnie des Omnibus à payer à Meifredy la somme de 180 fr."

COUR D'APPEL DE RIOM (1re Ch.)

1er juin 1886.

Présidence de M. Bonnet.

Serieys v. Consorts de Marsilhac.

Testament—Interdiction—Intervalle lucide—Validité.

Les testaments faits par une personne en état habituel de démence, mais à une époque antérieure à son interdiction, doivent être validés et recevoir exécution, lorsqu'il résulte tant de leur teneur et de la netteté de leurs dispositions que des autres circonstances et documents de la cause, la preuve qu'au moment de leur confection leur auteur a joui de la plénitude de ses facultés et a formulé sa volonté avec une lucidité et prévoyance parfaites.

COUR D'APPEL DE PARIS (7e Ch.)

11 janvier 1866.

Présidence de M. Fauconneau-Dufresne.

Des Portes d'Ambléxieux v. Comptoir Central de France.

Opérations de Bourse—Exception de jeu—Opération unique—Banquier—Bonne foi—Agent de change—Négociation—Intermédiaire—Art. 76 C. com.—Ratification—Demande de terme et délai.

1o. *L'exception de jeu en matière d'opérations de bourse ne saurait être opposée au banquier lorsqu'une seule opération a été faite et qu'il n'est point établi que le banquier ait su que cette opération devait se régler par le paiement de différences.*

2o. *La nullité tirée de ce qu'une opération de bourse a été effectuée par un banquier, sans*

l'intermédiaire d'un agent de change (art. 76 C. com.) ne saurait être proposée par le client, qui, ayant ratifié l'opération faite pour son compte et par son ordre, s'est reconnu débiteur et s'est borné à demander terme et délai.

A la date du 1er septembre 1883, jugement du Tribunal de commerce de la Seine ainsi conçu:

"Attendu qu'il est acquis aux débats que des Portes d'Amblézieux a chargé le Comptoir central de France d'exécuter, pour son compte, des opérations de bourse qui le constituent débiteur, à fin novembre 1882, de 3,454 fr. 60; que si des Portes répond au procès qu'il n'est point souscripteur des titres sur lesquels se sont effectuées les dites opérations, il est établi qu'il a bien commandé l'achat et que le liquidateur n'invoque point de souscription dans la cause; que, s'il est fait grief au Comptoir central de n'avoir point exécuté son ordre du 2 novembre, en report de valeurs ottomanes, il convient de reconnaitre qu'en refusant de continuer les opérations pour garantie desquelles il sollicitait alors vainement une couverture, le Comptoir ne s'est point écarté du légitime exercice de son droit, et que ce refus ne saurait dégager des Portes de ses obligations antérieures;

"Et attendu que, le 11 novembre 1882, des Portes a reconnu l'exactitude du compte au Comptoir central, en se bornant à demander terme et délai pour se libérer; qu'il n'a point obtenu ce délai; que le solde est échu, et qu'il y a lieu d'obliger des Portes au paiement;

"Par ces motifs,

"Condamne des Portes, par les voies de droit, à payer au liquidateur du Comptoir central la somme de 3,454 fr. 60, avec les intérêts suivant la loi, etc."

Des Portes d'Amblézieux ayant interjeté appel et invoqué devant la Cour l'exception de jeu et celle tirée de la violation de l'art. 76 C. com., la Cour a rendu l'arrêt suivant:

LA COUR,

Considérant que le Comptoir central de France n'a fait, pour le compte de l'appelant, qu'une seule opération; qu'il n'est point établi que le dit Comptoir ait su que cette opération n'avait pour but que le paiement de différences, et que, dès lors, des Portes d'Amblézieux est mal fondé à invoquer l'exception de jeu de l'art. 1965 du Code civil;

Considérant, d'autre part, que l'appelant a expressément ratifié et approuvé l'opération faite pour son compte et par son ordre; qu'il s'est reconnu débiteur et s'est borné à demander terme et délai; qu'il est, par suite, irrecevable à proposer la nullité de l'art. 76 Code com.;

Par ces motifs et adoptant, au surplus, ceux des premiers juges,

Déclare des Portes d'Amblézieux mal fondé dans son exception;

Le déclare non recevable dans sa demande en nullité, etc......

NOTE.—Sur le premier point: V. Cass. 18 novembre 1885 (Gaz. Pal. 85.2.737) et le renvoi.

Sur le second point: V. Cass. 28 juin 1885 (Gaz. Pal. 85.2.145) et les décisions citées au Répertoire universel de la jurisprudence française, Gaz. Pal. 85.2, v° Agent de change.

THE LATE MR. JUSTICE RAMSAY.

At the opening of the Court of Appeal at Montreal on Friday, Dec. 31, there being present Chief Justice Dorion and Justices Monk, Cross and Baby,

Sir A. A. DORION said: Since the last sitting of the court we have had the great misfortune to lose one of our colleagues. This event deprives us of the advantage, not only of giving judgment in a number of cases in which our late colleague took part in the hearing, but also of the assistance which we received from a judge so industrious and painstaking as Mr. Justice Ramsay. We feel that his death deprives the Bench, the Bar and society in general of one who was an ornament to his position. I may say that I have seen the notes of our lamented brother, and they show that he was ready to give judgment in every case heard last term with one or two exceptions. These opinions show that up to the last moment of his life he was characterized by his usual industry and acuteness in dealing with the questions before him, and I feel that it is a great loss to this Bench to have been deprived of the assistance which, at his age, might have been

hoped for during a long time to come. With these few words, we discharge the *délibéré* in the cases which were heard before four judges, including Judge Ramsay. It may be necessary hereafter to discharge the *délibéré* in other cases in which there were five judges, but in these cases it is necessary for us to confer first.

THE LATE MR. JUSTICE POLETTE.

Antoine Polette, of Three Rivers, a retired Justice of the Superior Court, died Jan. 6, aged 79.

The deceased was born at Pointe-aux-Trembles, near Quebec, August 25, 1807, and was educated at Quebec Seminary. He studied law with Messrs. Hilaire, Girard and Joseph Lagneux, and was called to the Bar in 1828. He was warden of the district of Three Rivers in 1842, mayor of the city for several years and sat for Three Rivers in the Canadian Assembly from 1848 to 1857. He was appointed a Queen's Counsel in 1854, was the chairman of the commission for the consolidation of the statutes of Lower Canada and Canada in 1856, and in the same year served as a commissioner to enquire into the falling of the Montmorenci suspension bridge. He was appointed a puisne judge of the Superior Court in April, 1860, residing first at St. Johns and afterwards at Three Rivers. In 1873 he was appointed a royal commissioner to investigate, together with Judges Day and Gowan, the charges brought against the Ministry of the time in connection with the grant of a charter to Sir Hugh Allan for the construction of the Canadian Pacific Railway. He resigned the judicial office in 1880, and was succeeded by the late Judge Macdougall. Mr. Polette was thrice married, lastly in 1857 to the daughter of the late Mr. Justice W. H. McCord, who, with three children, survive him.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 31.

Judicial Abandonments.

François N. Marchand, St. Stanislas, Dec. 23.

Nolin McGinnis & Co., Robinson, St. Francis, Dec. 23.

W. W. Morrow & Co., St. Johns, Dec. 22.

A. J. Fortin & Brother, Three Rivers, Dec. 24,

Louis T. Dorais, St. Grégoire, Dec. 22.

F. X. A. Montsion, Hull, Dec. 21.

Curators appointed.

Re John Gagnon, St. Zephirin.—Kent & Turcotte, Montreal, curator, Dec. 28.

Re Jos. Pagé, Montreal.—C. Desmarteau, Montreal, curator, Dec. 27.

Re A. Auclair, Sorel.—A. A. Taillon, Sorel, curator, Dec. 23.

Re Dame Adeléa Bouthillier (J. B. Roy & Co.), Montreal.—Kent & Turcotte, Montreal, curator, Dec. 28.

Dividends.

Re F. M. O'Donnell, St. Giles.—First and final dividend payable Jan. 15, H. A. Bedard, Quebec, curator.

Re L. J. O. Brunelle.—First dividend, P. E. Panneton, Three Rivers, curator.

Re T. Morency.—First and final dividend payable Jan. 18, E. Cloutier, Quebec, curator.

Separation as to property.

Eugénie Eléonore Hénault vs. Ernest Rondeau, Clerk, Sorel, Dec. 22.

Marie E. Th. B. Burland vs. Charles O'Reilly, merchant, Montreal, Dec. 28.

UNPROFESSIONAL ADVERTISING.

To the Editor of the LEGAL NEWS:

Sir,—I was always under the impression that it was one of the traditions of the Bar, that advertising in any way was derogatory to the dignity of its members, but this would now appear to be an exploded idea, and not compatible with "modern progress." Still one imbued with these prejudices, and who cherishes these antiquated notions of the profession, may at least have his growl against the ingenious methods of advertising now in vogue, including an apparently stray item in the newspapers of the institution of a suit, of an unimportant and private nature, a "Card" inserted daily in the new advertisements column, and the entry in the official(?) list of the number of fiats lodged or appearances filed during the year, thereby assuming to procure a high professional standing in the eyes of the public.

But even these methods are slow, and more direct action must be taken to procure a *clientèle*. What would the old Bar think of a printed circular being sent by a prominent city merchant to his customers, soliciting their patronage for a relative, a member of the firm of advocates, whose card he enclosed? Collection agencies are modern inventions. With their special forms, dire threats and uniformed collectors, they seriously encroach upon the legitimate collection practice, but so long as they can retain legal aid upon such terms as "no collection—no charge," so long are they likely to flourish, at the cost of the proper practitioner.

Jan. 7th, 1887. NEMESIS.

The Legal News.

VOL. X. JANUARY 22, 1887. No. 4.

The shafts of the great archer are flying thickly, and in the profession, as well as out of it, the losses have been heavy. Scarce hath fallen "the tender tear which nature sheds" over one we valued, when a fresh loss renews our grief. In the city of Montreal alone, within three short weeks, two judges—Ramsay and Torrance—and four members of the bar—Turgeon, Rogers, Réné Cotret, and R. A. Ramsay—have been removed by death. Within less than a year, the composition of the provincial bench has been greatly altered. Six judges have died—McCord, Macdougall, Mousseau, Ramsay, Torrance, and Polette—all but the last, falling while in the active discharge of their judicial functions. Two have been forced to resign in consequence of ill health—Rainville and Buchanan. This tremendous sweep, in a single province of the Dominion, produces a vivid sense of the shadowy nature of this existence, and shows that we are in truth, to borrow words sometimes lightly used, "bubbles on the rapid stream of time."

Mr. R. A. Ramsay, who died at Montreal, after a short illness, on January 15, was a gentleman who, by great diligence and honorable conduct, had won a very high position in the profession. Without natural gifts of eloquence or striking ability, he showed what could be attained by constant industry and painstaking effort. All that he did was thoroughly done. We remember a remark made by the late Mr. Justice Ramsay a few days before his death, in reference to an argument which had pleased him, by another gentleman of similar standing to Mr. Ramsay—that it was the plodders of the profession who generally accomplished the best work. Mr. R. A. Ramsay was only 42, and it is sad that the community should be deprived of perhaps thirty years of useful and beneficial labour, but his memory will long live, more especially among the younger members of the profession, for "his conduct is a legacy for all."

In one of the letters of Charles Lamb, he says, "goodness blows no trumpet, nor desires to have it blown. We should be modest for a modest man—as he is for himself." This is peculiarly applicable to the late Mr. Justice Torrance. He worked faithfully and earnestly, but shrank from any public acknowledgment of his worth. It was pleasing to witness the immense assemblage of the bar at the adoption of the usual resolutions, testifying their appreciation of the sterling qualities of the deceased and regret for his loss, and on the following day, the still larger assemblage that sorrowfully and reverently followed his remains to their last resting place. No Judge that has passed away in late years was so generally loved by the profession. We may live to see a more brilliant successor upon the bench, but it will be long before we shall see one who was so warmly regarded by men of all ages, parties and nationalities.

Under the pressure of many losses, we have omitted to notice particularly the retirement of Mr. Justice Buchanan of the Superior Court. It was rumoured at first that his withdrawal was only temporary, and that after a period of rest he would probably be able to resume the duties of his office. We regret that this information proves to be without foundation, and that Mr. Justice Buchanan has been compelled, by the condition of his health, to place his resignation in the hands of the government. Mr. Buchanan, who was assigned to the district of Bedford, was a judge of great accomplishments and personally very much esteemed. Many of his judgments have appeared in this journal, and bear evidence to his ability as a jurist. He has also sat from time to time in the Court of Review in this city, and his presence will be greatly missed by his colleagues and by the profession generally.

The enormous length of election contestations in this Province elicited some caustic

bservations from Mr. Justice Johnson, in giving judgment upon some motions in the Laval election case on the 18th instant. His Honour remarked that, "in England and in the other Provinces of Canada, election cases were much like other cases, as far as concerns the time they took. Here we had hundreds of witnesses, without any one knowing what they were going to say, which rendered an opening statement impossible, and it would suffice to mention, as regards the abuse of time, the last election in this very county, where the petition was pending and undecided during almost the entire duration of one Parliament. Then, as regards the numbers of these petitions, they bid fair to engross the time of the courts, and seemed to show that we must either be the one people in the British Dominions peculiarly unfitted for free elective institutions, or else the people most addicted to unprincipled litigation."

SUPERIOR COURT.

ST. JOHN'S, (District of Iberville), Nov. 29, 1886.

Before GILL, J.

Ex parte THE ATLANTIC & NORTHWEST RAILWAY CO., expropriating parties, and DUNN et al., expropriated parties.

Railway—Warrant of possession.

HELD:—1. *That a petition by a railway company to obtain a writ of possession of property required for the construction for their right of way, will be granted upon security being given to the satisfaction of the Judge, when by affidavit to the Judge's satisfaction the railway company establishes that the possession of the property is immediately required for the purposes of the railway.*

2. *Where the railway company has allowed the delays required by the Railway Act to expire before making the application, no further delay can be demanded by the proprietors.*

3. *That the railway company in serving a notice of expropriation is merely bound to give the name of their arbitrator, without any indication as to his residence or occupation.*

4. *That a clerical error in the description of the property to be expropriated in the petition cannot be urged as a ground of nullity when the property is correctly described in the expropriation notice; and the clerical error does not form an essential part of the description and is not misleading as to the identification of the property.*

The Railway Company served the proprietor with an expropriation notice describing the property required to be taken, naming the amount offered, and mentioning Duncan MacDonald as Arbitrator in the event of the offer being refused.

After having allowed the necessary delays to expire, the Company served the proprietor with a petition for a writ of possession supported by affidavits, praying that a warrant be issued by the Judge to put the Company in possession and giving ten days' previous notice of the application.

Upon the day the petition was to be presented, there being no Judge sitting in the district, the petition was continued from day to day, and finally was heard, about a week after notice of presentation had been given.

The petition was contested:

First—That the proprietors had not had sufficient time to obtain affidavits to show the position in which they were placed, and asking for a further delay.

Secondly—That the petition was not in order, there being a clerical error in the description of the property:—

Thirdly—That the name of Duncan MacDonald had been mentioned in the expropriation notice, without designating his residence or occupation, and that the notice was not a sufficient notice under the Railway Act.

The following is the text of the judgment:—

"We, the Honorable Charles Gill, Judge of the Superior Court, in the Province of Quebec, now in the town of St. Johns, district of Iberville, having heard on the twenty-fifth day of November instant, the above named parties, by their respective Counsel, on the petition of the said Railway Company, to obtain immediate possession of the strip of land hereinafter described, for

the purpose of building their line of railway thereon, examined the proceedings and affidavits and documents, filed by both parties, and on the whole, duly deliberated;

"Considering that the objections raised on behalf of the said proprietors as well to the form, or for want of notice, as to the merits of the petition, are unfounded, the notice of the presentation of the petition having been duly given, and the presentation duly made, and hearing thereon duly postponed till a Judge was present, when the said proprietors were themselves represented and allowed to urge the grounds they had against the said petition, and the said company having sufficiently followed the requirement of the law by giving merely the name of their arbitrator without further indication as to his residence or occupation, and considering that the clerical error whereby the figure seven was inserted instead of figure one in the notice served upon the proprietors, is not fatal, not being in an essential part of the description and not misleading as to the identification of the lot of land; Do dismiss the said objections;

And considering it is proved that the said company petitioners require for the construction of their Railway, according to their plan prepared and deposited, showing where their line is located,—that certain strip of ground belonging to the Estate of the said late William McGinnis, described as follows, to wit: "A strip of ground situate in the town, county "and district of Iberville, forming part of "Official lot No. twenty-one, on the Official "Plan and in the book of reference for the "said town of Iberville, measuring sixty "feet in width, by a length of four hundred "and twenty-five feet, English measure, "and containing twenty-five thousand five "hundred square feet in superficies, be the "same more or less, and bounded on the "East by the lot Official No. thirty of said "town, on the West by the lot Official No. "four of said town, and on the North and "South by the remaining portions of the "said Official lot No. twenty-one of said town "of Iberville;"

And considering that the said executors of estate William McGinnis, having refused the offer of two thousand dollars, made by the said Company for the price of the said strip of land and damages to the remaining part, and that the parties to settle the said price must resort to arbitration, a proceeding necessarily of some length, entailing more delay than what should be had for the construction of said railway, and that it is necessary that the said company should get immediate possession of the said strip of land, whilst it does not appear that the said proprietors will be inconvenienced by the fact of not being paid for the same before such possession is granted to the company;

"And considering that under these circumstance the said company petitioners are in law entitled to be allowed the occupation of said strip of land to build their railway thereon, pending such arbitration, on their giving, previously, security as by law provided, by depositing the amount hereinafter fixed and as directed;

"Do grant *acte* to the said company petitioners that they have nominated for their arbitrator Duncan MacDonald, and also *acte* of their readiness to give the above referred to security, and it is ordered that the said security be a sum of six thousand dollars to be deposited by the company petitioners in the Merchants' Bank of Canada, at St. Johns, district of Iberville, P.Q. to the credit of the said executors of the said estate William McGinnis, and of the said company petitioners, jointly, such sum to be used or such part thereof, as may be determined by the report of the arbitrators, to pay to the said executors the amount to be fixed as price of the said strip of land and damages to the remaining part of the property, and the said deposit not to be withdrawn from the said Bank, unless on the order of the Court or Judge, and granting, upon the condition that the said deposit be so made, the present petition for occupation of the said strip of land by the said Railway Company. We order that a warrant do issue, addressed to the Sheriff of the district of Iberville, to put the company petitioners in immediate possession of said above described strip or portion of land, so that they may, without further delay, construct that part of their railway passing thereon, the said Sheriff to be authorized by the said warrant to put

down any resistance or opposition that may be offered, and for that purpose to take with him sufficient assistance; *dépens réservés* and to follow the costs of arbitration according to the decision thereon."

R. T. Heneker, Atty. for Ry., expropriating.

Trenholme, Taylor, Dickson & Buchan, Attys. for proprietors.

(R. T. H.)

SUPERIOR COURT.

AYLMER, Nov. 22, 1886.

Before WÜRTELE, J.

NEVELLE V. CARRIÈRE.

Capias—Affidavit—C. C. P. 799—48 *Vict.* (*Q.*) *ch.* 22, *s.* 12.

HELD:—*That an allegation, in an affidavit for capias, that the defendant is notoriously insolvent, is insufficient under C. C. P.* 799 *and* 48 *Vict.* (*Q.*) *ch.* 22, *s.* 12, *which requires the affidavit to establish that the defendant has ceased his payments.*

PER CURIAM.—The plaintiff sued the defendant, who is a trader, carrying on business at Buckingham, for the recovery of certain promissory notes, and at the same time had him arrested under a writ of capias.

The defendant has contested the writ of capias, by petition; and the parties have been heard on the issue joined upon the petition.

The affidavit upon which the writ of capias was obtained is based on article 799 of the Code of Civil procedure, but without regard, however, to the change made by the twelfth section of the Act 48 Vict., ch. 22.

In the case of a trader, the original article required the affidavit to establish, that the defendant was notoriously insolvent, and that he had refused to arrange with his creditors or to make an assignment of his property for their benefit, while the substituted article requires the affidavit to establish that the defendant has ceased his payments and has refused to make the assignment.

The plaintiff alleges in his affidavit that the defendant is notoriously insolvent, but he does not affirm that the defendant has ceased his payments.

There is a difference between the two cases; that is, between being insolvent, and having ceased to make payments.

Insolvency is the state of a person who has not sufficient property to discharge his liabilities. A trader may be in this state, or be notoriously insolvent, and still not have ceased his payments; and again, a trader may be perfectly solvent, and still, owing to the stagnation of trade, or to some other temporary cause, be unable to meet his engagements as they mature. In support of these propositions, I may refer to Rolland de Villargues,—"*Verbo* Insolvabilité: L'in-"solvabilité est l'état d'impuissance de payer "ce que l'on doit. *Verbo* Faillite:—La ces-"sation de paiement peut avoir lieu de la "part d'un négociant quoiqu'il ne soit pas "insolvable, car, quoiqu'il ait plus de biens "que de dettes, un négociant peut ne pas "remplir ses engagements; c'est ce qui arrive "quand il n'a plus de crédit. Au contraire, "s'il est exact dans ses paiements, si, par "un crédit toujours souteun, il fait honneur "à ses engagements, dût-il dix, fois plus "qu'il ne possède, il n'est pas en état de "faillite."

Whenever the liberty of the subject is at stake, the law has to be strictly followed, under pain of nullity of the proceedings. In the present case, the requirements of the article of the code must, therefore, be strictly observed. To arrest and detain the defendant under a writ of capias, it was necessary that he should have ceased his payments. Now, as I have already stated, the affidavit does not allege that he had ceased his payments, but alleges that he was notoriously insolvent, for which, without the cessation of payment, the law does not subject him to be arrested and detained.

When the case was heard, the plaintiff argued that the allegation that the defendant was notoriously insolvent implied a cessation of payment on his part; and further, that the suit itself established such cessation of payment.

The Civil Code declares that bankruptcy means the condition of a trader who has discontinued his payments; but a trader

may be insolvent and not have discontinued his payments, as I have already mentioned, and therefore the allegation that the defendant was notoriously insolvent neither implied that he was a bankrupt nor that he had ceased his payments. On this point, Bédarride says:—(1, Des Faillites, No. 20,) "Une insolvabilité réelle et démontrée ne "suffirait pas pour constituer la faillite, s'il "n'y a pas eu cessation de paiements. La loi "ne reconnait d'autre insolvabilité que celle "qui s'annonce publiquement par une cessation de paiements; elle n'a pas voulu, "pour établir celle-ci, qu'on pût aller fouiller "dans les secrets de la position réelle de "celui qui a toujours continué les siens."—

As to the other pretension, that the suit established the fact that there was a cessation of payments, we have to seek the legal meaning of the phrase: "that he has ceased his payments." It does not mean the failure to pay in an isolated case; but it means a stoppage of payment in the general course of business. And the institution of a suit in an isolated case does not indicate a state of bankruptcy, or the cessation of payments, as the defendant may have good ground to oppose the claim, or may have been prevented from paying by a mere temporary embarrassment. Bédarride on this point says:—(1, Des faillites, No. 18,) "Le défaut "de quelques paiements, quelques protêts, "ne sauraient constituer la cessation légale "de paiements, si, depuis, le commerçant "s'est acquitté et a continué de remplir ses "obligations. Le refus de ces paiements "peut n'être qu'une juste résistance à des "prétentions exagérées, ou le résultat d'un "embarras momentané bientôt vaincu." The allegation of the affidavit is not synonymous with the phrase, "that the defendant has ceased his payments:" and the institution of the suit does not establish the stoppage of payment necessary to authorise the issue of a writ of capias.

The essential allegations of the affidavit upon which the capias is founded are therefore insufficient; and I consequently quash the writ and order that the defendant be discharged.

The judgment was recorded in the following terms:—

"Seeing that the plaintiff, in the affidavit "upon which the capias was issued, alleges "*that the defendant is a trader, that he is notori-* "*ously insolvent, that he has refused to arrange* "*with his creditors or to make an abandonment* "*of his property to them or for their benefit,* "*though he has been duly requested to make* "*such abandonment, and that he still carries on* "*his trade, the whole with intent to defraud his* "*creditors in general and the plaintiff in par-* "*ticular;*"

"Seeing that it is provided by article 799 "of the Code of Civil procedure that the "writ of capias may be obtained, if the "affidavit establishes, besides the debt, that "the defendant is a trader, that he has "ceased his payments and has refused to "make an assignment of his property for "the benefit of his creditors;"

"Considering that the formalities of a "writ of capias and the proceedings for the "issue thereof are matters of strict law and "have to be rigorously complied with under "pain of nullity;

"Considering that a trader may be in- "solvent at a time when he has not ceased "his payments, and that the law of this "Province does not allow the arrest of a "trader when he is alleged to be insolvent, "but only when it is established by the "affidavit that he has ceased his payments;

"Considering that the plaintiff has not "alleged in his affidavit that the defendant "had ceased his payments, but that he "merely alleges the insolvency of the de- "fendant, which is not a compliance with "the provisions of the law and did not war- "rant the issue of the writ;

"Considering that the essential allegations "of the affidavit upon which the capias is "founded are insufficient;

"Doth quash the writ of capias issued in "this cause, and doth order that the defend- "ant be discharged, with costs, of which dis- "traction is awarded to Messrs. Rochon and "Champagne, the defendant's attorneys."

N. A. Belcourt, for plaintiff.

Rochon & Champagne, for defendant.

SUPERIOR COURT—MONTREAL.*

Société commerciale—Lex loci contractus—Nullité absolue—Publicité—Conseil judiciaire.

JUGÉ:—1. Que dans une société commerciale en nom collectif, formée en France, les droits respectifs des parties sont régis par le droit commercial français en force au temps de la convention.

2. Qu'en France, sous peine de nullité absolue, l'extrait des actes de société en nom collectif doit être remis dans la quinzaine de leur date, au greffe du tribunal de commerce de l'arrondissement dans lequel est établie la maison de commerce social, pour être transcrit sur le régistre et affiché pendant trois mois dans la salle des audiences.

3. Que cette formalité est d'ordre public et peut être opposée en tout temps et sous toutes circonstances.

4. Qu'en loi, une société commerciale ne peut être valablement contractée par une personne à laquelle un conseil judiciaire a été donné, sans le consentement de ce conseil judiciaire.—*Furniss* v. *Larocque*, Loranger, J., 30 novembre 1886.

Exemptions from seizure—Damages awarded for libel and slander not exempt from seizure.

HELD:—That the amount of a judgment obtained as damages for libel, is not exempt from seizure by garnishment.—*Lalonde* v. *Archambault*, and *Great North Western Tel. Co.*, T. S., Torrance, J., Nov. 20, 1886.

Saisie-exécution—Procès-verbal de saisie.

JUGÉ:—1. Qu'en principe les officiers de justice sont présumés avoir obéi aux prescriptions de la loi, et qu'on ne peut induire du silence d'un procès-verbal de saisie-exécution qui mentionne la saisie d'un poèle, qu'il n'en a pas été laissé un autre au débiteur.

2. Que l'interpellation au débiteur saisi de signer le procès-verbal ne constitue pas une formalité substantielle dont le défaut entraîne la nullité de la saisie.—*Sexton* v. *Beaugrand*, Jetté, J., 10 décembre 1886.

* To appear in Montreal Law Reports, 2 S. C.

Dommages— Injures— Intimité— Saisie-gagerie déboutée.

JUGÉ:—1. Qu'il n'y a pas droit d'action en dommages pour des paroles mêmes injurieuses dites dans l'intimité; et notamment par une femme à son mari, la nuit dans leur domicile, quoique ces paroles aient été entendues du fils et de la fille du demandeur qui résident dans la même maison au-dessous du défendeur.

2. Qu'il n'y a pas non plus d'action en dommages contre une personne qui fait saisir-gager les biens meubles de son locataire lorsque cette action est rapportée en cour et n'est déboutée que parce que le saisissant n'a pu alors prouver qu'il avait, avant l'action fait une demande de paiement, mais qu'en défense à l'action en dommage, il établit que telle demande avait réellement été faite.—*Soullières* v. *de Repentigny*, Gill, J., 20 décembre 1886.

Saisie de biens meubles sans droit — Dommages.

JUGÉ:—Qu'il y a un recours pour dommages réels et exemplaires en faveur d'une personne dont les biens meubles sont, sans droit, saisis et gagés, contre celle qui a fait émaner cette saisie-gagerie et qui ne l'a pas rapportée en cour. — *Brouillet* v. *Clarke*, Papineau, J., 20 décembre 1886.

Saisie-arrêt avant jugement— Cause probable— Demande incidente—Dommages—Compensation—Terme—Insolvabilité.

JUGÉ: — Qu'une personne dont les biens sont saisis-arrêtés avant jugement, par un créancier, sans cause raisonnable et probable, peut dans la même action réclamer des dommages par demande incidente, et opposer à l'action un plaidoyer de compensation basé sur les dommages par lui réclamés par sa demande incidente.

2. Que l'insolvabilité du débiteur lui fait perdre le bénéfice du terme convenu.—*Furniss* v. *Bleault*, Mathieu, J., 15 décembre 1886.

Délit—Fausse arrestation—Garantie—Dommage.

JUGÉ:—Qu'il n'y a pas de garantie en matière de délit; qu'en conséquence un homme de police (private detective) poursuivi en

dommage pour fausse arrestation, n'a pas de recours en garantie contre celui pour le compte duquel il a fait l'arrestation.—*Courrette* v. *Fahey*, Gill, J., 20 décembre 1886.

LE JUGE RAMSAY.

(*La Minerve*, 17 *janvier* 1887.)

L'*Opinion Publique* de 1869 reproduit un portrait très fin, très fidèle du regretté juge Ramsay, que l'on doit au crayon de M. Hector Fabre. Cette reproduction était accompagnée d'une jolie préface par un autre regretté ami, qui alors s'occupait activement de journalisme, l'honorable M. Mousseau. Ces deux appréciations aussi bienveillantes que justes ont acquis malheureusement une douloureuse actualité.

Sous le titre alléchant de "Petite galerie parlementaire," M. Fabre a entrepris de buriner les membres de la législature locale. Observateur judicieux, critique fin et délicat, il peint au naturel et n'omet rien; si le sujet prète au ridicule, tant pis. M. Fabre est un journaliste très indiscret et qui dit tout ce qu'il sait, encore plus ce qu'il ne sait pas. Mais il a sa manière à lui; son trait caché, qui va droit au but, blesse sans meurtrir, pique sans laisser de traces, excepté pour les connaisseurs. Il est très amusant de voir M. Fabre en face d'un député nul: notre confrère est de trop bon ton et de trop bon goût pour lui dire tout court son fait et passer à un autre représentant. Ce député nul avait un adversaire de mérite et de talent; vite M. Fabre s'en empare, le place dans le siège qu'il considère vide et *le peint* de pied en cap: et du coup notre député se trouve apprécié, ses électeurs reçoivent une leçon et un conseil, et le candidat battu est vengé.

C'est ce tour qu'il vient de jouer à M. Cantwell, de Huntingdon, et la justice qu'il vient de rendre à M. T. K. Ramsay, son adversaire. L'appréciation du talent et du caractère de M. Ramsay y est parfaite. Nous nous faisons donc un plaisir et un devoir de le reproduire.

A. J. MOUSSEAU.

(De l'*Evénement* du 23 décembre 1869).

Je ne connais guère le nouveau député de Huntingdon, qui ne s'est fait encore remarquer à la Chambre que par sa tenue sévère et son silence prudent, et je n'en saurais dire autre chose. Dans le cadre qu'il laisse vide, je placerai le portrait de M. Ramsay. Si l'on est d'avis que par là, je marque une préférence et j'indique un choix pour l'avenir, je n'y ai aucune objection.

Doué d'un esprit ardent et droit, plein d'impétuosité, plein de ressources; que l'erreur, même légère, en matière de droit, la moindre déviation des grandes traditions constitutionnelles autant que l'injustice irritent; qui pousse jusqu'à la passion le culte des idées qu'il adopte et jusqu'à la haine l'antipathie contre les hommes qui personnifient la lutte contre ces idées; dévoué avant tout, l'on pourrait dire exclusivement, aux principes conservateurs qui lui paraissent les seuls justes, les seuls que puisse admettre un jugement sain, qui puissent satisfaire une haute raison; plus conservateur que feu lord Derby, méprisant très sincèrement M. Gladstone, certainement incapable de se résigner jamais à vivre sous un gouvernement républicain: M. Ramsay réalise admirablement le type de l'homme politique anglais avant l'avènement de l'école de Cobden et Bright. Même à Westminster, il se serait fait remarquer par l'inflexibilité de son caractère et la hauteur de ses vues; il y aurait marqué sa place aussi par la rigueur de sa dialectique, son érudition profonde, par le tour original et animé qu'il sait donner à tout ce qu'il dit, à tout ce qu'il écrit, la vivacité de ses impressions, la spontanéité et l'abondance de ses idées faisant contraste avec la sobriété de son style. Qu'il parle ou qu'il écrive, il ne délaie pas, il condense; tous les mots portent, toutes ses phrases sont remplies jusqu'au bord: rien ne sonne le vide; nulle part la pensée ne se relâche, partout elle est intense. Du sujet de plusieurs articles, il n'en tire jamais qu'un seul et n'omet que les développements inutiles.

Au barreau, dans les affaires criminelles, comme représentant le ministère public, il n'a guère d'égaux ici. C'est dans ce rôle surtout qu'il a eu occasion de montrer, de déployer ses facultés hors ligne. J'ignore s'il avait dirigé particulièrement ses études et son ambition de ce côté; mais ce que personne n'ignore c'est que du premier moment

où il a mis le pied dans ce domaine, il a pris son rang. Je crois, cependant, que partout il en aurait été ainsi. C'est un de ces esprits qu'on ne prend jamais au dépourvu et qui s'arrangent de façon à atteindre, en toutes choses qu'ils entreprennent, la supériorité.

Dans une société libre, sous un régime constitutionnel, l'exercice légitime des esprits virils, c'est la polémique, c'est la lutte. M. Ramsay l'aime et s'y livre avec ardeur; il recherche les difficultés souvent et ne les évite jamais. Dans le parti conservateur, on ne se bat guère sans lui, et en maintes occurrences, il sort des rangs et entreprend, à ses risques et périls, des expéditions hardies. A ce métier-là, on se fait bon nombre d'ennemis, et les plus modérés outrepassent parfois la mesure. Tous tant que nous sommes, journalistes et polémistes, il nous faut convenir, si nous voulons être sincères, que plus d'une fois nous avons attaqué des gens qu'il aurait mieux valu laisser passer leur chemin, que plus d'une fois nous avons frappé trop fort. Il suffit pour que votre conscience vous acquitte, qu'aucun vil motif ne vous ait inspiré. Personne, à ce titre, n'a plus droit que M. Ramsay au bénéfice des circonstances atténuantes, car c'est l'honneur et le désintéressment mêmes, et il ne recherche dans la lutte que le triomphe de son parti.

Comme tous les hommes dont le mérite porte ombrage, dont la franchise effraie, dont les idées absolues dépassent la moyenne des convictions, M. Ramsay arrivera tard, mais il arrivera. Le moment approche où le parti conservateur sentira le besoin de renforcer ses premiers rangs, de présenter à l'ennemi un front plus imposant et surtout d'offrir à ses amis un plus solide rempart, un plus brillant état-major. Dans la suite d'une longue guerre, tous les soldats sont bons: et c'est plutôt, au retour, en passant en revue vos forces que vous êtes frappé de ce qui vous a manqué, non pour réussir mieux peut-être, mais pour couronner vos conquêtes d'une gloire plus séduisante. L'opinion commence à sentir très vivement l'insuffisance de certaines manœuvres et la médiocreté de certains instruments. Les intérêts ne sont pas complètement rassurés pour l'avenir et l'amour-propre national n'est pas flatté outre mesure.

Le jour où ce travail sourd et lent touchera à terme, M. Ramsay, un des premiers arrivera. Ce serait déjà fait si le public anglais n'avait pas été jusqu'ici, sinon aussi apathique que le nôtre, du moins aussi peu soucieux d'élever le niveau de la vie publique.

A la Chambre, il prendrait tout naturellement, dès ses premiers discours, sa place parmi les hommes dont l'influence compte, en même temps qu'il gagnerait la sympathie par toutes ces qualités fines, délicates, aimables, élevées, qui forment comme l'ornement obligé des esprits de sa trempe.

APPEAL REGISTER—MONTREAL.

December 31.

Webster & Dufresne.—*Délibéré* discharged.

Leroux & Prieur.—Do.

Laviolette & Corporation Comté de Napierville.—Do.

Cie. Minière de Coleraine & McGauvran.—Do.

Corporation of Sherbrooke & Short.—Do.

Leduc & Beauchemin.—Do.

Weir & Winter.—Do.

Griffin & Merrill.—Do.

Exchange Bank & Carle.—Do.

Bolduc & Provost.—Judgment confirmed.

Rhode Island Locomotive Works & South Eastern Ry. Co.—Two cases.—Judgment confirmed in each case.

Marchildon & Denoon.—Judgment confirmed.

Leger & Fournier.—Judgment confirmed.

Archambault & Lalonde.—Petition for leave to appeal from interlocutory judgment granted.

The Court adjourned to January 15, 1887.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Jan. 8.

Dividends.

Re L. N. Bernatchez, Montmagny.—First and final dividend, payable Jan. 19. H. A. Bedard, Quebec, Curator.

Re George Long.—Dividend sheet prepared. W. A. Caldwell, Montreal, Curator.

Separation as to property.

Audélie Bilodeau vs. Jacques F. Goulette, tinsmith, Ste. Julie de Somerset, Jan. 3.

Georgianna Duval vs. Emmanuel Crépeau, lumber dealer, St. J. Bte. de Nicolet, Dec. 30.

Catherine Adelaïde Finn vs. Hugh J. McCready, shoe manufacturer, Montreal, Sept. 27, 1886.

Zoé Leclerc vs. Athanase Dussault, undertaker and joiner, St. Hyacinthe, Dec. 31.

The Legal News.

VOL. X. JANUARY 29, 1887. No. 5.

The vacancy in the Court of Queen's Bench, created by the death of Mr. Justice Ramsay, has been filled by the appointment of Mr. Church, Q.C. While regret must be felt that some of the seniors of the profession, such as Messrs. Bethune, Abbott and Kerr, have been once more, and, it may be, as to some of them, finally passed over, it is satisfactory to learn that the choice of the government has fallen upon a gentleman so well qualified as Mr. Church. The new judge has been 28 years at the bar, and has filled the offices of Attorney-General and Treasurer in provincial administrations. He has acquitted himself well in these positions, and for a number of years has been the senior member of the firm of Church, Chapleau, Hall & Nicolls, a prominent city firm. Mr. Church is personally much esteemed, and, although he has a difficult *rôle* to fill, in succeeding to a judge so distinguished as Mr. Justice Ramsay, there is every reason to believe that he will be an ornament to the position. The sayings of the honoured dead, under proper reserves, are matter of history, and we do not think there is any indiscretion in disclosing that when Mr. Church's name was publicly mentioned, about two years ago, in connection with another judicial position, Mr. Justice Ramsay expressed to the writer his admiration for Mr. Church's great ability as a lawyer, and his belief that the appointment, if made, would be a highly satisfactory one.

The appointment of Mr. Melbourne M. Tait, Q.C., to the district of Bedford, in the room of Mr. Justice Buchanan, resigned, has given general satisfaction. Mr. Tait has been 24 years at the bar, and during the greater part of that time has been a prominent member of the firm of Abbott, Tait & Abbotts, and constantly engaged in the most important commercial cases. Mr. Tait's name has been publicly mentioned in connection with this appointment for several weeks past, and during that time we have failed to hear a single word of disapproval; on the contrary the leading men of both parties have expressed their entire satisfaction at such an excellent selection. The bar of Bedford are to be congratulated on their new judge. The only regret we have to express is that Mr. Tait has not been appointed to the city bench, in which position his long experience in commercial cases would have been directly available. However, the new judge will naturally give to the city such time as may be spared from the work of the Bedford district, and we hope that at no remote day he may be transferred permanently to Montreal.

The forthcoming issues of the *Montreal Law Reports* have a melancholy interest owing to the large share which the opinions of the late Justices Ramsay and Torrance have in their composition. It is wonderful, in looking back upon the reports of the last few years, to note the activity which these two lamented judges have constantly manifested. With regard to Mr. Justice Ramsay, the reader will find no indication of shrinking from difficulties. Some of the opinions are exhaustive treatises upon the subjects under discussion. Note, for instance, the fulness of the opinions in *Langlais & Langlais*, 9 L. N. 90; in *Cadot & Ouimet*, M. L. R., 2 Q. B. 211; in *Macdougall & Demers*, M. L. R., 2 Q. B. 170; in *Corner & Byrd*, M. L. R., 2 Q. B. 262; and in *Jones & Cuthbert*, M. L. R., 2 Q. B. 44. After reading the opinion in *Cadot & Ouimet*, we expressed some surprise that he should have found time for such an elaborate review of the law, and remarked that it must have occupied at least an entire week. "More than that," replied the judge with a smile, and in a tone which implied that the estimate fell considerably short of the fact. In addition to all this labour which devolved upon him in the course of his judicial duties, he found time for such papers as occur in 9 L. N. 97, in which the measures introduced for the amendment of the criminal law are fully reviewed, and in 8 L. N. 313, upon the Boundary question, and for the prosecution of his work in digesting

the appeal decisions during thirteen years. His open letter to the Attorney-General on the subject of Judicial Reforms, 5 L. N. 273–287, occupied a month of vacation leisure. Mr. Justice Torrance also produced a great number of opinions within the last few years, some of which have still to be published. One of the latest that he delivered personally was in *Ross* v. *Hannan*, Dec. 14, the judgment being rendered almost immediately after the argument. Other opinions were read by his colleagues while he lay upon what proved to be his death-bed.

An appreciative writer in the *Quebec Chronicle* (J. M. L.), referring to the elevation of Mr. Justice Baby to the presidential chair of the Numismatic Society, says this event "seems to have infused new life into this society, already in existence for several years past. Mr. Chauveau's mantle, on retiring, could not have fallen on more worthy shoulders. Judge Baby's tastes are those of an antiquarian. He has, after years of toil, succeeded in gathering together a large number of rare works, prints, etc., on Canadian history. His collection of private letters, bearing on the early times of the colony, and especially those relating to the sieges of 1759 and 1775 and on the war of 1812, is both extensive and very curious to examine. It also comprises the autographs, likenesses and crests of many of the leading personages of these periods. In this the learned judge seems to have taken a leaf from the book of his predecessor, Sir L. H. Lafontaine, a well-read jurist as well as an antiquarian. Judge Baby has met with congenial spirits in two antiquarians and historians, Abbé Verreau and Raphael Bellemare, Jacques Vizer's friend, both of Montreal."

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*SUPERIOR COURT, MONTREAL.**

Opposition to seizure—Costs—C. C. P. 586.

An action having been dismissed with costs, one of the defendants, in order to recover his costs, caused an execution to issue, and seized the moveables in plaintiff's domicile. The plaintiff's wife filed an opposition, claiming the effects as her property, and she asked costs against the defendant seizing.

HELD:—That the opposant was not entitled to ask costs against the creditor seizing (here the defendant), but only (C. C. P. 586) against the judgment debtor (here the plaintiff); and a mere notice in writing of her claim to the effects, transmitted to the seizing party, did not entitle her to costs against him.—*Brown* v. *Ross et al.*, and *Howard et vir*, opposants, Torrance, J., Nov. 30, 1886.

Unpaid vendor—Incompatible conclusions—Demurrer.

An unpaid vendor is not entitled at the same time to pray for the resiliation of the sale, and also that the goods be sold and that he be paid by privilege from the proceeds; but he is entitled to pray for the resiliation of the sale and the return of the goods without offering the buyer the option of paying the price.

So, where the plaintiff prayed for the resiliation of the sale and also that he be paid the price out of the proceeds of the goods, it was held that such conclusions were incompatible, and the defendant, under C. C. P. 120, might, by dilatory exception, have called upon him to declare his option; but a demurrer to the action generally, with conclusions for its dismissal, was held bad because the demand for the resiliation of the sale was well founded.—*Wylie* v. *Taylor*, Loranger, J., Nov. 28, 1884.

Requête civile—Novation—Judicial counsel.

HELD:—1. That novation does not take place where the second obligation is only to be the result of the non-fulfilment of the first, and its conversion, *à titre d'indemnité*, into the payment of a sum of money.

2. Notice of the appointment of a judicial adviser to a party in the cause should be given to the opposite party. — *Forgues* v. *Brosseau*, In Review, Torrance, Gill, Mathieu, JJ., Nov. 30, 1886.

Company—Action for calls—Allotment of stock—Formalities for making calls on stock.

HELD:—1. The fact that the capital stock of a company has not been fully subscribed,

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* To appear in Montreal Law Reports, 2 S.C.

is not a defence to an action by the company against a shareholder for calls on shares subscribed for by him.

2. An allotment of stock is not necessary before instituting an action for calls against a shareholder who has subscribed for a specific number of shares.

3. The enactment of a by-law to regulate the mode in which the calls shall be made is not imperative. Where no by-law exists, the calls may be made as prescribed by the directors. — *The Rascony Woollen & Cotton Manufacturing Co.* v. *Desmarais*, In Review, Gill, Buchanan, Loranger, JJ., April 30, 1886.

Tutor—Sale of immoveables of minor—Formalities of sale—Nullity.

HELD:—That the sale by a tutor of the immoveables of the minor without the observance of the formalities prescribed by law is null; and even where the tutor is authorized to sell such immoveables by the will of his deceased wife, from whose succession the property devolved to the minors, he is bound, after his appointment as tutor, to observe the formalities prescribed by law.

2. The nullity can be invoked by the tutor himself, in answer to an action *en garantie*, alleging that the tutor has sold property as belonging to minors to which they had no legal right.—*Pichette* v. *O'Hagan*, In Review, Plamondon, Bourgeois, Loranger, JJ., Nov. 30, 1885.

Disabilities of corporations—Acquisition of immoveable property—C. C. 364, 366.

HELD:—That the provisions of C. C. 364, 366 are general and apply to all corporations without distinction; and therefore a building society incorporated by the Dominion Parliament to carry on operations throughout the Dominion is subject to the disabilities imposed by C. C. 366, and cannot acquire immoveable property in the Province of Quebec without the permission of the Crown. —*Cooper et al.* v. *McIndoe*, Loranger, J., Dec. 31, 1885.

Prescription—Interruption of—Mention of debt in inventory of debtor's succession.

HELD:—That the mention of a debt by a debtor, in the inventory of the succession of his *auteur*, is an acknowledgment of the debt which has the effect of interrupting prescription.—*Christin* v. *Archambault*, In Review, Doherty, Papineau, Loranger, JJ., Jan. 30, 1886.

Sale—Delivery—Completion of contract—Damages.

The defendant agreed to purchase, at 10½ cents per lb., a quantity of cheese then in warehouse in Montreal, with right to reject spoiled cheese. The cheese had to be weighed, in order to ascertain the sum total of the price. He sent men to examine the cheese, and they set apart 1,643 boxes as acceptable, and rejected 33. At his request, the cheese, which was to have been removed on Friday, 16th April, was allowed to remain in the same store a few days longer. On the following day, it was damaged to a small extent by a great flood which inundated the warehouse. The defendant then refused to carry out the purchase, and the cheese was resold at a loss, and the present action was brought by the seller to recover the difference.

HELD:—That the sale was complete on the examination of the boxes, and the cheese was then at the risk of the buyer who must bear the loss.—*Ross* v. *Hannan*, Torrance, J., Dec. 14, 1886.

Attorney—Distraction of Costs—Saisie-arrêt for costs after debt is discharged.

HELD:—Where the plaintiff had obtained judgment for the amount of his claim with costs *distraits* in favor of his attorneys, and had given the defendant a discharge for the debt, that he still retained sufficient interest in the suit to entitle him to take proceedings in execution of the judgment of distraction in favor of his attorneys (more especially when the attorneys signed the *fiat* for the writ), and a *saisie-arrêt après jugement* for the costs, issued in the plaintiff's name, was maintained.—*Morin et al.* v. *Langlois et al.*, In Review, Johnson, Papineau, Jetté, JJ., Nov. 30, 1886.

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*COURT OF QUEEN'S BENCH—MONTREAL.**

Lessor and Lessee — Ejectment — Action by proprietor of undivided half.

HELD:—That the proprietor *par indivis* has a right to bring an action of ejectment against a person holding the property solely by the will of a co-proprietor, the proprietor of an undivided share not having any right to lease the whole property, nor even his own share of it, without the consent of his co-proprietor. — *Stearns*, Appellant, and *Ross*, Respondent, Dec. 30, 1885.

CIRCUIT COURT.

QUEBEC, Dec. 1, 1886.

Before CASAULT, J.

LACOMBE v. BRUNEL.

Seaman—Action for wages.

HELD:—That a seaman, who had served on board a Canadian vessel, in the inland waters of this province, which was wrecked in one of her voyages, has a right to sue the owner of that vessel for the balance of his wages as such seaman on board said vessel, although the seaman had previously obtained judgment for the same amount against the master, from whom the seaman could not recover the amount of the judgment, the master being insolvent.

Pelletier & Chouinard, for plaintiff.

Montambault, Langelier, Langelier & Taschereau, for defendant.

(J. O'F.)

CIRCUIT COURT.

QUEBEC, Dec. 13, 1886.

Before CARON, J.

HAMEL v. WEBB.

Bailiff—Obligations of.

HELD:—1. A bailiff, even belonging to another district, is obliged to immediately execute a writ of execution sent to him; and his refusal to so execute such writ, will entail a *contrainte par corps* against him.

2. It is no answer for such bailiff to plead, to the *contrainte par corps*, that his disbursements had not been forwarded to him, unless he shows that he had, before such refusal, made a demand for such disbursements.

J. E. Bédard, for plaintiff.

Caron, Pentland & Stuart, for bailiff.

(J. O'F.)

COUR D'APPEL DE POITIERS (CH. CORR.)

29 octobre 1886.

Présidence de M. SALMON.

MIN. PUB. v. LELOUIS ET AL.

Animaux—Bête fauve—Renard—Dommage actuel—Dommage imminent—Chasse—Excuse.

Le fait, de la part du propriétaire, de repousser ou de détruire les bêtes fauves, spécialement les renards, qui portent dommage à ses propriétés, constitue non pas un acte de chasse, mais l'exercice d'un droit de légitime défense qui n'est soumis à aucune condition (L. du 3 mai 1844, art. 9, § 3).

Et la présence prolongée de bêtes fauves, sur une propriété ou dans son voisinage, peut être considérée comme un dommage actuel ou imminent qui justifie l'emploi, pour la destruction de ces animaux, des moyens usités en pareil cas et même des armes à feu.

Le fait de tirer un coup de fusil dans un bois qui n'est pas un enclos dépendant d'une habitation peut être considéré comme un acte de chasse, tant que le porteur de l'arme ne démontre pas qu'il était dans un des cas d'excuse prévus par la loi; il y a présomption du fait de chasse, jusqu'à la preuve contraire.

Jugement du Tribunal correctionnel de Marennes en date du 5 juillet 1886, ainsi conçu:

"Attendu que l'article 9 de la loi du 3 mai 1844, reconnaît à tout propriétaire, possesseur ou fermier, le droit de repousser et de détruire, même par les armes à feu, les bêtes fauves qui porteraient dommage à ses propriétés;

"Attendu que, pour rendre ce droit efficace, la loi a dû permettre au propriétaire ou fermier de se faire assister et aider par tels auxiliaires qu'il lui plaira de choisir;

"Attendu que le renard est incontestablement un fauve, que le propriétaire ou le

* To appear in Montreal Law Reports, 2 Q.B.

fermier a le droit de repousser et de détruire;

"Attendu qu'il est constant en fait que depuis longtemps des renards infestaient la commune de Hiers-Brouage et que beaucoup d'habitants ont été victimes des déprédations de ces animaux; que, dans la soirée du 28 mai dernier, Lelouis père et fils, leur fermier, Debrie, et leur domestique, Pouvreau, se sont réunis pour poursuivre et détruire un renard qui venait d'enlever une poule;

"Attendu que le fait reproché aux prévenus rentre dans la disposition finale du paragraphe 3 de l'article 9 de la loi du 3 mai 1844 et ne constitue ni délit ni contravention; qu'en effet, la présence du renard dans la ferme de Lelouis, le dommage qu'il venait d'y causer, constituaient bien le péril imminent autorisant chacun à employer le moyen le plus efficace pour défendre sa propriété;

"Par ces motifs,

"Renvoie les prévenus des fins de la plainte, sans dépens."

Sur appel du ministère public, la Cour a rendu l'arrêt suivant:

La Cour,

Attendu que le fait de tirer un coup de fusil dans un bois qui n'est pas un enclos dépendant d'une habitation peut être considérée comme un acte de chasse, tant que le porteur de l'arme ne démontre pas qu'il en a fait usage, soit pour atteindre un autre but qu'un gibier, soit pour tuer un animal dont la destruction est permise, à l'aide de ce moyen, par l'autorité compétente, soit pour se protéger contre les attaques d'un fauve, soit pour repousser par la force un animal nuisible accomplissant ou venant d'accomplir un dommage;

Attendu qu'il résulte du procès-verbal dressé par la gendarmerie de Marennes que, dans la soirée du 20 mai dernier, plusieurs coups de feu ont été entendus dans le bois de la Guilletterie, commune de Hiers-Brouage, et qu'on doit, dès lors, admettre, jusqu'à preuve contraire, qu'ils ont été tirés par des personnes se livrant à la chasse;

Attendu que les éléments suffisants d'une preuve ne sauraient résulter de la simple déclaration des prévenus, alléguant qu'ils s'étaient mis à la poursuite d'un renard qui venait de leur enlever une poule, s'il était établi par ailleurs qu'ils ont tiré les coups de feu entendus par les gendarmes;

Mais attendu que, loin de faire cette constatation le procès-verbal atteste, au contraire, que les sieurs Debrie et Pouvreau étaient porteurs, au sortir du bois, d'une ferrée et d'une faux, et que les autres délinquants n'ont point été vus; qu'il n'est donc pas possible de faire résulter des faits ainsi consignés la preuve que les prévenus ont fait usage d'une arme à feu;

Attendu qu'à la vérité, les prévenus ont reconnu qu'ils s'étaient mis à la poursuite d'un renard; mais comme ils ont déclaré en même temps qu'ils n'étaient porteurs d'aucune arme à feu, on ne saurait rencontrer, dans leurs aveux, la preuve qu'ils ont commis l'acte de chasse illicite qui leur est imputé;

Adoptant au surplus les motifs des premiers juges,

Confirme la décision dont est appel, et renvoie les prévenus des fins de la prévention, sans dépens.

Note.—Les principes admis par le Tribunal sont conformes à la jurisprudence désormais établie; le droit de repousser les fauves, en cas de dommage actuel ou imminent, même par délégation, et en dehors de sa propriété, est absolument certain au profit du propriétaire: Paris 30 avril 1881; Amiens 31 août 1882 (D. 82.5.64); Poitiers 19 janvier 1883 (D. 83.2.45); Cass. 8 avril 1883 (D. 83.5.53); Cass. crim. 29 décembre 1883 (D. 84.1.96) Comp.: Trib. civ. Blaye 21 janvier 1885 (Gaz. Pal. 85.2.76) et la note. De même, il est certain que le renard est une *bête fauve*, dans le sens de l'article 9 de la loi de 1884: Caen 26 juin 1878 (D. 80.2.73), quoique ce soit, en termes de vénerie, une *bête rousse*: Giraudeau et Lelièvre, Nos. 691-693). Mais nous ne croyons pas qu'il existe d'arrêts consacrant d'une façon aussi formelle le principe édicté par la Cour de Poitiers, à savoir: que quiconque est convaincu d'avoir tiré, en dehors d'un enclos attenant à une habitation, un coup de feu, est présumé avoir commis un délit de chasse, jusqu'à preuve contraire, preuve qui est à sa charge, puisqu'il s'agit d'une excuse invoquée.—*Gaz. du Palais.*

VICE-CHANCELLOR BACON.

So little expected was the retirement of Vice-Chancellor Bacon on the morning of the day he retired that, when the news spread, it seemed to come with almost dramatic suddenness to all. Very well did the Attorney-General discharge the duty that fell to him on such short notice, and extremely touching was the reply of the last of the Vice-Chancellors. One great distinctive feature in Vice-Chancellor Bacon was the perennial freshness of intellect which characterised him. His body might be feeble and show traces of the operations of time on it during the whole of the nineteenth century, and two years of the eighteenth, but that keen intellect remained clear and bright as ever, and a match for any of the "young men" who practised before him. One remarkable proof of his power of mind was his ability to adapt himself to every change in the law. In this respect he differed remarkably from Kelly—the last of the Chief Barons. As related in "A Generation of Judges," Chief Baron Kelly, although he never opposed the Judicature Acts, yet simply ignored them, except so far as they altered the details of practice. It would have been sacrilege to speak of the Exchequer *Division*, the High Court of Justice, or the Supreme Court of Judicature before him. Nothing could exceed his astonishment and indignation to be told when he obtained a new puisne that his proper title was Mr. Justice Hawkins. He simply refused to allow him to be so addressed. If the ancient title of Baron was denied, he should be called simply Sir Henry Hawkins, a style by which he is still known among officials who served in the Exchequer Court. We need hardly point out how different in this respect was Vice-Chancellor Bacon. This trait in his character was all the more remarkable as it was not till he was over seventy years of age that he was made a judge. So many and such good anecdotes about him have been told us, and have appeared in the papers, that we cannot forbear repeating and extracting a few for the benefit of those who may not have heard them. For instance, the patience the Vice-Chancellor displayed in listening to the cases that came before him may perhaps be well explained by his remarks to a junior who was expressing his regret at having detained the court so long. "Don't apologise to me. You haven't detained me. I am bound to be here, and either listening to this case, the next, or some other. I have no reason to suppose that the next case will be less uninteresting than this." Anyone casually observing the Vice-Chancellor in court would have supposed that he was not paying much attention. That this was not so he often showed in the readiness with which, in delivering judgment, he marshalled the facts and the evidence, and by the remarks he often made to counsel. One very good instance of this was told us. The Vice-Chancellor was remarkable for the purity of his English, and bad English was to him as annoying as a bad construe is supposed to be to the senior classic. A well-known junior, not famous for the elegance or correctness of his diction, was applying for the payment out of a certain sum of money which was in court; the Vice-Chancellor sitting in his well-known apathetic manner. "There is a sufficient sum of money *laying* in Court, my lord, to ——." "What?" interrupted the Vice-Chancellor, suddenly wakening up. "I was saying, my lord, that there is a sufficient sum of money laying in court to——." Here counsel was again interrupted, and made to repeat it once or twice again, to the intense amusement of those present, after which the Vice-Chancellor pushed aside the papers and said, "I should be very sorry to disturb such a profitable fund," and refused the application. We believe the learned counsel does not know to this day whatever there was to laugh at. The following struck us as being remarkably illustrative of him:—On one occasion a very pertinacious advocate, having drearily gone through one part of his case, said, "Then, my lord, we come to the matter of the accounts, to which I desire to direct your lordship's attention." "This is not the place for it; the accounts cannot be taken here, they must be discussed in chambers." "There are only three items I wish to mention." "Three more than it is my duty to consider now; three more than I propose to consider." "There is one item

which I am particularly anxious to go into." "Go into it by all means," said the judge, "but do not ask me to go into it. Go into it with my chief clerk; or if you cannot wait till you get an appointment with him—for I do not wish to abridge your lawful enjoyments—go into it alone." On another occasion, a counsel, notorious for his long-winded speeches, was bringing in a great deal of irrelevant matter, when he was thus addressed by the learned judge:—"Mr. X., at any other time or in any other place I should be most happy to converse with you on this or any other subject, but what you are now saying has nothing to do with the case before me, and I must request you to confine yourself to the subject matter of the case." After having thus politely delivered himself judicially, the learned judge proceeded to give an *obiter dictum* on the learned counsel before him, saying, *sotto voce*, "jabbering idiot."

The Vice-Chancellor was often very pointed and pithy in his judgments, as will be seen from the two following extracts, mentioned in the *Solicitors' Journal*:—

In one case, the question was whether the defendant, who lived on one side of the street, ought to be prevented from so increasing the height of his house as to diminish the amount of light coming to the windows of the plaintiff, who lived on the other side of the street. In delivering judgment, the Vice-Chancellor is said to have made the following remarks:—"The plaintiff is an artist. The proposed building will undoubtedly diminish the amount of light which has for the statutory period been in the habit of finding its way into the plaintiff's studio. An attempt has been made to justify this interference with the plaintiff's property, and for this purpose certain considerations have been suggested, which, by the courtesy of the counsel on the other side, have been called an argument. I am told that if the plaintiff's work is to be properly executed, it is desirable that light should fall upon it from only one source; that the studio is sufficiently lighted by a skylight, with which the defendant's building cannot possibly interfere; and that the defendant is conferring a positive benefit upon the plaintiff by removing the inconvenience which would necessarily be caused by an access of light from other sources. Now, I am not aware that there is any rule of law, or any principle of equity, which confers upon a man's opposite neighbours a right to decide upon the amount of light which is good for him, and I am of opinion that the gentlemen with whom this argument originated are in no danger of suffering from an excess of illumination."

In another case, a plaintiff, who sought to have his name removed from the list of shareholders of a company, relied upon the statement of a witness who had published a pamphlet purporting to show that the company had been fraudulently floated, and that the business had been dishonestly conducted. The witness admitted that his information had been derived from the secretary of the company, whose acquaintance he had cultivated with the express design of eliciting from him something detrimental to his employers. After commenting on the conduct of the witness, the judge said:—"Out of this scurrilous libel, to which the writer of it referred with manifest satisfaction as 'my pamphlet,' the plaintiff has culled and got together a number of odds and ends of incoherent tales, a set of particles and patches and fragments and scraps and rags and shreds and sticks and straws, out of which he has constructed a kind of jackdaw's nest, not without mud enough to hold it together."

Among those who regret the retirement of Sir James Bacon, we should hardly be safe in numbering Mrs. Weldon. If we trust her own account as accurate, one source of material danger to her has been removed. For, according to an allegation made, when an enthusiastic crowd were elevating her to the position of a national heroine, her voice had never, up to that time, recovered from the strain which it had undergone in the attempt to reach the perception of the Vice-Chancellor, who was referred to, with a seemingly sad lack of respect for the judicial bench, as a "deaf old judge.,' Possibly, however, Mrs. Weldon's *amour propre* suffered even more than her voice at the hands of the stalwart old lawyer.

Another litigant in person of the same sex as Mrs. Weldon met with less success in

her efforts before this judge. Having apparently failed to establish her *locus standi* in the court, she fell back upon that somewhat natural question: "What am I to do, my lord?" The laconic answer was perhaps not less natural, though expressive almost to a fault: "Go about your business, ma'am."

In the good old days, when the Vice-Chancellors held their courts in Lincoln's Inn—within the walls of the buildings, the principal difference of which from barns was perhaps in the character of their dirt—it is reported that a rotten egg was discharged with intent to bespatter the judicial countenance of the late Vice-Chancellor Malins. Happily, it missed aim, merely spreading its golden lustre upon the insensible wall. The offender was at once arrested, and ordered to appear for sentence on the following morning. The learned judge is said to have then delivered himself in words to the following effect:—"There has evidently been some mistake on your part. The missile could not have been intended for me. My brother Bacon is in the adjoining court, and it is sufficiently well known that, in the very nature of things, eggs and bacon always go together."—*The Jurist* (London).

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Jan. 15.

Judicial Abandonments.

Edward Carbray, Montreal, January 11.

Charles Denis Champoux (George Champoux & fils), Sherbrooke, Jan. 8.

L. J. Guillemette & Co., Montreal, Jan. 7.

Renaud & Desjardins, traders, Montreal, Jan. 7.

Edouard Senécal (E. Senécal & Co.), Montreal, Jan. 7.

Vaillancourt & Laberge, painters, Quebec, Jan. 12.

Curators appointed.

Re Arsene Bournival, St. Paulin.—Kent & Turcotte, Montreal, curator, Jan 10.

Re Louis Frechette, Ste. Madeleine.— M. E. Bernier, St. Hyacinthe, curator, Dec. 21.

Re Mark Kutner.—Kent & Turcotte, Montreal, curator, Jan. 13.

Re François Noel Marchand, St. Stanislas.—Kent & Turcotte, Montreal, curator, Jan. 10.

Re McGibbon, McCalman & Co.—John M. M. Duff, Montreal, curator, Jan. 11.

Re F. X. A. Montsion, Hull.—Kent & Turcotte, Montreal, curator, Jan. 13.

Re Joseph F. O'Gorman.—Robert Miller, Montreal, curator, Jan. 8.

Re Charles O'Reilly, Chambly.—Kent & Turcotte, Montreal, curator, Jan. 7.

Re J. B. L. Rolland.—Kent & Turcotte, Montreal, curator, Jan. 11.

Re Edouard Sénécal (E. Sénécal & Cie.)—Edwin Hanson, Montreal, curator, Jan. 7.

Dividends.

Re Roger Dandurand.—First and final dividend, payable Feb. 3. Euclide Mathieu, Montreal, curator.

Re Narcisse Grenier.—First and final dividend, payable Jan. 31. J. A. Poirier, St. Grégoire, curator.

Re Ludger Turcotte.—Second and final dividend, payable Jan. 31. J. A. Poirier, St. Grégoire, curator.

Quebec Official Gazette, Jan. 22.

Judicial Abandonments.

Angelique Normand and Maxime Lavigne (A. Normand & Cie.), grocers, Hull, Dec. 21.

D. & J. Maguire, Quebec, Jan. 19.

Narcisse Pilotte, district of St. Francis, Jan. 17.

Curators appointed.

Re Théophile Belanger, St. Jean Port Joli.—Kent & Turcotte, Montreal, curator, Jan. 14.

Re Robert G. Brown.—John McD. Hains, Montreal, curator, Jan. 14.

Re Edward Carbray.—C. Desmarteau, Montreal, curator, Jan. 18.

Re Mrs. J. E. Vaine, milliner.—Seath & Daveluy, Montreal, curator, Dec. 18.

Re Louis Trefflé Dorais, St. Grégoire.—P. E. Panneton, Three Rivers, curator, Jan. 17.

Re A. J. Fortier & Frère, Three Rivers.—Kent & Turcotte, Montreal, curator, Jan. 17.

Re P. T. Gibb, wire manufacturer. — Seath & Daveluy, Montreal, curator, Dec. 27.

Re Auguste Grundler.—Kent & Turcotte, Montreal, curator, Jan. 15.

Re L. J. Guilmette & Co.—John S. Brown, curator, Jan. 14.

Re Kerman Hirshfield, manufacturer. — Seath & Daveluy, Montreal, curator, Dec. 16.

Re Renaud & Desjardins.—C. Desmarteau, Montreal, curator, Jan. 14.

Re Rivet & Picotte, hatters and furriers.—Seath & Daveluy, Montreal, curator, Dec. 31.

Re Pierre Rodier and Flavie Lavigne. — F. X. Bilodeau, Montreal, curator, Jan. 18.

Re John N. Smith.— J. J. Griffith, Sherbrooke, curator, Jan. 17.

Re S. St. Denis, Lachine.—Kent & Turcotte, Montreal, curator, Jan. 15.

Dividends.

Re Elzéar Chouinard.—Dividend, payable Feb. 8, M. Joseph, Quebec, curator.

Re P. A. Labrie.—First and final dividend, S. C. Fatt, Montreal, curator.

Re Nathaniel Michaud, St. Eloi.—First and final dividend, payable Feb. 3. H. A. Bedard, Quebec, curator.

Re A. G. Morris, cigar dealer.—Dividend, Seath & Daveluy, Montreal, curator.

Re Charles Nelson, hardware merchant.—Dividend, Seath & Daveluy, Montreal, curator.

Re Cassils, Stimson & Co.—Second and final dividend, payable Feb. 1. Thos. Darling, Montreal, curator.

Separation as to property.

Malvina Beauchamp v. G. A. Lamontagne, trader, Montreal, Jan. 19.

The Legal News.

VOL. X. FEBRUARY 5, 1887. No. 6.

In the case of William Rauscher, the Supreme Court of the United States, on the 6th December last, affirmed the principle, that a person delivered up under the Extradition Treaty on a demand charging him with a specific offence mentioned in it, can only be tried, by the country to which he is delivered, for that specific offence, and he is exempt from trial for any other offence, until he has had an opportunity to return to the country of his asylum at the time of his extradition. Chief Justice Waite dissented.

Serjeant Ballantine, who died January 9, is best known to us as counsel for the Claimant in his great suit for the Tichborne baronetcy and estates in 1871. In 1875 Mr. Ballantine received a brief to defend a native prince in India, Mulhar Rao, the Gaekwar of Baroda, charged with an attempt to poison Col. Phayre, the British resident. On that occasion he received a retainer of five thousand guineas, which is one of the largest retainers ever handed to counsel. Mr. Ballantine's special gift was cross-examination. He was far from being a profound lawyer, but was unequalled in his own line. He earned large fees, but spent lavishly, and died poor.

The Earl of Iddesleigh, who died suddenly Jan. 12, was called to the bar in 1847. In the same year he was appointed Legal Secretary to the Board of Trade. In his youth he was private secretary to Mr. Gladstone. But after his succession to the family baronetcy as Sir Stafford Northcote, he held high offices under several Governments. In August 1886, he was Foreign Secretary in Lord Salisbury's administration, an office which he had resigned a few days only before his death.

The judgment in *Chavigny de la Chevrotière* v. *The City of Montreal*, which will be found in the present issue, does not present the literary finish to which we have been accustomed in the productions of the Judicial Committee. It bears internal evidence of hasty dictation and lack of revision, not only typographical but grammatical errors being apparent. However, to compensate for this, their lordships, by an *obiter dictum*, gently "boom" our fair city, remarking that "Mon-"treal in 1847 was a very different place "from the Montreal of 1803, growing and "extending every day, *and still growing and "becoming one of the most beautiful cities in the "world.*"

PUBLICATIONS.

Rapport de la Commission de Refonte des Statuts Généraux de la Province de Québec.

The eighth report of the Commissioners contains the fourth and last part of the Draft of Consolidation. The first portion of the report comprises laws which have some analogy with the dispositions of the Codes, but are not of a general and permanent character. The second portion comprises the amendments to the Codes. There are also lists of the Statutes in the C.S.C., the C.S.L.C., and the Acts passed since 1859 by Canada and the Province of Quebec.

Legal Sketches, by Alfred B. Major, Solicitor.—Montreal, A. Periard.

This is a reproduction of papers which have appeared in various legal journals. Mr. Major states in the Preface that his "only "object has been to amuse an occasional "leisure hour." In this, we think, he has been fairly successful, for the sketches are readable and entertaining. We may refer, as examples, to two of them which have appeared in this journal—"At Assizes," 8 L. N. 373, and "A Writ of Elegit," 8 L. N. 318.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, Nov. 16, 1886.

Before LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD COUCH.

CHAVIGNY DE LA CHEVROTIÈRE v. LA CITÉ DE MONTRÉAL.

Public place—User by the public—Acquiescence or abandonment—23 Vict. ch. 72, s. 10.

HELD:—1. *Where an old market place had been converted by the city of Montreal into a public square, which the public had enjoyed without interruption from* 1847 *down to* 1876, *that there was, independently of any statutory provision, an ample case of user on the one side, and dedication or abandonment on the other, which would constitute the square in question a public place, over which the public at large had rights to which the law would give effect.*

2. *That the square in question having been enjoyed by the public as a public way during more than ten years before registration under* 23 *Vict. ch.* 72, *and more than ten years after such registration, it became a public highway under the terms of that statute.*

The appeal was from a judgment of the Court of Queen's Bench, Montreal, Sept. 19, 1883, dismissing an action claiming the rescission of a deed of donation of a piece of land in the city of Montreal, known as Jacques Cartier Square. See 6 Legal News, 348, for report of the judgment appealed from.

PER CURIAM:—The action from which this appeal arises was commenced in the Superior Court of the province of Quebec, Lower Canada. The demandant, who is also the appellant, claimed to be proprietor of about seven-eighths of that part of the city of Montreal which from 1803 to January 1847 had been a public market, and from January 1847 to the present time has been an open public place in the city, known as the Place Jacques Cartier. The demandant claimed against the respondents, the city of Montreal, a right to resume possession of that piece of land as in the original ownership of the grantors. His money claim against the city amounted to 180,866 dollars. Further, he claimed that the original deed of grant of 29th December 1803 should be brought in and declared null and void. The claim is said to have arisen under that deed so often referred to in the course of the case.

It was said to have been a purely voluntary gift, but their Lordships think, if it were necessary to express an opinion on it, it might be doubtful whether it was voluntary, and whether its true character was not a grant to the magistrates of the city of Montreal for valuable consideration.

The place in question was originally the property of the Seminary of Montreal, and the Seminary, being about to dispose of it, entered into a treaty with Périnault and Durocher. The property appears to have been made over to Périnault and Durocher to make the most they could of it, but under a condition that they were to pay to the Seminary a sum of about 3,000 guineas. They proceeded accordingly to divide it for building purposes; but reserved a portion, and they entered into treaty with the concessionaires, who stipulated that there should be not only the Rue de la Fabrique (which did not then exist as a street, but was *projetée* only,) and also that the open space lying between the Rue de la Fabrique and the Rue St. Charles should be converted into a public market. Périnault and Durocher, being unable to comply with that condition without the aid of some public body, applied to the magistrates at Montreal, as they could create a public market, and it was necessary to seek their aid, and out of this sprang the grant of the 29th December 1803.

The result of that deed seems to be, that it created a public right as well as a private servitude,—that is, when that deed had been carried out by converting the open space, which is now the subject in question, into a public market place, with a right in the public to resort to it as a public market place,—it became subject to that public right, at the same time, possibly, being subject to a private servitude to the parties who had become concessionaires of the building plots. Their Lordships do not find it necessary to express any opinion upon the general construction, or upon the effect of the condition contained in the grant of 1803. They assume, but for the purposes only of the judgment which is about to be delivered, that the demandant's contention may be right, that when there was a breach of that condition, the donors or their representatives would be entitled to re-enter and to resume possession as of their former estate.

Several questions of very considerable importance and difficulty have been raised

before this Committee. One was suggested by one of their Lordships—whether the condition was apportionable, and, if not apportionable, whether the demandants could sue, not being the owners of nor interested in the whole of the property which is the subject-matter of the condition. On that question also, their Lordships do not find it necessary, in their present judgment, to express any opinion.

There were also questions whether the condition of re-entry was void in its inception, whether it was a condition of re-entry properly, or was merely inserted in the deed of gift *in terrorem*, and merely *comminatoire*.

There was also a question of prescription and other questions in the case upon which their Lordships do not propose to express any opinion, as the appeal may be disposed of on another and satisfactory ground.

The magistrates of Montreal having got possession of the land under that deed of 1803, and converted it into a public market, we come next to the Ordinance of 4 Vict., by which the magistrates ceased to be the managing body of the city of Montreal, and were replaced by a quasi-corporate body. That leads to the 8 Vict. c. 59. The magistrates in Montreal had accepted this deed of 1803, which, whether it was for valuable consideration, or a simple voluntary deed, was a deed of grant for ever. The words are "*maintenant et à toujours*"—but subject to the condition, whatever the effect of it was. Therefore, at the time of the incorporation of the city, the magistrates were, as trustees for the public, in ownership of this land in perpetuity, subject to the condition, with this market upon it; and over this public market place, not inhabitants of the city alone, but the public at large had acquired considerable rights.

That being the position of affairs, there came the Canadian statute of 8 Vict. c. 59; that statute is not a general Act dealing with all corporations, but with Montreal alone. It is to give greater potency and effect to the incorporation of the city of Montreal and to enlarge the powers of the corporate body. It gives them very extensive powers over the city, and amongst other things it says, in the 50th section, that they shall have power of "changing the site of any market or "market place within the said city, or to "establish any new market or market place, "or to abolish any market or market place "now in existence, or hereafter to be in "existence in the said city, or to appropri-"ate the site thereof, or any part of such site "for any other public purpose whatever, "any law, statute, or usage to the contrary "notwithstanding; saving to any party "aggrieved by any act of the said council "respecting any such market or market "place any remedy such party may by law "have against the corporation of the said "city for any damage by such party, sus-"tained by reason of such act" of the corporation.

Now it was contended that, acting under that statute and converting this market place to another public purpose, was no breach of the condition, and that the effect of the statute was to discharge the condition and leave it open to the corporation, acting for the public interests, to appropriate the site of that market place to any other public purpose, but subject to a claim for compensation by the demandant here and the parties he represents, if they had title, and had been injured by the act of the corporation. Now upon this very important question as to the effect of this statute, their Lordships do not think that it is necessary at present to express any opinion.

Proceeding under the powers that they had so obtained in December 1847, the first by-law was made. In that, the corporation indicate their intention to abolish this market and apply the site to another public purpose, and their Lordships can have no doubt, that in taking that step, the corporation were moved only by considerations of public good. They found it necessary, probably, to supply the growing city with a larger market place, for Montreal in 1847 was a very different place from the Montreal of 1803, growing and extending every day, and still growing and becoming one of the most beautiful cities in the world. They very likely thought that a larger market place was necessary, but that they ought to retain the space occupied by the market as an open space for the public good and the public health, and hence they

converted it into the Place Jacques Cartier.

In January 1847 the act of conversion was made complete, and there was also a subsequent by-law by which they directed that the new place should be henceforward called the Place Jacques Cartier.

Their Lordships assume also, for the purposes of the case, that, upon the happening of these events, whatever rights if any the demandant or those he represents had under the condition in the grant of 1803 came into existence in January 1847, that is, that they were then entitled, if at all entitled, to put their claims in force and to institute a proceeding against the corporation to take advantage of the condition annexed to the gift of 1803, and to resume possession of this plot of ground or to get compensation for the act of the corporation. But they did not do so, and things went on as before from 1847 to 1852. The effect of the transaction of January 1847 was, to convert, by the act of the corporation, the old market place into a public square which the citizens of Montreal and the public had a right to use.

Things continued in that condition down to 1852, when Perrin instituted his action. That action may be described with substantial accuracy as similar to the present. It made the same case. The present demandant is the assignee of Perrin's interest. Perrin's action the corporation defended. They put in exceptions similar, save in one respect, to those now before their Lordships. It was allowed to sleep for some six years. The case was then set down for hearing before the proper court in Canada, and was dismissed, either for want of prosecution, or on the merits. Perrin never instituted any other proceeding. He appears to have lain dormant for 19 years, and in 1876, for a nominal sum, to have assigned this large claim over to the present demandant. In all that interval, the public had been using this public place and it was not using it privately, it was not *clam*, but it was openly and as of right, without any interruption by the parties or any of them who are now represented to have had the property in the place. Mr. Fullarton relied very much on this action of Perrin's and a petition that came in from some outside parties. Who they were we do not know; but it was a petition which was not acted upon, and it is open to the suggestion that it was the existence of that petition that suggested the action of François Perrin. However, Perrin never took a step further, and it appears to their Lordships that the absence of any contestation of the right of the public to use this place as a public highway is clear evidence of acquiescence in the public right, or rather of abandonment of the claim, if any, that François Perrin had.

Their Lordships desire to point out that, independently of the statutes, there is evidence of a long-continued user by the public and an abandonment of right by those who could have disputed the user by the public, sufficient to sustain at common law the public right. There seems to be no difference between the law of Lower Canada and the law of England and of Scotland in that respect. The public had enjoyed the right from 1847 down to the commencement of the present action. They had enjoyed it openly, claimed it, not privately, but adversely, and as of right, and in the meantime, there had not been a single step on the part of the present claimant, or those from whom he derives title, to dispute that right, but, on the contrary, there was the amplest evidence of acquiescence in the public enjoyment. There has been made out, independently of any statutory provision, an ample case of user on the one side and dedication or abandonment on the other which would constitute the place in question a public place over which, not the citizens of Canada or Montreal alone, but the public at large, had rights, which the law would give effect to, independently of the provisions of any statute.

The 18 Vict. c. 100, Lower Canada, does not apply to Montreal, but deserves attention. Montreal is excepted from the operation of that Act, but it applies to every part of Lower Canada save Montreal and some other excepted places, and it contains this provision, that "every road declared a public "highway by any procès verbal, by-law or "order of any grand voyer, warden, com-"missioner or municipal council legally "made and in force when this Act shall

"commence shall be held to be a road with-"in the meaning of this Act until it be "otherwise ordered by competent authority." That was the Act adverted to by Chief Justice Dorion. He intended to refer to the 23 Vict. c. 72, which applies to Montreal alone. It deals with the property of Montreal. It deals with the powers of the corporation and extends them beyond the Act of the 8 Vict. In sub-section 6 of section 10 of that Act (23 Vict. c. 72) there is this special provision:—"The said council" (that is the council of Montreal) "shall also have "power to cause such of the streets, lanes, "alleys, highways, and public squares in "the said city, or any part or parts thereof, "as shall not have been heretofore recorded "or sufficiently described, or shall have been "opened for public use during 10 years but "not recorded, to be ascertained, described, "and entered of record in a book to be kept "for that purpose by the city surveyor of "the said city, and the same, when so enter-"ed of record, shall be public highways or "grounds; and the record thereof shall in all "cases be held and taken as evidence for "their being such public highways and "grounds."

Proceeding under this Act, the corporation did in 1865 register the Place Jacques Cartier as a public place of the city. Their Lordships have no doubt that the registration was valid, and has been amply proved. If any objection had been taken at the trial before the Canadian Judge, it would have been the easiest thing possible to produce the original book, but a certified copy of the entry of registration was admitted in its place.

The Place Jacques Cartier had been from 1847 up to 1865 (more than 10 years before registration) enjoyed by the public as a public way, and it was enjoyed as a public way more than 10 years after the registration and before the present action was commenced; and it seems to their Lordships that the case comes within the express language of that statute, and their Lordships have no doubt that, when the local Legislature passed this Act, they knew the state of things in the city, intended to provide for it, and did provide for it in strong and emphatic language, saying, that when a street or road should have been opened for public use during 10 years and placed upon the register, it should be a public highway.

Their Lordships are of opinion that, even if the common law question did not arise, still, there having been antecedent to this registration, and posterior to the registration, the statutable time during which the place should be used as a public street to give operation to the statute, the statute then applies, and upon that registration, the Place "Jacques Cartier" became a public highway. There is a distinction between the Canadian law and the law of this country as to public highways. The Canadian law agrees rather with the law of Scotland, which is founded on the civil law, namely, that when a street or road becomes a public highway, the soil of the road is vested in the Crown, if there is no other public trustee, or, if there is a corporate body that fills the position of trustee, then in that corporate body in trust for that public use. It was admitted in the argument for the appellant that such was the law of Lower Canada.

Their Lordships being of that opinion, which is in accordance with the principles deduced from *Guy* v. *Corporation of Montreal* (3 L. N. 402), and with the principles on which the Court of Queen's Bench for Lower Canada appears to have decided this case, will therefore humbly advise Her Majesty that the judgment of the Court of Queen's Bench for Lower Canada, which is also the judgment of the Superior Court, should be affirmed, and that the present appeal should be dismissed with costs.

Lacoste, *Q.C.*, for the appellants.
R. Roy, *Q.C.*, for the respondent.

SUPERIOR COURT.

SHERBROOKE, May 31, 1886.

Before BROOKS, J.

JOHNS esqual. v. PATTON.

Action by tutor—Acceptance of succession.

HELD:—*That where a tutor to minors sues in their behalf for a debt due their late father, alleging that they have accepted the succession, and the fact of such acceptance is*

put in issue by defendant, the plaintiff cannot succeed, if it appears that they had not legally accepted, i.e. with the previous authorization of a family council.

PER CURIAM :—

This is a suit for $250, amount of an obligation given by defendant to the late Jas. W. Wiggett, brought by the widow as tutrix to her minor children, alleging the death of Wiggett, the renunciation of plaintiff personally of the community, and the acceptance by minors of the succession of their late father, James W. Wiggett, represented by her. That on the 8th June 1885, said plaintiff renounced to the community of property existing between her and said late James W. Wiggett, and said minors are the lawful heirs and legal representatives of their said late father, and entitled to claim from defendant the amount sued for. That the survivors (one having died) have accepted the succession of the late James W. Wiggett, and are entitled to recover.

The defendants filed three pleas :—

1st. An assignment in insolvency before his decease by said James W. Wiggett as member of the firm of Wiggett Bros. & Co., to one Sam. Farwell.

2nd. A special denial of plaintiff's authority to sue; that the minors had never accepted the succession and could give no discharge.

3rd. General issue.

The first question that arises is, can plaintiff sue for minors who have not accepted the succession?

The legal representatives may accept or renounce. If they accept they may enforce claims, and this is what they allege they have done. Our law has been changed by the code to make it conform to the French Code, art. 461, in this particular. See Projet, Code civil, vol. 1, p. 217.

"According to the old law the tutor might by himself accept or repudiate the succession fallen to the minor, but the latter could always be relieved. But the commissioners have preferred the new rule introduced by the Art. 461 of C. N., which says that the tutor shall not do any such act without being authorized thereto by the family council, and that acceptance can only be made under benefit of inventory, consequently an article has been prepared and is submitted as an amendment to the law in force, which requires for the validity of acceptance or repudiation by the tutor, previous authorization by the judge and the advice of the family council." See change suggested by amendment. 301 C. C. P. is suggested in the place of the old law which was: "The tutor may accept or renounce the succession which falls to the minor, but the minor may be released from such acceptance or renunciation." C. C. 301 is now almost identical with C. N. 461. See Marcadé et Pont vol. 2, p. 264. See *Rolland* et al. v. *Michaud*, Q. B. 1876, Rev. Leg. vol. 9, p. 19, *et seq.*

Let us reverse the case and say that in a certain case minors are sued, would it not be a good defence to show that they had not accepted? Defendant has an interest that the proper representatives should give him a discharge. Would he have it if given by plaintiff? I think not.

Sirey & Gilbert, vol. p. 239, note 7.

"Du reste les successions échues à des mineurs ne peuvent être acceptées dans leurs intérêts que sous bénéfice d'inventaire et avec l'autorisation du conseil de famille. Il s'ensuit que la possession par eux prise ou par leur tuteur des biens de la succession sans cette autorisation ne peut avoir l'effet de les rendre héritiers purs et simples."

Plaintiff's action dismissed with costs.

Hall, White & Cate, for plaintiff.

Bélanger & Genest, for defendants.

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*COURT OF QUEEN'S BENCH—MONTREAL.**

Prohibition—Powers of Provincial Legislature—Brewer's License—Quebec License Act, 41 Vic., ch. 3.

The appellants caused a writ of prohibition to be issued out of the Superior Court, enjoining the Court of Special Sessions of the Peace from further proceeding with a summons and complaint issued by M. C. Desnoyers, police magistrate, against the appellant Ryan, upon the complaint of res-

* To appear in Montreal Law Reports, 2 Q. B.

pondent, inspector of licenses, charging Ryan with having sold intoxicating liquors without a license.

Ryan was a drayman employed to deliver and sell beer by Molson & Bros., the other appellants, who were duly licensed as brewers under the Dominion Inland Revenue Act, 1880, 43 Vic. ch. 19.

HELD:—1. That a writ of prohibition lies to bring up before the Superior Court a defect of jurisdiction of the justices of the Peace, which is only apparent on proof being made of the allegations of the plea containing matter showing such want of jurisdiction, *e.g.*, that the party prosecuted is the mere agent of a person not open to prosecution.

2. (Confirming the judgment of Loranger, J.) That the power of the Dominion Parliament to legislate as to the regulation of trade and commerce does not prevent the local legislature from passing an Act obliging a brewer to take out a local license permitting him to sell beer or ale manufactured by him, whether he sells such beer at his brewery, or elsewhere by a person paid by a commission on the sales; and therefore the Quebec License Act, 41 Vic. ch. 3, is constitutional. *Molson et al.*, appellants, and *Lambe*, respondent, Monk & Cross, JJ., *diss.*, Nov. 27, 1886.

Habeas Corpus—C. C. P. 1052—*Process in civil matters.*

A person, imprisoned under a writ of *contrainte par corps* for failing to produce effects of which he had been appointed guardian, petitioned for a writ of *habeas corpus*, on the ground that the warrant under which he was committed, contained no enumeration of the effects he was required to produce.

HELD:—That the petitioner being imprisoned under process in a civil matter, the Court had no authority to grant a writ of *habeas corpus*. C. C. P. 1052. *Ex parte Ward*, Nov. 22, 1886.

Bank in liquidation—Cheques paid after suspension—Recourse of liquidators.

The respondent, having funds to his credit in a bank which had suspended payment, drew cheques on the bank for various sums. These cheques were accepted by the bank on the same day, and the respondent then, for valuable consideration, disposed of them to various parties who were paid the respective amounts by the bank, by credits or otherwise.

HELD:—That the bank had no action against the respondent to recover the amount of the cheques so paid, their recourse, if any, being against the parties to whom they had paid the money.—*Exchange Bank of Canada*, appellant, and *Hall*, respondent, Ramsay, J., *diss.*, Nov. 22, 1886.

Charter party—Voyage direct from Havana to Montreal—Deviation—Right to touch at Sydney for coal.

The charter party described the voyage in writing as being from Havana, Cuba, "to Montreal direct *via* the river St. Lawrence." A printed clause declared that the steamship should "have liberty to tow and be towed, and to assist vessels in all situations, *also to call at any port or ports for coals or other supplies.*"

HELD:—(Reversing the judgment of the Court below):—That the fact that the steamship called at the port of Sydney, C. B., for coal in the course of the voyage, was not a deviation therefrom other than permitted by the charter party, and that the increased premium of insurance paid by the charterers in consequence of the vessel calling at Sydney could not be deducted from the freight.—*Peters*, appellant, and *The Canada Sugar Refining Co.*, respondents, Nov. 20, 1886.

GARÇON OU FILLE?

Il y a cinq ans naissait à Gaillon un enfant, qu'une prudente réserve nous commande de ne désigner que par le nom ambigu de Claude.

Les parents de Claude furent cependant troublés dans leur joie paternelle, par un doute affreux. Claude était-il un rejeton ou une rejetonne? La sage-femme, dans sa sagesse, n'osait se prononcer. On s'en référa donc à l'autorité du docteur Hurel, de Gaillon, aujourd'hui décédé. Le docteur Hurel,

après avoir examiné "l'objet" eut un petit rire fat, et laissa dédaigneusement échapper ce simple mot; "garçon."

Pourtant la mère de Claude eût désiré une fille, et, puis qu'il y avait des doutes, elle habilla Claude en fille; et comme telle, voulut, cette année, la faire entrer à l'école des filles de Gaillon.

Le maire consulta ses registres; et sur-le-champ, appela dans son cabinet, le père de Claude. Claude étant inscrit sur les registres municipaux, garçon, ne pouvait être admis à l'école des filles. "Ça m'est égal, répondit le père, c'est une fille.. Il me semble que je dois le savoir, nom d'un chien!.. " Intimidé par ces paroles violentes, M. le maire proposa une nouvelle consultation; et le successeur du Dr. Hurel, M. le Dr. Cabarrou, fut mandé chez M. le maire, où Claude, son père et sa mère se trouvaient déjà réunis. M. Cabarrou, après avoir examiné 'l'objet,' eut un petit rire fat, et laissa dédaigneusement échapper ce simple mot: "fille!"

"Que faire en une telle occurrence?" se demanda, toute la nuit qui suivit, M. le maire de Gaillon. Dès le lendemain matin, il s'enferma dans son cabinet, et à 6 heures du soir il avait achevé la lettre qu'il adressait à M. le Procureur de la République. "Le sexe de l'enfant inscrit comme garçon ne s'est pas développé, écrivait-il, au contraire."

Le Procureur, effrayé par ce mystérieux "au contraire," ordonna aussitôt au médecin attaché au Parquet de s'enquérir du sexe de Claude. Le médecin attaché au Parquet n'eût aucune hesitation: "Garçon!" s'écria-t-il, après avoir jeté un vague coup d'œil sur l'enfant. Mais il comptait sans le docteur Boularon, de Touniers, aux lumières duquel les parents de Claude eurent recours, dès qu'ils connurent l'opinion du médecin attaché au Parquet, "Fille!" dit simplement et d'un ton ferme le Dr. Boularan de Touniers, après avoir inspecté sommairement le jeune sphinx de Gaillon; et il ajoute: "Ah! ces médecins attachés au parquet!"

Désormais la justice seule pouvait dénouer les nœuds de pareilles contradictions. Le tribunal de Touniers, en presence de l'accord (deux à deux) des médecins précédemment consultés, a rendu un jugement aux termes duquel MM. les docteurs Petel, Faurin et Cornus devront "trancher la question, si toutefois c'est possible."

Console-toi, ô jeune Claude, si Petel, Faurin et Cornus, déclarent, comme c'est probable, qu'à l'inverse des Auvergnats, tu es à la fois homme et femme. Console-toi et rappelle-toi que les Grecs, ces divins artistes, avaient fait de l'Hermaphrodite le symbole de la double et parfaite beauté!—*Gazette du Palais.*

GENERAL NOTES.

Il serait fastidieux d'insister sur la férocité des mœurs rurales, car chaque jour il nous en vient de nouveaux et de plus frappants exemples. Lundi comparaitront devant la Cour d'assises de l'Ardèche les nommés Jean Faure, Rosine Faure et Philippe Plancher, accusés d'avoir assassiné, pour le dévaliser, leur frère et beau-frère Claude Faure et de l'avoir ensuite fait bouillir dans une marmite et donné à dévorer aux porcs.—*Gaz. du Palais.*

EXTRADITION WITH GUATEMALA.—An Order in Council was published in the London *Gazette* of December 3, directing, in accordance with a treaty recently concluded and ratified between England and the Republic of Guatemala for the mutual extradition of fugitive criminals, that the Extradition Acts, 1870 and 1873, shall apply to Guatemala after December 13 next. It is further ordered that the operation of the Acts shall be suspended within the Dominion of Canada so far as relates to Guatemala and the treaty referred to, so long as the provisions of the Canadian Extradition Acts of 1877 and 1882 continue in force.—*Law Journal,* (London).

Une femme Roussello était poursuivie aujourd'hui devant la dixième chambre de police correctionnelle, présidée par M. Barthelon, sous l'inculpation d'outrages aux agents. L'outrage consistait, selon l'inculpation, en ces paroles: "Vous me faites l'effet d'une pillule!" Les effets des pillules pouvant varier à l'infini, le tribunal a décidé qu'il n'y avait pas là un outrage suffisamment caractérisé et a renvoyé la femme Rousselle des fins de la poursuite.—*Gaz. du Palais.*

Any idea that the Postmaster-General was entitled by law to force the Cunard Company to carry mail-bags on board the Umbria on the ground that they are common carriers seems unfounded. A common carrier by land, holding himself out to carry goods from place to place, is bound to carry the goods of anyone offering them who is able and willing to pay for the carriage, and if the carrier has room for them. Ships going from England to foreign ports may be common carriers in the sense that they, like carriers by land, are liable for loss without proof of negligence: but they are not common carriers in the sense that it is compulsory on them to carry. In other words, some of the liabilities of common carriers have by analogy been imposed by the law on shipowners, but in no case to the extent of holding them liable to carry whether they will or not.—*Law Journal* (London).

The Legal News.

Vol. X. FEBRUARY 12, 1887. No. 7.

To represent a person as more youthful than he really is, would not generally be considered a very grave offence, and still less if the person be of the fair sex. However, in England, an action has arisen from an inaccuracy of this nature, the facts of which are given by the *Law Journal*, as follows: — "The action brought against Messrs. Stevens, the publishers of the 'Law List,' by a solicitor, the date of whose admission had been post-dated ten years, is of much interest. The plaintiff had been described in two issues of the 'Law List' as admitted in 1879 instead of 1869, although between the two publications he had drawn the attention of the publishers to the error. He complains that his apparent youthfulness has deprived him of the profits of two Chancery actions, and much sympathy will be felt for him. Messrs. Stevens, of course, had not acted maliciously, and even if they had, it was held in *Miller* v. *David*, 43 Law J. Rep. C. P. 85, that an injurious statement, although combined with falsity and malice, will not make a libel, unless the words are defamatory. The words, no doubt, were not in accordance with the fact, but it does not hold a man up to ridicule and contempt to say that he was admitted a solicitor ten years after the real date. Reliance was placed on the case of *Archbold* v. *Sweet*, 5 C. & P. 219. Mr. Archbold had sold his copyright in his "Criminal Pleading" to Mr. Sweet, but Mr. Sweet had published a third edition under the title "Criminal Pleading by Archbold, third edition." Mr. Archbold complained that blunders had been made in editing this edition, and contended that as the name of no new editor was affixed to it, there was a representation that the edition was by him. The jury gave Mr. Archbold 5*l.* damages, Lord Tenterden reserving to the defendant leave to move to enter a nonsuit. No advantage was taken of this permission, but the case is distinguishable from the present, on the ground that the blunders in criminal law made in the book were of a kind likely to bring Mr. Archbold into contempt with reviewers and others."

Superior to the power of steam, more potent than electricity, more marvellous than mind-reading, are the achievements of the collecting association and the law directory people. One of the latest circulars that has come to hand, undertakes to give the "legal ability," the "reliability," the "financial worth," &c., &c., of the sixty thousand lawyers in the United States and Canada!

A curiosity in the way of "corrections" appears in the *Quebec Official Gazette* of Feb. 5, in which it is stated that "the proclamation dated the 27th January 1887, inserted in an extra of the *Official Gazette* of the 29th January, 1887, respecting the putting into force of the Act 49-50 Victoria, chapter VII, intituled: 'An act to further amend the law respecting the constitution of the Superior Court,' was published in error."

The Tribunal Civil de la Seine, in *Loisellier* v. *Rouet*, 29 December 1886, has given a decision with reference to the marriage of priests, opposed to that of the Amiens Court noticed in 9 L. N. 80. The Court declares such marriage to be a nullity, the reason given being,

"Attendu qu'il résulte des art. 6 et 26 de la loi organique du Concordat du 18 germinal an X, que les prêtres catholiques sont soumis aux canons qui étaient alors reçus en France et par conséquent à ceux qui prohibaient le mariage aux ecclésiastiques engagés dans les ordres sacrés, et prononçaient la nullité du mariage contracté au mépris de cette prohibition;

"Attendu que la loi organique du Concordat de germinal an X n'a jamais cessé d'être considérée comme loi de l'Etat et que le Code civil ne renferme aucune dérogation à cette législation spéciale;

"Déclare nul et de non effet le mariage célébré à Londres, etc."

A remarkable action of damages was tried before the Chief Justice of England, January 25. The plaintiff *Brett* claimed £2,000 from the *Holborn Restaurant Company*, for personal injuries which, as alleged, had been caused through having swallowed a needle and thread in some food which had been served to the plaintiff at a Masonic banquet at the defendants' restaurant through the negligence of their servants. There was no doubt that the plaintiff had somehow swallowed a needle, for it, with some inches of thread attached, passed through him. The difficulty was to prove the time and occasion when it was swallowed. The plaintiff thought he swallowed it with some spinach at the masonic dinner, but it appeared that the vegetable was water cress, and it was proved that no women were employed in the restaurant and that no needles were kept on the premises. The jury under these circumstances found for the defendants.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, December 8, 1886.

Coram LORD HOBHOUSE, LORD HERSCHELL, SIR BARNES PEACOCK, SIR RICHARD COUCH.

SENÉCAL (defendant below), Appellant, and HATTON (plaintiff below), Respondent.

Contract—Repudiation — Return of debentures —Value.

HELD, (*Affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R.*, 1 *Q. B.* 112):—*That the appellant, Senécal, having repudiated his agreement with one Hibbard, under which he assigned to Hibbard certain rights in consideration of receiving from Hibbard* 35 *railway debentures, and having otherwise disposed of the rights so ceded, was bound to return the debentures to Hibbard; and an action brought by Hibbard's assignee, claiming the return of the specific debentures, or, in default, that Senécal be condemned to pay their value, was maintained, the value of the debentures being estimated by the Q. B. and P. C., at* 25 *cents to the dollar.*

SIR BARNES PEACOCK :—

This is an appeal from a judgment of the Court of Queen's Bench in Lower Canada, which modified a judgment which had been given by the Superior Court.

There were two actions: one was brought by Hatton against Senécal to recover from him 35 debentures of the Montreal, Chambly, and Sorel Railway Company for $1,000 each, with coupons attached, Hatton having received an assignment of those debentures from Hibbard; and the other action was brought by Senécal against Hibbard, calling upon him to intervene in the suit brought by Hatton against Senécal and to render an account of the debentures.

The declaration in the first suit, which was filed on the 16th of May 1882, stated that by deed dated 17th October 1872, the said Railway Company agreed to pay over to the defendant (Senécal) 25 per cent. of all subsidies which they should receive from the Government and Municipalities; that afterwards, on the 15th May 1875, in consideration of the sale and delivery to defendant by Hibbard of 35 debentures of the said Railway Company for $1,000 each, with coupons attached, for the payment of interest at 6 per cent. per annum (being the bonds in question), the defendant transferred to Hibbard all his rights under the deed of 17th October 1872, and gave him a receipt dated the 15th of May 1875, and an order dated the 19th of May 1875, with relation to that transfer; that afterwards, in November 1877, defendant repudiated the transfer of 15th May 1875, and alleging that it had been cancelled, claimed from the Government payment to himself of 25 per cent. of their subsidy to the Railway Company, and afterwards, on the 22nd November 1877, assigned his interest under the deed of 17th October 1872 to one Hurteau, who ultimately, as such assignee, obtained judgment against the Railway Company, and payment from the Government of a large sum; that notwithstanding the cancellation and repudiation of the transfer by the defendant to Hibbard, defendant, without right, retained the 35 debentures and sold them without the knowledge or consent of Hibbard or of the plaintiff (Hatton); that by deed dated 26th January, 1882, Hibbard sold and transferred the said debentures and coupons to the plaintiff; that plaintiff gave defendant

notice thereof, and demanded delivery to him of the said debentures, but that defendant, though frequently requested, had neglected and refused to deliver the same to Hibbard or to the plaintiff. The declaration concluded by praying that defendant be condemned to deliver to the plaintiff the said debentures and coupons, and in default of delivery, be condemned to pay $35,000, with interest thereon from 2nd January 1874, the date of the said debentures, and also interest on the amount of each coupon from the date when the same became due.

The defendant, in an amended plea, stated: That he ceded to Hibbard his rights under the deed of 17th October 1872, in consideration of 35 debentures, which Hibbard handed over to defendant under an arrangement that they were to be paid or else exchanged for debentures in other solvent companies, within one month from the handing over, and that it was upon these terms that the receipt of the 15th May, 1875, and the order of the 19th May were signed and handed by defendant to Hibbard; that afterwards, in April, 1876, Hibbard having made over to defendant his contract for the construction of the said railway, handed back to him the said receipt of 15th May and the order of the 19th May, 1875, and ceded back to him in this manner the rights under the deed of 17th October, 1872; that it was at the same time agreed between Hibbard and defendant that defendant should keep the said debentures in consideration of certain advances made by him to Hibbard, and that in case he sold the said debentures, he should render account to Hibbard of the proceeds of the sale, as he is still bound to do, setting off in such account the sums due by Hibbard to him which have not yet been settled, although the defendant has often requested Hibbard to do so; and that the balance in favour of the defendant far exceeds the value of the debentures.

Both Courts have found against the defendant upon that plea; and as to the arrangement which it was said that Hibbard had made with him. That being the case, it appears that Hibbard having handed over 35 debentures to Senécal in consideration of the transfer of the subsidy of the Government to the railway company, Senécal repudiated the agreement, and subsequently sold the right to the subsidy to another person. Under these circumstances, it became his duty to return the debentures to Hibbard. He did not do so, and Hibbard transferred the debentures to Hatton. The arrangement which was stated by Senécal as an answer to the action—that Hibbard had agreed with him that he should sell the debentures and account for the proceeds—was found by the Courts not to have been proved.

The Superior Court, in the first action, gave judgment for the plaintiff and condemned the defendant to deliver to the plaintiff the 35 debentures within 15 days from the date of the judgment, and in default to pay to the plaintiff $35,000 as the value of the debentures. On appeal, the Queen's Bench reduced the amount and valued the debentures at 25 cents to the dollar. The judgments were perfectly right in ordering the debentures to be returned and handed over to Hatton, and that in default of their being handed over, the defendant should pay the value of them.

It has been contended that the Court of Queen's Bench was wrong in valuing the debentures at 25 cents to the dollar. It appears to their Lordships that there was evidence upon which the Court were fully justified in arriving at that conclusion. There was evidence that on the 29th of November, 1882, similar debentures were sold at 25 cents to the dollar.

Under these circumstances their Lordships are of opinion that there was no error in the judgment of the Court of Queen's Bench.

In the other action by Senécal against Hibbard, Senécal relied upon the facts which he had set up in his defence to the first action, and complained that, notwithstanding the facts alleged, Hibbard had wrongfully transferred the debentures to Hatton, who had commenced an action against the plaintiff to recover the same; and concluded by praying that the defendant Hibbard should be made to intervene in the first action, and admit or deny the allegations of the defence therein, and produce a statement of all existing accounts between him and Senécal, and declare whether he had not on several occas-

ions admitted that Senécal was entitled to keep the said debentures.

In the second action, both Courts found, as they did in the first action, that the facts stated were not made out in evidence. The Superior Court dismissed the suit with costs. The Court of Queen's Bench on affirming the judgment said, "Considering that the "said appellant has failed to establish that "he was entitled to the conclusions of his "declaration against the said Ashley Hib-"bard, doth confirm the judgment rendered "by the Court below, and doth dismiss the "said action of the said Louis A. Senécal "with costs against him, both in the Court "below and on the present appeal." They, however, added a reservation. The contention of Mr. Fullarton, on behalf of Senécal, is that the reservation is not sufficient. It was this: they reserved to Senécal "any re-"course which he might have or pretend "against said Ashley Hibbard as defendant" on two judgments, which had been set up by Senécal in the suit; but there was no reservation in respect of two promissory notes which had also been set up by Senécal, the learned Judge on the trial having found that those two promissory notes were not on stamps, and that they were prescribed. It appears to their Lordships that such a reservation was unnecessary. The Court found merely that the plaintiff had not made out his conclusions; but, whether the reservation was necessary or not, their Lordships think that the Court omitted to reserve the right upon the two notes, because they considered that they had not been stamped, and were barred by prescription. Under those circumstances they think it unnecessary to amend the reservation by including in it the right to have recourse upon the two notes.

Their Lordships will therefore humbly recommend to Her Majesty that the judgment of the Court of Queen's Bench be affirmed. The appellants must pay the costs of this appeal.

Judgment affirmed.

Fullarton for the appellant.

Bompas, Q. C., and *Jeune* for the respondent.

CIRCUIT COURT.

MONTREAL, Nov. 30, 1886.

Before JOHNSON, J.

BERNARD v. LA CORPORATION DE LAPRAIRIE.

Municipal Code, Art. 807—Action by special Superintendent.

HELD:—*That the special superintendent appointed to revise a procès-verbal of a bridge, was not entitled under C. M. 807 to sue for more than was due to himself, the claims of others having been paid.*

The action was for $90, balance of a sum of $100 claimed by the plaintiff for services as special superintendent, and which, it was alleged, had been taxed at that sum by the Board of Delegates.

The defence was that the Board of Delegates taxed the whole amount due to various parties at $100, and that the plaintiff was only entitled to $12 for his services, of which $10 had been paid to him, and $2 were tendered.

PER CURIAM:—The plaintiff was charged by resolution of the County Municipality of Chambly, as special superintendent to revise a *procès-verbal* of a bridge common to two counties, and homologated by both. He accepted the office, and reported some amendments. Subsequently, at a meeting of the *Bureau des délégués* of both counties, the plaintiff's report was adopted. The declaration alleges that at this meeting of the delegates of both counties, the plaintiff's bill was taxed. That is true; but in going on to state that they fixed the fees of the plaintiff at $100, there is palpable error. They did no such thing. They taxed the bill, not only as regards what was due to the Superintendent but also as respects what was due to others; and the plaintiff now sues for the whole.

The defendants plead that the plaintiff is without right to ask anything not due to himself; and that they have paid all the costs incurred by his proceedings to himself and to others employed, and to his release, except $2 which they offer with their plea.

I am of opinion that the defendants have established their case. There is no doubt that the plaintiff would have been liable to those who have been paid; and a payment

to them and to his advantage, is a valid payment under Art. 1144. I have no doubt either, that the Art. 807 of the *Code Municipal* does not support the plaintiff's pretension of an exclusive right of action in himself. As I read it, it gives the action to all those who have earned the money. The plea and tender of the defendants are maintained. The previous offer of the $2 was proved, so the action must be dismissed with costs. If the plaintiff gets, as he does, all he is entitled to for himself, he cannot complain for others.

Geoffrion, Dorion, Lafleur & Rinfret for the plaintiff.

De Bellefeuille & Bonin for the defendant.

CIRCUIT COURT.

MONTREAL, Nov. 27, 1886.

Before JOHNSON, J.

MCCARTHY v. JACKSON, and WARD, Petitioner.

Contrainte par corps—Guardian—Commitment—Enumeration of effects—Petition under C. C. P. 792.

HELD:—1. *That C. C. P. 792 applies to all the cases in Section VII, C. C. P. 781-795.*

2. *In the commitment of a guardian for not producing effects placed under his guardianship, it is not essential that there should be an enumeration of the effects he has to deliver up in order to obtain his liberation.*

For reports of previous proceedings in the present case, see 9 L. N. 211; 9 L. N. 298; and M. L. R., 2 Q. B. 405.

JOHNSON, J.:—The petitioner is the guardian *en justice* of the effects seized in this case, and is imprisoned for contempt in not representing them when required. He now petitions for his release on the ground of the illegality of his detention, which illegality he makes to rest upon the allegations: First, that the warrant or authority for his detention does not specify what are the effects he is to deliver up in order to get his liberation; and secondly, because it requires him to pay the costs of his arrest. It is stated that the petitioner has already applied to the Queen's Bench for his release under a *habeas corpus*, which was refused because the detention was under civil process, and the civil courts can take care of their own processes. (*) What is sought now is action by the Circuit Court which issued the process, and it is invoked under the article 792. That article, and the preceding ones from 781—in section VII.—refer to the subject of coercive imprisonment, but it is contended by the plaintiff, who resists the application, that it applies merely to liberation for default to pay alimentary allowance when it has once been ordered. Art. 790 gives this right to alimentary allowance, and art. 791 relieves the creditor from continuing to pay it, if the debtor afterwards acquires property to the extent of $50. Then 792 says: The debtor may, if he has grounds for so doing, seek redress against such imprisonment by petition or motion to the court or judge served upon the creditor.

Although, therefore, it is true that 792 immediately follows the articles referring to alimentary allowance, and to the consequences of not paying it, it is not a necessary consequence that it relates only to those articles, and gives no right to release for any other cause of illegal detention. Now, section VII. refers not only to imprisonment for debt, nor yet to cases merely in which an alimentary allowance may be granted; but it expressly refers also to other kinds of coercive imprisonment similar to the present, and in which it has been held that no alimentary allowance will be granted, and in fact it refers to all cases of *contrainte par corps* whatsoever. (See art. 782.)

The question then is whether 792 applies to the case of the prisoner here; and having looked at the law since the case was argued yesterday, I am of opinion that it does apply to all the cases in sec. vii. Art. 792 makes reference expressly to art. 795 C. P. C., which, of course, indicates the French Code of *Procédure Civile*, as our codifiers, at the time they gave that reference, had no code of procedure of our own, and could have none while they were still making it or until it was completed, and adopted by the Legislature. The French *Code de Procédure* is very different from ours in its provisions respecting alimentary allowance, and is much more elaborate and detailed; and art. 795 of that code provides that

* See *Ex parte Ward*. M. L. R., 2 Q.B. 405.

the petition for discharge may be made, not only in that case, but in all cases (*dans tous les cas*), which would include all the cases in the section, some of which are *délits*.

We have then to look at the authority given for this imprisonment, and see whether it states a cause of detention that can be removed or complied with, so as to restore the prisoner to liberty. As has been stated already, it does not specify the effects he is to bring forward. Now I admit that when you send a man to jail under civil process, you must, if I may so speak, not only show him the way in, but you must also show him the way out; you must tell him what he is to do to satisfy you, and to get his liberation, and it must evidently be something that he can do, or that can be done. In the present case it was said that the prisoner being a guardian and entitled to a copy of the *procès-verbal* of seizure must know what are the effects he has to give up; on the other hand it was urged that though that might be so, yet his jailer did not necessarily know these effects, and would therefore not liberate him on his statement as to what they consisted of. That no doubt is true, but the jailer is not required so to act. The duty is not thrown upon him of judging whether there has been a compliance by the prisoner with the terms and conditions on which his liberation depends. That duty rests with the Court which has imprisoned him. Not only has the jailer no such duty or power, but in the nature of things it is a duty and a power that he could not possibly exercise, for even if the effects were specified in the warrant, and brought forward by the prisoner, and corresponded with the description, the identity would still be a matter of proof of which the jailer could not judge, and in which the creditor would have an obvious interest. (See *Cramp* v. *Coquereau*, 3 L. N. 332). Accordingly, we find by article 794 the discharge must be ordered by the judge upon application of which notice has been given to the prosecuting creditor. Application is made, and notice is given; but does the warrant state a cause of detention that he cannot remove? I think not. As guardian, and officer of this court he has by law a list of these effects. As far as he is concerned, at all events, he can know, and he must be held to know what they are. When he comes to the Court, and either produces them, or shows good reason for not producing them, or offers the money, the Court can order the discharge: but not till then can the Court interfere, still less the jailer, on the ground of non-disclosure by the commitment of that which the guardian is bound to know. Even if the effects were to be brought before the Court, the prosecuting creditor might contest the number or the identity of them, for it might be a gold watch that was seized, and the guardian might only produce a brass one, and so on in a variety of instances, where the Court alone could decide whether the things seized were faithfully represented or not. The other ground need not of course be noticed, as there is a sufficiently expressed legal ground of detention in the warrant.

Petition dismissed with costs.

W. H. Kerr, Q. C., for the petitioner,
J. G. D'Amour, for the plaintiff.

QUEEN'S COUNSEL, AND HOW THEY ARE MADE.

"Her Majesty having been pleased to appoint you one of her Counsel learned in the law, you will take your seat within the bar." Such are the words addressed by each judge to the newly-created Queen's Counsel when the latter attends the different courts for the purpose of formally taking his seat.

The gentlemen thus publicly honoured are barristers of ten years' standing and upwards, who have been considered by the Lord Chancellor, worthy of elevation to the dignity of Her Majesty's Counsel. It is said that the appointment is given as a recognition of the superior learning and ability of the gentlemen promoted, but, as a matter of fact, learning and ability have little or nothing to do with the matter, and a barrister desirous of promotion can obtain it, almost as a matter of course, by merely intimating his wishes to the Lord Chancellor. In this respect the law stands alone, for in every other profession the candidate for honours obtains promotion from being possessed of some special talent, or is appointed to

fill a vacancy which the death or advancement of a senior has created.

There are many points of difference between a Queen's Counsel and a barrister. The latter is allowed to "settle," as it is termed, the drafts of all the legal documents —indorsement of writs, statement of claim or defence, etc.,—required in commencing or defending an action. He can prepare the drafts of wills, settlements, deeds, and other papers required in carrying on the ordinary business of life, and he is also allowed to appear in court as an advocate.

The Queen's Counsel is not permitted to prepare any drafts of pleadings, deeds, or documents of any kind. He may advise upon points of law or equity submitted to him in "a case," that is, a written statement of facts; or he may give an opinion or settle a draft in consultation with a junior counsel; and he can appear in court on behalf of anyone who chooses (through a solicitor) to hand him a brief, except that he must not be employed in any cause against the sovereign without special license, and therefore cannot plead in court for the defendant in a criminal prosecution without the leave of the Crown.

On the other hand, a junior counsel can defend as many prisoners as he pleases, without leave or licence from anyone. And last, but not least, in the estimation of many people, the Q.C. is entitled to wear a gown of silk, and has precedence of all barristers who have not received a patent of precedence dated before the patent of the Q.C.; while the barrister has to rest contented with a robe of "stuff," and has literally to take a back seat, having to sit behind "the bar," as the wooden partition is termed which separates the seats used by the Queen's, or senior counsel, from those occupied by the juniors.

A barrister may desire to become one of Her Majesty's Counsel for various reasons. His health may be declining from over-work; he may have an idea that promotion will materially increase his income; or he may be anxious (being sufficiently wealthy) to add a couple of letters to his name before retiring from the profession. He is, however, generally induced to move in the matter by receiving notice that another barrister, his junior at the bar, is about to make application for promotion.

Having made up his mind to become one of Her Majesty's Counsel, the barrister addresses a letter to the Lord Chancellor to that effect. He must next, according to strict legal etiquette, inform by letter all those barristers who, according to the date of their call to the bar, are senior to himself, of his having made the application; and this is done in order to give such seniors an opportunity of applying on their own behalf, and so retaining their seniority.

When it becomes generally known that applications are being made for "silk," as it is professionally termed, there is considerable joy in the ranks of the remaining juniors, each of whom hopes to obtain a share of the "chamber work," as it is called, about to be thrown up by those who are desirous of elevation.

The application to the Lord Chancellor having been made, there ensues a week or two of great anxiety to the applicants. They are about to take a leap in the dark. They have each thrown up a business, producing, perhaps, an income represented by four figures, and will have to commence again in another grade of the profession, which may return them little or nothing; it not being, by any means, a matter of course that a man successful in one branch will be equally fortunate in the other.

A flutter of excitement in the legal hive announces that the appointments have been made. The letter which informs the recipients of the interesting fact is generally couched in the following style:—

"Sir,—I am directed by the Lord Chancellor to inform you that Her Majesty has been pleased to approve of your appointment as one of her Counsel learned in the law. And I am to request you to place yourself in communication with the Clerk of the Crown, and to furnish him with such information as he may require for the preparation of your patent.—I am, sir, your obedient servant,

(Signed) X. Y. Z.,
Principal Secretary."

The information required is the name of the applicant in full, and the date of his call

to the bar, the latter to determine the order of precedence.

Upon the receipt of this letter the barrister returns to the respective solicitors all the instructions for the preparation of the drafts of documents he may have before him, but he retains all his briefs.

Arrangements have then to be made for being sworn in, and formally taking his seat, and as there is not sufficient time between the receipt of the letter of appointment, and the day fixed for the ceremony, a dress wig and silk gown have to be borrowed from the wig maker, and thus arrayed, with the addition of knee breeches, silk stockings, and patent shoes with ornamental buckles, the newly-appointed Queen's Counsel attends at the private room of the Lord Chancellor, and there takes the following oath:—

"I do swear that well and truly I will serve the Queen as one of her Counsel learned in the law, and truly counsel the Queen in her matters when I shall be called, and duly and truly minister the Queen's matters and sue the Queen's process after the course of law and after my cunning. I will take no wages or fee of any man for any matter against the Queen where the Queen is party. I will duly, in convenient time, speed such matters as any person shall have to do in the law against the Queen as I may lawfully do without long delay, tracting or tarrying the party of his lawful process in that that to me belongeth. I will be attendant to the Queen's matters when I be called thereto."

The oath having been taken, each gentleman receives a box covered with crimson leather, containing his patent. This document is engrossed upon parchment, and has attached to it, by a plaited woollen cord, a wax seal of goodly dimensions, being about eighteen inches in circumference, and one-and-a-half inches thick.

The "Patent" is as follows:—

"Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, defender of the faith. To all to whom these presents shall come, know ye that we of our special grace have constituted, ordained, and appointed our trusty and well-beloved Gamma Delta, of the Temple, esquire, one of our Counsel learned in the law. And we have also given and granted unto him, as one of our Counsel aforesaid, place, precedence and pre-audience next after Alpha Beta, esquire, in our courts or elsewhere. And we also will and grant to the said Gamma Delta full power and sufficient authority to perform, do, and fulfil all and everything which any other of our Counsel learned in the law as one of our said Counsel may do and fulfil. We will that this our grant shall not lessen any office by us or by our ancestors heretofore given or granted. As witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster the day of by the Queen herself. (Signed) X. Y. Z.
Clerk of the Crown."

To formally take their seats in the various courts is the next thing to be done. On the day when this ceremony is appointed to take place, a visitor to the neighbourhood of the "Royal Courts" would not fail to notice an extra amount of excitement. Senior and junior counsel, solicitors and clerks, are awaiting at the entrances to the building the arrival of the newly-promoted gentlemen, discussing their merits, and the probabilities of their success or failure. The Appeal Court, where the ceremony first takes place, is speedily filled with barristers and visitors, among the latter being the wives, daughters or sisters of the gentlemen who have been appointed. The new Queen's Counsel, attired as when attending to be sworn in, presently enter, and stand at the end of the seat they will be entitled to occupy in future.

As soon as the judges enter and are seated a list of the new silks according to seniority is handed to the president and he calls upon each Counsel in turn by name to take his seat, using the words with which this article commences. The gentleman named passes to the centre of the seat, and bows to the judges, who bow to him in return. He then bows to the Queen's Counsel seated on the same bench, who rise and return salutations. He then turns to the barristers seated in the rear and bows to them, they also all rising and bowing in return, the wives, daughters and sisters seeming very much inclined to follow their example.

The new Q.C. then seats himself for an instant. "Do you move?" says the president, meaning "have you any motion or application to make to the court." The Counsel, although he may have a bag full of briefs marked with fabulous fees awaiting his attention, is oblivious of their existence for the time, and bows a negative, immediately departing to go through the same ceremony in the other courts in the building.

One other point of etiquette remains to be observed. Cards, upon each of which is engraved the Counsel's name, followed by the words, "On his appointment as one of Her Majesty's Counsel," are left at the private houses of each of the judges. This having been done, the barrister becomes a fully-fledged Q.C., and can sit within the bar and await the rush of leading briefs, which he confidently believes will follow his elevation.—*Tit-bits.*

The Legal News.

VOL. X. FEBRUARY 19, 1887. No. 8.

In two recent cases in Ontario, *Broddy* v. *Stuart*, before Armour, J., Dec. 21, 1886, and *Clarkson* v. *Ontario Bank*, before Ferguson, J., Jan. 19, 1887, the question has been raised whether the local legislature has a right to pass an Act respecting assignments for the benefit of creditors. In the former case, the defendant demurred on the ground that the Act in question, 48 Vic. c. 26 (O.) was *ultra vires* of the Ontario legislature, being legislation concerning bankruptcy and insolvency. Armour, J., in overruling the demurrer, remarked: "How can it be said that this Act deals with insolvency when there is no compulsory liquidation, no enforced taking of a debtor's estate from him for distribution among creditors, no proceedings *in rem*, and no discharge of the debtor?" Ferguson, J., followed this decision in the case of *Clarkson* v. *Ontario Bank*.

The mode in which a record has been preserved during eight centuries is not without interest. That is the period during which the great survey known as the "Domesday Book" has been handed down from generation to generation. The first place of deposit of this venerable record, according to *Time*, appears to have been the royal treasury at Winchester Cathedral, but from a notice in the "Dialogus de Scaccario," it seems to have afterwards become the inseparable companion of the royal seal. It is not known when it was deposited in the exchequer at Westminster, where it was kept in an iron chest (still preserved), under three locks and keys in the charge of several officials of the Exchequer. In 1696 it was removed to the Chapter House, and from there it was finally taken to its present home in Fetter Lane, where it is in the care of an official specially charged with its custody. The old binding of wood, covered with leather and ornamented with brass, is still kept; but the volumes have been put into modern bindings of leather with silver fittings, and are carefully preserved under glass. No printed edition of this great work appeared until the year 1783, when it was issued under the direction of the Record Commission in two large volumes. In 1862-65 an edition in fac simile of the survey of each county was published under the direction of Sir Henry James, of the Ordnance Survey.

The Massachusetts Supreme Court, in a late case of *Commonwealth* v. *Lynes* (7 East. Rep. 862), holds that it is no objection to the competency of a child to testify, that the child was instructed in the nature of an oath after the adjournment of the Court on the previous day, in order to qualify her as witness in the particular case. The practice upon this question has varied. In *R.* v. *Williams*, 7 Car. & P. 322, it was held that before a child is examined as a witness, the judge must be satisfied that the child feels the binding obligation of an oath from a general course of religious education. This case, observed Gardner, J., in the *Lynes* case, has been criticised and has not generally been followed. In *R.* v. *Nicholas*, 2 Car. & K. 246, Pollock, C. B., refused to put off the trial in order that a child of six years might receive instruction, but said that in the case of children of nine, ten or twelve, whose religious education had been neglected, a postponement of the trial might be proper. In the English practice it is usual for a judge to examine an infant as to his competency, before going before the grand jury, or before proceeding to trial, and if found incompetent for want of proper instruction, it is in his discretion to put off the trial, in order that the party may in the meantime receive such instruction as may qualify him to take an oath. Rosc. Crim. Ev. 114; 2 Russ. Cr. 590; 1 Stark. Ev. (2d ed.) 94; *R.* v. *White*, 1 Leach 430; 2 Bac. Abr. 577; *R.* v. *Baylis*, 4 Cox C. C. 23.

Referring to the Sovereign's influence in the constitution, the *Law Journal* says:—"When the 'great Anna,' a sovereign of no very distant date, did 'sometimes counsel take' at Hampton Court and elsewhere, she

presided over the meetings of her Cabinet Council. When George I. arrived, he did not attend, because he did not understand English. From this accident arose the convenient practice of the sovereign leaving his Cabinet to consult, unembarrassed by his presence; but still the Cabinet Council is the Council of the Cabinet of the sovereign, in which the influence of the sovereign not only may, but is required by the Constitution to be felt. In 'Kin Beyond Sea,' published in 1878, Mr. Gladstone well expressed the relation of the sovereign to the Cabinet:—

> In the face of the country, the sovereign and the ministers are an absolute unity. The one may concede to the other, but the limit of concession by the sovereign is at the point when he becomes willing to try the experiment of changing his government; and the limit of concession by the ministers is at the point when they become unwilling to bear what in all circumstances they must bear, while ministers, the undivided responsibility of all that is done in the Crown's name. But it is not with the sovereign only that the ministry must be welded into identity.

And so on, in another passage, reproduced in 'Gleanings of Past Years,' Mr. Gladstone says:—

> There is not a doubt that the aggregate of direct influence normally exercised by the sovereign upon the counsels and proceedings of her ministers is considerable in amount, tends to permanence and solidity in action, and confers much benefit on the country, without in the smallest degree relieving the advisers of the Crown from their undivided responsibility. It is a moral, not a coercive, influence. It operates through the will and reason of the ministry, not over or against them. It would be an evil and a perilous day for the monarchy were any prospective possessor of the crown to assume, or claim for himself, final or preponderating, or even independent power, in any one department of the State.

If the Cabinet Council do not feel the influence which it is the Queen's duty to exert, they must possess singular powers of resistance to the weight of the opinions of the one person in England who has been in office continuously for fifty years, and who has had more experience in politics than any of her advisers."

SUPERIOR COURT.

QUEBEC, May 21, 1886.

Before CASAULT, J.

GILBERT v. MINGUY.

Bailleur de fonds—Re-registration—C. C. 1092.

When, in a deed of sale of an immoveable, the price has been made payable by instalments, with a bailleur de fonds hypothec, enregistered before the promulgation of the cadastre, there being no obligation, imposed by the deed of sale on the purchaser, to renew the bailleur de fonds hypothec after the cadastre should be promulgated:

HELD:—1. *That the act of the purchaser, in creating a hypothec on the immoveable, which hypothec had been enregistered before the promulgation of the cadastre and had been renewed after such promulgation, and the purchaser's omission to renew the bailleur de fonds hypothec,—had not diminished the security of the bailleur de fonds creditor, and had not rendered immediately payable, under art.* 1092 *of the C. C., the instalments then not payable of the purchase-money;*

2. *That, in the absence of an express covenant, in a deed of sale of an immoveable with bailleur de fonds hypothec, to the effect that the purchaser shall renew the bailleur de fonds hypothec, he is not obliged to do so;*

3. *That an oral promise to so renew the hypothec, made after the execution of the deed of sale, would only give rise to an action of damages, if damages there should be, and caused by such failure to renew.*

The judgment is as follows:

"Considérant que, pour que le défendeur ne puisse pas réclamer le bénéfice du *terme*, il faut non seulement qu'il n'ait pas procuré, au créancier, des suretés qu'il aurait promises, mais qu'il ait diminué, par son fait, les suretés qu'il lui aurait données par son contrat;

"Considérant que le défendeur, en donnant à la Banque Nationale, pour la dette qu'il lui devait, une hypothèque sur la propriété qu'il avait acquise du demandeur, n'a pas diminué les suretés qu'il avait données, au dit demandeur, par son contrat d'acquisition, et que, si ces suretés sont diminuées, ce n'est que parce que le dit demandeur *n'a pas enregistré sa créance*, tandis que la Banque Nationale *a enregistré* la sienne;

"Considérant que si le défendeur s'était obligé de faire enregistrer la créance du demandeur, les faits allégués et prouvés ne lui donneraient qu'un recours en dommages, si le cas y échet;

"Considérant que l'obligation alléguée, comme en étant une de la vente même, n'est pas écrite au contrat qui la constate;

"Considérant que les termes, réclamés par le demandeur, n'étaient pas dus, lorsqu'il a pris son action;

"Considérant que le compte produit par le demandeur ne comprend pas les taxes comme témoin qu'il devait au défendeur, et que la quittance générale qui s'y trouve ne peut s'appliquer à d'autres dettes que celles résultant des comptes pour ouvrages et fournitures;

"Considérant que le demandeur était endetté envers le défendeur, lors de l'institution de son action, en trois diverses sommes, pour taxe du dit défendeur comme son témoin, se montant à $9.40, somme qui était liquide et exigible, et que les intérêts alors dus au dit demandeur étaient compensés et éteints par la dite somme, qui les excède;

"Renvoie l'action du dit demandeur, avec dépens distraits en faveur de Joseph P. Roy, écuier, procureur du dit défendeur."

Ignace Aubert, for plaintiff.

Joseph P. Roy, for defendant.

(J. O'F.)

COUR DE CIRCUIT.

MONTRÉAL, 7 février 1887.

Coram GILL, J.

FRASER v. NICHOLSON.

Exception à la forme—Offres réelles acceptées—Avis de plaider—Exception de paiement.

Le 11 octobre 1886, Adam B. Fraser poursuivit Thomas W. Nicholson en recouvrement d'une somme de $59.27 due pour épiceries. Le défendeur comparut et plaida par exception à la forme que le bref d'assignation était entaché de nullité parce qu'il ne contenait ni les noms, qualité et domicile du demandeur, ni les noms et domicile du défendeur; qu'il ne contenait même pas la mention du jour où le sceau de la Cour avait été apposé ni celle du jour où le bref devait être rapporté.

Le 20 novembre suivant, le défendeur, par le ministère de M. J. Arcas Dorval, N. P., offrit la somme réclamée: $59.27 sans frais. Le notaire reçut la réponse suivante: "*I* "*hereby accept the said sum of $59.27 as offered* "*to me by these presents, and give full receipt of* "*all claim against the said Nicholson, and I* "*signed after reading hereof.*

"(Signed,) ADAM B. FRASER,
" M. J. A. DORVAL, N.P."

Le 22 novembre, le demandeur requit le défendeur de plaider au fond, ce qu'il fit le 23 suivant, en produisant une exception de paiement.

Voici le jugement:—

"Jugement rejetant exception à la forme, en autant que le paiement effectué le 20 novembre 1886, sans aucune réserve par le défendeur, était un abandon de tous les droits qu'il pouvait avoir par suite de la dite exception, sans frais sur la dite exception, le demandeur ayant accepté le paiement aussi sans faire aucune réserve; mais attendu que le demandeur a mal à propos requis le défendeur de plaider au fond après avoir accepté paiement sans réserve et que le défendeur, pour éviter une condamnation par défaut qui aurait pu intervenir contre lui, était tenu de produire la défense au fond qu'il a produite, condamne le dit demandeur à payer les dépens sur la dite défense au fond, distraits à MM. Lavallée & Olivier, avocats du défendeur."

Augé & Lafortune pour le demandeur.

Lavallée & Olivier pour le défendeur.

(L. A. L.)

CIRCUIT COURT.

MONTREAL, Feb. 4, 1887.

Before GILL, J.

WALKER v. WEBB.

Sale of goods—Liability.

Action in assumpsit, for goods sold.

Plea, that the articles were purchased by one W., who was with defendant at the time of the sale. That defendant had a contract with W., by the terms of which the latter was to purchase these goods.

PER CURIAM.—Credit was given to defendant, not to W. The plaintiffs had no knowledge of the contract, and defendant tacitly

admitted at the time that he was the purchaser.

Judgment for plaintiff.

Hague & Hague, for the plaintiff.

G. F. Cooke, for the defendant.

(J. K. H.)

APPEAL REGISTER—MONTREAL.

Saturday, January 15.

McKinnon & Keroack.—Petition that cause be heard by privilege.—Granted, the appellant being in jail under *capias*.

Canadian Pacific Railway Co. & McRae.—Motion to dismiss appeal, the judgment appealed from not being final.—Granted. Motion of appellants for leave to appeal, granted.

Monday, January 17.

Morris v. *Cassils et al.*—Heard on motion for leave to appeal from interlocutory judgment.—C. A. V.

Cantin & La Banque d'Hochelaga, & Fair.—Motion that the proceedings in this case be suspended until similar causes between the same parties be ready for hearing.—C. A. V.

Ex parte Hoke.—Petition for *habeas corpus*.—Heard on preliminary objection, that a similar application had already been made to two of the judges of the Court in Chambers, and had been rejected.—C. A. V.

McKinnon & Keroack.—Heard on merits.—C. A. V.

Moss & La Banque de St. Jean.—Hearing commenced.

Tuesday, January 18.

Cantin & La Banque d'Hochelaga.—Case postponed until Monday next.

Morris v. *Cassils et al.*—Motion of Cassils for leave to appeal rejected.

Ex parte Hoke.—Preliminary objection rejected; writ of *habeas corpus* ordered to issue.

Wilson & Globensky.—Appeal dismissed, the appellant not having proceeded.

Astor & Rose.—Motion for leave to appeal from interlocutory judgment rejected.

Moss & La Banque de St. Jean.—Hearing on merits concluded.—C. A. V.

Beaudry & Dunlop.—Heard on merits. C. A. V.

McDonald & Canada Investment & Agency Co.—Heard on merits.—C. A. V.

Allan & Pratt.—Part heard on merits.

Wednesday, January 19.

Brewster & Mongeon.—Judgment reversed.

Leclaire & Dessaint.—Judgment confirmed.

Reinhardt & Davidson. — Judgment confirmed.

Beaudry & Courcelles Chevalier.—Motion for substitution granted by consent.

Ross et al. & Fontaine, and three other respondents.—Heard on motions for leave to appeal from interlocutory judgment.—C. A.V.

Ross et al. & Brulé.—Heard on motion for leave to appeal from judgment dismissing opposition.—C. A. V.

Ex parte Hoke.—Part heard on petition for *habeas corpus*.

Thursday, January 20.

Picault & Guyon Lemoine. — Motion for dismissal of appeal.—*Rayée*, the parties not being present.

Ex parte Hoke.—Hearing on petition for *habeas corpus* concluded.—C.A.V.

Allan & Pratt.—Hearing on merits concluded.—C.A.V.

Webster & Dufresne.—Two appeals, 125 and 60. Heard *de novo*.—C.A.V.

Cie. de Navigation de Longueuil & Cité de Montréal, & Taillon, Atty.-Gen.—Part heard on merits.

Friday, January 21.

Ross & Fontaine, Locke, Mayrand, and Foucher.— Motions for leave to appeal in four cases, granted.

Ross & Brulé.—Motion for leave to appeal, granted.

Cleveland & Exchange Bank.—Judgment reversed.

Normandin & Berthiaume. — Judgment confirmed.

Normandin & Lachambre. — Judgment confirmed.

Hutchinson & Ingram. — Judgment confirmed.

Papineau & La Corporation de Notre Dame de Bonsecours. — Judgment confirmed, Tessier, J., *diss.*

Cie. de Navigation de Longueuil & Cité de Montréal & Taillon.—Hearing on merits concluded.—C.A.V.

Griffin & Merrill.—Heard *de novo*.—C.A.V.

Exchange Bank & Carle.—Submitted *de novo* on factums.—C.A.V.

Cooper & McIndoe.—Part heard on merits.

Saturday, January 22.

Ex parte Hoke.—Petition for *habeas corpus* rejected, and prisoner remanded, to be delivered to the U. S. Government under the commitment of C. A. Dugas, Esq., Commissioner of Extradition.

Cooper & McIndoe.—Hearing on merits concluded.—C.A.V.

Gifford & Harvey.—Heard on merits.—C.A.V.

Evans & Foster.—Heard on merits.—C.A.V.

Monday, January 24.

Griffin & Merrill.—Judgment confirmed.

Cie. de Navigation de Longueuil & Ville de Longueuil.—Motion for dismissal of appeal.—Granted for costs only.

Cantin & La Banque d'Hochelaga & Fair.—Heard on merits.—C.A.V.

Leroux, Elie, & Duval, appellants, *& Prieur,*—Heard *de novo.*—C.A.V.

Tuesday, January 25.

Laviolette & Corporation de Napierville.—Heard *de novo.*—C.A.V.

Corporation of Sherbrooke & Short.—Submitted *de novo* on factums.—C.A.V.

Leduc & Beauchemin.—Heard *de novo.*—C.A.V.

Weir & Winter.—Heard *de novo.*—C.A.V.

Ex parte Norman.—Heard on petition for *habeas corpus.*—C.A.V.

Blondin & Lizotte.—Heard on merits.—C.A.V.

Wednesday, January 26.

Hodgson & La Banque d'Hochelaga.—Judgment confirmed. Motion for leave to appeal to Privy Council, granted.

Ex parte Norman.—Petition for writ of *habeas corpus* rejected.

Rhode Island Locomotive Works & South Eastern Railway Co.—Nos. 35 & 36. Heard on petition for correction of judgment' of Dec. 31, 1886.—C. A. V.

Papineau & La Corporation de la Paroisse N. D. de Bonsecours.—Heard on motion for leave to appeal to Privy Council.—C. A. V.

Burroughs & Wells.—Heard on merits.—C. A. V.

Brodeur & La Cie. du Chemin de fer du Sud Est.—Appeal dismissed, the appellant making default.

South Eastern Railway Co. & Guevremont.—Heard on merits.—C. A. V.

Taylor & Gendron.—Heard on merits.—C. A. V.

Corporation des Commissaires d'Ecole d'Hochelaga & Cie. des Abattoirs de Montréal.—Heard on merits.—C. A. V.

Thursday, January 27.

Rhode Island Locomotive Works & S. E. Railway Co.—Petition for correction of judgment granted, without costs.

McKinnon & Kerouack.—Judgment confirmed, Cross, J., *diss.*

McConnell & Millar.—Motion for leave to appeal from interlocutory judgment, rejected.

Birabin St. Denis & Lombard.—Appeal dismissed, the appellant not having proceeded.

Silberstein & Bury.—Do.

Walters & St. Onge.—Do.

Molsons Bank & Hughes.—Do.

Lewis & Walters.—Do.

Bryson & Synod of Diocese of Montreal.—Do.

Scott & Prudhomme.—Do.

O'Brien & Semple.—Heard on merits.—C. A. V.

Gault & The Exchange Bank of Canada.—*Acte* granted to appellant of *désistement* from appeal.

The Court adjourned to February 22.

RAILWAY DECISIONS.

TORONTO, May 28, 1886.

Before O'CONNOR, J.

TAYLOR v. THE ONTARIO AND QUEBEC RAILWAY Co. (11 Ont. P. R. 371.)

Award — Interest — Consolidated Railway Act 1879 (D).

Money was paid into a Bank under Consolidated Railway Act 1879 (*D*), *sec.* 9, *subsec.* 28, *and an order for immediate possession of lands expropriated by the Company was made by a Judge under the sub-section, and an award of compensation was made subsequently.*

HELD, *That the landowner was entitled to interest on the amount awarded him only at the rate allowed by the Bank on the money paid in, and not at the legal rate.*

The Ontario and Quebec Railway Company, in order to obtain immediate possession of three parcels of land in the Township of York, for their right of way, before the amount of compensation therefor was ascertained by arbitration, on the 12th April 1883, paid the sum of $9,000 into the Canadian Bank of Commerce, to the joint credit of the Company and the land-owners (Messrs. Taylor Bros.) under an order made by the County Court Judge, under subsec. 28, sec. 9 of the Consolidated Railway Act, 1879 (D); the Solicitor for the Taylors appearing and consenting thereto.

This deposit of $9,000 bore interest at the rate of 4 per cent, until 15 October 1885, when the rate was reduced by the Bank to 3 per cent.

In one of these cases, that of George Taylor, an award was made and afterwards set aside by Cameron, J. (6 O. R., p. 338.) Another award was subsequently made, and O'Connor, J., ordered payment of the amount of it out of the deposit in the Bank.

On settling the order, a dispute arose as to the rate of interest to be allowed on the award; the Company contending that they were only called upon to pay Bank interest, while Taylor claimed interest at six per cent.

It appeared from the evidence on the motion for payment out, that the Arbitrators in their award had allowed interest at six per cent for two years from the time of taking possession of the lands by the Railway Company, and included it in their award.

John Leys, for Taylor:—The arbitrators have allowed 6 per cent, that rate must now govern. Taylor has been kept out of his money by prolonged litigation through no fault of his own, and is entitled to legal interest.

The Railway Act contemplates payment of legal interest, see subsec. 33 of sec. 9, where the words "the interest" occur. (O'Connor, J.—If the expression was "interest" only, I should agree with you). I refer to *MacDonald* v. *Worthington*, 8 P. R. 154; *Sinclair* v. *G. E R. W. Co.*, L. R., 5 C. P. 391.

Angus MacMurchy, for the Ontario and Quebec Railway Company:—The cases cited do not apply to this case, where the Court has jurisdiction under the Railway Act. In cases such as the present one, the principle was laid down by Mowat, V. C., in *Great Western R. W. Co.* v. *Jones*, 13 Gr. 355. The $9,000 here was appropriated by the Company with notice to the Taylors for payment of the compensation to be subsequently ascertained; it has lain in the bank ever since, and the Company should not, while losing the difference between Bank and legal interest on the balance remaining after the compensation is paid, be compelled to pay such difference on the other moiety to the land owner. The case cited has been followed by Galt, J., in Re Lea and Ontario and Quebec R. W. Co., 21 C. L. J. 154, where the same question came up as here. For an analogous decision under the Public Works Act, see Wilkinson v. Geddes, 3 S. C. R. 216.

O'CONNOR, J.—I have no doubt as to the order I should make regarding the interest. While there is sufficient in the Bank to cover the amount awarded, I do not see why the Railway Company should be compelled to pay a higher rate than the fund earns in the Bank. If an award is made hereafter in another case for more than the amount in the Bank, such a case can be dealt with then. In this case there is sufficient to satisfy the award, and the cases cited by counsel for the Railway Company support this view.

Order made allowing Bank interest on the amount of the award.

Before BOYD, C.

TORONTO, July 2, 1886.

PHILBRICK v. ONTARIO AND QUEBEC RAILWAY Co. (11 P. R. 373.)

Award—Interest — Consolidated Railway Ac 1879 (D).—*Arbitrators fees— Summary order.*

An order was obtained for immediate possession of land, under the Consolidated Railway Act, 1879 (D), and money was paid into the Canadian Bank of Commerce under the same Act by the company.

HELD:—*That the land-owner was entitled to interest upon the amount subsequently*

awarded him from the date of the award, only at the rate allowed by the bank upon a deposit, and not at the legal rate of six per cent.

Re Lea 21 *C. L. J.* 154, *followed.*

In the litigation that ensued it was determined that neither party was entitled to the costs of arbitration under the Statute; but the company, in order to take up the award, paid the whole of the arbitrators' fees.

HELD:—*That a summary order could not be made to recoup the company for one half the fees, out of the moneys payable to the land-owner, and such order was refused, without prejudice to an action for the same purpose.*

This was an application made on behalf of the land-owner Philbrick, for payment of the amount of an award made under the provisions of the Consolidated Railway Act 42 Vic. ch. 9, (D) under the following circumstances:

The company and the land-owner being unable to agree upon the amount of compensation to be awarded the land-owner for their right of way through his property, the former deposited the sum of $7,700 in the Canadian Bank of Commerce to the joint credit of the company and the land-owner, and thereupon obtained an order for immediate possession of the land required for their railway, from the County Court Judge under sub-sec. 28, sec. 9, of the Railway Act.

Subsequently an arbitration was had between the parties, and the arbitrators awarded the land-owner the sum of $3,516. Litigation was then commenced, respecting the question of the costs of the arbitration, both parties contending that they were entitled to them. The Supreme Court finally decided, however, that neither party was entitled to costs.

The company took up the award, and in doing so, were compelled to pay the arbitrators' fees. They offered to pay Philbrick the amount awarded, less half the arbitrators' fees, with interest upon the award at the rate paid by the Bank of Commerce, where the original amount of $7,700 was deposited.

The land-owner's motion was for payment to him of the total amount of the award, with interest at six per cent, without any deduction for arbitrators' fees.

Alfred Hoskin, Q.C., for the motion.

George Tate Blackstock, contra.

BOYD, C.—As to the claim of the proprietor to be allowed six per cent interest on the amount awarded to him from the date of the award, it is my duty to follow the case as decided by Galt, J., in Re Lea, 21 C. L. J. 154, which appears to me to be directly in point. I have not seen the text of that judgment, but I think that I would have reached the same conclusion independently of it. In this case an order was obtained for immediate possession of the land, under sec. 9, sub-sec. 28, of the Railway Act 1879, (D), and thereupon the fund in question was deposited in the Canadian Bank of Commerce. When the award was made, as it was not complained of by either party, it was competent for the proprietor to have applied for and obtained the amount then awarded to him under sub-sec. 28. Failing to do this, he should not seek to charge more than the bank rate of interest against the railway company.

It has been determined in this matter that neither party is entitled to costs of arbitration under the statute, but the company having taken up the award, and to do so, having paid the arbitrators' fees, now seek to have one half the amount of this disbursement deducted out of the money payable to the proprietor out of the fund It appears to me that I have no power to exercise a summary jurisdiction in this behalf. It is urged that natural justice requires that an order to recoup should be made, based on Marsack v. Webber, 6 H. & N. 1. It is answered that these sums paid the arbitrators, though technically costs of award, are yet covered by the general term of the statute "costs of arbitration," and to this the case of Re Walker 30 W. R. 703 (not cited) gives support. Difficult questions arise upon this question of contribution which are properly the subject of an action between the parties: Bates v. Townley, 2 Exch. 152. Besides this, the language of the

statute in sub-sec. 29 is adverse to my assuming any power of interference upon this application. It says no part of such deposit, &c., shall be paid to the owner or repaid to the company without a Judge's Order, "which he shall have power to make in accordance with the terms of the award." This to my mind demonstrates (having regard to the circumstances and decisions in this case) that the railway company must be left to action, and I dispose of this application without prejudice to such litigation.

The result is that I order the amount awarded to the proprietor with the accrued bank interest thereon to be paid out to him, and the balance of the fund, with accrued interest, to be paid out to the railway company. It is not a case for costs of this application.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Feb. 5.

Judicial Abandonments.

Angélique Normand and Maxime Lavigne (A. Normand & Cie), grocers, Hull, Dec. 21.

D. & J. Maguire, Quebec, Jan. 19.

Narcisse Pilotte, district of St. Francis, Jan. 17.

Curators appointed.

Re Théophile Bélanger, St. Jean Port Joli.—Kent & Turcotte, Montreal, curator, Jan. 14.

Re Robert G. Brown, Montreal.—John McD. Hains, Montreal, curator, Jan. 14.

Re Edward Carbray.—C. Desmarteau, Montreal, curator, Jan. 18.

Re Dame J. E. Vaine, milliner.—Seath & Daveluy, Montreal, curator, Dec. 18.

Re Louis Treffilé Dorais, St. Grégoire.—P. E. Panneton, curator, Jan. 17.

Re A. J. Fortier & frère.—Kent & Turcotte, Montreal, curator, Jan. 17.

Re P. T. Gibb, wire manufacturer.—Seath & Daveluy, Montreal, curator, Dec. 27.

Re Auguste Grundler.—Kent & Turcotte, Montreal, curator, Jan. 15.

Re L. J. Guillemette & Cie.—John S. Brown, Montreal, curator, Jan. 14.

Re Kerman Hirshfield.—Seath & Daveluy, Montreal, curator, Dec. 16.

Re Renaud & Desjardins.—C. Desmarteau, Montreal, curator, Jan. 14.

Re Rivet & Picotte, hatters and furriers.—Seath & Daveluy, Montreal, curator, Dec. 31.

Re Pierre Rodier & Flavie Lavigne.—F. X. Bilodeau, Montreal, curator, Jan. 18.

Re John N. Smith.—J. J. Griffith, Sherbrooke, curator, Jan. 17.

Re S. St. Denis.—Kent & Turcotte, Montreal, curator, Jan. 15.

Dividends.

Re Elzéar Chouinard.—Dividend payable Feb. 8, Montefiore Joseph, Quebec, curator.

Re P. A. Labrie.—First and final dividend, S. C. Fatt, Montreal, curator.

Re Nathaniel Michaud, St. Eloi.—First and final dividend, payable Jan. 4, H. A. Bédard, Quebec, curator.

Re A. G. Morris, cigar dealer.—Dividend, Seath & Daveluy, Montreal, curator.

Re Charles Nelson, hardware merchant.—Dividend, Seath & Daveluy, Montreal, curator.

Re Cassils, Stimson & Co.—Second and final dividend, payable Feb. 1, Thos. Darling, Montreal, curator.

Canada Gazette, Feb. 12.

The Hon. Andrew Stuart, Chief Justice Superior Court, to be Administrator Province of Quebec, during the absence on leave of His Honor L. F. R. Masson, Lieutenant Governor.

GENERAL NOTES.

How William IV, of England, came to be called William is explained as follows in a recent work:—"The late King William," says Miss Lloyd to Mr. Hayward on March 20th, 1862, "honored my dear sister, Helen Lloyd, with his friendship and confidential intimacy from the time of her first introduction to him, when Duke of Clarence, to the day of his death. A very few days after the death of George IV., Helen met him at the house of Lady Sophia Sydney, with whom she was staying on a visit. She had heard him express strong preference for his second name, that of Henry, and says that as medals had been struck giving to Cardinal York the title of Henry IX., he wished to assume his undoubted right to that name. My sister familiarly asked him whether he was to be proclaimed King Henry or King William? 'Helen Lloyd,' he replied, 'that question has been the subject of a discussion in the Privy council, and it has been decided in favor of King William.' His Majesty added that the decision had been mainly influenced by an old prophecy (the existence of which he seemed not to have been previously aware of) to the effect that as *Henry VIII. had pulled down monks and cells, Henry IX. would pull down bishops and bells.*

In a recent case, the Kentucky Court of Appeals, in deciding the claim of a woman to be licensed as a pharmacist, observed: "It is gratifying to see American women coming to the front in these honorable pursuits. The history of civilization in every country shows that it has merely kept pace with the advancement of its women. The Brahmin's wife was burnt with his dead body. The Mahomedan woman is a slave for the man. The husband of the English wife formerly had a right to chastise her; and by a fiction of law, her legal identity was completely absorbed in him. We are leaving mockeries behind us, and it is gratifying that these matters are now a long way in the past."

The Legal News.

VOL. X. FEBRUARY 26, 1887. No. 9.

The *Law Journal* (London), referring to the decision in *Armstrong* v. *Mills et al.*, which will be found in the present issue, says:—"After thirty-eight years' criticism, the doctrine of *Thorogood* v. *Bryan*, 18 Law J. Rep. C. P. 336, which, familiarly illustrated, is that a man on an omnibus has his driver's negligence attributed to him in any collision with another omnibus, has fallen to the ground by the decision of the Court of Appeal, unless, as is not likely, the House of Lords should set it up again. From Baron Parke's *quære* in his copy of 'eighth Common Bench,' which the research of Lord Esher has unearthed, to the decision of the Supreme Court of the United States in *Little* v. *Hackett*, the doctrine has over and over again been disputed. It is now authoritatively overruled, and the agreement on the subject of English-speaking lawyers will probably be gratifying across the Atlantic, where they led the way."

An interesting move has been made in England in the establishment of a society dealing with the history of English Law. On the 29th January a meeting was held in Lincoln's Inn Hall, at which the following resolution was passed: "That it is desirable that an association be formed in order to encourage the study and to advance the knowledge of the history of English law." Lord Justice Fry said that though most of those present had a great deal to do with English law practically, yet he was not ashamed to own that he himself had much to learn respecting its history in early times, and he was afraid that, if the truth must be spoken, England was in danger of being outstripped in this branch of study by America in the persons of Mr. Bigelow and Judge Holmes, and also by Germany; and he concluded by expressing an opinion that it was quite time that steps were taken to do away with this reproach. Chief Justice Coleridge proposed that the society be called the "Selden Society," and the suggestion was adopted. He said that many men who had been engaged for a long period of their lives in the practice of the law were almost without a knowledge of its history. In early life most of them learned what it was necessary to learn for the purposes of practice. If practice came and their time was taken up in reading briefs and discharging their duty, it was impossible for such men to read very widely or to grasp the principles which they knew experimentally rather than scientifically. Anyone who had had, as he himself had had for some years past, to administer a great system like that of the English law, must feel how important it was to know the history and the principles of law—to know the origin of a practice, and to know what was the fountain-head of a principle which was to be applied—because it was only by the knowledge of history that they could be preserved from the misapplication of principles.

The records in the six telephone cases which have just been heard before the U. S. Supreme Court comprise 25,000 pages of printed matter. The argument began January 24, and was concluded February 8. In these suits the claims of the Bell Telephone Company, which thus far have controlled the business, are contested. The decision will be the first that has been rendered by the Supreme Court in this important series of suits.

The question of judicial remuneration is one which perpetually recurs. In some of the great States of the Union the scale is less generous than in Canada. In Illinois, for instance, the judges of the highest court in the State, who receive only five thousand dollars per annum, are obliged six times a year to make a circuit of the places where courts are held, entirely at their own expense. Every day that they are away from home is so much deducted from their salary. And, worst of all, at the end of their service no pension awaits them. In Pennsylvania the salary is larger, but there is no pension on retirement. A bill has been introduced recently to supply this deficiency in the judicial system. The *Bulletin* of Philadelphia says:—

"The fear of living to an age when he would be helpless to the public and without the means of support did much to harass the mind of one of the noblest and most upright gentlemen that ever sat upon the Philadelphia bench, and the eyes of others who strove hard to do their duty have been turned toward the path of political preferment solely because of a natural desire to support their families in comfort, and to feel that they may be free to provide for a time when infirmities or natural decay will cut off their usefulness on the bench."

COURT OF REVIEW.

QUEBEC, November 30, 1886.

Before STUART, CH. J., CASAULT, J., CARON, J.

NOLET v. BOUCHER.

Sale—Clause résolutoire—Third person—Action en réintegrande.

HELD:—*(reversing the judgment of the Court below, Casault, J., dissenting),* 1o. *When in a deed of sale of an immovable there is a resolutive clause to the effect that a failure to pay, on the appointed day, any one of the instalments of the price of sale should operate as a rescision de plano of the contract of sale, and that the vendor should, in such case, have the right, without being obliged to have recourse to law, to resume possession of the immovable,—that even, on the supposition of the contract being pleno jure null, the right of re-entering into possession cannot be exercised by a person not a party to the contract, but to whom the price of sale had been made payable;*

2o. *That the possessor of the immovable, who held possession under a lease from the vendee, and who had been dispossessed by such third party, has a right to the action en complainte et réintégrande.*

The judgment is as follows:—

"Considérant qu'il parait, par la preuve au dossier, que le demandeur est devenu propriétaire de l'immeuble dont il réclame la possession par sa présente action en vertu d'un acte de vente en date du 11ème jour de juillet 1882;

"Considérant que le demandeur, après avoir pris possession de cet immeuble, le donna à ferme à un nommé Laroche, lequel en fut expulsé vers le mois de mai, 1884, par le défendeur, qui s'en empara, le demandeur étant alors aux Etats-Unis;

"Considérant que, nonobstant la clause résolutoire contenue dans le dit acte de vente, faute de paiement de partie du prix, le défendeur, qui n'était pas partie au dit acte, n'avait aucun droit de s'emparer du dit immeuble contre le gré du demandeur;

"Considérant que le défendeur, n'ayant pas lui-même vendu cet immeuble au demandeur, n'aurait pas pu le poursuivre pour s'en faire déclarer le propriétaire, en admettant que le dit acte aurait été nul de plein droit;

"Considérant que le demandeur a le droit d'être réintégré dans la possession du dit immeuble;

"Considérant qu'il y a erreur dans le jugement rendu en cette cause par la Cour Supérieure, à Arthabaskaville, le 10ème jour d'avril 1886;

"Casse et annule le dit jugement, et procédant à rendre le jugement, que la dite Cour aurait dû rendre, renvoie les défenses du défendeur et maintient l'action du demandeur, partant déclare le demandeur possesseur de l'immeuble suivant, savoir; etc., fait défense au défendeur de troubler le demandeur dans la possession du dit immeuble, réintègre le dit demandeur et le maintient dans la paisible possession du dit immeuble."

Crépeau & Côté, for plaintiff.

Laurier & Lavergne, for defendant.

(J. O'F.)

SUPERIOR COURT.

QUEBEC, February 3, 1886.

Before ANDREWS, J.

PARADIS v. J. LÉGARÉ et al., & O. LÉGARÉ, *adjudicataire* and petitioner to annul sale, & J. LÉGARÉ, contesting petition.

Sheriff's sale—Nullity.

HELD:—*Upon a Sheriff's sale of an immovable described by the cadastral number, the advertisement stating the metes and bounds and the area, as set forth in the book of reference that if it appear, upon a petition of the*

purchaser to annul that sale, that, between the date of the publication of the cadastre and the date of the Sheriff's seizure, a portion of the immovable so sold, as a whole, by the Sheriff, had been acquired by a third person, not a party to the suit, and had, since its acquisition, been in the possession of that third person, the Court will (1) *annul said sale,* (2) *order the Sheriff to return to the purchaser the amount of his adjudication, and* (3) *condemn the defendant contesting the petition to pay the costs of that contestation, and the plaintiff to pay the costs of an uncontested petition to annul a Sheriff's sale.*

The judgment is as follows:—

"Considering that the said *adjudicataire*, Olivier Légaré, petitioner *en nullité de décret*, has proved the material allegations of his petition, and more especially that he cannot obtain possession of the immovable purporting to have been sold and adjudged to him by the Sheriff in this cause, and that the portion of the said immovable, to wit: of number 186 of the cadastre of the parish of Charlesbourg, of which the said *adjudicataire* could legally obtain possession under the said adjudication, *differs so much* from the description given in the minutes of seizure of the property purporting to be seized and sold, to wit: *the whole* of said lot, cadastral No. 186, that it is to be presumed that the said petitioner would not have bought it, had he been aware of said difference;

"Considering that the defendant has wholly failed to make any proof of the allegations of his contestation of the said *adjudicataire's* petition *en nullité de décret*, the said contestation is dismissed with costs against the said defendant; the said petition is maintained with costs against the said plaintiff, as if uncontested; and the said sale and adjudication to the said petitioner are hereby annulled; and the Sheriff of this district is ordered to return to the said petitioner, Olivier Légaré, the sum, which, as such *adjudicataire* of said lot, he had paid to said Sheriff, to-wit: the sum of $850."

Morrissette & de St. George, for purchaser.
Hamel & Tessier, for defendant contesting.
(J. O'F.)

SUPERIOR COURT.

ST. JOHNS, Dist. of Iberville, Feb. 17, 1887.

Before LORANGER, J.

ATLANTIC & NORTH-WEST RY. COMPANY, Expropriating parties, and GEORGE WHITFIELD, proprietor.

Consolidated Railway Act, 1879, (*D.*)—*Deposit in chartered bank.*

HELD:—*That the railway company has the right to withdraw from the Bank the money which has been deposited by order of the Judge, as security to the proprietor when a warrant of possession is granted under sec.* 9, *sub-sec.* 34 *of the Railway Act, when it is shown that an award has been rendered by the Arbitrators, and the amount of the award with interest has been deposited in Court under the provisions of sec.* 9, *sub-sec.* 28 *of the Railway Act,—notwithstanding the fact that the proprietor has taken an action to set aside the award.*

The railway company deposited in the Merchants Bank of St. Johns, the sum of $5,000 as security to this proprietor, as required by a judgment granting to the railway company a warrant of possession of the land to be expropriated.

Subsequently an award was rendered by the arbitrators named by parties, a copy of which award was served upon the proprietor, and as the latter refused to accept the amount awarded, the railway company, finding that a large mortgage existed on the expropriated land, took the necessary measures to obtain a ratification of title, and under sec. 9, sub-section 34 of the Railway Act, deposited in Court the amount of the award, with six months' interest, and filed with the deposit a copy of the notarial award, after having given notice of this procedure to the proprietor, and to the prothonotary. The railway company then applied to the Judge, asking for the withdrawal of the money deposited in the bank, as the requirements of the Act had been complied with, and the proprietor objected on the ground that he had refused to acquiesce in the award, and that he had actually taken proceedings and had served an action to set it aside, arguing that in the event of his suc-

ceeding in obtaining a larger compensation for his lands, the amount deposited in Court would not give him sufficient security.

The learned Judge held that the Act provided for the deposit of the money in Court, in the event of a refusal on the part of the proprietor to accept the amount awarded, or when the railway company had reason to fear that any claim, mortgage or incumbrance existed on the property, and that as the Act did not go any further, he could not refuse the application, and ordered that the money deposited in the bank be returned to the railway company.

R. T. Heneker, atty. for railway company.

Trenholme, Taylor, Dickson & Buchan, attys. for proprietor.

(R. T. H.)

COURT OF APPEAL.

LONDON, Jan. 24, 1887.

Before LORD ESHER, M. R., LINDLEY, L. J., LOPES, L.J.

SHIP BERNINA. ARMSTRONG ET AL. v. MILLS ET AL.

Action for Negligence—Contributory Negligence of Persons in charge of vessel in which Plaintiff is—Action under Lord Campbell's Act in Admiralty Division — Judicature Act, 1873, *s.* 25, *subs.* 9.

These were three actions brought *in personam* under Lord Campbell's Act by the personal representatives of Armstrong, Owen, and Toeg respectively, to recover damages sustained by the deaths by drowning of these persons in consequence of a collision between the defendants' steamship Bernina and the steamship Bushire. Both vessels were to blame for the collision. At the time of the collision, Armstrong was one of the crew of the Bushire, as first engineer, but was off duty and had nothing to do with the negligent navigation of the Bushire, which partly caused the collision. Owen was, also, one of the crew, as second officer, and was directly responsible for the negligent navigation of the Bushire. Toeg was a passenger on the Bushire, and had nothing to do with her negligent navigation.

The actions were brought in the Admiralty Division, and the facts were stated in a special case for the opinion of the Court, and the questions were—(1) Whether the defendants in each of the three cases were liable for the damages sustained by the respective plaintiffs, and (2) whether, if liable, the defendants were liable for the whole of the damages or a moiety only.

Mr. Justice Butt being of opinion, upon the authority of *Thorogood* v. *Bryan*, 8 C. B. 115; 18 Law J. Rep. C. P. 336, that the defendants were not liable, and that the cases were not within the Judicature Act, 1873, s. 25, subs. 9, gave judgment for the defendants.

The plaintiffs appealed.

T. Bucknill, Q. C., and *Nelson*, for the plaintiffs.

Sir Walter Phillimore, Q. C., and *Gorell Barnes*, for the defendants.

Their Lordships held (overruling *Thorogood* v. *Bryan*) that the representatives of Armstrong and Toeg, who were not guilty of any negligence, were not precluded from recovering in the action by reason of the negligence of those in charge of the Bernina at the time of the accident. Their lordships, therefore, allowed the appeal in those cases. Their lordships also held that cases under Lord Campbell's Act are common law, and not Admiralty, actions, and are not within section 25, sub-section 9, of the Judicature Act, 1873.

COURT OF APPEAL.

LONDON, Jan. 27, 28, 1887.

Before COTTON, L.J., LINDLEY, L.J., LOPES, L.J.

In re VAN DUZER'S TRADE-MARK.

Trade-mark—'Fancy word'—'Melrose'—Geographical Name—Patents, Designs, and Trade-marks Act, 1883.

Appeal by the Comptroller-Generals of Patents, Designs and Trade-marks from a decision of BACON, V.C., reported 55 Law J. Rep. Chanc. 812, in which he held that a dealer in perfumery might register as a trade-mark the words 'Melrose Favorite Hair Restorer,' the word 'Melrose' not being in common use in the perfumery trade, notwithstanding that it was in common use to designate a town in the United Kingdom.

Sir R. Webster, Q. C. (*Attorney-General*), *Sir H. Davey, Q.C.*, and *Ingle Joyce* for the Comptroller-General.

Aston, Q.C., and *Sebastian* for the respondent.

Their Lordships held that 'Melrose' was not a 'fancy word' and could not be registered as a trade-mark, and allowed the appeal.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION (21 C.L.J. 154).

Toronto, March 11, 1886.

Before Galt, J.

Lea v. The Ontario and Quebec Railway Co.

Interest payable on award out of moneys paid into Court.

Where money is paid into Court under sub-sec. 28 of sec. 9, Con. Ry. Act (D.) 1879, by a Railway Company, as security for the compensation of land expropriated by them, pending an arbitration to ascertain such compensation; on such amount being ascertained, the owner is only entitled to the current rate of interest on the fund in Court, and not to legal interest.

The Ontario and Quebec Railway Company on 25th April 1883, paid into the Canadian Bank of Commerce, the sum of $8,000 under the direction of the judge, pursuant to subsection 28 of section 9 of the Consolidated Railway Act, 1879, as security for the lands of one John Lea, expropriated by them for the purposes of their railway, and thereupon obtained an order for immediate possession of the said lands. The money remained on a deposit receipt in the bank to the joint credit of the land owner and the company, bearing interest at 4 per cent. Subsequently, on January 1st, 1884, the amount of compensation coming to the land owner was ascertained to be $3,792 by arbitration under the provisions of the Act.

Afterwards, on March 13th, 1885, on motion by both parties for payment out, the question arose as to what rate of interest the land owner was entitled to.

Galt, J. (following *Great Western Railway Co.* v. *Jones*, and *Wilkins* v. *Geddes*, 3 S. C. 216), made an order for payment to both parties of their respective shares out of the $8,000, with interest at the rate of 4 per cent, from date of the taking of possession of the land by the Company.

Shepley, for the land owner.

MacMurchy (*Wells & Co.*) for the company.

APPEAL REGISTER—MONTREAL.

Tuesday, February 22.

McDonald & Canada Investment Co.—Judgment reversed.

Webster & Dufresne.—Judgment confirmed.

Exchange Bank & Carle.—Judgment confirmed.

Corporation of Sherbrooke & Short.—Judgment reversed.

Weir & Winter.—Judgment reversed.

Blondin & Lizotte.—Judgment reversed.

Burroughs & Wells.—Judgment confirmed.

South Eastern Railway Co. & Guevremont.—Judgment confirmed.

Corporation des Commissaires d'Ecole & La Cie des Abattoirs.—Judgment confirmed.

O'Brien & Semple.—Judgment reversed.

Barré & Lapalme.—Heard on motion for leave to appeal. C.A.V.

Nash & Sternberg.—Motion to dismiss appeal granted.

The Court adjourned to March 15.

IS SHAMPOOING A NECESSARY?

At the Brompton County Court, on Wednesday, December 22, before his Honour Judge Stonor and a jury, the case of *Lucretia Canham* v. *The Hon. F. C. Howard* was tried. The plaintiff, a professional rubber and shampooer, sued the defendant for the sum of 35*l.* for shampooing his wife, Lady Constance Howard, on numerous occasions during the years 1883 and 1884. The shampooing had been originally ordered by Dr. Whatman Wood. The action was commenced in the High Court, and the defendant had pleaded never indebted, and the issue was sent for trial by this court. It appeared by the evidence that on their marriage, the defendant had prohibited his wife from pledging his credit, the lady having a separate income of her own of 200*l.*, and the defendant paid all expenses of house-keeping out of an income of 300*l.* per annum. The

defendant deposed that he had never in fact pledged his credit to the plaintiff; and there being no evidence to the contrary, that was admitted. The defendant's wife deposed that the debt in question was hers, that she had reduced it from its original amount by a payment of 5*l.*, and had promised and intended to pay the whole amount, but had not yet been able to do so, her income being insufficient. Counsel for the defendant cited the cases of *Jolly* v. *Rees*, 33 Law J. Rep. C. P. 177, and *Debenham* v. *Mellon*, 50 Law J. Rep. Q. B. 155 (in the House of Lords), and submitted that the latter was exactly in point. Counsel for the plaintiff contended that, according to the case of *Debenham* v. *Mellon*, a husband was not liable for necessaries supplied to his wife when she had sufficient means, but that he was so liable if she had not sufficient means, and that, in the present case, the shampooing was a necessary, and the lady's means insufficient; or, at all events, that these were proper questions for the jury.—His Honour said he was disposed to enter a nonsuit, as there was no evidence of the necessity of of the shampooing in the first instance, or, at all events, of its continuance for two years. He also thought that, out of the lady's income of 400*l.* for two years, she had clearly sufficient means to have paid the plaintiff's bill of 35*l.*, or, at all events, that there was no evidence to the contrary. At the request of counsel, however, and in order that the case might go in a complete state before the High Court, he left four questions to the jury, to which they replied as follows: 1. Did the defendant pledge his credit?—No. 2. Did the plaintiff give credit to the defendant's wife in the respect of her separate income?—No. 3. Was the rubbing or shampooing a necessary?—Yes. 4. Had the defendant's wife sufficient means to pay for the same?—No. And his Honour entered a verdict for the plaintiff accordingly, the defendant giving notice of appeal.

SERGEANT BALLANTINE.

Sergeant Ballantine belonged to an era in the history of the bar which has not only passed away, but which has been succeeded by another which has passed away. Of his own contemporaries, Serjeant Parry is dead, Mr. Justice Hawkins and Baron Huddleston are on the bench, and Lord Halsbury is on the woolsack. Of their successors by rather a long interval (for Serjeant Ballantine was old enough to have been the pupil of Barons Platt and Watson), Mr. Douglas Straight 'shot madly from his sphere' to a seat on the bench at Allahabad, and Mr. Montagu Williams finds himself quietly ensconced in the magistrate's chair at Woolwich. Serjeant Ballantine, with his contemporaries already mentioned, was among those who soon advanced beyond the practice of the criminal law and entered upon more remunerative business, but while at the Old Bailey and the Sessions House, they played all the forensic parts of the Criminal Courts. Their best *rôle* was that of defenders of prisoners, but they were equally at home in prosecuting them. Their representatives of to-day are perhaps too apt to become specialists, even in a special branch of practice. They are divided into prosecuting counsel and defending counsel, and the result is a deterioration of both. The result is due to a large extent to the monopoly which the Treasury has obtained of all prosecutions of a serious kind. The criminal classes are, for example, hardly likely to choose Mr. Poland, whom they see daily making gaps in their ranks under the inspiration of a Treasury brief, to defend them if they should find him not engaged on the other side. The practice of always prosecuting and never defending, and *vice versâ*, has a tendency to embitter the proceedings, and a change from the one to the other is healthy for the individual and is in accordance with forensic habits and the genius of the law. The institution of a Public Prosecutor of late years has, perhaps, necessarily given rise to a class of counsel like the substitutes of *Procureurs-Généraux* abroad. No complaint is to be made of them, but the institution has a tendency to narrowness. The best corrective is to let it be understood that young counsel must win their spurs by defending well, and for the Treasury to give its retainers to the rising defenders of prisoners somewhat on the principle that an old poacher makes the best game-keeper.

Serjeant Parry's talent lay in declamation and in appeal to the feelings which came from his own heart; the characteristics of Serjeant Ballantine, though less conspicuous, were rarer, and had an original flavour of their own. Serjeant Ballantine was not an actor who pretended to feel what he did not, but one who pretended to be much inferior to himself. This appeared in the robing room and at the club, for the serjeant could not be so cynically wicked as he ingenuously professed. In Court it was the serjeant's way to lie low. When he examined a witness, he would assume an expression of vacuity which disarmed opposition. With a drawl and a stutter he would put questions of so apparently artless a kind that witnesses had not the heart to deny a gentleman who was probably doing his best, however stupid he was. In this power of drawing out witnesses he was something like the late Sir John Holker, but Sir John's heavy manner was natural, while that of Serjeant Ballantine was assumed, although so inveterately as almost to be a part of himself. The initiated could see, by a little jerk in his lip, when he had made a point, and he would finally dismiss the witness with an affected 'Thank you,' having extracted everything that was necessary to his case. Like all good cross-examiners, Serjeant Ballantine was great in examination-in-chief. In cross-examination he seldom put a dangerous question. In criminal cases, which are all very much of a pattern, he was believed to be possessed of a series of questions the answers to which, if given either way, would help his case. In cases involving the relations of the sexes, Serjeant Ballantine was especially at home, a wide experience of life having given him the key to a large range of human motives. He was not one of those advocates who believe in their clients because they are theirs. The Claimant could not have had a greater contrast in this respect than when he changed Ballantine for Kenealy. His fault was rather not to believe in the good motives of anyone, last of all of his own client. This habit was not on all occasions pleasing to his clients. Serjeant Ballantine was counsel in the Divorce Court for a petitioner against whom the plea of connivance was set up. In his speech to the jury, he dwelt much on the apparent fact that his client was a fool, equalled only in folly by his mother. In going out of Court, the petitioner pathetically appealed to his friends whether it was for this that he had paid the serjeant two hundred guineas—that not only he should be abused as a fool, but his poor mother too. The client possibly thought that the serjeant had an Oriental way of including a man's ancestry in comprehensive abuse; and the reflection that he had won his case would have soothed him more if he could have seen that he could not have won it without deserving these hard names. It was this same petitioner who by his reluctance to give his evidence in the presence of ladies, drew from Serjeant Ballantine the famous ejaculation that the ladies came to hear, and that they ought not to be disappointed. Whether the Gaekwar of Baroda fared better than less exalted clients, was a State secret not disclosed, but a characteristic story is told of the voyage to India. The solicitor who instructed Serjeant Ballantine and his son thoughtfully provided a book-box containing 'the Penal Code,' 'the Evidence Act,' works by Currie and others, and digests of Indian reports, in the hope that the Serjeant would indulge his leisure on board ship with study. When the box was opened at Bombay it was found to contain French novels, an emendation which the Serjeant was tempted to make in passing through Paris. In the *Mordaunt Case*, Serjeant Ballantine exhibited self-denial where smaller men might have succumbed to temptation. When the Prince of Wales had given his evidence, it was open to the Serjeant to cross-examine him, but he simply said, 'I have no question to ask.' These were the palmy days of a contemporary, which in its pilgrim's progress through society gives us a sketch of a prominent person every week, and straightway a portrait of Serjeant Ballantine appeared with the legend, 'He declined to cross-examine a prince.' Serjeant Ballantine made considerable mark in civil cases not of the heavy kind, such as the case of Risk Allah Bey, but he was most at home in cases like the Müller case and the Brighton poisoning case of 1872. The Overend-Gurney case, in which he held a brief, was a little out of his beat.

Serjeant Ballantine in his prosperous days,

no doubt, made a great deal of money at the bar, especially when he extended his practice from the Criminal Courts in which he had earned his fame. His talent in the extraction of evidence was utilised in most branches of law, including election petitions and railway cases. His cross-examination of surgical experts, called in cases of compensation for personal injuries to swear up to the 'railway shock,' was always enjoyed by the junior bar and the jury. It was this latter branch of practice which clung to him last, but to his old habits of repugnance to work and inattention to detail, there was at last added a failure of brain power, so that he retired from practice. The money he had made was usually spent as soon, or before. A man who will buy a theatre and make a present of it is not likely to save money. Fortunately, in view of this lavishness, Serjeant Ballantine's son was well provided for, having married the widow of a rich man, Mr. Mitchell, at one time member for Bridport, and his son's well-being was a great consolation to the serjeant's latter days. Great lawyer he never was. He used to boast: 'Thank heaven, I know a little of everything, except law.' Sometimes his cases brought him before the Courts in Banco or even the Exchequer Chamber, where his great adroitness made up for his innocence of law. When very hard pressed and convicted of uttering a startling infraction of elementary law, he would remark blandly, 'Of course, my lord, it is as your lordship says. I had forgotten. There is that case in the Exchequer.' Whilst he was about it, he did not hesitate to vouch the authority of this most technical of the Courts. Of course he frequently gave offence. Cynicism appeared to be a matter of absolute conviction with him, and he could be bitter towards those he did not love. The only occasion on which he was accused of making a long speech was when he unduly occupied the attention of the judges of the Court of Common Pleas while Sir John Coleridge, their Chief Justice elect, was outside in Westminster Hall on a November afternoon, shiveringly awaiting his turn to go through the ceremony of admission as a serjeant. Whatever may be said of the late sergeant, he was intellectually and morally honest. No one has suggested that he ever took an unfair advantage of an opponent in Court. His trustworthiness with other people's money is shown by his success as treasurer of Serjeant's Inn, which he gave up to go to India, and which was reserved for him till he came back. When the property of the Inn was divided, Serjeant Ballantine was not the man to compromise with his conscience by putting his share of the spoil in a missionary box. He had the full courage of his opinions, and spent it on his own amusements. In his last days he wrote a book of Reminiscences which, although amusing, did not read as the sergeant talked; and his attempt to appear in the United States as a lecturer was a failure. His death removes from conversation much of the bitter flavour which is not uncongenial to the lawyer's taste. He was an advocate of consummate skill, and as such added lustre to the bar.—*Law Journal* (London).

THE LAW'S DELAY.

To the Editor of the Legal News:

Sir,—Cases inscribed for Enquête and Merits in November have been fixed for hearing some time in March. The February roll was not concluded and part of it had to be continued to March. Cases inscribed in December may have a chance to be heard in April. There are 75 cases fixed for next month, and there are as many more inscriptions filed and standing over. Debtors become aware of these delays and are not slow to profit by them. I have a case now, where the debt is admitted, yet, the knowing defendant pleads and laughs in his sleeve, as he thinks of the three or four months grace he will have before a judgment could be procured against him, giving him ample time to dispose of his assets in the ordinary way.

Great things are expected of our new Government; here is their opportunity. Let them take immediate steps to prevent the administration of justice in Montreal from becoming—what it now nearly is—a farce.

Nemesis.

Montreal, Feb. 24.

The Legal News.

VOL. X. MARCH 5, 1887. No. 10.

A very distinguished member of our bar will be installed as the Mayor of Montreal, on Monday, March 14. There has been reason to regret in the past, that municipal honors have been unwelcome to some of the most eminent citizens. The office of chief magistrate of a city of 200,000 inhabitants certainly affords scope for the exercise of talent and sagacity, and there is no reason whatever why it should not be the object of honorable ambition. The opportunities of usefulness are greater than in the local legislature or in the senate, and these offices are sometimes eagerly sought after. The Hon. J. J. C. Abbott, the mayor elect, it is true, would have seemed to be more appropriately placed, if he filled the office of Chief Justice of the Supreme Court or of the Court of appeal, in either of which positions his commanding abilities would have had the happiest influence upon our jurisprudence. Such an appointment, of course, would have involved a great pecuniary sacrifice on the part of Mr. Abbott, since the state is far from being the most generous paymaster. Our belief is however, that eminent lawyers exhibit more public spirit than merchant princes, and are less likely to be deterred from assuming important duties by selfish considerations. Mr. Abbott has shown both courage and public spirit in consenting to accept the mayoralty, and it is to be hoped that his example will promote a change which has already commenced, by which a superior order of men are coming forward as aldermen and giving their time and energies cheerfully to the service of the city.

An indictment for murder under peculiar circumstances, was tried before Mr. Justice Field at Nottingham, Febuary 4. The prisoner, John Jessop, and the deceased John Allcock, had gone to several chemists' shops and procured at each a small quantity of laudanum. They retired to a barn and took the poison between them. The prisoner recovered from the effects, but Allcock died shortly afterwards of narcotic poisoning. Jessop subsequently made several statements as to what had occurred. Among others he said, "We both got ourselves into disgrace and we did not know what to do with ourselves. Allcock proposed doing away with himself somehow. He said to me, "Shan't you die with me?" I said, "I am not particular." Allcock pulled a bottle out of his pocket with laudanum, and said this would do it if we could only get some more." The prisoner's counsel submitted that there was no evidence of murder. He referred to the case of *Regina* v. *Alison*, 8 C. & P. 418. In that case the prisoner had procured poison and persuaded the deceased to share it with him, and Mr. Justice Patteson had held that this was murder. Here, however, the evidence showed that Allcock was the leading spirit. He had announced his intention to commit suicide, and the prisoner had followed suit. There had been no definite agreement between the men to commit suicide together. The learned judge overruled the objections, and told the jury that if they considered the men had agreed together to commit suicide—and the evidence was very clear—they were bound to find a verdict of guilty. The jury convicted the prisoner, with a strong recommendation to mercy, and he was sentenced to death.

An extraordinary admission of evidence is reported in Pennsylvania. A young woman named Scott, who was far advanced in pregnancy, appeared before a justice of the peace, and charged a young man named William Bloodgood with assault. She deposed that two weeks previously, Bloodgood had entered her house and choked her until she was almost unconscious, and had also twisted her left wrist very severely. Bloodgood, who denied the assault, of which there was no witness, was held for trial. Before the case came on, the woman gave birth to a child, and at the trial appeared with her baby. Her lawyer offered to exhibit the child to the jury, and the judge permitted this to be done. On one side of the infant's throat appeared the distinct impression of four fingers, and

on the other side a similar mark of a thumb. This was not all: the baby's left wrist was twisted out of shape and swollen. On this evidence, coupled with the statement of the mother, the prisoner was convicted. As the assault took place only a month before the birth of the child, it is difficult to escape the conclusion that the marks and injuries observed by the jury had been inflicted after birth, and for the purpose of manufacturing evidence. The jury must have been very credulous indeed to imagine that they had any connection with the assault. The mystery is why the judge should have admitted such evidence.

COURT OF QUEEN'S BENCH.

QUEBEC, Oct. 8, 1886.

Before DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

RINFRET (deft. below), Appellant, and POPE (petitioner below), Respondent.

Constitutional Law — Public Health — Jurisdiction—C. S. C. ch. 38—31 *Vict.* (D.) *ch.* 63—*Quo Warranto.*

HELD:—1. (RAMSAY and CROSS, JJ. *diss.*) *that legislation concerning the public health, with the exception of quarantine establishments and marine hospitals, comes within the powers attributed to the provincial legislatures, and the Dominion Parliament had no jurisdiction to repeal the C. S. C. Ch.* 38 *which contains provisions concerning the maintenance of public health in the former Province of Canada. The Act* 31 *Vict.* (*D*) *Ch.* 63 *is therefore ultra vires.*

2. *Where a local board of health was illegally appointed by the City Council of Quebec, after the Council had ceased to have any right to make such appointment, a quo warranto might be sued out in the name of any citizen and ratepayer, to test the validity of the appointment, and such proceeding need not be brought in the name of the Attorney General.*

3. *There being no evidence that the defendant, in accepting his illegal nomination as a member of the board of health by the City Council, had acted in bad faith, or done anything prejudicial, he should not be mulcted in a fine for his action in the premises.*

The respondent's petition for a writ in the nature of a *quo warranto* was maintained in the Court below by CASAULT, J.

RAMSAY, J.—This is a proceeding under Art. 1016 C. C. P., in the nature of a *quo warranto*, calling upon the appellant to show why he occupied the office of member of the Board of Health, appointed by the Corporation of the City of Quebec.

It was contended that the respondent had no interest to raise the question. I think this proposition is untenable under the Code, Art. 1016. Respondent is a corporator of the corporation of the city of Quebec, and his interest attaches to its every act. It seems to me to be idle to say that it may do the respondent no harm. That is not the question, but whether it is unlawful, and therefore whether it may do him harm.

The petition was met by a law issue, and by a peremptory exception. By the former it was contended that chap. 38 C. S. C., had been abolished by the 31 Vic. cap. 63, a Dominion Act, that the appointment of a board of health by the Lt. Governor was therefore illegal, and that the corporation was entitled to name a board of health.

This raises a constitutional question, which we have not yet had before us, namely, whether the legislation respecting the health of the people of Canada generally is a subject for local or for federal legislation; and particularly whether chap. 38, C. S. C., is a statute regulating a matter of federal or of local concern.

By the classification of sects. 91 and 92 of the B. N. A. Act, 1867, the matter of public health is not attributed in express terms either to the legislation of Parliament or to that of the local legislatures. An endless number of subjects are not expressly attributed to one or other legislature; and it is inexact to say that everything which is not expressly attributed to the local legislature, belongs to the jurisdiction of Parliament. It is even more strikingly inexact to contend, that what is not expressly attributed to federal legislation is subject of local legislation, for the statute says the contrary. But section 92, SS. 16, attributes to the local legislatures "generally all matters of a merely local or private nature in the province." We

have therefore to enquire whether the subject matter of the public health is by its nature local or private. The argument that Sect. 91, SS. 11, has expressly attributed "Quarantine, and the establishment and maintenance of marine hospitals" to the federal jurisdiction, therefore it has transferred all other matters relating to health to the local legislatures, appears to me to be a mis-application of the doctrine of *inclusio unius* etc. To apply it in this way to the powers of Parliament, would be to ignore the introductory and concluding parts of section 91, and to place the generality of local legislation on a higher footing than the generality of the federal parliament. (1)

It seems to me, however, that there is room for distinction, and that we cannot decide the question absolutely by saying "public health" is wholly a federal matter, or that it is wholly a local matter. Many questions more or less nearly relating to health may be merely local: as, for instance, scavenging, drains, cess-pools, over-crowding of dwellings, preventing nuisances and other matters too numerous to be detailed. It seems to me, nevertheless, to be quite as clear that questions of health, which may affect the whole people of the Dominion, are matters for general and not for local legislation, by their very nature. (2.)

This is no classification made for the purposes of our federal system. All our municipal laws have recognized the former class of health regulations; while the Act before us shows that the public health of a municipality was looked upon as quite a different thing from the public health of the then Province of Canada.

The history of the legislation will make this plain. The session of the 12 Vic. (1849) was a very active one, for all matters of organization. The quarantine act was amended, chap. 7; the preservation of the public health act (origin of the 38 C.S.C.) was introduced, or rather regulated, and its quality, as a measure of general import, fixed by chap. 8. A general municipal corporation act for Upper Canada was also passed (12 Vic. c. 81), which did not attribute the preservation of the public health of the then province to the municipalities, although the Act referred to health; showing that the legislature of the old Province of Canada was attracted to the subject. It would probably be difficult to give any example in the legislations of the civilized world, of the greater organizations for the public health being left entirely to municipal control. To say that the control of the central government over matters of public health was to begin and to stop at the seashore is inconceivable.

I think, therefore, that it is by examining chap. 38 C.S.C. we must decide whether it specially is a general or a local Act. Whether we look at its terms, its history or the reason of things, it seems to me clear that the statute regulates a federal matter, and that the Parliament of Canada had a right to repeal or amend that Act, and to pass any other general law affecting the public health.

This power was fully exercised by the 31 Vic. c. 63, and the 38 chap. C.S.C. was repealed, and new provisions respecting the public health were substituted (sections 7, 8, 9, 10, 11 and 12). Later, by the 35 Vic. c. 27, sec. 11, in its turn the 31 Vic. chap. 63 was repealed, but it was expressly provided that what the 31 Vic. had repealed should not revive. Chap. 38 C. S. C. was therefore repealed, and remains so, if Parliament had jurisdiction over the matter. I don't think it necessary to go into minute detail as to

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(1.) At the delivery of the judgment a new argument was advanced to answer this. It was said, S. S. 2, Sect. 92, B. N. A. Act, 1867, gives all the other powers relating to health to the local legislatures. It makes no allusion to general health. It charges the local finances with all hospitals and other eleemosynary institutions, except marine hospitals. In the next place, if establishing, maintaining and paying for hospitals has any direct relation to the laws concerning public health, it is clear sub-section 7, Sect. 92, no more exhausts the subject than does S-S. 10 of Sect. 91. This answer then is inconclusive.

(2.) It has been contended that, under chap. 38 C.S.C., the matter was made municipal. If so, it was unnecessary to refer to s.s. 7, sec. 92, for s.s. 8 gives "municipal institutions in the Province" generally. But it is inexact to say chap. 38 treats the health of the whole of Canada as a municipal matter. It proceeded on a totally contrary principle. The origin and cost of it remain with the Government, the municipal organization only being employed as an auxiliary to the direct action of Government.

the indications of the federal character of this law, as shown by many of its provisions. It is sufficient to indicate that it was passed for the whole Province of Canada, Upper and Lower; that its cost was a charge on the revenue of the old province; and that its organization was common to both Upper and Lower Canada. It may be pertinently asked, on what government would the cost now fall? (3.)

It is said that Parliament has renounced the power to deal with the preservation of public health generally, and has, by the 35 Vic., acknowledged it had not power to repeal chap. 38 C.S.C. On the contrary, the 35 Vic. has persevered in repealing chap. 38 C.S.C. But we are told that the Minister of Justice, and a Senator, had declared in the Senate that the Government meant to abandon it. The formal abandonment by the Dominion Parliament of a right to legislate in any doubtful matter would be a strong motive for deciding in any doubtful case as they had done; but it seems to me it would be necessary that the question of jurisdiction should be doubtful, and the expression of the resolution to abandon it unequivocal and authoritative. None of these conditions appear in this case. It seems to me the preservation of the health of the whole country, or any part of it threatened with any formidable epidemic, endemic or contagious disease, is, above all question, a matter of general and not of local interest. As for the opinions of members of Parliament, it is obvious they ought not to be, and are not authority. If they were to be admitted as giving a clue to interpretation, the real intentions of the legislature might be upset by the opinion of an individual. Again, these opinions, even if, as they sometimes might be, important, are not sworn to. The member may not have said what he thought, and he may be badly reported. At most, he could only be an *expert*. The Minister of Justice and the Senator don't appear in that capacity before this Court, even if we could admit legal *experts* as to a disposition of our own law. I enter more into this point than is perhaps necessary, because many people seem to think that those engaged in making laws should know more about them than other people. Experience of the parliamentary system does not support this view, however plausible it may appear to a casual observer.

Accepting the conclusion that chap. 38 is a federal law, and that it is repealed, the chief reason of respondent's objection to the proceedings of appellant disappears. His action is in conflict with no other organization, and we have not to enquire whether or not the Mayor refused to establish a board of health when first required so to do, or not.

It may, however, still be said that the corporation had no right to establish boards of health. This pretension is at once met by the Act of Incorporation of the City of Quebec, 29 Vic. c. 57 (1865). Section 7 authorizes the Council to make by-laws "for establishing boards of health," and "so soon as the corporation shall have established boards of health, such boards may take cognizance of the causes of disease, and shall have all the powers and privileges conferred upon them by the 12 Vic. chap. 116"—that is, the statute chap. 38 C.S.C. In 1875 the legislature of Quebec passed an Act, a section of which added to the Act of the 29 Vic. "a section to define and regulate the duties of health officers," and this statute recognizes the repeal of the chap. 38 C.S.C. so far that it only takes "cognizance of the causes of disease." If abandonment is conclusive, this one seems to be more formal and more authentic than the speeches of the Minister and the Senator. Again, the Act of 1886 scarcely claims a universal power in the local authorities to deal with all questions of public health. Under all reserves, I may add that, so far as I have been able to examine the provisions of this Act, it does not seem to me to be *ultra vires*, but it is possible it might become so, in part at least, by federal legislation.

From this view, I should have been pre-

(3.) It was said, in rendering judgment, that this argument was not *invincible*. It was not propounded as demonstration, but as giving reasons why a power, not specified, should not be attributed to the local legislatures. Of course, the victorious reason is that the public health of the Dominion is not attributed piecemeal to the provincial legislatures, and that it is impossible to say that it is a matter "of a merely local or private nature in the province."

pared to say that the appellant had not contravened any law; on the contrary, that his appointment was strictly in conformity to law, as the general powers of the corporation, sec. 29 s.s. 1, justified the organization of a board of health for certain purposes.

Has Dr. Rinfret and his board gone further than to exercise the simplest duties of a board of health? It seems they established an ambulance, and made arrangements to vaccinate the poor. Surely it was not these alarming preparations that disturbed the respondent.

I would reverse, with costs.

Cross, J., delivered an opinion to the same effect, the conclusion being as follows:— General powers not enumerated fall necessarily to the Dominion legislature, and are excluded from the jurisdiction of the Provincial legislatures. The exercise of general powers is appropriately applicable for the prevention or mitigation of epidemics, endemics or contagious diseases. Therefore, in repealing chap. 38 C.S.C., the Dominion legislature wiped out of the statute book the previously existing provisions for the creation of boards of health as a general system. The Lieut.-Governor's proclamation could not put in force a law that did not exist, nor could there be any usurpation of an office for the creation whereof there was no law, and Dr. Rinfret could not be compelled to desist from the exercise of functions not recognized by authority of law; and whatever ever authority he received from the City Council could not be contradicted by an authority which had no legal force. I am therefore of opinion that the proceeding in the nature of a *quo warranto* taken in this case should be quashed, and the complaint as supported and prosecuted by Pope dismissed.

The judgment of the majority of the Court was as follows :—

" La cour, etc....

" Considérant que le chapitre 38 des Statuts Refondus du Canada, contient des dispositions relatives au maintien de la santé publique dans la ci-devant province du Canada, maintenant les provinces d'Ontario et de Québec, et que toute législation sur la santé publique dans chaque Province, à l'exception des établissements de quarantaine et des hopitaux de marine, tombe dans les attributions législatives de chaque Province ;

" Et considérant que le Parlement de la Puissance n'avait aucun pouvoir de rappeler les dispositions du dit chapitre 38 des Statuts Refondus du Canada, et que le statut était encore en vigueur lors des divers procédés relatés dans les plaidoiries qui ont eu lieu sous l'autorité du dit acte ;

" Et considérant qu'après la proclamation émanée par le lieutenant gouverneur de la Province de Québec, publiée dans la Gazette Officielle de Québec, le 4 sept. 1885, mettant le dit acte en opération dans la Province, et la nomination d'un bureau central de santé pour la dite Province, le maire de la cité de Québec a été requis de convoquer une assemblée du conseil de la cité de Québec, pour procéder à la nomination d'un bureau local de santé pour la dite cité de Québec, ce qu'il n'a pas fait dans le délai prescrit par le statut ci-dessus mentionné ;

" Et considérant qu'à défaut par le maire de convoquer une telle assemblée dans le délai ainsi fixé, le lieutenant-gouverneur était, sur certificat à cet effet, autorisé par la loi à nommer un bureau local de santé comme il l'a fait ;

" Et considérant que l'appelant n'a été nommé par le conseil de ville de la cité de Québec, l'un des membres du bureau local de santé pour la cité de Québec, qu'après que le lieutenant-gouverneur de la Province de Québec ait par un ordre en conseil à cet effet procédé à la nomination d'un tel bureau de santé à défaut par le maire d'avoir convoqué une assemblée du conseil pour nommer un tel bureau de santé ;

" Et considérant qu'après la nomination d'un bureau local de santé par le lieutenant-gouverneur comme susdit, le conseil de ville n'avait pas le droit de nommer un autre bureau de santé local pour agir dans la cité de Québec, en vertu des dispositions du ch. 38 des Statuts Consolidés, et que la nomination que le conseil de ville a faite de l'appelant pour agir sur tel bureau de santé est nulle et de nul effet ;

" Et considérant que l'appelant, sur la présente requête de l'intimé, a maintenu qu'il avait été légalement nommé et qu'il avait le

droit d'agir comme l'un des membres du bureau local de santé pour la cité de Québec, et ce en vertu des dispositions du chapitre 38 des Statuts Refondus ;

" Et considérant qu'il n'y a pas d'erreur dans cette partie du jugement de la cour de première instance, rendu le 31 décembre 1885, qui a ordonné que le dit appelant fût dépossédé et exclu de la charge de membre du bureau local de santé pour la cité de Québec, en vertu des dispositions du chap. 38 des Statuts Consolidés du Canada ;

" Mais considérant que l'intimé n'a pas prouvé que l'appelant qui a été nommé comme l'un des membres du bureau local de santé pour la cité de Québec, par le conseil municipal de la cité, ait en cette qualité fait aucun acte qui fut préjudiciable soit à l'intimé soit au public, ni qu'en acceptant ou en réclamant le droit d'accepter la dite charge, qui est une charge gratuite, il ait agi de mauvaise foi, et que partant le dit appelant n'avait pas dû être condamné à payer une amende de $100 ;

" Cette cour, confirmant la première partie du jugement de la cour de première instance, adjuge et déclare que le dit appelant n'a pas été légalement nommé à la dite charge de membre du bureau local de santé pour la cité de Québec, en vertu du chap. 38 des Statuts Refondus du Canada, et qu'il n'a pas eu et n'a pas le droit d'exercer la dite charge, et condamne le dit appelant à payer à l'intimé les frais encourus sur la dite requête en cour de première instance, et renverse cette partie du dit jugement qui a condamné l'appelant à payer une amende de $100, et rejette cette partie de la dite condamnation, chaque partie payant ses frais en appel."

Baillairgé & Pelletier for appellant.

M. Chouinard, counsel.

Angers & Casgrain for respondent.

SUPREME COURT OF CANADA.

NOVA SCOTIA.]

OTTAWA, Feb. 15, 1887.

MARSHALL v. MUNICIPALITY OF SHELBURNE.

Action on bond—Seal—Evidence.

In an action on a bond against the sureties of a defaulting clerk of the Municipality of Shelburne, the defence raised was that the bond was not executed by them as it had no seals attached when the sureties signed it.

HELD, (Henry, J., *hesitante*) that as the plaintiffs had proved a *prima facie* case of a bond properly executed on its face, and neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the defendant, who had not negatived the due execution of the bond, it being quite consistent with his evidence that it was duly executed, the onus of proving want of execution was not thrown off the defendant, and plaintiffs were entitled to recover.

Borden, for the appellants.

Sedgewick, Q. C., for the respondents.

OTTAWA, Feb. 17, 1887.

PICTOU BANK v. HARVEY.

Sale — Non-Acceptance — Possession revested in vendor.

On July 14th, 1884, H. forwarded a lot of hides from Halifax, addressed to J. L. Pictou, the bill of lading specifying that they were to be carried to Pictou station. H. had been selling hides to L. for three or four years. An invoice was sent to L. for the price of the hides at the rate previously paid, and L. sent H. a note for the amount which was discounted. The course of dealing between H. and L. was for H. to receive a note for the amount according to his own estimate of weight, &c, and if there was any deficiency to allow L. a rebate on a final settlement.

This lot of his was put off at Pictou landing and remained there until Aug. 5th. On that day, L. sent his lighter-man to Pictou Landing for some other goods, and he, finding the hides there, took them in his lighter and brought them to L's tannery with the other goods. The next day, L. on being informed that the hides were at the tannery, had them put in the store of D. L., whom he told to keep them for the parties who sent them, there being, at the time, other hides of L. in the said store. The same day, Aug. 6th, L. sent a telegram to H. as follows :—" In trouble. Have stored hides. Appoint some one to take charge of them." H. immediately came to Pictou and having learned what L. had done, expressed himself as satisfied. He did

not take possession of the hides, but left them where they were stored, on L's assurance that they were all right.

On Aug. 6th a levy was made under an execution of the Pictou Bank against L. on all L's property that the sheriff could find, but these hides were not included in the levy.

On Aug. 12th L. gave the Bank a bill of sale on all his hides in the store of D. L., and the Bank, on indemnifying D. L, took possession of the hides so shipped by H. and stored with D. L. In a suit by H. against the Bank and D. L.:

HELD, affirming the judgment of the Court below, that the contract of sale between L. and H. was rescinded by the action of L. in refusing to take possession of the goods when they arrived at his place of business and handing them over to D. L., with directions to hold them for the consignor, and in notifying the consignor, who acquiesced and adopted the act of L., whereby the property and possession of the goods became revested in H., and there was, consequently, no title to the goods in L. on Aug. 12th, when the bill of sale was made to the Bank.

Sedgewick, Q.C., for the appellants.
Borden, for the respondents.

OTTAWA, Feb. 15, 1887.

SOVEREIGN FIRE INS. CO. v. MOIR.

Insurance, Fire — Condition — Hazardous Business—Increase of Risk—Forfeiture.

A policy of insurance on the respondent's property contained the following provisions:-

"In case the above described premises shall, at any time during the continuance of this insurance, be appropriated, or applied to, or used for the purpose of carrying on, or exercising therein, any trade, business or vocation denominated hazardous or extra-hazardous . . . . . unless otherwise specially provided for, or hereafter agreed to by this company in writing, or added to, or endorsed on this policy, then this policy shall become void."

"Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent."

When the insurance was effected, the insured premises were occupied as a spool factory, and it was described as a spool factory in the application. During the continuance of the policy, a portion of the building insured was used for the manufacture of excelsior, but the fact of its being so used was not communicated to the company or its local agent. A loss by fire having occurred, the company resisted payment, on the ground that the manufacture of excelsior on the premises avoided the policy under the above conditions.

On an action to recover the insurance, the plaintiff obtained a verdict, the jury finding, in answer to questions submitted on the trial, that the manufacture of spools was more hazardous than that of excelsior, and that the risk was not increased by adding the manufacture of excelsior in the building. The Supreme Court of Nova Scotia sustained the verdict.

HELD, reversing the judgment of the Court below, that as the manufacture of excelsior was, in itself, a hazardous business, the introduction of it into the building insured would avoid the policy under the first of the clauses above set out, even if the jury were right in their finding that it was less hazardous than the manufacture of spools.

HELD, also, that the addition of the manufacture of excelsior to that of spools in the said premises was a change material to the risk, and avoided the policy under the second clause above recited.

Henry, Q.C., for appellant.
Borden, for respondents.

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*SUPERIOR COURT.—MONTREAL.**

Insolvent company—Execution of judgment of Ontario court—45 Vict., (D.) ch. 23, ss. 86, 87 & 88.

HELD:—That under 45 Vict. (D.) ch. 23, s. 86, the Courts in the Province of Quebec, will enforce an order for the execution of a judgment, issued from a competent court in Ontario, in like manner as if it had been issued

* To appear in Montreal Law Reports, 2 S. C.

from a court in Quebec.—*In re Queen City Refining Co., Williamson & Calcutt*, Mathieu, J., June 16, 1886.

Dommage—Injures.

Jugé :—Qu'un maître de poste qui retarde injustement d'expédier une lettre à lui confiée, et qui, lorsque la personne qui lui a remise cette lettre, se plaint de ce retard, lui reproche de vouloir lui faire du chantage, et ajoute "qu'elle avait besoin d'argent et qu'elle se servait de faux prétextes pour en obtenir," peut être poursuivi en dommages, et une somme de $10.00 par lui offerte, n'est pas suffisante.— *Chartrand* v. *Archambault*, Torrance, J., 20 novembre 1886.

Prescription—Assessments—City of Montreal—C.C. 2250—Civil Fruits.

Held :—1. That the prescription of three years, under the Act 42-43 Vict. (Q.) ch. 53, s. 10, is not applicable to arrears of assessments exigible before the passing of said Act.

2. Municipal assessments are included under the term "civil fruits," which are prescribed after five years by C.C. 2250.

3. The fact that the name of the person assessed did not appear in the books of the Corporation as owner, does not preclude a demand for assessments as owner, where it appears that he was, in fact, owner.—*City of Montreal* v. *Robertson*, Torrance, J., November 10, 1886.

Prescription—Assessments, City of Montreal—C. C. 2250—Civil Fruits—Collection under warrant—C. C. P. 15.

Held :—1, 2 and 3, as in *City of Montreal* v. *Robertson, supra.*

4. The collection of the assessment for one year by a bailiff under a warrant is not a bar to an action for the assessment due for an anterior year.—*City of Montreal* v. *Fleming*, Nov. 10, 1886.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Feb. 19.

Judicial Abandonments.

Milton Pennington, Montreal, Feb. 11.
Germain E. Robitaille, Sherbrooke, Feb. 3.
Spenard & Bedard, Montreal, Feb. 11.

Curators appointed.

Re John O'Neill.—A. W. Stevenson, Montreal, curator, Feb. 9.

Re Narcisse Pilotte, Wotton.—Kent & Turcotte, Montreal, curator, Feb. 10.

Dividend.

Re Mulholland & Baker, Montreal.—Final dividend, payable March 9. Arch. Campbell, Montreal, assignee (under Ins. Act of 1875).

Separation as to Property.

Dame Elizabeth Paulet vs. Louis Beland, trader, Sorel, Feb. 1.

Dame Mary Elizabeth Reuter vs. Job Wallace Taylor, trader, Cowansville, Feb. 16.

GENERAL NOTES.

In *Morse* v. *Mayo* (Boston) the plaintiff recovered $150 damages against a dentist who extracted a sound tooth and left the decayed tooth in.

The shrewdness, humor and decisiveness of Vice-Chancellor Bacon were the characteristics which made his popularity with the profession. His humor was not only in his tongue and in his manner, but extended to his pen, which sometimes was unable to refrain from reproducing on the margin of an affidavit or elsewhere the features of a witness which offered provocation. If this talent had been less under control, he might have relieved the Court of Appeal of the difficulty under which they labor in deciding questions of fact upon appeal, namely, that they have not the advantage of seeing "the demeanor of the witnesses." It was supposed that a long-winded counsel would sometimes hardly escape being placed open-mouthed in the pictorial pillory of the judge's note-book, if so much may be revealed of the contents of a volume of high privilege and even of sanctity. The vice-chancellor's pen was less likely to spare the advocate if under his wig he wore a beard, which the vice-chancellor thought obstructed the voice. In any case, Vice-Chancellor Bacon did not like long speeches at the bar, and did not indulge in long judgments, although perhaps he had the fault of over-taciturn judges, that his silence sometimes induced his deciding on a ground which would have been shown to be erroneous if known to have been in his mind.—*Law Journal* (London).

Great lawyers are seldom good witnesses. When Lord Selborne stepped into the witness-box, in *Adams* v. *Coleridge*, he was asked, "Did you know that your solicitor was acting for Miss Coleridge?" And he answered, "I should prefer to state what passed." The statement was so little what the plaintiff wanted to know, that at last Lord Selborne confessed, "Perhaps I had better answer the question put to me," which a good witness would have done at first. Sir Charles Russell's lapse of memory in regard to John Baptist's Day was perhaps precipitated by the discomfort of having so accomplished a man and subtle an advocate by his side as a client. If so, the disturbing influence was its own remedy, as, no doubt, it was the distinguished defendant himself who brought back the Court to the consciousness that the day was identical with a familiar quarter-day.

The Legal News.

VOL. X. MARCH 12, 1887. No. 11.

From the observations of "Nemesis," in a recent issue, it might be inferred that responsibility for the delay in getting cases on to trial rests upon the judges. The truth is that the judges have less to do with the matter than the bar,—if we take into account the largeness of the representation of the bar in the provincial legislature. The difficulty proceeds, not from indifference or lack of zeal on the part of the bench, but from the deficiency of court rooms, which hampers the judges in the performance of their duties. There are usually eight judges available for the work of the Superior Court in this city, and that force would probably be found ample, if there were rooms enough to permit several divisions to proceed simultaneously. The evil is of long standing, and it is to be hoped that the recent acquisition by the government of the St. Gabriel Church property, as an adjunct to the Court House, will diminish it, at least, to some extent. The members of the bar in the Quebec legislature might, it seems to us, by vigorous combination, have procured some relief long ago. As it is, unfortunate suitors are heavily taxed, the surplus of fees going into the general revenue, and they have not even the satisfaction of being promptly heard.

What are "necessaries" is a question that affords lawyers in England some amusement. On p. 69 we published a note of a case in which a bill of $175 was claimed from a husband by a professional shampooer, for shampooing the defendant's wife. In another case, a sum of about $500 was claimed from a parent for coats and trousers supplied by a tailor to a youth at a public school, who had, moreover, a liberal allowance for his personal expenses. In a later case of *Jones* v. *Barron*, tried before Mr. Justice Stephen, a tailor contended that a dressing gown was a necessary for a minor. The learned judge did not appear to concur in this view. He said "he found it quite enough bother to dress himself once every morning, without first dressing in one suit to wear while he dressed in another."

The same judge had an interesting question before him in *Reg.* v. *Ensor*, in which the indictment was against a solicitor, charging him with having maliciously published a certain libel intending to injure the character of one John Batchelor, deceased. Mr. Justice Stephen directed an acquittal on the ground that to libel the dead is not an offence known to the law. We shall give the reasons of the learned judge in another issue. The ruling has not escaped criticism. The *Law Journal* says: "Every respect will be paid to this decision of a judge who has made the criminal law a special study and whose judgment shows every sign of care and research. At the same time, there are indications that some of his colleagues on the bench do not take the same view, or did not previously to Mr. Justice Stephen's judgment. The judgment of a judge at Nisi Prius must rely for its authority mainly on its reasoning, and the doubt which arises from Mr. Justice Stephen's argument is whether his view of the criminal law of libel, to which he appears to give much the same limits as the civil law of libel, is not too narrow. The general principle upon which the law treats a libel as a criminal offence appears to be because of its tendency to lead to a breach of the peace. Mr. Justice Stephen's argument seems to assume that this necessarily means a breach of the peace at the hands of the person libelled; but in a criminal prosecution the person libelled is not necessarily the prosecutor, and the Crown takes the matter up, not in the interests of the prosecutor, but of all the Queen's subjects. Suppose, for example, a big bully libels a lady. The lady is not likely to resort to a thick stick, but her brother or some other male champion may well be expected to do so. Similarly, the dead cannot break the peace, but their surviving friends are all the more likely to do so, because the libel is of the dead. A criminal libel is thus less like a civil libel than it is like a seditious libel, which actively incites to crime, while a defamatory libel passively gives occasion for it."

COUR SUPÉRIEURE.

MALBAIE, 5 février, 1887.

Coram CIMON, J.

TREMBLAY v. LES CURÉ ET MARGUILLERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE ST. IRÉNÉE ET AL.

Concession des bancs dans les églises Catholiques —Droit de retrait—Règlement du roi du 9 juin 1723 au sujet de la concession des bancs dans les églises du Canada.

JUGÉ:—1. *Que s'il est dans l'habitude de la fabrique et des paroissiens de ne passer aucun titre écrit de la concession des bancs, alors il suffira à l'enfant, qui veut retraire le banc dont son père jouissait à son décès et qu'il possédait depuis grand nombre d'années, de produire le registre des bancs tenus par la fabrique constatant que, de fait, le banc a été concédé à son père, qui a, tous les ans, payé la rente, prix de la concession;*

2. *Que la fabrique peut concéder deux bancs à un même paroissien;*

3. *Que les enfants ont droit de retraire les bancs de leur père; et, au cas où le père avait deux bancs, le fils ainé pourra retraire l'un des deux, et le second fils pourra retraire l'autre.*

CIMON, J., prononce le jugement comme suit:—

A sa mort, arrivée le 30 juin 1885, François Tremblay, paroissien de St. Irénée, occupait, à titre de concessionnaire, dans l'église paroissiale, le banc n° 1 dans le jubé, 3ème rangée, coté de l'évangile, et le banc n° 9, dans la nef, 3ème rangée, coté de l'évangile. Le premier lui avait été concédé il y a une vingtaine d'années, et l'autre, il y a une trentaine d'années, et il les avait toujours occupés depuis. Ces concessions étaient à vie. François Tremblay avait régulièrement payé la rente annuelle. Suivant un règlement de la fabrique fait en 1866, et vu le décès de leur titulaire, la fabrique, le 27 décembre 1885, qui était le dernier dimanche de l'année, mit les deux bancs à la criée et adjudication. Le banc no 9 fut crié le premier et adjugé à Paschal Gauthier, qui en était le plus haut enchérisseur; mais Léandre Tremblay, fils ainé de François Tremblay, demanda à le retraire, et le retrait lui fut accordé. Puis vint la criée de l'autre banc, savoir, du n° 1 dans le jubé. Le défendeur Alexis Girard en fut le plus haut enchérisseur pour une rente annuelle de $5. Le demandeur David Tremblay—l'autre fils de François Tremblay—demanda immédiatement, en présence d'Alexis Girard, du curé et du marguiller en charge, à retraire le banc, et il a offert les $5, que la fabrique a refusé. Vu que la question était embarrassante, la fabrique a aussi refusé l'argent de Girard. La fabrique était bien prête à laisser faire le retrait, mais Girard s'y opposa et prit possession du banc, et refusa de le remettre au demandeur. De là, la présente action. Le demandeur a, avec son action, déposé $5, le montant de la rente de l'année 1886, l'action étant prise en janvier 1886; et il poursuit la fabrique et Alexis Girard, et demande que la Cour enjoigne à la fabrique de lui donner, en la forme ordinaire, un titre de concession du banc n° 1, et, à défaut par elle de le faire, que le jugement serve de tel titre, et qu'il soit enjoint aux défendeurs de le mettre en possession du dit banc, qu'il leur soit fait défense de le troubler dans cette possession, et il réclame $250 de dommages.

La fabrique et Girard ont plaidé conjointement une défense au fond en fait et une exception. Ils prétendent:

1. Que feu François Tremblay n'avait pas de titre au banc n° 1 du jubé;

2. Que, par la loi, nul paroissien ne peut avoir plus d'un banc, et, en conséquence, que feu François Tremblay n'avait droit qu'à un seul banc; et, s'il a eu l'autre, ça n'a été que par tolérance, la fabrique n'ayant pu le lui concéder;

3. Que les enfants de François Tremblay, dans tous les cas, ne pouvaient retraire qu'un seul des deux bancs, et que Léandre Tremblay, le fils ainé, ayant déjà retrait le n° 9, l'autre fils ne pouvait ensuite retraire le n° 1.

1. *François Tremblay avait-il un titre au banc n° 1 dans le jubé?*

Se fondant sur l'autorité de *Jousse*, les défendeurs disent que ce titre doit être par écrit. Or le curé de la paroisse dit que la fabrique—comme d'ailleurs c'est dans un

grand nombre de paroisses—n'a pas coutume de consentir par écrit des titres de concession des bancs. Mais il est prouvé que depuis à peu près vingt ans, François Tremblay occupait ce banc. De plus, les fabriques sont obligées de tenir un registre particulier de toutes les concessions de bancs. Or la fabrique défenderesse tenait tel registre. M. le curé l'a produit lors de sa déposition, et, dans ce registre,—qui est un écrit en la possession même de la fabrique qui fait foi contre elle—François Tremblay y est entré comme le concessionnaire de ce banc pour £0.9.5 de rente annuelle. M. le curé dit que François Tremblay, ayant toujours fidèlement payé la rente annuelle, se trouvait à sa mort le titulaire de ce banc n° 1, comme de celui n° 9. De plus ce banc a été crié comme ayant appartenu à feu François Tremblay. Le fait de la concession est évident. Il semble à la Cour que ça serait souverainement injuste—un déni de justice—si elle refusait d'admettre que le titre de François Tremblay au banc n° 1 est prouvé. On lit au *Code des Curés* du juge Beaudry, p. 243: "*Autant que possible*, cette concession doit "être constatée par un écrit fait devant "notaire, *ou en présence de témoins.*" L'écrit se trouve ici de la main même de la fabrique, dans ses propres archives.

2. *François Tremblay pouvait-il être légalement concessionnaire de deux bancs?*

Quand il a eu la concession du banc n° 1 dans le jubé, il y avait déjà plusieurs années que François Tremblay était le concessionnaire du n° 9. Il s'est donc trouvé concessionnaire de deux bancs. C'était l'usage, dans ce temps là, pour les paroissiens de St. Irénée, de pouvoir obtenir plus d'un banc. Il y a une quinzaine de paroissiens à qui la fabrique avait concédé, à chacun, deux bancs. Personne n'a alors protesté, ni contre la concession du banc n° 1 faite à François Tremblay quand il en avait déjà un autre, ni contre la concession de deux bancs aux autres. Il est vrai qu'alors les paroissiens n'étaient pas aussi nombreux qu'aujourd'hui. Il est aussi vrai que d'anciens arrêts de règlement faits *spécialement* pour *certaines* paroisses de France statuaient qu'il ne pourrait être concédé qu'un seul banc à la même personne et au même chef de famille; mais ces arrets de règlements n'avaient en vue que les exigences de ces paroisses. Ils n'ont pas grande valeur légale sous les circonstances particulières de ce pays; et, ici, c'est à la fabrique de réglementer, de temps en temps, suivant les exigences de sa paroisse, ce droit d'un paroissien de pouvoir obtenir la concession de plus d'un banc. Dans les commencements des nouvelles paroisses—et, dans ce pays, des nouvelles paroisses surgissent fréquemment—toutes susceptibles de prendre par la suite une population plus considérable, et où, en vue de cette augmentation, on construit les églises plus grandes, il est avantageux, pour les revenus de la fabrique et pour la paroisse, que la fabrique puisse concéder plus d'un banc à une même personne. C'est ce qui a eu lieu à St. Irénée, comme dans un grand nombre d'autres paroisses. Sans doute, lorsque la population est devenue plus grande, la fabrique pouvait refuser de vendre plus d'un banc à une même personne, ou d'en vendre un second à un paroissien qui en avait déjà un. Mais les concessions qu'elle avait déjà faites, sans protestation de personne, étaient légales et elles étaient à vie. Le règlement de la fabrique de 1866, produit par les défendeurs, dit que la concession des bancs est à vie. De quel droit, la fabrique aurait-elle pu, du vivant de François Tremblay, lui enlever l'un, ou l'autre, des bancs n° 1 et n° 9, qu'elle lui avait concédé ainsi à vie? Est-ce que le contrat pouvait ainsi être brisé du consentement d'une seule des parties? Où est la loi qui rendait ce contrat nul quant au banc n° 1? Il n'est pas contre l'ordre public; au contraire, il était alors dans l'intérêt public. Et si la fabrique ne pouvait revenir contre ce contrat, de quel droit un paroissien pourrait-il maintenant venir s'en plaindre, surtout après vingt années de silence? Le juge Beaudry, à la p. 245 de son *Code des Curés*, reproduit cette disposition des anciens arrêts de règlements dans les termes suivants: "Nul paroissien ne peut avoir plus d'un banc *au détriment des autres paroissiens*," et il ajoute: "Cette disposition est nécessaire "pour conserver l'égalité entre tous les "paroissiens; ce qui ne peut cependant em- "pêcher de concéder un second banc à une "personne, *lorsqu'aucune autre personne ne le*

"*réclame.* C'est un juste tempérament." La cour est donc d'avis que les deux concessions faites par la fabrique à François Tremblay étaient légales et qu'elles étaient à vie, et que tous les privilèges attachés à la concession d'un banc existaient également et au même degré pour François Tremblay et sa famille sur chacun des deux bancs n° 1 et n° 9,—ce qui nous amène à considérer la troisième question.

3. *Le fils ainé, Léandre Tremblay, ayant retrait le n° 9, l'autre fils David (le demandeur) pouvait-il retraire le n° 1?*

Les défendeurs prétendent que non, et disent qu'autrement, si Léandre Tremblay eût été le seul fils, il aurait pu retraire les deux bancs, et forcer la fabrique ainsi à concéder deux bancs à la même personne. Cela n'est pas logique. Admettons que les circonstances de la paroisse sont changées, et qu'il y a maintenant inconvénient à accorder deux bancs à la même personne, alors, si Léandre Tremblay ne peut avoir qu'un seul banc, il pouvait en retraire un, car le retrait n'est rien autre chose qu'un achat: c'est prendre l'enchère d'un autre. Léandre Tremblay est un paroissien ayant droit à un banc; David Tremblay (le demandeur) est aussi un paroissien ayant droit à un banc. Leur père avait deux bancs. La loi veut que les enfants puissent retraire les bancs de leur père. La loi ne dit pas que le fils ainé seul aura droit de retraire: ce droit appartient *aux enfants.* Or le fils ainé retrait le n° 9, et il se trouve à n'avoir qu'un seul banc. Et s'il a droit de retraire un banc, il aurait pu retraire l'un, ou l'autre. Il choisit le n° 9. L'autre banc reste là. Or le second fils le retrait; et il n'a qu'un seul banc.

Mais où est la loi concernant ce droit de retrait? Voici ce que Jousse dit, p. 59: "Dans le cas de mort ou translation de "domicile des pères et mères, *les enfants* de- "meurant sur la paroisse sont préférés aux "autres paroissiens dans la jouissance *du* "*banc* qu'occupaient leurs père et mère, *en* "*continuant la même rente et redevance,* et *en* "*recompensant,* d'ailleurs, la fabrique par "quelques deniers, du tiers au moins de ce "qui aura été donné par les père et mère, ou "telle somme qui sera arbitrée par le "bureau, si le banc avait été adjugé sans "deniers et pour une rente seulement...... "Il y a même des endroits où *les enfants* sont "préférés à l'adjudicataire du banc de leur "père et mère, en payant une redevance "égale à celle de la nouvelle adjudication." Tel était ce qui avait lieu dans l'ancien droit en France.

Le cas s'est présenté dans la nouvelle France. Le Conseil Supérieur de Québec, par un arrêt du 2 mai 1718, avait annulé le bail que la fabrique de N. D. de Québec avait accordé au nommé *Greysac* du banc de feu *André Jorian,* et ordonné "que le banc en "question sera crié et adjugé au plus offrant "et dernier enchérisseur *en donnant la pré-* "*férence* AUX héritiers du dit *Jorian.*" Or, le procureur général du roi fut scandalisé de cet arrêt, et, en conséquence, dans un réquisitoire adressé au Conseil Supérieur, où il disait "que son ministère l'obligeant d'être "toujours attentif à ce qui concerne le bien "public, il ne peut se dispenser de faire ses "remontrances sur le préjudice que causerait "au public l'exécution de l'arrêt rendu en ce "conseil le 2 mai 1718, au sujet des bancs "dans les églises," il fit remarquer que "les veuves, les enfants et les héritiers, qui "doivent être préférés, n'auraient plus de "préférence si, au lieu d'une reconnaissance "modique qu'ils doivent seulement donner, "ils étaient contraints de suivre le caprice "d'un ambitieux qui, pour avoir un banc "dans l'église, le pousserait à une somme "exorbitante; que, suivant la coutume de "Paris et tous les usages qui s'y observent, "on y conserve aux veuves les bancs de "leurs maris, et aux enfants et héritiers "ceux de leurs père et mère ou parents, en "*donnant une légère reconnaissance,* parcequ'il "serait injuste de faire passer à des étran- "gers des bancs sous lesquels souvent les "maris, père et mère ou parents sont en- "terrés." Et le 7 juillet 1721, le conseil "supérieur "ayant égard au dit réquisitoire "et sans avoir égard à son arrêt du 2 mai "1718, a ordonné et ordonne qu'à l'avenir les "concessions de banc passeront aux veuves "des concessionnaires tandis qu'elles de- "meureront en viduité; que les concessions "seront renouvelées en faveur des enfants "des concessionnaires et sur leur réquisition, "en donnant à la fabrique une réquisition

"modique," qui fut fixée à dix livres pour Québec, Montréal et Trois-Rivières, et à trois livres pour les paroisses des côtés. Mais le Roi de France est intervenu et il donna, le 9 juin 1723, un règlement "au "sujet de la concession des bancs dans les "églises du Canada," qui est encore notre loi. Ce règlement ordonnait qu'à l'avenir "les veuves qui resteront en viduité jouiront "*des bancs* concédés à leurs maris, en payant "la rente portée par la concession qui leur "en aura été faite; qu'à l'égard *des enfants* "dont les pères et mères seront décédés, *les* "*bancs* concédés à leurs dits pères et mères "seront criés en la manière ordinaire et "adjugés au plus offrant et dernier enché-"risseur, *sur lequel ils auront cependant la* "*préférence*, en payant les sommes portées "par la dernière enchère."

Ainsi, comme on le voit, ce règlement ne fait pas de distinction entre le cas où le défunt n'avait qu'un banc, et le cas où il en avait plusieurs. Il ne fait pas non plus de distinction entre les enfants. Comme la raison de cette préférence est fondée sur les souvenirs de famille attachés au banc, elle doit avoir également lieu pour deux bancs, lorsque le père en avait deux et qu'il y a plusieurs fils, chacun d'eux n'exerçant le retrait que pour un seul banc.

La cour est d'avis que le demandeur a établi son action. L'inconvénient invoqué contre la concession de deux bancs à un même paroissien n'existe pas, puisque Léandre Tremblay et le demandeur se trouvent à n'avoir, chacun, qu'un seul banc.

Comme c'est une question de droit que les défendeurs pouvaient avoir intérêt à faire décider par les tribunaux, et qu'il n'y a pas eu de malice, la Cour n'accordera que $10 de dommages, mais tous les frais. Les défendeurs ayant plaidé conjointement, ils sont condamnés comme tels. La Cour déclare que son jugement équivaudra en faveur du demandeur à un titre au banc n° 1 dans le jubé; ordre est donné aux défendeurs d'en livrer la possession au demandeur, et défense leur est faite de le troubler ensuite.

J. S. Perrault, avocat du demandeur.

Chs. Angers, avocat des défendeurs.

SUPERIOR COURT.

AYLMER (district of Ottawa), March 3, 1887.

Before WÜRTELE, J.

BANQUE NATIONALE v. CHARETTE.

Evidence—Promissory note signed with cross.

HELD:—*That a promissory note signed with a cross is not a private writing which makes proof between the parties, without evidence of its execution.*

PER CURIAM:—This action is founded on a promissory note signed with a cross in the presence of a witness, and the plaintiff has inscribed the cause for judgment. He invokes 1223 of the C. C. and 145 of the C. C. P., and asks for judgment, without proving the signature, or rather the making of the note. The articles referred to provide that promissory notes and other private writings are held to be proved when the party against whom they are set up does not deny his writing or signature, or when the heirs or legal representatives of the party who wrote or signed such a document do not declare that they do not know his writing or signature. In this case, the note is not in the writing of the defendant and does not bear his signature, as the defendant's mark or cross does not constitute a signature which can be recognized or identified. For a private writing to fall under the purview of the articles above cited, it must bear the signature of the party against whom it is set up I find a passage in point in 4 Massé, Droit Commercial, No. 2394: "Mais on ne pourrait "pas suppléer à la signature de l'une des "parties qui ne saurait écrire, par un signe, "tel, par exemple, qu'une croix. Toutefois, "dans cet état, l'acte pourrait, du moins en "matière commerciale, faire un commence-"ment de preuve qui devrait être completé "soit par des présomptions, soit par des "témoignages verbaux."

It is urged that for years it has been the settled jurisprudence to give effect to promissory notes signed with a cross. It is true that jurisprudence has acknowledged the validity of such a promissory note; but it must not be forgotten that this jurisprudence arose when it was necessary to prove the

signature of the maker, and that the change in the law contained in the articles referred to, only relates to the proof of promissory notes and other private writings which bear the manual signature of the party against whom they are set up. The rules respecting the effect of a promissory note remain the same, whether it bear the signature of the maker or is signed with a cross; but a change in the rule of evidence has been made in the first case and not in the second. As heretofore, therefore, the signature with a cross must be proved.

I therefore discharge the inscription for judgment, in order to allow the plaintiff to proceed to proof.

Inscription discharged.

Rochon & Champagne, for plaintiff.

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*SUPERIOR COURT—MONTREAL.**

Procedure—Judgment by default—Opposition—Proof—Action by transferee—Signification.

HELD:—1. A deposition filed in a case in order to obtain judgment by default, will not avail to prove the plaintiff's case on his contestation of the opposition to judgment made by defendant.

2. In an action instituted by the transferee of a debt without signification of the transfer, the service of the action is not equivalent to signification of the transfer where such transfer is not alleged in the declaration. *McLachlan* v. *Baxter*, Papineau, J., Dec. 20, 1886.

Contrainte—Service of rule upon person in custody.

HELD:—That the service of a rule for *contrainte* upon a person while he is in custody and restrained of his liberty under a previous order of the court in the same cause, and not made by personal service between the wickets, as required by C. C. P. 70, is null and of no effect. *Lamoureux* v. *Gilmour*, in Review, Torrance, Taschereau, Gill, JJ., Nov. 30, 1886.

Montreal, City of—Statute Labor Tax—Water rate.

HELD:—That a person who pays water rate in the city of Montreal, thereby contributes to the municipal revenue, and is exempt from the payment of statute labor tax. *Dechene* v. *Fairbairn et al.*, Caron, J., Feb. 18, 1886.

Mandamus—Board of Revisors—Failure to perform duty within statutable time—Powers of the Court.

HELD:—That the Court has power to compel the performance of a public duty by public officers, though the statutable time for performing the duty has passed; consequently the board of revisors was ordered to place names on the list of municipal electors, after the statutable time for performing the duty was passed. *Dechene* v. *Fairbairn et al.*, In Review, Johnson, Papineau, Loranger, JJ., May 31, 1886.

Montreal, City of—Board of Revisors—Statute Labor Tax—Water Rate.

HELD:—That the discretion of the Board of Revisors extends merely to matters of fact, such as the verification of names and residences of voters, and not to matters of law, and if they decide a question of law, the Court by mandamus may interfere to prevent such illegal exercise of discretion.

2. The water rate imposed in the City of Montreal is in the nature of a tax, and not the price of a commodity sold, and those who pay such water rate are exempt from the payment of the Statute labor tax, which is due only by those who do not otherwise contribute to the municipal revenue. *Glalon et al.* v. *Fairbairn et al.*, In Review, Taschereau, Gill, Loranger, JJ., Nov. 9, 1886.

Pledge—Illegal sale—C. C. 1487—Lien de droit—C. C. 1975—Action of pledgor against transferee of pledge.

An obligation having been transferred merely by way of collateral security for a debt, the pledgee sold the obligation so transferred, to the defendant, who, with knowledge of all the facts, collected the full amount thereof from the debtor.

HELD:—That the sale by the pledgee was a nullity under C. C. 1487, and that the pledgor might maintain an action against the defendant to recover the amount received by

* To appear in Montreal Law Reports, 2 S. C.

him in excess of the debt secured by the pledge.

2. Under the circumstances of the case it was not essential to allege that the pledgee had been paid the debt secured by the pledge. *Leduc* v. *Girouard*, In Review, Johnson, Papineau, Loranger, JJ., May 31, 1886.

C. C. 1053—Wrongful appropriation of property of another—Lien de droit.

Action by plaintiff, alleging that defendants had unlawfully sold and converted to their own use certain effects which the plaintiff had caused to be seized in another case under a *saisie-gagerie*, and which the guardian had placed temporarily in the charge of the present defendants; and praying that they be condemned to pay the value of such effects to the extent of the balance due to plaintiff on the judgment maintaining the *saisie-gagerie*.

HELD, not demurrable. *Morris* v. *Miller et al.*, In Review, Johnson, Papineau, Jetté, JJ., November 30, 1886.

Slander—Criticism of conduct of member of Parliament—Imputation of dishonest motives.

HELD:—That while the conduct of a member of Parliament in his public capacity is subject to criticism, and an action is not maintainable for an imputation which arises fairly and legitimately out of his conduct, yet an imputation, unsupported by evidence, of dishonest motives in voting upon a question and of selling his influence, is unjustifiable, and an action based upon such accusation will be maintained. *Champagne* v. *Beauchamp*, In Review, Johnson, Jetté, Loranger, JJ., November 30, 1886.

Insaisissabilité—Damages for permanent bodily injury—Chose jugée—Interlocutory judgment.

HELD:—1. That an interlocutory judgment declaring a *saisie-arrêt tenante* until final judgment, has not the force of *chose jugée* between the parties as to the validity of the *saisie-arrêt*.

2. That a sum of money awarded by the Court as indemnity for personal injuries of a permanent nature, partakes of the nature of an alimentary provision and is *insaisissable*. *Beauvais et al.* v. *Leroux & La Cie. des Moulins à Coton, T. S.*, Papineau, J., May 31, 1881.

Frais d'une action antérieure déboutée avec dépens—Suspension de l'action subséquente—Exception dilatoire.

JUGÉ:—1. Que les articles 450 et 453 du C. P. C., qui déclarent que toute partie peut se désister de sa demande à la condition de payer les frais, et qu'elle ne peut recommencer avant d'avoir préalablement payé les frais encourus par la partie adverse sur la demande abandonné, s'appliquent également et même avec plus de raison à une action déboutée qu'à une action discontinuée.

2. Que dans ce cas le défendeur a une exception dilatoire pour faire suspendre les procédés sur la deuxième action jusqu'à ce que les frais de la première soient payés. *Sauriol* v. *Lupien*, Rainville, J., 31 janvier 1880.

RIGHTS OF PEWHOLDERS.

The case of Misses Alice Lamoureux and Mary Foley, against the beadle of the church of N. D. de Bonsecours, for assault, was tried in the Police Court, Montreal, March 7, before Mr. Dugas. It appeared that the complainants entered the church to attend the afternoon service, and occupied the pew of Mr. Berthiaume, which was then empty. After the service commenced, the lessee came up and ordered them out. They refused to go, when Mr. Berthiaume, and the beadle, Mr. Pelletier, put them out into the vestibule of the church by force. They remained there quiet for some little time, when the beadle returned, and seizing Miss Lamoureux by the collar, ran her half way across the street, and tried to put her by force into a sleigh, when he was compelled to desist by some friends of the young lady. Rev. H. R. Lenoir, the *curé* of the church, testified that he had publicly, from the pulpit, on a former occasion, invited the faithful to occupy seats whenever they were not occupied by their owners. A large number of witnesses were examined on both sides, and after addresses by the respective counsel, the magistrate delivered judgment. His Honor held that the pews were free to strangers, but while services were being held they belonged to the proprietors. In this case, the proprietor came into the church after the service had commenced, and had a right to occupy his own

pew. When the complainants refused to leave, he had a right to call the beadle to have them ejected, and the beadle, who was a sworn special constable, was acting within his duties in so doing. But the evidence showed that the beadle had left the ladies in the vestibule, and once they were free from his hands he had no right to touch one of them again, so long as there was no further offence. The beadle's action in dragging Miss Lamoureux by the collar into the centre of the street was most unjustifiable, and for this offence he would be condemned to pay $2 fine and $8.50 costs. The other case was dismissed with $4.10 costs against Miss Foley.

INSOLVENT NOTICES, ETC.

(*Quebec Official Gazette, Feb. 26.*)

Judicial abandonments.

Connell Levin, Richmond, Feb. 17.

Leopold Provencher, district of Three Rivers, Feb. 19.

R. Gould Sweet, trader, Montreal, Feb. 8.

Curators appointed.

Re Antoine Martin.—G. Sylvain, Rimouski, curator, Feb. 16.

Re Jane Mayrand (Mrs. Billy).—Kent & Turcotte, Montreal, curator, Feb. 19.

Re Milton Pennington.— A. W. Stevenson, Montreal, curator, Feb. 22.

Re Sanders & Pelletier.—Kent & Turcotte, Montreal, curator, Feb. 22.

Re Spenard & Bedard.—C. Desmarteau, Montreal, curator, Feb. 19.

Re Arthur Toupin. — C. Desmarteau, Montreal, curator, Feb. 22.

Dividends.

Re W. W. Morrow & Co., Robinson.—First and final dividend, payable March 16. A. W. Stevenson, Montreal, curator.

Re Charles Nelson, hardware merchant.—Dividend, at office of Seath & Daveluy, Montreal, curator.

Separation as to property.

Miriam F. Pincus vs. Marks Kutner, trader, Montreal, Feb. 14.

Commissioner.

H. P. Brocklesby, solicitor, London, E.C. to be commissioner for affidavits, under C. C. P. 30.

(*Quebec Official Gazette, March 5.*)

Judicial abandonments.

Louis Cousineau, Montreal, Feb. 28.

James B. McKinnon, Montreal, Feb. 19.

Curator appointed.

Re Thomas Lee, Beauharnois.—A. McKay, Montreal, curator, Feb. 24.

Dividends.

Re Damien Chaput, St. Hyacinthe.—Dividend, payable March 26. Kent & Turcotte, Montreal, curator.

Re A. T. Constantin & Co.—First dividend, payable March 18. H. A. Bedard, Quebec, curator.

Re Fortin & Frère, Three Rivers.—Dividend payable March 26. Kent & Turcotte, Montreal, curator.

Re Auguste Grundler.—First and final dividend, payable March 26. Kent & Turcotte, Montreal, curator.

Re M. Kutner.—Dividend, payable March 26. Kent & Turcotte, Montreal, curator.

Re F. N. Marchand.—Dividend, payable March 26. Kent & Turcotte, Montreal, curator.

Re Cyrille Mongeon, Sorel.—First dividend, payable March 26. Kent & Turcotte, Montreal, curator.

Re P. Neveu, St Augustin.—First dividend, payable March 26. Kent & Turcotte, Montreal, curator.

Separation as to property,

Rosetta Harris vs. Barnett Laurance, trader, Montreal, Feb. 28.

Marguerite Laurin vs. Elie Gauthier, contractor, Montreal, Oct. 29, 1886.

Canada Gazette, March 5.

The Hon. Sir Alex. Campbell, K. C. M. G., to be Lieutenant-Governor of the Province of Ontario.

Parliament summoned for April 13.

GENERAL NOTES.

The Hon. Justice Baby, judge of the Court of Queen's Bench, ex-M.P. and ex-Federal minister, has received the diploma as Knight first class, *Haut Protecteur* of the National Order of the "*Société Humanitaire des Chevaliers-Sauveteurs des Alpes Maritimes,*" of Nice, at the instance of Commandant Major Huguet-Latour, general delegate of the order in Canada. The objects of the society are to give help in all cases of public calamity, epidemics, railway accidents, etc.; to exercise benevolence; to encourage men to do good actions by the publicity given to such; to distribute gold medals, etc., etc., to persons who by acts of courage or devotion, or by their publications, have rendered services to humanity. Amongst the knights, *Hauts-Protecteurs*, we see the names of the Emperor of Brazil, Marshal MacMahon, Duchess of Magenta, King and Queen of Spain, Queen of Portugal, Prince of Wales, Duke and Duchess of Connaught, Queen Isabel of Bourbon, Bey of Tunis, Princess of Monaco, Duchess of Urach-Wortemberg, Prince of Monaco, Duke of Aosti, Duke of Oporto, King of Siam, Prince and Princess of Lusignan, King and Queen of Sandwich Islands, King of Cambodia, Khedive of Egypt, Prince Sourindro Mohum Tagore, Ferdinand de Lesseps, Summed the Grand Francais, Commander John Meyer (surnamed the Petit Manteau Bleu d'Italie), Imperial Prince Zil and Sultan Massoud Minza, Duchess of Bragance, etc.—*Gazette.*

At the opening of the Criminal assizes at Toronto, Mr. Justice Rose, in his address to the grand jury, said a matter which he thought the jurors should consider was the employment of persons who resort to the jails to pass the winter. He thought the objection to employment of prisoners made by the laboring classes was most absurd—one that too much attention was given to by politicians, owing to the importance of their votes. The grand jury of Wentworth had recommended that prisoners be kept hard at work, and that, he believed, was quite right, as it would make their sojourn in jail less pleasant.

The Legal News.

VOL. X. MARCH 19, 1887. No. 12.

Mr. Justice Baby, in addressing the Grand Jury, at the opening of the March Term, made the following reference to the removal of an honoured colleague. His Honour said: "Before going any further, it is my painful duty to inform you of the melancholy death of the eminent judge who, during the last term, presided over this court and addressed you from this very place in that clear, practical and fearless manner which always characterized his sayings and carried such weight with you. In the prime of life and full possession of his intellectual faculties, which were of a very high order, he might have still rendered great service to the country in general, and his colleagues in particular, but Divine Providence, in the wisdom of His decree, has ordained it otherwise, and we have now only to submit, and deplore a death so unexpected. After having gone through a brilliant career at the Bar, Judge Ramsay was an ornament to the Bench for nearly fifteen years, and his virtues, as well as his legal lore, were admitted by all. But it was in this court principally that came out more forcibly his firmness of character, his moral rectitude and his profound knowledge of the law, the whole tempered, however, with that clemency and that commiseration which distinguish the superior mind. Society has lost one of its most useful and devoted members; and, while we all regret him, his memory will live long among us, no doubt, as that of having been an enlightened, industrious and conscientious magistrate."

The case of *King* v. *Henkie*, decided recently by the Supreme Court of Alabama, is a case of novelty and interest. The action was by the personal representatives of a deceased person, under an Act similar to Lord Campbell's Act, against a saloon keeper who sold liquor to a man helplessly drunk, who, after swallowing the stuff, expired almost instantaneously. The Supreme Court held that the action could not be maintained, that the drinking of the liquor, which was the act of the deceased, was the proximate cause of his death, and that the act of the defendant, in selling or giving the liquor, was only the *remote* cause, and that fact protected him from liability. The court said:—"The only wrongful act imputed to the defendants was the selling, or giving, as the case may be, of intoxicating liquors to the deceased while he was in a stupidly drunken condition, knowing that he was a man of intemperate habits. It is not shown that the defendants used any duress, deception, or arts of persuasion to induce the drinking of the liquor. The act, however, as we have said, was a statutory misdemeanor. But this was only the remote, not the proximate or intermediate cause of the death of plaintiff's intestate. The rule is fully settled to be that, 'if an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote.' Cooley on Torts, 68-69; 1 Addison on Torts, 12-13; §§ 10-11."

CUSHING'S NOTARIAL FORMS.

Cushing's Notarial Form Book, with a Treatise or Historical Outline of the Notarial Profession. Montreal, A. Periard, publisher.

This is a work of considerable importance, prepared by an experienced member of the notarial profession, Mr. Charles Cushing, B.C.L. The author states that one of the reasons which led him to compile this book is that no work on the notarial profession has been written in English. The Forms are given in alphabetical order, and extend over 260 quarto pages. The usefulness of such a work needs no comment, and we presume that at least all notaries who have occasion to pass deeds in the English language will find it indispensable. It is also of interest to the members of the legal profession. The book is well printed on excellent paper, and neatly bound.

COURT OF REVIEW.

QUEBEC, May 31, 1886.

Coram STUART, Ch. J., CASAULT, J., CARON, J.

Costs on congé défaut—Distraction in favor of attorney.

HELD:—(*Confirming the judgment of the Court below,* ANGERS, J., Beauce,) *That costs, on a* congé de défaut, *awarded, by way of distraction to the attorney, are exclusively due and payable to him; and, therefore, that, in another suit brought by the same plaintiff against the same defendant, for an amount including the amount of the first demand, the defendant cannot set up, as a ground of temporary exception, the precedent non-payment of such costs to the defendant.*

The judgment is as follows:—

"Considérant que les frais obtenus sur le congé de défaut d'une action pour la somme de $128.62, qui forme partie de la présente demande, ont été distraits en faveur de Sévère Théberge, écuier, procureur, et n'appartiennent pas au défendeur, qui ne peut les réclamer,—rejette l'exception temporaire du défendeur avec dépens."

Judgment confirmed.

Morrisset & de St. George for the plaintiff.

Sévère Théberge for the defendant.

(J. O'F.)

SUPERIOR COURT.

AYLMER, (district of Ottawa), Feb. 24, 1887.

Before WÜRTELE, J.

DUMAIS, Petitioner, v. FORTIN, Respondent.

Hull, City of—Election of Alderman—Contestation—Security for costs—Bail bond.

HELD:—1. *That the contestation of the election of an alderman of the City of Hull is a matter which depends on and belongs to the Superior Court.*

2. *That the bail-bond for security of the costs of the contestation of an election under the charter of the City of Hull and under the municipal code, need not contain the description of the real estate of the sureties.*

PER CURIAM.—The petitioner contests the election, on the 18th January last, (1887,) of the respondent as an alderman of the City of Hull.

Before presenting his petition, the petitioner gave security for costs before the Prothonotary, as required by the 37th section of the charter; but although the surety justified his sufficiency on oath, the bond does not contain the description of his real estate. The petition is addressed to the Judge of the Superior Court, residing in the District of Ottawa; but the bond specifies that the security given is for the costs which may be awarded by the Superior Court.

On the presentation of the petition, the respondent filed an exception to the form, which he styled "preliminary objections," alleging the irregularity and insufficiency of the security for costs, for the two reasons just mentioned, and the consequent nullity of the proceedings.

Now, as to the first objection.

The charter provides, in section 35, that the contestation of the election of an alderman shall be decided by a judge of the Superior Court, sitting in the District of Ottawa, in term or in vacation, and section 37, in speaking of the procedure, says that a notice stating the day on which the petition will be presented to the *court*, must be served on the respondent eight clear days before it is so presented to the *court*. Whether the judge acts in term or in vacation, he constitutes the Court for the trial of the contestation; and that court is the Superior Court, of which the bond entered into as security for the costs and the other proceedings in the contestation are records. There is therefore no irregularity in the bond, when it states that it is entered into as security for the costs which may be awarded by the Superior Court on the contestation of the election.

Then as to the other objection.

Section 237 of the charter enacts that the municipal code shall apply on all subjects not provided for. The nature of the security to be given for the costs on the contestation of an election is not mentioned in the charter, and therefore the provisions of article 353 of the municipal code apply: "The sureties "must be owners of real estate to the value "of $200, over and above any incumbrances "there may be on such property. One surety "suffices, provided he is an owner of real "estate to the required value." In connec-

tion with this article it was decided by Mr. Justice Mackay and again by Mr. Justice Sicotte, in 1872, that it was not necessary to describe the real estate of the sureties, or even of a single surety, in the bond. (2 Revue Critique, p. 235, and 16 L. C. J. p. 255.)

These precedents are sufficient; and the reasons on which they are founded seem clear. A bail-bond creates an obligation on the part of the sureties towards the respondent, and being judicially entered into, carries hypothec on any real estate belonging to the sureties which may be described in a notice duly registered with or subsequently to the bail-bond. It is therefore only necessary to describe the real estate of the sureties in the bail-bond when the law specifically requires it.—It is not required in the case of the contestation of an election under the municipal code or under the charter of the City of Hull; and the omission of the description of the real estate of the surety in the bail-bond in the present case is therefore not a cause of nullity nor even an irregularity.

When, however, a surety is objected to, he is required to give a description of his real estate, and to establish his title and its hypothecary status and value. If the respondent could not contest the form of the bail-bond because it did not contain such description, he could, on the presentation of the petition, contest the qualification of the surety. As the exception in this case implied an objection to the qualification of the surety, I ordered him to give a description of his real estate and to show his title and its hypothecary status and value; and he has done so to my satisfaction.

I therefore overrule the preliminary objections.

The judgment was recorded as follows :—

"The Court, having heard the parties by their counsel on the preliminary objections raised by the respondent, having taken the declaration of the surety Damien Richer and examined the deeds and certificates produced by him under and in obedience to the interlocutory judgment of the 18th day of February instant, having examined the record and having deliberated;

"Considering that all the proceedings in the contestation of the election of an alderman of the City of Hull, whether had before the judge in vacation or before the judge in term, form part of the records of the Superior Court, and that the contestation of such election is therefore a matter which depends on and belongs to the Superior Court;

"Considering that it is not necessary that the bond entered into for security for costs should contain a description of the real estate on which a single surety justifies his sufficiency, and that the bond, without such description, is obligatory, and carries hypothec on any real estate of the surety which may be described in a notice duly filed and registered, but that the respondent may contest the qualification and the sufficiency of the surety, and that in such case, the surety is required to give in a declaration of his real estate, together with his titles thereto;

"Seeing that the surety in this cause has, in compliance with the interlocutory judgment above mentioned, given a description of his real estate, and has produced his titles thereto, a certificate of its hypothecary status and a certificate showing its value according to the municipal valuation;

"Seeing that the documents so produced have established the qualification and the sufficiency of the surety;

"Doth overrule and dismiss the preliminary objections raised by the respondent, with costs."

Rochon & Champagne, for petitioner.

J. M. McDougall, for respondent.

SUPERIOR COURT.

SHERBROOKE, February 24, 1887.

Coram BROOKS, J.

Ex parte HENDERSON et al., Petitioners for Probate of Will.

Will—Signature of Witnesses.

HELD :—*That when witnesses, called to attest the execution of a will, have not signed the same in the presence of the testatrix, at the time of the alleged execution, probate will be refused.*

PER CURIAM :—The petitioners represent that on the 18th January last, the late Emma Maud Webb (widow of the late William Gordon Mack), who subsequently died on the 4th February, 1887, made and executed

her last will and testament in writing, naming petitioners her executors. The executors produce affidavits of the Rev. H. Roe and A. C. Scarth as to its execution and ask for probate. The Rev. H. Roe testifies that he wrote the paper produced as the last will of Mrs. Mack, at her request, in her presence and at her dictation as had for her last will and testament. That in his presence and that of the Rev. Mr. Scarth, she declared said paper to be her last will and testament, and attempted to sign the same, making her mark the capital "E" at the bottom of the will. That the signatures "Henry Roe" and "A. Campbell Scarth" as attesting witnesses, are, respectively, in their handwriting. That they did not *then* sign the will as attesting witnesses, owing solely to the impression that the failure of Mrs. Mack to write her signature in full rendered it null, and that it was on being informed that this was not necessary that they afterwards signed it. That the cause of her not completing her signature was not any change of intention with regard to the disposition of her property, but from physical weakness.

The sole question that comes up for me to consider, on the present application, is this: Have the requisite formalities been complied with to authorize the granting of probate prayed for in the said petition? It is well that the attention of the public, both lay and clerical, should be called to this point, and it is perhaps more necessary that clergymen should understand the rules of law affecting the making of wills under the English form, as, from their profession, they are often required to attend at the bedside of the dying, and are called upon to assist them in making final disposition of their property, when it is impossible to obtain professional assistance.

Prior to the Civil Code coming into force, 1st August, 1866, with regard to wills made in the English form, the rules applicable in England in 1774 prevailed, which required three witnesses, who, however, need not all have been present or signed at the same time, but must have signed at the request of the testator. They must have been subjects of Her Majesty and competent to give evidence, and there were certain disqualifications from interest, which it is now unnecessary to refer to, but which, as they now exist, are defined in the Civil Code, Art. 853: "In wills in the last mentioned form (see the English form), legacies made to any of the witnesses, or to the husband of any such witness (in the first degree) are void, but do not annul the other provisions of the will." The Codifiers reported desirable changes in the law (which were adopted), in order to make our law conform to the then recent legislation in England. This was done and we have our Code Article 851, which enacts that wills made in the form derived from the laws of England (whether they affect moveable or immoveable property), must be in writing and signed at the end with the signature or mark of the testator, made by himself or another person for him, in his presence and under his express direction, (which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request)"; and Article 855 C.C. declares that the formalities must be observed on pain of nullity. The same is declared by the Code Napoléon, Art. 1001. For an interesting case see *Mignault* v. *Malo*, (14 L.C.J. 141, and 16 L.C.J. 288), which went through all our courts and was finally referred to the Privy Council. Their Lordships discussed the whole question as to the law then affecting wills made in English form and the law relating to the probate of wills. The recent legislation referred to by the Codifiers of Ontario consisted of Imperial Statutes of Will. 4 & 1 Vic. Cap. 26 which, amongst other things, enact: "And be it further enacted that no will shall be valid, unless it be in writing and executed in manner thereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the

presence of the testator, but no form of attestation shall be necessary." Parsons, on Wills, says: "The signature to a will must be made or acknowledged in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator."

Again, he says: "The witnesses must subscribe their names in the presence of the testator and in each others' presence and by the direction of the testator, which direction it is presumed may be considered complied with if the will is strictly otherwise executed according to the statute."

It is advisable, however, in all cases, for the testator to expressly request the witnesses to subscribe their names as witnesses. The paper writing purporting to be the will must be duly executed as the will of such person. Thus when verbal instructions for a will were obtained from F. T., who was dying, by the personal suggestion and importunity of M. T. who directly afterwards wrote out the will and procured its execution, F. T. never spoke after the execution, but the evidence proved a certain degree of capacity at the time of execution, M. T. and her near relatives took a large benefit under the will, and it was attested in the same room in which the deceased was. M. T. deposed that the deceased could see the witnesses sign their names; the witnesses deposed that she could not. It was held that the paper for which instructions had been obtained was not entitled to probate, and that the balance of evidence showed that it was not duly executed as a will. In Stephen's commentary, we find the rule laid down, that the will must be subscribed by witnesses in the presence of the testator. It was adjudged also that though the witnesses must all see the testator sign, or, at least, acknowledge the signing, yet they might see him do so at different times, though they must all subscribe their names in his presence, *lest by any possibility they should mistake the instrument.* Our law is now plain, so plain that those who run may read, and it should be a part of every liberal education to teach so much at least of the provisions of law as would enable even those who are not supposed to be learned in the law to know what course to adopt under circumstances like these under which the so-called will was made. It is unfortunate that what were undoubtedly the last wishes of the deceased as to the disposition of her property cannot be carried out, owing to the want of formalities attending the execution of the same and which are prescribed by positive law. It would never do to allow the attestation of execution of wills by persons who perhaps, years after, might come up and say that they saw the signature or mark set to a document alleged to be a last will and testament subscribed by the testator, but were not requested by the testator to sign the same as attesting witnesses and were not legal attesting witnesses.

I cannot, under the circumstances, grant probate of this will.

CIRCUIT COURT.

AYLMER (dist. of Ottawa), March 6, 1887.

(In Chambers.)

Before WÜRTELE, J.

MCCLELLAND v. FOOKS, & MAJOR *et vir*, Opposants.

Venditioni Exponas—Opposition—C. C. P. 664 —Third party.

HELD:—*An opposition to withdraw, to a writ of Venditioni Exponas founded on a right of ownership, may be made by a third party, notwithstanding the previous opposition of another third party.*

A seizure of moveables in the possession of the defendant was made on the 19th June, 1886, and on the 28th day of the same month, his wife, Amelia Locke, stopped the execution by an opposition to withdraw, by which she claimed all the property seized. The opposition was discontinued on the 24th February, 1887, and a writ of *Venditioni Exponas* was issued the next day.

Maria Major made an opposition to withdraw on the 4th March, 1887, claiming all the moveables seized as her property, and gave notice for the 6th of an application to the judge for an order to stay proceedings on the writ of *Venditioni Exponas.* On the presentation of the application, the plaintiff contended that the cause or ground of opposition was anterior to the date of the filing of the

previous opposition, and that as all the publications upon the first writ had been made, the execution of the writ of *Venditioni Exponas* could not, according to article 664 C. C. P., be stopped by the opposition.

PER JUDICEM.—The female opposant first claimed the moveables under seizure by an attachment in revendication, and on the 24th February last (1887), her action was dismissed and she was told that her proper recourse was an opposition to withdraw; now it is pretended that her opposition is too late. If the law refused her all recourse, there would be a denial of justice in her case.

The article of the Code of Civil Procedure invoked against the allowance of the opposition, ordains that when all the publications upon the first writ have been made, the execution of a writ of *Venditioni Exponas* can be stopped by opposition only for reasons subsequent to the proceedings by which the sale was stopped in the first instance.

The article in question replaces paragraph 2 of Section 15 of chapter 85 of the Consolidated Statutes of Lower Canada. This paragraph enacted that the Sheriff should not receive any opposition, and suspend his proceedings on a writ of *Venditioni Exponas*; but jurisprudence allowed an opposition to be filed, and provided for a suspension of the execution upon the order of the Court or of a judge. The article contains this provision, but adds that the opposition must be "for "reasons subsequent to the proceedings by "which the sale was stopped in the first "instance." Does this mean that a party who has a right of ownership in the property seized, and who had not previously intervened, loses his right to revendicate his property by opposition, because the sale had been stopped by the unfounded opposition of another person?

I find no reported case in point, and I am therefore left to my own judgment.

It would seem that the addition made to the article was intended to remedy the abuse of retarding a sale under execution, by the judgment debtor setting up an informality in a proceeding anterior to the proceeding attacked in the first instance for an alleged irregularity or nullity, or by the same third party making repeated oppositons. A third party who has made an opposition to a seizure cannot, in my view, according to the article, make another opposition founded on facts anterior to those alleged in his first opposition; but I am of opinion that this rule does not apply to another third party. If such were the case, a person having a lawful claim to property seized, but only becoming aware of the seizure after the issue of a writ of *Venditioni Exponas*, would be deprived of the recourse necessary for the exercise of his rights; and this cannot be the intention of the law.

Of course, in all such cases, the judge must be satisfied, before he grants his order, that the opposant has, at first view, a good cause of opposition.

In the present instance, the female opposant appears at first view to have good ground for her claim; and I therefore grant the order to stay proceedings.

Opposition allowed.

N. A. Belcourt, for opposants.
Henry Aylen, for plaintiff.

ENCROACHMENTS ON THE RIGHTS OF UNIVERSITIES.

In the annual report of McGill University, the following passage occurs:—"We regret to say that further encroachments on the rights of the universities on the part of the councils of the Bar and of the medical profession are contemplated, which may be injurious to the true interests of professional education. These relate to the privileges heretofore enjoyed by graduates as well as to the examinations for entrance to study.

"Several educational fallacies underlie these encroachments. One is, that examinations alone can raise the standard of education, whereas this can be done only by well-equipped teaching bodies, such as those furnished by the universities. Another is, that extra-academical examiners should be employed, whereas experience shows that only those who, by continuous teaching, are induced to keep up their reading and knowledge, can be suitable examiners to maintain and advance the standard of education. A third is, that the multiplication of lectures is the best method to raise the standard of edu-

cation, whereas it has been proved by experience that this can best be done by the employment of skilled and eminent professors, by the cultivation of habits of independent study and by the extension of practical work. It is lamentable that these and similar fallacies, exploded in the most advanced educational countries, should appear to influence men whom we are bound to believe actuated by the wish to raise the standard of education, and not by that spirit of local and race jealousy and professional exclusiveness sometimes attributed to them. In any case, it is time that an active and earnest movement should be made to arrest the evils arising from this cause. A committee of this corporation has been appointed to consider the matter and to confer with other bodies on the subject.

"In so far as the province of Quebec is concerned, it is believed that the disabilities thus inflicted on the graduates of the Protestant universities are contrary to the spirit of that provision of the law of Confederation which guarantees to the English and Protestant minority of this province the educational privileges which it possessed before Confederation, and that such action is not within the power of the local Legislature. It has been proposed to test this question by submitting a case to counsel, should our present appeals to the local Government and Legislature be unavailing."

A CAUSE CÉLÈBRE IN RUSSIA.

La justice criminelle russe vient de juger une affaire de duel qui a soulevé une vive émotion dans l'aristocratie de ce pays.

Il s'agit du duel tragique qui mit en présence, le 20 avril dernier, le fils du général Lazareff, le vainqueur de Kars pendant la campagne de 1877, et le capitaine Panioutine, des hussards de la garde de l'empereur.

Pendant l'été de 1885, lors d'un séjour aux eaux de Kislovodsk, célèbre station balnéaire du Caucase, fréquentée par le *high-life* russe, le capitaine Théodore Panioutine se lia intimement avec la famille Lazareff, à laquelle est allié le général Gémardgidzé, commandant du 2e corps d'armée caucasien. Le jeune officier devint éperdument épris de l'aînée des demoiselles Lazareff, Nina.

—C'est la seconde fois, lui disait-il, dans l'abandon de leurs causeries, que je rencontre une personne qui ait produit autant d'impression sur moi. J'ai connu autrefois une femme que j'ai aimée, la princesse O...; mais maintenant je l'ai complètement oubliée.

A la fin de la saison, M. Panioutine formula sa demande en mariage.

Mlle. Nina Lazareff l'accueillit favorablement; mais exprima à M. Panioutine le désir qu'il obtint le consentement de ses parents à lui.

On repartit pour Saint-Pétersbourg, où le bruit des fiançailles avait précédé Mlle. Lazareff, qui fut félicitée de toutes parts. Cependant la jeune fille ne recevait aucune nouvelle des parents du capitaine Panioutine. Elle lui écrivit, elle finit par lui télégraphier pour lui demander le motif d'un pareil silence. Enfin, la réponse arriva.

"A mon aveu, écrivait M. Panioutine, ma mère s'est évanouie! Mon sort était décidé depuis longtemps. Je devais épouser la princesse O...., dont je vous ai parlé au Caucase. Je vous ai compromise par mes assiduités; mon excuse est dans mon grand amour. Soyez sûre que vous serez toujours le meilleur souvenir de ma vie!"

Mlle Lazareff répondit:

"Au moment de lier ma vie à un homme sans caractère, je suis trop heureuse d'être avertie à temps; je vous laisse votre liberté!"

Cette correspondance avait été tenue secrète. Mais quelques jours plus tard, on apprenait le mariage du capitaine Panioutine avec la princesse O...

Lorsque les frères de Mlle Lazareff apprirent ce dénouement imprévu, il fut convenu que le cadet, Pierre, irait provoquer le capitaine dans ses terres. Mais celui-ci était parti subitement pour Saint-Pétersbourg où le grand-duc Nicolas l'avait appelé par dépêche, pour lui demander des explications.

M. Pierre Lazareff écrivait alors une lettre de provocation à M. Panioutine. Ce fut Mme Panioutine mère qui répondit: elle avait intercepté le cartel, son fils venait d'épouser la princesse O.... dans la propriété de laquelle les deux époux passaient leur lune de miel. Mais il fallait bien aboutir, et les ennemis

finirent par se rencontrer. Le duel fut décidé.

Les témoins ne tombèrent pas immédiatement d'accord sur le lieu de la rencontre. Enfin, après bien des pourparlers, il fut décidé qu'elle aurait lieu à Tsarskoé-Sélo, à environ vingt verstes de Saint-Pétersbourg.

Rendez-vous fut pris le 20 avril, à six heures du soir, dans une forêt qui borde la chaussée. L'arme choisie était le pistolet avec échange d'une balle chacun à vingt-cinq pas et faculté de s'avancer jusqu'à quinze pas. Dans le cas où les pistolets viendraient à rater, ils seraient immédiatement rechargés. Tout devait être fini en trois minutes.

Sur le terrain, M. Lazareff fit deux pas en avant et tira, mais son pistolet rata, pendant que la balle de M. Panioutine lui effleurait l'oreille. Selon les conditions du combat, le pistolet de M. Lazareff fut rechargé ; ce dernier fit quatre pas en avant et tira de nouveau ; le capitaine Panioutine tomba, atteint mortellement au flanc droit. Il succomba le surlendemain.

L'affaire fut immédiatement rapportée à l'empereur, et M. Lazareff vient d'être jugé dans les termes de la loi russe qui dit :

" Si l'offensé est tué, l'offenseur sera puni de six ans et huit mois de prison ; si l'offenseur est tué, l'offensé sera puni de deux ans et six mois de la même peine."

A l'audience, le procureur impérial s'est attaché à établir que M. Lazareff était l'offenseur et que le duel avait été réglé dans les conditions les plus dangereuses.

Il a demandé, en conséquence, l'application du maximum de la peine, six ans et huit mois de prison.

Me. Guérard, un des maîtres du barreau russe, a présenté une défense éloquente de M. Lazareff.

L'accusé a été condamné à deux ans et six mois de forteresse.—*Gaz. du Palais.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, March 12.

Judicial Abandonments.

James Cullens, grocer, Montreal, March 7.

Henry Kearney, grocer, Montreal, March 8.

Louis Lambert, threshing machine manufacturer, Louiseville, March 2.

Telesphore Monpas, trader, St. Pierre-les-Becquets, March 3.

Curators appointed.

Re Louis Cousineau.—C. Desmarteau, Montreal, curator, March 8.

Re Dame Exilda Bougie (Mrs. D. Leonard).—Kent & Turcotte, Montreal, curator, March 8.

Re Mary Rodger.—J. McD. Hains, Montreal, curator, March 8.

Re Connel Levin.—W. A. Caldwell, Montreal, curator, March 8.

Dividends.

Re Thomas Lang, district of Ottawa.—Dividend, W. A. Caldwell, Montreal, curator.

Re Octave Painchaud et al.—First and final dividend, James Shearer, Montreal, curator.

Re Sharpe & McKinnon.—Dividend, D. L. McDougall and David Seath, Montreal, curators.

Re C. H. Taber.—Dividend, W. A. Caldwell, Montreal, curator.

Re Vaillancourt & Laberge.—First and final dividend, payable March 20, H. A. Bedard, Quebec, curator.

Separation as to property.

Marie Louise Odile Abran vs. Moïse Masson, merchant, Three Rivers, March 9.

Marie Leonie Beauchemin vs. David Poisson, farmer, Gentilly, March 3.

Marie Rose Anna Monast vs. Wilfrid Lemonde, carriage-maker, St. Mathias, March 9.

APPOINTMENTS.

Joseph Gabriel Pelletier and Zéphirin Perrault, joint prothonotary of the Superior Court, Clerk of the Crown and Clerk of the Peace, district of Kamouraska.

Denis Barry and Alexandre Eudore Poirier, advocates, joint fire commissioner, Montreal.

GENERAL NOTES.

THE council of the Incorporated Law Society (London) have under consideration the course to be adopted in celebrating the fiftieth year of the Queen's reign. It has been resolved that there shall be a dinner, and that the dinner shall be followed by a ball. The idea of retaining one of the principal theatres for a special performance finds favour.

UN TRÉSOR.—Le tribunal civil de Laon devait avoir à statuer sur une affaire fort curieuse. En effet, on n'a pas oublié l'émotion produite, il y a quatre ans, dans le monde artistique, par la découverte, aux environs de Laon, d'un trésor qui n'était autre que la vaisselle plate d'un des lieutenants de Caracalla. La propriété de ce trésor avait tout d'abord donné lieu à un procès entre "l'inventeur," le détenteur et le général de Brauer, propriétaire du domaine où le trésor a été découvert. Mais, à la veille de plaider, les adversaires du général lui offrirent une transaction tellement avantageuse qu'il l'accepta. A la suite de cette transaction, le trésor en question va être prochainement mis en adjudication par les soins de M. Emile Vanderheym, expert près la cour de Paris, et la vente d'un objet du temps de Caracalla sera certainement fort courue.—*Gaz. du Pal.*

The Legal News.

VOL. X. MARCH 26, 1887. No. 13.

In connection with the judicial returns published in the *Quebec Official Gazette*, to which further reference will be made in another issue, it may be observed that no mention is made of interlocutory judgments rendered in the district of Montreal, while the returns from other districts include such interlocutories. It appears from a statement prepared by the Prothonotary, that during the year 1886 there were 912 interlocutory judgments rendered in this district on motions, petitions, etc., upon which *délibérés* were had: viz., January, 107; February, 117; March, 75; April, 91; May, 87; June, 95; July, 31: August, 31; September, 68; October, 64; November, 72; December, 74. The fact that interlocutories are not included in the return from the district of Montreal, serves to explain why the number of judgments rendered in this district appears to be much less, compared with the number of actions taken out, than in the district of Quebec.

The venerable authority of Coke has received a rude shock from that impetuous critic, Mr. Justice Stephen. On Coke being cited by counsel at Cardiff, the learned judge is reported to have said, "I know another equally high authority, Lord Blackburn, who never regarded Coke as an authority at all!"

The obligation to appear as a witness is sometimes an onerous one. The defendants in the Plan of Campaign conspiracy case having summoned the Attorney General for Ireland as a witness, it is stated that he was obliged to transfer the brief for the prosecution to the Solicitor-General for Ireland, by which he lost a fee calculated at £700.

A Roman coffin, containing the skeleton of a lady, was dug up at Plumstead lately, on a spot which appears to have been a Roman cemetery. The disposal of the interesting relics gave rise to some difficulty. The vicar of the parish, who does not appear to be an enthusiastic antiquarian, caused the remains to be buried in the parish church-yard. This disposition of the relics was objected to by the owner of the land on which they were found, and was also protested against by a representative of the Kent Archæological Society. The county coroner also complained of the remains being disposed of without his authority, while virtually in his charge, and as the coffin is in some respects unique and in remarkable preservation, the antiquaries intend to make strenuous efforts for its recovery. The *Law Journal* remarks on these pretensions:—"The claim of the coroner that the remains were in his charge was altogether inadmissible. The coroner has no general control over dead bodies, but only when there is reasonable suspicion of death by extraordinary causes; and his jurisdiction being practical, and not historical, does not extend to the investigation of the decease of persons dying some 1,400 years ago. The claim of the proprietor of the soil to the body was equally without foundation. Not only is a dead body incapable of being the subject of property, but to disinter, from whatever motive, a dead body from consecrated or unconsecrated ground is a misdemeanor at common law (*Regina* v. *Sharpe*, 26 Law J. Rep. M. C. 47). The disinterment in this instance was accidental, but none the less a breach of that respectful treatment of a buried body which the law requires; and the least that the discoverer of the body could do was to re-inter it. Different considerations apply to the coffin, which is the subject of property, but although so many centuries have elapsed since the death of the lady, the right of property in the coffin vested in her representatives has never been abandoned. Even if the owner of the soil has any right of property in the coffin it is only as trustee for the purpose to which it was obviously devoted —namely, the reception of the body. He would be relieved from this trust only by the impossibility of finding any one entitled to assert it. Whether the vicar of the parish has any rights or duties in the matter is doubtful. He has duties towards the bodies buried in his churchyard, and he is bound to bury all baptized persons; but to insist on the re-interment in the churchyard of a body

buried for centuries, seems in excess of his power. The proper course is to apply to the Home Secretary, under section 25 of the Burials Act, 1857, for a license to remove the remains. That section provides that it shall not be lawful to remove any body or the remains of any body which may have been interred in any place of burial, without license from the Secretary of State, and a disregard of the section subjects the offender to a penalty, summarily recoverable, not exceeding £10. The words 'place of burial' have no technical meaning, and apply to the present grave, especially if it turn out, as supposed, to be a cemetery."

SUPERIOR COURT.

QUEBEC, June 4, 1884.

Before CASAULT, J.

COURTEAU v. GAUTHIER et al.

Immovable—Description—Tutorship of widow—Second marriage.

HELD:—1. *In a hypothecary action against the "tiers-détenteur" of an immovable, situate within the limits of a registration-division, wherein art.* 2168 *of the C. C. is in force, that immovable must be described by its cadastral number and by the description of it given in the cadastral book of reference;* (1)

2. *The tutorship of a widow to her minor children ceases, on her second marriage.* (2)

The judgment is as follows:—

"Considérant que l'action est hypothécaire et que la description de l'immeuble n'est pas celle voulue par la loi;

"Considérant que le convol en secondes noces et même en troisièmes noces de la défenderesse, Julie Bertrand, a mis fin à sa tutelle à ses enfants;

"L'exception à la forme est maintenue et l'action est renvoyée avec dépens, sauf à se pourvoir."

Belleau & Stafford, for plaintiff.

Morrisset & de St. George, for defendants.

(J. O'F.)

(1) Art. 2168 C. C.
(2) Art. 282 C. C., par. 3.

COURT OF REVIEW.

QUEBEC, Nov. 30, 1886.

Coram CARON, ANDREWS, LARUE, JJ.

DUFOUR v. DUFOUR, & ANGERS, oppt.

Petitory action—Improvements—Rights of hypothecary creditor.

HELD (*confirming the judgment of the Court below*):—1. *That neither the law nor the judgment itself extended the right of retention for re-payment of any sum of money, paid to the experts, as the plaintiff's share of their costs;*

2. *That the prosecuting creditor, under the peculiar circumstances of the case, should, within 15 days, put in good and sufficient security for securing the amount of the opposant's claim; but that, on failure to give such security, the sale should take place free from any such reserve or charge.*

In this suit, a petitory one, for the recovery of an immovable occupied by a *bonâ fide* possessor, the Court awarded the immovable to the plaintiff, but reserved to the defendant the right of retention, until payment to him of whatever sum might thereafter be awarded to him for his improvements, under an *expertise* ordered by the judgment.

The *experts'* award was $400; and the judgment, homologating their report, ordered that each party should pay his own witnesses, that the costs of the *expertise* should be borne equally between them, and that the plaintiff should pay the other costs of the defendant, awarded by way of distraction, to Mr. J. S. Perrault.

For those costs, Mr. Perrault caused the immovable to be seized and advertised for sale, "*subject to the right of the defendant to retain the immovable until payment to him of whatever sum he might have paid, as the plaintiff's share of the costs of the experts.*"

Charles Angers, having a hypothecary claim on the immovable, opposed the sale being made subject to that condition, which specified no particular sum, but consented to the sale taking place, subject to said condition, if Mr. Perrault would give security that the price of sale should be sufficient to cover the opposant's claim.

The judgment of the Superior Court (Dis-

trict of Saguenay, A. B. Routhier, J.) which was confirmed in Review, was as follows :—

"Considérant que la réserve faite en faveur du défendeur, dans les annonces de saisie-exécution en cette cause, de son droit de rétention sur l'immeuble saisi, "pour toute "somme qu'il peut avoir payée aux experts "pour le demandeur," est indéterminée, sans aucun montant fixé, et pour cette raison irrégulière et illégale;

"Considérant en outre que ni la loi, ni le jugement rendu en cette cause, n'étendent le droit de rétention du défendeur à la créance qu'il peut avoir contre le demandeur pour sommes payées aux experts à son acquit;

"Maintient l'opposition de Charles Angers, créancier du demandeur, et ordonne que la vente de l'immeuble saisi en cette cause ne soit soumise à la réserve du droit de rétention pour sommes payées aux experts, que si bonne et suffisante caution est donnée que l'immeuble sera vendu à un prix suffisant pour assurer au dit opposant le montant de sa créance, savoir : $100, avec les intérêts ; et si tel cautionnement n'est pas fourni dans un délai de 15 jours, la Cour ordonne que l'immeuble soit vendu libre de telle réserve ou charge."

Jos. S. Perrault, for J. S. Perrault.
Charles Angers, for Charles Angers.
(J. O'F.)

SUPERIOR COURT.

SHERBROOKE, Jan. 31, 1887.

Before BROOKS, J.

KIPPEN v. STERLING.

Tender—Costs.

Where an action was instituted for $300.38, and a tender of $99 and costs, made before return, was held insufficient, and judgment was given in favor of plaintiff for $126.50, costs were allowed plaintiff.

PER CURIAM. This action was for $300.38, being for the balance of account alleged to be due to plaintiff for the rent of a certain saw mill property in Lennoxville, under three separate agreements; and several other items.

Defendant pleaded, denying the agreements as alleged by plaintiff with reference to the mill, and produced a *contra* account against plaintiff, alleging that before the return of the action into Court, he had tendered $99.00 and costs to plaintiff, which more than covered any balance due him, and bringing said amount into Court, and renewing the tender by his pleas.

The amount due for the mill, under the first agreement, is agreed upon at $300.46. As to the second and third agreements, plaintiff has failed to prove the same as alleged by him; on the contrary, the weight of evidence is in favor of defendant's pretensions. The evidence of Wm. Mitchell for defendant, is reasonable as to the new agreement and is not contradicted.

Under the circumstances, I can allow plaintiff nothing more than is credited by defendant for the mill, with the exception of $28, for sawing 28,000 feet of lumber which was done by Bond Little, about the middle of June, @ $1.00 per 1000 feet,-$28.00. It is evident this sawing is not credited, for Little says it was done after the middle of June, and that he sawed several days, and I find that credit is given by defendant for certain hours only, and in only one case, June 23rd, as many as six hours.

Plaintiff should also be allowed $30.00 for the use of the grist mill, during said season, being one half the proceeds of grinding.

As to claims for extras, and counter claims for reductions, in connection with building plaintiff's house, nothing is allowed either party.

Adding the above items, plaintiff's account stands as follows:—

Due for mill under 1st agreement..	$ 300.46
Sawing by Little, 28,000 feet @ 1.00.	28.00
Use of Grist Mill......	30.00
Paid for Insurance................	15.67
Drawing wood....................	22.75
Potatoes.........................	5.40
Use of mill 144 hours, being 14 days and 4 hours, June 10th to Aug. 13th, @ 2.00	28.80
	$ 431.08

Of defendant's account, plaintiff admits in his deposition $275.83, and to this amount must be added $28.75, the balance charged by defendant for roofing, which, under the

evidence, must be allowed. This makes defendant's account $304.58, which being deducted from plaintiff's account of $431.08, leaves a balance in his favor of $126.50, for which amount, judgment will go for plaintiff, with costs.

Hall, White & Cate, Attys. for plaintiff.

Camirand, Hurd & Fraser, Attys. for defendant.

(H. R. F.)

CHANCERY DIVISION.

London, Feb. 17, 1887.

Before Stirling, J.

Phipps v. Jackson. (22 L.J.)

Injunction — Mandatory — Covenant in Husbandry.

By an agreement for letting a farm it was stipulated that the tenant should at all times keep on the farm a proper and sufficient stock of sheep, horses, and cattle. The tenant had advertised the whole of the stock for sale. The landlord moved for an injunction to restrain the tenant from allowing the farm to remain without a proper and sufficient stock of sheep, horses, and cattle.

Stirling, J., held that the Court could not superintend the execution of a stipulation in a farming agreement involving a series of continuous acts, and that an injunction could not be granted.

CHANCERY DIVISION.

London, Feb. 21, 1887.

Before Stirling, J.

Chalmers v. Wingfield. (22 L.J.)

Domicil — Domicil of Choice — Intention to Abandon — 'Animus manendi.'

This was a summons to vary the certificate of the chief clerk, who had found that the domicil of the testator was German. The testator was born in India, his father being an officer in the service of the East India Company. He was himself an officer in that service, and never left India until the year 1870. He was married at Madras to a lady of Dutch extraction, by whom he had four children, all born in India. He left the service in 1868, and from that time until his death, he was in receipt of a Government pension. After 1868, he entered the service of the Nizam of Hyderabad. In 1871 (being then a widower) he left Hyderabad and went to reside at Darmstadt, where in 1872 he purchased a house. He lived there until his death, only leaving it to pay short visits to England in the years 1871 to 1874, and to India in 1874, for the purpose of obtaining a pension from the Nizam, and to friends in different parts of Germany. It appeared, from a letter written by him in 1871 to a friend in Germany, that on the occasion of his leaving India, the Nizam had refused to let him go for good, not wishing to lose his services, but had given him a furlough of fifteen months, hoping that he would be disgusted with Europe and would desire to return to India. In this letter, he referred to the Franco-German war of 1870-71, and identified himself with the German side. In July, 1871, he wrote a letter, stating his wish to marry, and that he preferred a German wife, and asking permission to pay his addresses to a certain young lady of that nationality. He made his will in Germany in 1874 in English form. By it he gave his property to his grandchildren to the exclusion of his children. By the German law, a testator is not allowed to disinherit his children; therefore, according to the finding of the certificate, the will was inoperative. There was also evidence to show that the testator was dissatisfied with Germany and wished to live in England.

Stirling, J., said that the main properties of the law as laid down in *Bell* v. *Kennedy*, L. R. 1 Sc. App. 307, and *Udny* v. *Udny*, L. R. 1 Sc. App. 441, were, that the domicil of origin adhered to the subject until he acquired a new domicil of choice; that the burden of proving a change of domicil lay on the persons who asserted that such change had taken place; that in order to acquire a domicil of choice, two things were necessary—actual residence in the country of choice, and an intention to remain there permanently; and that the domicil of choice was put an end to by actual residence in another place, and by an intention permanently to reside there. The question, therefore, was whether the testator had during

his lifetime indicated an intention to reside in Germany. It was contended that if the domicil was held to be German the will would be ineffectual; but it was established by *In re Steer*, 3 H. & N. 594, that even an expressed wish to retain the domicil of origin would not prevail against evidence which proved the *animus manendi* in the domicil of choice; still less could a desire to retain rights according to the law of one country prevail in opposition to the fact that the man was domiciled in a different country. The most important fact, although not conclusive, was the purchase of the house in Darmstadt, wich appeared to him to be strong *primâ facie* evidence of an intention to settle in Germany. On the evidence, he was of opinion that the testator had acquired a German domicil at the time of his will and of his death, and that if he had any intention of abandoning that domicil, he failed to carry that intention into effect.

LIBELS ON THE DEAD.

At Cardiff, on February 10, before Mr. Justice Stephen and a special jury, the case of *Regina* v. *Ensor* was heard. It was an indictment against the defendant, a solicitor practising at Cardiff, charging him with having, on July 23, 1886, maliciously published a certain libel intending to injure the character of one John Batchelor, knowing the same to be false, by reading and publishing the same to one Taylor and others, and by publishing it in the *Western Mail*. A second count charged him with having done so intending to throw scandal on the character and memory of the said John Batchelor and to injure his family and posterity. A third count charged that the libel had a tendency to create a breach of the peace, and that it did cause an assault to be committed. A fourth count alleged that it had a tendency to excite the friends and relatives of the said John Batchelor to revenge by a breach of the peace, and that it did cause an assault to be committed by the sons of the said John Batchelor. The prosecution, alleged that the defendant, who was in the habit of writing articles for the *Western Mail* under the name of "Censor," had gone to the office of this newspaper on the evening of July 23, and read a suggested epitaph on John Batchelor before the staff. On the next morning there appeared in the columns of the paper the following statement:—"Our esteemed correspondent "Censor" sends us the following suggested epitaph for the Batchelor statue: 'In honour of John Batchelor, a native of Newport, who in early life left his country for his country's good; who on his return, devoted his life and energies to setting class against class, a traitor to the Crown, a reviler of the aristocracy, a hater of the clergy, a panderer to the multitude; who, as first chairman of the Cardiff School Board, squandered funds to which he did not contribute; who is sincerely mourned by unpaid creditors to the amount of 50,000*l.*; who at the close of a wasted and misspent life, died a pauper, this monnment, to the eternal disgrace of Cardiff, is erected by sympathetic Radicals. Owe no man anything." The innuendo "that he had been transported as a felon" was alleged upon the words "left his country for his country's good."

Mr. Justice STEPHEN, after hearing counsel for the prosecution, directed an acquittal on grounds which he stated he had put into writing. These were as follows:—

There can be no question that if John Batchelor were living, the language applied to him would be libellous. But he died more than three years before it was published, and this raised the question whether and in what cases, a libel upon a dead man is, by the law of England, a crime. The authorities upon the subject are few. Practically, there are only three. The latest is the case of *Regina* v. *Labouchere*, 53 Law J. Rep. Q. B. 363; L. R. 12 Q. B. Div. 320. It has, in reality, little to do with the matter, as the question there was whether an *ex officio* information should be granted for such a libel, and it was held that the fact that the person said to have been libelled was dead was a reason why the Court should not in its discretion grant an extraordinary remedy, which is granted only in special cases. It does not follow that, because the Court in that case refused to grant an *ex officio* information for various reasons of which that

was one, an indictment for this libel will not lie. As we have heard, when an application was made to the Court to quash the indictment in this very case, the two judges to whom the application was made, and who formed part of the Court which decided *Regina* v. *Labouchere*, said that the judgment in that case was not intended to decide the point which arises in this. The other authorities are Lord Coke and Lord Kenyon. Lord Coke (in 5 Reports, 125*a*) distinguishes libels as made against a private man or a magistrate; and then says: "Although the private man or the magistrate be dead at the time of the making of the libel, yet it is punishable; for in the one case, it stirs up others of the same family blood and society to revenge and to break the peace; and in the other, the libeller traduces and slanders the State, which dies not." If this is or ever was good law, it would follow that all history is unlawful, for every true history must in many cases traduce the State, which dies not. Lord Coke, in the latter part of his long life, was distinguished for his independence as a judge and his defence of the subject against the encroachments of the royal prerogative. But his earlier character was different. In his history of the Star Chamber, it is said: "In all ages, libels have been severely punished in this Court, but most especially they began to be frequent about 42 & 43 Elizabeth" (1600, when Sir Edward Coke was her Attorney-General). In this passage, therefore, he was probably giving his impression of the Star Chamber practice, which no one would now regard as of any authority. There are, I think, many instances in which Lord Coke's views of the criminal law are doubtful, and go far beyond the authorities he refers to. In this passage he refers to none. The only real authority on the subject, as far as I know, is *Rex* v. *Topham*, 4 T. R. 126, in which Lord Kenyon delivered the considered judgment of the Court. In this case, judgment was arrested upon an indictment which charged Topham with libelling Lord Cowper deceased, "intending to defame his memory," and to cause it to be believed, in short, that he was a wicked man. The substance of the reasons for the judgment is given in these words: "Now to say in general that the conduct of a dead person can at no time be canvassed, to hold that even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history; and therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose to vilify the memory of the deceased and with a view to injure his posterity (as in *Rex* v. *Critchley*, 4 T. R. 129), then it comes within the rule stated by Hawkins—then it is done with a design to break the peace, and then it becomes illegal." The judgment seems to me to show that a mere vilifying of the deceased is not enough. Judgment, indeed, was arrested in *Topham's Case* because it was not enough. There must be a vilifying of the deceased with a view to injure his posterity. The dead have no rights and can suffer no wrongs. The living alone can be the subject of legal protection, and the law of libel is intended to protect them, not against every writing which gives them pain, but against writings holding them up individually to hatred, contempt, or ridicule. This, no doubt, may be done in every variety of way. It is possible, under the mask of attacking a dead man, to attack a living one. There are, in our own and other languages, well-known coarse terms of abuse which, taken literally, reflect only on the character of a man's mother, but which, if applied to a living man in writing, would certainly be libellous, whether his mother was living or dead, because they are known to attribute to the son the qualities which such a mother might be supposed to transmit; and if the mother were mentioned and vice were imputed to her, in order to bring disgrace upon the son, it seems to me that though the son was not expressly mentioned, the law would be the same. If the object appeared clearly to be to bring James I. into contempt, it would, I think, make no difference whether you said, "James was the son of an adulterous murderess," or, "Mary Stuart was an adulterous murderess." In cases of libel, the intention is everything. If you wish to cause Haman to be hanged, it makes no

difference whether you say, "Behold also the gallows which Haman has made," or, "On no account look at the gallows which Haman has made." It is sometimes said that, as a man must be held to intend the natural consequences of his acts, and as the natural consequence of the censure of a dead man is to exasperate his living friends and relations, and so to cause breaches of the peace, attacks on the dead must be punishable as libels, because they tend to a breach of the peace, whether they are or are not intended as an indirect way of reflecting on the living, unless, indeed, they are privileged as fair comments on matters of public interest or the like. My brother Wills, in charging the grand jury in this case, seemed to take this view. I have the most unfeigned respect for whatever falls from him, but I cannot agree to this in its full extent. It seems to me that if it were correct, Lord Coke's view would be correct. But the case of *Rex* v. *Topham* distinctly holds that it is not, for in that case judgment was arrested, because no intention to injure the family was alleged. This shows that the intent to injure the family was a fact requiring proof and necessary to be found by the jury, and not an inference by which they were bound from the terms of the writing reflecting on the dead man. I wish to add that I regard the silence of the authorities and the general practice of the profession as a more weighty authority on this point than the isolated statements of Lord Coke and the few unsatisfactory cases referred to in *Rex* v. *Topham.* I am reluctant in the highest degree to extend the criminal law. To speak broadly, to libel the dead is not an offence known to our law. If an extension of it is required, it is for Parliament and not for the judges to extend it. I think it is a fatal objection to several of the counts of the indictment that they aver only a tendency and not an intention to injure and to excite a breach of the peace. To define the crime of libel with reference to the tendency of the matters written, and not by the intention of the writer, might or might not be an improvement of the law; but, if it is, it must be effected by the Legislature and not by the judges. For these reasons, I think that, as it is not and cannot be suggested that the observations made on the late Mr. Batchelor were intended to injure and bring contempt on his family, but only to injure the character of the late Mr. Batchelor himself, the defendant must be acquitted.

The jury returned a verdict of not guilty.

APPEAL REGISTER—MONTREAL.

Tuesday, March 15.

The Queen v. *Cole* or *Bowen.*—Two reserved cases; continued to 23rd inst.

Bondy v. *Valois;* and *Falardeau* v. *Valois.*—Motion for appeal from interlocutory judgment. C. A. V.

Laurier v. *Legris.*—Motion for leave to appeal from interlocutory judgment, rejected with costs.

Cie Minière de Colraine & McGauvran.—Heard *de novo* on merits. C. A. V.

Lebeau & Poitras.—Heard on interlocutory appeal. C. A. V.

Canadian Pacific Railway Co. & McRae.—Heard. C. A. V.

Garth et al. & La Banque d'Hochelaga, & Taillon, & Mercier.—Petition for *reprise d'instance;* granted by consent.

Wednesday, March 16.

Lanctot & Ryan.—Heard on motion for leave to appeal from interlocutory judgment. C. A. V.

La Cie. de Navigation de Longueuil & Les Commissaires d'Ecole de la Ville de Longueuil.—Heard on motion for appeal from interlocutory judgment. C. A. V.

Fellows Medical Co. & Lambe.—Motion that Mr. Beausoleil be substituted for Messrs. Lacoste & Cie. Mr. Brosseau asks for production of authority for substitution. C.A.V.

Lapalme & Barré.—Heard on motion to quash writ. C. A. V.

Judah & Boxer et al.—Heard on motion to quash writ. C. A. V.

Goodall & Exchange Bank.—Heard on merits. C. A. V.

Bryson & Cannavon.—Part heard on merits.

Thursday, March 17.

Bryson & Cannavon.—Hearing concluded. C. A. V.

Benoit & Benoit.—Heard. C. A. V.

Mail Printing Co. & Canada Shipping Co.—Heard. C. A. V.

Aubry & Rodier.—Part heard.

Friday, March 18.

Bondy & Valois, and *Falardeau & Valois.*—Motion for leave to appeal rejected without costs.

Papineau & Corporation N. D. de Bonsecours. Motion for leave to appeal to Piivy Council, rejected.

Judah & Boxer.—Motion granted; writ of appeal quashed with costs.

Fellows Medical Co. & Lambe.—Motion for substitution ordered to be put on the roll for the 21st, for the attorneys of record to give their objections to the substitution.

Beaudry & Dunlop et al.—Judgment reversed.

Allan & Pratt.—Judgment confirmed.

Evans & Foster.—Judgment reversed, each party paying his own costs of appeal.

Leroux, Elie, Duval & Prieur.—Judgment confirmed with costs of first instance; each party paying his own costs in appeal.

Aubry & Rodier. — Hearing concluded. C. A. V.

Cantlie & Coaticooke Cotton Co.—Part heard.

Saturday, March 19.

Cantlie & Coaticooke Cotton Co.—Hearing concluded. C. A. V.

APPOINTMENTS.

The Hon. Hugh Nelson, Burrard Inlet, to be lieutenant governor of the province ot British Columbia.

Thomas Robertson, Q. C., Hamilton, to be a judge of the Chancery Division of the High Court of Justice for Ontario.

Charles James Townshend, Q. C., Amherst, N. S., to be a *puiné* judge of the Supreme Court of Nova Scotia, *vice* Mr. Justice Rigby, deceased.

Télephore Ouimet to be warden of the St. Vincent de Paul Penitentiary, *vice* Godfroi Laviolette, resigned.

Thomas McCarthy to be deputy warden.

William E. Sanford, Hamilton, to be senator, *vice* Sir A. Campbell, resigned.

GENERAL NOTES.

A Use for the Imperial Institute.—Mr. Sydney H. Preston writes to the London *Law Journal*:—"Should the Imperial Institute prove a grand success, a room might be set apart therein where not only information concerning Colonial Intestates could be obtained, but copies of wills and letters of administration be consulted, as similar documents relating to persons who have died in India can now be at the India Office."

The Four Courts.—The Four Courts in Dublin were discovered one day last month to be on fire. The whole pile of buildings was enveloped in smoke, and flames were issuing from the windows. The fire brigade effected an entrance and directed their efforts to the centre of the blaze, the Vice-Chancellor's Court in the west wing, which was entirely gutted, and the books and furniture destroyed. The fire originated in the passage to the Vice-Chancellor's Court. After two hours' exertion, the fire was subdued and prevented from extending. The damage is estimated at thousands of pounds. The absence of wind and the thickness of the walls favoured the exertions of the fire brigade to save the building.

Trade Marks.—The decision of the Court of Appeal in the cases of *Van Duzer* and *Leaf* will make the owners of all names registered as trade-marks anxiously cross-examine themselves whether the name can be said to be a 'fancy name.' Grave doubts are, by the decision, thrown on any geographical name or descriptive word, and that independently of its appropriateness to the article in respect of which it is registered. No one, probably, would suppose that at Melrose there was a factory for hair wash, or that 'electric' very aptly described velveteen. The Lords Justices, however, decide that neither of these can be registered as 'fancy words,' contrary to the view which has been taken in several cases in the Courts below, especially by Vice-Chancellor Bacon. Thus Mr Justice Chitty's acceptance of Alpine as applied to embroidery, the application by Mr. Justice Kay of Strathmore to whiskey, and perhaps even the adoption of 'Gem' as applied to a gun, must go by the board. Designers of trade-marks must, it would seem, not attempt to give a reflected value to the goods, unless they can do so by coining an entirely new word. Those who desire to register a single word are, therefore, relegated to such monstrosities as Cyanochaitanthropopoion, from which infliction Vice-Chancellor Bacon's decision delivered the English language.—*Law Journal* (London).

Trial of Peers.—The trial and acquittal of Lord Graves by a jury on his 'waiving his privilege as a peer' must not be taken as a precedent. To speak of a peer 'waiving his privilege' is insensible, as there is no privilege to waive. Peers are, by law, tried for felony by peers, and commoners by commoners, and it would be as correct to speak of a commoner waiving his privilege of trial by jury as it is of a peer waiving trial by his peers. No one has ever suggested that a commoner might waive trial by jury and be tried for murder, say, by an official referee. Even if there were anything to waive, nothing in a criminal case can be waived by the prisoner. Coke (3 Inst. p. 3[illegible]) says, 'A nobleman cannot waive his trial by his peers,' and this view is supported by all the other authorities except *Lord Dorset's Case*, reported on the authority of Dallison in the reign of Philip and Mary. Lord Coleridge, when he referred to *Lord Ferrer's Case* as an example of the trial by jury of a peer for felony, was probably thinking of *Dorset's Case*. The verdict of 'Not guilty' entered in *Regina* v. *Graves* on the charge of felony is, therefore, a nullity, not the less because of the studied absence of Sir H. James, the defendant's counsel, from the Court while it was recorded. It will be necessary for the Attorney-General to enter a *nolle prosequi*, or to obtain a pardon from the Crown which may be pleaded in the Queen's Bench. The mistake made in granting a *certiorari* of the charge of felony into the Queen's Bench was pointed out at the time by a learned correspondent on April 3 last.—*Ib.*

Locking the Side-door.—Some time ago a Scottish law agent went to Australia and demanded the right to practise in Queensland without conforming to the regulations of the colony. His application was refused. After his refusal, he went to Victoria, where the same objection did not prevail as in Queensland, and he was admitted in due course. As between Victoria and Queensland there is free trade in solicitors, those of either colony being entitled to admission in the other. Being now a Victorian solicitor he again applied to the Supreme Court of Queensland for admission in his new capacity. The Chief Justice, however, characterised his second application as an attempt to evade the rules which had been laid down there for admission.—*Scottish Law Review.*

The Legal News.

VOL. X. APRIL 2, 1887. No. 14.

Another movement is being made towards an increase of the judges' salaries. Deputations of the bar of Ontario and Quebec are in communication with the Minister of Justice on the subject, and it is hoped that a measure will be introduced in the next Session of Parliament.

Baron Huddleston, in charging the grand jury at the Warwickshire Assizes last month, made some remarkable statements with reference to charges brought under the Criminal Law Amendment Act. The learned judge said there were two criminal charges in the calendar, made under a recent Act of Parliament which had given, as it was expected it would give, great trouble and anxiety to those who were entrusted with the administration of justice. He meant the Criminal Law Amendment Act, which the Legislature, prompted by many excellent persons with the best intentions, passed for the purpose of preventing, as it was alleged, outrages and crimes upon women and children. No doubt it was most desirable that severe punishment should follow upon those who were guilty of the horrible crime of immorality with little children, but he ventured to express his great doubt—a doubt arising from an experience of Courts of justice of nearly fifty years, a doubt fortified by an experience as a judge twelve years—whether it was to the advantage of the public to afford greater facilities for charges of a particular sort which were made by adult females against men. He believed he was giving the experience of his learned brothers when he said that *the majority of these charges were untrue*. Some were put forward by women for the purpose of shielding their own shame, sometimes for the purpose of extorting money, sometimes even, as he had known happen, by women for the mere purpose of getting their expenses paid and a trip to the assize town, sometimes from no conceivable motive whatever. He had in his recollection three cases in that Court in which charges were brought by women against men, in which it was proved without doubt that all those three cases were utterly false and without the slightest foundation. In one of those instances a man was convicted and sentenced to five years' penal servitude, but circumstances appeared in the course of the case which seemed to him to require investigation. Investigation took place, and the result was that the accused was liberated, but not before having been several months in prison. Such instances taught them that in these cases men wanted protection rather than women. He pointed out that it was criminal to be unduly intimate with a girl under sixteen years of age, and remarked that this part of the Act gave rise to charges of an extraordinary character. Calendars were full of them almost at every assize. He referred to a case at Exeter in which men were charged with immorality with girls under sixteen, but who looked quite thirty, remarking that he was afraid that the prosecution was taken by an over-zealous policeman, who thought it pleasant to spend a few days in the autumn at the assizes, in order to relieve him of his ordinary duties. Such cases were extraordinary when it was remembered that the Act made it a defence if the man had reason to believe the girl was over sixteen. Probably when more cases of this description were brought before Courts there might be reason to induce the Legislature to reconsider that branch of the Act.

Les journaux de Paris, annoncent la mort de M. Demolombe, l'éminent professeur et doyen honoraire de la faculté de droit de Caën. M. Demolombe était né à la Fère, en 1804; après avoir fait ses études de droit à Paris, il fut reçu docteur en 1826 ; il jouissait alors déjà d'une brillante réputation parmi ses condisciples et ses professeurs. Dès l'année suivante, M. Demolombe passait, par dispense d'âge, le concours de l'agrégation; il était nommé professeur suppléant à la faculté de Caën. Un nouveau concours, qui eut lieu en 1831, et pour lequel le jeune professeur dut de rechef solliciter la

dispense d'âge, lui valut le titre de professeur et la chaire de code civil à la même Faculté. C'est dans cette chaire qu'il commença à se rendre célèbre en professant les cours qu'il devait plus tard publier. Cet ouvrage, qui fait autorité en jurisprudence, devait comprendre le commentaire de tout le code civil. Commencé en 1845, il fut arrêté en 1879 par suite de l'état de santé de M. Demolombe et repris depuis, sous sa direction, par M. Guillouard, professeur à Caen.

SUPREME COURT OF CANADA.

Ontario.]

OTTAWA, March 1, 1887.

BALL v. THE CROMPTON CORSET Co., et al.

Patent—Infringement of— Mechanical equivalent — Substitution of one material for another.

In a suit for the infringement of a patent, the alleged invention was the substitution in the manufacture of corsets of coiled wire springs, arranged in groups, and in continuous lengths, for India rubber springs previously so used. The advantage claimed by the substitution was that the metal was more durable, and was free from the inconvenience arising from the use of India rubber, caused by the heat from the wearer's body.

Held, affirming the judgment of the Court of Appeal for Ontario, (12 Ont. App. Rep. 738), Fournier and Henry, JJ., dissenting, that this was merely the substitution of one well known material, metal, for another equally well known material, India rubber, to produce the same result, on the same principle, in a more agreeable and useful manner, or a mere mechanical equivalent for the use of India rubber, and it is, consequently, void of invention and not the subject of a patent.

Appeal dismissed.

Cassels, Q.C., and *Akers*, for appellants.

McLellan, Q. C., and *Osler*, Q. C., for respondents.

P. E. Island.]

OTTAWA, March 1, 1887.

SHERREN v. PEARSON.

Statute of limitations—Title to land—Possession for twenty years—Isolated acts of trespass —Not sufficient to effect ouster.

In an action of ejectment, the defence was that the land in question was a part of the defendant's lot, and, if not, that the defendant had had possession of it for over twenty years, and the plaintiff's title was, consequently, barred by the statute of limitations. In support of the latter contention, evidence was given of cutting lumber by the defendant and those through whom he claimed on the land, but these alleged acts of possession only extended back some seventeen years, with one exception, which was that of an uncle of the defendant who swore that he had cut every year for thirty-five years. The defendant, however, swore that this uncle had nothing to do with the land. The jury found for the plaintiff.

Held, affirming the judgment of the Supreme Court of Prince Edward Island, that these acts of cutting lumber were nothing more than isolated acts of trespass on wilderness land, which could not effect an ouster of the true owner and give the defendant a title under the statute of limitations.

Appeal dismissed.

Hodgson, Q.C., for the appellants.

Davies, Q.C., for the respondents.

Ontario.]

OTTAWA, March 14, 1887.

WHITING et al. v. HOVEY et al.

Company—Directors of— Assignment of property by, for benefit of creditors—Ultra vires —Change of possession—R. S. O. ch. 119— Description of property assigned.

An assignment by the directors of a joint stock company of all the estate and property of the company to trustees for the benefit of the creditors of the company, is not *ultra vires* of such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders.

Quære. Is such an assignment within the

provisions of the Chattel Mortgage Act of Ontario, R. S. O. ch. 119?

Where such an assignment was made, and the property was formally handed over by the directors to the trustees, who took possession, and subsequently advertised and sold the property under the deed of assignment:

Held, that if the assignment did come within the terms of the act, its provisions were fully complied with, the deed being duly registered, and there being an actual and continued change of possession as required by section 5. In such deed of assignment, the property was described as "All the real estate, lands, tenements and hereditaments of the said debtors (company) whatsoever and wheresoever, of or to which they are now seized or entitled, or of or to which they may have any estate, right, title or interest of any kind or description with the appurtenances, the particulars of which are more particularly set out in the schedule hereto and all and singular the personal estate and effects, stock in trade, goods, chattels, right and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever, &c." The schedule annexed specifically designated the real estate, and included the foundry erections and buildings thereon erected and including all articles, such as engines &c., in or upon said premises.

Held, that this was a sufficient description of the property intended to be conveyed to satisfy sec. 23 of R. S. O. c. 119. McCall v. Wolff, May 12, 1885, unreported, approved and followed.

Appeal dismissed.

Robinson, Q.C., and *W. M. Hall*, for the appellants.

Dr. McMichael, Q.C., *S. H. Blake, Q.C.*, and *H. McK. Wilson, Q.C.*, for the respondents.

Ontario.]

OTTAWA, March 14, 1887.

SHOOLBRED'S CASE.

Company—Winding up Act—45 V. ch. 23 (D)—Appointment of liquidator under Notice of appointment under sec. 24—Order set aside for want of.

It is a substantial objection to a winding up order appointing a liquidator to the estate of an insolvent company under 45 Vic. cap. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the company, as required by section 24 of the said Act, and an order so made was set aside, and the petition therefor referred back to the judge to be dealt with anew.

Per GWYNNE, J. (dissenting), that such an objection is purely technical and unsubstantial, and should not be allowed to form the subject of an appeal to this Court.

Appeal allowed.

Cassels, Q.C., and *Walker*, for appellants.

Bain, Q.C., for respondents.

Quebec.]

OTTAWA, March 14, 1887.

WILLIAM W. WHEELER et al. (Defendants in the Court below), Appellants, and JOHN BLACK et al. (Plaintiffs in the Court below), Respondents.

Actio confessoria servitutis—Building of barn over alley subject to right of access to drain—Aggravation—Art. 557 C.C.

By deed dated Aug. 22, 1843, P. D. sold to one J. B. a certain property in the town of St. John, P. Q., with the right of draining thec ellar or cellars of the said property "by making and passing a good drain through the lots the said Pierre Dubeau has and possesses . . . . . and beneath the alley now left open," "and between the several houses belonging to the said Pierre Dubeau," and the said deed of sale establishing the said servitude was duly registered by a memorial thereof, October 6, 1843.

The respondents having subsequently acquired said property, by their present action against the appellants, owners of the servient land, prayed that the said appellants' property be declared to have been and to be still subject to said servitude, and that the appellants be ordered to demolish a portion of a large barn, constructed by them over said drain, which, they claim, tended to diminish the use of the servitude and to render its exercise more inconvenient. The

appellants, on the present appeal, contended that inasmuch as the barn was built on wooden posts there was no solid floor in the barn, and the drain could be raised up and repaired just as well, if not better, as outside of the barn, there was no change of condition of the servient land contrary to law.

HELD, affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q.B. 139, that on the evidence the building of the barn in question aggravated the condition of the premises, and therefore that the judgment of the Court below ordering the appellants to demolish a portion of their barn covering the said drain, in order to allow the respondents to repair the drain as easily as they might have done in 1843, when said drain was not covered, and to pay $50 damages, should be affirmed.

GWYNNE, J., was of opinion that all appellants were entitled to was a declaration of right to free access to the land in question for the purpose of making all necessary repairs in the drain as occasion may require, without any impediment or obstruction to their so doing being caused by the barn which had been erected over the drain, and that the action for damages was premature.

Appeal dismissed with costs.

Robertson, *Q.C.*, for appellants.

Geoffrion, *Q.C.*, for respondents.

Quebec.]

OTTAWA, March 14, 1887.

L'ASSOCIATION PHARMACEUTIQUE DE LA PROVINCE DE QUEBEC V. WILFRED E. BRUNET.

Quebec Pharmacy Act, 48 *Vic.* (*Q.*) *ch.* 36, *s.* 8—*Construction of—Partnership contrary to law—Mandamus.*

HELD, affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q. B. 362, that section 8 of 48 Vic. ch. 36 (Q.) which says that all persons who, during five years before the coming into force of the Act, were practising as chemists and druggists in partnership with any other person so practising, are entitled to be registered as licentiates of pharmacy, applies to respondent, who had, during more than five years before the coming into force of said Act, practised as chemist and druggist in partnership with his brother and in his brother's name, and therefore he (respondent), was entitled under section 8 to be registered as a licentiate of pharmacy.

Appeal dismissed with costs.

J. L. Archambault for appellants.

C. A. Geoffrion, *Q.C.*, for respondent.

Quebec.]

OTTAWA, March 14, 1887.

THE CORPORATION OF THE PARISH OF ST. CESAIRE V. MACFARLANE.

Municipal debentures—Conditions—Municipal code, Art. 982.

HELD, affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q. B. 160, that a debenture being a negotiable instrument, a railway company that has complied with all the conditions precedent stated in the by-law to the issuing and delivery of debentures granted by a Municipality is entitled to said debentures, free from any declaration on their face of conditions mentioned in the by-law, to be performed in future, such as the future keeping up of the road.—Art. 982 (Mun. Code) Fournier, J., dissenting.

Appeal dismissed with costs.

C. A. Geoffrion, *Q.C.*, for appellants.

J. O'Halloran, *Q. C.*, for respondent.

Quebec.]

OTTAWA, March 14, 1887.

FAIRBANKS et al., Appellants v. BARLOW et al. (Defendants), and O'HALLORAN (Intervenant) Respondents.

Pledge without delivery—Possession—Rights of creditors.

B, who was the principal owner of the South Eastern Railway Company, was in the habit of mingling the monies of the Company with his own. He bought locomotives which were delivered to and used openly and publicly by the Railway Company as their own property for several years. In January and May, 1883, B, by documents *sous seing privé*, sold ten of these locomotive engines to F et al., the appellants, to guarantee them against an endorsement of his notes for $50,000. B,

having become insolvent, F et al., by their action directed against B, the South Eastern Railway Company and R et al., trustees of the Company under 43 & 44 Vic. ch. 49 Q., asked for the delivery of the locomotives, which were at the time in the open possession of the South Eastern Railway Company, unless the defendants pay the amount of their debt. B. did not plead. The South Eastern Railway Company & R et al., as trustees, pleaded a general denial, and, during the proceedings, O'Halloran filed an intervention, alleging he was a judgment creditor of B, notoriously insolvent at the time of making the agreement.

HELD, affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q. B. 332, that as the transaction with B. only amounted to a pledge not accompanied by delivery, F. et al., the appellants, were not entitled to the possession of the locomotives as against creditors of the Company, and that in any case they were not entitled to the property as against O'Halloran, a judgment creditor of B., an insolvent. The action was therefore rightly dismissed and intervention maintained.

Appeal dismissed with costs.

Church, Q. C., & Nicolls for appellants.

O'Halloran, Q. C., for respondents.

COURT OF QUEEN'S BENCH, MONTREAL.[*]

Prescription—Promissory note—Interruption—Foreign judgment—C. S. L. C., ch. 90.

HELD:—That a judgment obtained in a foreign country upon a promissory note made therein has the effect of interrupting prescription. *Almour & Harris*, Feb. 21, 1884.

Judicial sale of moveables—Irregularities—Nullity—Revendication of thing sold.

HELD:—(Reversing the decision of GILL, J., M. L. R., 2 S. C. 11):—That a judicial sale of moveables may be set aside for irregularities in the proceedings as well as for fraud and collusion; and where a piano not the property of defendant was seized and sold as belonging to him, for an insignificant part of its value, and the owner had no knowledge of such seizure, and it further appeared that there was no bidder at the sale, except the person who purchased the piano, it was held that the sale was a nullity, and that the owner was entitled to revendicate the property. *Nordheimer et al. & Leclaire et al.*, Sept. 21, 1886.

Procédure—Faits nouveaux par réplique—Réméré par créancier du vendeur.

JUGÉ:—1. Qu'un demandeur, qui a produit une contestation à une opposition, peut alléguer par une réplique spéciale à la réponse de l'opposant, un jugement intervenu dans une autre cause entre l'opposant et le débiteur du demandeur contestant, qui règle le litige entre l'opposant et le contestant, lorsque ce jugement a été rendu depuis la production de la contestation, surtout si dans la contestation et la réponse il a été fait allusion à cette autre cause et que l'opposant ne se soit pas plaint en cour inférieure de l'irrégularité de la réplique en en demandant le rejet ou autrement par la procédure écrite;

2. Que le créancier peut exercer la faculté de réméré au lieu et place de son débiteur, et que s'il intervient un jugement entre ce dernier et l'acquéreur d'un immeuble accordant le réméré et fixant le montant payable à l'acquéreur pour obtenir la rétrocession, le créancier bénéficie de tel jugement et peut exercer les droits et se prévaloir des avantages qu'il assure à son débiteur et les opposer à l'acquéreur;

3. Que sous ces circonstances, si l'immeuble a été délaissé par l'acquéreur et vendu en justice et qu'il soit colloqué pour les sommes qu'il a payées, le créancier du vendeur peut faire réduire telle collocation au montant fixé par le jugement accordant le réméré et déterminant la somme que l'acquéreur pouvait exiger avant de parfaire la rétrocession;

4. Qu'en pareil cas, si les deniers devant la cour sont suffisants pour acquitter les réclamations de l'acquéreur, le créancier n'est pas tenu de lui faire des offres de la somme que le vendeur était tenu de lui payer pour obtenir la rétrocession de l'immeuble. *Bouchard & Lajoie*, November 27, 1886.

[*] To appear in Montreal Law Reports, 2 Q. B.

Imputation of payments—C. C. 1159—Account rendered yearly during series of years—Acquiescence.

HELD :—1. Where the credits for each year, in an account current, are in excess of the amount of interest charged for the year, it cannot be pretended that compound interest has been charged, inasmuch as (under C. C. 1159) payments made by a debtor on account are imputed first on the interest.

2. (CROSS, J., *diss.*) Where an account current was rendered each year during a long series of years, charging commissions as well as interest, and the debtor, being pressed to close the account, without formally admitting or denying the right to charge such commissions, continued to remit sums on account, which remittances (if commissions should not have been charged) were more than sufficient to pay the claim, it is a fair inference that the debtor acquiesced in the rate of commissions as charged, and he is obliged to settle the balance of the account on that basis. *Dudley & Darling*, May 26, 1886.

Insolvent Trader—Departure after making assignment—Saisie-arrêt—Privilege of commercial traveller.

HELD :—The fact that an insolvent trader has made a voluntary assignment of his estate, does not justify his departure from the country without the consent of his creditors. It is his duty to be present, in order to give such information as may be required for the realization of his assets, and his departure without explanation is ground for the issue of a *saisie-arrêt* before judgment.

The privilege of a commercial traveller for wages, under C. C. 2006, which was maintained by the Court below (M. L. R., 1 S. C. 191) not determined by the Court of Appeal, but doubted. *Heyneman & Harris*, June 30, 1886.

Promissory note — Evidence — Refusal to send the case back to enquête.

In an action on a promissory note for value received, the Court of appeal will not be disposed, unless for some substantial reason, to send the case back to *enquête*. And so where the defendant was in default to proceed, and finally, after the case had been taken *en délibéré*, wished to examine some witnesses, and the Court below rejected the application, the Court of appeal refused to send the case back, on the ground that the defendant had not shown any substantial grievance. *McGreevy & Senécal*, June 30, 1886.

Compensation—Notes received by Bank for Collection—Insolvency.

HELD :—(Reversing the decision of TORRANCE, J., M. L. R., 1 S. C. 225) :—Where drafts and notes were placed with a bank by a debtor of the bank, not as collateral security, but for collection; that compensation does not take place until the bank has received the amounts collected by them on such notes; and in the present case, the debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the bank and the debt due to it. *Exchange Bank of Canada & Canadian Bank of Commerce*, May 27, 1886.

NEGLIGENCE OF RAILWAY PASSENGERS IN IMMINENT PERIL.

"If I place a man in such a position that he must adopt a perilous alternative, I am responsible for the consequences." This is the rule laid down by Lord Ellenborough, in the leading English case of *Jones* v. *Boyce*,[1] where it appeared that the plaintiff had been on the top of a coach when, in consequence of the horses becoming unruly and unmanageable, there was a real danger that the coach might be upset, and the plaintiff, therefore, jumped off and was thereby injured. And so, in the leading American case of *Stokes* v. *Salstonall*,[2] where it appeared that a passenger had jumped from a stage-coach, fearing that it would overturn, it was laid down that "it is sufficient, if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt one alternative, leap or remain in peril." We find Chief Baron Kelley laying down a like doctrine in *Siner* v. *G. W. Ry. Co.*;[3] and so, in

the Admiralty case of *The Bywell Castle*,[4] where in a collision, the libelled vessel changed her course when "in her very agony," as James, L.J., put it, it was held that, if a ship, by wrong manœuvres, has placed another ship in a position of extreme peril, that other ship will not be held to blame, if in that moment of extreme peril and difficulty she happens to do something wrong, and is not manœuvred with perfect presence of mind, accurate judgment and promptitude, "although," observed Cotton, L.J., those before whom the case comes to be adjudicated, with knowledge of all the facts, are able to see that the course adopted was in fact not the best." As it is put in the American case of *Wesley City Coal Company* v. *Healer*,[5] where a party has given another reasonable cause for alarm, he cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility resulting from the alarm. So, in *Collins* v. *Davidson*,[6] it was said by McCrary, J.: "In the case of sudden and unexpected peril, endangering human life, and causing unnecessary excitement, the law makes allowances for the circumstance that there is but little time for deliberation, and holds a party accountable only for such care as an ordinarily prudent man would have exercised under similar circumstances." But, in a recent case,[7] Bramwell, L. J., objected with much force to such a phrase as "What would a prudent man do?" saying that a prudent man might jump out of a fast train, if he saw imminent danger to his wife or child;[8] and the phrase should be taken to mean, "What would a prudent man do under ordinary circumstances?" The general rule, indeed, seems to be best formulated by Field, J., thus:

"If a person, by a negligent breach of duty, expose a person towards whom the duty is contracted to obvious peril, the act of the latter, in endeavoring to escape peril, although it may be immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrong doer;[9] and this doctrine has we think, been rightly extended in more recent time to 'a grave inconvenience' when the danger to which the passenger is exposed is not in itself obvious."[10]

In such a case, said Lord Ellenborough in *Jones* v. *Boyce*,[11] "the proprietor will be responsible, though the coach was not actually overturned." But an able writer in the October number of the *American Law Register* is perfectly justified in stating that the rule is subject to this limitation,—that it is necessary that the situation of peril in which the plaintiff is placed, in order to make his act while there an excusable error of judgment, must be the result of the negligence of the defendant;[12] and where, therefore, the plaintiff has, by his own negligence, placed himself in a position of known peril, or where the act of the plaintiff causing his injury resulted from a rash apprehension of danger which did not exist, then, although in the excitement and confusion he makes a mistake in his attempt to escape from impending peril, and is exposed to greater danger, the consequences of such mistake cannot be visited upon the defendant, for no degree of presence of mind nor want of it has anything to do with the case, as it was negligence to be there. On this subject, no better illustration could be presented than the Irish case of *Kearney* v. *The Great Southern and Western Railway Co.*, decided in June last by the Queen's Bench Division.

The plaintiff there was a passenger on the defendants' railway from Lismore. At six o'clock, when the train was approaching Castletownroche station, the plaintiff felt a shock, and some pebbles struck the windows of the carriage, and the carriage, as the plaintiff thought, became filled with smoke. A man in the same compartment as the plaintiff looked out of the window, and cried out that the train was on fire. The train was moving very slowly at the time; the plaintiff was greatly frightened, and jumped out of the carriage, and was in consequence injured. It appeared that the coupling rod of the engine had broken, which caused water and steam to issue from the engine, which, it would seem, the plaintiff mistook for smoke. In fact, the carriage was not on fire, nor was the plaintiff, in fact, in any danger, when the accident happened. A brake was put on, and the train had nearly stopped when the plaintiff jumped out. O'Brien, J., who tried the case, was of opinion

that there was no evidence that the injury to the plaintiff was caused by any negligence or default of the defendants, and directed a verdict and judgment to be entered for the defendants. The plaintiff, thereupon, moved to set aside this verdict and judgment, and the question for the Court was, whether the judge was right in the direction he gave. May, C.J., and O'Brien, J., held, that the injury to the plaintiff was not the result of any negligence by the defendants, and that the direction of the trial judge was right; though, of course, as regards the negligence of the defendants, the case would have assumed a different aspect had the railway carriage been in fact overturned in consequence of the defect in the machinery, or the plaintiff injured by the direct consequence of that defect, instead of by reason of rashly jumping out, without inquiry, immediately on hearing the cry of "fire." Johnson, J., agreed in the decision, but without deciding whether there was evidence of negligence on the defendants' part for the jury. But, on the question whether, assuming negligence on the defendants' part, it was by reason thereof the plaintiff sustained the injuries, he thought there was not evidence for the jury of a peril justifying the plaintiff's dangerous act of jumping out of the carriage. And after citing *Jones* v. *Boyce* and *Robson* v. *North Eastern Ry.*, he said: "In the present case there was not, in my opinion, evidence of peril or grave inconvenience within these authorities which ought to have gone to the jury. The coupling-rod of the engine broke; one end pierced the boiler; steam escaped thence, and smoke from the furnace; the train yielded at once to the action of the vacuum brake—was slowed and shortly came to a standstill. It does not appear how the engine-driver and stoker came by the serious injuries they sustained; but no passenger in the train was injured, or (except the plaintiff and the girl O'Connor) even alarmed. These two seem to have been terrified by the cry—a statement of some men being passengers in the same compartment—that the train was on fire. The defendants are not responsible for this cry or statement; it was unfounded, in fact; but the plaintiff, in panic, jumped through the carriage door, which the girl O'Connor had opened, and she was injured. The injuries, however, were, in my opinion, the result of unfortunate rashness, and not of the defendants' negligence. On this ground, therefore, I think the case was rightly withdrawn from the jury."—*Irish Law Times.*

[1] 1 Stark. 402.
[2] 13 Pet. 181.
[3] L. R. 3 Ex. 150.
[4] 4 Pro. D. 219.
[5] 84 Ill. 126.
[6] 19 Fed. Rep. 83.
[7] Lax v. Mayor of Darlington, 5 Ex. D. 28.
[8] See Lloyd v. Hannibal, etc., Ry., 53 Mo. 509.
[9] Jones v. Boyce, *supra*.
[10] Robson v. The North Eastern Ry. Co., L. R. 10 Q. B. 271.
[11] Jones v. Boyce, *supra*.
[12] See the Elizabeth Jones, 112 U. S. 514, 526.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, March 19.

Judicial Abandonments.

George Daroche, trader, St. Mathias, district of St. Hyacinthe, March 10.

Pierre Georges Delisle, printer, Quebec, March 16.

C. E. Dion & Co., traders, Tingwick, March 11.

Myer Myers, Montreal, March 14.

François Xavier St. Laurent, trader, Richmond, March 14.

B. St. Pierre & Co., boot and shoe dealers, Nicolet, March 4.

Curators appointed.

Re Berthiaume & Co., hatters and furriers.—Seath and Daveluy, Montreal, curators, March 3.

Re Rudolph Bouthillier.—C. Desmarteau, Montreal, curator, March 15.

Re James Cullens.—Fulton & Richards, Montreal, curator, March 15.

Re Zelic Davis, cigar manufacturer.—Seath and Daveluy, Montreal, curator, Feb. 25.

Re Melodie Leclaire (A. Amyot & Co).—Henry Ward, Montreal, curator, March 9.

Re Henry Kearney, grocer.—S. C. Fatt, Montreal, curator, March 16.

Re Louis Lamontagne, Ste. Cunégonde.—Seath & Daveluy, Montreal, curator, March 10.

Re Barnett Laurence.—S. C. Fatt, Montreal, curator, Feb. 4.

Re Oliver, Gibb & Co.—J. McD. Hains, Montreal, curator, Feb. 22.

Re Leopold Provencher, Ste. Gertrude.—Kent & Turcotte, Montreal, curator, March 10.

Dividends.

Re Archibald M. Allan.—Final dividend, payable April 10, Kent & Turcotte, Montreal, curator.

Re A. E. Desilets, Three Rivers.—Final dividend, payable April 10, Kent & Turcotte, Montreal, curator.

Re Marie Desautels (J. H. Lamontagne & Co.)—Final dividend, payable April 10, Kent & Turcotte, Montreal, curator.

Re Jane Mayrand (Mrs. Billy).—Final dividend, payable April 10, Kent & Turcotte, Montreal, curator.

Re Angélique Normand (A. Normand & Co.)—Final dividend, payable April 10, Kent & Turcotte, Montreal, curator.

Re Willaim Knowles, tailor.—Dividend, Seath & Daveluy, Montreal, curator.

Re Lecavalier & Frere.—Final dividend, payable April 10, Kent & Turcotte, Montreal, curator.

Re Sanders & Pelletier.—Final dividend, payable April 10, Kent & Turcotte, Montreal, curator.

Separation as to property.

Mary Hoobin vs. Michael Leahy, stevedore, Montreal, March 15.

Helcia Roy vs. Clément Phaucas *dit* Raymond, formerly of Notre Dame du Lac, March 9.

Apoline Tétreault vs. Michel Benoit, laborer, Farnham, March 10.

The Legal News.

VOL. X. APRIL 9, 1887. No. 15.

The Supreme Court of the United States, on the 7th of March, affirmed the decision in *Accident Insurance Co. of N.A.* v. *Crandal*, reported in 9 Leg. News, 137, 138. The law is thus laid down that an insurance against "bodily injuries, effected through external, accidental and violent means," and occasioning death or complete disability to do business, and conditioned not to "extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries," covers a death by hanging oneself while insane. We shall give a report of the case in another issue.

The London *Law Times*, referring to the second reading in the House of Lords of Lord Bramwell's bill to enable prisoners, and the husbands and wives of prisoners, to give evidence on their trial, says:—"We wish the measure all success, for although it will no doubt work unfavorably to criminals as a class, we feel convinced that it will be a boon to innocent persons, and aid materially in unravelling mysteries in which innocent persons are charged with crime. The fifth clause of the bill, to which Lord Esher objects, provides that a prisoner shall not be cross-examined as to any previous convictions. But we fail to appreciate Lord Esher's objection. Evidence from the dock under any circumstances would always be received by a jury with reserve, but the admission by a prisoner of a previous conviction would in nine cases out of ten ruin his chance of acquittal, and completely defeat the object of the act. A prisoner, although innocent of the immediate crime charged against him, would hesitate to give evidence, however important his evidence to his case might be, if he knew that he ran the risk of having to admit a previous conviction."

The Supreme Court of Kansas, in *Union Pacific R. R. Co.* v. *Beatty*, gave their decision in a way which hardly seems fair to the physician who was plaintiff. The question was of considerable interest. A passenger train was thrown from the track by a tornado, and a number of employees and passengers were injured. The division superintendent of the company had ordered the injured persons to be taken into town and to be treated by a certain physician at the company's expense. The physician presented his bill to the company, for services and medicines, for $250, which the general superintendent rejected on the ground that the company was not in fault for the accident, and that he was not employed by the company to attend the injured passengers. He brought suit and recovered judgment, and the railroad company appealed the case. The Supreme Court held, that where passengers are injured through no fault of the company, a contract made by the division superintendent with a physician to give these persons medical attendance and supplies will not be enforced against the company; he is not authorized to bind the company; and that the company in cases where injury to a passenger resulted from unavoidable accident without any fault or negligence on its part, is not responsible for the injuries sustained.

SUPERIOR COURT.

SHERBROOKE, Feb. 28, 1887.

Before BROOKS, J.

MACKENZIE et vir v. WILSON, and MACDONALD et al., and BERNARD, *mis en cause.*

Lessor and Lessee—Prohibition to sublet—C. C. 1638—Waste—Resiliation.

HELD:—*That the clause in a lease providing that the tenant shall not sub-let without the consent of the lessor being first obtained in writing, must be strictly observed.*

PER CURIAM.—This was an action under the Lessor and Lessees Act, accompanied by an attachment *par droit de suite.*

The plaintiffs set up a written lease, *sous seing privé*, of a house and farm of about 30 acres, in the township of Melbourne, from May 1st, 1886, to May 1st, 1887, for the rental of $175.00, payable quarterly, with prohibition

to sub-let, except with the consent of the lessor in writing ; and allege :—

1. That defendant abandoned the premises and sub-let the *house* to the Rev. Bernard without plaintiffs' consent ;

2. That defendant committed waste and damage on the property, particularly by allowing his cattle to roam at will through a large orchard of young trees, whereby damage to the amount of $90 was caused ;

3. That the premises were left insufficiently garnished to secure the rent for the balance of the year. The defendant had paid the rent up to the 1st of Nov. 1886.

The defendant pleads the general issue, and claims that no damage was done, that the orchard was injured prior to his occupancy ; that he had sub-let with plaintiffs' knowledge and consent, had tendered the rent for the balance of the lease before going out, and had left upon the property much more than enough to secure the rent for the rest of the term.

From the voluminous evidence, it appears that the moveables left on the place by defendant, ranged in value from $200 to $800, according to the estimate of different witnesses ; considerably more than the amount sued for, $172.50. The plaintiffs, therefore, fail entirely on this point.

As to sub-letting, our Code, Article 1638, says that the lessee has a right to sub-let or to assign his lease, unless there is a stipulation to the contrary. If there be such a stipulation, it may apply to the whole, or a part only of the premises leased, and in either case it is to be strictly observed.

Is this condition such, that the *writing* is essential, *de rigueur* ?

Lorrain, Code des Locateurs et Locataires, p. 173, No. 457, says :—

" La clause prohibitive de sous-location " stipule ordinairement que le locataire ne " pourra sous-louer *sans le consentement par* " *écrit du locateur*. Il faut rechercher par les " termes de l'acte ou par les circonstances si " la condition de l'écriture est essentielle au " consentement, auquel cas l'écrit serait in- " dispensable pour prouver la consentement " à la sous-location, ou si elle n'est insérée " que par habitude et n'est qu'une forme de " style banale, auquel cas le consentement " même verbal pourrait être prouvé suivant " les règles ordinaires de la preuve." But it is to be observed that this proceeds on the assumption that a consent of some kind has been given.

In the present case, the plaintiff denies that she gave consent, but says that when applied to, which was after the premises were abandoned and she had consulted her attorney, she replied that she had nothing to do with the matter, that it was out of her hands.

The case of *Cordner* v. *Mitchell*, 9 L. C. J., p. 319, is not in point, for there, there was the verbal consent of the plaintiff's agent, and the plaintiff had acquiesced therein during the entire term of the lease, which was held to be equal to a consent in writing. Here the plaintiff denies consent, and even the witness, Mrs. Wilson, does not pretend that plaintiff said anything further than that the Rev. Bernard would make a good tenant. The fact of her having nothing to urge against his desirability as a tenant, is not equivalent to consenting to receive him as such.

The case of *David* v. *Richter*, 12 R. L. 96, was not this case. There the defendant was not to sublet without the consent in writing of the lessor and without his approval of the new tenants. It was held that this was not so absolute as to prevent the Court from considering the motives of the lessor who refused systematically to consent to a subletting and finally put a price upon his consent.

The only question is, is this clause a complete prohibition to sublet? Our Code, Art. 1638, says it is, and when the law says expressly that a clause is *de rigueur*, it requires the most positive proof to establish the contrary.

Marcadé, Vol. 6, (Ed. 1875) under Art. 1717, C. N. says :—

" Mais si le locataire peut ainsi, en prin- " cipe, sous-louer ou même céder son bail, " il se peut aussi que cette faculté lui soit " enlevée par une convention particulière de " ce bail ; et notre article a soin de déclarer " que cette convention, dont on tenait autre- " fois peu de compte dans les baux des " maisons, devra désormais être prise *tou-* " *jours à la rigueur*, c'est a-dire être sérieuse- " ment appliquée par les tribunaux, aussi

"bien dans les baux de maisons que dans "ceux de biens ruraux. Ce n'est là, au surplus, qu'une application du droit commun, "qui veut que toute convention fasse loi "pour ceux qui l'ont souscrite."

This is quoted by the Codifiers as the basis of our article 1638. Sirey (Ed. 1885) Art. 1717, note 24, says, the prohibition to sublet is absolute. See also Mourlon (Ed. 1883) Vol. 3, p. 332 no. 739.

Laurent, (Ed. 1878) Vol. 25, p. 246, no. 219, says:—

"Faut-il l'interpréter à la rigueur de "décider qu'un consentement verbal, ou "manifesté par des faits, serait insuffisant, "alors même qu'il n'y aurait aucun doute "sur la volonté du bailleur?

"Il a encore été jugé que le consentement "verbal du bailleur à la sous-location était "suffisant et que la preuve en pouvait se "faire par les voies ordinaires que la loi "autorise; dans l'espece par des présomptions appuyées sur un commencement de "preuve par écrit."

Here there is no commencement of proof and no verbal consent.

See also Sirey (Ed. 1885), 1717, note 25.

As to the question of waste and damage, the evidence shows clearly that the defendant did not use the premises as he ought to have done, particularly the orchard. Damage to the extent of at least $20, is proved.

Judgment for balance of rent and $20 damages. Lease resiliated and attachment held good.

Hon. H. Aylmer, for plaintiffs.

Lawrence & Morris, Counsel for plaintiffs.

Ives, Brown & French, for defendant.

(H. D. L.)

SUPERIOR COURT.

AYLMER, (district of Ottawa), March 4, 1887.

[In Chambers.]

Before WÜRTELE, J.

DUMAIS, Petitioner, v. FORTIN, Respondent.

Hull, City of—Municipal Election.

HELD:—*That to give a casting vote in case of an equality of votes at a municipal election in the city of Hull, it is not necessary that the president of the election should be qualified as a municipal elector.*

PER CURIAM. A petition was presented a few days ago contesting the election of the respondent as an alderman of the city of Hull, and an application is now made for a day to be fixed for the adduction of evidence and for the subsequent hearing of the case.

The charter provides that the judge shall order proof to be adduced, if he is of opinion that the grounds set forth in the petition are sufficient in law to void the election. This implies a preliminary hearing on the sufficiency of the allegations.

In the present case, various grounds are alleged, such as bribery, furnishing money to pay taxes, giving liquor, providing carriages, that certain electors voted without having paid their taxes, and lastly that the president of the election gave his casting vote while owing arrears of taxes.

After having heard the parties on the sufficiency of these allegations, I am of opinion that all the grounds except the last might be sufficient to annul the election, but that the last is not a cause of nullity.

The first election in the city of Hull was presided by the registrar of the county of Ottawa, and section 14 of the charter provided that in the event of an equality of votes, he should give a casting vote and that he should be entitled to give such casting vote whether or not he was himself qualified to vote.

All municipal elections in the city of Hull, are now presided by one of the aldermen who do not retire from office, appointed by the council; and section 19 of the charter enacts that such alderman, for all purposes relating to elections, should have the same powers as the registrar. Section 205 of the Quebec Election Act, which provides that it shall be the duty of the returning officer in case of an equality of votes, to give a casting vote, has, moreover, been incorporated in the charter, with the substitution of the "president of the election" for the "returning officer."

The duty of giving a casting vote is imposed upon the president of the election, but it is nowhere provided that he must possess all the qualifications of a municipal elector to do so, including the payment of all muni-

cipal and school taxes then due. In fact the very contrary is laid down in the charter itself; and it may happen (and I believe that in the present case it does happen), that the president of the election is not an elector of the ward in which an equality of votes occurs.

The president of the election, like the returning officer in a parliamentary election, does not give the casting vote in the exercise of a franchise, but gives it in the execution of a duty specially imposed upon him by statute. Whoever is qualified to act as the president of an election, is empowered without other qualifications to give a casting vote.

The ground that the president of the election had not paid the taxes due by him previously to the day of the voting is therefore insufficient in law to void the election, and must be rejected.

The judgment was drawn as follows:—

"Parties ouies après examen de la requête en cette cause:

"Considérant que le président de l'élection dans une élection municipale, dans la cité de Hull, donne son vote prépondérant au cas de partage égal des voix en sa qualité de président de l'élection et non comme électeur, et que, partant, il n'y a pas lieu de s'enquérir s'il possède toutes les qualifications nécessaires pour autoriser un électeur à voter;

"Considérant que le fait que Charles Everett Graham, le président de l'élection dont il est question en cette cause, n'aurait pas payé ses taxes municipales ou scolaires lorsqu'il a donné son vote prépondérant en faveur de l'intimé, ne constitue pas une cause de nullité et ne saurait affecter le sort de l'élection;

"Considérant que les autres faits et moyens articulés dans la requête pourraient être suffisants en loi pour faire prononcer la nullité de l'élection de l'intimé dont le pétitionnaire se plaint;

"Nous, soussigné, juge de la Cour Supérieure, renvoyons comme insuffisante et non fondée en loi l'allégation que le vote prépondérant du président de l'élection est nul parce qu'il n'avait pas payé ses taxes et, partant, n'était pas qualifié comme électeur à voter, et nous ordonnons qu'il soit procédé à la preuve des autres faits et moyens articulés dans la requête, jeudi, le dix mars courant, dans la salle d'audience de la Cour Supérieure, au palais de justice, à Aylmer, à onze heures de l'avant-midi, et que l'audition des parties ait lieu immédiatement après la clôture de l'enquête."

Rochon & Champagne for petitioner.

J. M. McDougall, for respondent.

SUPERIOR COURT.

AYLMER, (district of Ottawa,) March 14, 1887.

(In Chambers.)

Before WÜRTELE, J.

MAJOR et vir v. MCCLELLAND.

Tariff of Advocates' Fees—Action dismissed on demurrer.

HELD:—*That the attorney's fee, on an action dismissed on a demurrer, is the same as on an action dismissed on a preliminary plea.*

An application was made in this cause to the judge in chambers, for the revision of the taxation by the Prothonotary of the costs awarded to the defendant on the dismissal of the action. The point submitted was, what fee was a defendant's attorney entitled to when the action was dismissed on a demurrer. The ruling was as follows:—

"Having heard the parties by their counsel upon the application for revision of the taxation of the costs payable by the female plaintiff to the defendant, having examined the proceedings of record, and having deliberated thereon;

"Seeing that the action in this cause was dismissed, after the production of a peremptory exception and plea, but before any proof was made, on a demurrer pleaded by the defendant;

"Seeing that the Prothonotary, by his taxation, has allowed a fee on the action of $50, as if the action had been dismissed after final hearing on a plea to the merits, and that the taxation of such fee is contested by the plaintiffs;

"Considering that by article 21 of the Tariff of Advocates' fees in the Superior Court, a demurrer, in respect of the taxation of fees, is assimilated to declinatory and dilatory exceptions and to exceptions to the

form, or to pleas other than pleas to the merits, and that only the same fee is allowed on a demurrer which is over-ruled as on the dismissal of any such preliminary exception;

"Considering that by article 7 of the tariff, a fee of $25 is allowed to the defendant's attorney, on an action of the first class, when it is dismissed on a plea other than a plea to the merits and without proof having been made;

"Considering that the same rule should and must be applied, in respect to the taxation of costs, to a demurrer, whether it be over-ruled or whether the action be dismissed thereon, and that the same fee only can be allowed on an action dismissed on a demurrer, as on an action dismissed on a preliminary plea, being in the present case $25;

"Considering, however, that in the present case, a plea to the merits other than a demurrer was filed, and that the action was disposed of after the filing of such a plea, which entitles the defendant's attorney to a fee of $30;

"I, the undersigned judge of the Superior Court, do therefore reduce the attorney's fee of $50 to $30, and I do further strike off a fee of $3 erroneously charged for attendance at the putting in of security for costs; and, making such deductions, I do allow and tax the defendant's bill of costs on revision at $62.80."

N. A. Belcourt, for Plaintiffs.
Henry Aylen, for Defendant.

COUR DE CIRCUIT.

MONTREAL, 21 mars 1887.

Coram LORANGER, J.

DESJARDINS v. ROCHON.

Clôture mitoyenne—Droit du propriétaire riverain.

JUGÉ:—*Que lorsque deux propriétaires riverains ont fait une clôture mitoyenne chacun par moitié, un des propriétaires a le droit d'enlever la clôture faite par son voisin pour la remplacer par le mur de sa maison, mais que dans ce cas, il doit remettre la clôture qu'il a enlevée au propriétaire qui l'avait faite, ou lui en payer la valeur.*

Le demandeur réclamait du défendeur $10.00 pour une clôture qu'il avait faite pour clore son terrain et que le défendeur avait enlevée sans droit.

Le défendeur plaida que cette clôture était mitoyenne, et qu'il ne l'avait enlevée que pour bâtir à la place un mur en brique, lequel devait servir de mur de côté à la maison qu'il bâtissait à cet endroit, qu'ainsi le demandeur ne souffrait aucun dommage, qu'au contraire, le mur mitoyen actuel valait beaucoup plus que la clôture enlevée.

La cour décida que bien que la clôture fût mitoyenne et que le défendeur pouvait l'enlever pour construire à la place un mur en brique à l'usage de sa maison, néanmoins, il devait remettre au demandeur sa clôture qu'il avait enlevée, ou lui en payer la valeur. Or, comme dans son plaidoyer il n'offrait pas de remettre cette clôture, le défendeur devait être condamné à en payer la valeur estimée à $9.00.

Jugement pour le demandeur pour $9.00 avec dépens.

Adam et Duhamel, avocats du demandeur.
J. J. Beauchamp, avocat du défendeur.
(J. J. B.)

COURT OF QUEEN'S BENCH, MONTREAL.*

Quo Warranto—C. C. P. 1016—*Jurisdiction of the Courts—Fines.*

Held, 1. Under C. C. P. 1016, any person interested may bring a complaint in the nature of a *quo warranto*, whenever another person usurps, intrudes into, or unlawfully holds or exercises any office in any corporation, or other public body or board; whether such office exists under the common law, or was created in virtue of any statute or ordinance.

2. The jurisdiction of the courts of justice cannot be ousted, save by express words in the statute incorporating such public body, and a mode of appeal provided by the bylaws does not, therefore, deprive the members of their recourse before the ordinary tribunals.

3. The members of such body cannot be deprived of their votes for non-payment of

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* To appear in Montreal Law Reports, 2 Q.B.

fines exigible under the by-laws, without first having had an opportunity to give their reasons why the fines should not be imposed and further, without the fines having been formally pronounced. *Heffernan & Walsh*, Nov. 27, 1886.

Railway—Execution—Seizure of Part.

Held, That a railway cannot be seized and sold in part, even on a judgment by bondholders, except in accordance with the dispositions of the special statute authorizing the creation of the mortgage or hypothec. A railway is an indivisible thing, and can only be sold as a whole. *Stephen et al., & La Banque d'Hochelaga*, Sept. 21, 1886.

SUPERIOR COURT, MONTREAL.*

Promissory note—Endorsers—Agreement between the parties—Evidence.

Held, In an action between parties to a promissory note, that the true intention and agreement of the parties should be carried into effect, the facts and circumstances at the time of the transaction may be established by parol evidence, and it may be shown that an endorser, whose name appears below that of the payee, really endorsed before the latter, as surety for the maker to the payee, although the name of the payee appears on the note as the first endorser. *Deschamps* v. *Leger*, and *Bonhomme*, Torrance, J., Nov. 24, 1886.

Principal and Agent—Revocation of agent's authority—Right to indemnity—Prospective Profits.

Held, That while a mandate, for which no term has been stipulated, is revocable at will, even if the agent be remunerated by a fixed commission, yet the revocation in such case is subject to the obligation on the part of the principal to indemnify the agent for any loss actually suffered by him in consequence of the revocation of his mandate, and that may be seen to have been contemplated at the time the appointment was made.

2. The agent's claim to indemnity, however, cannot be extended so as to include loss of profits in *futuro* after the revocation of his agency, but only such expenditure as he may have made to provide for carrying on the business.

3. In the present case, no proof was made of such expenditure. *Cantlie et al.* v. *The Coaticook Cotton Co.*, Johnson, J., May 26, 1886.

Jury trial—Time for fixing facts for jury—C. C. P. 352—Acquiescence in irregularity—Libel—Error in name of defendant—Amendment by final judgment.

Held, 1. The rule of C. C. P. 352, which says that no trial is fixed until the facts to be inquired into by the jury have been assigned, is one to be strictly followed, and where a motion by plaintiff to reform the assignment of facts was granted after the day for the trial was fixed, this was an irregularity which the defendants were entitled to urge, unless it appeared that no injustice had been caused to them by the error. But in the present case, the defendants had waived their right to object, by acquiescing in proceeding to trial and by consenting that a bystander should serve on the jury, when it appeared that sufficient jurors were not present to form a jury.

2. Where the publisher of a libel was served and ordered (but by a wrong name) to appear, and he appeared in that wrong name, and, without disclosing his correct name, pleaded not guilty, such plea put in issue only the fact of publication and the innuendos, and the verdict rendered by the jury cannot be set aside on the ground that it was founded upon evidence of what was done by another person.

3. The judges of the Superior Court sitting in review, may, by the final judgment, grant the plaintiff's motion to insert the correct name.

4. Misdirection refers to matters of law, and it is not misdirection where the judge presiding at the trial charges the jury to find affirmatively or negatively on a matter of fact.

5. It is not misdirection for the judge to charge the jury that by law they should find the article to have been published falsely and maliciously unless the defendants pleaded

* To appear in Montreal Law Reports, 3 S. C.

and proved the truth of it. *Canada Shipping Co.* v. *Mail Printing and Publishing Co.*, in Review, Sicotte, Johnson, Cimon, JJ., April 30, 1885.

Testamentary executor—Grounds for removal from office—Mala fides and dishonesty —C. C. 917, 282, 285.

Held, That a testamentary executor, whose administration exhibits dishonesty or bad faith, may be removed from office. Dishonesty on the part of the executor is shown in the present case; (*a*) by his placing obstructions in the way of the administration of the estate, in order to favor another estate in which he has a greater interest; (*b*) by concealing from his co-executor a debt due by him to the estate; and (*c*) by his pleading in defence to an action by the estate, that he had been party to an evasion of the law, which plea, if successful, would destroy a security given to the estate. *Mitchell et al.* v. *Mitchell*, in Review, Torrance, Gill, Mathieu, JJ., Nov. 30, 1886.

APPEAL REGISTER—MONTREAL.

Monday, March 21.

Sehlbach & Stevenson.—Heard on merits. C. A.V.

Robillard & Dufaux.—Heard on merits. C. A.V.

Joyce & The City of Montreal.—Heard on merits. C.A.V.

Tuesday, March 22.

Cie. de Navigation de Longueuil & Les Commissaires d'Ecole de Longueuil.—Motion for leave to appeal from interlocutory judgment, rejected.

Lapalme & Barré.—Motion to quash writ of appeal granted. Motion for leave to appeal from interlocutory judgment rejected.

Lanctot & Ryan.—Motion for leave to appeal from interlocutory judgment, rejected.

Leduc & Beauchemin.—Judgment confirmed.

Cooper et al. & McIndoe.—Judgment confirmed. Motion for leave to appeal to Privy Council, granted.

Gifford es qual. & Harvey et al.—Judgment reversed.

Taylor & Gendron.—Judgment confirmed.

Fellows Medical Co. & Lambe es qual.—Motion for substitution granted. Costs reserved.

Lowrey & Routh.—Heard on merits. C.A.V.

Durham Ladies' College & Tucker.—Case settled out of court.

Gilman & Exchange Bank of Canada.—Heard on merits. C.A.V.

Beaudry & Courcelles Chevalier, & Lord et al.—Part heard.

Wednesday, March 23.

The Queen v. *Cole* or *Bowen.* (Two cases).—Heard on reserved case. C.A.V.

Dorion & Dorion.—Heard on motion for leave to appeal from interlocutory judgment. C.A.V.

Beaudry & Courcelles Chevalier, & Lord et al.—Hearing on merits concluded. C.A.V.

Ross & Brulé.—Heard. C.A.V.

Thursday, March 24.

Allan & Merchants Marine Ins. Co.—Motion for dismissal of appeal, granted for costs.

Massue & Corporation St. Aimé.—Heard. C.A.V.

Primeau & Giles.—Heard. C.A.V.

Giles & Jacques.—Heard. C.A.V.

Saturday, March 26.

The Queen v. *Cole* or *Bowen.* (Two cases).—Conviction maintained.

Cie de Navigation de Longueuil & Cité de Montréal, & Taillon, Atty. Gen.—Judgment confirmed, Cross, J., diss.

Lebeau & Poitras.—Judgment reversed, each party paying his own costs in all the courts.

Canadian Pacific Railway Co. & McRae.—Judgment confirmed.

Robillard & Dufaux.—Appeal dismissed without costs.

Mail Printing Co. & Canada Shipping Co.—Judgment confirmed.

Fraser & McTavish.—Motion for leave to appeal from interlocutory judgment. C.A.V.

Judah & Boxer.—Motion for leave to appeal from interlocutory judgment. C.A.V.

Charbonneau & Charbonneau.—Appeal dismissed, no proceedings being taken within the year.

Jodoin & Lanthier, & Jodoin et al.—Petition for *reprise d'instance* granted.

Ryan & Sanche.—Motion for leave to appeal from interlocutory judgment. C.A.V.

Monday, March 28.

Dorion & Dorion.—Motion for leave to appeal from interlocutory judgment granted.

Fraser & McTavish.—Similar motion granted.

Ryan & Sanche.—Similar motion granted.

Judah & Boxer.—Motion for leave to appeal from interlocutory judgment rejected.

Mail Printing Co. & Laflamme.—Motion for dismissal of appeal granted for costs.

Allan & Pratt.—Heard on motion for leave to appeal to Privy Council. C.A.V.

Murray & Burland.—Heard on motion to dismiss appeal. C.A.V.

Ritchie & Tourville.—Heard on merits. C. A.V.

Nadeau & Cheval St. Jacques.—Heard. Appeal dismissed without costs.

Wheeler & Dupaul.—Heard on merits. C. A.V.

Tuesday, March 29.

Murray & Burland.—Security declared insufficient. New security ordered.

Allan & Pratt.—Motion for leave to appeal to Privy Council granted.

The Bradstreet Company & Carsley et al.—Heard on merits. C.A.V.

The Bradstreet Company & Carsley.—Heard on merits. C.A.V.

The Court was adjourned to Monday, May 16, 1887.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, March 26.

Judicial Abandonments.

Ferdinand Jobin, Quebec, Feb. 21.

Curators appointed.

Re Charles E. Fournier.—Kent & Turcotte, Montreal, curator, March 22.

Re Ferdinand Jobin.—E. Begin, Quebec, curator, March 12.

Re T. Monpas, St. Pierre.—Kent & Turcotte, Montreal, curator, March 19.

Re Myer Myers.—W. A. Caldwell, Montreal, curator, March 23.

Re Henry D. Somerville.—S. Boyd and W. S. Maclaren, Huntingdon, curators, Feb. 10.

Re Joseph G. Yon.—C. Desmarteau, Montreal, curator, March 22.

Dividends.

Re Edward Carbray.—First and final dividend, payable April 10. C. Desmarteau, Montreal, curator.

Re Victor L. Coté.—Special dividend, payable April 12, Kent & Turcotte, Montreal, curator.

Re C. H. Dougall & Bro.—Dividend, Seath & Daveluy, Montreal, curator.

Re John McLean, Murray Bay.—First and final dividend, payable April 7, H. A. Bedard, Quebec, curator.

Re Pinkerton & Turner.—First dividend, payable April 13, A. W. Stevenson, Montreal, curator.

Re Renaud & Desjardins.—First and final dividend, payable April 10, C. Desmarteau, Montreal, curator.

Re John O'Neil.—First and final dividend, payable April 13, A. W. Stevenson, Montreal, curator.

Re Milton Pennington.—First and final dividend, payable April 13, A. W. Stevenson, Montreal, curator.

Re C. T. Picard.—Dividend, A. D. Parent and G. Daveluy, Montreal, curator.

Separation as to property.

Léda Aubé vs. Cléophas Méthot, farmer, St. Jean Port Joli, district of Montmagny, January 24.

Cadastre.

Cadastre for County of Brome deposited, April 1st.

Quebec Official Gazette, April 2.

Judicial Abandonments.

Emile Guenette, St. Hyacinthe, March 26.

Hubert Pronovost, general store-keeper, St. Félicien, April 1.

J. A. Rolland & Co., manufacturers, Montreal, March 30.

Eutrope Rousseau, dry goods merchant, Quebec, March 29.

Curators appointed.

Re Louis Béland, Sorel.—Kent & Turcotte, Montreal, curator, March 3.

Re George Darche, St. Mathias.—Kent & Turcotte, Montreal, curator, March 24.

Re C. E. Dion & Co., traders, Tingwick.—H. A. Bedard, Quebec, curator, March 31.

Re A. Labbée & Co.—G. Piché, Montreal, curator, March 28.

Re B. St. Pierre & Co., boot and shoe dealers, Nicolet.—C. A. Sylvestre, Nicolet, curator, March 24.

Re Charles A. St. Pierre, grocer, Rimouski.—E Begin, Quebec, curator, Dec. 2.

Dividends.

Re Arsène Bournival, St. Paulin—Final dividend, payable April 20, Kent & Turcotte, Montreal, curator.

Re Alphonse Labelle.—First and final dividend, payable April 18, C. Desmarteau, Montreal, curator.

Re Z. Simard, Rimouski.—Second and final dividend, payable April 20, Kent & Turcotte, Montreal, curator.

Re The Bolton Veneer Company.—First and final dividend, payable April 13, A. W. Stevenson, Montreal, curator.

Separation as to property.

Honora Emard *dit* Poitevin vs. Joseph Thibault clerk, Montreal, Nov. 24.

Anastasie Tétreault vs. François Xavier Poulin, jr. heretofore of St. Grégoire le Grand, March 31.

APPOINTMENTS.

Wm. H. Webb, advocate, Melbourne, to be sheriff of the district of St. Francis.

The Legal News.

VOL. X. APRIL 16, 1887. No. 16.

LE SECRET DES LETTRES.

La conférence des avocats, en France, a été saisie de cette question :

" Le mari a-t-il le droit d'ouvrir les lettres adressées à sa femme ? "

La conférence a répondu affirmativement. Cela occupe depuis quelques jours toute la presse française.

La lettre suivante a été adressée au directeur d'un journal par M. Allou, sénateur, ancien bâtonnier de l'ordre des avocats :

Vous me demandez une consultation sur la question à la mode : Le mari a-t-il le droit de décacheter les lettres adressées à sa femme ou écrites par elle ?

La réponse me semble facile.

Dans le cours ordinaire de la vie, les lettres destinées à la femme lui sont remises directement, elle les ouvre. Si le ménage est un peu solennel et guindé, la femme rend tout simplement compte à son mari de ce qu'elles contiennent, si les relations sont délicates et affectueuses, la femme passe les lettres, tout ouvertes, à celui pour lequel elle n'a pas de secrets. Quant aux lettres expédiées par la femme les choses se passent absolument de même.

Mais aux heures de crise, lorsque naissent les noirs soupçons, même les simples inquiétudes, le mari peut-il s'emparer des lettres de sa femme ? La question est singulière à poser en théorie. C'est le fait brutal qui la tranchera toujours : les tiroirs seront forcés, le buvard sera fouillé, les serrures voleront en l'air, la femme de chambre sera contrainte de livrer la lettre qu'elle emporte. Il n'y a pas de règle qui tienne. Mais enfin le mari, puisqu'on veut raisonner, a-t-il le droit de se comporter ainsi ?

Incontestablement oui.

La puissance maritale, qui est le fondement nécessaire de l'association conjugale, est bien là dans sa sphère. Elle comporte le contrôle de la conduite de la femme, et l'examen de la correspondance est une des formes naturelles, légitimes, de ce contrôle. Si l'acte violent du mari est justifié par la lecture d'une lettre saisie, de quoi se plaindrait la femme ? S'il ne l'est pas, de quoi se plaindrait-elle encore, en présence du mari confus et d'un entraînement qui n'est qu'une forme de la tendresse et de la jalousie ?

La question s'est plus d'une fois posée juridiquement, dans les procès de séparation de corps. La femme a voulu souvent arguer du droit du destinataire d'une lettre et en rester seul propriétaire, en s'opposant à ce que lecture fut donnée, en justice, de lettres par elle reçues ou par elle écrites, les tribunaux ont toujours reconnu et affirmé, à titre d'exception des règles générales de la propriété en matière de correspondance, que le droit du mari était complet et qu'il n'y pouvait pas être apporté d'obstacles.

Voilà, il me semble, à quels termes se ramène ce grave problème, où l'on risque de rencontrer, à peu près unanimement, les femmes d'un côté et les maris de l'autre : mais je crois que c'est du côté des maris qu'est la vérité et le droit; avec le tempérament, bien entendu, du tact, de la mesure, du bon goût, s'il y a encore un peu de place pour tout cela dans la vie d'aujourd'hui.

COMMUNICATIONS ÉCHANGÉES ENTRE UN AVOCAT ET SON CLIENT.

M. le procureur général près la Cour d'appel de Rennes s'est pourvu devant la Cour contre une décision rendue par le Conseil de l'ordre des avocats d'un des tribunaux du ressort, dans des circonstances particulièrement intéressantes.

M. X.. plaida il y a quelques années une affaire devant le Tribunal de Z.. et la perdit. Cela arrive.

Il écrivit donc à son client pour lui apprendre la fâcheuse issue du procès, et, en son bon droit ayant toujours confiance, n'hésita pas à mettre en doute l'impartialité du président du Tribunal.

" Le président, écrivait-il, ne dédaigne pas, vous le savez, les bénéfices acquis dans le négoce. Il est en relations d'affaires avec votre adversaire ; il eût été surprenant qu'il ne lui donnât pas raison ! "

Plusieurs années s'étaient écoulées, et M. X.. avait oublié les amertumes de sa cause perdue, lorsque son client trépassa.

M. X.. en fut affligé et il était près de s'en consoler quand il apprit des choses singulières.

Le notaire chargé de l'inventaire des biens du feu client avait trouvé la lettre écrite jadis par M. X.., et mû par un inappréciable sentiment, s'était empressé de l'aller remettre entre les mains du président incriminé.

Celui-ci la communiqua aussitôt au parquet sur la plainte duquel M. X.. fut traduit devant l'ordre des avocats de Z.., qui déclara que le caractère confidentiel de la lettre mettait son auteur en dehors de tout blâme ou de toute peine disciplinaire.

Le parquet de première instance interjeta appel contre cette décision et l'affaire venait jeudi 7 mars devant la Cour d'appel de Rennes toutes chambres réunies.

L'arrêt de la Cour, que nous publierons prochainement, a confirmé la décision du Conseil de l'ordre.

D'autre part, Me X...., estimant sans doute que seul le triomphe complet est un triomphe, a assigné le notaire en dommages-intérêts devant le Tribunal civil.—*Gaz. du Pal.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, Feb. 7, 1880.

Before SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

GOLDRING v. LA BANQUE D'HOCHELAGA.

Capias—C. C. P. 822—Appeal to Privy Council.

HELD :—*Where a defendant has appealed to the Court of Queen's Bench (under Art. 822 C. C. P.) from a judgment rejecting his application to be discharged from custody under a writ of capias, that the judgment of the Court of Queen's Bench on such appeal is in the nature of an interlocutory order, and an appeal does not lie therefrom to Her Majesty in Her Privy Council.*

The following judgment was delivered by the Lords of the Judicial Committee of the Privy Council, on the petition for leave to rescind the order granting leave to appeal from the judgment of the Court of Queen's Bench, Montreal, reported in 2 Leg. News, p. 232. (The decision of their lordships was briefly noticed in 3 Leg. News, p. 49.)

PER CURIAM. Their lordships, upon the best consideration they can give to this case, are of opinion that it is not one in which it was competent to the Court of Queen's Bench to grant the leave to appeal. The 1178th Article of the Code of Procedure is precise, that an appeal lies to Her Majesty in Her Privy Council from final judgments rendered in appeal or error by the Court of Queen's Bench. Then it gives the cases in which the appeal is allowed. There is no express provision for the allowance of such an appeal from an interlocutory order. The argument in support of the order of the Court has proceeded chiefly upon Art. 822 of the same Code, which is one of those which relate to procedure in respect of writs of capias. That article appears to their lordships clearly to imply that the decisions to which it relates are no more than interlocutory orders. If the decision of the Superior Court on the matter therein referred to had been regarded as a final judgment, there would have been no necessity to give by this article special leave to appeal, because it would have been appealable under Art. 1115, as pointed out by Mr. Digby. The real object of the article is to make special provision for an appeal to the Court of Queen's Bench from an interlocutory order of a particular kind. The Code gives by Art. 1116 an appeal against certain other interlocutory judgments, but in these cases Art. 1119 provides that there must be a preliminary motion before the Appellate Court, in order that that court may decide whether the particular judgment falls properly within the terms of Art. 1116. But an appeal from an interlocutory judgment under Art. 822 was not to be subject to that provision, and hence the necessity for that article.

The judgment of the Court of Queen's Bench upon a judgment of the Superior Court in this matter, cannot be regarded as a final judgment within the meaning of Art. 1178, unless it can be shown that proceedings

under the provisions of Art. 796 and the subsequent Articles of the Code which relate to the particular subject of *capias ad respondendum*, are so severed from the general suit that they are to be treated as something separate in their nature, and not as incident to the suit. Their lordships are of opinion that the Code has not expressed that they are to be so treated, and that from their nature they are merely incidental to the suit and in the nature of process therein. They are, therefore, of opinion that the judgment of the Queen's Bench, which is the subject of this appeal, is not a final judgment within the meaning of the Code, and consequently that the appeal has not been regularly brought before Her Majesty in Council.

It has been suggested that their lordships may now recommend Her Majesty to grant, as they have unquestionably power to do, special leave to appeal; but they are of opinion that there are not before them sufficient grounds for making such a recommendation. They, therefore, think that the prayer of this petition must be granted; but, considering that the point is novel, and that the Court of Queen's Bench has seen fit to allow this appeal, they do not think it is a case for costs. Their lordships will, therefore, humbly advise Her Majesty accordingly.

COUR DE CIRCUIT.

ARTHABASKA, 24 février 1887.

Coram PLAMONDON, J.

LA CORPORATION DE LA PAROISSE DE ST-FORTUNAT DE WOLFESTOWN v. RAINVILLE, et LAPIERRE et al., tiers-opposants.

Art. 1067 C.M.—Homologation d'un procès-verbal par le Bureau des délégués—Appel à la Cour de Circuit—Mis en cause des requérants—Tierce-opposition.

JUGÉ:—*Que sur l'appel d'une décision d'un bureau de délégués homologuant un procès-verbal, tous les requérants au procès-verbal doivent être mis en cause, à défaut de quoi un jugement de la Cour de Circuit, cassant tel procès-verbal sera déclaré nul et le procès-verbal maintenu avec dépens contre les appelants sur la production d'une tierce opposition par les requérants, même si plusieurs d'entre eux ont déjà donné un commencement d'exécution au jugement ainsi rendu.*

En 1885, environ quarante contribuables de St-Fortunat, comté de Wolfe, et de Chester-Est, comté d'Arthabaska, demandèrent par requête, au conseil de comté d'Arthabaska, l'ouverture d'un chemin de six milles de longueur, entre ces deux municipalités, afin de faciliter des communications jusqu'alors presqu'impossibles.

Le surintendant fit un rapport ou procès-verbal favorable, qui fut homologué par un bureau de délégués des deux comtés intéressés, ordonnant l'ouverture du chemin aux dépens des corporations municipales de St-Fortunat et de Chester-Est.

Celles-ci se pourvurent en appel devant la Cour de Circuit d'Arthabaska, se contentant de faire signifier leur bref d'appel au secrétaire du bureau des délégués et aux secrétaires des deux comtés, sans mettre chacun des intéressés en cause personnellement.

Il en résulta un jugement de la Cour cassant le procès-verbal homologué par le bureau des délégués avec dépens contre les requérants qui se trouvaient ainsi à perdre leur chemin et à payer des frais considérables.

Enfin, après plusieurs mois pendant lesquels certains requérants avaient payé leur part de frais, tous se pourvurent contre les municipalités appelantes, par voie de tierce-opposition, alléguant qu'en vertu de l'article 1067 du Code Municipal, le procès-verbal homologué par les délégués n'aurait pas dû être cassé sans que tous les intéressés eussent été individuellement mis en cause par la signification du bref d'appel, et que par conséquent ce jugement devait être annulé et l'ouverture du chemin ordonné de nouveau.

C'est précisément ce que la Cour de Circuit d'Arthabaska vient de décider en maintenant cette tierce-opposition avec dépens contre les municipalités.

J. H. N. Richard, avocat des tiers-opposants.

Laurier & Lavergne, avocats des municipalités.

(J. J. B.)

SUPERIOR COURT—MONTREAL.*

Father and children—Maintenance—Fault of father—C. C. 166.

Held, That the obligation of children to maintain their father, mother and other ascendants who are in want (C. C. 166), does not cease when the necessitous condition of the parent is caused by his own fault. The intemperance of an aged father does not constitute a valid ground for refusing to maintain him. *Arless* v. *Arless et al.*, In Review, Johnson, Gill, Loranger, JJ., Jan. 31, 1887.

Obligation with term—Loan of money at interest—C. C. 1091.

Held, Where money is loaned at interest, the term is presumed to be stipulated in favor of the creditor as well as of the debtor. *Ouimet* v. *Ménard*, in Review, Johnson, Papineau, Loranger, JJ., June 12, 1886.

COURT OF QUEEN'S BENCH—MONTREAL.†

Master and Servant—Personal Injuries—Negligence of Foreman.

The plaintiff (respondent) was employed in one of two gangs of men who were engaged in discharging defendant's steamship. After the gang to which plaintiff belonged had been dismissed for lunch, the foreman of the other gang called for volunteers to assist in removing a heavy iron girder. The respondent volunteered, and while assisting, was injured in consequence of the girder toppling over. The accident was attributable to the negligence of the foreman in charge.

Held, (affirming the decision of TORRANCE, J.) 1. That masters and employers are responsible for the fault and negligence of the foreman placed in authority by them, whether the damage be caused to a fellow servant or not.

2. The fact that the plaintiff, while in the employment of the defendants, volunteered for the particular service in which he was engaged when injured, does not relieve the employer from responsibility. *Allan et al.*, appellants, and *Pratt*, respond., March 18, '87.

* To appear in Montreal Law Reports, 3 S. C.

† To appear in Montreal Law Reports, 3 Q. B.

SUPREME COURT OF THE UNITED STATES.

March 7, 1887.

ACCIDENT INSURANCE COMPANY OF NORTH AMERICA v. CRANDAL.

Insurance—Accident—Suicide when insane.

An insurance against "bodily injuries, effected through external, accidental and violent means," and occasioning death or complete disability to do business, and conditioned not to "extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries," covers a death by hanging oneself while insane.

In error to the Circuit Court of the United States for the Northern District of Illinois. (See 9 Legal News, 138.)

This was an action against an accident insurance company upon a policy beginning thus: "In consideration of the warranties made in the application for this insurance, and of the sum of fifty dollars, this company hereby insures Edward M. Crandal, by occupation, profession or employment a president of the Crandal Manufacturing Company," in the sum of ten thousand dollars, for twelve months, ending May 23, 1885, payable to his wife, the original plaintiff, "within thirty days after sufficient proof that the insured at any time within the continuance of this policy shall have sustained bodily injuries, effected through external, accidental and violent means within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof, or the insured shall sustain bodily injuries by means as aforesaid, which shall, independently of all other causes immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then on satisfactory proof of such injuries, he shall be indemnified against loss of time caused thereby in the sum of fifty dollars per week for such period of continuous total disability as shall immediately follow the accident and injuries

as aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident."

Then followed certain conditions, the material part of which was as follows: "Provided always that this insurance shall not extend to hernia nor to any bodily injury of which there shall be no external and visible sign; nor to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment; and no claim shall be made under this policy when the death or injury may have been caused by duelling, fighting, wrestling, unnecessary lifting, or by over-exertion, or by suicide, or by freezing, or sunstroke, or self-inflicted injuries."

The application was signed by the assured, and began as follows: "The undersigned hereby applies for a policy of insurance against bodily injuries effected through external and accidental violence, said policy to be based upon the following statement of facts, which I hereby warrant to be true."

The rest of the application consisted of fifteen numbered paragraphs, stating the name, age, residence and occupation of the applicant, the amount, term and payee of the policy applied for; affirming that he had never been "subject to fits, disorders of the brain, or any bodily or mental infirmity," that he had not "in contemplation any special journey or any hazardous undertaking," and that "his habits of life are correct and temperate;" and expressing his understanding of the effect of the insurance in several particulars, the last of which was as follows:

"15. I am aware that this insurance will not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to death or disability caused wholly or in part by bodily infirmities or by disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor in any case except when the accidental injury shall be the proximate and sole cause of disability or death."

The assured died July 7, 1884; and the plaintiff soon afterward gave to the defendant written notice and proofs of the death, which stated that the assured, while temporarily insane, hanged himself with a pair of suspenders attached to a door-knob in his bed-room. At the trial, the plaintiff introduced evidence that the death of the assured was caused by strangulation from his so hanging himself; and against the defendant's objection and exception, was permitted to introduce evidence tending to show that he was insane at the time. At the close of the plaintiff's evidence, the defendant moved the court to instruct the jury that under the law and the evidence in the case the plaintiff was not entitled to recover. The court over-ruled the motion, and the defendant excepted. The defendant then introduced evidence, and the case was argued to the jury.

The jury, under instructions to which no exception was taken, and in answer to specific questions from the court, returned a special verdict that Edward M. Crandal made the application; that the defendant issued the policy; that the premiums were fully paid, and the policy was in force at the time of his death; that he hanged himself on July 7, 1884, and thereof died on the same day; that he was insane at the time of his act of self-destruction; that due notice and proof of death were given to the defendant; and according to what, upon these facts, the opinion of the court in matter of law might be, found for the plaintiff in the full amount of the policy, or for the defendant. The court overruled a motion for a new trial, and rendered judgment on the verdict for the plaintiff. 27 Fed. Rep. 40. The defendant sued out this writ of error.

GRAY, J. (After stating the case as above reported). The refusal of the court to instruct the jury, at the close of the plaintiff's evidence, that she was not entitled to recover, cannot be assigned for error, because the defendant at the time of requesting such an instruction had not rested its case, but afterward went on and introduced evidence in its own behalf. *Grand Trunk Ry. Co.* v. *Cummings*, 106 U. S. 700; *Bradley* v. *Poole*, 98 Mass. 169. The subsequent instructions to

the jury were not excepted to. No error is assigned in the previous rulings upon evidence, except in the admission, against the defendant's objection and exception, of evidence tending to prove the insanity of the assured. The only other matter upon this record is whether the judgment for the plaintiff is supported by the special verdict, which finds, that while the policy was in force, the assured died by hanging himself, being at the time insane, and that due notice and proof of death were afterward given.

The single question to be decided therefore is whether a policy of insurance against "bodily injuries effected through external, accidental and violent means," and occasioning death or complete disability to do business; and providing that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries;" covers a death by hanging oneself while insane.

The decisions upon the effect of a policy of life insurance, which provides that it shall be void if the assured "shall die by suicide," or "shall die by his own hand," go far toward determining this question. This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words "sane or insane," does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect. *Life Ins. Co.* v. *Terry*, 15 Wall. 580; *Bigelow* v. *Berkshire Ins. Co.* 93 U. S. 284; *Insurance Co.* v. *Rodel*, 95 id. 232; *Manhattan Ins. Co.* v. *Broughton*, 109 id. 121.

In the last case, which was one in which the assured hanged himself while insane, the court, repeating the words used by Mr. Justice Nelson, when chief justice of New York, said that "self-destruction by a fellow being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose," and "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical force." 109 U. S. 132; *Breasted* v. *Farmers Loan & Trust Co.*, 4 Hill, 73.

In a like case, Vice Chancellor Wood (since Lord Chancellor Hatherley) observed that the deceased was "subject to that which is really just as much an accident as if he had fallen from the top of a house." *Horn* v. *Anglo-Australian Ins. Co*, 30 L. J. (N. S.) Ch. 511; S. C., 7 Jur. (N. S.) 673. And in another case, Chief Justice Appleton said that "the insane suicide no more dies by his own hand than the suicide by mistake or accident," and that under such a policy "death by the hands of the insured, whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule." *Easterbrook* v. *Union Ins. Co.*, 54 Me. 224, 227, 229.

Many of the cases cited for the plaintiff in error are inconsistent with the settled law of this court, as shown by the decisions above mentioned.

In this state of the law there can be no doubt that the assured did not die "by suicide," within the meaning of this policy; and the same reasons are conclusive against holding that he died by "self-inflicted injuries." If self-killing, "suicide," "dying by his own hand," cannot be predicated of an insane person, no more can "self-inflicted injuries;" for in either case it was not his act.

Nor does the case come within the clause which provides that the insurance shall not extend to "death or disability which may have been caused wholly or in part by bodily infirmities or disease."

If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or any thing but the act of hanging himself, could be held to be the cause of his death. *Scheffer* v. *Railroad Co.*, 105 U. S. 249, 252; *Trew* v. *Railway Passengers' Assurance Co.*, 5 H. & N. 211, and 6 id. 839, 845; *Reynolds* v. *Accidental Ins. Co.*, 22 L. T. (N. S.) 820; *Winspear* v. *Accident Ins. Co.*, 42 id. 900; affirmed, 6 Q. B. Div. 42; *Lawrence* v. *Accidental Ins. Co.*, 7 id. 216, 221;

Scheiderer v. *Travellers' Ins. Co.*, 58 Wis. 13.

But the words "bodily infirmities or disease" do not include insanity. Although, as suggested by Mr. Justice Hunt in *Life Ins. Co.* v. *Terry*, 15 Wall. 589, insanity or unsoundness of mind often, if not always, is accompanied by or results from disease of the body, still in the common speech of mankind, mental are distinguished from bodily diseases. In the phrase "bodily infirmities or disease" the word "bodily" grammatically applies to "disease" as well as to "infirmities;" and it cannot but be so applied without disregarding the fundamental rule of interpretation, that policies of insurance are to be construed most strongly against the insurers who frame them. The prefix of "bodily" hardly affects the meaning of "infirmities," and it is difficult to conjecture any purpose in inserting it in this provision, other than to exclude mental disease from the enumeration of the causes of death or disability to which the insurance does not extend.

In the argument for the plaintiff in error some stress was laid on the fact that the concluding paragraph of the application differs in form of expression, so as to include mental as well as bodily diseases. It is by no means clear that this is so, but if it were, it would not affect the case. The whole application is not made part of the contract, and the only mention of it in the policy is in the opening words: "In consideration of the warranties made in the application for this insurance." This does not include all the statements in the application, but only those which are warranties. Some of them may be; others clearly are not. The statements as to the age, occupation, previous state of health and present habits of the assured, and as to his other insurance, may be warranties on his part. Those as to the amount, terms and payee of the policy applied for, certainly are not. The statements expressing his understanding of what will be the effect of the insurance are statements not of fact, but of law, and cannot control the legal construction of the policy afterward issued and accepted.

The death of the assured not having been the effect of any cause specified in the proviso of the policy, and not coming within any warranty in the application, the question recurs whether it is within the general words of the leading sentence of the policy, by which he is declared to be insured "against bodily injuries effected through external, accidental and violent means." This sentence does not, like the proviso, speak of what the injury is "caused by;" but it looks only to the "means" by which it is effected. No one doubts that hanging is a violent means of death. As it affects the body from without, it is external, just as suffocation by drowning was held to be in the cases of *Trew*, *Reynolds* and *Winspear*, above cited. And according to the decisions as to suicide under policies of life insurance, before referred to, it cannot, when done by an insane person, be held to be other than accidental.

The result is that the judgment of the Circuit Court in favor of the plaintiff was correct, and must be affirmed.

DOMINION APPOINTMENTS.

Queen's Counsel.

Malcolm MacLeod; John Ramsay Fleming; Frederick Thomas Judah; Augustus Barthélemi Cressé; Wilfrid Prévost; Joseph Duhamel; Louis Wilfrid Marchand; John Kennedy Elliott; Ernest Racicot; John L. Morris; L. A. Billy; Edouard Lefebvre de Bellefeuille; Charles Narcisse Hamel; Adolphe Fontaine; Alfred N. Charland; Louis Nathan Benjamin; François Xavier Archambault; Leonidas Heber Davidson; William Wilson; Joseph L. Terrill; Christopher Alphonse Geoffrion; Thomas Page Butler; Olivier M. Augé; John Cassie Hatton; Augustus Power; Charles Pentland; Louis Edouard Panneton; John Spratt Archibald; Henry B. Brown; Joseph Louis Archambault; Charles Darveau; Isidore Noël Belleau; François Xavier Drouin; Thomas Linière Taschereau; Hon. Charles L. Champagne; Edmund James Flynn; Joseph Moise Désilets; Hon. Elzéar Gérin; John S. Hall, Jr.; Pascal Vinceslas Taché; François J. Bisaillon; Charles J. Doherty; Thomas Chase Casgrain; Harry Abbott; C. A. Cornellier.

Speaker of Senate.

Hon. Josiah Burr Plumb, to be Speaker of the Senate.

INSOLVENT NOTICES, ETC.,

Quebec Official Gazette, April 9.

Judicial Abandonments.

Joseph Barnabé Leduc, trader, Pointe-aux-Trembles, April 1.

Max Kert, storekeeper, Buckingham, April 2.

Robert Mauger, trader, Ste. Adelaide de Pabos, March 26.

John Street, Montreal, March 31.

Félix Vachon, trader, l'Islet, April 2.

Curators appointed.

Re Louis Carpentier, Sorel.—Kent & Turcotte, Montreal, curator, April 6.

Re Emile Guenette, St. Hyacinthe.—Kent & Turcotte, Montreal, curator, April 4.

Re Duncan King, district of Ottawa.—J. H. Ireland, Montreal, and J. Kavanagh, Ottawa, curators, April 22, 1886.

Dividends.

Re L. J. O. Brunelle.—Dividend, payable April 27, P. E. Panneton, Three Rivers, curator.

Re Patrick Lynch, trader, St. Etienne de Beauharnois.—Dividend, payable May 9, D. Seath, Montreal, curator.

Re G. E. Robitaille, Sherbrooke.—First dividend, payable April 21, H. A. Bédard, curator.

Separation as to property.

Catherine Alix vs. Eloi Guilmette, St. Césaire. March 3.

Marie Elmire Turcotte vs. Napoléon Charette, laborer, Montreal, April 5.

GENERAL NOTES.

All who know Judge Bleckley and recall his long waving hair and beard will appreciate this story: He was on his way to the Supreme Court one morning, when he was accosted by a little street gamin, with an exceedingly dirty face, with a customary "Shine, sir?" He was quite importunate, and the judge, being impressed with the oppressive untidiness of the boy's face, said: "I don't want a shine, but if you will go wash your face I will give you a dime." "All right, sir." "Well, let me see you do it." The boy went over to an artesian hydrant and made his ablution. Returning, he held out his hand for the dime. The judge said: "Well, sir, you've earned your money, here it is." The boy said: "I don't want your money, old fellow; you take it and have your hair cut," saying which he scampered off. The judge thought it so good a story that he told it himself.—*Augusta Chronicle.*

PROMPTINGS OF HEAVENLY VOICES.—Probably the most singular defence ever heard in any court was raised the other day in a case at Chester Assizes. The action was a dispute about some shares which the defendant improperly detained from his aunt. On cross-examination the defendant said a voice in his ear told him—"Go with your aunt to fetch the shares." Counsel: Which ear was it? (Laughter). Defendant (seriously): The right ear. (Laughter). Was it a loud voice or a soft voice? Well, it was a voice I could understand very plainly. Do you think your aunt could hear it? (Laughter). I can't say. (Renewed laughter). Counsel (raising his voice): Was it as loud as I am speaking to you now? (Laughter). Defendant: Not quite. (Roars of laughter). The judge: Do you think it was a voice from heaven? That was what I thought it was. Your guardian angel, eh? I don't say so. Well, what do you say? I think it was a heavenly voice. (Laughter). The heavenly voice having told you to go with your aunt and fetch the shares, you thought you would go? I followed the precept. (Roars of laughter). You went with your aunt? Yes; I went with my aunt, and she gave me the shares freely, but I never asked for them. The judge: Well, if you did not want the shares, why, when she wanted them back, did you not let her have them? Because she carried on so, and behaved disrespectfully. The judge: Did the voice say, "Don't let her have them back?" (Laughter). No. Mr. McIntyre: Did the voice give you any other precept? Defendant: Many a time I have been under conviction, but not of that description. What description then was it? Defendant: That was more in regard to a turn from a sinful life to a better life. (Laughter). But have you been leading a very sinful life? No, not particularly sinful. But the heavenly voice thought you had, and advised you to give it up? Yes. (Laughter). The judge: So long as it is in that light I would not go further, but when a heavenly voice interferes in secular matters then we have a right to inquire into it. (Laughter). If the promptings of voices were once allowed to be raised in courts of justice as defences to actions, we expect they would speedily extend their interference in secular matters.—*Gibson's Law Notes*

STAGE DRESS OR UNDRESS.—A preliminary injunction was recently granted but afterward dissolved, in England, restraining the lessee and manager of the Gaiety Theatre, from preventing the plaintiff, Miss Fay Templeton, from performing the part of Fernand in the play of Monte Cristo, in accordance with a contract entered into in November last; and also restraining him from employing anybody else to perform the part. *Gibson's Law Notes* says: "The affidavits disclosed that the defendant justified his dismissal of the plaintiff on the ground that she wore her dress improperly. This the plaintiff denied, and stated that the dress was supplied by the management. She also stated that when the lord chamberlain complained of the dresses in the piece being loud, she asked for another dress, but her request was not acceded to. Sashes were however supplied, and she said she had always worn one, but it appeared that the defendant alleged that this was not worn in the proper manner. Now, the whole gist of this application was undoubtedly the proper or improper mode of wearing the dress. Of course there are many ways of putting on a sash. But surely this is a question of fact which the judges should have decided. Why did their lordships not make Miss Templeton put on the dress in dispute and appear in court? The holy cardinals have set the example. Is there not an engraving in the shop windows representing the cardinals sitting in judgment on a dancing gypsy girl to decide on the propriety of the entertainment. Some of their faces certainly do not wear a judicial look. We should immensely enjoy being in court during the performance to see the faces of Mr. Justice Denman and Mr. Justice Matthews."

Mr. L. N. Benjamin, a member of the Montreal bar, who has been in ill-health for about a year past, died on Sunday, April 10. Mr. Benjamin was admitted to the bar in 1863, and his name appeared in the list of newly appointed Queen's Counsel published on the day preceding his decease.

The Legal News.

VOL. X. APRIL 23, 1887. No. 17.

The judges who have been knighted are Matthew Crooks Cameron, Chief Justice Common Pleas, Ontario; Andrew Stuart, Chief Justice Superior Court, Quebec; Frederick Matthew Darley, Chief Justice of the Supreme Court of the Colony of New South Wales; and Eugène Pierre Jules Léclezio, Chief Judge of the Supreme Court of the Island of Mauritius.

The question upon which we published M. Allou's opinion last week, the right of husbands to open their wives' letters, has given rise to various opinions depending on the point of view of the writers. Alexandre Dumas says:—"It is impossible to hesitate for a moment with an answer to the question. The lawyers, in answering it in the affirmative, have been guided by simple common sense. A husband who doubts his wife, and who hesitates to open the letters which she receives, in order to enlighten himself, is an imbecile." M. de Pressensé, without going very deeply into the matter, says:—"It is difficult to give a very definite answer to this delicate question; but, at first sight, it seems to me that the husband should respect the secrets of his wife.... If the measure concerned only adulterous women, it might be defended; but are there only adulterous women in the world?" This does not really conflict with the opinion of M. Dumas. Mdme. de la Peyrebrune adopts the lawyers' view. She says:—"The lawyers have been logical in holding that a husband has the right to open letters addressed to his wife. This is a consequence of the laws which restrain a woman's moral liberty after she is married. To deny the husband this right would be to deprive him of one of his prerogatives as legal guardian."

In *Chesapeake & Potomac Telephone Co. & Baltimore & Ohio Telegraph Co.*, the Maryland Court of Appeals held (Jan. 5, 1887), that a telephone company, being bound by statute to receive dispatches from and for all telegraph companies, may not justify a discrimination in favor of a particular telegraph company by the fact that its contract with the company controlling the telephone patents requires it to do so. Alvey, J., said:—"The telegraph and telephone are important instruments of commerce, and their service, as such, has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them; but they have no power to discriminate, and while offering to serve some refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations."

In commenting upon the gap or lack of connection between the law that is packed away in the text books and the practice of it in the courts, the New York *Daily Register* makes the following practical observations for the benefit of young practitioners:—"Every young lawyer will find great practical advantage in adopting some system in these post-graduate studies, which must be desultory enough at the best. He who would succeed in present business must study his cases well in preparation for trial, for argument, for advising, for drafting, whichever may be the duty. He who would succeed in future business should review his cases after they are over. The contest or the effort on the facts opens the mind to a larger view of the law; and he who would make his experience most profitable, and economize his time in future service, should look over the field after the battle has been fought, take down some books he had not time to look into before or had not thought of, or review again, in the light of fresh experience, those he had examined, and read

anew the leading cases with the clearer grasp that the contest has given him of the principles involved. To say that this will sometimes mortify him by suggesting how he might have succeeded better, is only to say that it very efficiently instructs him how to succeed on a future occasion. The impression of the law in motion, which a truly legal mind gets in actual contest, is a sort of instantaneous photograph, often wonderfully accurate, but always required to be 'developed' before it is got in order to make it serviceable."

COUR SUPERIEURE.

SAGUENAY, 8 novembre 1884.

Coram ROUTHIER, J.

MCNICHOLL et vir v. LABERGE *es qualité*, et LABERGE, Intervenante.

Usufruitier—Action en partage.

JUGÉ :—*Que l'usufruitier ne peut prendre une action en partage et licitation du fonds sur lequel porte son usufruit.*

La demanderesse conjointement avec son second mari, poursuivit le défendeur en sa qualité de douairière.

L'action alléguait le premier mariage, le droit de la demanderesse à l'usufruit d'un certain immeuble, en sa qualité de douairière, et concluait à ce que le dit immeuble fût vendu par licitation, le partage en étant impossible, pour jouir, la dite demanderesse à part et divis de son droit d'usufruit sur la moitié du prix en provenant.

Le défendeur confessa jugement et consentit à la licitation vu que le partage était impossible.

Basilice Laberge, créancière du défendeur esqualité, comme donatrice à charge d'une rente viagère, de l'immeuble que l'on voulait faire liciter, produisit une intervention qui fut admise, et plaida en droit :

Que les conclusions de la déclaration étaient vicieuses parce que la demanderesse n'ayant qu'un droit de jouissance sur l'immeuble en question, ne pouvait conclure à la licitation de ce dernier, mais tout au plus au partage et licitation de la jouissance.

Les demandeurs, à l'audition de la défense en droit, s'appuyèrent sur l'art. 1452 C. C.

L'intervenante cita : 447 et 1562 C. C. et [illegible] C. proc. Pothier, Cout. d'Orléans, du douaire, Nos. 36 et 39. Pothier, traité du douaire, No. 174, et seq. Aubry et Rau, vol. 6, p. [illegible]

Défense en droit maintenue et action renvoyée avec dépens, la Cour ajoutant aux citations ci-dessus : 10 Demol. No. 337, bis. Guyot répert. verbo partage, ch. 3, p. 69, col. [illegible] Proud'hon, usufruit, vol. 3, p. 221, No. 12[illegible] Michaud, traité des liquidations et partages, liv. 1, p. 36.

J. S. Perrault, avocat des demandeurs.
Charles Angers, avocat de l'intervenante.
(C.A.)

COUR DE CIRCUIT.

SAGUENAY, 4 septembre 188[illegible]

Coram ROUTHIER, J.

DESMEULES v. LAPOINTE.

Action qui tam—Informalité du bref.

JUGÉ : *Que dans une action qui tam, le bref doit indiquer que l'action est prise tant au nom du poursuivant qu'au nom de sa Majesté.*

Action *qui tam* pour défaut d'enregistrement d'une déclaration de société. Le bref ne dit pas que l'action est prise tant au nom du demandeur qu'en celui de Sa Majesté. La déclaration est régulière, et allègue que la poursuite est au nom des deux. Les conclusions en sont légales.

Le défendeur plaide par exception à la forme cette informalité du bref.

Le demandeur répond que le bref est complété par la déclaration.

Le défendeur cite les autorités suivantes : art. 49, C. proc. *Lami* v. *Rabouin*, 7 R. L., p. 687 ; *Robert* v. *Doutre*, 5 R. L., p. [illegible] *Houle* v. *Martin*, 6 R. L., p. 641 ; *Lalonde* v. *McMartin*, 7 R. L., p. 185 ; *Graham* v. *Morissette*, 5 Q. L. R., p. 346.

Exception à la forme maintenue avec dépens.

Ce jugement fut confirmé unanimement en révision, le 30 octobre 1883 ; Stuart, Casault et Caron, JJ.

J. S. Perrault, avocat du demandeur.
Charles Angers, avocat du défendeur.
(C.A.)

COUR DE CIRCUIT.

MONTRÉAL, 14 avril 1887.

Coram MATHIEU, J.

Z. DESMARCHAIS v. P. DOYLE.

ettre d'avocat—Offres légales et consignation.

Le demandeur fit envoyer au défendeur ne lettre d'avocat par laquelle il réclamait ne certaine somme d'argent plus les frais de itte lettre.

Sur réception d'icelle, le défendeur se ren-t au bureau des avocats du demandeur et frit le montant réclamé, moins cependant s frais de lettre, prétendant qu'il n'était pas galement tenu de payer tels frais. Sur ce, ı refusa d'accepter les offres. De là, une tion contre le défendeur réclamant le ontant offert ainsi que les frais de lettre 1.50).

Dans sa défense, le défendeur allégua en-: autres choses :

Que lorsqu'il a été régulièrement requis de yer par le demandeur il a offert la balance i appert au compte produit, en billets de la iissance du Canada.

Que le demandeur par l'un de ses procu-ırs a refusé d'accepter cette balance sous étexte qu'il (le défendeur) devait payer rtains frais ;

Que le défendeur a refusé d'obtempérer à demande du demandeur par ses procu-ırs parce qu'alors, il n'y avait pas de frais tables contre lui. Puis il réitère ses offres consigne le montant déjà offert.

Le plaidoyer du défendeur fut soutenu à ıdition par la preuve et la Cour déclara les es bonnes et valables et débouta le de-ndeur de son action avec dépens.

Monk & Raynes, pour le demandeur.

Laralle & Olivier, pour le défendeur.

SUPERIOR COURT—MONTREAL.*

Promesse de mariage—Tuteur—Dommages.

Jugé, 1o. Que lorsqu'une fille mineure or-line s'engage, sans le consentement de son ur, à contracter un mariage, et que subsé-mment regrettant cet engagement, elle ıande à son tuteur de le rompre, l'intervention de ce dernier et son opposition au mariage, sans autre raison, est légitime, et ne le rend pas responsable des dépenses d'argent que le prétendant aurait faites en vue de ce mariage, ni des dommages qu'il peut en subir.

2o. Que bien plus, le fait seul d'avoir décidé ce mariage sans le consentement et la connaissance du tuteur et d'avoir convoqué un conseil de famille en ne lui en donnant avis que par le notaire, serait suffisant pour justifier le tuteur de s'opposer à un mariage décidé en de pareilles circonstances. *Gadbois* v. *Morache*, Mathieu, J., 14 février 1887.

Servitude—Droit de passage—Construction au-dessus.

Jugé, Qu'un propriétaire qui donne ou vend un droit de passage en ces termes: "*auront le droit de s'en servir et d'en faire usage en voiture ou autrement,*" n'est pas pour cela empêché de bâtir au-dessus, pourvu qu'il laisse le passage libre, aéré et éclairé suffisamment pour permettre l'usage commode du dit passage. *Desjardins* v. *Cléroux*, 7 déc. 1886.

Articulation de faits—Forme—Motion.

Jugé, Que des articulations de faits en termes généraux comme les suivants : "*N'est-il pas vrai que toutes les allégations de la déclaration du demandeur sont vraies ? N'est-il pas vrai que toutes les allégations du plaidoyer des défendeurs sont fausses ?*" sont illégales et peuvent être rejetées sur motion. *Leggat* v. *Larose*, Mathieu, J., 24 mars 1887.

Vente—Vices cachés—Nullité de la vente—Ressorts d'une voiture.

Jugé, 1o. Que l'on ne peut considérer comme un défaut caché dont le vendeur est tenu de garantir l'acheteur, la trop grande faiblesse des ressorts d'une voiture que l'acheteur a pu examiner en l'achetant.

2o. Que le vendeur n'est pas tenu des vices de la chose vendue, et la vente n'en peut être annulée, lorsque l'acheteur les a connus depuis la vente, et qu'il a persisté à garder cette chose vendue, acceptant l'obligation du vendeur de la réparer. *Paquette* v. *Dépocas*, 7 mars 1887.

* To appear in Montreal Law Reports, 3 S. C.

QUEEN'S BENCH DIVISION.

LONDON. March 2, 1887.

LEWIS, Appellant, and FERMOR, Respondent.

[22 Law J., N.C.]

Cruelty to Animals—Spaying Sows—12 & 13 Vict. c. 92, s. 2.

Case stated under 20 & 21 Vict. c. 43.

The respondent was summoned on May 11, 1886, before justices for the county of Sussex, by the appellant, under section 2 of 12 & 13 Vict., c. 92, for ill-treating, abusing, and torturing five sows. The operation complained of was known as "spaying," which is the cutting out the uterus and both ovaries. It was admitted to be a painful operation.

The appellant, when before the magistrates, adduced evidence that the operation, while being very painful, was unnecessary, as the flesh of the animal operated on was not improved, but rather deteriorated. It was, however, proved that the practice was usual in the district where the respondent operated on the animals in question.

The respondent did not offer any evidence, but contended that the evidence adduced by the appellant did not show that an offence had been committed within the meaning of the statute.

The justices were of opinion that the operation did cause pain, but agreed with the contention of the respondent, and dismissed the information.

Waddy, Q.C. (*Colam* with him), for the appellant, contended that there ought to be a conviction, as the evidence went to show that the operation inflicted cruel torture and was unnecessary, as not in any way benefiting man by increasing or improving the supply of food. He cited *Murphy* v. *Manning*, 46 Law J. Rep. M. C. 211.

No counsel appeared for the respondent.

The Court (Day, J., and Wills, J.) held that, as cruel torture within the section was the infliction of grievous pain without some legitimate object existing in truth or honestly believed in, and as there was no evidence to show that the respondent was not acting in an honest belief that the operation was for the benefit of man, the decision of the justices was right.

Judgment for respondent.

QUEEN'S BENCH DIVISION.

CROWN CASE RESERVED.

LONDON, March 5, 1887.

REGINA v. RILEY.

Criminal Law—Evidence—Indecent Assault—Cross-examination of Prosecutrix—Evidence of Previous Connection with Prisoner—Contradiction.

Case stated by the Chairman of Quarter Sessions for the hundred of Salford.

The prisoner, James Riley, was tried upon an indictment charging him with an assault on one A. Creswell with intent to commit a rape. The defence was that the prosecutrix had consented to what had been done to her by the prisoner. In cross-examination by the counsel for the prisoner, the prosecutrix denied that she had ever had connection with the prisoner. The Court refused to receive evidence offered by the counsel in contradiction. The prisoner was convicted, and the Court respited judgment and stated a case.

The Court (Lord Coleridge, L.C.J., Pollock, B., Stephen, J., Mathew, J., and Wills, J.) quashed the conviction, on the ground that the evidence which had been rejected was material to the point in issue and was therefore receivable.

Conviction quashed.

QUEEN'S BENCH DIVISION.

CROWN CASE RESERVED.

LONDON, March 5, 1887.

REGINA v. GIBSON.

Criminal Law—Evidence, Misreception of—Effect on Conviction.

Case stated by the Deputy-chairman of the Quarter Sessions of the West Derby hundred of the county of Lancaster.

The prisoner was tried on an indictment charging him with unlawfully and maliciously wounding one T. Simpson. During the trial evidence was tendered for the prosecution for the purpose of identification, and without objection was admitted, as to words uttered neither in the presence nor the hearing of the prisoner by a woman who was not called as a witness. In the summing-up the attention of the jury was di-

rected to, *inter alia*, the evidence as to the words. After the summing up, and when the jury had retired, but before verdict, the counsel for the prisoner contended that the evidence as to the words was not admissible, and that it should be withdrawn from the jury. The Court over-ruled the contention, and the prisoner was convicted. There was ample evidence of identification against the prisoner other than the statement made by the woman.

The question for the opinion of the Court was whether the fact that the evidence as to the woman's statement was left to the jury vitiated the verdict.

The Court (Lord Coleridge, L.C.J., Pollock, B., Stephen, J., Mathew, J., and Wills, J.) quashed the conviction on the ground that before the Judicature Acts, both in civil and criminal cases, if any evidence, however slight, which was not legal evidence was left to the jury, the verdict was vitiated and set aside; and that the rule still applied in criminal cases, which were unaffected by the Judicature Acts.

Conviction quashed.

COUR D'APPEL DE RENNES.

(Ch. du cons).

7 mars 1887.

Présidence de M. de Kerbertin, premier président.

Proc. Gén. de Rennes v. Me. X...

Avocat—Discipline—Injure à un magistrat—Lettre missive adressée à un client—Caractère confidentiel.

Une lettre missive, contenant l'expression intime et secrète de la pensée de son auteur, est confiée à la discrétion du destinataire, et ne peut être divulguée sans l'assentiment de l'expéditeur.

Ce principe protège plus spécialement encore les communications échangées entre un avocat et son client.

Par suite, une lettre, adressée par un avocat à son client, ne peut servir de fondement à une poursuite disciplinaire contre cet avocat, à raison d'expressions ou imputations outrageantes qu'elle contiendrait pour un magistrat, lorsqu'elle ne devrait être connue que du client et n'a reçu publicité que par suite d'un acte délictueux.

Spécialement par le fait d'un notaire, qui l'ayant trouvée en procédant à l'inventaire des papiers après le décès du destinataire, l'a détournée, au mépris de ses devoirs et de la volonté des héritiers, et fait parvenir au magistrat qu'elle visait.

Après le décès de l'un des clients de Me X.., avocat, survenu en 1886, le notaire, qui procédait à l'inventaire, trouva dans les papiers du défunt une lettre, que l'avocat avait écrite à son client, au lendemain d'un procès qu'il avait plaidé pour lui et perdu en 1883. Cette lettre, qui contenait des appréciations plus que vives à l'égard de l'un des magistrats, qui avait concouru au jugement du procès, fut saisie par le notaire, et envoyée par lui, malgré la protestation des héritiers du défunt, au magistrat qui s'y trouvait visé A la suite de cette communication, Me X.. fut traduit disciplinairement devant le Conseil de l'Ordre qui l'acquitta. M. le procureur général près la Cour de Rennes ayant interjeté appel de cette décision, la dite Cour, statuant disciplinairement en Chambre du conseil, a rendu l'arrêt suivant :

La Cour,

Considérant que l'inviolabilité des correspondances privées intéresse essentiellement l'ordre social et la morale publique ; qu'une lettre contenant l'expression intime et secrète de la pensée de son auteur est confiée à la discrétion du destinataire et qu'elle ne peut être divulguée sans l'assentiment de l'expéditeur ; que ce principe protège plus spécialement encore les communications échangées entre un avocat et son client ; que si les nécessités de l'instruction criminelle autorisent la justice, dans des conditions restrictivement déterminées par la loi, à saisir les correspondances qui peuvent fournir la preuve du méfait qu'elle poursuit, cette exception ne s'étend pas au cas où la lettre même constituerait l'infraction et que notamment le pouvoir disciplinaire ne va pas jusqu'à s'emparer de sa teneur, lorsque, dans l'intention de l'écrivain, elle ne devait être connue que de son confident et qu'elle n'a

reçu publicité que par suite d'un acte délictueux ;

Considérant que la lettre incriminée a été écrite le 30 juin 1883, par Me X.., en réponse à la dépêche d'un de ses clients habituels qui l'interpellait sur l'issue d'un procès jugé la veille, et qu'elle est restée pendant trois ans dans le secrétaire de celui-ci sans que rien établisse qu'il en ait donné communication ; qu'à son décès, elle aurait été trouvée par le notaire, chargé d'inventorier ses papiers domestiques et que cet officier public, au mépris de ses devoirs et de la volonté des héritiers, l'aurait détournée pour la faire parvenir à la personne qu'elle devait offenser ;

Considérant que, quelque blâmables qu'en puissent être les termes, les magistrats ne sauraient sanctionner un tel oubli du respect dû aux correspondances privées et au secret professionnel, en prenant connaissance d'un document confidentiel, dont l'existence n'a été révélée que par l'effet d'un véritable abus de confiance, de nature à tomber sous l'application de la loi pénale ;

Par ces motifs et sans adopter ceux du Conseil de l'Ordre ;

Dit n'y avoir lieu de faire état de la lettre visée dans la citation et déboute M. le procureur général de son appel.

NOTE.—La Chambre criminelle de la Cour de cassation a, dans un arrêt du 12 mars 1886, au rapport de M. le conseiller Dupré-Lasale (Gaz. Pal. 86. 1.599), formellement décidé que l'exception au principe de l'inviolabilité du secret des lettres missives, admise pour permettre et faciliter, dans un intérêt social, les recherches de la justice criminelle, ne saurait être étendue aux correspondances échangées entre l'avocat et son client. Dans l'espèce résolue par la Chambre criminelle, il s'agissait d'une lettre adressée par un accusé à son avocat. Le principe paraît comporter les mêmes raisons d'application, quand il s'agit, comme dans l'espèce actuelle d'une lettre adressée par l'avocat à son client. D'ailleurs M. le procureur général de Rennes ayant formé un pourvoi contre l'arrêt ci-dessus, la Cour de cassation aura prochainement à se prononcer sur cette intéressante question.—*Gazette du Palais.*

COUR DE CASSATION.

(CH. DES REQUÊTES.)

16 mars 1886.

Présidence de M. BÉDARRIDES.

LARCHER V. PIMIENTA.

Responsabilité—Notaire—Signature des parties—Omission—Comparution des parties—Preuve—Réparation—Etendue—Appréciation souveraine.

1. *Un notaire commet une faute qui lui est légalement imputable, et engage, par suite, sa responsabilité, lorsqu'il néglige de faire signer par l'une des parties contractantes l'acte que les deux parties l'avaient chargé de retenir, et pour lequel elle s'étaient présentées ensemble en son étude.*
2. *Et la preuve de la présence simultanée des parties, en l'étude du notaire au moment de la rédaction de l'acte, peut s'induire de simples présomptions, tirées des circonstances de la cause, entre autres du fait même de la signature de l'acte par le notaire lui-même et les témoins instrumentaires.*

Le 29 août 1881, M. Larcher, notaire à Oran, a reçu un acte, aux termes duquel un sieur Obadia se reconnaissait débiteur du sieur Pimienta d'une somme de 3,578 fr. 95 c. et consentait à celui-ci diverses sûretés pour garantir son remboursement. L'acte, reçu en présence de deux témoins instrumentaires, a été signé par le créancier Pimienta, le notaire et les deux témoins, mais sur le moment le notaire a omis d'exiger la signature du débiteur Obadia, qui, sollicité depuis de la fournir, a refusé de la donner et a nié avoir participé et consenti à l'acte du 29 août 1881. Dans ces circonstances, Pimienta a assigné M. Larcher devant le Tribunal civil d'Oran, pour voir dire qu'il avait commis une faute grave en omettant de faire signer l'acte d'obligation par Obadia, au moment où il l'avait reçu, et s'entendre condamner à lui payer à titre de dommages-intérêts la somme de 3,578 fr. 95, montant de la dite obligation, en réparation du préjudice résulté pour lui de cette omission. Un jugement du Tribunal civil d'Oran a admis la prétention de Pimienta en modérant toutefois à 1600 fr. le chiffre des dommages-intérêts. L'appel principal a été interjeté par M. Larcher, qui a soutenu

et a offert de prouver qu'en fait une seule des parties, Pimienta, s'était présenté en son étude le 29 août 1881, et que l'acte rédigé ce jour-là était en conséquence un simple projet que les parties se proposaient de réaliser ultérieurement. De son côté, Pimienta a interjeté appel incident. Le 26 janvier 1885, la Cour d'Alger a rendu l'arrêt suivant :

" Sur l'appel principal de Larcher :

" Atteudu que Larcher prétend à l'appui de son appel. 1o. que le 29 août 1881, Pimienta se serait présenté à son étude, où il aurait apporté un acte tout préparé, contenant reconnaissance de dette et cession de garantie par Obadia ; 2o. que sur l'affirmation de Pimienta que le débiteur se présenterait dans la journée pour signer, l'acte authentique avait été préparé, puis signé par mégarde par le notaire ; 3o. qu'Obadia ne s'est jamais présenté chez Larcher et a toujours refusé de signer ou ratifier l'acte dont il s'agit ;

" Attendu que l'inexactitude de ces allégations est dès à présent démontrée par toutes les circonstances de la cause ; qu'en effet, la signature du notaire et celle des témoins instrumentaires ont été apposée sur l'acte du 29 août 1881 ; que cet acte a été répertorié, soumis à l'enregistrement par ses soins, et que mention en a été faite au bureau des hypothèques d'Oran, le 9 novembre 1881 ; qu'en outre, dans les conclusions qu'il a signifiées le 5 novembre 1882, Larcher reconnait que Pimienta et Obadia s'étaient tous deux présentés en son étude pour y ratifier l'acte authentique des conventions arrêtées directement entre eux ; vue Larcher ne peut être admis à prouver, contre sa propre signature, apposée en qualité de notaire, qu'une seule des parties s'est présentée devant lui ; que les premiers juges ont déclaré avec raison que le défaut de signature d'Obadia est imputable à une négligence de Larcher, et que ce dernier doit réparer le préjudice qu'il a ainsi causé à l'intimé ;

" Sur l'appel incident :

" Attendu qu'en négligeant de faire signer par Obadia l'acte du 29 août 1881, Larcher a fait perdre à l'intimé, non seulement la garantie hypothécaire consentie à son profit, mais encore l'authenticité de la reconnaissance de dette par Obadia et un titre exécutoire contre ce dernier ; qu'ainsi la réparation du préjudice doit consister dans l'allocation d'une somme égale au montant total de la créance, soit 3,580 franes ;

" Par ces motifs,

" Confirme l'appel principal ; infirme, au contraire, sur l'appel incident ; élève à 3,580 fr. les dommages-intérêts dus par Larcher à Pimienta."

M. Larcher s'est pourvu en cassation contre cet arrêt. La Chambre des requêtes s'est prononcée par l'arrêt de rejet dont la teneur suit:—

La Cour,

" Sur le premier moyen tiré de la violation par fausse application de l'art. 1382 C. civ., de la violation de l'art. 1315 du même Code, et des règles en matière de preuve de quasi-délit, ainsi que de l'art. 7 de la loi du 20 avril 1810 ;

" Attendu qu'il résulte des motifs tant de l'arrêt attaqué que de ceux du jugement auxquels l'arrêt se réfère, que la Cour d'appel d'Alger a condamné le notaire Larcher à 3,580 francs de dommages-intérêts, parce que cet officier public a commis une faute qui lui est légalement imputable en négligeant de faire signer par l'une des parties contractantes l'acte que les deux parties l'avaient chargé de retenir et pour lequel elles s'étaient présentées ensemble à son étude ; que le moyen manque en fait ;

" Sur le deuxième moyen, pris de la violation des art. 1318, 1319 et 1341 C. civ., des art. 14 et 68 de la loi du 25 ventôse an XI, de la fausse application de l'art. 1356 C. civ., et de la violation de l'art. 7 de la loi du 20 avril 1810 ;

" Attendu que pour rejeter la demande d'enquête de Larcher, les juges d'appel se fondent sur un ensemble de circonstances qui rendent, d'après eux, cette enquête inutile et inadmissible ; que si, parmi ces circonstances, ils signalent la signature apposée sur l'acte par Larcher comme par les témoins instrumentaires et la reconnaissance faite par Larcher dans ses premières conclusions, contredites seulement quant à ce par ses conclusions ultérieures, de la présence simultanée à son étude de Pimienta et d'Obadia, ils n'y attachent ni la force que l'art. 1341 C. civ. attribue à l'acte authentique, ni celle que

l'art. 1356 du même Code donne à l'aven judiciaire ; qu'ils se bornent à constater cette signature et cette présence comme deux faits certains et à y puiser, ainsi qu'ils en avaient le droit, des éléments d'appréciation ; d'où il suit qu'aucun des articles susvisés n'a été violé, ni faussement appliqué ;

" Sur le troisième moyen, tiré de la violation de l'art 68 de la loi du 25 ventôse an XI et de la fausse application des art. 1382 et 1383 C. civ. ;

" Attendu qu'il ressort des motifs de l'arrêt que Larcher a été condamné à réparer l'intégralité du dommage causé par sa négligence, non à raison de l'interprétation erronée ou de la fausse application des dispositions de la loi du 25 ventôse an XI, mais à raison de la gravité de sa faute et de l'étendue du préjudice en résultant, lesquelles ont été appréciées par la Cour d'appel en vertu de son pouvoir discrétionnaire, d'après les circonstances particulières de la cause, que dès lors, les articles susvisés n'ont été ni violés ni faussement appliqués ;

" Par ces motifs,

" Rejette."

NOTE.—Sur le premier point : il avait été déjà jugé en ce sens que le notaire est responsable de la nullité d'un acte de son ministère, qu'il a revêtu de sa signature avant que toutes les parties comparantes l'aient signé, et que l'une d'elles refuse de signer ultérieurement : Cass. 19 août 1845 (S. 45. 1. 633.—J. du P. 46. 1. 235.—D. 45. 1. 378) ; 5 mai 1846 (J. du P. 46. 1. 714). Il en est de même au cas où la nullité provient de l'omission de la signature de l'un des témoins instrumentaires : Paris, 25 mai 1826 (S. chr.) ; Bourges, 28 juillet 1829 (*ibid.*) ; Pau, 5 février 1886 (S. 66. 2. 194), ou de l'absence de la signature du notaire lui-même : Cass. 14 avril 1886 (Gaz. Pal. 86. 1. 746).

Sur le deuxième point : En prenant en considération entr'autres circonstances de la cause, l'existence de la signature du notaire et des témoins instrumentaires par l'acte demeuré imparfait, à titre de présomption établissant la simultanéité de la présence des parties en l'étude du notaire au moment de la rédaction du dit acte, les juges n'avaient point encouru le reproche, que leur adressait le pourvoi, d'avoir attribué à un acte, qu'ils déclaraient eux-mêmes nul, la force probante qui n'eût pu être reconnue qu'à un acte régulier ; ils avaient seulement ainsi fait usage du pouvoir souverain d'appréciation, qui appartient aux juges du fond, en ce qui concerne la gravité, la précision et la concordance des présomptions, sur lesquelles ils fondent leur conviction, dans le cas où ce mode de preuve est légalement admis.—*Gaz. du Pal.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 16.

Judicial Abandonments.

André Dupil and François Pion, traders, St. Hyacinthe, March 31.

Joseph Adhémar Martin, trader, Rimouski, April 9.

Curators appointed.

Re William Angers, L'Ange Gardien.—M. E. Bernier. St. Hyacinthe, curator, April 12.

Re Joseph A. Rolland *et al.*—Charles R. Black, Montreal, curator, April 9.

Re F. X. St. Laurent, Richmond.—J. McD. Hains, Montreal, curator, March 29.

Re John Street.—C. Desmarteau, Montreal, curator, April 9.

Separation de biens.

Marie Anne Weller vs. George Tessier, farmer, St. Casimir, April 14.

Circuit Court, Soulanges.

To be held 15th to 20th of March, June, September and December.

Court of Queen's Bench, Richelieu.

To commence 14th January and 2nd July.

GENERAL NOTES.

The notice issued by the Controller of the Stationery Office that the 'reprinting without authority of matter which has appeared in any Government publication is subject to the same penalties as those incurred had the copyright been in private hands,' is not well considered. It is pervaded with the erroneous notion that copyright belongs to the publisher, and not the author, in the first instance. The copyright of mere compilations made by the clerical staff of a Government office probably is vested in Her Majesty, but the copyright in much more tempting productions, like the reports of commissioners and of consuls, does not become Her Majesty's simply because the Stationery Office issues them. In public documents, like Acts of Parliament, Rules of Court, bye-laws, and the like, which are part of the law of the land, there can be no copyright at all, and a Secretary of State when he writes a dispatch does not assign the copyright in it to the Crown. Again, the copyright in evidence given by a witness before a commission, or suggestions made by him, does not vest in the Crown simply because it is printed by the Queen's printers. In order to prove its copywright in official documents the Crown must at least show that they were paid for with a view to their publication.—*Law Journal*, (London).

The Legal News.

VOL. X. APRIL 30, 1887. No. 18.

By the death of Mr. C. E. Schiller, the Montreal Court House loses another of its venerable officials. Mr. Schiller entered the office of the Clerk of the Crown and Clerk of the Peace in 1834, and had completed 53 years' service. He was a valuable assistant to a long line of judges and crown prosecutors, being a very fair illustration of what Bacon says: "An ancient clerk, skilful in precedents, wary in proceeding, and understanding in the business of the court, is an excellent finger of a court, and doth many times point the way to the judge himself."

The *Harvard Law Review*, published by the Harvard Law Review Publishing Association, makes a distinguished appearance in its first number (April), the paper and type being very superior, and the contents creditable. This publication replaces one that has just died, the *Columbia Jurist*, which was brought to an untimely end by a species of dishonesty too common, viz., the neglect and refusal, of those who had subscribed, to meet their engagements. The *Boston Law Record*, the *Kansas Law Journal*, and some others appear to have recently suffered the same fate.

The Supreme Court of Ohio, has made an order reciting the death of the Hon. W. W. Johnson, late a member of the Court, and the desire of his colleagues that some appropriate tribute be paid to his memory, and that five members of the bar be appointed to prepare a memorial sketch of his life and services, for insertion in the next volume of the reports of the Court. This looks like the commencement of a system of biography with which the reports should not be incumbered.

Mr. Joseph Frémont, advocate, has issued in pamphlet form his *thèse* on *Le Divorce et la Séparation de Corps*, in the law faculty of Laval University. The subject is carefully treated. The first part refers to divorce among the Romans, in France, England, and Canada. In the second part, the writer proceeds to consider *séparation de corps*, the grounds on which it is decreed, the procedure, effects, &c.

The *Jurist* is the title of a new monthly journal established in London, England, for law students and the profession, under the editorial charge of Mr. R. M. Stephenson, L.L.B. The contents are varied, including notes of cases, articles and miscellaneous topics. A good deal of attention is given to subjects especially interesting to students.

SUPERIOR COURT.

AYLMER (Dist. of Ottawa), April 22, 1887.

Before WÜRTELE, J.

SCHARF v. SCHARF.

Security for costs—Non-resident plaintiff.

HELD:—*That when a non-resident plaintiff has described himself as domiciled in the Province, and an application for security for costs has not been made within the four days from the return of the action, security will not afterwards be ordered unless it appear that the application is made within four days of the knowledge acquired by the defendant of the plaintiff's absence, or with due diligence.*

PER CURIAM.—This suit was instituted in October 1885, over eighteen months ago. The plaintiff is a first cousin of the defendant and described himself as of the Township of Templeton, in the district of Ottawa. Issue was duly joined, and the parties have proceeded to proof; the plaintiff closed his enquête on the 3rd of February last, and the defendant is now proceeding with his.

The defendant now moves for security for costs, inasmuch as it would appear from the affidavits produced with the motion that the plaintiff does not reside in the province of Quebec. The affidavits state that the plaintiff resides, and has been residing from a period anterior to the institution of the action, in the province of Ontario; but nothing is

brought to show when the defendant acquired a knowledge of this fact.

When the plaintiff resides without the province at the time he brings his action, and so describes himself, the application for security for costs must be made within four days from the return. When the plaintiff, although a non-resident, describes himself as an inhabitant of the province, or when he leaves the province after the institution of the action, the application must be made within four days of the knowledge acquired by the defendant of such fact, or with due diligence after that period when he can show a good reason for not having made it sooner.

In this case it is not shown when the defendant became aware of the plaintiff's non-residence, and no proof is made of diligence. The motion cannot therefore be granted.

The judgment was entered as follows :—

"Seeing that the defendant shows, by the affidavits filed in support of his application for security for costs, that the plaintiff resided before the institution of the action in the province of Ontario, and that it does not appear that the defendant has only recently had knowledge of his absence and has made his motion within four days of his having obtained such knowledge, or at least with due and proper diligence, the Court doth reject the said motion, with costs."

A. McConnell, for plaintiff.

Rochon & Champagne, for defendant.

SUPERIOR COURT.

AYLMER (District of Ottawa), April 26, 1887.

Before WURTELE, J.

FOLCHER v. LABLOUGLIE.

Costs—Unnecessary evidence.

HELD :—*That costs of enquête will not be allowed when testimony is unnecessary.*

PER CURIAM.—The plaintiff has sued to recover the amount of two promissory notes written and signed by the defendant; and the defendant has filed a plea of general denial, but without an affidavit denying the signatures, or alleging that the notes are not genuine.

The plaintiff inscribed for proof, and counsel at enquête appeared for both parties. The plaintiff produced a witnes, (who was examined and cross-examined by the counsel at enquête), merely to declare that in his opinion, from his knowledge of the defendant's writing, the signature to the notes was that of the defendant.

Article 145 of the Code of Civil Procedure enacts that every denial of the signature to a promissory note must be accompanied with an affidavit of the party making the denial or of his agent or clerk, and article 1223 of the Civil Code declares that if the party against whom a private writing is set up do not formally deny his signature in the manner I have just mentioned, such signature is held to be acknowledged. Then article 1222 of the Civil Code says that writings so held to be acknowledged shall make proof between the parties as authentic writings.

In the present cause the plaintiff's case was made out without any enquête having been necessary. The enquête made was therefore supererogatory. Now proceedings which have no useful object should not be allowed for the mere purpose of swelling costs; and I consequently disallow all costs connected with the enquête which was made in this cause.

Judgment for the plaintiff, with interest and costs of suit, but excluding from such costs all costs of enquête.

F. A. Beaudry, for plaintiff.

Rochon & Champagne, for defendant.

CIRCUIT COURT.

PORTAGE DU FORT (DISTRICT OF OTTAWA).

Feb. 26, 1887.

Before WÜRTELE, J.

WAUGH et al. v. PORTEOUS, and MONGRAIN, Opposant.

Security for costs—Non-resident plaintiff contesting opposition.

HELD :—*That a non-resident plaintiff contesting an opposition cannot be compelled to give security for costs.*

The opposant moved that, inasmuch as the plaintiffs who had contested the opposition

did not reside within the province, they should be ordered to give security for the payment of costs.

PER CURIAM. The plaintiffs obtained judgment against the defendant and seized certain goods and furniture which his wife claims to be hers, and the plaintiffs contest her opposition.

The opposant has moved that the contestants be required to give security for costs, and that the proceedings be stayed until they do so.

Article 29 of the C. C. provides that every person not resident in Lower Canada, who brings or institutes any action, suit, or proceeding in its courts, is bound to give the opposite party security for the costs which may be incurred in consequence of such proceeding.

As to whether, under this article, a plaintiff contesting an opposition is bound to give security for costs, opinions seem to be divided, and judgments have been given both for and against. After examining the various judgments on the point which have been reported, I prefer to follow the opinion of the late Mr. Justice Smith, in the case of *Morrill & McDonald*, 6 L. C. J. 40, that he is not bound to do so.

The article of the C. C., already cited, is taken from sec. 68, of ch. 83 of the C. S. L. C. which provided that "in all actions, oppositions, and suits prosecuted before the courts in Lower Canada, by any person residing without Lower Canada, the defendant, or other party concerned, may demand security for the payment of his costs in case the plaintiff or prosecutor should fail in his action, opposition, or other suit." Under this section it is clear that an opposant could be compelled to give security for the costs incurred in consequence of his opposition, but that he could not require security from any party contesting his opposition. The article of the Code, although not reproducing the exact words, was intended, as appears from the report of the codifiers, to reproduce the provisions of this section.

Any stranger, or rather any non-resident, seeking to establish a right in our courts, is required by our law to give security to the party against whom he claims such right, and this applies to an intervener and to an opposant, as well as to a plaintiff. But, once a right has been judicially recognized, it seems to me that our law does not require security to be given for the costs, direct or incidental, to be incurred in enforcing such right.

I find the following authorities on this point:—

Sirey, Codes Annotés, article 16, No. 7: l'étranger poursuivant une expropriation forcée n'est pas tenu de fournir la caution *judicatum solvi*. Poncet, Traité des Actions, No. 173: il en est de même s'il ne fait que poursuivre l'exécution d'un titre paré, c'est-à-dire revêtu de la formule exécutoire; car il ne s'agit plus pour lui de réclamer un droit litigieux, mais d'exercer un droit acquis.

In this case, the plaintiff's right has been judicially recognized, and they are seeking to enforce it. It is the opposant who is now seeking to establish a right which the plaintiffs contest. They occupy the same position as a defendant who denies a right claimed against him, and who, not seeking, but resisting, is not bound, and should not be called upon to give security. Then again, the end sought by the contestation is the enforcing of a right which has been judicially recognized, and the costs are incidental to the execution of the judgment obtained.

I am of opinion that the opposant is not entitled to security from the plaintiffs, and I reject the motion.

Motion dismissed.

D. R. Barry, for opposant.

C. P. Roney, for plaintiffs contesting.

SUPERIOR COURT.

MONTREAL, Feb. 12, 1886.

Before JOHNSON, J.

TANSEY v. GRAHAM.

Libel—Private and public capacity—Expression of opinion by an elector of a public man.

The libel complained of was contained in a letter written by the defendant during an epidemic of small-pox, representing that the plaintiff was a cipher on the Board of Health of Montreal.

The learned Judge, in his charge to the special jury, observed:—

The case has taken a very wide range indeed, and latterly, a very impracticable tone, not intended, I suppose, to lead the judgment of the jury astray from the very simple questions of fact which were submitted to them. The case is not void of public interest and importance, but it is possible to exaggerate the importance of all cases. It strikes me with amazement that, at the close of the nineteenth century, in a country where free institutions prevail, it should be necessary to take up the time of a Judge and Jury with the hearing of twenty-one witnesses on one side and seven on the other, to say nothing of the addresses of the counsel and the charge of the Judge, to ascertain the character of a letter, and whether the defendant was within his right in publishing it. The plaintiff complains that he has been libelled. The defendant says, "No "such thing, I never libelled you in your pri- "vate character. I have said nothing about "it. If you wanted to guard your private "character, you should have stayed at home; "but you came out of your privacy and sought "a public position. I'm an elector and have "some rights as such. I have a right to ex- "press my opinion; so long as I do not do so "in scandalous or improper language, the "law will protect me." And so it will, if what he says is true. Little would any country be fit to live in, if the law were not so.

The plaintiff undertakes in his declaration to explain what he thinks the letter means, and he says that when the defendant calls him a cipher on the Board of Health, he means that he is an imbecile. But the letter does not, evidently. Nor does it mean, when it says that the Board should be strengthened that, as the plaintiff asserts, he would be the cause of the continuance of the prevalence of small-pox, and a visitation of cholera. All I can say is that those are not the meanings as far as I can judge. However, this is a question of fact for you to decide. I think the construction sought to be put upon the letter, is most improper, and one which the words do not bear. As to the second letter, it was never published at all, but was a private communication.

Now we have to consider what was the meaning of the letter itself. The law at all times has drawn a wide distinction between libel and slander respecting private character; and criticisms, no matter how severe, as long as they are fair, upon men in their public capacity. In the one case, the law imposes a strong check. But the tendency of all modern cases has been that, where the intention of the writer is honest, where the criticism is intended to be and is fair, the writer is protected by the law, even if his opinion be mistaken. The rule seems to be that the private character is sacred. But as for public men and their conduct, if we could not discuss them freely, we would become a nation of slaves. Such discussion, even if it does hit rather hard sometimes, or use strong expressions, is not a breach of the law. In this case, I have not heard a suggestion that there has been any private or malevolent purpose to serve. The defendant was an elector and the plaintiff a public man seeking re-election as Alderman. The defendant had the same right and the same duty as all of us to see at that critical time that power should be held only by the safest and most competent men. If the defendant's motives were honorable and his object pure, if he sought the public good and nothing else, he is within the protection of the law. If you believe that he was acting for a public end, do not, because of the eloquence of the counsel for the plaintiff, say that he is a libeller, and a dishonest libeller. The law overlooks the mere severity of such criticism, so long as it is not opprobrious, insulting or indecent.

As to the expression "cipher" used, it is perhaps exaggerated; but I see nothing indecent or insulting. It is true that the expression reduces the estimate of the plaintiff to the lowest point, but, even if not true, it is not necessarily punishable. If the motive were pure, and the letter written for the public good, the defendant was within his right; and to say otherwise, would be to make us a nation endowed with the forms of freedom but deprived of the means of using it.

You have heard the evidence, but remember this—that when the defendant accuses the plaintiff of being a nonentity on the Board Health, the latter cannot excuse himself by

proving seal on other occasions. No one can fairly doubt that the letter was a strong expression of opinion, by an elector, of a public man, and, in the fulfilment of his right as a citizen.

It is to you, however, and not to me that the law defers the duty of deciding in this case. I have given you the law. The facts are entirely left with you, and my view need not necessarily be your view.

The jury found for the defendant.

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*COURT OF QUEEN'S BENCH—MONTREAL.**

Insolvency—Acts of Assignee.

HELD,—That creditors, by assenting to and ratifying a deed of assignment by an insolvent trader, do not become liable to warrant the acts of the assignee. They do not act jointly and severally in appointing a common mandatary, but each simply gives his sanction, *quoad* his individual interest, to the appointment of the assignee by the insolvent as his agent and administrator. And so, where the assignee sold the stock of an insolvent, and the purchaser was unable to obtain possession, it was held that an action of damages did not lie by the purchaser against creditors who had assented to the appointment of the assignee. *Marchildon*, Appellant, and *Denoon et al.*, Respondents, Dec. 31, 1886.

Railway Company — Expropriation—Failure of Company to comply with legal formalities —Rights of Proprietor.

HELD,—Where land has been taken by a Railway Company without observing the formalities prescribed by the Railway Acts, for the expropriation of lands for the use of the railway, that the owner is entitled to oppose the sale of such land under an execution against the railway company, and to claim its withdrawal from seizure by an opposition *à fin de distraire*. *Brewster*, Appellant, and *Mongeon*, Respondent, Jan. 19, 1887.

Sale — When goods cease to be at risk of Vendor—Inferiority of quality—Right of Purchaser to recover difference in value.

HELD,—Where flour was sold at Toronto, Ontario, to a purchaser in Sherbrooke, province of Quebec, at $4.85 per barrel delivered at Sherbrooke and Arthabaskaville, that the flour was at the risk of the vendor until delivered, and that the purchaser (who had paid cash and who did not examine the flour until a quantity had been sold in small lots to his customers,) was entitled to recover from the vendor the difference in value between flour of the quality ordered and that which had been received. *Taylor et al.*, Appellants, and *Gendron*, Respondent, March 22, 1887.

Imputation of Payments—C.C. 1161 — Note discounted by Bank—When held to be paid.

HELD,—That the rule contained in Art. 1161 C.C. (that the imputation of payment is made upon the oldest debt) applies to an account between a bank and a customer; and so, where the amount of a note discounted by a bank for the endorser was charged on maturity to the endorser's account, and the deposits subsequently made by the endorser, as shown by the books of the bank, were more than sufficient to cover his indebtedness to the bank at the time the note matured, such note must be held to have been paid, and the bank has no action thereon against the maker who has paid the endorser (but without obtaining possession of the note); and the fact that the endorser's aggregate indebtedness to the bank has continued to increase does not affect the question of payment of the note referred to, in the absence of a reserve of recourse by the bank thereon. *Cleveland et al.*, Appellants, and *Exchange Bank of Canada*, Respondent, January 21, 1887.

Principal and agent—Money deposited by lender with her notary—Responsibility for default of notary—Evidence.

Held, Where the amount of a loan was deposited by the lender with her notary, with instructions to hold it until the obligation to be given for it was executed and registered, that the responsibility for the default of the notary to pay over a portion of the money must fall upon the lender; and it made no

*To appear in Montreal Law Reports, 3 Q. B.

difference whether the notary was to pay over the amount to the borrower, or (as in the present case) was to apply it to the discharge of certain debts in accordance with a list furnished to him by the borrower.

2. That the borrower's acknowledgment in the deed that he had received the whole amount, might be contradicted by the lender's admission that she had paid the money to her notary, and the notary's admission that he had not paid over a portion of the amount. *Webster et al.*, appellants, and *Dufresne et al.*, respondents, Feb. 22, 1887.

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*SUPERIOR COURT—MONTREAL.**

Recovery of money paid by error—C.C. 1047, 1140—*Allegations of action—Compulsion.*

Held, That assessments voluntarily paid, in accordance with a duly homologated assessment roll, cannot be recovered from the corporation, without alleging specially that the payment was made through error of law or of fact. The sending of a tax bill, accompanied by notice that if the same be not paid within fifteen days execution will issue, does not constitute compulsion. *Haight* v. *City of Montreal*, and *Nichols* v. *City of Montreal*, Loranger, J., Jan. 31, 1887.

COUR DE CASSATION (Ch. civile).

15 février 1887.

Présidence de M. Barbier, premier président.

Grousset v. Consorts Mabelly.

Action possessoire—Mur—Fond de droit—Motifs —Cumul du pétitoire et du possessoire.

Cumule le pétitoire et le possessoire le jugement qui, bien que ne statuant par son dispositif que sur la possession, se fonde sans s'attacher au fait matériel et aux caractères légaux de la possession sur des motifs exclusivement tirés du fond du droit.

Il en est ainsi spécialement du jugement qui, pour déclarer et maintenir une partie en possession d'un mur litigieux, se fonde uniquement sur l'existence même du mur et sur ce qu'il n'était susceptible d'aucun autre mode de possession.

* To appear in Montreal Law Reports, 3 S. C.

Les consorts Mabelly sont propriétaires d'un terrain de 3 ares, clos de murs, dans lequel se trouve le tombeau de leur famille, près de Nîmes. En 1851, le sieur Grousset, dont la propriété confine à l'ouest à ce terrain, a démoli le mur séparatif. Les consorts Mabelly l'ont aussitôt assigné au possessoire devant M. le juge de paix pour faire reconnaître leurs droits de possesseurs du dit mur, et faire cesser le trouble provenant de sa démolition. Le juge de paix a fait droit à leur demande, et en les reconnaissant et maintenant, par le dispositif de sa sentence, en possession du mur litigieux, en a ordonné la reconstruction aux frais de Grousset. Sur appel de ce dernier, le Tribunal civil de Nîmes a rendu, le 25 février 1886, le jugement confirmatif dont la teneur suit :

"Attendu qu'il est établi par le jugement dont est appel que le mur qui a été démoli par Grousset clôturait à l'ouest les 3 ares de terrain dans lequel se trouve le tombeau de la famille Mabelly ;

"Attendu, dès lors, que la possession annale de ce mur au profit des intimés est justifiée ; que cette possession résulte en effet de l'existence même du mur qui n'était susceptible d'aucun autre mode de possession, et que, par suite, l'appel est infondé et doit être rejeté ;

"Par ces motifs,

"Et adoptant les motifs du premier juge ;

"Démet Grousset de son appel ; confirme la décision attaquée."

Grousset s'est pourvu en cassation contre ce jugement, à l'encontre duquel il a formulé le grief suivant :

"Violation des art. 23 et 25 C. pr. civ., et 7 de la loi du 20 avril 1810, en ce que le jugement attaqué, sans répondre aux conclusions de l'exposant, a accueilli une action en complainte à raison de la démolition d'un mur sous l'unique prétexte que ce mur clôturait par un côté un terrain appartenant aux demandeurs, lesquels ne justifiaient d'aucun acte de possession."

Ce pourvoi a été accueilli par l'arrêt suivant de la Chambre civile :

La Cour,

Sur l'unique moyen :

Vu l'art. 25 C. pr. civ. ;

Attendu que, pour accueillir l'action en complainte possessoire, le jugement attaqué, au lieu de s'attacher au fait matériel et aux caractères légaux de la possession, s'est uniquement fondé sur ce que le mur litigieux clôturait à l'ouest 3 ares de terrain appartenant à la famille Mabelly ; qu'il fait résulter la possession de ce mur au profit des consorts Mabelly, de son existence même et qu'il déclare qu'il n'était susceptible d'aucun autre mode de possession ;

Attendu que ces motifs sont exclusivement tirés du fond du droit, qu'il suit de là que le jugement attaqué, en statuant comme il l'a fait, a accumulé le pétitoire et le possessoire et par suite, violé l'art. 25 C. pr. civ. ;

Par ces motifs,

Casse.

BLACKMAIL.

On écrit de Bordeaux :

M. Georges Laroze, greffier du tribunal de commerce de Bordeaux et frère de l'ancien sous-secrétaire d'Etat, était depuis quelque temps en butte aux attaques les plus violentes, en raison de ses fonctions, dans le *Réveil bordelais*, qui l'accusait, entre autres choses, de ne présenter au tribunal que les causes des gens qui le payaient largement.

Un certain Marty, auteur de ces articles, lui proposa de cesser, moyennant quinze cents francs, toute polémique et toute révélation. M. Laroze repoussa ces offres avec indignation, et aussitôt parut dans le *Réveil* un article plus violent encore que les autres. Cette fois, l'honorable M. Laroze intenta au *Réveil* un procès pour diffamation et tentative de chantage, et il se porta partie civile.

L'affaire est venue hier devant la cour d'assises de la Gironde. L'avocat de la partie civile, l'avocat général, et le président de la cour se sont trouvés d'accord pour flétrir avec énergie la presse à scandale. Ce n'est pas, ont-ils dit entre autres choses, un procès de presse ou de tendance que le procès d'aujourd'hui. La presse, la vraie, tout le monde la respecte ; mais peut-on appeler journalistes des maîtres chanteurs et journal une officine de chantage et de scandale ?

M. Georges Grilhé, dit Leryant, directeur du *Réveil*, assistait au procès en qualité de témoin. Après l'avoir vertement tancé, M. le président Rozier, se tournant vers le banc des journalistes, s'est écrié :

" Vous faites là une vilain métier ; il n'est pas un des jeunes gens assis à cette table qui ne considérerait comme une injure d'être appelé votre confrère."

Le jury a rapporté un verdict affirmatif sans circonstances atténuantes.

Maurel, gérant du *Réveil bordelais*, est condamné à six mois de prison, 2,000 fr. d'amende, 2,000 fr. de dommages-intérêts et à l'insertion du jugement dans tous les journaux de Bordeaux, et en première page du *Réveil* lui-même.

Marty, auteur des articles, qui fait defaut, est condamné à quatre mois de prison, 1,000 fr. d'amende et 1000 fr. de dommages-intérêts. —*Gaz. du Palais.*

QUEER CLIENTS.

The chief clerk of a leading firm in New York, gives some notes of his experience with suitors. " The reception room," he says, " has many queer people in it at times. There are a set of cranks of the most annoying kind, who make the rounds of the leading law firms in the city. They are born litigants. Some of them have money ; but most of them have none. Whenever a man comes into an office for the first time and unrolls an old map or any other document, with the yellow tint of age on it, the guns are at once trained on him. Mistakes are sometimes made. It does not always do to size up a man from appearances. My resignation was asked once because I sat down hard on a client who could sign his check for a million, but looked like a tramp. That's one serious drawback ; millionaires do not always look like it. The people who own half the city and can prove it, and those who are interested in inventions and patents are the hardest to get rid of. If they can get hold with an eyelid they will never let go. They have plausible stories all, and insist on seeing the head of the firm. Sometimes they do get an audience, and as long as they pass the outer gate, he thinks they are all right, and takes an interest in the

business. One smart fellow got us to bring a suit for damages against a well-known business man. Our client had documentary proof that made a splendid case, and would have stood in any court, but when the case came to trial, it was shown that the people and facts were drawn from his own imagination, and the case was thrown out of court, It was the third time he had fooled a lawyer, but as he paid for his fun, no hearts were broken. The women clients of this kind are the most troublesome. They insist on seeing the head of the firm without telling their business to any one else. To tell them a little lie about his being out is no good, for they will sit the whole day, if necessary, to test the statement. There are three or four women who have money, and spend their time going the rounds of the prominent lawyers, trying to enlist them in some imaginary suit. They will put up a retainer if asked to, but woe be to the man who takes it. A trip to Europe is the only means of escape. They will bring a suit on the slightest pretence, but usually there is no ground for complaint. The desire to litigate seems to be overpowering. One of the women visits the courts regularly, has picked up a good knowledge of law, and can ask questions that would make the oldest practitioner scratch his head. Nearly all these peculiar people are eccentric or mentally unsound, and most of them really believe they have been injured and are entitled to redress. At one time, there were several fine-looking women who sought to get an audience with first-class lawyers, as well as business men, for blackmailing purposes, and it is a rule in some offices that strange women are never seen by any member of the firm except when witnesses are present. It is a peculiar thing that women clients, who have legitimate business in court, form a violent antipathy against any one who is opposed to them, and do not hesitate to make known their intense hatred by word and manner."

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 23.

Judicial abandonments.

D. J. Rees, trader, Montreal, April 18.

Curators appointed.

Re P. G. Delisle, Quebec.—V. W. Larue, Quebec, curator, April 18.

Re Julie E. A. Mongrain (Porteous & Co.), Bryson.—W. G. Leroy, Bryson, curator, April 15.

Re Joseph B. Dubuc.—F. A. St Laurent, Quebec, curator, April 18.

Re Max Kert, district of Ottawa.—W. A. Caldwell, Montreal, curator, April 15.

Re J. Adhémar Martin, trader, Rimouski.—H. A. Bedard, Quebec, curator, April 19.

Re Eutrope Rousseau, dry goods merchant.—H. A. Bedard, Quebec, curator, April 15.

Dividends.

Re Théophile Bélanger, St. Jean.—Final dividend, payable May 16. Kent & Turcotte, Montreal, curator.

Re D. Chaput, St. Hyacinthe.—Final dividend, payable May 16. Kent & Turcotte, Montreal, curator.

Re James Cullens, Montreal.—Final dividend, payable May 10. Fulton & Richards, Montreal, curator.

Re Exilda Bougie (Mrs. D. Leonard), Montreal.—Final dividend, payable May 16. Kent & Turcotte, Montreal, curator.

Re C. E. Fournier, Montreal.—Final dividend, payable May 16. Kent & Turcotte, Montreal, curator.

Re P. Neveux, Terrebonne.—Final dividend, payable May 16. Kent & Turcotte, Montreal, curator.

Re Arthur Toupin, Montreal.—First and final dividend, payable May 11. C. Desmarteau, Montreal, curator.

Separation as to property.

Marie Albina Corbeil *vs.* Leon Gagnon, St. Leonard de Port Maurice, farmer, March 7.

Philomène Parmentier *dit* Nourri *vs.* Juste Boucher Sherbrooke, trader, April 19.

Emma Vallee *vs.* Romuald Piché, Montreal, tailor. April 13.

Sheriff.

Alphonse Couillard, Rimouski, to be sheriff for the district of Rimouski.

GENERAL NOTES.

Rather an amusing point arose in the case of *Grant v. Morley*, heard recently before Day and Wills, JJ. The plaintiff had obtained judgment against an elderly maiden lady named Miss Julia Morley, and issued a writ to take the furniture of the house where she lived. Thereupon her sister, Miss Nancy Morley came forward and claimed the furniture as jointly hers, the two ladies being both entitled to it under a gift. Then the sheriff who had seized the goods, being puzzled, went before the judge at chambers, who also was perplexed, not seeing how half a chair or half a table could be sold, and so the sheriff was ordered to withdraw. Upon this the creditor appealed. The Court said, of course, he could not sell the goods, as they belonged to Miss Nancy as well as to Miss Julia. but he could sell the interest of Miss Julia, his debtor. and the purchaser would be "tenant in common" with Miss Nancy. The debtor, Miss Julia, was wrong in disputing the right of the creditor to seize the furniture, for he must seize, in order to sell, though he could not sell the goods, and could only sell the interest of Miss Julia, his debtor. The sheriff must, therefore, seize and sell her interest, and she must pay the costs.—*Jurist*, (London.)

The Legal News.

VOL. X. MAY 7, 1887. No. 19.

A curious illustration of the supposed progressiveness of the age is supplied by the fact that the Supreme Court of the United States is about to adjourn for the summer with over a thousand cases unheard. Between three and four hundred cases are disposed of annually, so that there is work enough on hand for three years at least, and cases put on the roll now will have to take their turn at the end of that time. Why should a court adjourn for the summer under such circumstances? A great daily like the London *Times* does not adjourn for the summer, yet the work is as exhausting as that of a court. The continuity is preserved by increasing the number of those by whose joint effort the paper is produced. The same system applied to the Supreme Court would enable it to sit upon every lawful day throughout the year, or to prolong the daily sitting to ten or twelve hours.

Some of the "smart things" attributed to English judges smack of vulgarity—not to say brutality—which would not be tolerated on this side of the Atlantic. For example, the London *Jurist* has the following:—"Some amusement was recently caused by a retort made by Mr. Justice Chitty to a learned counsel. The barrister in question was arguing a case about the possession of agricultural implements and furniture, and when he had finished the first part of his argument, during which the judge frequently rebuked him for irrelevancy, he remarked, 'And now, my Lord, I will address myself to the furniture.' Mr. Justice Chitty: 'You have been doing that for a long time, sir.' If this be true, Mr. Justice Chitty is sadly in need of somebody to teach him manners, and if he were sitting in any Court out of England, would soon find an instructor.

A curious point, illustrating the subtleties of criminal pleading, says the *Jurist*, (London) was taken by a member of the bar as *amicus curiæ* at the late Stafford Assizes. Two men, named Jones and Stone, were indicted for that "they did together assault, with intent to rob," the prosecutor. At the commencement of the proceedings the counsel for the prosecution said he would offer no evidence against Stone, as there was nothing to identify him, and the learned judge (Mr. Justice Manisty) concurring in this course, a formal verdict of "Not guilty" was taken in his favour. The case against Jones was then proceeded with. But at the close of the case for the prosecution a counsel present asked to be allowed to take a point in the prisoner's favour, as he was undefended. Leave having been given, counsel then proceeded to argue that the indictment was laid under s. 43 of 24 & 25 Vic., c. 96, which ran, "Whoever shall .... together with one or other person or persons rob or assault with intent to rob any person .... " The indictment averred that Jones did this together with Stone, but Stone had been declared not guilty, and as the essence of the offence was the combination, it was impossible to convict Jones on that indictment; he should have been indicted separately under the s. 40. Mr. Justice Manisty held, after some argument, that the indictment could not be sustained, and ordered the prisoner to be discharged.

SUPERIOR COURT.

SWEETSBURG, April 5, 1887.

Coram TAIT, J.

WETHERBEE v. FERGUSON et al., and FERGUSON, Opposant.

Procedure—Opposition not contested—Proof—Costs—C. C. P. 586.

HELD:—*That on an uncontested opposition afin d'annuler based upon irregularities, the opposant has a right to make proof ex parte, and the plaintiff will be condemned to pay the costs.*

One of the defendants made an opposition *afin d'annuler* to the seizure made by plaintiff, alleging fatal irregularities on the part of the bailiff, and further, that a mass of goods had been seized belonging to defendants individually, without any specification as to the portion belonging to each; and that

the opposant had an interest in having the property specified in order to have recourse against his co-defendants.

The plaintiff filed a declaration that he did not contest.

The opposant inscribed *ex parte*, and proceeded to examine witnesses under objection of plaintiff. The only witness apart from the bailiff was the opposant's brother, who admitted that he was present to attend to an opposition he had in Court; was told that he would be taxed in this case and the opposant in his, and supposed he was examined so as to be taxed.

When the case was submitted by the opposant, it was admitted by the plaintiff that the opposition must be maintained with costs against him, if he was responsible for the bailiff's irregularities, but he contended that, as he did not contest, the opposant had a right to be relieved from the seizure without subjecting the losing party to costs of *enquête*; that an opposition *afin d'annuler* based upon irregularities and illegalities required no oral proof, and the plaintiff should not be mulcted in costs of a useless *enquête*.

The opposant urged that he had a right to prove that the portion of the mass of property seized belonged to him.

In reply, the plaintiff argued that the pretension of the opposition was as to the irregularity in not specifying the particular owner of property seized, etc., and no proof was necessary to show the irregularity which was not contested. 586 C. C. P. was cited. The 84th Rule of Practice is very clear as to opposition being maintained without proof, where plaintiff declares he does not contest.

The judgment was as follows:—

"Considering that the declaration filed by plaintiff, that he did not contest the said opposition *afin d'annuler*, was and is an admission on his part that opposant had a right to be relieved from the seizure, etc., by reason of the irregularities and defaults therein complained of on the part of the bailiff charged with the writ of execution;

"Considering that, notwithstanding said declaration, opposant had a right to make proof *ex parte* in manner and form as he hath done;

"Considering that plaintiff, under the circumstances of this case and the proof made, should be held responsible for said irregularities and defaults of said bailiff, etc., doth set aside and annul the seizure, etc., and maintain said opposition with costs against plaintiff."

Noyes & Bernard for plaintiff.
Baker & Martin for opposant.

(J. P. N.)

SUPERIOR COURT.

AYLMER, (Dist. of Ottawa,) April 20, 1887.

Before WÜRTELE, J.

KENT et al. v. ROSS et al.

Insolvency—Revendication by curator of goods removed from his custody.

HELD:—*That the curator to the property abandoned by an insolvent trader has the right to revendicate goods removed without his consent from his custody, without previously taking the advice of the creditors and being judicially authorized, but at his own risk and cost.*

PER CURIAM:—The plaintiffs were appointed joint-curator to the property abandoned by one Isaïe Hortie, an insolvent trader.

They allege in their declaration that they were placed in possession by the provisional guardian of the property so abandoned, and that the defendants wrongfully removed and took away from their possession and custody, certain goods and effects forming part of the insolvent's stock in trade; and they seek to revendicate the same.

The defendants demur to the declaration and ask for the dismissal of the action, because it was instituted without the advice of the creditors or inspectors having been taken and without any permission of the court or judge in accordance with article 772 of the Code of Civil Procedure.

This article requires the previous permission of the court or judge when the curator wants to exercise a right of action of the debtor or a right of action possessed by the mass of his creditors; and the reason of this is that he should not be allowed to institute proceedings which may involve the estate in expense without due consideration on the part of those interested and judicial authorization.

But in the present case, the demand is not the exercise of a right of action which belonged to the insolvent nor of a right of action possessed by the mass of his creditors. The plaintiffs, as joint-curator, are responsible for the safe keeping of the property of the insolvent, and are accountable therefor to his creditors, and in their own interest they have an action in their own right as depositaries, under article 866 of the Civil Code, to revendicate the goods and effects wrongfully taken from their custody. In doing so, they exercise a right of action of their own; but they must do it at their own risk and costs. They have therefore no need to consult the creditors or inspectors, nor to obtain any judicial authorization.

I am of opinion that the demurrer is unfounded and I dismiss it, with costs.

The judgment was registered in the following words:—

"The Court, &c.

"Seeing that the defendants allege that the plaintiffs in their quality of joint-curator to the property of the said debtor, Isaïe Hortie, had no authority to institute the present suit without the permission of the court or of a judge;

"Considering that such permission is required under article 772 of the Code of Civil Procedure, to empower the Curator to the property of an insolvent trader, to exercise the actions of the debtor or the actions possessed by the mass of his creditors;

"Seeing that the action in this cause is an action to revendicate certain goods and effects, which are alleged to belong to the said debtor, Isaie Hortie, and to have been in the possession of the plaintiffs in their said quality, and which the defendants are alleged to have removed and taken away from the possession and custody of the plaintiffs, without their consent and against their will, and to detain wrongfully, illegally and unjustly;

"Seeing that the plaintiffs are personally responsible to the mass of the creditors of the said debtor, Isaïe Hortie, to account for the said goods and effects;

"Considering that the plaintiffs, as the depositaries of the goods and effects in question, have the right to revendicate the same at their own risk and costs;

"Seeing that the action in this cause is one which appertains to the plaintiffs personally, and in their own right, and is not one in which a right of action of the said debtor, Isaie Hortie, nor a right of action possessed by the mass of his creditors, is exercised;

"Considering therefore that the provision above mentioned of article 772 of the Code ot Civil Procedure does not apply to the present case;

"Considering that the allegations set forth and contained in the plaintiffs' declaration are sufficient to establish a right of action, and that the allegations set forth and contained in the demurrer pleaded by the defendants are unfounded in law;

"Doth over-rule and dismiss the said demurrer, with costs."

N. A. Belcourt, for Plaintiffs.
Major & Talbot, for Defendants.

SUPERIOR COURT.

AYLMER, (Dist. of Ottawa,) Feb. 24, 1887.

Before WÜRTELE, J.

MAJOR et vir, v. MCCLELLAND.

Execution—Recourse of third party claiming right of ownership in the effects seized.

HELD:—*That in the case of the seizure of moveables, the proper recourse of a third party claiming a right of ownership therein is by opposition, and not by an action and attachment in revendication.*

PER CURIAM. — The defendant obtained judgment against one Frederick Fooks, and seized certain effects in his possession, which were placed under the care and guardianship of one James Thom. The sale was stopped by an opposition and the effects are still under seizure, but have been placed by the guardian in the hands of the defendant in this cause.

The female plaintiff claims the effects so seized as her property, and has brought the present action to revendicate them. In her declaration she first sets up her right of ownership, and she then alleges that the

effects in question had been seized at the instance of the defendant, and placed under the guardianship of James Thom.

The defendant has demurred to the action on the ground, amongst others, that the female plaintiff's recourse is by opposition and not by action in revendication.

Articles 580 and 582 of the Code of Civil Procedure, provide that the seizure of moveables in execution may be contested by opposition, either by the debtor or by third parties, and that any party claiming a right of ownership in the property seized may oppose the execution.

The corresponding article of the French Code of Civil Procedure uses similar language: "Art. 608. Celui qui se prétendra "propriétaire des objets saisis, ou de partie "d'iceux, pourra s'opposer à la vente par ex-"ploit signifié au gardien, et dénoncé au sai-"sissant et au saisi......" Boitard (Vol. 2, No. 863), in commenting upon this article, says: "Les demandes en distraction ne sont "autre chose que des revendications, c'est-à-"dire des actions par lesquelles le deman-"deur se prétend propriétaire des effets sai-"sis sur une autre personne..... L'article "608 détermine les formes de ces demandes "en revendication......." And Jaccotton (Actions Civiles, Nos. 69 et 70), in this connection, remarks: "Jusqu'ici, nous nous som-"mes exclusivement occupé du cas où le "propriétaire, agissant par voie principale, "est tenu de faire procéder sa demande d'une "saisie-revendication. Mais il faut aussi, et "cela arrive très fréquemment, former inci-"demment sa demande, lorsque les meubles "qu'il revendique ont déjà été frappés d'une "saisie-exécution par un créancier du déten-"teur. C'est le cas prévu par l'article 608 "du Code de Procédure Civile...... Il ré-"sulte virtuellement de l'article 608 que celui "qui se prétend propriétaire d'objets que "l'on veut saisir ne peut pas s'opposer à la "saisie et n'a que le droit de former opposi-"tion à la vente. Il en résulte encore que le "propriétaire ne peut pas exercer sa reven-"dication à l'instant même de la saisie. In-"dépendamment du texte de la loi qui paraît "justifier cette opinion, on peut l'appuyer "sur un motif qui nous semble péremptoire, "c'est que la saisie à laquelle il est procédé, "nonobstant la réclamation du propriétaire, "ne saurait lui causer un dommage sérieux. "Car le but de cette mesure, pour lui comme "pour les créanciers, est de placer les meu-"bles qu'il revendique sous la main de la "justice, ce qu'il aurait été obligé de faire "lui-même par une saisie-revendication, et, "par conséquent, de conserver ses droits qu'il "peut faire valoir ensuite par une opposition "à la vente."

In this case the seizure is in force, and the guardian James Thom, is responsible for the production of the effects seized.

Once a thing is seized, a person claiming a right of ownership in it, cannot proceed by way of attachment in revendication, but must proceed, as prescribed by the articles just mentioned of our code of civil procedure, by way of opposition. The attachment is unnecessary as the thing is already under judicial control and subject to the order of the court, and the demand made by the opposition is a form of the exercise of the action of revendication. I am of opinion that an opposition is the proper way to bring such a claim before the Court, and that the ground of demurrer which I have mentioned is well founded.

The plaintiff referred at the argument to some cases which he contended supported his view, that he had the right to proceed by action and attachment in revendication; but I found on examining the reports, that in the cases referred to the actions were taken where the effects sought to be revendicated had been seized under warrants of distress issued by Justices of the Peace, or under warrants for the levy of taxes in municipalities where no provision had been made for oppositions. In these cases, the property seized was not subject to the direct order of the Court, and the proper way to bring it under the control of the court, was by an attachment in revendication. The law moreover gave no other recourse to the claimants. They do not therefore apply to the present case.

I maintain the demurrer and dismiss the action.

The judgment was drafted and registered as follows:

"The Court, &c;

"Seeing that the female plaintiff seeks to revendicate by this action certain effects which she claims as her property; and that she alleges in her declaration, that the said effects had been seized in the possession of one Frederick Fooks, at the instance of the present defendant, under and in virtue of a writ of execution issued from the Circuit Court, in and for the district of Ottawa, in a certain cause bearing the No. 547, wherein the present defendant was plaintiff and the said Frederick Fooks was defendant, and placed under the care and guardianship of one James Thom;

"Considering that at the time that the said effects were seized by way of revendication, they were already under judicial control;

"Considering that under and in virtue of articles 580 and 582 of the Code of Civil Procedure, the proper recourse of the female plaintiff is by opposition to the seizure of the effects and not by attachment in revendication;

"Considering therefore that the present action is unfounded in law and that it has been wrongfully brought;

"Considering that the ground or reason lastly alleged and set forth in the demurrer pleaded by the defendant, is well founded and sufficient to obtain the dismissal of the present action:

"Doth dismiss the action in this cause, and release the effects seized in revendication from the attachment in revendication, with costs."

N. A. Belcourt, for Plaintiffs.
Henry Aylen, for Defendant.

*COURT OF QUEEN'S BENCH—MONTREAL.**

Secretary-treasurer—Notice of action—C. C. P. 22—Quebec Election Act, 38 Vic., ch. 7—Transmission of duplicate of electoral list to Registrar.

HELD: — 1. (Affirming the decision of TASCHEREAU, J., M. L. R., 1 S. C. 323):—A public officer is not entitled to notice of action under C. C. P. 22, where the action is for a penalty for failing or omitting to do what the law requires him to do.

2. (Reversing the decision of TASCHEREAU, J., *supra*). The fact that the electoral list was still under the consideration of the Council, is not a valid ground of defence, where a secretary-treasurer is sued for a penalty for not transmitting a duplicate of the list to the registrar of the registration division, within eight days after it came into force, as required by 38 Vict. (Q.) ch. 7, and the penalty may be recovered even where the secretary-treasurer does not appear to be in bad faith. *Jodoin*, Appellant, and *Archambault*, Respondent, Nov. 23, 1886.

* To appear in Montreal Law Reports, 3 Q. B.

SUPERIOR COURT.—MONTREAL. (*)

Lessor and Lessee—Repairs to leased premises—Putting lessor en demeure to make repairs.

HELD:—That the lessee is not entitled, without first putting the lessor *en demeure*, to demand the resiliation of the lease because repairs are necessary. Unless the condition of the premises be such as absolutely to prevent his use and enjoyment, the proper course is for the lessee to ask that the lessor be ordered to make the repairs which are necessary, and, in default, that the lessee be authorized to make them at the lessor's expense.—*Pagels* v. *Murphy*, In Review, Johnson, Papineau, Gill, JJ., Dec. 30, 1886.

Procedure—Tierce-opposition—Saisie-arrêt—C. C. P. 510, 625.

HELD:—That a tierce-opposition, unless accompanied by an order of a Court or judge, does not suspend the execution of a judgment, and that a *tiers-saisi*, paying in good faith the amount of the final judgment, will be discharged notwithstanding the prior service upon him of a tierce-opposition, without order of suspension.—*Mullen et al.* v. *Pearl*, & *Trépannier*, & *The Commercial Union Ass. Co.*, *T. S.*, Cimon, J., Jan. 13, 1887.

Cour du Recorder de Montréal—Juridiction—Prohibition avant conviction—Preuve testimoniale.

(*) To appear in Montreal Law Reports, 3 S. C.

JUGÉ :—1o. Que la Cour du Recorder de la cité de Montréal a juridiction sur les matières et offenses consistant à tenir *une maison malfamée et une maison de désordre* dans la cité de Montréal.

2o. Qu'un bref de prohibition peut émaner avant la conviction.

3o. Que la preuve testimoniale peut être légalement faite sur un bref de prohibition émané avant la conviction.—*McKeown & La Cour du Recorder et al., & La cité de Montréal*, Taschereau, J., 31 mars 1887.

Fabrique—Indemnité à un marguillier—Délit—Ratification—Nullité absolue—Marguillier en charge.

JUGÉ :—Qu'une résolution d'un Conseil de Fabrique décidant de payer à un des marguilliers une somme d'argent, à même les deniers de la fabrique, pour l'indemniser d'un pareil montant qu'il aurait été condamné à payer sous forme de dommages à un tiers, en conséquence d'un délit par lui commis dans l'exercice de sa charge, est nulle, illégale et *ultra vires*.

2o. Que le fait que cette somme a été entrée dans la reddition de compte du marguillier en charge, laquelle reddition de compte fut soumise à une assemblée des anciens et nouveaux marguilliers et approuvée par eux, sans protestation de la part du contestant qui était présent à l'assemblée, et que ce compte fut ensuite approuvé par l'évêque, ne constitue pas de la part du contestant une ratification qui lui enlève le droit de contester la légalité de la dite résolution, surtout lorsque ce dernier a préalablement protesté contre la dite résolution; que d'ailleurs cette ratification d'un acte *ultra vires* serait sans valeur.

3o. Que dans l'action pour faire déclarer nulle et illégale une semblable résolution, il n'est pas nécessaire de mettre en cause le marguillier en charge qui a fait le paiement suivant la résolution.—*Perras v. Les curé et marguilliers de l'œuvre de la paroisse de St-Isidore et al.*, Jetté, J., 31 mars 1887.

Voiturier—Responsabilité—Retard dans l'expédition.

JUGÉ :—Qu'une compagnie de transport (voiturière) est responsable des dommages qu'elle cause, par le fait qu'elle ne transporte pas, dans un délai raisonnable, au lieu de leur destination, les choses à elle confiées.—*Pontbriand v. The Grand Trunk Railway Co. of Canada*, Papineau, J., 31 mars 1887.

COUR DE CASSATION (CH. CIVILE).

11 mai 1886.

Présidence de M. BARBIER, premier président.

HOUEL et PICARD v. LETELLIER.

Louage de services—Ouvrier—Règlement d'atelier—Congé—Renvoi sans motifs—Usages locaux—Interprétation—Cassation.

Les patrons et les ouvriers peuvent, sans porter atteinte à aucun principe d'ordre public, déroger aux usages locaux, concernant les congés à donner, soit par les patrons, soit par les ouvriers.

A ce titre est donc valable la clause d'un règlement affiché dans les ateliers d'une fabrique, portant que, "quel que soit le mode de paiement, les ouvriers de l'établissement ont le droit de faire établir leur compte à toute heure de la journée, et de s'en aller quand bon leur semblera; les patrons, par réciprocité, peuvent les renvoyer à n'importe quelle heure de la journée."

L'ouvrier qui a accepté, avec connaissance de la dite clause, de travailler dans la fabrique, ne peut en aucun cas prétendre droit à une indemnité contre le patron, pour renvoi sans motifs.

Le jugement qui en décide autrement, sous prétexte d'interprétation, dénature la convention, intervenue entre le patron et l'ouvrier, et encourt la censure de la Cour de cassation.

LA COUR,

Vu l'art. 1134 C. civ.;

Attendu que les patrons et les ouvriers peuvent, sans porter atteinte à aucun principe d'ordre public, déroger aux usages locaux concernant les congés à donner, soit par les patrons, soit par les ouvriers;

Attendu, en fait, que les sieurs Houel et Picard ont fait afficher dans les endroits les plus apparents de leurs ateliers un règlement portant une clause ainsi conçue: "quelque soit le mode de paiement, les ouvriers de l'établissement ont le droit de faire établir leur compte à toute heure de la journée et de s'en

aller quand bon leur semblera ; les patrons, par réciprocité, peuvent les renvoyer à n'importe quelle heure de la journée ; "

Attendu que des énonciations de l'arrêt attaqué il résulte que le sieur Letellier n'a accepté de travailler dans les ateliers des sieurs Houel et Picard qu'avec connaissance de la clause ci-dessus énoncée ;

Attendu, dès lors, que le contrat s'étant formé par l'accord intervenu entre les patrons et l'ouvrier, ce contrat doit être exécuté suivant les termes mêmes de la convention ; que ces termes sont clairs, formels et non susceptibles d'interprétation ; que c'est dénaturer la convention de soutenir qu'elle ne prévoyait pas le cas d'un renvoi sans motifs ;

Attendu qu'en condamnant dans ces conditions les sieurs Houel et Picard à payer au sieur Letellier une somme de 22 fr. pour la semaine de congé à laquelle celui-ci prétendait droit, le jugement attaqué a violé les articles de loi invoqués par le pourvoi ;

Par ces motifs,

Casse.

NOTE.—Les règlements d'atelier, qui dérogent aux usages locaux, obligent les ouvriers, comme les patrons, lorsqu'ils ne contiennent rien de contraire à l'ordre public, et que d'ailleurs les ouvriers ne les ont point ignorés : Cass. 14 février 1866 (S. 66.1.194) ; 15 avril 1872 (S. 72.1.232) ; 7 août 1877 (S. 77.1.107.) D'ailleurs la preuve de la connaissance, que les ouvriers ont eue de ces règlements, peut se faire, dans tous les cas, par témoins, ou par simple présomption. Cass. 16 janvier 1866 (S. 66.1.7).

COUR DE CASSATION (CH. DES REQUÊTES.)

17 mai 1886.

Présidence de M. BÉDARRIDES.

TROTTIN v. MALANÇON ET CIE.

Marchés à terme—Exception de Jeu—Banquier—Fortune apparente du spéculateur—Bonne Foi—Cassation—Appréciation souveraine.

La question de jeu, dans l'hypothèse où il peut y avoir incertitude sur le caractère d'opérations à terme, en vue de bénéfices à réaliser sur la variation des cours des effets publics, est une question de fait et d'intention, qu'il appartient aux juges du fond de trancher dans la plénitude de leur pouvoir souverain d'appréciation.

Et le rejet de l'exception de jeu, opposée à un banquier, demandeur en paiement d'un solde d'opérations de bourse, auxquelles il a procédé comme mandataire et pour le compte d'un tiers, est suffisamment justifié par cette constatation souveraine en fait, que les opérations litigieuses n'étaient pas en disproportion avec les facultés apparentes du mandant, et qu'il n'est pas établi que le dit banquier ait prêté sciemment son concours à des opérations aléatoires.

Ainsi jugé sur le pourvoi en cassation du sieur Trottin contre un arrêt de la Cour de Paris du 19 juin 1885, rendu au profit des sieurs Malançon et Cie et rapporté Gaz. Pal. 85.2.45.

LA COUR,

Sur le moyen unique du pourvoi tiré de la violation des art. 2, 1965 C. civ., et fausse application de l'art. 1er de la loi du 28 mars 1885 :

Attendu que la question de jeu dans l'hypothèse où il peut y avoir incertitude sur le caractère d'opérations à terme, en vue de bénéfices à réaliser sur la variation des cours des effets publics, est une question de fait et d'intention qu'il appartient aux juges du fond de trancher dans la plénitude de leur pouvoir souverain d'appréciation ;

Attendu que si l'arrêt attaqué constate qu'après une série de marchés à terme sur différentes valeurs se soldant en bénéfice encaissés par Trottin, Malançon et Cie, d'ordre et pour le compte de celui-ci, ont acheté, le 9 janvier 1882, fin courant, 200 actions alpines, et que, faute de prendre livraison, tous ces titres ont été revendus le 31 du même mois, avec une perte de 35,975 fr. 75 cent., réclamée à Trottin par Malançon et Cie, le même arrêt ajoute que les opérations auxquelles Trottin s'est livré, n'étaient pas, par leur importance, en disproportion avec ses facultés apparentes, et qu'il n'est pas établi que Malançon et Cie aient prêté leur concours à des opérations aléatoires ;

Attendu que ces constatations souveraines, exclusives d'un concours prêté sciemment par Malançon et Cie à des opérations de jeu constituent des motifs juridiques qui suffisent à justifier le rejet de l'exception de jeu

opposée par Trottin à la demande en paiement dirigée contre lui par Malançon et Cie, et rendaient inutile l'examen de la question relative aux effets de la loi du 28 mars 1885;

Rejette.

Note.—La question directement soumise à la Ch. des requêtes par le pourvoi, dans son moyen unique, était celle de savoir si la loi du 8 avril 1885, sur les marchés à terme, doit être ou non appliquée avec un effet *rétroactif*. La Cour d'appel l'avait, contrairement à l'opinion la plus généralement suivie, V. l'état de la jurisprudence sur cette question controv. en note sous Douai 11 janvier 1886 (Gaz. Pal. 86.1.298), résolue affirmativement. La Ch. des requêtes, à l'examen de laquelle elle n'avait point encore été soumise, l'a, dans l'espèce, purement et simplement écartée. Après s'être formellement prononcée, par des motifs à elle propres, dans le sens de la rétroactivité de la loi dont s'agit, la Cour de Paris avait, en effet, adopté les motifs du jugement, qu'elle confirmait par son arrêt. Or, pour repousser l'exception de jeu, déjà proposée devant eux, les premiers juges s'étaient fondés sur l'ignorance dans laquelle le banquier, demandeur, s'était trouvé du caractère aléatoire des opérations, auxquelles il prêtait son intermédiaire, sans d'ailleurs qu'aucune des circonstances de la cause pût être considérée comme ayant été de nature à le lui révéler. En décidant que dans cet état des faits souverainement constatés, et dût-on même appliquer l'art. 1965 C. civ., abstraction faite de la loi du 8 avril 1885, comme le voulait le pourvoi, l'exception de jeu avait, dans tous les cas, dû être écartée, la Ch. des requêtes n'a fait que persister dans les errements d'une jurisprudence qui, antérieurement à la dite loi du 8 avril 1885, n'était, depuis longtemps déjà, plus discutée. V. notamment Cass. 18 novembre 1885 (Gaz. Pal. 85.2.722); 9 mars 1886 (Gaz. Pal. 86. 1.452); 6 avril 1886, (Gaz. Pal. 86. 1, supp. 122), rejetant des pourvois formés contre des décisions antérieures à la dite loi.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 30.

Judicial Abandonments.

Charles McCambridge, Montreal, April 26.

Curators appointed.

Re Dunbard Beaudry, manufacturer.—G. A. Bouillet, Montreal, curator, April 26.

Re Louis Landry, plumber and gasfitter.—Seath & Daveluy, Montreal, curator, April 19.

Re D. Rees & Co., Montreal.—A. W. Stevenson, Montreal, curator, April 19.

Dividends.

Re Louis Béland, Sorel.—Dividend, payable May 25, Kent & Turcotte, Montreal, curator.

Re L. Carpentier, Sorel.—Dividend, payable May 25, Kent & Turcotte, Montreal, curator.

Re Louis Cousineau.—First and final dividend payable May 17, C. Desmarteau, Montreal, curator.

Re A. Goyer.—Dividend, L. J. D. Beaudry, Montreal, curator.

Re Emile Guenette, St. Dominique.—Dividend payable May 25, Kent & Turcotte, Montreal, curator.

Re Rivet & Picotte, hatters and furriers.—Dividend, Seath & Daveluy, Montreal, curator

Re Spénard & Bédard.—First and final dividend, payable May 18, C. Desmarteau, Montreal, curator.

Separation as to property.

Virginie Thibault vs. Jean-Bte. Lavoie, carpenter, Montreal, April 22.

Quebec Official Gazette, May 7.

Judicial Abandonments.

P. J. A. Noël, general storekeeper, St. Antoine de Tilly, May 5.

Curators appointed.

Re Chs. McCambridge, Montreal.—C. Desmarteau, Montreal, curator, May 4.

Re Robert Mauger, trader, St. Adelard de Pabos.—H. A. Bédard, Quebec, curator, May 2.

Re J. J. McCorkell, biscuit maker, Quebec.—H. A. Bédard, Quebec, curator, May 2.

Re P. J. A. Noël.—E. Bégin, N.P., Quebec curator, April 30.

Re Pepin & Boire, contractors.—Seath & Daveluy, Montreal, curator, May 3.

Re F. X. Rinfret, trader, Matane.—H. A. Bédard. Quebec, curator, May 4.

Re Felix Vachon, trader.—H. A. Bédard, Quebec. curator, April 13.

Separation as to property.

Marie George vs. André Phaneuf, farmer, township of Magog, April 30.

Elizabeth Trudeau vs. Eusèbe Auclair, navigator, Sorel, May 2.

GENERAL NOTES.

The Liability to Fence.—In an action by a child of tender years to recover damages for injuries sustained by falling down a hole in a vacant lot where she was playing, where it was not shown that the defendant did anything more than merely suffer or permit the use of the lot by children, there is not an invitation which would impose any duty or responsibility for the condition of the lot. (*Galligan* v. *The Metacomet Manufacturing Company*, Sup. Ct. Mass. 3 N. Engl. Rep. 704.)

The Legal News.

VOL. X. MAY 14, 1887. No. 20.

An Act passed recently by the Legislature of Ohio goes very far in the assertion of "women's rights," and in giving husband and wife a separate status. The wife is authorized to make personal contracts as if unmarried, and husband and wife may contract together subject to the doctrine of confidential relations. On the other hand it imposes on the wife the duty of assisting the husband in supporting the minor children, if he is unable to do it wholly. The *American Law Record* says: "The present act removes the last vestige of the old, fanciful doctrine of the common law, that husband and wife are but one person in the eye of the law, together with all the consequences deduced from that proposition by the inexorable logic of the feudal lawyers."

The *Law Journal* (London) remarks that "the Attorney-General, in the House of Commons, went too far when he said that 'any report of a trial which was in fact an indecent publication was subject to the law as to indecent publications,' and that this was part of the doctrine in the case of 'The Confessional Unmasked,' namely, that motive was not to be considered. The decision, however, in *Steele* v. *Brannan*, 41 Law J. Rep. M. C. 85, where that case is reported on the second occasion on which it came before the Courts, is that an indecent book republished as part of a report of the trial of a proceeding in which it was pronounced indecent has no privilege. Mr. Justice Keating and Mr. Justice Grove confined themselves strictly to deciding this point, and Chief Justice Bovill held that the publication was not, in the circumstances, a fair report of the trial. It is obvious that when a trial at law is made a subterfuge for publishing indecent matter, no privilege exists, because the claim is not *bonâ fide*. A fair report of a trial published in the interests of justice, and not using the judicial proceedings as a cloak for indecency, although it does use words which, if published on another occasion, would be indictable, has never been held to be indictable; and it is not in accordance with the genius of English law that it should be."

COUR DE REVISION.

QUEBEC, 30 avril 1886.

Coram STUART, J. C., CARON, ANDREWS, JJ.

LABERGE v. LABERGE ès-qualité, et MCNICHOLL et vir, opposants, et LABERGE, contestante.

Douaire—Opposition afin de surseoir—Créance antérieure au douaire.

JUGÉ:—*Que le créancier antérieur au douaire peut faire saisir et vendre l'immeuble affecté au douaire; que le douairière qui a institué une action en licitation et partage de la jouissance de l'immeuble sur lequel porte son droit, ne peut par une opposition afin de surseoir faire suspendre la vente jusqu'à adjudication sur telle action, mais qu'elle peut faire valoir son droit par une opposition à fin de charge.*

La demanderesse ayant obtenu jugement pour pension alimentaire contre le défendeur, tuteur à ses petits enfants issus du mariage de l'opposante avec feu Ferdinand Bergeron, fit saisir un immeuble ayant appartenu à la communauté de biens qui avait existé entre ces derniers.

L'opposante et son second mari produisirent une opposition à fin de surseoir à la vente. L'opposante alléguait (1) son douaire sur l'immeuble saisi; (2) qu'elle avait institué contre ses enfants une action en licitation et partage de l'usufruit du dit immeuble, action encore pendante, concluant: "A ce "que les procédés sur la vente soient suspen- "dus jusqu'à ce que le dit immeuble soit "licité et partagé quant à la jouissance et "usufruit, avec dépens en cas de contesta- "tion contre qui de droit, l'opposante à tout "événement, devant être remboursée des dits "dépens comme frais de partage et licita- "tion."

La demanderesse contesta parce que l'immeuble saisi avait été donné par elle au premier mari de l'opposante à la charge de la

pension réclamée; et que la dite donation avait été consentie antérieurement au mariage de l'opposante qui avait créé le douaire invoqué.

La contestante, outre les faits ci-dessus, prouva l'enregistrement de sa donation après le mariage, mais avant l'enregistrement requis pour conserver le douaire.

La Cour Supérieure (Malbaie, ROUTHIER, J.) renvoya la contestation par le jugement suivant:—

"Considérant qu'en vertu du jugement qu'elle a obtenu en cette cause, contre le défendeur ès-qualité, la demanderesse ne peut faire vendre sur lui (défendeur) que la part de l'immeuble saisi qui lui appartient, et non la part qui appartient à l'opposante, et qui consiste dans la moitié indivise du dit immeuble;

"Considérant qu'il est établi que l'opposante a, dès la fin de décembre 1884, institué contre le défendeur ès-qualité une action en partage et licitation du dit usufruit indivis, et que la dite action est encore pendante devant cette Cour, sous le No. 584;

"Considérant que les droits immobiliers respectifs du défendeur et de l'opposante dans le dit immeuble saisi, doivent être divisés et licités dans la dite instance, et qu'il est juste que la saisie-exécution faite en cette cause par la demanderesse soit suspendue jusqu'à ce qu'il y ait eu partage ou licitation du dit usufruit, dans la dite cause No. 584;

"Maintient la dite opposition de Louise McNichol et vir, et ordonne que la saisie-exécution immobilière, telle que faite en cette cause, soit suspendue jusqu'à ce que l'usufruit de l'immeuble saisi soit licité ou partagé comme susdit, avec dépens de la contestation de l'opposition contre la demanderesse mais sans préjudice au droit de cette dernière de faire vendre, s'il y a lieu, la nue-propriété de l'immeuble."

Ce jugement fut accompagné des observations suivantes:

Le grand moyen de contestation invoqué par la demanderesse contre l'opposition *afin de surseoir* faite en cette cause, peut se résumer comme suit:

"Mon titre de créance, dit la demanderesse, est antérieur à celui des opposants; donc, ils ne peuvent pas préjudicier à l'exercice de mon droit. Maintenir l'opposition, ce serait soutenir que le douaire de l'opposante prime mon privilège de bailleur de fonds."

Mais en raisonnant ainsi, la demanderesse se méprend sur la véritable portée de l'opposition. Les opposants ne contestent pas le privilège de bailleur de fonds de la demanderesse; ils ne mettent pas en question l'antériorité de ce privilège et ils ne prétendent pas à une préférence dans la revendication de leurs droits. Il ne peut pas même être question de préférence entre les droits respectifs des parties, parce que ces droits ne sont pas de même nature.

En effet, la demanderesse réclame une créance, tandis que les opposants revendiquent une part de propriété.

Les prétentions des opposants peuvent se résumer comme suit, en s'adressant à la demanderesse:

"Vous avez une *créance personnelle* contre Emile Laberge ès-qualité, et en même temps une *hypothèque privilégiée* sur l'immeuble que vous avez saisi en cette cause; nous ne contestons ni votre *créance personnelle* ni votre *privilège*, ni le jugement que vous avez obtenu, ni votre droit de faire saisir et vendre les biens qui appartiennent à Emile Laberge ès-qualité. Mais, il y a une portion de l'immeuble que vous avez saisi qui nous appartient, et cette portion est indivise: elle consiste dans l'usufruit de la moitié indivise du dit immeuble. Si cette portion était divise, nous la reclamerions par une opposition *afin de distraire*, et vous seriez bien obligée d'y consentir puisque vous n'avez pas de jugement contre nous, et ne pouvez pas faire saisir-exécuter nos biens. Si nous n'avions pas déjà devant cette Cour, une action en partage et licitation contre Emile Laberge ès-qualité réclamant notre usufruit, nous pourrions aussi faire une opposition *afin de charge*, demandant que l'immeuble saisi soit vendu à charge de notre usufruit. Mais dans ce cas, on comprend quels inconvénients énormes il en résulterait non-seulement pour les opposants, mais pour l'adjudicataire, et par contrecoup pour la demanderesse; car l'indivision subsisterait après la vente et l'adjudicataire serait soumis aux ennuis et aux frais d'une action en *partage et licitation*. Or cette action,

qui devrait alors être portée contre l'adjudicataire, elle est aujourd'hui pendante contre les défendeurs; et tout ce que nous demandons par notre opposition, c'est que vos procédés pour faire vendre l'immeuble soient suspendus jusqu'à ce que les droits respectifs des opposants et des défendeurs dans le dit immeuble soient divisés ou licités par sentence de cette Cour. S'ils sont divisés, vous pourrez faire vendre alors la part des défendeurs; s'ils sont licités, vous réclamerez sur le prix le paiement de votre créance en faisant valoir alors votre privilège; et la balance du prix sera partagée entre le défendeur et l'opposante, suivant leurs droits respectifs."

Je suis d'avis que ces prétentions des opposants sont parfaitement fondés en droit et en équité. Je ne vois pas en quoi la demanderesse peut s'en plaindre.

Sans doute elle est retardée dans sa procédure; mais ce retard est nécessité pour éviter l'illégalité et l'injustice qu'elle commettrait en faisant vendre sur le défendeur une part d'immeuble qui ne lui appartient pas. Ce retard peut lui être préjudiciable, mais c'est pour éviter un plus grand préjudice. Je pourrais citer dans notre procédure un grand nombre de cas semblables, où des moyens dilatoires sont permis quoiqu'il en résulte certain préjudice à certaines parties. Qu'il me suffise de rappeler les exceptions dilatoires pour appeler des garants, qui retardent quelque fois beaucoup l'action principale.

Le simple retard causé à la demanderesse me semble un préjudice minime comparé à celui qu'éprouverait l'opposante, si après avoir fait une opposition *afin de charge*, elle était obligée de reprendre après la vente, une nouvelle action en *partage et licitation* contre l'adjudicataire.

Au reste, c'est le droit de la demanderesse d'intervenir dans l'instance pendante *en partage* afin de hâter la procédure et de la surveiller. De fait, il appert au dossier, quoique l'issue ne soit pas jointe sur ce point, que telle intervention a eu lieu.

La demanderesse soutient dans son factum que l'opposante, en sa qualité de douairière, est tenue personnellement, comme le défendeur, au paiement de sa créance. Cela me paraît fort douteux; mais supposé que ce soit exact, cela ne donnerait pas à la demanderesse un *titre exécutoire* contre l'opposante, et ne lui permettrait pas de faire vendre l'usufruit qui lui appartient sans avoir préalablement obtenu jugement contre elle.

La demanderesse dit encore que la procédure adoptée par l'opposante n'est appuyée sur aucun texte de loi positif.

Mais ce serait une erreur de croire que les seules procédures permises devant nos tribunaux soient celles qui sont indiquées et réglées par notre Code de Procédure. S'il devient nécessaire pour faire reconnaître nos droits dans une cause, de recourir à des procédés exceptionnels que notre Code n'a pas prévus, la justice exige de les admettre s'ils ne sont pas incompatibles avec les dispositions de notre Code. C'est ce que déclare d'ailleurs l'article 21 de notre C. P. C.

Ici, d'ailleurs, le procédé n'est pas nouveau. Il existait dans l'ancienne procédure française d'où la nôtre est tirée, et il a été récemment reconnu et conseillé par l'hon. juge Casault dans la cause citée par l'appelante.

La demanderesse admet la justice du procédé dans le cas cité par Pigeau. Or ce cas est analogue à celui qui nous occupe. La seule différence c'est que dans le premier c'est le droit de propriété *tout entier* qui est indivis, tandis que dans le second cas c'est l'usufruit seulement qui est indivis. La question, d'ailleurs, est identique, et la solution doit être la même.

En révision, la contestante cita les autorités suivantes:

I. La rente réclamée garantie par privilége de bailleur de fonds: 2014 et 2044, C. C. *Dufresne & Dubord*, 4 Q. L. R. 59, en appel; *Chapais & Lebel*, 3 L. C. R. 477.

II. Le douaire étant postérieur à la créance de la demanderesse ne peut lui préjudicier: Art. 1447 C. C., et les autorités sous cet article. Pothier, Douaire, No. 91,—Guyot, vbo. douaire, p. 303, col. 2, parag. 2; 2 Argou, liv. 3, ch. 10, pp. 146 et 147; Code de Procéd., Art. 710; Renusson, Douaire, p. 226, No. 11.

III. Le droit d'usufruit de l'opposante sur l'immeuble saisi, n'empêchait pas de le saisir pour le tout sur le défendeur. Autorités cidessus et Héricourt, Décret d'immeuble, p. 150 et seq.

IV. L'opposante n'avait que l'opposition afin de charge.

C. de Proc., Art. 659; Pothier, Procéd., p. 234; Ferrière, Coutume de Paris, vol. 2, p. 474; Ferrière, Dict. de Droit, vbo. opposition, p. 296, col. 2.

L'opposante cita: 2 Chabot, Quest. transitoires, vbo. Droits acquis, pp. 88, 90, 92, 93, idem loc. cit. vbis. douaire coutumier, pp. 33, 34, 42, 61, 65; 4 Legal News, p. 71, opinion de l'hon. juge Rainville, C. S. Rév; Art. 1427, C. C.; 1 Pigeau, proc. civ. pp. 762 et 763; 10 Q. L. R. p. 136, l'*Hopital Général* v. *Gingras*, C. S. Casault, J.; *Roy* v. *Roy*, 13 R. L., p. 380, Mathieu, J.

Jugement en révision:

"Considering that the plaintiff's judgment under which she has taken in execution the immoveable in this cause seized, is for arrears of a life rent created on the said immoveable in her favor by deed of donation by her and her deceased husband to the opposant's deceased husband prior to opposant's marriage with him;

"Considering that the right of the opposant in said immoveable is merely one of usufruct during her life and ought to be claimed by her by an opposition *afin de charge* and subject to the obligation on her part of giving to the plaintiff security that the said immoveable would be sold for a sufficient sum to assure to the plaintiff payment of her life rent;

"Considering that the plaintiff is entitled to bring to sale forthwith the whole of the said immoveable without regard to the action *en partage* brought by the opposant, and the opposition by the opposant filed to said sale is unfounded, and that there is therefore error in the judgment rendered by the Superior Court for the district of Saguenay on the 3rd March, 1886, maintaining the said opposition;

"Doth hereby reverse the said judgment and doth hereby dismiss the said opposition with costs, as well of said Court of first instance as of this Court of Review, distraits, etc."

Charles Angers, proc. de la contestante.

J. S. Perrault, proc. de l'opposante.

(C. A.)

CIRCUIT COURT.

HULL, (District of Ottawa), May 6, 1887.

Before WÜRTELE, J.

GUEST v. CARLE & DUNN.

Procedure—C.C.P., Arts. 34, 69—Summons—Matters purely personal.

HELD:—*That the Courts in the Province of Quebec have no jurisdiction, in matters purely personal, over persons residing in the Province of Ontario, when they have no property in the Province of Quebec, when the cause of action did not arise therein, and they have not been personally served within the territorial jurisdiction of such Courts.*

PER CURIAM.—This suit is founded upon a promissory note, made and signed by the defendant Carle, in the city of Ottawa, and Province of Ontario, and endorsed there by the other defendant Dunn.

The defendant Dunn resides in the city of Ottawa, and the action was served upon him there. He has not filed a declinatory exception; but in his pleas to the merits he invokes the want of jurisdiction.

Under article 34 of the C.C.P. our Courts have jurisdiction in matters purely personal, when the defendant has his domicile in the territorial jurisdiction of the Court, when the defendant is personally served in such territorial jurisdiction, and when the right of action originates within such territorial jurisdiction. Under article 68 the Courts have jurisdiction over non-residents who have property in this Province; and under article 69 the Courts have also jurisdiction over residents of the other Provinces of the Dominion, when they have property in this province, or when the cause of action arose therein.

In the present case the defendant Dunn resides in the Province of Ontario, he has not been personally served within the limits of the county of Ottawa, which forms the territorial jurisdiction of this Court; it is not alleged, nor shown by affidavit or otherwise, that he has property within the county of Ottawa; and the cause of action arose without the province. He is therefore not amenable to the jurisdiction of this Court.

Regularly the want of jurisdiction or incompetency of the Court should be invoked by a declinatory exception; but article 114 of the C.C.P. enacts that, even when no such exception has been pleaded, the parties must be dismissed by the Court, if the action is manifestly beyond its jurisdiction. Here the facts brought under the notice of the Court establish manifestly that the defendant Dunn is not amenable to it. I must therefore apply this article to the case, and I consequently declare the Court incompetent and discharge the defendant Dunn out of Court.

It has been established that the defendant Dunn was sued in the Province of Ontario for the note now in question, and that he has paid certain moneys on account of the judgment against him. I therefore condemn the other defendant, Carle, to pay only the balance now due on the note with interest and costs.

Defendant Dunn discharged out of Court, and judgment against the other defendant, Carle.

Arthur McConnell, for Plaintiff.
Rochon & Champagne, for Defendants.

COUR DE CASSATION.

(CH. CIVILE.)

(DEUX ARRÊTS.)

29 mars 1886.

Présidence de M. BARBIER, premier président.

Chemins de fer—Transport de marchandises—Avaries de route—Tarif spécial—Clause de non garantie—Faute—Preuve.

La clause d'un tarif spécial d'une compagnie de chemins de fer, pour le transport des marchandises portant que la compagnie ne répond pas des avaries de route, n'a point pour effet d'affranchir la dite compagnie des fautes qui seraient reconnues avoir été commises par elle ou ses agents; mais elle a pour effet de mettre la preuve de ces fautes à la charge de l'expéditeur ou du destinataire qui les invoquent (1re et 2e espèce).

En conséquence, est nul, comme manquant de base légale, le jugement, qui, nonobstant la dite clause, déclare la compagnie responsable d'une avarie de route, sans constater aucun fait précis et déterminé constitutif d'une faute imputable à la dite compagnie ou à ses agents (1re espèce);

Spécialement le jugement, qui se borne à affirmer en ne prenant en considération que la nature de l'objet transporté et les conditions matérielles du transport, que l'avarie survenue en cours de route, n'a pu être causée que par une faute de la compagnie (1re espèce).

Mais un jugement a pu, à bon droit, déclarer la compagnie responsable, en reconnaissant que l'avarie provient de ce qu'en opérant eux-mêmes le chargement et le déchargement des objets transportés, ses agents ont omis de prendre les précautions les plus élémentaires, et que l'avarie notamment aurait été évitée si les dits agents avaient placé et déplacé avec soin les dits objets, et les avaient, au besoin, éloignés les uns des autres (2e espèce).

1re Espèce—CH. DE FER P.-L.-M. v. BENOIT.

LA COUR,

Statuant sur le moyen unique du pourvoi:

Vu le tarif spécial No. 41 du chemin de fer de Paris à Lyon et à la Méditerranée, le dit tarif dûment homologué;

Attendu qu'il est constaté par l'arrêt attaqué que les 98 tuyaux de fonte faisant l'objet du procès, avaient été expédiés par Benoît, d'après sa demande, aux conditions du tarif spécial No. 41, de la compagnie demanderesse lequel affranchit la dite compagnie des déchets et avaries de routes;

Attendu, d'une part, que ces dispositions sont générales; qu'elles s'appliquent sans distinction à toutes les avaries qui peuvent atteindre en cours de route les marchandises transportées et particulièrement à la casse;

Attendu d'autre part, que la clause susvisée, insérée dans le tarif, avait pour effet, non de faire disparaître la responsabilité de la compagnie à l'égard de ses propres fautes ou de celles de ses agents, mais seulement de mettre la preuve de ces fautes à la charge du propriétaire des marchandises, par dérogation aux règles du droit commun en matière de transport;

Attendu que Benoît n'a allégué à l'encontre de la compagnie l'existence d'aucune faute imputable soit à la compagnie elle-même, soit à ses agents; que, pour accueillir la demande

en paiement de l'avarie, l'arrêt attaqué n'a constaté aucun fait précis et déterminé constitutif d'une faute; qu'il s'est borné à déclarer que le tuyau de fonte remis intact au départ était arrivé brisé, et que la casse, autant par la nature de l'objet que par les conditions matérielles du transport, avait été causée par une faute de la compagnie;

Mais attendu qu'il n'existe aucune corrélation nécessaire entre le fait relevé et la conséquence qui en est déduite; d'où il suit que la décision attaquée (Montpellier 25 janvier 1884) manque de base légale et qu'elle renferme la violation du tarif sus-visé;

Par ces motifs,

Casse.

2e Espèce.—Ch. de fer de l'Est v. Geoffroy-Jobard.

La Cour,

Sur l'unique moyen du pourvoi:

Attendu que si le tarif spécial P. V. No. 33 des transports à petite vitesse des chemins de fer de l'Est porte que la compagnie ne répond pas des avaries de route, cette clause ne saurait avoir pour effet d'affranchir la dite compagnie des fautes qui seraient reconnues avoir été commises par elle ou par ses agents; qu'il en résulte seulement que la preuve de ces fautes reste à la charge de ceux qui les invoquent;

Attendu que pour rendre la compagnie de l'Est responsable des avaries éprouvées par les objets expédiés pour le compte de Geoffroy-Jobard, le jugement attaqué déclare qu'il est établi et non dénié que la compagnie a elle-même opéré le chargement et le déchargement de la buanderie et de la cuisinière transportées; que ces objets, par leur nature, offraient une résistance suffisante pour que la simple trépidation du wagon en marche ne pût les briser; qu'il suffisait, pour éviter l'accident survenu, de prendre les précautions les plus élémentaires; que ce résultat eût été atteint si les agents de la compagnie avaient placé et déplacé avec soin les articles de quincaillerie qui leur avaient été confiés et les avaient au besoin éloignés les uns des autres: qu'en ne prenant pas ces précautions, la compagnie a commis une faute engageant sa responsabilité;

Attendu qu'en tirant, par une affirmation directe de ces faits et circonstances souverainement constatés par le Tribunal, notamment de la nature et de la résistance des marchandises, rapprochées du défaut de soins des agents de la compagnie, la conclusion formelle que les avaries éprouvées par les objets transportés avaient été occasionnées par l'absence de précautions de la part de la dite compagnie, le jugement attaqué (Trib. com. Chaumont 6 août 1883) a suffisamment établi la faute qu'il relève à la charge de cette dernière et n'a, par suite, violé aucune des dispositions de la loi visés par le pourvoi;

Par ces motifs,

Rejette.

THE LATE SIR JOHN MELLOR.

Sir John Mellor, formerly a Justice of the Court of Queen's Bench, England, died April 26, aged 78. He was the only son of a wealthy member of the firm of Gee, Mellor, Kershaw & Co., Lancashire manufacturers. He was called to the Bar, June 7, 1833, and joined the Midland Circuit. In 1849 he became Recorder of Warwick, was made Q.C. in 1851, and Recorder of Leicester in 1855. In 1857 he was elected to Parliament for Yarmouth. Four years later he was raised to the Bench by Lord Westbury. The following notice of his career is from the *Law Journal* (London):—

The career of Sir John Mellor exemplifies how often determination to succeed secures success, and with how little learning or brilliance a man may be a very satisfactory judge. He was one of those men who started at the bar under the favouring influence of friends, who managed to secure that fillip to professional progress—a seat in Parliament, and who was eventually appointed, with the usual professional murmurs, on political grounds, to a seat on the bench. All these things would not have happened but for the resolve which he registered in the Castle Yard at Leicester, under the stirring influence of the entry of the judges of assize, that he would be a judge himself, and for his having steadily kept that resolve in view through life. He was far from being the first, as he will not be the last, man who, being the son of a maker of hats or even of humbler origin,

has attained high judicial office. Sir John Mellor had above other men the art of getting on, and had the good fortune or the good judgment to attach himself closely to Bethell. He was one of the few men who were Lord Westbury's friends, and it was Lord Westbury's personal feeling for him which gave him his judgeship, while political service served as a justification to the party if not to the profession. Lord Westbury had only been Chancellor a few months, since the death of Lord Campbell, and Mr. Justice Mellor was his first judge. Sir John Mellor, although he read in the chambers of Thomas Chitty, did not, like most of the lawyers of his day, practice the art of special pleading, which it is the fashion now to decry, but which has made most of our great lawyers, and the loss of which as a means of education is already showing itself in the rising generation; but, recognizing the true bent of his talents and the direction of his opportunities, he betook himself to quarter sessions and circuit in the Midland counties. The considerable business which he obtained as a junior was of a kind rather to be consolidated than imperilled by his becoming a Queen's Counsel, and, having in turn obtained two Recorderships and achieved a seat in Parliament, he, on the resignation of Mr. Justice Hill, and the refusal of Sir William Atherton, Attorney-General, to take the vacant place, became a judge of the Court of Queen's Bench.

During all the time that Mr. Justice Mellor was in that Court he sat beside Cockburn as Chief Justice, and nearly all the time beside Blackburn as puisne judge. Shee, Hayes, Quain, Archibald, and Hannen came and went, but these seemed permanent. Lord Blackburn was then *impiger iracundus acer*, and Mr. Justice Mellor often had to throw the oil of his manner on the waters troubled by his vigorous colleague. He outlived the Court of Queen's Bench, although its destruction did not touch his feelings as it did those of the Chief Justice. What may, however, be called the apotheosis of the Queen's Bench, when the Common Pleas and the Exchequer were merged in it, did not occur until after Mr. Justice Mellor had left the bench and Cockburn was dead. By that time Lord Blackburn had been elevated to the Lords, leaving the Court very much as long a time before Mr. Justice Mellor left it as he had joined it before Mellor was appointed. Mr. Justice Mellor had left the bench before the migration to the Royal Courts of Justice took place, and the farewell which he took of the bar on June 12, 1879, was the last judicial farewell which took place in Westminster Hall, just as the farewell to Vice-Chancellor Bacon was the first given in the Royal Courts. Sir John Holker, as Attorney-General, delivered the address from the bar, and described the first appearance of the now retiring judge on circuit at Appleby, the critical attitude of the bar on that occasion, and the satisfactory way in which the new judge acquitted himself. The bar, said Sir John Holker, had been treated by Mr. Justice Mellor "not only with courtesy, but with a generous kindness." No one who saw the broad lines of the beaming face and the careless figure of Mr. Justice Mellor on the bench but would believe this testimony, still less any one, especially if he were a young counsel, who had practised in his Court. Something has been said about the opinions of Mr. Justice Mellor in regard to religion. No doubt these opinions changed from time to time, but a story which is told of him at a period when Lush and Shee were his colleagues on the bench shows the view taken at that time. The Court of Queen's Bench had to decide a question of ecclesiastical law, and the judges were said to be variously qualified for the duty. Lush was a Baptist, Shee was a Roman Catholic, Mellor was nothing at all, and the Church of England was left to be represented by Cockburn. Subsequently Mr. Justice Mellor and Mr. Justice Lush alone had before them the application of a Nonconformist to be admitted as a fellow of Hertford College, Oxford, which they granted, to be overruled afterwards by the Court of Appeal, although no bias was ever suggested. As Mr. Justice Mellor's first judicial experience was on the Northern Circuit so was his last. A year after his retirement, in consequence of the indisposition of Baron Huddleston, he gallantly undertook to go the Winter Circuit in the North as a special commissioner. It was

argued in these columns at the time, and it has since been generally accepted as sound law, that his qualification was solely as a serjeant, and that a Queen's Counsel who has been a judge is no longer a Queen's Counsel. Mr. Justice Mellor was perhaps best known to the public as a prominent figure in the trial at bar in the case of *Regina* v. *Castro*. It fell to his lot to pass sentence in that case, and he addressed the defendant by his several aliases of Castro, Orton, and Tichborne, and on awarding a punishment of fourteen years' penal servitude, added that it was "wholly inadequate to the offence."

In his later days Mr. Justice Mellor suffered from the infirmity of deafness, which is the terror of judges, and he shared some of the aversion of Sir James Bacon to the beard on the upper lip. He used to take great trouble to hear what was said, and would insist on its being repeated in a louder tone if he did not hear. Sometimes in a criminal trial a witness would have to repeat words which he modestly spoke in a low tone. The judge, misunderstanding his motive, would sternly order him to speak out, whereupon the witness would in desperation shout out at the top of his voice words which no one would be proud of repeating. Mr. Justice Mellor was perhaps more at home in Criminal Courts, where his knowledge of life, common sense, and genuinely kind manner were conspicuous. He was, with Mr. Justice Blackburn, one of the special commissioners who tried the murderers of Sergeant Brett at Manchester. An attempt was made to show that the prisoners in Brett's charge when he was shot in an attempt at rescue were held under an illegal warrant; but the judges decided against the contention without any doubt. The eighteen years during which Mr. Justice Mellor was in the Queen's Bench make him conspicuous in the history of the time; but his *role* in *banco* was rather as moderator of the brilliance, learning, and vigour of his colleagues of that day than as contributing to the shining qualities of the Bench. He did not illuminate the law by learning or originality, but he may safely be numbered among the good judges of his day.

GENERAL NOTES.

Legal Position of French Pennies.—Some misapprehension prevails in regard to the legal position of French coins in England. By an Act passed in 1870 (33 Vict. c. 10, s. 5) it is provided that 'no piece of gold, silver, copper, or bronze, or of any metal or mixed metal, of any value whatever, shall be made or issued except by the Mint, as a coin or a token for money, or as purporting that the holder thereof is entitled to demand any value denoted thereon; every person who acts in contravention of this section shall be liable on summary conviction to a penalty not exceeding twenty pounds.' A person who pays a penny omnibus fare with a French penny, 'issues a piece of bronze as a coin or a token for money,' and is liable to the penalty of the section. French pennies are, therefore, not merely an illegal tender in the sense that the creditor may refuse to take them, but in the sense that it is penal to offer them and an abetting of a penal act to take them. If the Government offices were to accept these coins the Queen's servants would be assisting in the commission of a penal offence of which they themselves would be guilty if they sent the coins to the bank. *Law Journal*, (London).

Inferences from Literary Style.—In the Court of Appeal of Ontario, on March 1 an appeal from the Common Pleas Division in a case of *Scott* v. *Crerar* was heard. It was an action for a libel contained in an anonymous letter circulated among members of the legal profession in the city of H., charging the plaintiff with unprofessional conduct. No direct evidence was given to show that the defendant was the author of the letter, but the plaintiff relied upon several circumstances pointing to that conclusion. The trial judge refused to admit some of the evidence tendered. It was held, reversing the judgment of the Court below, that evidence of the defendant being in the habit of using certain peculiar or unusual expressions which occurred in the letter was improperly rejected; but *Semble* that a witness could not be asked his opinion as to the authorship of the letter; and *per* Burton, J.A., that evidence of literary style on which to found a comparison, if admissible at all, is not so otherwise than as expert evidence.—*Canadian Law Times*.

The Costs of Justifying Libels.—When Mr. Lever's trial ended in his acquittal, the prosecutor Mr. Hunter, was ordered to pay the costs of the defence. The costs which Mr. Lever had to pay to his own counsel and solicitors amounted to £2,205. Of this he recovers from Mr. Hunter, under the order of the Court, £558, so that he is actually out of pocket to the extent of £1,647. The *Liverpool Daily Post* says that Mr. Lever's losses are not caused by any peculiarities of his case, but are the necessary consequence of the position which he took up. If a public-spirited man takes upon himself to expose a bad system he must go to enormous expense in collecting evidence to support his plea, while the prosecutor has, in general, but, few points, and those of the simplest nature, to prove. The result is that, even if the truth of the libel be established, the convicted man undergoes no punishment beyond the payment of costs; while the defendant, if found guilty, may be sent to gaol, and, if acquitted, has to face the certainty of heavy pecuniary loss.—*Law Journal* (London).

The Legal News.

VOL. X. MAY 21, 1887. No. 21.

The *Chicago Law Times*, for April, contains a portrait and biographical sketch of Chief Justice Marshall. The articles take a wider range than the majority of legal periodicals. The Hon. Wm. Brackett contributes an essay on "A Prescription for Poverty," Hon. C. B. Waite writes upon "European Politics," etc.

The members of the Moral Reform Union have made the following representations in a memorial addressed to the Home Secretary:—"It is not desirable that any public acts or utterances should by law be cut down to the level of the mental and moral capacity of children and the immature; their protection in this, as in other matters, must be left to the care of their respective guardians. All adult citizens, whether men or women, must bear their share of the suffering which results from the wrong which may exist in their midst. That they have no right to protect themselves from the knowledge of it by an interference with the general rights of the people; and that it is not desirable that they should remain in ignorance of it, as only by knowing of it can they be roused and fitted to help in its removal. The publication of useless and offensive details can be best prevented by appeals to the conductors of papers, and by such expression of public opinion as will support such appeal. The right of judges to clear their Courts ought to be strictly limited to the exclusion of minors. The rights of all adult citizens are equal, and women must not be treated as minors. Your memorialists pray that no prohibitory law be framed to restrict the liberty of the press in the reports of trials of matters concerning the relations of men and women."

The Queen's Bench Division, in *Hawkins* v. *Shearer*, had, at the end of last sittings, before it, an interesting question of rural law, as to which there was an unexpected bareness of authority. The plaintiff was the occupier of the surface of land under which the defendant was entitled to quarry. The defendant did not fence, and the plaintiff's ox fell into the pit. The County Court judge nonsuited the plaintiff, but Mr. Justice Mathew and Mr. Justice Cave entered judgment for him. "The decision goes somewhat further," says the *Law Journal*, "than *Groucott* v. *Williams*, 32 Law J. Rep. Q. B. 237, which appears to be the only other authority on the subject. The danger in that case was an old shaft, the occupier of which had left it, not open, but insufficiently covered, and the horse of the occupier of the surface fell in. Chief Justice Cockburn said that 'there was an obligation on the person who sank the shaft to render it harmless to the horses and cattle feeding on the surface,' or, as Mr. Justice Blackburn expressed it, he must 'prevent injury.' In the case of the shaft there could have been no negligence or acquiescence on the part of the surface owner, but in the present case there might have been. The expressions used by the Chief Justice and Mr. Blackburn seem, however, to show that the obligation is that of an insurer, and the Chief Justice points out that the owner of the soil does not know when, or in what way, or to what extent, the shaft will be sunk and kept open."

SUPERIOR COURT.

AYLMER (dist. of Ottawa), April 26, 1887.

Before WÜRTELE, J.

LEDUC v. GOURDINE.

Obligation for the payment of money—Damages for inexecution—C. C. 1077.

HELD:—*That in the case of an obligation for the payment of money, the damages resulting from the debtor's default are restricted by article* 1077, *C. C., to interest on the sum, either at the rate stipulated, or, in the absence of an agreement, at the rate fixed by law; and that the stipulation of a fixed sum in addition to the interest for costs of collection, is illegal.*

PER CURIAM. On the 14th May, 1883, the defendant signed, before a notary, an obligation in favor of the plaintiff for $200, payable in two years and bearing interest at the rate of 8 per cent.

This obligation contains the following clause: "Faute aussi par le dit débiteur de rem-"bourser la somme ci-dessus mentionnée à "son échéance il payera en sus de l'intérêt "dix par cent pour frais de collection."

By his action, the plaintiff asks for the capital of the obligation, with interest, $20 for costs of collection, and the costs of suit.

The law gives him his costs of collection by allowing the costs of suit; but he wants twenty dollars in addition to what the law so allows. He wants a double toll, which certainly does not seem proper nor right. But does the law sanction such a demand?

Damages incurred by the inexecution of an obligation other than for the payment of money are estimated in money; in other words, the obligation is converted into the debt of a certain sum of money. In the case of an obligation to pay a sum of money, its inexecution cannot change its nature; it was an obligation to pay money and it remains what it primitively was.

In the case of such obligations, damages do not therefore accrue for inexecution, but only for delay in the payment.

In the case of the non-performance of an obligation other than for the payment of money, the damages are either fixed by agreement or estimated by the Court at a certain sum, which represents the loss or injury sustained. In the case of default or delay in the payment of money, a special rule as to the damages resulting therefrom is laid down by article 1077 of the C. C., which provides that such damages shall consist *only* of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law. They are, however, due without it being necessary for the creditor to prove that he has sustained any loss, and they accrue from day to day as long as the default lasts. The article is imperative, and prohibits anything being stipulated in addition to the interest; but the damages are commensurate with the length of the default.

Sirey, in note 1, under article 1153, says: "Les dommages-intérêts dus à raison du re-"tard apporté à l'exécution d'une obligation "qui se borne au paiement d'une somme "d'argent, ne consistent jamais que dans la "condamnation aux intérêts fixés par la loi. "quelque soit d'ailleurs le préjudice que le "défaut de paiement a causé au créancier." It may be observed here that article 1153, C. N., limits the damages to interest at the rate fixed by law; whereas our Code allows of the rate being fixed by agreement as well.

Messrs. Aubry & Rau, in volume 4, page 107, say: "Les dommages-intérêts........ consistent toujours, mais consistent uniquement, dans les intérêts légaux...... quelque soit d'ailleurs le préjudice que le défaut de paiement a causé au créancier...... Ainsi, le créancier, qui, en stipulant le remboursement à jour fixe de la somme à lui due, aurait indiqué au débiteur un dommage spécial...... devant résulter pour lui du défaut du remboursement au terme convenu, ne pourrait, malgré cela, réclamer que les intérêts moratoires."

In the present case, the ten per cent. stipulated by the creditor for costs of collection is nothing else than a special damage payable, in addition to the interest, in consequence of the debtor's default. This is contrary to the provisions of article 1077, C. C., and is therefore illegal and cannot be allowed. The article is prohibitive, and any agreement in contravention thereto is consequently null. (Article 14, C. C.)

Judgment for two hundred dollars with interest and costs: "And the Court doth "reject the surplus of the plaintiff's demand, "the same being contrary to the provisions "of article 1077 of the C. C."

Rochon & Champagne for plaintiff.

SUPERIOR COURT.

DISTRICT OF OTTAWA, October 25, 1886.

Coram WÜRTELE, J.

COSGROVE v. MAGURN.

Action en Bornage—Old Borne—Prescription —Costs.

HELD:—*That by law, a peaceable possession, as proprietor, for thirty years, prevails over the limits indicated by titles, or by measurement, and also over posts and boundary marks between lots and other tracts of land, and confers ownership of the lands so possessed upon the possessor.*

2. *That the plaintiff, having failed to maintain his pretensions respecting the line of division, should be held for the costs of the suit; but that the costs of the expert surveyor's operations, report and plan and affixing the bounds and placing the boundary marks, should be divided equally between the parties.*

The action was in the ordinary terms for *bornage*—assuming that no delimitation of boundary line in question had been made. The properties in question are the north halves of lots 10 and 11 marked in cadastre plan 10*a* and 11*a* respectively, in the fifth range of the Township of Buckingham, in the County of Ottawa, the plaintiff holding 10*a* and the defendant 11*a*.

The facts and issues in the case appear in the *considérants* of the judgment:—

"The Court, having heard the parties by their respective counsel on the merits, examined the proceedings and proof of record and having deliberated thereon;

"Considering that the plaintiff alleges that the defendant refused to join with him in establishing and fixing the boundary line between his land, being lot number 10*a* in the fifth range of the Township of Buckingham, and the contiguous land of the defendant, being lot number 11*a* in the same range and township, and that he therefore brought the action in this cause to compel the defendant to do so;

"Considering that the defendant pleads that about forty-five years ago, a division line was duly run by a surveyor between the contiguous lands in question; that a fence was erected in such line for a portion of its length; that the defendant had, for over thirty years, been in continuous and undisputed public possession of all land on his side of such fence and line, and that he has therefore acquired the ownership thereof; that the plaintiff has no right to disturb such established and existing boundary line; and that he (the defendant) is willing to have bounds placed in such boundary line at common expense;

"Considering that it is in proof that the division line between the two lands in question was run in or about the year 1837 by a surveyor named Theodore Davis at the request of one Baxter Bowman, the owner at that time of both the lands in question; that he built a fence in such line, for a distance of one-eighth of a mile from the south line of such lands—which fence still exists for a length of two chains, ninety-eight links; that at the time it was so run, the division line through the wooded part of the lands was picketed, and the trees were blazed to the line between the fifth and sixth ranges; and that the defendant has had continuous and undisturbed open possession of all land up or eastwardly to such division line for thirty years, and has cultivated undisturbedly, during all that time, the land up to the fence in question;

"Considering that it is not proved that the defendant refused, before the institution of the action in this cause, to bound their lands on the above mentioned division line;

"Considering that the *Expert* Surveyor in this cause, after having ascertained the distance on the front line of the sixth range of the Township of Buckingham, between the undisputed post between lots numbers one and two of the sixth range to the undisputed post between eleven and twelve, which gave an average width of twenty-six chains, eight links and nine-tenths of a link to each lot, fixed a point on the range line at that distance eastwards from the post between lots numbers eleven and twelve; that he then ascertained the distance on the front line of the fifth range between the undisputed post between lots numbers nine and and ten and the undisputed post between lots eleven and twelve, and gave to each of the lots ten and eleven, one-half of such distance for its width, and that he afterwards ran a line between the two points so established, which line, he states in his report, to be, in his opinion, the true line of division between lots 10*a* and 11*a*;

"Considering that the *expert* surveyor in this cause also ran another line according to the pretensions of the defendant, following the fence above mentioned and continuing on the same bearing a course of north five degrees forty minutes and thirty-eight seconds west astronomically, running for the greater part of the length through bush land to the rear line of the fifth range, as shown on the plan accompanying his report;

"Considering that, by law, a possession of thirty years prevails over the limits indicated by titles, or by measurement, and also over posts and boundary marks between lots and other tracts of land, and confers ownership of the lands so possessed, upon the possessor;

"Considering that the defendant has prescribed beyond the line of division indicated by the *expert* surveyor to the fence herein-above mentioned, and to a line of division continued therefrom to the rear line of the range, and that his possession prevails over such division line, and that in the present case, the rules laid down by the Statute respecting Land Surveyors and the survey of ands (45 Vic., ch. 16, Q.) for the verifying and establishing the range and side lines, do not apply, but that the defendant has the right to be maintained in his possession, and to have the line of division determined, fixed and bounded in accordance therewith;

"Considering, moreover, that the plaintiff has failed to maintain his pretensions respecting the line of division, and that it was the groundlessness thereof which was the cause of the present suit; and that the party in an action of boundary who fails to establish his pretensions, should be held for the costs of suit;

"Doth reject the motion of the plaintiff for the homologation of the report of the *expert* surveyor; doth accept and homologate that portion of the report which defines the line of division drawn according to the pretensions of the defendant in the line of the fence up to which, it has been proved, that the defendant's possession has extended for thirty years, and continuing therefrom, on the same bearing or course, to the rear of the fifth range;

"Doth adjudge and order that the boundary line dividing the lands of the parties shall be such line of division—which line is indicated and shown on the plan accompanying the report of the *expert* surveyor and produced and filed therewith, by the letters C D, and runs from the stone boundary planted by Surveyor McLatchie on the bearing or course of north five degrees forty minutes and thirty-eight seconds west astronomically, to the rear line of the fifth range: doth further order that such line be run and laid out on the ground, and that proper boundary marks be placed thereon according to law to determine, fix and establish such line of division for the future, by the *expert* surveyor in this cause, J. B. Mullarkey, or in case of his refusal or default to act, by such other surveyor as may be agreed upon by the parties, or in default of such agreement, by such surveyor as may be named by the Court; and that such surveyor do draw up a statement of such operations and produce and file the same in this cause, with all due diligence; and doth order that the costs of the *expert* surveyor's operations, report and plan and of affixing the bounds and placing the boundary marks, be divided equally between the parties, and doth condemn the plaintiff to bear, alone, the costs of his action, and to pay the costs of the defendant, etc."

Authorities of Defendant:—

C.C. 2242, 504; 12 L.C.J. 39, *Eglaugh* v. *The Society of the Montreal General Hospital*, Q.B., 1868; 17 L.C.J. 185, *Pattenaude* v. *Charron*, S.C., 1873; 1 Rev. L. 713, *Ricard* v. *Fabrique de Ste. Jeanne de Chantal;* 11 L.C.J. 129 (Privy Council) *Herrick* v. *Sixby;* 1 Rev. de L. 354, *Thériault* v. *Leclerc.*

Statutes:—Quebec Act of 1872 (45 V., ch. 16) secs. 71, 74, 75, 76 and 81; (Surveyors and Survey of Lands); Rule of Survey before 24 Dec., 1875; Cons. St. Canada, ch. 77, secs. 47 (12 V., ch. 35, s. 20.)

Evidence—Reference to Original Survey: —2 L.C.J. 203, *Adams* v. *Gravel.*

Road—Boundary:—1 Rev. de L. 354, *Blanchet* v. *Jobin;* Pandects, Lib. 10, Tit. 1, § 2, par. v.

Costs:—C.C. 504, 2nd clause, "In case of contestation, are in the discretion of the Court"; 2 L.C.J. 81, *Slack* v. *Short*, Q.B., 1857.

T. P. Foran, for Plaintiff.

Malcolm McLeod, Q.C., for Defendant.

[M.M.]

*SUPERIOR COURT, MONTREAL.**

Review—C. C. P. 494—Petition for nomination of notary to make inventory—C. C. P. 19.

Held, 1. A review may be had upon every judgment or order rendered by a judge in summary matters under the provisions contained in the third part of the Code of Procedure.

2. The petition of heirs for the appointment of a notary to make the inventory of the estate, should be made in the name of the parties themselves, and not by attorney.

3. The judge is not bound to appoint the notary chosen by the majority of the heirs, but may, in his discretion, name another where he considers that the choice of the majority is not the most advantageous.—*Ex parte Paré et al.* v. *Paré et al.*, In Review, Doherty, Loranger, Tait, JJ., March 31, 1887.

Vente—Encan public—Dettes actives ou " book debts "—Livres de comptes.

Jugé, Que la vente des dettes actives ou " book debts " d'un commerçant en faillite à l'encan public, ne comprend pas les livres de compte eux-mêmes, mais simplement la vente des créances du failli.—*Guindon* v. *Fatt*, En Révision, Jetté, Würtele, Tait, JJ., 31 mars 1887.

Procedure—Power of Attorney and security for costs.

Held, That a non-resident plaintiff, contesting the collocation of a third party in a report of distribution, is obliged to furnish a power of attorney and give security for costs. —*Bornais* v. *Arpin & Merchants Bank*, Taschereau, J., April 16, 1887.

Evocation de la Cour de Circuit—Jugement sur évocation—Révision—Délai.

Jugé, Que dans une cause de la Cour de Circuit évoquée à la Cour Supérieure et jugée finalement au mérite, on ne peut, dans les huit jours du jugement final au mérite, inscrire la cause en révision tant sur le jugement au mérite que sur le jugement décidant la validité de l'évocation, mais que ce dernier jugement, qui est un jugement final, doit être inscrit en révision dans les huit jours qu'il a été rendu.—*Seers* v. *Boursier*, en révision, Doherty, Loranger, Tait, JJ., 31 mars 1887.

* To appear in Montreal Law Reports, 3 S. C.

Déposition—Ratures et renvoi non certifiés.

Jugé, Que des mots rayés et des renvois non constatés au bas d'une déposition, ne rendent pas, dans les circonstances ordinaires, cette déposition nulle.—*Lord* v. *Glasgow & London Ins. Co.*, Mathieu, J., 23 mars 1887.

Injures—Quête dans l'église—Dommages—Frais —Révision en questions de frais.

Jugé, 1. Qu'une personne chargée de faire la quête dans une église pendant l'office divin, et qui par préméditation néglige de présenter l'escarcelle à un paroissien, de manière à attirer l'attention de ceux qui sont dans l'église, se rend coupable vis-à-vis de ce paroissien d'une insulte pour laquelle il est passible de dommages.

2. Qu'un jugement accordant au demandeur $20 de dommages et $20 de frais, mais condamnant le dit demandeur à payer au défendeur la différence de frais, c'est-à-dire, tous ses frais moins $40, est erroné en autant qu'il détruit virtuellement l'effet du jugement prononcé en faveur du demandeur.—*Primeau* v. *Demers*, en révision, Jetté, Loranger, Brooks, JJ., 30 juin 1885.

COUR D'APPEL DE DOUAI.

(1re CHAMBRE.)

19 et 24 janvier 1887.

(DEUX ARRÊTS.)

Présidence de M. MAZEAUD, prem. président.

Notaire — Responsabilité — Prêt hypothécaire— Initiative du placement—Estimation des immeubles — Exagération — Erreur sur la propriété — Hypothèques antérieures—Promesse de radiation—Inexécution—Dommages intérêts.

Un notaire engage sa responsabilité, lorsque, quittant le rôle qui lui appartient, il s'entremet dans les actes que passent ses clients, lorsque, par exemple, ayant reçu un acte de prêt hypothécaire, il a cessé d'être simple rédacteur

de la volonté des parties, a pris lui-même l'initiative du placement, et s'est fait l'agent actif du placement, qui allait être consommé (1re et 2e espèces.)

Il est à bon droit déclaré, en pareil cas, responsable de l'insuffisance des garanties hypothécaires fournies, lorsqu'ayant précisé lui-même aux prêteurs la valeur des immeubles hypothéqués, son estimation s'est trouvée considérablement exagérée (1re et 2e espèces.)

Ou lorsqu'ayant pris l'engagement personnel de faire radier les hypothèques, grevant les dits immeubles antérieurement au prêt, il n'a pas satisfait à cet engagement (1re espèce.)

Ou lorsque l'acte portant que la somme prêtée servirait par l'intermédiaire du notaire à libérer l'emprunteur vis-à-vis des créanciers antérieures, de telle sorte que le prêteur restât seul inscrit sur les immeubles, il n'a pas surveillé cet emploi, qui n'a pas eu lieu, et a laissé ainsi subsister des hypothèques, qui priment le dit prêteur (2e espèce.)

Ou bien encore, lorsqu'ayant négligé de se renseigner, il a compris au nombre des immeubles affectés à la garantie du prêt, une pièce de terre, dont l'emprunteur avait cessé d'être propriétaire au moment de la dite affectation (2e espèce.)

La réparation due par le notaire doit être, en pareil cas, de tout le préjudice subi par le prêteur auquel il peut être tenu ainsi de rembourser le montant intégral du prêt, en principal, intérêts et frais faits pour parvenir au recouvrement, à charge seulement par le dit prêteur de le subroger, après paiement dans ses droits contre l'emprunteur (2e espèce.)

1re espèce.—19 janvier 1887.

CONSORTS DELAHODDE v. HÉRITIERS DE M. L..

LA COUR,

Attendu que la responsabilité de L.. ne saurait être contestée ; qu'il ne s'est pas renfermé dans son rôle de notaire, mais qu'il s'est fait l'agent actif du prêt qui allait être consommé ; qu'il a pris l'engagement personnel de faire rayer les hypothèques qui grevaient l'immeuble devant servir de garantie au prêteur ; qu'il a lui-même déterminé la valeur de cet immeuble, et l'a fixée à 18,000 ou 19,000 fr. ; qu'il a ainsi engagé les intimés à prêter une somme de 13,000 fr., qui devait être garantie très suffisamment par des immeubles d'une valeur largement supérieure et libres de toute inscription ; que l'emprunteur ne pouvant faire face à ses engagements, les immeubles ont dû être vendus, et que la vente a atteint seulement le prix de 9,400 francs ;

Attendu, en outre, que ces immeubles étaient grevés de deux inscriptions non radiées ; que L.. a donc commis une double faute, en donnant aux immeubles la valeur exagéré de 18,000 à 19,000 fr., qui devait pleinement rassurer le prêteur, et en ne faisant pas opérer la radiation des hypothèques antérieures ;

Attendu que ces faits ont causé un préjudice aux héritiers Delahodde, dont les héritiers L.. leur doivent réparation ;

Attendu qu'il n'y a pas lieu de s'arrêter à la demande d'expertise formée par les appelants, laquelle est déclarée inutile ;

Par ces motifs,

Dit n'y avoir lieu à expertise ;

Confirme le jugement quant à la responsabilité du notaire et au chiffre de la réparation due par les consorts L.. aux consorts Delahodde.

2e espèce.—24 janvier 1887.

EPOUX POURRE-DELPIERRE v. HÉRITIERS DE L..

LA COUR,

Attendu que par contrat reçu L.., notaire à X.., le 14 octobre 1880, l'épouse Fasquelle emprunta de l'épouse Pourre-Delpierre, la somme de 23,000 fr. ; qu'elle hypothéqua, pour garantie et sûreté de sa créance, divers immeubles désignés au contrat et d'une valeur estimative de 60,000 francs ; que les intérêts des années 1884 et 1885 ont été inutilement réclamés par la créancière ; qu'un tiers créancier, le sieur Dallery, a fait à cette époque pratiquer une saisie sur les immeubles de l'épouse Fasquelle ; que la vente de ces immeubles n'a pas dépassé le prix de 18,705 fr. ; que les époux Pourre-Delpierre non-seulement n'ont pas trouvé dans ce prix somme suffisante pour couvrir le montant de leur inscription hypothécaire de 23,000 fr. en capital, mais qu'ils sont encore primés sur le montant de l'adjudication par une hypothèque antérieure ; qu'ils ont alors fait assigner

le notaire L.., ou quoique soit, ses héritiers, prétendant que la responsabilité de ce notaire est engagée et qu'il doit être tenu de réparer le préjudice qu'ils ont éprouvé par sa faute ;

Attendu que la responsabilité du notaire est engagée lorsque, quittant le rôle qui lui appartient, il s'entremet dans les actes que passent ses clients, lorsqu'il cesse, par exemple, d'être le rédacteur de la volonté des parties, et prend lui-même l'initiative d'un placement ;

Attendu que le notaire L.. s'est fait l'intermédiaire du prêt ; que, suivant un usage qu'il semble avoir depuis longtemps pratiqué, il a cherché un prêteur qui consentit à prêter, à des conditions déterminées, 23,000 fr. à l'épouse Fasquelle ; qu'il a lui-même déterminé les conditions et les garanties de cet emprunt ; qu'il a précisé que les immeubles à hypothéquer en garantie avaient une valeur de 50,000 fr. sans les constructions ; de 60,000 fr., si l'on y ajoute ces dites constructions, que la somme prêtée devait servir par son intermédiaire à libérer complètement la femme Fasquelle, de telle sorte que le prêteur restât seul inscrit sur l'immeuble ;

Attendu que le prêteur a pu et dû croire à ces garanties qui lui assuraient, pensait-il, le remboursement de l'argent prêtée, et le mettaient à l'abri de toute mauvaise fortune de son débiteur ; que cependant les immeubles saisis et vendus ont produit seulement 18,705 fr., somme inférieure au prix effectué ; que, tout en reconnaissant que la propriété foncière a subi une diminution considérable, il n'est pas possible d'admettre que des immeubles d'une valeur de 50,000 fr., en octobre 1880, sans les bâtiments, et de 60,000, avec ces bâtiments, aient pu éprouver une pareille dépréciation ; que l'estimation du notaire était entachée d'une grande exagération ; que c'est une première faute dont il est responsable ;

Attendu que le notaire a pris inscription pour le prêteur sur les immeubles du débiteur ; qu'il n'est pas contesté que, parmi les parcelles immobilières hypothéquées, le No. 10, une pièce de terre de 1 hectare, 24 ares, 13 centiaires, n'appartenait plus à la femme Fasquelle au moment de la rédaction de l'acte ; que le gage était ainsi diminué sans que le notaire qui, pour s'en assurer, avait seulement à consulter l'état des transcriptions, ait cherché à se renseigner ; que c'est là une faute lourde qui engage sa responsabilité ;

Attendu qu'il avait été convenu que le débiteur devait se libérer par les mains du notaire, désintéresser les créanciers, de telle sorte que le prêteur restât seul inscrit ; qu'il n'en a pas été ainsi ; que le prêteur se trouve primé sur le prix des immeubles par un créancier inscrit avant le prêt et non désintéressé ; que c'est une troisième cause de préjudice, et une nouvelle faute du notaire ;

Attendu, enfin, que L.. se considérait si bien comme responsable du placement qu'il avait ménagé, qu'au mois d'octobre 1881, le service des intérêts éprouvant quelque retard, il déclarait que, si l'épouse Fasquelle ne payait pas ces intérêts, il les servirait lui-même ; que la responsabilité du notaire L... est donc engagée ;

Par ces motifs,

Infirme ;

Dit qu'il a été mal jugé, bien appelé ;

Condamne les héritiers L.. à rembourser aux appelants : 1o. la somme de 23,000 fr., principal de l'obligation du 14 octobre 1880, sous défalcation des sommes touchées de la Caisse des dépôts et consignations selon bordereau délivré en vertu de l'ordre ouvert ; 2o. les intérêts de la dite somme à 5 p. c. par an à partir du 14 octobre 1884 ; 3o. les frais faits pour obtenir le remboursement de la créance, les frais de production à l'ordre ouvert et tous autres ; sous l'offre, par les appelants, de subroger, après paiement, les héritiers L.. dans leurs droits résultant de la production à l'ordre ouvert.

NOTE.—V. conf. sur le principe et l'étendue de la responsabilité du notaire, qui a négocié un emprunt hypothécaire, et sur des applications analogues à celles faites par les arrêts ci-dessus de la Cour de Douai, de ce principe de responsabilité : Trib. civ., Nantes, 28 janvier 1884 (Gaz. Pal. 84.1.827) ; Grenoble, 23 janvier 1884 (Gaz. Pal. 84.1.950) ; Chambéry, 23 juin 1884 (Gaz. Pal. 84.2.551) ; Paris, 11 décembre 1884 (Gaz. Pal. 85.1.643) ; Bordeaux 18 novembre 1884 (Gaz. Pal. 85.1.761) ; Cass., 21 octobre 1885 (Gaz. Pal. 85.2.621); 25 janvier 1887 (Gaz. Pal. 87.1.287), et les notes.—*Gaz. du Palais.*

THE PARNELL LETTER.

A critical examination of the letter attributed to Mr. Parnell by its internal evidence alone is not favourable to its authenticity. The writer of the body of the letter, evidently a clerk, had undoubtedly, from the crowding of the lines and words at the bottom of the page, set himself the task of filling the first sheet of his paper so as to leave no room for the signature. No well-conditioned secretary or copyist would ever do this in the ordinary course of work, and it was evidently done with an object. The comments of the *Times* on this and other points, did not clear up the suspicion. So far from its being "an obvious precaution to sign upon the back instead of the second page, so that the half-sheet might, if necessary, be torn off and the letter disclaimed," any such device would have been of no value whatever. If the writer wished to suppress the letter he had only to burn it; and to tear it in half so that it might be joined again would be folly, as neither half would be of any value without the other. Again, the erasure in the manuscript is claimed "as undesigned evidence of authenticity," when it has rather the suspicious look of a design to make the letter look genuine or suggests that the writer was writing on paper already signed so that he could not begin over again. The document. in fact, looked very much as if the body of it had been prefixed to a signature given as an autograph or otherwise. Mr. Parnell, however, pronounces the document a forgery—every letter of it—and, by so framing his denial, removes the suspicions suggested by the letter on its face. If the document was forged altogether, there was no object in putting the signature in so unusual a place, so that the matter now turns on a comparison of signatures and any external evidence there may be. The effect of the publication of the letter will only be removed by Mr. Parnell taking proceedings with a view to a judicial inquiry. The most obvious course would be a prosecution for libel. According to the present practice in the Queen's Bench, a criminal information would not be granted, as Mr. Parnell is not an official person, and it was refused in the case of Mr. Plimsoll when a member of Parliament was accused of sending ships to sea to sink. The Director of Public Prosecutions would, however, at once give his fiat for an indictment. If Mr. Parnell distrusts an English jury, the *Times* is published in Ireland, and an indictment, with the permission of the Attorney-General, will lie. Whether or not the British public would in its turn trust an Irish jury, there would at least be a judicial investigation upon which all the world could form its own opinion. Almost the same result would follow an application to the House of Commons for a Committee of Privilege to hear evidence, with managers for and against. For a newspaper to publish a letter showing that a member of Parliament secretly approved what he publicly denied in his place is a breach of privilege; and, although the Parliament sitting in 1882 no longer exists, there are precedents for a succeeding Parliament punishing contempts of a predecessor.—*Law Journal* (London).

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, May 14.

Judicial Abandonments.

Télesphore Delâge *dit* Lavigueur, Coteau Station, May 10.

Curators appointed.

Re Albert P. Benoit.—J. J. Griffith, Sherbrooke, curator, May 6.

Re Louis Odilon Paradis, Sorel.—Kent & Turcotte, Montreal, curator, May 6.

M. R. Spinelli, Montreal.—Kent & Turcotte, Montreal, curator, May 7.

Dividends.

Re Chas. Cadotte.—First and final dividend. A. M. Cassils, Montreal, curator.

Re Henriette Dubeau, milliner and trader.—Dividend. Seath & Daveluy, Montreal, curator.

Re Dame J. E. Vaine, milliner—Dividend. Seath & Daveluy, Montreal, curator.

Re Narcisse Pilotte, Wotton.—Dividend, payable May 31. Kent & Turcotte, Montreal, curator.

Separation as to property.

Cécile Dufour *dite* Latour vs. Tertulien Dagenais, cooper, Montreal, April 28.

Jubilee of the Queen.

June 21, proclaimed as a day of public thanksgiving.

The Legal News.

VOL. X. MAY 28, 1887. No. 22.

The work of the late Mr. Justice Ramsay, to which reference has already been made, and of which we have received some advance pages from the publisher Mr. Periard, differs from an ordinary index of decisions in that it embodies definitions of civil and criminal law as well as a synopsis of points held. In some cases the definition is not accompanied by any reference to a decision. These notes, which may be assumed to embody the result of a study of the subject, will be found valuable and interesting owing to the high reputation of the learned author, but they detract to some extent from the methodical arrangement of an Index of Decisions. The profession will look eagerly for the appearance of a work to which no small portion of time was devoted, and notwithstanding some defects which would have been remedied if the lamented judge had lived to see it pass through the press, there can be no doubt that it will take a high place in our local jurisprudence.

The resignation by Mr. Gladstone of his seat on his becoming Commissioner of the Ionian Isles, remarks the *Law Journal*, is no precedent in the case of Colonel King-Harman. In that character Mr. Gladstone was 'a governor of plantations' within the meaning of 6 Anne, c. 41, and therefore disqualified to sit in Parliament, notwithstanding that no profit was attached to the office. Mr. Gladstone might have supplied a better precedent from his own experience of 1873, when, on adding the office of Chancellor of the Exchequer to that of First Lord of the Treasury without salary he declined to resign his seat. The legality of this course could not be questioned in Parliament because of the dissolution, but the better opinion was that the seat was vacated; and in 1881, when Mr. Herbert Gladstone was appointed a Lord of the Treasury without salary, he resigned his seat. The difference, however, between these last two cases and the case of Colonel King-Harman's appointment is that the former were cases of the acceptance without salary of an office which by usage was an office of profit under the crown, whereas, when a new office is created without salary, it is not an office of profit at all. If it were, Colonel King-Harman would not only have to resign his seat, but could not be re-elected without an Act of Parliament. The statute 41 Geo. III. c. 52, applying to offices uuder the Lord Lieutenant, puts them practically in the same position as offices under the Crown provided for by the statute of Anne. These statutes, however, do not apply, and there is no other reason why the new Under-Secretary should not sit in the House. By a statute passed in 1858 (21 & 22 Vict. c. 108, s. 4) it was provided that not more than four principal secretaries and four under-secretaries shall sit in the House of Commons. Colonel King-Harman will make the fourth Under-Secretary in that House, as the Secretary to the Board of Trade is not an Under-Secretary of State.

CIRCUIT COURT.

LACHUTE, (Co. of Argenteuil,) May 18, 1887.

Before WÜRTELE, J.

LACHUTE TOWN CORPORATION v. MCCONNELL.

Tax imposed by Municipal By-Law—How enforced.

HELD :—*That the payment of a tax imposed by a municipal by-law cannot be enforced by fine or imprisonment.*

PER CURIAM.—The Charter or Special Act of Incorporation of the Town of Lachute (48 Vict., ch. 72) gives power to the town-council to impose and levy an annual tax or license-fee upon all animals kept within the limits of the town. Under the power thus conferred, the town-council passed a by-law on the 14th July, 1886, which imposed an annual tax on dogs kept within the limits of the town, payable on or before the 31st January in each year. This tax is imposed in the following terms :—"Every owner or "keeper of a dog in the Town of Lachute, "shall annually, on or before the 31st day of

"January, cause it to be registered, numbered, described and licensed for one year "from the 1st day of the month of February, "in the office of the Secretary-Treasurer of "the town, ... and shall cause it to wear "around its neck a collar to which shall be "attached by a metallic fastening a metallic "plate, having raised or cast thereon the letters T. T. P., and the figures indicating the "year for which the tax has been paid, and "number corresponding with the number of "the registry, ... and the owner or keeper "shall pay for such license, $1.50 for a male "dog and $2.50 for a female dog."

The by-law contains also other provisions under the power conferred by section 275 of the "Town Corporations' General Clauses Act," which authorizes the town-council to pass by-laws to cause dogs to be muzzled or tied up, and to prevent them being permitted to go at large or without some person to take charge of them, and to authorize municipal officers to destroy vicious dogs or those found contravening the municipal regulations. It contains moreover a clause imposing a fine or an imprisonment for enforcing its provisions.

The plaintiff represents that the defendant was, on the first day of February last, and still is the owner of a dog kept within the limits of the town, and that he had neglected to cause such dog to be registered and to comply with the requirements of the by-law, and prays that in consequence of this contravention, he be condemned to pay a fine not exceeding $20.00 or to be imprisoned for a period not exceeding thirty days.

The evidence proves the defendant's possession of the dog and his omission to pay the tax for the current year.

The defendant pleads, among other things, that the plaintiff has no right to enforce the collection of the tax in the manner and form attempted.

The power given by the legislature to the town-council by the Special Act is clearly one to impose taxation on animals for the purpose of revenue, and not one to license the keeping of animals within the limits of the town for the purpose of police regulations. There is in the section referred to a misapplication of the word "license-fee"; and it is evident that it is used as synonymous to the words "annual tax" (Dillon on Municipal Corporations, 2nd. Ed., No. 609). The town-council does not therefore possess the power to license animals within the limits of the town, but merely to impose and levy an annual tax upon them. The phraseology of the by-law is peculiar, but, although the town-council has no power to force the owners of dogs to register them and to cause them to carry a metallic receipt for the annual tax, it seems to me that the words used are sufficient to express the intention of imposing an annual tax upon dogs and to authorize the levying of the same.

How is the payment of this tax to be enforced? Where a mode to enforce the payment of taxes is prescribed by statute, that mode and no other is to be pursued (Dillon on Municipal Corporations, 2nd. Ed., No. 653; Cooley on Taxation, page 300). In the case of the Town of Lachute, the collection of taxes is regulated by the "Town Corporations' General Clauses Act," which prescribes that municipal taxes may be levied by the seizure and sale of the goods and chattels of a ratepayer in default under a warrant signed by the mayor, or may be claimed by an action brought in the name of the corporation. No power is given to enforce payment by fine or by the arrest of the person taxed.

In the present case, however, the corporation instead of asking by its action that the defendant be condemned to pay the amount of the tax upon his dog, asks that he be condemned to pay a fine or to be imprisoned for his breach of the by-law. This is not levying and is moreover not the mode prescribed; and the suit is therefore illegal and untenable.

That by-laws may be enforced, it is necessary that some penalty should be imposed for the breach of them; and the legislature has therefore empowered Municipal Councils to enact penalties by fine or imprisonment. But this applies to the breach of a rule of conduct laid down by a by-law and not to the neglect or refusal to pay a tax imposed by a by-law. In the first case, when a municipal corporation prosecutes, it seeks to punish an infraction which has been committed of its by-law; but in the other, it seeks

to collect its revenue, and that cannot be attained by punishment, but by compulsion under a judgment, for the payment of the tax.

Were the plaintiff to complain that the defendant had allowed his dog to go at large, the violation of the by-law could be punished by fine or imprisonment; but where the complaint is of the non-payment of the annual tax upon his dog, the remedy is not attained by fine or imprisonment, but by a judgment under which the payment can be enforced by the seizure and sale of the defendant's goods and chattels.

Although the amount involved in this suit is small, the principle involved is important, for if the defendant can be fined or imprisoned for the non-payment of the tax upon his dog, any rate-payer could equally be fined or imprisoned for the neglect or refusal to pay a municipal tax upon his moveable or immoveable property.

The plaintiff's recourse is by action of debt and not by prosecution for fine or imprisonment; and I consequently dismiss the action, with costs.

Action dismissed.

R. C. de Laronde, for plaintiff.
Joseph Palliser, for defendant.

COUR DE CIRCUIT.

MONTREAL, 19 avril 1887.

Coram MATHIEU, J.

THIBODEAU v. MELOCHE, & MELOCHE, opposant.

Art. 479 C. P. C.—Taxation des frais—Opposition—Défaut de taxation des frais avant l'émanation d'un bref d'exécution.

JUGÉ :—*Qu'un bref d'exécution qui émane pour frais, sans taxation préalable de ces frais, est nul, et qu'une opposition invoquant cette nullité sera maintenue avec dépens.*

Dans cette cause et en cinq autres semblables, le demandeur avait fait émaner un bref d'exécution pour des frais du jour que les défendeurs avaient été condamnés à lui payer. Son *fiat*, écrit sur le mémoire même, requérait l'émanation d'un bref d'exécution *pour les frais taxés d'autre part*, mais aucune taxation n'avait été faite par les officiers de la Cour. Les opposants demandèrent la nullité du bref d'exécution et de la saisie par suite de ce défaut de taxation des frais.

PER CURIAM. Le jugement que le demandeur cherche à faire exécuter condamne les défendeurs au paiement de certains frais non liquidés, appelés frais du jour. La liquidation de ces frais ne pouvait se faire que par la taxation régulière du mémoire de frais. A Québec, on a décidé que les frais devaient être taxés contradictoirement, après avis à la partie adverse. Sans aller aussi loin, il parait certain que le jugement qui condamne la partie aux frais, ne peut être exécuté qu'en autant que ces frais ont été dûment liquidés. Il appert, à la face même des procédés en ces causes, que les frais en question n'ont jamais été liquidés, n'ont jamais été taxés tel que voulu par l'art. 479 du code de procédure civile. Le bref d'exécution est donc nul et la saisie doit être mise de côté.

Oppositions maintenues avec dépens.*

G. A. Morrison, avocat du demandeur.
Archambault, Lynch, Bergeron & Mignault, avocats des opposants.

(P. B. M.)

SUPERIOR COURT—MONTREAL.†

Agent—Responsabilité personnelle—Preuve.

Jugé, Que lorsqu'une action est basée sur un écrit du défendeur, ce dernier, s'il prétend n'avoir alors agi que comme l'agent d'un tiers, doit prouver légalement que le demandeur connaissait, lors de la signature de l'écrit, que le défendeur agissait comme agent seulement.—*Ménard* v. *Leroux*, en révision, Doherty, Gill, Loranger, JJ., 31 janvier 1887.

Entrepreneur en sous ordre—Privilège—Radiation.

Jugé, Qu'il n'y a que l'entrepreneur principal qui puisse acquérir le privilège du constructeur, et que l'entrepreneur en sous-ordre n'a pas ce droit.

2. Qu'un entrepreneur en sous-ordre qui aura fait inscrire un prétendu privilège sur un immeuble, sera condamné à en faire faire la radiation à ses frais et dépens.—*Moisan* v. *Thériault*, Würtele, J., 31 mars 1887.

* Voir aussi *Lewis et al.* v. *McGinley*, 6 Q. L.R. 61.
† To appear in Montreal Law Reports, 3 S. C.

THE LAW OF THE FRONTIER.

The following diplomatic note, dated April 28, 1887, was addressed to the French Ambassador at Berlin on the release of M. Schnaebele:—

On the strength of communications made to me by his Excellency the Ambassador of the French Republic with regard to the judicial arrest of the French police commissary Schnaebele, as well as of communications from the French Minister of Foreign Affairs to the Imperial Chargé d'Affaires at Paris, the undersigned has given the affair his careful consideration. For this purpose the judicial authorities concerned were requested to furnish the documents relating to the arrest of Schnaebele and its attendant circumstances.

Copies of the most important of these documents, especially the statement made by Schnaebele after his capture, and all the depositions of witnesses officially examined, have been communicated to the Ambassador of the French Republic; and from these it is beyond doubt that the arrest in each of its stages was made exclusively on German territory, without any crossing of the French frontier.

The judicial proceedings against Schnaebele were taken on information that he had committed the crime of treason within the territory of the German Empire, and were based on complete evidence of his guilt, consisting of the confessions made by the German subject Klein, similarly accused, and of autograph letters posted at Metz by Schnaebele, and afterwards acknowledged by him. On the ground of the proved guilt of Schnaebele, and his own subsequent confession, the Imperial Court issued an order for his arrest whenever he set foot on German soil. This was done on the 20th inst., on the occasion of a business meeting at the frontier between Schnaebele and the German police commissary Gautsch. In these circumstances, therefore, it is not possible to doubt that Schnaebele would be convicted, and that his punishment would presumably be all the more severe seeing that in acting criminally, as he did, he abused the confidence reposed in him in an especial degree from the very fact of his being a frontier official. Schnaebele did harm to the trust which is so indispensable for international intercourse in that he used his official position as a frontier servant to bribe German subjects into the commission of criminal actions against their Fatherland. This abuse of his office aggravates Schnaebele's offence in the eyes of the Court, apart from the question whether or not he acted on higher instructions. The undersigned takes the liberty of pointing out this view of the case, so as to meet the contingency of Schnaebele, after his present liberation, being again found on German territory, without being secured against seizure by previous official agreement.

The undersigned ventures to hope that the documents communicated will convince the Ambassador that the judicial order for the arrest of Schnaebele was well justified, and that in executing it the German Government was within its right, and that French rights were not infringed.

Nevertheless, the undersigned thought it his duty to beg the Emperor, his most gracious Master, to command the liberation of Schnaebele. He was guided in so doing by the doctrine of international law that the crossing of a frontier, when done on the strength of official agreement between the functionaries of neighbouring States, must always be looked upon as carrying with it the tacit assurance of a safe-conduct. It is not credible that the German official Gautsch invited Schnaebele to a conference with the object of facilitating his arrest; but there are letters which prove that Schnaebele, when seized, had come to the spot where this was done in consequence of an agreement with a German official to meet and transact common official business. If on such occasions frontier officials were exposed to the danger of being arrested on the strength of the claims preferred against them by the tribunals of the neighbouring State, the caution thus enjoined upon them would carry with it a cause of hindrance to current border business, which would not harmonise with the spirit and traditions of present international relations. The undersigned is, therefore, of the opinion that such official meetings should always be

looked upon as enjoying the mutual protection and assurance of a safe-conduct. Thus while fully acknowledging the right of the German tribunals and officials to act as they did, he has submitted all the facts of the case to His Imperial Majesty the Emperor, and His Imperial Majesty has been graciously pleased to decide that, in consideration of the reasons of international law in favour of the unconditional security of international negotiations, the aforesaid Schnaebele shall be set at liberty, notwithstanding his arrest on German territory and the evidence there is of his guilt.

While bringing this to the knowledge of the Ambassador of the French Republic, the undersigned begs to add that the necessary instructions have been issued for the release of Schnaebele, and at the same time prays his Excellency to accept the assurance of his most distinguished consideration.

VON BISMARCK.

To his Excellency M. Herbette, Ambassador Extraordinary and Plenipotentiary of the French Republic.

THE BERNINA No. 1.

The case of *The Bernina No.* 1, 56 Law J. Rep. P. D. & A. 17, (*ante*, p. 68) which in the future will be cited as exploding the doctrine of *Thorogood* v. *Bryan*, 18 Law J. Rep. C. P. 336, is reported in the April number of the *Law Journal Reports*. The case was so fully commented on in these columns on May 8 last year, and the criticisms then passed on *Thorogood* v. *Bryan* are so fully borne out by the present decision, that little remains to be said. It is a little remarkable that a month after the decision of Mr. Justice Butt was reported, and the week after those comments were made, there appeared in full in these columns the report of *Little* v. *Hackett* * in the Supreme Court of the United States. It was thus promptly brought before the profession in a manner which contributed to the result of the appeal, although, doubtless, in the end the industry of those concerned would have brought the case to the surface. Decisions extending over a greater space no doubt have been previously reported, but the present decision may well be considered a *tour de force* on the part of the Court of Appeal which with exemplary keenness and industry runs to earth and kills an error which has troubled the law of England for five-and-thirty years.

The interesting judgment of the Master of the Rolls apparently discloses what was the *fons et origo mali*. It appears to have been a *dictum* of Baron Parke, interpolated in the course of the argument of the case of *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 244, heard in 1838. The declaration in that case was for injury by the negligence of the servants of the defendants in the conduct of a train of the defendants. The plea was that the train in which the plaintiff was did not belong to the defendants; nor was it under the care and management of them or their servants, but under the care and management of others; that the persons who had the control and management of the train in which the plaintiff was were guilty of negligence; and that in part by and through the negligence of the last-mentioned persons, as well as in part by and through the negligence on the part of the servants of the defendants, the collision took place. To this there was special demurrer on the grounds that the plea amounted to not guilty, and that it was argumentative and alleged evidence. During the argument Baron Parke said: 'The question is whether the plea is not altogether bad in substance. It is consistent with all the facts stated in it that the plaintiff, *or those under whose guidance he was*, was guilty of negligence, and yet that the plaintiff is entitled to recover. Can it be said that because a carriage is on the wrong side of the road a party is excused who drives against it? It ought to have been shown that there was negligence in not avoiding the consequences of the defendants' default.' Upon this *dictum* Mr. Justice Williams, who was one of the judges responsible for *Thorogood* v. *Bryan*, says that he and his colleagues founded their decision. If so, it must be confessed they had a very slender basis to rest upon. What Baron Parke meant was that it was not enough to plead joint negligence, but contributory negligence must be pleaded, because it is consistent with

* 9 Leg. News, p. 106.

joint negligence that the defendant was guilty of negligence in not avoiding the consequences of the plaintiff's negligence. The argument appears to have been that, even supposing negligence in the plaintiff to be alleged (and he takes the pleader's view of the extent of the plaintiff's responsibility for negligence in respect of persons for the moment), yet the plea was bad because, besides alleging that the plaintiff was guilty of negligence, it did not allege that the defendants were not guilty of negligence in not avoiding the plaintiff's negligence. The distinction was in itself put in a way so difficult to follow that there is no wonder that the learned judge in his effort to make it clear neglected to let his mind go with the premisses on which he was basing it. It would be irreverent to reflect on the learned reporters, but if they had repressed this careless expression of Baron Parke's, which he did not repeat in giving judgment, they would have conferred a service on mankind. Mr. Justice Williams, however, followed it at Nisi Prius, and his brethren—Justices Coltman, Maule, and Cresswell — upheld him. Before *Thorogood* v. *Bryan* was argued the editors of 'Smith's Leading Cases,' then Mr. Willes and Mr. Keating, had criticised the *dictum* of Baron Parke, and that learned judge seems early to have repented of it, for in his own copy of 'Eighth Common Bench' he put a *quære* against the case, which fact was brought to the attention of the Courts as long ago as 1875. Still the doctrine appears to have been accepted, and its fallacy escaped even the acuteness of Baron Bramwell, for in *Childs* v. *Hearn*, 43 Law J. Rep. Exch. 100, if we are to believe the 'Law Reports,' that learned judge said, 'I think in such a case'—that is, the case of 'a person riding in a rotten carriage'—'the person riding in the carriage would be identified with the carriage in which he was riding.' There is external evidence that something of this sort was said by the learned baron, but it is only fair to add that this 'somewhat startling figure,' as the Master of the Rolls calls it, is not given in the LAW JOURNAL report of the case. A better idea of Baron Bramwell's opinion in the matter is to be obtained from *Armstrong* v. *The Lancashire and Yorkshire Railway Company*, 44 Law J. Rep. Exch. 89, in which he and Baron Pollock held that the travelling inspector in the train of a railway company, whose driver had contributed to a collision by his negligence, could not recover from the other company, which had also been negligent. Baron Bramwell followed *Thorogood* v. *Bryan*, with the observation that in that particular instance there was strong reason for the rule, 'however unreasonable it might seem at first sight.' Notwithstanding the learned judge's opinion that it would be preposterous that the servants of one railway company should sue another for the negligent acts of their servants, it would not seem easy to reconcile that decision with the present. But the first 'stout disagreement,' as the Master of the Rolls calls it, with the decision came from Dr. Lushington in 1861, when he declined to be bound by it, as wrong in principle and contrary to the practice of the Admiralty Court.

Of the earlier decisions on the other side of the Atlantic the most important is *Chapman* v. *The Newhaven Railroad Company*, 5 Smith's Rep. 341, in which the Court of Appeals of New York, in a case of a collision between the trains of different companies, pronounced *Thorogood* v. *Bryan* 'based on fiction and inconsistent with justice,' although a majority of the judges of the same Court shortly afterwards, in *Brown* v. *The New York Central Company*, 5 Tiffany, 597, a case of collision between a stage coach and a railway train, thought that 'in a case of this kind' *Thorogood* v. *Bryan* applied. American lawyers found some difficulty in reconciling these two cases until, in 1868, in *Webster* v. *The Hudson River Railroad Company*, 11 Tiffany 260, the same Court pronounced boldly in favour of the former against the latter decision. The Supreme Court of the United States, as we know, has recently expressed the same opinion. The history of legal opinion on this subject on both sides of the Atlantic shows that there must be something inherently puzzling in the subject. Baron Pollock, in *Armstrong* v. *The Lancashire and Yorkshire Railway Company*, made a gallant effort to grapple with the word 'identified,' which he explained did not mean that the

passenger constituted the driver his agent, but that 'under all the circumstances the plaintiff must be taken to be in the same position as the driver.' A rule which to support it could only be stated over again was not likely to stand, and with the great weight of authority now supporting the view taken by the Court of Appeal, English Law has probably said its last word on the subject.—*Law Journal*, (London).

APPEAL REGISTER—MONTREAL.

Monday, May 16.

Baker v. *Brossoit*.—Petition for leave to appeal from interlocutory judgment. Rejected without costs.

Ryan v. *Sanche*.—Motion to dismiss appeal. Granted for costs.

Gilman & Gilbert.—Motion to complete record. Granted by consent.

Cayotte Lasciserai & The Queen.—On the writ of error the plaintiff asks to be heard by counsel without the prisoner being present, as the proceedings are had *in forma pauperis*. Application withdrawn. The plaintiff in error then files a petition for a writ of *habeas corpus* addressed to the Warden of the Penitentiary. Petition granted.

Dorion & Dorion.—Case struck.

Chauveau & Benoit.—Case struck.

Senécal & Beet Root Sugar Co.—Case struck.

Barnard & Molson.—Heard on merits. C.A.V.

Fletcher & Chevrier.—Heard on merits. C.A.V.

Tuesday, May 17.

The Court adjourned for want of a quorum.

Wednesday, May 18.

The Mayor et al. & Brown.—Motion to dismiss appeal granted for costs only.

North Shore Railway Co. & McWillie et al.—Motion to dismiss appeal granted for costs only.

Cayotte Lasciserai v. *The Queen*.—The parties having been heard, the plaintiff in error was remanded until the 23rd inst.

McTavish & Fraser.—Heard. C.A.V.

Ryan & Sanche.—Called, struck.

Jodoin & Lanthier.—Heard. C.A.V.

Wade et al. & Mooney et al.—Heard on merits. C.A.V.

Friday, May 20.

Dorion & Dorion.—Heard on appeal from interlocutory judgment. C.A.V.

Canadian Pacific Railway Co. & Chalifoux.—Heard on merits. C.A.V.

Archambault & Lalonde.—Heard. C.A.V.

Saturday, May 21.

Ryan & Sanche.—Called, struck again.

Stephens & Chaussé.—Heard. C.A.V.

City of Montreal & Ecclesiastics of Seminary.—Continued to next term by order of the Court.

Redfield & La Banque d'Hochelaga.—Called, struck.

Allan & Merchants Marine Ins. Co.—Called, struck.

Canadian Pacific Railway Co & Cadieux.—Heard. C.A.V.

Monday, May 23.

Joseph Cayotte dit Lasciserai v. *The Queen*.—Judgment reversed, and conviction quashed.

Gilmour & Lapointe, Paradis, Daoust, Paradis, Boismenu, Paradis, Allaire, Brouillette, Mauroit.—Nine appeals. Heard. C.A.V.

The Montreal City and District Savings Bank & Exchange Bank.—Case settled out of Court.

Ogilvie et al. & Exchange Bank.—Case settled out of Court.

City of Montreal & Labelle.—Heard. C.A.V.

Kelly & Holiday.—Submitted on factums. C.A.V.

Baxter & McDonald.—Struck from the roll.

Wednesday, May 25.

Lemieux & Fournier.—Motion to dismiss appeal. Ordered to be heard with the merits.

Newton & Seale.—Heard. C.A.V.

Newton & Hammond.—Heard. C.A.V.

Palliser & Strong.—Heard. C.A.V.

Rivet & City of Montreal.—Motion for substitution granted.

Lemieux & Fournier.—The appellant not appearing, the appeal was dismissed.

Beckett & La Banque Nationale.—Heard. C.A.V.

Monette & Poirier.—Heard. Judgment confirmed, each party paying his costs in the three Courts; Tessier, J., *diss*.

Thursday, May 26.

Cie Minière de Colraine & McGauvran.—Judgment confirmed.

Bryson & Cannavon.—Judgment confirmed.

Ritchie & Tourville.—Judgment reversed; action dismissed.

Ross & Brulé.—Reversed.

Joyce & City of Montreal.—Confirmed.

Wheeler & Dupaul.—Confirmed.

Bradstreet & Carsley et al.— Confirmed. Leave to appeal to Privy Council granted.

Bradstreet & Carsley.—Confirmed. Leave to appeal to P. C. granted.

Jodoin & Lanthier.—Reversed.

Cie du Grand Tronc & Corporation Ville de St. Jean.—Heard on motion to dismiss appeal. C.A.V.

Société de Construction Métropolitaine & Molsons Bank & Rea.—Heard on petition for leave to appeal. C.A.V.

Ryan & Sanche.—Heard on interlocutory appeal. C.A.V.

Cie du Grand Tronc & Lebeuf et al.—Heard on merits. C.A.V.

Friday, May 27.

Canadian Pacific Railway Co. & McRae.—Heard on motion for leave to appeal from interlocutory judgment. C.A.V.

Corporation Roxton Falls et al. & Poirier.—Motion for dismissal of appeal; appellant not present. C.A.V.

Joyce & City of Montreal.—Motion for leave to appeal to Privy Council. Rule ordered to issue, returnable first day of next term.

Brosseau & Forgues.—Heard. C.A.V.

Gadoua & Pigeon.—Heard. C.A.V.

Ulster Spinning Co. & Foster. — Heard. C.A.V.

Saturday, May 28.

Cie du Grand Tronc & Corporation Ville de St. Jean.—Motion for dismissal of appeal granted.

Société de Construction Metropolitaine & Molsons Bank.—Motion for leave to appeal rejected.

Corporation of Roxton Falls & Poirier.—Motion for dismissal of appeal granted.

Campbell & The Dominion of Canada Freehold Estate and Lumber Co.—Interlocutory judgment reversed; Cross, J., *diss.*

Cantlie & Coaticook Cotton Co.—Confirmed.

Moss & Banque de St. Jean.—Confirmed.

McTavish & Fraser.—Reversed.

Exchange Bank & Montreal City and District Savings Bank.—Heard on merits. C.A.V.

Papineau & De Bellefeuille.—*Perimée.* Appeal dismissed.

Berg & Exchange Bank.—Appeal dismissed.

Exchange Bank & Gault.—Appeal dismissed.

Monday, May 30.

McKercher & Mercier.—Petition for leave to appeal from interlocutory judgment allowing certain questions in interrogatories on *faits et articles.*—Petition rejected.

Downie & Francis.—Motion for *non pros.* Withdrawn with the permission of the Court.

Gilman & Gilbert.—Heard. C.A.V.

Shea & Prendergast.—Heard. C.A.V.

Bulmer & Exchange Bank.—Heard. C.A.V.

Mail Printing Co. & Laflamme.—Part heard.

Tuesday, May 31.

Cie du Grand Tronc & Corporation de la Ville de St. Jean.—Petition for leave to appeal from interlocutory judgment granted.

Murray & Burland & Curran.—Motion to dismiss appeal. Appeal to be dismissed by consent, unless reasons be filed within eight days.

Canadian Pacific Railway Co. & McRae.—Motion for leave to appeal from interlocutory judgment rejected.

Mail Printing Co. & Laflamme.—Hearing resumed, and continued to Sept. 15.

Fraser & McTavish.—Motion for leave to appeal from interlocutory judgment rejected.

Joyce & City of Montreal.—Respondent to shew cause, June 28, instead of Sept. 15, why appeal should not be allowed.

The Court adjourned to June 28.

INSOLVENT NOTICES, etc.

Quebec Official Gazette, May 21.

Curators appointed.

Re Télesphore Delâge, Coteau du Lac.—C. Desmarteau, Montreal, curator, May 18.

Re Alexis Roberge, St. Francois District.—C. Millier, Sherbrooke, curator, May 18.

Re Clément Berthiaume, Contrecoeur. — A. E. Gervais & A. L. Kent, Montreal, curator, May 18.

Dividends.

Re Maurile Besner, Beauvoir. — Application, May 30, for order upon sheriff to pay parties collocated, Kent & Turcotte, Montreal, curator.

Re André Bourque, St. Clet.—Application, May 30, for order upon sheriff to pay parties collocated, Kent & Turcotte, Montreal, curator.

Re F. X. Larin.—First and final dividend, payable June 4, C. Desmarteau and E. G. Phaneuf, curator.

Re L. J. Latour, Lanoraie.—Seath & Daveluy, Montreal, curator.

Re Nicholas R. Mudge.—First and final dividend, payable June 1, F. M. Cole, Montreal, curator.

Re P. J. A. Noël.—First and final dividend, payable June 9, E. Begin, Quebec, curator.

Re James Smith.—First and final dividend, payable June 9, E. Begin, Quebec, curator.

Re B. St. Pierre & Co., Nicolet.—First and final dividend, payable June 6, C. A. Sylvestre, Nicolet, curator.

Separation as to property.

Emilie Coutu vs. Alfred Allard, mariner, Sorel, May 9.

Tharcile Cusson vs. Alphonse Racette, barber, Montreal, March 12.

Marie Turcotte vs. Narcisse Grenier, farmer St. Grégoire le Grand, May 14.

The Legal News.

VOL. X. JUNE 4, 1887. No. 23.

In contrast with the three years' arrears before the Supreme Court of the United States, it may be mentioned that there are only eleven appeals before the House of Lords, and only three of these are last year's cases. Of course, this does not imply any reproach to the members of the American Court; on the contrary, the amount of work dispatched by the latter is enormous, but the number of cases which go up to them is overwhelming, and it is questionable whether at the present rate of progress—nearly two cases per working day—the questions which arise can always receive that careful consideration which is expected from an ultimate Court of Appeal.

The May Term of the Appeal Court in Montreal had considerable effect in breaking down the list, more than thirty cases being disposed of notwithstanding the occurrence of two holidays and the loss of a third day owing to the illness of members of the Court. It seems probable that the September list will contain not more than eighty cases, a large majority of which will be heard before Christmas.

It is stated by the special correspondent of the *Gazette* that the question of judicial salaries will not be considered this session, but that next session a measure will be introduced dealing with the subject. Something not unlike this has, we believe, been said before. In connection with the subject of judicial salaries, it may be remarked that the vacancy in the Superior Court caused by the death of Mr Justice Torrance has been left too long unfilled. While complaints are constantly heard as to the difficulty of getting cases tried, no chair in a court of original jurisdiction should be left empty for a month, much less six months. We have had occasion to remark several times that in this respect a faulty deviation is made from the practice in England.

*SUPERIOR COURT—MONTREAL.**

Procedure—Power of attorney and security for costs.

HELD:—That a non-resident plaintiff, contesting the collocation of a third party in a report of distribution, is obliged to furnish a power of attorney and give security for costs. *Bornais* v. *Arpin*, & *Merchants Bank of Canada*, Taschereau, J., April 16, 1887.

COURT OF QUEEN'S BENCH—MONTREAL.†

Municipal Corporation—Responsibility—Condition of Streets—Extraordinary Circumstances—Serment Supplétoire.

HELD:—1. That a municipal corporation is not bound to make extraordinary exertions, out of proportion to the means at its disposal, in order to keep the streets free from snow and ice, but only to such extent as is reasonable, taking into consideration the means at its disposal.

2. Where there is no evidence of the cause of the accident, it is not a proper case for submitting the *serment supplétoire*, and thus permitting the case to be proved entirely by the plaintiff's oath. *Corporation of Sherbrooke & Short*, Feb 22, 1887.

Novation—Extinction of obligation by granting a term to substituted debtor—C. C. 1169.

The appellant, being indebted to the respondent, settled by giving his own note (paid at maturity) for part of the debt, and for the balance he gave an order or draft on the St. H. Company, which was accepted. But, instead of exacting immediate payment of the draft (which was payable forthwith), the respondent took from the St. H. Company their two promissory notes payable at one and two months respectively, and before these notes matured the St. H. Company became insolvent.

HELD:—That novation was effected by the acceptance of the new debtor in the room of the old, whom it was intended to discharge, as evidenced by the term granted by the creditor to the substituted debtor without the

* To appear in Montreal Law Reports, 3 S. C.

† To appear in Montreal Law Reports, 3 Q. B.

concurrence of the former debtor. *O'Brien & Semple*, Feb. 22, 1887.

Promissory Note—Signature obtained by Fraud—Action by Transferee—Knowledge of Fraud—Proof of Consideration.

HELD:—Where defendant's signature to a promissory note was obtained by fraud under circumstances which, in the opinion of the Court, were matter of public notoriety at the time the note was transferred to B. (for whom the plaintiff was *prête-nom*), that it was incumbent on the plaintiff to prove that B. gave consideration for the note. *Exchange Bank of Canada & Carle*, Feb. 22, 1887.

COUR SUPÉRIEURE.

JOLIETTE, 16 janvier 1884.

Coram CIMON, J.

GADOURY v. BAZINET et al.

C. proc. arts. 81 *et* 82—*Défaut d'entrer l'action au jour fixé—Congé-défaut—Le demandeur a-t-il droit de procéder sur la copie d'action déposée par le défendeur pour congé-défaut?*

JUGÉ:—1o. *Que le demandeur ne peut plus rapporter son action après le jour fixé;*

2. *Que le défendeur qui dépose sa copie d'action pour obtenir congé-défaut, aura droit à ce congé-défaut, bien que le demandeur déclare être prêt à procéder sur cette copie.*

CIMON, J., s'exprime comme suit:

Le bref de sommation était rapportable le 22 décembre 1883, et, ce jour là, les défendeurs, par leurs procureurs, se présentent au greffe, suivant l'assignation faite, et produisent une comparution; mais à 4 heures p. m., le demandeur n'ayant pas rapporté le bref de sommation, les défendeurs déposent au greffe leurs copies d'action pour obtenir un congé-défaut, et font de suite signifier au demandeur un avis que le 10 janvier 1884—premier jour du terme—ils présenteraient une motion pour congé-défaut. Le 24 décembre, à 2 heures p. m., le bref original fut rapporté au greffe. Maintenant le demandeur, en réponse à la motion pour congé-défaut, dit qu'il avait le 21 décembre adressé, par la malle, au protonotaire le bref original, mais que la malle ayant été retardée, le protonotaire ne l'a reçu que le 22 décembre entre sept et huit heures du soir, et que le bureau du protonotaire étant alors fermé, et le 23 décembre étant un dimanche, le protonotaire ne l'a ensuite entré que le lundi, 24 décembre. Le demandeur prétend 1o. que, sous les circonstances, son bref a été entré légalement le 24 décembre, et 2o. qu'il peut obliger les défendeurs à procéder au mérite sur leurs copies d'action qu'il accepte comme étant celles de l'original.

1o. Le demandeur a-t-il pu rapporter utilement son action après le jour fixé dans le bref? L'art. 81 nous dit: "Tout bref "d'assignation........ *doit être produit* au "greffe *pendant les heures de bureau le ou avant* "*le jour fixé* pour répondre à la demande..." Le bref en cette cause était rapportable le 22 décembre, un jour juridique. Or il appert par le paraphe du protonotaire et le régistre de la Cour Supérieure qu'il n'a été produit au greffe que le 24 décembre. Dans la cause de *Ross & Marceau*, en appel (24 L. C. J. 143), le juge en chef Sir A. A. Dorion, prononçant le jugement de la Cour, a dit: "L'intimé a "poursuivi l'appelante pour $104.72...... "L'action était rapportable le 12 sept. 1877, "mais le paraphe du protonotaire et l'entrée "au régistre font voir que le writ n'a été "rapporté que le lendemain, 13 sept. Le "procureur de l'appelante avait fait, avant "le rapport de l'action, quelques propo-"sitions d'arrangement de la part de sa "cliente. Ces propositions ne furent pas "agréées par l'intimé et son refus a été com-"muniqué au procureur de l'appelante, avec "intimation qu'il eut à plaider à l'action. Il "n'en a rien fait, et l'intimé a obtenu juge-"ment par défaut pour le montant de sa "demande. L'appelante se plaint de l'irré-"gularité du rapport de l'action. Les pro-"cureurs de l'intimé ont produit des affi-"davits pour établir que le bref de sommation "et la déclaration avaient été produits au "greffe le 12 sept. 1877, quoiqu'ils n'eussent "été entrés au régistre, et paraphés par le "protonotaire comme ayant été rapportés le "13. Le régistre de la Cour Supérieure et le "certificat du protonotaire que le bref n'a "été rapporté que le 13 sept. 1877, ne "peuvent être contredits par affidavit. "Nous avons déjà décidé une question ana-

"logue dans la cause de *Brooks et al & Dallimore*, 20 Jurist, 176, et aussi dans celle de "*Mallette & Lenoir*, 21 Jurist, 84. L'action a "donc été irrégulièrement rapportée, et "comme cette irrégularité n'a pas été couverte, l'appelante n'ayant pas comparu, le "jugement qui a été prononcé contre elle "doit être infirmé." L'art. 81 C. P. est bien positif, et ne laisse aucune discrétion au tribunal, et le demandeur ne pouvait utilement rapporter son action le 24 décembre. Il est donc en défaut.

2o. Venons au *congé-défaut*. L'art. 82 dit: "Si le bref n'est pas rapporté tel que ci-"dessus réglé, le défendeur PEUT obtenir "*congé* contre le demandeur et *congé* de "l'assignation avec dépens, *en déposant la* "*copie du bref* qui lui a été signifiée." *Boitard* dit que le congé est un *relaxe, une décision qui tient pour non avenu l'exploit d'ajournement.* Vide Carré & Chauveau, vol. 2, Q. 617, p. 24, qui citent Boitard. En demandant un *congé-défaut*, le défendeur ne fait rien autre chose que de demander *à s'en aller*. En effet, il a reçu assignation à un jour fixé; il se présente au jour fixé; celui qui l'a assigné n'y est pas. Il fait constater qu'il, le défendeur, s'est rendu à l'assignation, que le demandeur n'y est pas, et il demande *à s'en aller*, c'est-à-dire à ne pas être obligé de répondre ultérieurement à cette assignation. Voilà ce que c'est que le *congé-défaut*. Notre art. 82 est très clair, et il dit deux choses: 1o. que le défendeur *peut* obtenir *défaut* contre le demandeur et *congé* de l'assignation; 2o. que pour obtenir ce défaut et ce congé, le défendeur devra déposer la copie du bref qui lui a été signifiée. Ainsi donc, si les défendeurs ont déposé leur copie d'action, ce n'est pas pour donner au demandeur l'opportunité de procéder sur cette copie, mais seulement pour obtenir le congé-défaut, et ce n'est que pour cette seule fin que la Cour doit considérer cette copie d'action. En conséquence la Cour donne aux défendeurs congé-défaut de l'assignation.

Motion pour congé-défaut accordée.

Boisvert & Leblanc, pour le demandeur.

J. N. A. McConville, pour les défendeurs.

COUR DE CIRCUIT.

FRASERVILLE, 18 mai 1887.

Coram CIMON, J.

DAMIEN et al. v. DEMERS, et SAINDON, oppt.

C. proc. art. 582—*Saisie-gagerie—Opposition par le locateur à la vente des meubles affectés à son gage—C. proc. art.* 578—*Droit du premier saisissant d'empêcher la vente à la poursuite d'un second saisissant.*

JUGÉ:—1o. *Que le locateur ne peut plus s'opposer à la saisie et vente des meubles affectés à son gage;*

2o. *Qu'une saisie-gagerie n'est pas une saisie-exécution et que le demandeur sur saisie-gagerie ne peut empêcher la vente à la poursuite d'un second saisissant qui procède par saisie-exécution.*

CIMON, J., s'exprime comme suit:

L'opposant a pris une saisie-gagerie contre la défenderesse et a saisi ses effets mobiliers. Alors que cette saisie-gagerie était pendante —avant qu'elle fut validée—le demandeur, qui avait obtenu un jugement contre la défenderesse, fit saisir les mêmes effets mobiliers et les annonça en vente. L'opposant a produit une opposition à cette dernière saisie pour qu'elle "soit suspendue jusqu'à ce que" sa saisie-gagerie soit jugée, et il allègue les deux raisons qui suivent: 1o. il est locateur et a un privilége sur ces effets; 2o. il est le premier saisissant.

Sous l'ancien droit, la première prétention de l'opposant était fondée. En effet, Pothier, louage, No. 269, dit: "......si un créancier "du locataire saisissait les meubles, le loca-"teur est fondé à s'opposer à l'enlèvement et "à demander la main-levée de la saisie, si "mieux n'aime le saisissant se charger de "toutes les obligations du bail, tant pour le "passé que pour l'avenir, et d'en donner "caution...." La raison en est,—comme le dit Pigeau, proc. du chatelet, vol. 1, p. 618 —que "le propriétaire ou principal locataire "a intérêt, s'il lui est dû des loyers, que l'on "ne saisisse pas les effets de son locataire, "lorsqu'ils ne sont pas considérables, *parce-"que la saisie et les frais qu'elle occasionnerait "pourrait en consumer le prix;* cette saisie, "d'ailleurs, dépossédant le débiteur, il ne "peut vendre ses meubles à l'amiable pour

" payer les loyers sans frais, ni les donner en " paiement, facultés dans lesquelles il est " important qu'il soit maintenu pour l'intérêt " du propriétaire qui peut, par là, être payé " plus promptement et sans qu'il lui en " coûte." Et Pothier, proc. civile, ed. 1809, p. 188, dit: " Lorsque le second saisissant " est le maître d'hôtel ou de métairie, qui " saisit les effets exploitant son hôtel ou " métairie, pour les fermes et loyers qui lui " sont dûs, cette saisie doit prévaloir à une " précédente qui aurait été faite par un " créancier, et la saisie de cet autre créancier " doit être convertie en opposition à celle du " seigneur d'hôtel ou de métairie." Cela semble tout juste et équitable. Mais la loi a été changée d'abord par la sec. 96 de 12 Vict. ch. 38, laquelle section 96 est reproduite à la sec. 146 du ch. 83 S. R. B. C. qui se lit ainsi: "Chaque fois que des meubles et " effets sont saisis en vertu d'un bref émané " d'une cour quelconque dans le Bas Canada, " et que le locateur réclame un privilége ou " droit de gage pour son loyer, le dit locateur " ne pourra empêcher la vente des dits " meubles et effets par une opposition, mais " il pourra mettre ou déposer une opposition " afin de conserver entre les mains du shérif " ou de l'huissier qui aura saisi les meubles " et effets, soit avant, soit après la vente; et " si l'opposition est ainsi déposée avant la " vente, le shérif ou l'huissier n'en procèdera " pas moins à la vente des dits meubles et " effets par lui saisis et il en fera son rapport, " et sur ce rapport le locateur conservera son " privilége ou droit de gage sur les deniers " provenant de la vente de tels meubles et " effets, et sera colloqué en conséquence." Et l'art. 582 du code de proc. a maintenu ce changement dans les termes suivants: "Le " locateur ne peut cependant s'opposer à la " saisie et vente des meubles affectés à son " gage, et il ne peut exercer son privilége que " sur le produit de la vente." La loi actuelle est donc contraire à la première prétention de l'opposant.

Reste le deuxième point. L'opposant est le premier saisissant! Il invoque la vieille maxime: *saisie sur saisie ne vaut*. Et Pothier, proc., p. 188, appliquant cette règle, dit: " Ainsi un créancier ne peut saisir les effets qui " se trouvent déjà saisis par un autre créan- " cier, et, s'il le fait, la saisie de ce second " saisissant ne doit point valoir comme " saisie, mais se doit convertir en opposition " à la première saisie." Pigeau, proc. du chatelet, p. 618, vol. 1, dit: "s'il y a une " saisie déjà faite, le gardien ou le premier " saisissant peut s'opposer à la seconde ..... " Lorsque la première est une *saisie-exécution*, " et comprend tous les meubles, elle a la pré- " férence *parceque le plus diligent mérite tou-* " *jours d'être favorisé.* La seconde est con- " vertie en opposition à la première......" C'est encore à peu près notre loi. En effet, si l'art. 577 permet une seconde saisie, il faut que le second saisissant nomme le même gardien, si le débiteur a été dépossédé, et l'art. 578 ajoute: " Le premier saisissant *qui* " *ne fait pas diligence* ne peut empêcher *la* " *vente* à la poursuite du second saisissant," —ce qui veut dire que *le premier saisissant qui fait diligence peut empêcher la vente à la poursuite du second saisissant.* Mais remarquons que cet art. 578 se trouve dans la partie du code de proc. traitant des *saisies-exécutions*, et que Pigeau a le soin de dire: " Lorsque la première saisie est une *saisie-* " *exécution....*" La saisie-gagerie n'est pas une saisie-exécution, ce n'est qu'une saisie conservatoire qui a besoin d'être validée avant que le locateur puisse obtenir de procéder à la vente. La saisie-gagerie se trouve au titre du code de proc. qui concerne *les mesures provisionnelles qui accompagnent l'assignation.* L'art. 611 du code de procédure en France dit: "L'huissier qui, se présen- " tant pour saisir, trouverait une saisie déjà " faite et un gardien établi, *ne pourra saisir* " *de nouveau;* mais il pourra procéder au " récolement des meubles et effets sur le " procès-verbal que le gardien sera tenu de " lui représenter: il saisira les effets omis et " fera sommation au premier saisissant de " vendre le tout dans la huitaine; le procès " verbal de récolement vaudra opposition " sur les deniers de la vente." Or, sous l'empire de cet art. 611, Boitau, Colmet-Daage et Glasson, dans leurs *Leçons de procédure civile*, vol. 2, p. 294, disent: "Si " l'huissier qui se présente pour faire une " *saisie-exécution* trouve, il est vrai, une saisie " déjà faite et un gardien établi, mais que " cette première saisie ne soit qu'une saisie

"de précaution (*saisie-gagerie*, saisie foraine, "saisie-conservatoire), l'huissier pourra "passer outre à la *saisie-exécution*. L'art. "611 est ici sans application: la saisie de "précaution, qui ne peut être immédiate-"ment suivie de vente, ne met point obstacle "à une saisie-exécution qui mène directe-"ment à la vente." *Vide* aussi 4 Carré & Chauveau, p. 754, Q. 2078 bis. Rien de plus correct que cela. L'opposant n'a donc pas droit, pour les raisons qu'il allègue, d'obtenir que la saisie des demandeurs en cette cause soit suspendue. Il viendra par opposition sur le prix, pour être payé par privilége, si les frais de vente n'absorbent pas tout.

Opposition renvoyée.

Pouliot & Pouliot, pour l'opposant.

L. B. Dionne, pour les demandeurs.

COURT OF REVIEW.

QUEBEC, March 31, 1887.

Coram CASAULT, CARON, ANDREWS, JJ.

TREMBLAY v. LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE ST. IRÉNÉE et al.

Pew in Catholic Church—Droit de Retrait—Rights of Children—Inscription in Review.

HELD:—1, 2 & 3 (affirming the decision of CIMON, J., 10 Leg. News, 82).

4. *That one of two defendants who pleaded together in the Court below, and were condemned to give the plaintiff possession of a pew in a church, may inscribe alone in Review.*
5. *An action by a paroissien against a Fabrique, claiming possession of a pew, is not a real action, the right of property being in the Fabrique.*

CASAULT, J. Feu François Tremblay, père du demandeur, possédait à sa mort, en 1885, deux bancs dans l'église paroissiale de St. Irénée, l'un depuis près de trente ans et l'autre depuis environ vingt. Le premier était le No. 9 de la troisième rangée du côté de l'évangile, et le second le No. 1 de la troisième rangée dans le jubé. Il n'avait pas d'autre titre écrit à ces bancs que son inscription sur les registres de la fabrique comme concessionnaire de chacun d'eux, inscription qui consistait, pour tous les concessionnaires de bancs, dans la mention de la rangée et du numéro du banc, du nom du concessionnaire et du prix de la location, sans même la date de cette dernière. Il n'a jamais été accordé d'autres titres pour les bancs dans cette paroisse.

Après la mort de François Tremblay, ces deux bancs furent, le 31 déc. 1885, vendus à l'enchère, et adjugés, le premier à un nommé Gauthier, le second au défendeur, Alexis Girard. Le fils aîné de François Tremblay déclara, immédiatement, qu'il prenait, au prix de l'adjudication, le premier des dits deux bancs, savoir le No. 9 de la troisième rangée du côté de l'évangile dans la nef, et le demandeur fit une semblable déclaration pour le second banc, ou mieux celui qu'avait toujours possédé feu François Tremblay dans le jubé et qui, au lieu d'être le premier de la sixième rangée, était de fait le No. 1 de la troisième rangée. Cette différence dans la description du banc telle qu'entrée dans les registres et telle que l'avait toujours possédée feu François Tremblay n'est pas expliquée; mais Tremblay n'avait jamais possédé d'autre banc dans le jubé, depuis la construction de celui-ci, et l'acquisition qu'il avait faite d'un banc là; et c'est son banc, rendu vacant par sa mort, qui était mis aux enchères.

Le curé et les marguilliers avaient alors des doutes si plus d'un banc pouvait être ainsi retrait par les enfants du concessionnaire originaire. Ils n'hésitèrent, non plus que son adjudicataire, à donner le banc de la nef au fils aîné de François Tremblay, mais refusèrent d'accepter et de l'adjudicataire et du demandeur les $5 prix du banc du jubé. Quelques jours plus tard, néanmoins, dans la visite faite par le curé et les trois marguilliers, ceux-ci dirent au demandeur que le banc du jubé était à lui et qu'il pouvait en prendre possession; et, le même jour, en avertirent le défendeur Girard. Mais celui-ci déclara qu'il garderait le banc: et, le dimanche suivant, il en prit possession avec deux autres personnes et refusa, en ne bougeant pas, quoique requis, d'y laisser entrer le demandeur.

Ce dernier a pris l'action en cette cause et contre Girard et contre la fabrique, qui se sont joints pour la défense; mais la fabrique,

après le jugement en première instance en faveur du demandeur, n'a pas voulu persister dans la contestation des droits du demandeur, et a laissé Girard inscrire seul en révision.

Le demandeur a demandé, par motion, le rejet de cette inscription, prétendant qu'un seul des deux défendeurs poursuivis ne pouvait pas inscrire en révision quand la fabrique, qui l'avait joint dans une défense commune en première instance, acquiescait au jugement, et aussi que le dépôt de $20 fait par le défendeur n'était pas suffisant, et qu'il eut dû être de $40 parceque l'action, dit-il, est d'une nature réelle.

L'action n'est pas réelle; car les bancs d'église ne peuvent pas être la propriété d'autre que la fabrique; ils ne sont pas susceptible d'une possession *animo domini*, et ne peuvent être accordés, ou vendus, qu'à titre de location. Ce n'est pas la propriété même du banc que réclame le demandeur, il n'y a aucun droit; c'est la possession de la chose à laquelle la location lui donne droit. Son action n'est pas plus réelle que ne le serait celle du locataire d'une maison, contre le propriétaire et une personne qui l'occupe, pour faire reconnaître son bail et se faire mettre en possession. 25 Laurent, Nos. 9 et 10. Le retrait lignager autorisé par l'article 129 de la Coutume de Paris, ne pouvait être exercé que pour des immeubles, néanmoins Ferrière, Petite Coutume, vol. 1, p. 290, enseigne que l'action en retrait est mixte, plus personnelle que réelle, et que, pour cette raison, l'assignation en retrait devait être donnée par devant le juge du domicile de l'acquéreur.

Le défendeur Girard pouvait seul soutenir le bail qu'il prétend avoir obtenu de la fabrique, même si celle-ci ne reconnaissait pas ses droits. Il eut pu défendre seul à l'action, et, par là même, peut seul demander la révision du jugement. La motion du demandeur doit être rejetée avec dépens.

Au mérite, le défendeur propose deux moyens contre le jugement: le premier que la location des bancs doit se faire par écrit, et que le demandeur, n'en représentant pas un de la concession du banc à son père, ne justifie pas d'un titre en faveur de celui-ci; le second, qu'un paroissien ne peut obtenir la concession que d'un seul banc dans l'église paroissiale, que celle d'un second est nulle et ne permet pas, aux enfants de celui qui l'a possédé sans droits et contrairement à la loi, d'être préférés à l'adjudicataire, lorsque le banc est vendu.

Il est, comme je l'ai déjà dit, prouvé que, dans la paroisse de St. Irénée, on ne donne pas d'autre titre écrit aux concessionnaires des bancs que leur inscription comme tel sur les registres de la fabrique. Cet écrit est un titre suffisant. Ce tribunal l'a décidé, en décembre 1884, dans la cause de *Champagne* v. *Goulet* (10 Q. L. R. 379). Quant à l'erreur dans la désignation du banc, elle n'a pas d'importance. Il est clairement établi que le banc qui fait le sujet du procès est celui dont le père du demandeur a été mis en possession, et dont il a toujours joui en vertu de ce titre. Une erreur de désignation du banc dans le titre, qui ne lui a pas été communiqué et qu'il n'a pas pu faire corriger, ne peut pas priver l'acquéreur de ses droits au banc qu'il a acquis et possédé pendant 20 ans. Cette longue possession ne permet pas un doute sur l'identité du banc, qui, du reste, n'a été vendu que parce que la mort de son locataire, le père du demandeur, l'a rendu vacant.

L'objection que le père du demandeur n'avait droit qu'à un banc dans l'église aurait pu lui être opposée, lorsqu'il a acquis le second banc. Les paroissiens eussent alors pu s'en plaindre et empêcher la fabrique de consentir cette seconde concession. La règle que les paroissiens ne peuvent posséder qu' chacun un banc dans l'église n'est pas tellement absolue qu'elle fasse nulle la concession d'un second banc au même individu. L'eût-elle été en France, elle n'aurait pas cet effet ici, où une coutume contraire a toujours existé et se justifie par la nécessité, dans un pays nouveau, de construire des églises contenant plus de bancs que n'exigent les besoins présents de la population et celle d'en retirer de suite un revenu. La fabrique, même en France, peut en concéder plus d'un à la même personne quand aucun autre concessionnaire ne se présente. Elle a le droit de s'y refuser et les paroissiens même peuvent l'y forcer. Ce n'est là qu'une nullité relative qui n'a rien d'absolu. Dans l'église de St. Irénée, il est prouvé que, après la construction d'un jubé, il y a une vingtaine d'au-

nées, plusieurs personnes, qui possédaient des bancs dans la nef, en ont acquis un second là, et qu'il y a encore, présentement, douze à quinze personnes qui possèdent deux bancs dans l'église. La déclaration du 9 juin 1723, spéciale pour le Canada (1 Edits et Ordonnances, p. 480), autorise cette coutume existante dans le pays, en faisant la règle qu'elle crée applicable aux bancs au pluriel, concédés aux père et mère au singulier. Et, lorsque la fabrique a consenti la concession d'un second banc à celui qui en avait déjà un, que les paroissiens y ont donné un consentement tacite, et que le concessionnaire a possédé deux bancs, de l'agrément de tous, pendant les vingt ans qui ont précédé sa mort, que personne n'a, jusque là, contesté ses droits aux deux bancs, peut-on, lorsqu'ils sont mis aux enchères, après la mort du concessionnaire, objecter aux enfants, qui sont plusieurs et réclament la préférence à laquelle leur donne droit le règlement, déjà cité, du 9 juin 1723, qui oblige de les préférer au dernier enchérisseur des bancs de leur père, leur opposer une objection qui n'a jamais été faite au père? Peut-on leur dire que leur père n'était pas concessionnaire des deux bancs quand il l'était de fait? Et de quel droit leur en assignera-t-on un plutôt que l'autre, comme celui pour lequel ils doivent être préférés? Si le concessionnaire décédé n'avait laissé qu'un enfant, on pourrait lui objecter qu'il n'a droit qu'à un banc et le forcer à opter pour l'un des deux que possédait son père. Mais, s'il a laissé plusieurs enfants, l'objection ne vaut plus, surtout quand deux sont, comme dans le cas présent, des résidants dans la paroisse où ils possèdent des propriétés immobilières et n'ont pas d'autre banc dans l'église.

M. le juge Cimon a, dans ses notes qui ont été publiées dans le Legal News, vol. 10, p. 82, donné une réponse complète à ces deux objections sur lesquelles il n'est pas nécessaire d'insister.

On trouve, au deuxième volume de la Revue de Législation, p. 276, la mention d'une cause où il aurait été décidé par la Cour du Banc de la Reine, à Québec, en 1819, que le fils aîné du concessionnaire d'un banc y avait droit, après le convol en secondes noces de la veuve de son père (*Borne* v. *Wilson*). Cette attribution du banc au fils aîné est contraire à la déclaration susmentionnée qui dit "qu'à l'égard des enfants dont les père et mère seront décédés, les bancs concédés à leurs dits père et mère seront criés en la manière ordinaire et adjugés au plus offrant et dernier enchérisseur, sur lequel ils auront cependant la préférence en payant les sommes portées par la dernière enchère, et que lorsqu'il n'y aura ni veuve ni enfants de ceux à qui les dits bancs auront été concédés, ils soient criés et publiés comme vacants, en la manière ordinaire, et adjugés au plus offrant et dernier enchérisseur."

Ce règlement ou mieux cette loi, car les règlements faits par le roi, à cette époque de la monarchie française, étaient des lois qui obligeaient tout autant que les Edits ou les Ordonnances, ne distingue pas entre les enfants: elle les comprend tous quelque soient leur âge et leur sexe. Ils peuvent se réunir et réclamer ensemble la préférence sur l'enchérisseur, qui leur est attribuée, et qui leur permet de reprendre, au prix de la dernière enchère, le banc concédé à leur père. Mais, aussi, cette préférence n'est que celle de se substituer au dernier enchérisseur, en réclamant le banc de suite et avant que l'enchérisseur ait obtenu son titre. Elle est un retrait qui est permis, mais pour lequel il n'est accordé aucun délai et qui doit, par là même, s'exercer au moment même de l'adjudication, qui, sur leur déclaration qu'ils la prennent, doit leur être faite à eux-mêmes. Il y a préférence dans l'octroi du titre, mais il faut que le banc soit réclamé par les préférés avant qu'il soit, par l'octroi du titre, devenu la propriété de l'acheteur.

Dans le retrait que la loi permettait à tous les lignagers, sans distinction d'âge, de sexe ou même de degrés, c'était, quoique il put l'être dans l'an et jour, celui qui l'exerçait le premier qui était préféré. Egalement la préférence accordée aux enfants appartient à ceux qui l'exercent les premiers, s'ils ne la réclament pas tous concurremment, ou ensemble: et si un seul l'invoque elle n'appartient qu'à lui. Le frère aîné du demandeur a, seul pour lui-même, demandé cette préférence pour le banc No. 9 dans la nef qui a été vendu le premier. Il avait ainsi seul droit à la concession du banc, non pas à titre

d'aîné, mais parcequ'il était seul à réclamer la préférence que la loi accordait à lui et à ses frères et sœurs; et, lorsque le No. 1 de la troisième rangée, dans le jubé, a été adjugé, le demandeur, aussi seul des enfants de François Tremblay, a demandé sa substitution au dernier enchérisseur. Il devait aussi seul, pour la même raison, être préféré. D'où il suit qu'il a pu, seul de tous ses frères et sœurs, les actes au dossier indiquent qu'ils sont plusieurs, poursuivre en justice pour obtenir le banc qu'on lui conteste.

Mais, même en supposant que l'action qu'il a prise fut héréditaire, les auteurs enseignent, presque à l'unanimité, que chaque héritier peut, pendant l'indivision, revendiquer la totalité de l'hérédité, bien qu'il ait des co-héritiers, et que le tiers, contre lequel il agit, ne peut pas se prévaloir de ce que le demandeur n'est pas seul héritier.

L'indication des autorités à ce sujet, se trouve dans le rapport de la cause de *Bell* v. *Savard*, 11 Q. L. R. 318, où j'ai décidé cette question qui y était soulevée. Cette règle de droit autorisait le demandeur à poursuivre seul la revendication du banc en question.

Je crois que le jugement doit être confirmé.

Judgment confirmed.

J. S. Perrault for the plaintiff.

Chs. Angers for the defendant.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, May 28.

Judicial Abandonments.

David Rioux, trader, Trois Pistoles, May 23.

Curators appointed.

Re L. D. Brasseur, St. Polycarpe.—Kent & Turcotte, Montreal, curator, May 20.

Re Georgiana Desmeules (C. Turcotte & Co.)—Kent & Turcotte, Montreal, curator, May 26.

Re Solomon Goldstone, pawnbroker, an absentee.—Kent & Turcotte, Montreal, curator, May 26.

Re Louis Lambert.—L H Mineau, Three Rivers, curator, April 18.

Re Hubert Pronovost, trader, St. Felicien.—H. A. Bedard, Quebec, curator, May 16.

Dividends.

Re Adam Darling.—First and final dividend, payable June 16, P. S. Ross, Montreal, curator.

Re Labée & Co.—First and final dividend, payable June 5, G, Piché, Montreal, curator.

Re J. A. Rolland & Co.—Dividend, C. R. Black, Montreal, curator.

Terms of Court altered.

Superior Court, district of Iberville. Every judicial day to be a term day.

Circuit Court, co. of Vaudreuil. Terms to be held from 10th to 14th of March, June, September and December.

Separation as to property.

Ellen Walsh vs. James Lawlor, hotel keeper, Levis, May 25.

Minutes of Notary transferred.

Minutes of late L. E. D. Cartier, Sorel, transferred to W. L. M. Désy, Sorel.

GENERAL NOTES.

THE CAREER OF A LAW REPORTER.—The benchers of the Middle Temple have done well in choosing Mr. W. F. Finlason a bencher of the Inn. Mr. Finlason does not conduct trials or argue points of law, but he reports those who do, and from the lowest motives honour should be done to the *vates sacer*. This recognition has been earned by a lifetime of industry and self-denial. Mr. Finlason began his work in the Courts as long ago as 1834, and in 1841, when he had saved enough to pay his fees, he entered the Middle Temple. In 1844 he took out a certificate as a special pleader, and had a considerable practice, with many pupils, several of whom are now in distinguished positions. His nights he spent with his note-book in the gallery of the House of Commons. From drawing special demurrers he became in 1851, when he was called to the bar, competent to argue them, and when the Common Law Procedure Act was passed in 1852, he brought out an edition of it in conjunction with Mr. Morris, and later an edition by him alone of the Acts of 1854 and 1860 was published. Mr. Finlason's legal practice appears, however, to have decayed under the innovating influence of those times, and he applied himself closely to legal literature and reporting. In 1853 he joined the 'Common Law and Equity Reports,' taking the Common Pleas single-handed. On the demise of these reports in 1855 Mr. Finlason joined the *Law Journal Reports*, and remained with us five years in the Exchequer. Meanwhile, he was engaged with the late Mr. Campbell Foster in bringing out the four volumes of their Nisi Prius Reports, and in 1869 he published his edition of Reeves's 'History of English Law.' Several other works and editions bear his name. Mr. Finlason is now well known as the chief representative of the *Times* in the Law Courts, and may well be considered the *doyen* of reporters. *Law Journal*, (London).

ESPRIT DE CORPS IN THE POLICE FORCE.—Constable Warren, lately of the Cardiff police force, deserves the thanks of the world for the neatness and force with which he expressed the constant attitude of the police constable in the witness-box. Warren admitted that he had perjured himself to screen a brother constable, thereby fastening a charge of assault upon an innocent man, and he explained that there was an *esprit de corps* in the force by which every man was bound to perjure himself in the interests of his fellow on pain of being odious to the whole body. We fear that this is only too true elsewhere, and it is encouraged by an indolent habit of magistrates to treat the policeman's evidence as a trump card, and when in doubt, to believe it. No one who has had much acquaintance with the inside of criminal Courts but knows that the evidence of a constable, when the conduct of another constable is concerned, must be viewed with the greatest suspicion.—*Ib.*

The Legal News.

VOL. X. JUNE 11, 1887. No. 24.

The *Gazette du Palais* (Paris) mentions the following interesting question relative to the administration of the *serment judiciaire*, which arose before the Tribunal civil d'Agen: "Deux religieuses carmélites de la ville se virent intenter un procès par M. B..., négociant, au sujet d'une bande de terrain dont les deux parties se contestaient la propriété. Il ne s'agissait, pour que ces dames eussent gain de cause, que d'affirmer par serment leur droit de possession; or, d'après les prescriptions du Code de procédure civile, ce serment devait être prêté en audience publique, à la barre du Tribunal. Mais les deux carmélites, invoquant la rigoureuse claustration imposée à leur Ordre, demandaient à prêter le serment à l'intérieur même du couvent. Leur avocat, M. de Grousson, exposa que la jurisprudence française n'avait jamais eu l'occasion de se prononcer sur ce point, mais que les quakers, à qui leurs croyances interdisent toute espèce de serment, ont souvent obtenu raison des Cours anglaises et américaines. Le Tribunal civil ne tint aucun compte de cette assimilation, et son jugement, confirmé par arrêt de la Cour d'appel, condamna les religieuses à prêter le serment exigé par le Code. Grand embarras pour les carmélites qui, après de longues hésitations, obtinrent des dispenses en cour de Rome et purent ainsi obéir à la loi, sans enfreindre les règles de leur congrégation."

In the present issue will be found an article upon the revision of the statutes, contributed by Mr. G. W. Wicksteed, who, we think, is the senior Q. C. of this Province. Mr. Wicksteed was himself on the first revision, for Lower Canada only, with Mr. Buchanan and the Hon. H. Henry,—Mr. (now Justice) Johnson being the secretary of the Commission. Mr. Wicksteed was also a member of the second Commission, for the Province of Canada, with five confrères from Lower Canada and six from Upper Canada. It may be observed that in a third volume of the present Revision (still in the hands of the printer), it is intended to insert the articles of our Civil Code which relate to matters subject to the exclusive jurisdiction of Canada, together with certain Acts of Quebec and other Provinces, which for various reasons the Commissioners did not think proper to include in volumes I and II.

On the 6th of May, in the English House of Commons, the Attorney General made a statement on a question which has frequently arisen in the course of investigations by coroners. He said: "It has been a subject of controversy whether a coroner's inquest ought necessarily to be a public proceeding, but the weight of authority seems to be decidedly in favour of the view that a coroner has an absolute discretion to exclude whom he will. There is no statute regulating the practice on coroners' inquests as far as regards the presence of reporters."

The vacancy in the Superior Court referred to last week, and which has existed since January 2, is to be filled by the appointment of Mr. C. P. Davidson, Q.C., who, for some years, with Mr. Ouimet, Q.C., has conducted the Crown business in Montreal. Mr. Davidson's reputation as a sound and painstaking lawyer is well established, and he is young enough to look forward to a long career on the bench. We fail to see any satisfactory reason why the appointment should not have been made five months ago.

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*SUPERIOR COURT—MONTREAL.**

Action de $100 *à* $200—*Exception à la forme—Dépôt—Délai d'assignation.*

Jugé, 1. Que dans les causes de la Cour Supérieure, depuis $100 à $200, le dépôt qui doit accompagner une exception à la forme est de $4 seulement.

2. Que dans une action à la Cour Supérieure de $100 à $200, le délai d'assignation est de dix jours, sinon l'action peut être renvoyée sur exception à la forme, sauf à se pourvoir. — *Bruchési* v. *Denis*, Mathieu, J., 20 avril 1887.

*To appear in Montreal Law Reports, 3 S. C.

Juridiction—Ordre par lettre d'expédier des marchandises—Cause d'action.

Jugé, Que dans le cas où un commerçant expédie des marchandises sur une commande contenant un ordre formel, le contrat est parfait par l'exécution qu'en fait le commerçant à qui la commande est adressée sans autre déclaration de sa part, et la cause d'action origine alors à l'endroit où le contrat a été exécuté.—*Gratton* v. *Brennan*, Mathieu, J., 30 avril 1887.

COURT OF REVIEW.

QUEBEC, November 30, 1886.

Before CARON, ANDREWS, and LARUE, JJ.

FEE v. KILLETT.

Evidence—C. C. 1233.

HELD:—*(Reversing the judgment of the Court below), that a covenant to sell and deliver hemlock-bark is a commercial matter, and can be proved by oral testimony, notwithstanding Article* 1233 *of the C. C.*

The judgment of the Court is as follows:—

"Considering that the plaintiff has duly and legally proved the material allegations of his declaration, and more especially that about the 5th November, 1879, the defendant sold to the plaintiff the quantity of 300 cords of hemlock bark, for the price of $4.75 per cord, and covenanted with the plaintiff to deliver the same to him during the course of the then ensuing winter, at any one of the Grand Trunk Railway stations of Acton, Danby, or Durham; and that, in pursuance of such covenant, the said defendant did deliver, to the said plaintiff, a portion of such bark, to-wit 10 cords thereof, but refused to deliver the rest of such bark to the plaintiff, and sold and delivered the rest of such bark to one Goodhue at $5.50 per cord: and that, by the non-delivery of such bark, the said plaintiff suffered a damage of at least $225;

"Considering, therefore, that there is error in the judgment rendered at Arthabaskaville, on the 21st of May, 1886, dismissing the plaintiff's action, the said judgment is hereby reversed, and the said defendant is hereby condemned to pay to the said plaintiff, for such damages, $225, interest and costs of both courts."

Laurier & Lavergne, for plaintiff.

Crépeau & Côté, for defendant.

(J. O'F.)

COUR SUPÉRIEURE.

MALBAIE (SAGUENAY), 2 sept. 1884.

[EN CHAMBRE.]

Coram ROUTHIER, J.

MCNICHOLL et vir v. LABERGE, et LABERGE, intervenante.

Honoraires d'avocats—Action renvoyée sur défense en droit.

JUGÉ:—*Que dans une action déboutée sur défense en droit, l'honoraire des procureurs est le même que si l'action est soumise après preuve et audition finale au mérite.* (Item 10 du tarif de C. S.)

Taxation du Mémoire accordant $50.00 d'honoraires au procureur de l'intervenante maintenue.

J. S. Perrault, procureur des demandeurs.

Charles Angers, procureur de l'intervenante.

(C. A.)

COUR DE CIRCUIT.

MALBAIE, 3 sept. 1885.

Coram ROUTHIER, J.

BOUCHARD v. CHARETTE.

Action—Père—Injures faites à fille mineure.

JUGÉ:—*Que le père peut, en son nom personnel, poursuivre pour injures faites à sa fille mineure.*

Action de $50.00 basée sur ce que le défendeur avait souffleté la fille mineure du demandeur. Allégué spécial que le demandeur avait souffert dans sa sensibilité, ses sentiments, etc., des dommages au montant réclamé.

Le défendeur plaida défense en fait, et en droit que le demandeur ne pouvait poursuivre personnellement, et qu'il aurait dû se faire nommer tuteur.

Sur preuve des faits ci-dessus, l'action fut maintenue pour $10.00, avec dépens.

Autorités citées par le demandeur: Dareau, traité des injures, p. 68 et seq. et p. 408 et seq.; 15 L. C. R., p. 102. Un père peut maintenir une action en dommages pour injures faites à son enfant mineure, s'il est en conséquence privé de ses services ou souffre autrement des dommages.

Charles Angers, procureur du demandeur.

J. S. Perrault, procureur du défendeur.

(C. A.)

COUR DE CIRCUIT.

MALBAIE (SAGUENAY), 4 novembre 1885.

Coram ROUTHIER, J.

LABERGE v. BOUCHARD, et CHARETTE, tiers saisi, et BOUCHARD, contestant.

Dommages—Saisissabilité.

JUGÉ:—*Que les dommages accordés comme réparation civile dans une action d'injure parce que le défendeur aurait souffleté la fille mineure du demandeur, sont insaisissables.*

Saisie renvoyée avec dépens.

J. S. Perrault, procureur du demandeur saisissant.

Charles Angers, procureur du défendeur contestant.

(C. A.)

THE REVISED STATUTES OF CANADA.

The revision and consolidation of the Statutes of Canada having been completed by the incorporation therein of the Acts passed in the session of 1886, and brought into force on, from and after the first day of March, 1887, by proclamation of His Excellency the Governor-General, issued on the 24th of January last, under the Act 49 Vict., ch. 4, as "The Revised Statutes of Canada," and being printed and distributed in English, in two volumes containing 185 Acts or chapters, in 2,246 pages, with a table of contents, a general index, and an index to chapters appended to each volume, some account of the revision will be interesting and useful to the readers of the *Legal News*, the revisers having prefixed no preface or introduction to their work.

The Commission for the revision was issued in June, 1883, to the following Commissioners, viz:—Sir Alexander Campbell, K.C. M.C., Minister of Justice; James Cockburn, of Ottawa, Q.C.; Joseph Alphonse Ouimet, of Montreal, Barrister; Wallace Graham, of Halifax, Q.C.; George Wheelock Burbidge, of Ottawa, Barrister and representative of the Minister of Justice; Alexander Ferguson, of Ottawa, Barrister, and William Wilson, of Ottawa, Assistant Law Clerk to the House of Commons of Canada.

Mr. Cockburn died before, or soon after this commission issued, having done some preparatory work only; the other six gentlemen made the report of the commission on the 31st December, 1884.

After the formal opening, the commission reads as follows:—

Whereas, it having become necessary to revise and consolidate the Statutes of Canada,

And whereas each of the Provinces of Canada before Confederation possessed legislative authority over, and passed laws with respect to matters now within the exclusive legislative control of the Parliament of Canada,

And whereas, the British North America Act, 1867, continued these laws in force until repealed or altered by the Parliament of Canada, some of which have been so repealed or altered, some remain still the laws of the Province in which they were enacted, some are local in their nature, not being capable of being extended to the whole of our Dominion of Canada, while others might properly be extended to the whole or other parts of Canada, and it is probable that some should be entirely repealed;

And whereas, certain schedules of Acts requiring examination having been previously prepared, we deemed it necessary that further examination, collection and classification of the several Statutes of Canada should be made, preliminary to the proper revision and consolidation thereof, and for the purposes aforesaid did cause a commission under the Great Seal of Canada to issue to the said James Cockburn, bearing date the 15th day of November, in the year of our Lord 1881, constituting and appointing him to be, from the 1st day of July then last past, our commissioner to complete the said Schedules already prepared, and to examine the Statutes passed by the Parliament of Canada since the first day of July, in the year of our Lord 1867, and to collect therefrom all those enactments which are still in force, and to note the enactments of the Old Provincial Statutes which have been repealed or altered; also to classify all unrepealed enactments according to subjects, care being taken to distinguish those applying to one or more provinces only; and generally to make such examinations, classifications and collections of the said Statutes as might be necessary preliminary to the proper revision and consolidation thereof.

And whereas, We deem it advisable that the commission, which it was proposed to constitute after the preparatory work of consolidation as aforesaid had been completed, should be constituted without delay.

Now, therefore, know ye, etc., that reposing etc., by and with the advice of our Privy Council for Canada, etc., We do hereby constitute and appoint you the said (*names of Commissioners*) to be our commissioners to consolidate and revise the Statutes of Canada.

To have and to hold, etc., the said office of, etc., with all powers, etc., during pleasure. And we do hereby appoint you, the said the Hon. Sir Alexander Campbell, to be chairman, and you, the said William Wilson, to be the secretary of this our commission, and hereby authorise and require you to report to our Privy Council for Canada from time to time as they may require, what may have been done by you in the premises, and to transmit to them all such tables, schedules, annotations, classifications, collections, revisions, and consolidations as may have been prepared.

In testimony, etc.

Dated 7th June, 1883.

On the 31st December, 1884, as aforesaid, the Commissioners made the following report:—

To His Excellency the Most Honourable the Marquess of Lansdowne, Governor-General of Canada, etc.

MAY IT PLEASE YOUR EXCELLENCY:—

The Commissioners appointed to consolidate and revise the Statutes of Canada, have now the honour to submit a draft of the work entrusted to them.

In preparing the several chapters, care has been taken to preserve uniformity of language throughout, to remove redundancies, and to arrange the provisions of the law in the most natural sequence. To effect this it has, in very many instances, been necessary to divide chapters, and divide and transpose sections. The Interpretaion Act provides that the law shall be considered as always speaking, and for that reason the present tense has been used in the consolidation.

Among the Statutes of the several Provinces, passed previous to Confederation, there are certain Acts in respect to which doubts have arisen as to the authority with which the legislative power rests. There are also Acts, both among the Statutes above referred to and the Statutes of Canada, which it has not been considered advisable to consolidate, although their repeal is not recommended. These include Acts authorizing the raising of loans by Government, Acts of indemnity, Acts relating to specific localities less than a whole Province, and Acts of a temporary character. These Acts have been collected in a separate schedule.

Another class of provisions, which make violations of Acts within the legislative power of Provincial Legislatures indictable offences, and provide for their punishment, have also been collected in a separate schedule. It is suggested that provision should be made that these should be repealed in each instance, from the time when the punishment of the offence, by fine or imprisonment, is provided for by the proper Provincial Legislature.

A table is appended to each chapter, showing what Acts are proposed to be consolidated therein, the portion consolidated, the portion which it is proposed to repeal, the portion to be consolidated elsewhere, and a note of the Act with which such latter portion is to be incorporated, and to each section is attached a reference, showing the corresponding Act and section of the Statutes now in force.

When material changes have been found necessary, a note in smaller type has been inserted, showing the nature of the change, or the new matter is printed in italics.

Ottawa, 31st December, 1884.

This report, with the draft of the work therein mentioned, was laid by order of His Excellency the Governor-General, before both Houses of the Parliament of Canada, and by them referred to a Joint Committee of the Senate and House of Commons, of which the Minister of Justice was chairman, and examined and reported by the said Committee with certain amendments.

These amendments were attended to by the Commissioners in their final Report made in the following year. They will be found in the Minutes of Proceedings of the Senate of Monday, 6th July, 1885, with the report of the Committee. They relate mainly to changes made, not in the substance, but in the expression of the law, to render it clearer and to better ensure the accomplishment of its intent. They extend to the Schedule A annexed, providing for the repeal of certain Provincial enactments; and their most striking effect is to reject the suggested repeal of enactments respecting the observance of the Lord's Day. The report of the Committee contains the following passages: "The Committee have carefully examined the consolidation and revision submitted to them." "Without retracing the whole labour of the Commissioners in preparing the draft of the proposed consolidation and revision, it was impossible for the Committee to compare with the original each of the sections represented to be transcripts of sections now in force, to verify absolutely the completeness of the consolidation, or to ascertain beyond doubt that no statutory provisions have been omitted or repealed provisions included. The time at the disposal of the Committee did not allow more than a general examination and the application of tests to ascertain the character of the work in these respects. In the opinion of the Committee it has been well and carefully done."

"The chapters of the draft were apportioned among sub-committees, who made a careful examination, comparison and verification of all those sections of existing Statutes, which are noted in the draft as having undergone any changes in arrangement or language, as having been repealed, or in regard to which any change is suggested by the Commissioners."

"The general arrangement and execution of the proposed consolidation and revision are, in the opinion of the Committee, convenient and satisfactory."

The Commissioners having thus performed the work entrusted to them, Messrs. Wilson and Ferguson, who had been members thereof, with Mr. A. Power, of the Department of Justice, and a barrister of the Province of Nova Scotia; and Mr. J. G. Aylwin Creighton, a barrister of the Province of Quebec, the Law Clerk of the Senate, were instructed by the Government, after the close of the Session of 1885, to incorporate the Public General Acts of that Session with the reported work of the Commission, to superintend its translation into French, and generally to prepare it for publication.

The French version was prepared by Mr. Coursolles, chief French translator to the House of Commons, or under his immediate supervision.

It was found, however, that it would not be possible to have the work ready for publication before the commencement of the then next session: and on the 31st December, 1885, the gentlemen last named made the following report:—

To the Honourable the Minister of Justice of Canada:—

SIR,—Pursuant to the instructions which we received from you, we have incorporated with the draft submitted by the Commissioners appointed to consolidate and revise the Statutes of Canada, such of the Acts passed during the last session of Parliament as appeared to be proper subjects for consolidation therewith, and also the amendments suggested in the report of the Joint Committee of the Senate and House of Commons appointed last session to consider that draft. In the execution of this work we have adhered closely to the system and rules adopted by the Commissioners in the performance of the duties assigned to them.

We have also carefully revised, and made the additions to the Schedules to the report, rendered necessary by the legislation of last session, and we have completed the chronological and analytical table, showing in what manner each Act of Canada, and of each of the Provinces, which relate to matters within the control of Parliament, have been dealt with by the Commissioners and by ourselves.

We have also in course of preparation for publication, according to your instructions, a collection of all the statute law of a public general nature, relating to subjects within the legislative authority of the Parliament of Canada, now in force, but which in the opinion of the Commissioners could be more conveniently dealt with in this way than by consolidation.

Ottawa, 31st December, 1885.

This report was accompanied by a draft of the work in its then state, which was laid before Parliament, submitted to a Joint Committee of both Houses, and reported with amendments, and being approved by Parliament as so amended, the Act now 49 Vict. c. 4, was passed, authorizing the Governor-General to cause such Public General Acts of the Session as he should deem proper to be incorporated with it, and to bring it into force on and after such time as he should appoint.

The work as now published consists of one hundred and eighty-five Acts, each forming a chapter, on some subject within the exclusive jurisdiction of the Dominion Parliament; and printed separately with the Royal Arms and the imprint of the Queen's Printers, and from stereotype plates kept by him, so that he can furnish copies of any required Act or number of Acts, or the Acts relating to any subject or class of subjects can be taken out of the volumes and bound or stitched separately, a great convenience to professional men or officers of departments, or others, requiring to have the Statute Laws on any matter in a handy and portable form.

In this portion of their work the Commissioners have followed generally the order and lines of the Consolidated Statutes of the old Province of Canada, and of Upper and Lower Canada, and have indicated at the end of each section the sources from which it has been taken or derived, thus affording easy means of finding the date at which any provision became law, a facility not given in the Revised Statutes of the Maritime Provinces or British Columbia; and they have also here given effect to the provision in their commission empowering them to collect and classify Provincial enactments still in force on subjects under the exclusive jurisdiction of Parliament, by inserting such

enactments in the chapters on the matters to which they respectively relate, distinguishing them clearly as applying only to the Provinces by the Legislature whereof they were passed. When such Provincial enactments contain provisions of like effect with those of sections of the Revised Statutes, they are incorporated with them, and referred to as being so; otherwise, if they are intended to apply to the whole Dominion, they are made separate sections, and their origin indicated; but if, though they relate to the subject of the chapter, they are not so to apply, the Province or Provinces to which only they are to apply are indicated. Provincial enactments thus extended to a Province or Provinces to which they did not before apply, will, of course, be so extended only from the coming into force of the Revised Statutes (1st March, 1887). Many such Statutes are repealed, such appeal taking effect from the same date.

Schedule A, hereinafter mentioned, contains a list of all Acts so repealed, whether of the Dominion of Canada or of any of the Provinces thereof. The following chapters will be found to extend, or to act as extending, to the Dominion, or to set forth and declare as applicable only to a Province or Provinces named, enactments of Provincial Legislatures:—

Chap. 123. Bills of exchange and promissory notes.

Chap. 127. Interest.

Chap. 144. Application of criminal law of England to Ontario and British Columbia.

Chap. 147. Riots and unlawful assemblies.

Chap. 148. Improper use of weapons.

Chap. 152. Peace at public meetings.

Chap. 157. Offences against public morals and convenience.

Chap. 159. Lotteries and betting.

Chap. 161. Offences relating to the law of marriage.

Chap. 163. Libel.

Chap. 164. Larceny and similar offences.

Chap. 165. Forgery.

Chap. 168. Malicious injuries to property.

Chap. 173. Threats, intimidation, etc.

Chap. 174. Procedure in criminal cases.

Chap. 179. Recognizances.

Chap. 180. Fines and forfeitures.

Chap. 181. Punishments.

Chap. 183. Public and reformatory prisons.

After the chapters, Volume II. contains Schedule A:—"Acts and parts of Acts repealed, from the date of the coming into force of the Revised Statutes of Canada, so far as the said Acts and parts of Acts relate to matters within the legislative authority of the Parliament of Canada." Of the Consolidated Statutes of [the Province of] Canada, it repeals the whole or parts of 44 Acts; of the Consolidated Statutes for Upper Canada, 39; of the Consolidated Statutes for Lower Canada, 31; of the Acts of the late Province of Canada, 101; of the Acts of Nova Scotia (revised and since revision), 86; of the Statutes of New Brunswick (revised and since revision), 147; of the Revised Statutes of British Columbia, including those of the former colonies of Vancouver Island and British Columbia, 61; of the Statutes of Prince Edward Island (revised and since revision), 173 (all these being, of course, Statutes respecting matters now subject to the exclusive control of the Parliament of Canada, and passed before coming into force of the B. N. A. Act, 1867, after which no such Provincial Statute could be legally passed); and of public general Statutes of the Parliament of Canada, 612; making the total number of Statutes so repealed, in whole or in part, 1294.

Schedule B:—"Acts and parts of Acts of a public general nature, which affect Canada, and have relation to matters not within the legislative authority of Parliament, or in respect to which the power of legislation is doubtful, or has been doubted, and which have in consequence not been consolidated; and also Acts of a public general nature, which for other reasons have not been considered proper Acts to be consolidated." In this table, the portion of each Act as to which the Commissioners entertained the doubts mentioned is given in the outer column, and the subject of the Act is shown by the title given in the centre column, except as to the Act 29 Vict. (1865, 2nd session) of the Statutes of the late Province of Canada, as to which the outer column indicates only the numbers of the Articles of the Civil Code of Lower Canada brought into force by procla-

mation under the said Act, which the Commissioners, for reasons other than those mentioned in the heading to the said Schedule B, have not considered proper Acts to be consolidated. It may be useful to mention here the subjects of said Articles, which are as follows:

Arts. 12 to 21. Interpretation of laws and terms used in them.

Art. 23. Status of alien woman married to British subject.

Pars. 6, 7 of Art. 36. Legal effect of civil death.

Art. 108. Legal presumptions of death from absence.

Arts. 115 to 127. Qualities and conditions necessary for contracting marriage.

Arts. 135 to 156. Opposition to marriage on grounds of nullity.

Arts. 185, 206. Dissolution of marriage. Separation from bed and board.

Art. 367. Corporations not to carry on business unless authorized to do so.

Art. 369, Par. 2. How only corporations can be dissolved.

Arts. 400, 402, 403. Public roads, gates and walls of fortifications.

Art. 803. Gifts by insolvents.

Art. 1569. Sale of registered ships. 1573. Sale of notes, checks, etc.

Arts. 1676, 1678, 1679, 1681, 1682. Common carriers.

Arts. 1785, 1786. Loans on interest.

Art. 1886. Claims of special partners in bankruptcy cases.

Art. 1989. Privileged claims of Crown. 1998, 1999. Do. of vendors

Art. 2007. Claims on ships and cargoes and freight.

Art. 2022. What moveables are susceptible of hypothecation.

Art. 2032. Legal hypothec of the Crown.

Art. 2090. Hypothecs created within thirty days before bankruptcy.

Art. 2151. Form of consent to discharge of hypothecs by Crown, etc

Arts. 2211 to 2216. Prescription, and rights not prescriptible.

Arts. 2279 to 2354. Bills, notes and cheques.

Arts. 2355, 2356, 2359, 2361, 2362, 2373, 2374. Merchant shipping.

Arts. 2383 to 2403. Privileges and liens on vessels, cargo and freight.

Arts. 2406 to 2462. Affreightment of ships.

Arts. 2464 to 2467. Passengers in ships.

Arts. 2582 to 2558. Contribution by average in case of loss. 2560 to 2567. The same.

Arts. 2594 to 2612. Bottomry and respondentia.

All the Acts and parts of Acts, or of the Code, mentioned in Schedule B will be found in a third volume, prepared by the Commissioners and in the hands of the printer, but not yet ready for distribution.

The articles respecting bills and notes are referred to by the Commissioners in a note on chapter 123, p. 1655. All the articles above mentioned are unquestionably law in the Province of Quebec, and those on bills and notes and shipping are more especially interesting to commercial men, as rights may exist or be affected by them or under them in any Province. The articles of the code relating to shipping have been largely amended by the Dominion Acts, 36 Vict. chaps. 128, 129. The articles respecting bills and notes are referred to in chap. 123, but none of the articles of the code or of the Acts and parts of Acts in Schedule B have been printed in Volumes I. and II., the insertion of Provincial enactments being confined to such as it was thought right to incorporate in the Revised Acts (and so extend to the whole Dominion) or such as related directly to the subject of any chapter, and could therefore be conveniently printed with it, though distinguished as applying only to one or more named Provinces. But Schedule B is a most important portion of the revision, as indicating the Provincial enactments, including those of the Code, on subjects under the exclusive legislative authority of the Dominion Parliament, and therefore demanding the most attentive consideration in any attempt to make the law of Canada uniform on any such subject. The Civil Code, more especially, is deserving of attention as having been framed by a Commission composed of a Chief Justice and Judges, who gave their whole time to the work for several years, with most able secretaries and assistants, and the authorities relied on are stated at the end of each article. The fourth book

relates entirely to commercial law, and the authorities cited are from the best English as well as French authors. This book, and indeed the whole Code, is well worth the attention and study of lawyers of the other Provinces of the Dominion, and yet more especially of legislators who wish to make the law uniform throughout Canada, as in commercial cases, at any rate, it ought certainly to be.

Schedule C, appended to Vol. II., contains a list of "Acts and parts of Acts repealed, so far as they constitute indictable offences, from and after a day when the proper Legislature makes provision for the punishment of the offence by fine or imprisonment or by both, under the British North America Act, 1867." This Schedule is founded on sub-section 15 of the 92nd section of the B.N.A. Act.

There are also appended to Vol. II.: "A Table of Acts passed prior to Confederation by the different Provinces now comprised in the Dominion of Canada, and of Acts of the Dominion of Canada, showing how much of each is in force, and how each has been dealt with;" and "A Table of Acts and parts of Acts consolidated, showing where each section, or part of a section, is consolidated." These two schedules embody a full and detailed account of the work done by the Commissioners, and enable the reader to judge of the care and labour bestowed upon it; and with the tables we have mentioned, and the full and detailed index repeated in each volume, afford every facility for using the work and testing its correctness; and though we have not been able to give to the examination of their work the time which the Joint Committees of the Senate and House of Commons were able to bestow upon it, yet we have given it no slight attention and consideration, and feel safe in saying with that Committee that "it has been well and carefully done." W.

HOW TO GET OUT OF A STEAMSHIP BERTH.—A variety of opinion appears to prevail among Her Majesty's judges, as evidenced by the case of *Andrew* v. *Little*, upon the grave question how to get out of a berth at sea. Mr. Justice Grove appears to think that one must get out anyhow, because he proposed to nonsuit a lady who complained that she was allowed only a chair to step upon. The Master of the Rolls and Mr. Justice Day appear to think that the right way to get out is front foremost, while a learned judge, who is ex-president of the Alpine Club, and ought to know, declared that he should have hesitated long before deciding whether to get out forwards or backwards when the ship was rolling. The jury were for the lady, who had stepped out forwards on the top rail of a chair which the stewardess had put for her, and had fallen and hurt herself. The prevalent opinion on the bench shows how civilisation has blunted the prehensile faculty in man. We venture to say that there is not an omnibus conductor in London who will not affirm confidently that the right way to come down from the top of an omnibus is with the face inwards, and they have not abandoned this view since the very general substitution of a staircase for a ladder. The attitude is not dignified, and would be inadmissible on the Matterhorn, where the eyes have to be used; but it is favoured by arboreal apes, the schoolboy climbing trees and the hodman carrying loads. Whether a lady whose mode of leaving her berth is by stepping forwards on the top rail of a chair is entitled to recover damages from the owners of the steamboat, is one of those great questions which, like Mr. Jackson's thumb, seem specially reserved for the consideration of the House of Lords. It will then be for the Lords to say whether placing a chair beside a berth for a lady to step on is evidence of negligence proper to be left to a jury.—*Law Journal*.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, June 4.

Judicial Abandonments.

Napoléon Fauteux, St. Hyacinthe, May 27.
Joseph Parent, Quebec, May 5.
Andrew B. Sommerville, trader, Kinnear's Mills, May 31.

Curators Appointed.

Re Nathaniel Chaffee, hotel keeper, Montreal.—F. Jacobi, Montreal, curator, June 1.

Re Arline Filteau (Mrs. J. A. Thérien), Three Rivers.—Kent & Turcotte, Montreal, curator. May 31.

Re Elie Dufresne, St. Barthelemy.—Kent & Turcotte, Montreal, curator, June 1.

Re Fournier & Guertin, Danville.—Kent & Turcotte, Montreal, curator, May 31.

Re George Washington Murray, Montreal.—C. Desmarteau, Montreal, curator. June 2.

Re Elie Dufresne, St. Barthelemy.—Kent & Turcotte, Montreal, curator.

Dividends.

Re André Bourque, St. Clet.—Final dividend, payable June 25, Kent & Turcotte, Montreal, curator.

Re George Darche, St. Matthias.—Dividend, payable June 25, Kent & Turcotte, Montreal, curator.

Re C. E. Dion & Co., Tingwick.—First and final dividend, payable June 14, H. A. Bedard, Quebec, curator.

Re Melodie Leclaire (A. Amyot & Cie.), Berthierville.—First and final dividend, Henry Ward, Montreal, curator.

Re Olivier Lefebvre.—First and final dividend, payable June 20, J. O. Dion, St. Hyacinthe, curator.

Re Thomas Lavoie.—First and final dividend, payable June 15. L. N. Paquet, Rivière du Loup Station, curator.

Re L. O. Paradis, Sorel.—Dividend, payable June 25, Kent & Turcotte, Montreal, curator.

Re Eutrope Rousseau, Quebec.—First and final dividend, payable June 14, H. A. Bedard, Quebec, curator.

Re M. R. Spinelli, Montreal.—First and final dividend, payable June 25, Kent & Turcotte, Montreal, curator.

APPOINTMENTS.

L. W. Sicotte, Montreal, advocate, to be Clerk of the Crown, and Clerk of the Peace and Sessions of the Peace, for the district of Montreal.

The Legal News.

VOL. X. JUNE 18, 1887. No. 25.

Mr. Justice Chitty, in *Twogood* v. *Pirie*, 56 L. T. Rep. (N. S.) 394, has decided that "Jubilee" is not a valid trade mark. He said:—"It is not obviously meaningless or not descriptive with reference to note paper, because it may be note paper which is produced in the Jubilee year. I have said the Jubilee year. Mr. Aston argued at some little length that the word 'Jubilee' was not a good English word, but it is plain it is a common English word, and used also without reference to the term 'year.' The term 'Jubilee' is used by several writers of authority, not of the present day, but of times past, such as Dryden and Sir Walter Scott, and I could give many others, but I only mention these because I happen to have before me Webster's Dictionary which gives quotations from both these authors."

In these days of large payments to authors for copyrights, the sums allotted to ancient positions like that of the Poet Laureate are utterly insignificant, and the office would be more onerous than profitable if the Laureate were unable, like other authors, to dispose of the title. The *Law Journal* on this subject, says:—"A weekly contemporary, who professes to be at the bottom of the well in respect of his facts, states that Lord Tennyson has received 700*l.* from a publisher for his 'Jubilee Ode,' and suggests that as the Poet Laureate receives 200*l.* a year and a butt of wine for his services, this sum should be accounted for to the Crown. The butt of wine picturesquely introduced, and the other gifts in kind to the Laureate have long been commuted for 100*l.* a year, which Lord Tennyson duly receives less income tax. If the statement as to the 700*l.* is more accurate, the comment on it shows a not uncommon confusion as to the law of copyright. The Poet Laureate is retained by the Queen, not to produce copyright for the benefit of the Crown, but to write odes for her personal gratification and use. When he has 'said or sung' the ode commanded his duty is at an end. The right to multiply copies of it belongs to himself."

An article in the *Law Quarterly Review*, for April, on Preventive Jurisdiction, says, in a note referring to the prohibition of indecent publications:—"The Louisiana Criminal Code (513) enacts that 'any person who shall publish any account of any trial for rape, adultery, offences against decency, etc., containing any indecent or wanton details, shall be fined not exceeding two hundred dollars, *and* imprisoned not exceeding sixty days, *if the account be substantially true*; but if it be false the punishment shall be doubled.' If there were some such law in England, the trial of celebrated divorce cases would not inflict the harm they now do on the morality of the people. The French and Belgian penal codes prohibit the sale, distribution, etc., of publications which are 'contrary to good morals' (*contraires aux bonnes mœurs.*)"

In a treatise upon insanity, by Mr. J. H. Lloyd, M.D., of the University of Pennsylvania, the writer says:—"The class of lunatics from whom are recruited most of the criminal insane comprises the patients with elaborate, systematized delusions. These are the monomaniacs, or, as the Germans call them, the cases of original insanity, or *Primäre Verrücktheit.* This has sometimes been called the 'insanity of character.' Its roots are deep in the very construction of the man's brain; he was born with a bad brain, which is bound not to perform properly its function of ideation. It will not elaborate good thought or sound sentiment in whatever environment it is placed, and whatever sensations stimulate it to its special reflexes of comparison and action—at least thus we are taught to believe of these congenital fools. Here is where a fallacy, I think, creeps into the admirable logic of those who have described this class. While it is true, in every sense, that there is a class of men born with poorly constructed brains, it is not so applicable a truth that they must necessarily be forever in the grip of a fate which holds them all equally irrespons-

ible lunatics. Men are born with every grade of brain-power, from the microcephalic idiot to the sage whose cerebral masses weigh sixty ounces. Character is a varying quality, not always strictly in proportion to the amount and quality of a brain, but also in proportion to the character of the environments of that brain. If there is any truth in the doctrine of evolution, or any force in our systems of education, it seems to me to rest upon this truth. Otherwise we are all the most unfortunate fatalists, and in a literal sense, the sins of our great-grandfathers are visited upon us without amendment or expiation possible on our parts. Hence this doctrine of original insanity, while attractive to the ear and eye, bears a fallacy with it if extended too far. Insanity is not a mere peculiarity of character, else this doctrine may extend its long arms until it embraces all the oddities, and eccentricities, and notions, and fallacies, and sins of mankind, or until one-half the human race is caught by this *octopus* of the extreme school of alienists. Insanity must be conceded to be something more definite than this, especially criminal insanity, wherein arises the question of responsibility under the law. If Erskine's test of delusion is applicable at all, it is certainly to this class of lunatics, for insane delusion, fixed and logical, is the essence of their disease; it supplies the motive, usually, of their crimes (whether its connection with the crime can be traced or not); it dominates their lives and perverts all their conceptions of moral, social and legal relations. Unless such a positive perversion of cerebral activity can be shown, it seems very doubtful if these 'primary cranks' have passed from the borderland of folly and wickedness into the neighboring field of irresponsible lunacy. . . . The writer cannot but feel, in common with his profession, a prejudice against hard and fast dogmatic tests of insanity. It is in this respect that the physician has all along been apt to part company with the lawyer. This arises in part from the directly opposite positions taken by the two in regard to the case in issue. The physician, searching for disease, may be too apt sometimes to construe slight and irrelevant symptoms as indicative of what he seeks, while the lawyer, upon the bald assertion of the law that every man is in normal health until he is proved to the contrary, is always too prone to resist anything but the most glaring and unmistakable signs. It thus happens that the medical definition has sometimes been stretched so wide that it includes cases which shock the common sense of the most intelligent, while the legal tests have been made so narrow and unscientific that it is difficult to include in them some of the most patent cases of insanity."

COUR DE CIRCUIT.

MALBAIE, 26 janvier 1881.

Coram ROUTHIER, J.

SAVARD v. LES COMMISSAIRES D'ECOLE DE LA MALBAIE.

Exception à la forme—Amendement—Signification.

JUGÉ:—*Que dans les causes en Cour de Circuit non appelables, il n'est pas nécessaire de faire signifier copie du bref tel qu'amendé. Mais qu'en Cour Supérieure, telle signification est requise.*

Les défendeurs plaidèrent à la forme que la demanderesse, dénommée en l'action: "Elmina," s'appelait: "Marie-Louise-Elmina." La demanderesse obtint permission d'amender, et fit signifier au procureur des défendeurs un avis les informant qu'elle avait amendé son bref et sa déclaration conformément à la permission obtenue, sans faire signifier nouvelle copie du bref et de la déclaration.

Les défendeurs firent ensuite motion demandant le renvoi de l'action parce que telle signification n'avait pas eu lieu; que l'avis informait bien que l'amendement avait été fait, mais ne le prouvait point.

Motion renvoyée avec dépens, la Cour faisant remarquer qu'en Cour Supérieure la règle est différente.

J. A. Martin, procureur de la demanderesse.

J. S. Perrault, procureur des défendeurs.

(C. A.)

COUR DE CIRCUIT.

MALBAIE, 26 janvier 1881.

Coram ROUTHIER, J.

LABRECQUE v. PERRAULT.

Tarif des médecins—Contrat tacite de ces derniers avec ceux qui ont coutume de les employer—Consultation et remèdes.

JUGÉ :—*Qu'un médecin qui a coutume de soigner une personne pour tel prix, ne peut pas, sans avis préalable, augmenter ses charges pour s'en tenir au tarif.*

Qu'on ne doit pas entendre par "consultation et remèdes," le fait qu'un médecin après avoir ausculté une personne pour connaître sa maladie, lui envoie ensuite les mêmes remèdes pour cette maladie qu'il a constatée.

J. A. Martin, procureur du demandeur.
J. S. Perrault, procureur du défendeur.
(C. A.)

COUR DE CIRCUIT.

MALBAIE (Saguenay), 27 janvier 1887.

Coram ROUTHIER, J.

BOIS v. GERVAIS.

Billet promissoire—Pénalité.

JUGÉ :—*Que le billet promissoire consenti au percepteur du revenu par un défendeur poursuivi pour vente de boisson sans licence qui confesse jugement, et ce pour le montant de la pénalité, est valable.*

A l'action basée sur tel billet, le défendeur plaida que ce billet était nul, ayant pour considération une pénalité ; que l'amende ne devant pas retourner en entier au percepteur du revenu, le billet ne pouvait, dans tous les cas, lui être consenti que pour sa part.

Jugement tel que demandé et déclarant le billet valable—la Cour faisant remarquer que si le demandeur a agi illégalement, ce n'est point au défendeur à s'en plaindre, mais au trésorier de la province.

J. A. Martin, procureur du demandeur.
J. S. Perrault, procureur du défendeur.
(C. A.)

CHANCERY DIVISION.

LONDON, April 6, 1887.

Before STIRLING, J.

In re COOKE'S TRUSTS.

Domicile—Acquisition of New Domicile—Domicile of Choice—Abandonment of Domicile of Origin.

This was a petition for payment out of Court of certain funds which represented one moiety of the residuary estate bequeathed by the will of W. H. P. Cooke in favour of Charlotte S. Nicholson, the fund having been paid into Court under the provisions of the Trustee Relief Act. Charlotte S. Nicholson, the legatee, was the child of English parents, and was, by her domicile of origin, English. In the year 1839, being then an infant, she married in France a Frenchman named the Viscount d'Argeavel, and by a notarial contract entered into in France previously to the marriage it was agreed that the property should be separate. There were three children of this marriage, two of whom were living. In 1845, the viscountess separated from her husband, taking her children with her, and went to live with her father in Jersey, and thenceforth ceased to reside in France. In the year 1846 the testator died. In May, 1849, a decree for separation, as regards the property of the viscountess, was made in the Royal Courts, Jersey. Some time in the year 1852 the viscountess observed in the papers an announcement of the death of her husband (who, however, did not in fact die until 1877), and on July 4, 1853, she went through the ceremony of marriage with the petitioner, and with him and her children went to New South Wales, where they resided until the death of the viscountess in the year 1879. In 1878 the viscountess made a will, by which she left all her property to the petitioner. Under this will the petitioner now claimed. The claim was opposed on two grounds. First, it was said that from the time of her marriage down to the time of her death her domicile continued to be French; and, secondly, that, whether or not that were so, at all events she had so dealt with her property by the notarial contract

entered into before her marriage as to preclude her from saying that she was able to deal with it otherwise than in accordance with French law.

STIRLING, J., held that during the period between the death of the viscount in 1877, and that of the viscountess in 1879, there existed the two elements necessary for the acquisition of a domicile of choice, viz., actual residence and intention permanently to reside, and consequently that the viscountess was at the time of her death domiciled in New South Wales. But, even if this was not so, she had during the last two years of her life *animo et facto* put an end to her French domicile, and her English domicile of origin had consequently revived. His Lordship further held, on the authority of *Sottomayor* v. *De Barros*, 47 Law J. Rep. P. D. & A. 23; L. R. 3 P. D. 1, that the validity of the notarial contract must be decided by her domicile of origin at the time when the contract was entered into, and therefore that it had no greater effect than a similar contract would have had if entered into by the viscountess previously to, and in contemplation of, an English marriage. There was nothing to show that she ever took the benefit of the contract, or adopted or confirmed it. His Lordship therefore held that the petitioner was entitled to the order for which he asked. *Law Journal.*

COUR DE CASSATION.

(CH. CIVILE.)

10 novembre 1886.

Présidence de M. BARBIER, premier président.

COMMUNE DE SAINT-NAZAIRE V. EPOUX TOURNISSA et al.

Servitude—Eaux pluviales—Ecoulement—Fonds supérieur — Fonds inférieur — Travaux — Extinction—Prescription.

Si le propriétaire du fonds inférieur ne peut acquérir, par la voie de la prescription, un droit de servitude sur les eaux découlant du fonds supérieur qu'au moyen de travaux apparents exécutés par lui sur ce fonds, *il n'en est pas de même quand il s'agit d'opérer, par des travaux de ce genre, l'extinction de la servitude légale établie par l'art. 640 C. civ.* Il suffit, en ce cas, que les travaux aient été faits sur le fonds asservi.*

Le 10 mai 1880, la commune de Saint-Nazaire, agissant poursuite et diligence du maire, a fait assigner les époux Tournissa et autres propriétaires sur le territoire de la dite commune, et riverains d'un chemin public dit "de la Barque vieille," pour voir dire qu'ils seraient tenus de rétablir et rendre libre, par la suppression d'un barrage, qu'ils avaient construit, une tranchée telle qu'elle existait autrefois le long de leurs propriétés, et dans laquelle se déversaient alors les eaux pluviales, qui, par suite des travaux exécutés depuis par les défendeurs, et à défaut d'autre issue, s'accumulaient actuellement sur le dit chemin. La commune alléguait, au soutien de sa prétention, que la tranchée en question, qui avait existé autrefois sur le terrain des défendeurs, et dont le rétablissement faisait l'objet du procès, avait été, en 1811, un cours d'eau non navigable ni flottable, compris dans la catégorie des biens, qui sont *res nullius*, aux termes de l'art. 714 C. civ.; d'où il suivait, concluait-elle, que ni les défenseurs ni leurs auteurs n'avaient eu le droit ni de combler cette tranchée, ni de faire obstacle par leurs travaux de barrage, à ce que la commune y deversât les eaux pluviales du chemin; subsidiairement, et pour le cas où la tranchée litigieuse serait reconnue avoir le caractère d'une propriété privée, et appartenir aux défendeurs, la commune prétendait, du moins, un droit de servitude d'écoulement des eaux du chemin sur les propriétés inférieures de ceux-ci, et demandait la suppression des travaux litigieux, comme portant atteinte à l'exercice de cette servitude. Un jugement du Tribunal civil de Narbonne, rendu après visite des lieux et expertise, avait admis la prétention de la commune de Saint-Nazaire, mais sur appel interjeté par les époux Tournissa et consorts la Cour de Montpellier rendit, le 29 juillet 1884, l'arrêt infirmatif, dont la teneur suit :

" Attendu que, par sa nature et par sa situation, le fossé dont la commune de Saint-Nazaire demande le rétablissement, n'est pas affectée à l'usage général de ses habitants, et qu'il a toutes les apparences d'un ouvrage

* This article appears as 501 in our Code.

établi jadis par les auteurs des appelants pour l'utilité de leurs fonds ; que la suppression de ce fossé et l'établissement du barrage élevé au point E du plan des experts remontant à plus de trente ans, n'ont fait l'objet d'aucune opposition de la part de la commune ; que, tenant l'état actuel des lieux, la commune ne peut avoir le droit exorbitant d'écouler les eaux pluviales qui s'accumulent sur le chemin rural d'exploitation dit de la Barque vieille par le fossé en litige, qu'à la condition de prouver qu'elle en est propriétaire ou qu'il est grevé à son profit d'une servitude ;

" Attendu que la commune ne fait pas cette preuve ; qu'elle n'invoque aucun titre ; que les indications du plan cadastral de 1811 et la délibération du 26 avril 1856, ne sauraient lui en tenir lieu et son action doit dès lors être déclarée mal fondée ;

" Par ces motifs,

" Réforme le jugement entrepris ; ce faisant déclare mal fondée l'action de la commune intimée."

La commune de Saint-Nazaire s'est pourvue en cassation contre cet arrêt à l'encontre duquel elle a formulé trois griefs, le premier et le deuxième sans intérêt, et le troisième ainsi conçu :

" Violation des art. 640, 642, 690, 2229 C. civ., et des règles de la prescription en matière de servitudes, défaut de motifs, en ce que la Cour d'appel a déclaré mal fondée l'action d'un propriétaire supérieur tendant à assurer l'écoulement naturel des eaux pluviales sur les fonds inférieurs, et à faire percer un barrage construit sur l'un de ces fonds, sous prétexte que le droit de ce propriétaire supérieur était prescrit, et cela sans constater au profit des propriétaires inférieurs les éléments nécessaires d'une possession utile pour prescrire, et notamment ce fait essentiel qu'ils auraient exécuté sur le fonds supérieur des travaux de nature à leur créer une possession réelle."

La Chambre civile a statué comme il suit :

La Cour,

Sur le premier et le deuxième moyens :
(Sans intérêt) ;

Sur le troisième moyen pris de la violation des arts. 640, 642, 690, 2229 C. civ., des règles de la prescription en matière de servitudes et d'un défaut de motifs :

Attendu que, s'il est vrai que la commune de Saint-Nazaire a prétendu subsidiairement qu'elle avait un droit de servitude d'écoulement d'eaux sur les parcelles de terrain appartenant aux défendeurs, et si, par conséquent, le troisième moyen, proposé par le pourvoi, ne saurait être considéré comme nouveau, il est formellement déclaré, en fait, par l'arrêt attaqué, que cette servitude a été éteinte au profit des défendeurs par la prescription trentenaire ;

Attendu que le chemin dit " de la Barque vieille " est qualifié, tant par cet arrêt que par la commune elle-même dans son exploit introductif d'instance, du 10 mai 1880, " chemin rural d'exploitation " et, par suite, était soumis aux règles du droit commun en matière de prescription ; qu'il importe peu que le barrage élevé par les auteurs des défendeurs l'ait été sur leur propre fonds ; que, si le propriétaire du fonds inférieur ne peut acquérir, par la voie de la prescription, un droit de servitude sur les eaux découlant du fonds supérieur qu'au moyen de travaux apparents exécutés par lui sur ce fonds, il n'en est pas de même quand il s'agit d'opérer, par des travaux de ce genre, l'extinction de la servitude légale établie par l'art. 640 C. civ. ; qu'il suffit, dans ce cas, qu'ils aient été faits sur le fonds asservi, puisque le propriétaire du fonds dominant est toujours averti par le refoulement des eaux de l'existence de travaux qui constituent des actes contraires à l'exercice de la servitude ; que c'est donc à bon droit que l'arrêt dénoncé a pu déclarer que la servitude réclamée par la commune de Saint-Nazaire était éteinte par la prescription, et a, dès lors, suffisamment motivé son dispositif ;

Rejette.

Note.—La jurisprudence paraît toujours avoir été fixée en ce sens que des travaux même apparents, que le propriétaire du fonds inférieur a exécutés sur son propre fonds, sont toujours insuffisants pour lui acquérir, par la voie de la prescription, un droit de servitude sur les eaux découlants du fonds supérieur. Les ouvrages apparents, dont parle l'art 642 C. civ., doivent donc nécessairement avoir été exécutés sur le fonds supé-

rieur. V. Cass. 5 juillet 1837 (S.37.1.565); 15 avril 1845 (S.45.1.583—J. du P. 45.2.652—D.45 1.254); 15 février 1854 (S.54.1.186—J. du P. 54.2.350—D. 54.1.141); 18 mars 1857 (S.57.1. 263—J. du P. 57.846—D. 57.1.122); 23 janvier 1867 (S.67.1.125—J. du P. 67.288—D.67.1.159). En doctrine, au contraire, la question a toujours été très vivement controversée, et l'opinion contraire à celle de la Cour de cassation a réuni d'importants et nombreux suffrages. V. dans le sens de la jurisprudence : Duranton, t. V. No. 181 ; Vazeille, Prescription, No. 401 ; Demolombe, Servitudes, t. I., No. 80 ; Garnier, Régime des eaux, t. II, No. 48. *Contrà :* Favard, Rép., vo. Servitude, section 2 § 1. No. 2 ; Pardessus, Servitudes, t. I, No. 100 ; Marcadé sur l'art. 642, No. 2; Massé et Vergé, t. II, § 318, note 5 ; Demante, t. II, No. 493 *bis* ; Aubry et Rau, t. III, § 244, texte et note 17, p. 37 et 38. Quoi qu'il en soit, les motifs, qui ont conduit la Cour de Cassation, et les auteurs qui l'ont suivie, à formuler cette exigence spéciale pour l'application de l'art. 642, ne trouvent plus, comme le dit l'arrêt ci-dessus, leur raison d'être lorsqu'il s'agit de l'exécution de travaux, devant servir de point de départ au délai de 30 ans par lequel peut s'éteindre, en cas de non usage, la servitude légale d'écoulement naturel des eaux, imposée entre fonds supérieur et fonds inférieur par l'art. 640 C. civ.

Au premier cas, en effet, l'on fait observer notamment que le propriétaire supérieur n'a même pas le droit de s'opposer à l'exécution des travaux exécutés sur le fonds inférieur, pour capter ses eaux, sauf à lui à les retenir chez lui, comme il l'entend ; qu'il peut fort bien ignorer d'ailleurs les travaux exécutés sur ce fonds inférieur, soit par exemple que ce fonds soit clos de murs, soit qu'il ne soit pas contigu, mais séparé de fonds supérieur par un chemin public ou un autre fonds. Tel est le fondement de l'interprétation que donne la jurisprudence à l'art. 642 C. civ., les raisons sont sans valeur au second cas; d'une part, le propriétaire du fonds supérieur sera toujours averti des travaux exécutés sur le fonds inférieur par le refoulement des eaux sur son propre fonds, et, d'autre part, tant que trente ans ne se seront pas écoulés depuis que ce refoulement aura commencé à se produire, il aura le droit de demander la suppression de tous travaux qui en sont la cause, et qui tendraient, en quelque endroit qu'ils aient été exécutés, à paralyser ou gêner à son préjudice l'exercice de la servitude. On doit admettre également dans un ordre d'idées analogue, que, tandis que la prescription, dans les termes de l'art. 642, suppose nécessairement que les travaux sont l'œuvre du propriétaire du fonds inférieur, qui se prévaut de cette prescription, Cass., 15 avril 1845 (S. 45.1.583—J. du P. 45.2.652—D. 41.1.254); 18 mars 1857 (S. 57.1.263—J. du P. 57.846—D. 57.1.122); *adde :* Aubry et Rau, t. II, § 244, texte et note 15, p. 37, le propriétaire du fonds inférieur, qui se prétend affranchi de la servitude de l'art. 640 est, au contraire, admis à se prévaloir de tous travaux ayant modifié l'écoulement des eaux à son profit, sans distinguer s'ils sont son œuvre ou l'œuvre du propriétaire du fonds supérieur : Aubry et Rau, t. III, § 240, texte et note 28, p. 12.—*Gaz. du Palais.*

TRIBUNAL CIVIL DE LA SEINE.

(5e. Chambre.)

25 mars 1887.

Présidence de M. Auzouy.

Vittecoq v. de Greffulhe.

Vente à l'essai—Délai—Calcul—Point de départ —Jour de la livraison.

En cas de vente à l'essai, subordonnée pour sa perfection à l'agrément de l'acheteur dans un délai déterminé, le jour de la livraison ne compte point pour le calcul du délai, lorsqu'en fait il a été impossible à l'acheteur de commencer utilement l'essai de la chose le jour même de la livraison.

Le Tribunal,

Attendu que Vittecoq réclame au vicomte de Greffulhe la somme de 4,000 francs, formant le prix d'un cheval vendu à l'essai par le demandeur et livré le 27 janvier 1886 ;

Attendu que les conditions du marché résultent d'une lettre écrite par un sieur Julien, piqueur de de Greffulhe, dans laquelle, à la date du 26 janvier 1886, il invite Vittecoq à envoyer le lendemain, mercredi, par le train de 12 h. 50, le cheval nommé Conquérant, en gare à Nangis, où livraison en sera faite à 3 heures ; qu'il était dit que le cheval était pris

à l'essai pendant 15 jours et que, s'il ne convenait pas, il serait remis au vendeur 200 fr. d'indemnité ;

Attendu que ce cheval a été ainsi mis à la disposition du mandataire du défendeur ; qu'il n'a pu convenir à de Greffulhe qui s'est refusé à en réaliser l'achat définitif ;

Attendu qu'il résulte d'un récépissé de chemin de fer de l'Est que le cheval a été ramené à Paris le 10 février où il paraît avoir été refusé par le mandataire de Vittecoq ; que, dès le 11 février, ce dernier, par une dépêche télégraphique a été prévenu du retour du cheval à Paris, et a été invité à donner des ordres pour le reprendre ;

Attendu que Vittecoq soutient que la vente est devenue définitive à raison de ce fait que le délai pour la rupture du marché expirait le 10 février, et qu'il n'a été averti que le 11 ;

Attendu qu'il était convenu que l'essai du cheval aurait une durée de 15 jours ; que, s'il a été livré le 27 janvier en gare à Nangis, son essai n'a pu commencer le dit jour, à raison de l'impossibilité d'y procéder utilement dès son arrivée par le chemin de fer ; qu'en conséquence le jour de la livraison ne peut être compris dans le délai ; que ce délai, n'ayant commencé à courir que le 28 janvier, n'expirait dès lors que le 11 février :

Attendu que de Greffulhe, qui s'était fait envoyer ce cheval de Paris, où il était confié à un tiers et où le marché s'était conclu n'avait pas à le faire conduire ailleurs qu'à Paris, et que Vittecoq a été suffisamment mis en mesure de donner des ordres pour le recevoir au lieu dans lequel il l'avait primitivement placé ; qu'ainsi la vente n'est pas devenue parfaite ; que la restitution du cheval a été faite en temps utile et que Vittecoq n'a droit qu'à l'indemnité de 200 fr. convenue ;

Attendu que de Greffulhe a fait offres réelles de la somme ; que ces offres sont valables et libératoires ;

Attendu que de Greffulhe, sur le refus persistant de Vittecoq de reprendre son cheval, l'a fait placer au Tattersall, où il a dû payer 180 fr. d'avance pour les frais de garde et de nourriture ; que de Greffulhe est en droit d'obtenir le remboursement de cette avance ;

Par ces motifs,

Déclare Vittecoq mal fondé dans sa demande, l'en déboute ; reçoit de Greffulhe reconventionnellement demandeur ;

Déclare valables et libératoires les offres par lui faites à Vittecoq, condamne Vittecoq à payer à de Greffulhe la somme de 180 fr., et en tous les dépens.

*RECENT QUEBEC DECISIONS.**

Requête civile—Rescindant et rescisoire.

Jugé, 1. Que le jugement remettant au dossier une requête civile rejetée en première instance, avec l'addition que la requérante "is hereby allowed to proceed upon the said *requête civile* in due course of law," ne fait qu'autoriser la production de la requête sans prononcer sur le rescindant qui ne peut être accordé que sur preuve des allégations de la requête.

2. Que, tant que le jugement attaqué par la requête civile, n'est pas retracté, les droits de celui qui l'a obtenu subsistent, et qu'il ne peut pas être obligé à remettre ce qu'il a reçu en vertu de ce jugement.—*Cooke* v. *Caron*, en révision, Casault, Caron, Andrews, JJ., 30 nov. 1885.

Insurance, Marine—Arbitration — Prescription —Condition—Undisclosed Principal.

Held, 1. A condition in a marine policy, that any difference between the company and the assured as to the loss or damage should be settled by arbitration, is not of a nature to exclude the ordinary action before the courts of law.

2. A condition in such policy, that any suit for a recovery thereunder shall be absolutely barred unless brought within one year from date of loss, is not binding, inasmuch as prescription is a matter of public order, and cannot be renounced by anticipation. C.C. 2184.

3. An undisclosed principal can sue on a contract of marine insurance made by his agent, in the agent's name.—*Anchor Marine Ins. Co. & Allen*, In Appeal, May 6, 1886.

Capias ad respondendum—Révision—Délai.

Jugé, Que la déclaration qu'il entend faire réviser la décision que l'art. 823 C. P. exige être faite de suite par le demandeur, n'est requise que pour empêcher le défendeur d'être mis en liberté, et que le demandeur peut, sans

* 13 Q. L. R.

elle, demander la révision du jugement annulant le *capias* avec dépens contre lui.—*Richardson* v. *Fortin*, en révision, 30 nov. 1886.

Procureur ad litem—Désaveu.

Jugé, Que la partie qui autorise un procureur à comparaître pour elle à une action, et à l'y défendre, ne peut, ensuite, sous prétexte qu'elle était absente de la province lors de l'institution de l'action et de la production du plaidoyer, et n'avait pas spécialement autorisé ce plaidoyer, poursuivre tel procureur en désaveu.—*Dawson & La Banque Union*, en appel, 6 mai 1886.

Recouvrement de taxes municipales—Juridiction.

Jugé, 1. Que toute action pour le recouvrement de taxes ou contributions municipales doit être portée, soit devant la Cour Supérieure, soit devant la Cour de Circuit, suivant le montant en litige—le Code de Procédure Civile ne contenant aucune disposition exceptionnelle à l'égard de ces dites taxes comme celles qu'il contient au sujet des taxes scolaires et des contributions pour la construction et réparation des églises et presbytères.

2. La juridiction donnée par les articles 401 et 1042 du Code Municipal, à la Cour de Circuit, à la Cour du Magistrat ou à un Juge de Paix, en matière de recouvrement du coût des travaux de voierie, n'est pas exclusive de la juridiction de la Cour Supérieure.—*La Corporation d'Irlande Nord & Mitchell*, en appel, 5 février 1887.

LE SECRET PROFESSIONNEL.

Une curieuse affaire de révélation de secret professionnel médical vient de se présenter devant le Tribunal de Besançon.

Un habitant de cette ville, M. D.... avait contracté une assurance sur la vie de 5,000 fr.

Après son décès, la compagnie exigea de ses héritiers, conformément aux clauses de la police, la production d'un certificat indiquant le genre et la durée de la maladie à laquelle avait succombé M. D....

Les héritiers s'adressèrent au médecin qui l'avait soigné. Mais celui-ci refusa de délivrer le certificat.

" Ce serait, disait-il, trahir un secret professionnel que de révéler la maladie qui a déterminé la mort de M. D.... et je ne veux pas me mettre dans le cas de me faire appliquer l'article 378 du Code pénal."

Or, c'était là le point épineux.

Les médecins ne sont pas d'accord sur l'étendue de leurs obligations quand il s'agit d'un certificat à produire en matière d'assurances. Les uns pensent qu'ils peuvent faire connaître la maladie dont leur client a été atteint chaque fois que cette maladie n'aura pas un caractère honteux ou héréditaire.

D'autres sont d'un avis contraire, entre autres le docteur Brouardel.

Le docteur qui avait soigné M. D.... fut assigné devant le Tribunal civil en même temps que la Compagnie.

Les héritiers de M. D.... réclamaient à cette dernière le paiement de l'assurance, et au médecin un certificat qui leur donnât le moyen d'obtenir ce paiement. Leur demande fut soutenue par Me Belin.

Me Francey plaida pour le docteur et soutint que son client, invoquant le secret professionnel ne pouvait être contraint de délivrer un certificat.

Me Bouvard invoqua pour la Compagnie d'assurances les clauses de ses polices, où figure parmi les pièces à produire à l'effet d'obtenir les règlements, après décès, le certificat du médecin traitant.

Le Tribunal, conformément aux conclusions de M. le substitut Schuler, a mis le docteur X.... hors de cause sans dépens et condamné la Compagnie à payer le montant de l'assurance, celle-ci n'alléguant même pas que M. D.... avait succombé à une des causes de mort qui, suivant la police, l'exonérait entièrement.

La Compagnie a été, en outre, condamnée à tous les dépens.—*Gaz. du Palais.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, June 11.

Judicial Abandonments.

Eusèbe Bourgouin, trader, Ste. Flavie, June .
Copland & McLaren, Montreal, June 8.
Louis Lavertu, trader, East Angus, June 8.

Curators appointed.

Re James R. Rouse.—A. Barney, Frelighsburg, curator, May 7.

Dividend.

Re D. Rees & Co., Montreal.—First and final dividend on privileged claims, payable June 29, A. W Stevenson, Montreal, curator.

The Legal News.

VOL. X. JUNE 25, 1887. No. 26.

A jury, at a recent trial in New York, returned a sealed verdict in these words:—"We, as a body of jurors, have agreed to disagree." The Court declined to receive the verdict, and the jurors were threatened with punishment for contempt. The foreman defended the verdict on the ground that he had seen it done before. Finally the difficulty was overcome by a consent of counsel that the jury should be discharged. The threat of punishment, we presume, referred to the manner rather than to the matter of the verdict, for jurors, as judges of the facts, have as much right to adhere to their respective views as judges have when they are discharging a similar duty.

The *Law Times*, referring to the attorney general's bill for amending the law respecting the attendance of registrars at marriages in non-conformist places of worship, says:—"It proposes to extend to dissenting ministers the power of solemnizing marriages without the presence of a registrar, which is now possessed by clergymen in orders recognized by the Church of England, and by Quakers and Jews. The proposed privileges are to be confined to those denominations who, in the opinion of the registrar-general, have a central organization sufficient for maintaining discipline among their ministers. A large number of the numerous sects, which are known even by name to few persons outside the registrar-general's office, would be excluded by this last provision. We have had no religious census in England for five and thirty years, but the Irish tables give forty-eight sects which only boast two members apiece, and another fifty whose congregations are all under twenty. The bill is principally designed in the interests of the five great Methodist bodies—the Wesleyans, the New Connexion, the Primitive Methodists, the Bible Christians, and the United Methodist Free Churches—all of whom possess extensive organizations, and, as it requires certain preliminary proceedings to be taken before the registrar, and a return under his hand to be given to the officiating minister, who must be registered, it is difficult to see whom the passing of this long-needed measure can prejudice."

Lord Esher had an opportunity in Court recently to rebut the common idea that appeals were taken almost as a matter of course from Court to Court. The masters in Chancery, his lordship said, make about 35,000 orders in a year. Of these 2,000 reach the judge, 250 the Divisional Court, 75 the Court of Appeal, and last year only one went to the House of Lords. There is nothing unreasonable in this.

SUPERIOR COURT—MONTREAL.*

Femme commune en biens—Dommages—Conclusions en faveur de la femme seule.

Jugé,—Que dans une action en dommages pour torts corporels à une femme mariée sous le régime de la communauté, la femme et son mari peuvent tous deux être demandeurs dans la cause en leur qualité de communs en biens; et le fait que les conclusions demandent que la somme réclamée soit payée à la femme est indifférent.—*Gagnon* v. *La Corporation de St. Gabriel*, Jetté, J., 30 avril 1887.

Stipulation for benefit of a third person—Art. 1029 *C. C.*

By an arbitration bond, A agreed to pay the sub-contractors of P, who was the sub-contractor of A, for the construction of the Pontiac Pacific Junction Railway.

R, one of the P's sub-contractors, brought action against P and A, claiming the benefit of the stipulation made in and by the bond.

A pleaded, *inter alia*, that the arbitration was not carried out, no award made, and that the submission became inoperative—Article 1348, C. C. P.

Held,—That the arbitration having fallen through, the submission became inoperative, and the stipulation in favor of R, the third

* To appear in Montreal Law Reports, 3 S. C.

party, was revoked.—*Read* v. *Perrault et al.*, In Review, Jetté, Taschereau, Loranger, JJ., March 31, 1887.

L'acte des licenses de Québec—Certificat—Conseil municipal—Refus de confirmer—Electeurs qualifiés.

Jugé, 1. Que le certificat pour obtenir une licence pour vendre de la boisson enivrante, doit être signé par vingt-cinq électeurs qualifiés au temps de la signature du certificat.

2. Qu'un conseil municipal est en droit de refuser la confirmation d'un certificat dont plusieurs des vingt-cinq signataires, quoique portés sur la liste des électeurs, se trouvent déqualifiés par le fait qu'ils doivent des taxes municipales ou scolaires.—*Wiseman* v. *La Corporation de St. Laurent*, Doherty, J., 14 mai 1887.

Locateurs et locataires—Résiliation de bail—Juridiction—Valeur du bail.

Jugé,—Que dans une action en résiliation de bail où aucune somme d'argent n'est réclamée ni pour comme loyer, ni comme dommages, c'est la valeur du bail qui détermine la juridiction du tribunal; mais que dans le cas où des sommes d'argent ont déjà été payées au locateur, c'est la balance due ou à devenir due en vertu de ce bail qui en fixe la valeur.—*Wood* v. *Varin*, Mathieu, J., 29 déc. 1886.

CIRCUIT COURT.

CHAPEAU (Co. of Pontiac), June 4, 1887.

Before WÜRTELE, J.

VAILLANCOURT v. LIBBEY.

C.C. 1669—Domestic—Evidence of employer.

HELD:—1. *That a teamster employed in lumbering operations is not a domestic.*

2. *That a master cannot offer his oath to prove damages occasioned by the misconduct of his servant.*

The plaintiff had been engaged by the defendant as a teamster in connection with certain lumbering operations which the latter was carrying on, and he sued for two months' wages.

The defendant pleaded that the plaintiff had engaged with him for the winter season, that the plaintiff had abandoned his service before the expiration of the term of his engagement, and that by reason of such abandonment and of the plaintiff's misconduct during the time he worked he had suffered damages exceeding the amount of the wages claimed; and he offered his oath, under art. 1669 of the C. C., as to the conditions of the engagement and as to the fact of his having suffered damages and the amount thereof.

PER CURIAM. The article invoked allows the master, in a suit for wages by domestics or farm servants, in the absence of written proof, to offer his oath as to the conditions of the engagement and as to the fact of the payment of the wages. In the latter case, he has to accompany his oath with a detailed statement, showing how the payment was made.

The plaintiff was not a farm-servant. Was he a domestic? A domestic is a servant who lives in his master's house or in its dependencies, and is employed in household work or in other work on the premises,—or in personal care to his master or the members of his family. Rolland de Villargues, *Verbo* Domestique, No. 2. "Je crois donc "qu'on doit réserver la qualification de do- "mestiques aux serviteurs à gages, qui don- "nent leurs soins à la personne ou au mé- "nage du maître,.... et qui, d'ailleurs, lo- "gent et vivent dans sa maison." 3 Aubry et Rau, page 133, note 19. "Les domestiques "proprement dits, c'est-à-dire les gens atta- "chés au service personnel des maîtres ou à "celui du ménage." The plaintiff does not come under this description. He was not employed in household or other work on his master's premises, but worked as a teamster in the woods and elsewhere away from his master's residence. He was therefore not a domestic, and the defendant has consequently no right to offer his oath as to the conditions of the engagement.

As to the other point, the article allows a master to prove the payment of the wages claimed by his oath, on producing at the same time a detailed statement showing the various sums paid and the dates on which they were given. Here the defendant wants

to prove, not a payment made by himself, but the misconduct of his servant; and he further wants to estimate the damages which he suffered by such misconduct. This is altogether beyond the privilege given to masters by the article; and the defendant could not be allowed to prove such misconduct and damages by his oath even if the plaintiff were a domestic.

Application rejected.

T. G. O. Grondin, for plaintiff.
D. R. Barry, for defendant.

CIRCUIT COURT.

CHAPEAU, (Co. of Pontiac), June 4, 1887.

Before WÜRTELE, J.

LANGAN v. MADORE.

Witness—Right to use his own language.

HELD:—*That the parties in pleading or testifying, and witnesses in giving their evidence, have the right to use either the English or the French language.*

The plaintiff, who does not understand the French language, called the defendant as a witness. The first question was put to him in English, but he answered in French. The plaintiff's attorney reqnested him to reply in English, but he answered that, although he understood English, he was not sufficiently skilled in it to convey his meaning properly in that language. The plaintiff's attorney then asked the court to order the defendant to answer in English, giving as a reason that his client wished the evidence to be given in the language which he understood.

PER CURIAM. Our constitution makes the use of the English and French languages optional in our courts. Section 133 of "the British North America Act," provides in express terms that "either of those languages "may be used by any person, or in any "pleading or process, ... in or from all "or any of the Courts of Quebec." The defendant is a French Canadian, and the language in which he is skilled is the French language. He wishes to use this language before the court and claims his privilege to do so. He has the constitutional right to use that one of the two authorized languages which is his, notwithstanding that his adversary does not understand it. If the plaintiff had appeared in person, I would appoint an interpreter under article 10 of the C. C. P., to assist him; but this is unnecessary as he is represented by an advocate who knows both languages. I allow the defendant to give his evidence in French, as he claims the right to use it.

Application refused.

T. G. O. Grondin, for the plaintiff.
C. P. Roney, for the defendant.

COUR DE CASSATION (CH. DES REQUÊTES).

11 mai 1887.

Présidence de M. BÉDARRIDES.

PROC. GÉN. DE RENNES v. ME X....

Lettre missive—Secret des lettres—Discipline—Avocat—Client—Magistrat offensé—Communication délictueuse.

En aucune matière, il ne peut être porté atteinte au principe de l'inviolabilité du secret des lettres au moyen de procédés délictueux, ce principe de haute moralité intéressant l'ordre public.

Spécialement une lettre confidentielle, adressée par un avocat à l'un de ses clients habituels, ne peut servir de fondement à une poursuite disciplinaire contre cet avocat, à raison d'expressions ou imputations outrageantes qu'elle contiendrait pour un magistrat, lorsque c'est au mépris de la volonté de son auteur et même du destinataire ou de ses héritiers, qu'elle a été par un véritable abus de confiance communiquée à ce magistrat.

M. le procureur général près la Cour d'appel de Rennes s'est pourvu en cassation contre l'arrêt de cette Cour, en date de 7 mars 1887, rapporté 10 Leg. News, 133.

Ce pourvoi a été rejeté par la Chambre des requêtes aux termes d'un arrêt ainsi conçu :

LA COUR,

Attendu que l'arrêt attaqué constate en fait que la lettre confidentiellement écrite par Me X.... en réponse à la dépêche d'un de ses clients habituels, a été détournée au mépris de la volonté de son auteur et même des héritiers du destinataire, pour être commu-

niquée par un véritable abus de confiance à la personne qu'elle devait offenser;

Attendu qu'en aucune matière il ne peut être porté atteinte au principe de l'inviolabilité du secret des lettres au moyen de procédés délictueux, ce principe d'une haute moralité intéressant l'ordre public; d'où il suit que la Cour de Rennes, saisie d'une poursuite disciplinaire contre Me X... a fait une irréprochable application de la loi en disant qu'il n'y avait lieu de faire état de la lettre incriminée;

Rejette.

TRIBUNAL CIVIL DE QUIMPER.

11 mai 1887.

Présidence de M. Pavec.

X.... v. J....

Lettres missives—Lettre confidentielle—Secret—Avocat—Détention et usage illicites—Restitution—Dommages-intérêts.

Le fait de disposer d'une lettre missive confidentielle, d'en prendre ou d'en laisser prendre copie et de ne la point rendre à son expéditeur qui seul a des droits sur elle depuis le décès du destinataire, autorise l'expéditeur à demander et à obtenir une réparation pécuniaire et la restitution de la lettre.

Il en est ainsi spécialement du fait du président d'un tribunal de commerce, qui s'approprie une lettre confidentielle écrite par un avocat à son client après la perte d'un procès et qui la transmet au chef du parquet du ressort, pour obtenir une condamnation disciplinaire contre l'avocat en raison d'imputations injurieuses ou outrageantes pour sa personne.

Nous avons déjà rapporté les faits à l'occasion desquels a surgi ce procès:

Après le décès de l'un des clients de Me X..., avocat, survenu en 1886, le notaire, qui procédait à l'inventaire, trouva dans les papiers du défunt une lettre, que l'avocat avait écrite à son client, au lendemain d'un procès qu'il avait plaidé pour lui et perdu en 1883. Cette lettre, qui contenait des appréciations plus que vives à l'égard de l'un des magistrats, qui avait concouru au jugement du procès, fut saisie par le notaire, et envoyée par lui, malgré la protestation des héritiers du défunt, au magistrat qui s'y trouvait visé. A la suite de cette communication, Me X... fut traduit disciplinairement devant le Conseil de l'Ordre qui l'acquitta. M. le procureur général près la Cour de Rennes, ayant interjeté appel de cette décision, la dite Cour, statuant disciplinairement en Chambre du Conseil, rendit à la date du 7 mars 1887, un arrêt rapporté 10 Leg. News, 133, par lequel elle confirmait la délibération du Conseil de l'Ordre et déboutait M. le procureur général de son appel. M. le procureur général s'est pourvu en cassation contre cet arrêt: la Chambre des requêtes a également rejeté son pourvoi par l'arrêt que nous rapportons plus haut.

Me X..., ainsi qu'il l'avait fait pressentir dans sa défense, a assigné devant le Tribunal de Quimper la veuve de son ancien client, le notaire et le président du Tribunal de commerce en restitution de la lettre et solidairement en dommages-intérêts. Une transaction est intervenue entre la veuve du client, le notaire et l'avocat; mais l'action ayant été continuée contre Y..., président du Tribunal de commerce, le Tribunal a statué comme suit:

Le Tribunal,

Attendu que, quelle que soit la voie par laquelle Y.... a été mis en possession de la lettre confidentielle du 30 juin 1883, question qu'en l'état de la cause il n'y a pas lieu d'examiner, il est incontestable qu'il a disposé de cette lettre, qu'il en a pris ou laissé prendre copie et ne l'a pas rendue à son expéditeur qui seul a des droits sur cette missive depuis le décès du client auquel elle était personnellement et exclusivement destinée;

Attendu que le fait de cette détention et de cet usage illicites autorise X.... à demander et à obtenir une réparation pécuniaire qu'il appartient au Tribunal d'arbitrer d'après les circonstances de la cause, et, en même temps, la restitution de l'écrit objet du litige; que cependant, en fixant le délai dans lequel cette restitution devra être effectuée, il convient de tenir compte de la communication du document à M. le procureur général près la Cour d'appel de Rennes;

Par ces motifs,

Condamne Y.... à restituer la lettre du

30 juin 1883, écrite par X.... à son client et toutes les copies que Y.... a prises ou laissé prendre de cette lettre, notamment celle qui a été produite dans l'instance, et le fac-simile qui a été établi; dit que cette restitution aura lieu dans les vingt-quatre heures du présent jugement pour le cas où il l'aurait entre les mains au moment de la signification, et dans les vingt-quatre heures qui suivront la réception par Y.... de ladite lettre au cas où il ne l'aurait pas reçue de M. le procureur général près la Cour d'appel de Rennes, antérieurement à la notification du présent, et ce, à peine de 5 francs de dommages-intérêts par chaque jour de retard;

Condamne Y.... à payer à X.... une somme de 100 francs à titre de dommages-intérêts;

Le condamne aux dépens, exclusion faite des frais de poursuite dont le demandeur s'est désisté, etc....

NOTE.—Celui qui est mis par une erreur ou par une fraude en possession d'une lettre missive confidentielle destinée à un tiers ne peut, contre le gré de l'expéditeur, être admis à faire usage de cette lettre dans son intérêt personnel. V. Cass. 3 mai 1875 (S.75.1.197); Rennes 26 juin 1874 (S.75.2.34); Rennes 7 mars 1887 (Gaz.Pal.87.1.383) et la note. La production de pareille lettre par le tiers est dès lors susceptible de donner lieu à des réparations civiles. V. Cass. 3 février 1873 (D.73.1.468), Comp. aussi: Cass. 12 mars 1886 et le rapport de M. le conseiller Dupré-Lasale (Gaz.Pal.86.1.598).

*RECENT QUEBEC DECISIONS.**

Loi des Licences de 1878—*Tribunal compétent.*

Jugé, Qu'une poursuite pour contravention à "la loi des licences de Québec de 1878," ne peut être jugée par trois juges de paix; et sur un bref de prohibition, la sentence ou conviction rendue par trois juges de paix sera annulée.—*Arseneault* v. *La Corporation de St. Charles*, Angers, J., C. S., Montmagny, 8 mai 1886.

Procédure—Bref d'appel.

Jugé, Que lorsque le bref d'appel n'a été signifié ni à la partie ni à son procureur personnellement pendant le délai fixé par la loi, l'appelant a perdu le droit de signifier le bref d'appel, et l'appel devra être renvoyé.—*Gingras & Choquet*, en appel, 3 fév. 1887.

Billet promissoire—Porteur de bonne foi—Fraude.

Jugé, Que lorsqu'un billet promissoire a été obtenu par fraude, le tiers, qui en est devenu porteur même de bonne foi, ne peut en recouvrer le montant du signataire. — *Banque Jacques Cartier & Lescard*, en appel, 4 déc. 1886.

Preuve—Témoin.

Jugé, 1. Qu'on peut en transquestionnant un témoin, appelé pour prouver la bonne réputation de l'épouse du demandeur, demander à ce témoin s'il a payé tous ses créanciers, et que s'il refuse de répondre la Cour pourra l'y contraindre.

2. Qu'en transquestionnant un autre témoin, une femme mariée, appelée pour prouver la mauvaise réputation de l'épouse du demandeur, il n'est pas permis de lui demander pour la discréditer, si elle a eu des rapports charnels avec un autre que son mari. *Dussault* v. *Bacon*, C. S., Andrews, J., 27 oct. 1886.

Chemin—Ponceau—Action en démolition.

Jugé, Que dans l'espèce actuelle, les appelants étant autorisés par la loi à construire un ponceau (culvert), sur le chemin qui est sous leur contrôle et qui longe la terre de l'intimé, il n'y a pas lieu à une action pour faire démolir ce ponceau. *Les Syndics des Chemins à Barrières de la Rive Sud & Bégin et al.*, en appel, 5 fév. 1887.

Caution judicatum solvi—Frais—Appel.

Jugé, Que, quelques généraux et amples que soient les termes du cautionnement fourni pour le paiement des frais sur une action, instance, ou procès, portee, intentée, ou poursuivi dans cette province, par une autre personne qui n'y réside pas, les cautions ne répondent que du paiement des frais en première instance, et ne sont pas

* 13 Q. L. R.

tenus au paiement de ceux de l'appel.—*Boulet* v. *Levasseur*, en révision, 31 mars 1887.

Slander—Privileged communication.

A statement made concerning a servant, by her late employer, to the keeper of the registry office through whom she had been engaged, and reflecting unjustly upon the character of such servant, will not be considered a privileged communication.—*Fitzgibbons & Woolsey et vir*, in appeal, Feb. 7, 1887.

Husband and wife—Desertion by wife—Order to return.

Held, That the obligation of a wife to reside in her husband's home is conditional upon the furnishing by him of one reasonably fit for her residence.

That inasmuch as by her marriage the wife contracts the obligation to reside with her husband at his home, an action at law accrues to the latter to obtain an order and judgment of the court to compel her obedience to such obligation, and power is vested in the Court to put such judgment into execution.

That a wife needs no further authorization to defend such action than that furnished by the fact of her husband's causing the issue of a writ summoning her to do so.

That the wife's right to the advantages secured to her by marriage contract being conditional upon the observance by her of the obligations incumbent upon her as such wife, she may, if, without lawful reason or cause, she leave her husband's home, and refuse to return thereto, be condemned and ordered to return to her husband and remain and live as his wife, and in default of obedience to such judgment, may be declared to have forfeited all her matrimonial advantages.

That such forfeiture, in the present case, would include also certain advantages secured to the defendant in and by a certain deed of donation *inter vivos* by the plaintiff to his son by a former marriage, made by the plaintiff in view of his intended marriage with defendant.

That such forfeiture will be declared, without prejudice to the execution of such judgment and order to return, and enforcement of obedience thereto, in due course of law.

Quaere, can such judgment and order to return to the conjugal domicile be enforced by *contrainte par corps*, or can her return be procured by force, *manu militari*?—*Sansfaçon* v. *Poulin*, S. C., Andrews, J., April 6, 1887.

Election—Recompte.

Jugé, 1. Que l'omission par un sous-officier rapporteur, d'apposer ses initiales sur le dos de tous les bulletins de votes donnés à un bureau de votation, n'invalidait pas ces bulletins.

2. Que nonobstant la disparition des bulletins de votes donnés à un ou plusieurs candidats dans un bureau de votation, le juge doit recompter les suffrages donnés dans tous les autres bureaux de votation.

3. Que vu la disparition de 130 bulletins de votes donnés à un bureau de votation, le juge ne peut pas recompter les suffrages donnés à ce bureau de votation, et doit donner instruction à l'officier-rapporteur d'agir, au sujet de ce bureau de votation, conformément à la sect. 63 de l'Acte des élections.—*Exparte Tremblay*, C. S., Malbaie, Routhier, J., 16 mars 1887.

THE JUBILEE AT THE LAW SOCIETY.

On Saturday, June 4, and on Monday, June 6, the members of the Incorporated Law Society celebrated the Queen's Jubilee by banquets in the Central Hall of the Royal Courts of Justice.

The Lord Chancellor, in responding to the toast of his health, said: I confess I am gratified by the manner in which you received this toast, not only because I am naturally proud of the high office it is my privilege to fill, but also because I have been informed that the members of my own profession were disposed to regard with a jealous, if not with an unfavourable, aspect the legislation which I have proposed to the nation. I am now delighted to have such a contradiction of that statement as I have received, and although I believe that what-

ever law was passed, lawyers, who by virtue of their profession are loyal subjects, would recognise the fact that their primary duty is to enforce the law, yet, without professing any canting view about men being absolutely regardless of their own interests, I believe that that which makes the law cheaper and more popular is ultimately to the personal advantage of members of the profession of the law. You have heard from Lord Chelmsford—and I am delighted to hear him in such an assembly as this, in which I will venture to say that the name of Thesiger must ever be dear—what those whose hearts beat beneath red coats will and can do on behalf of their Queen and country. Some of the most important questions of the world that have ever been decided have been decided in the Courts of law as well as on the field of battle; and as long as you have brave soldiers, loyal subjects, and able and courageous lawyers to fight your battles on fields of battle, in Courts of law, and at sea, you will maintain that same position you have hitherto maintained, not simply by mere brute violence and force, but by the recognition of this great fact, which all in this great hall ought to recognise—that in the result and in the end, truth and justice will finally prevail.

The President, in proposing the toast of 'The Bench and the Bar,' adopted the words of Lord Justice Bowen, used on a recent occasion, that 'justice is administered in this country, immaculate, unspotted, and unsuspected. There is no human being whose smile or frown, no Government, Conservative or Liberal, whose favour or disfavour could start the pulse of an English judge upon the bench or move by one hair's breadth the even equipoise of the scales of justice.' The bar is the portal by which alone the bench is approached and gained, and the bench is the reward of honourable and successful exertion at the bar. As we venerate and respect the bench, so we honour and respect the bar from which our judges proceed.

Lord Esher, in responding for the bench, said: I and the other judges present are here for ourselves and on behalf of all of us to assist in this admirably imagined mode of doing honour to the Queen. We are here, not only as guests, but as fellow-members of the same profession. It is true that our profession is divided into three parts, but the profession is one, and, except when on duty, we are equally members of that one profession. That profession is one of high and peculiar trust, and must be practised not merely with honesty, but with the most scrupulous and delicate honour. That honour strikes us in different ways. The judge knows of nothing in the profession but what is brought before him in a public Court. His honour, therefore, only requires of him that he shall spare no pains or trouble to come to a right decision. The barrister knows of no circumstances in his profession but those which are contained in his brief; but he has a most severe responsibility in determining how much of that which is in his brief shall be disclosed. That which he thinks right not to disclose in Court, he is bound in honour never to disclose at all. But the solicitor, from the necessity of the case, is made to know circumstances of the most delicate kind, and if he were to betray the secrets which must be entrusted to him, he would in many cases destroy the peace of families, and in others the fortunes of multitudes of people. It is upon that division of our profession, therefore, that the delicacy of trust of which I have spoken weighs most heavily, and I am here to-day in order to testify to my most earnest belief and conviction that that delicacy of trust is rarely, if ever, betrayed. I am here on behalf of Her Majesty's judges to say that we come here as members of our one profession for the purpose of showing the respect which we feel, and which everybody feels, for the division to which the great majority of this company belong.

The Attorney-General, in responding for the bar, said: The bench, the bar, and solicitors each have their respective duties. These respective branches and duties have existed for hundreds of years. There will, I have no doubt, be some changes, but I hope none of us will ever be tempted to break down that particular line of difference which now exists between solicitors and the bar. Let the facilities for changing from one branch

of the profession to the other be made as easy as possible. Let those at the bar who think they can work better as solicitors and let those solicitors who think they can get on at the bar have every means of changing afforded to them. But do not, in the interest of our great profession, break down those distinctions which have worked so well hitherto. I need not refer to the mutual confidence and trust that is engendered by the relations between solicitor and client and solicitor and barrister, but I feel sure that most members of the profession will be satisfied that it is to the interest of all its branches that we should remain as we are.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, June 18.

Judicial Abandonments.

Joseph Corrivault, Sherbrooke, June 13.

Obéline Lefebvre (Jos. Giroux & Co.), Montreal, June 8.

Louis Lavertu, Sherbrooke, June 8.

Curators appointed.

Re Obéline Lefebvre.—C. Desmarteau, Montreal, curator, June 16.

Re Napoléon Fauteux, Upton.—Kent & Turcotte, Montreal, curator, June 8.

Re Alphonse D. Parant, cashier, Montreal.—David Seath, Montreal, curator, June 14.

Re William H. Parsons (W. H. Parsons & Co.), commission agent, Montreal.—S. C. Fatt, Montreal, June 16.

Dividends.

Re Albert P. Benoit.—First and final dividend, payable July 5, J. J. Griffith, Sherbrooke, curator.

Re Edouard Hudon, St. Octave.—First and final dividend, payable July 1, H. A. Bédard, Quebec, curator.

Re Wilson & Cowley.—First and final dividend, payable July 7, J. M. M. Duff, Montreal, curator.

Separation as to property.

Margaret Maria Bond vs. George Barry, Montreal, trader, June 14.

Elizabeth Bruce Gardner vs. Harry Maclaren, trader, Montreal, June 10.

Minutes of Notary transferred.

Minutes of late Robert Trudel, Ste. Geneviève de Batiscan, transferred to David T. Trudel, of same place.

GENERAL NOTES.

Mr. David Dudley Field, at the age of eighty-two, sails for Europe to attend a convention of the Association for the Reform and Codification of the Law of Nations, to be held at the Guildhall, London, July 25th; one of the Institute of International Law, to be held at Heidelberg early in September; and one of the Commercial Law Congress, to be held in Antwerp the last of July.

WAS HE PROPERLY BRIEFED?—In the case of *Missouri* v. *Jump*, decided by the Supreme Court of Missouri, December, 1886, 7th Western Rep. 280, the Court said: "Appellant's counsel has not furnished us with a brief on his behalf, and we have been compelled to search the record without such aid. If counsel thinks a cause of sufficient importance to appeal it to this Court, and the errors committed by the lower Court of sufficient magnitude to warrant a reversal of the judgment, he does not discharge his duty to his client if he fails to file an abstract and brief in the case, and has no right to complain if this Court overlooks some point upon which the judgment might have been reversed.'

CITIZENS AND CITIZENESSES.—In *State ex rel. M'Campbell* v. *County Court* it was held by the Supreme Court of Missouri, February, 1887, that the word 'citizens' included persons of both sexes in determining whether a majority of the 'assessed taxpaying citizens' had signed a petition for the granting of a dram-shop license. 'The rule of construction,' said the Court, 'forbids us to accept the proposition so earnestly and ingeniously contended for by counsel for the relator—viz.: That the word citizens as used in the above section only includes such male citizens as have the right to vote. To give the word this meaning would be in plain disregard of the rule, by restricting its application to a fractional part of the persons falling within the customary meaning of the term citizen.'—*American Law Record.*

A CURIOUS CLAIM.—According to the *Albany Law Journal*, a jilted suitor recently sued the father of a young lady named Sarah, in the Court of Common Pleas of New York, and alleged that the defendant agreed with the plaintiff, in consideration of the plaintiff, upon the request of the defendant, marrying Sarah, to give his consent to the marriage; and that the plaintiff had expended large sums of money in entertaining Sarah, making costly presents to her, preparing for housekeeping, and incurring other expenses necessary and incident to entering upon family life, at the request of defendant; but that the defendant had refused his consent, and induced Sarah not to marry the plaintiff, and the plaintiff claimed $10,000 damages. While the action was pending Sarah married another man, and the plaintiff married another woman. Upon the eve of trial the plaintiff's presents were returned. A few days before the trial the plaintiff moved for leave to amend his complaint, but the Court denied the motion; and the cause being called for trial a day or two later, the plaintiff's counsel moved for a discontinuance, which was granted on the usual terms, the Court remarking that the case was unprecedented, and that the defendant's contention that the action was not maintainable was correct.

The Legal News.

VOL. X. JULY 2, 1887. No. 27.

Referring to the subject of copyright in lectures, the *Law Journal* says:—"The House of Lords, in the case of *Caird* v. *Syme*, has had to come to close quarters with that legacy of doubt and hesitation which Lord Eldon bequeathed to the profession in *Abernethy* v. *Hutchinson*, 3 Law J. Rep. (o.s.) Chanc. 209. Lord Eldon put the right of a lecturer to restrain the publication of a lecture partly on the ground of contract and partly on the ground of property. The theory of contract can hardly hold, because it only reaches to publication by the person who hears the lecture. The true view of the law seems to be that there is a right of property at common law in a lecture, whether reduced into writing or not, so long as the lecture is not published to the world. The delivery of Mr. Abernethy's lecture to the Students at St. Bartholomew's hospital was not a publication of this kind; neither was Professor Caird's delivery of his lecture in the University of Glasgow such a publication. This appears to be the view entertained by the Lord Chancellor and Lord Watson, and Lord Fitzgerald differs only as to the application of it, being of opinion that the delivery of the lecture in the university was a publication. On the other hand, the Scotch judges held that the publication by the defender 'did not constitute an infringement of any legal right of property or otherwise belonging to or vested in the pursuer.' We can well understand the Scotch judges being puzzled by Lord Eldon's halting periods; but we are glad to know that the law is now established on its true footing—namely, that there is a right of property in lectures."

Nichols v. *State*, before the Supreme Court, Wisconsin, March 22, 1887, was a novel example of burglarious entry. The accused concealed himself in a chest and had him self shipped in an express car, and in that way gained admission to the car, with intent to assault and rob the express messenger while the train was *en route*. The Court held this to be a breaking and entering the car, within the meaning of the statute. The Court said: "The question recurs whether the proofs show that there was a breaking in fact, within the meaning of the statute. Certainly not in the sense of picking a lock, or opening it with a key, or lifting a latch, or severing or mutilating the door, or doing violence to any portion of the car. On the contrary, the box was placed in the express car with the knowledge, and even by the assistance of those in charge of the car. But it was not a passenger car, and the plaintiff in error was in no sense a passenger. The railroad company was a common carrier of passengers as well as freight. But the express company was exclusively a common carrier of freight, that is to say, goods, wares and merchandise. As such carrier, it may have at times transported animals, birds, etc., but it may be safely assumed that it never knowingly undertook to transport men in packages or boxes for special delivery. True, the plaintiff in error contracted with the local express agent for the carriage and delivery of such box, but neither he, nor any one connected with the express car or the train, had any knowledge or expectation of a man being concealed within it. On the contrary, they each and all had the right to assume that the box contained nothing but inanimate substance—goods, wares, or merchandise of some description. The plaintiff in error knew that he had no right to enter the express car at all without the consent of those in charge. The evidence was sufficient to justify the conclusion that he unlawfully gained an entrance, without the knowledge or consent of those in charge of the car, by false pretenses, fraud, gross imposition and circumvention, with intent to commit the crime of robbery or larceny, and in doing so, if necessary, the crime of murder. This would seem to have been sufficient to constitute a constructive breaking at common law, as defined by Blackstone, thus: 'To come down a chimney is held a burglarious entry, for that is as much closed as the nature of things will permit. So also to

knock at the door, and upon opening it to rush in with a felonious intent, or under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house. All these entries have been adjudged burglarious, though there was no actual breaking, for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. And so, if a servant opens and enters his own master's chamber door with a felonious design; or if any other person, lodging in the same house, or in a public inn, opens and enters another's door with such evil intent, it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both, for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt.' 4 Bl. Com. 226, 227. So it has frequently been held in this country that 'to obtain admission to a dwelling-house at night, with the intent to commit a felony by means of artifice or fraud, or upon a pretence of business or social intercourse, is a constructive breaking, and will sustain an indictment charging a burglary by breaking and entering.' *Johnson* v. *Commonwealth*, 85 Penn. St. 54; 82 id. 306; *State* v. *Wilson*, 1 N. J. Law, 439; 1 Am. Dec. 216; *State* v. *McCall*, 4 Ala. 643; 39 Am. Dec. 314; Bish. St. Crimes, § 312, and cases there cited. The same was held in Ohio under a statute against 'forcible' breaking and entering. *Ducher* v. *State*, 18 Ohio St. 308."

SUPERIOR COURT.

AYLMER (district of Ottawa), June 10, 1887.

[In Chambers.]

Before WÜRTELE, J.

EGAN et al. v. THOMSON.

Costs on putting in security for costs—Costs of Motion.

HELD: — *That the disbursement and fee for putting in security for costs form part of the costs of suit and follow the issue of the cause; but the fee allowed by the tariff to the plaintiff's attorney on the motion for security for costs does not form part of such costs of suit.*

Some of the plaintiffs did not reside in the province, and the defendant moved for security for costs, which was ordered to be given by the non-resident plaintiffs. Judgment was afterwards rendered in favor of the plaintiffs, and their attorney included in his bill of costs a fee of $3.00 for attendance when the motion was made, another fee of $3.00 for attendance at the putting in of the security, and $1.00 for the Prothonotary's fee for the bond. The defendant objected to these items; and the prothonotary struck off the first, but allowed the two others. The taxation was then informally submitted by the parties to the judge for revision.

PER JUDICEM. Every non-resident who brings an action in this province is bound, under the provisions of article 29 of the C. C., to give security for the costs which the party sued may become entitled to recover from him. The putting in of such security is a necessary proceeding in the cause, and the costs thus incurred are necessary costs. They therefore form part of the costs of suit, like the costs on any other act of procedure required by the code of procedure or the rules of practice.

When the plaintiff does not voluntarily put in the security for costs, he is in default, and the defendant may take proceedings to compel him to do so. The defendant then enforces the fulfilment of an obligation due to him against a debtor in default; and when the plaintiff is ordered to give the security, he, like any other losing party, must pay the costs incurred on the judicial proceedings adopted, and that whether the recourse be by dilatory exception or by motion. He does not receive but has to pay costs on the proceedings to enforce the fulfilment of his obligation. In the present case, the plaintiffs have therefore no right to recover the fee of $3.00 payable to their attorney for his appearance on the motion from the defendant.

I maintain the ruling of the Prothonotary in his taxation of the bill of costs.

Revision refused.

J. R. Fleming, Q.C., for plaintiffs.
Asa Gordon, for defendant.

CIRCUIT COURT.

MONTREAL, June, 1887.

Before CARON, J.

GANNON v. SAUVÉ.

Jurisdiction—Cause of action.

HELD:—*Where goods are ordered by letter written in the Province of Ontario, and addressed to the city of Montreal, and the goods are shipped by the vendor at Montreal, addressed to the purchaser in Ontario, that an exception déclinatoire will not lie to an action instituted at Montreal for the recovery of the price.*

In this case, the plaintiff sued defendant, resident at Cornwall, Ontario, for goods ordered by him under the following circumstances:—It was proved that the defendant requested one Ruest, a trader at Cornwall, Ont., to order certain goods for him from the plaintiff at Montreal. Ruest wrote from Cornwall to Montreal instructing the plaintiff to send the goods to defendant at Cornwall, and that defendant would either remit the money or pay plaintiff's traveller when he came next to Cornwall. The plaintiff sued defendant at Montreal for the price of the goods.

The defendant pleaded want of jurisdiction in the Circuit Court, Montreal, by *exception déclinatoire*, and quoted *Gault & Bertrand*, 25 L. C. J. p. 340; also *Desmarteau* v. *Mansfield*, 3 Leg. News, p. 136.

The learned judge, in rendering judgment dismissing the *exception déclinatoire*, held that though the order was written at Cornwall, it was accepted in Montreal, and the goods were delivered to the defendant by delivery to the carrier at Montreal, being thereafter at the risk of defendant, and hence the sale and delivery being completed at Montreal, the cause of action arose there, and therefore the Court had jurisdiction in the case.

Exception dismissed.

Larivière, for plaintiff.

Dunlop, Lyman & Macpherson, for defendant.

(F. S. L.)

RECENT QUEBEC DECISIONS.*

Donation d'usufruit à conjoints—Insaisissabilité.

Jugé, Qu'un usufruit donné à conjoints ne peut être divisé, de manière à faire offrir aux enchères publiques la part du mari, et à la faire attribuer, par adjudication, à un étranger, qui jouirait ensuite conjointement avec la femme.

2. Qu'une telle division répugne à l'ordre publique, et est impossible d'exécution.

3. Que l'usufruit entier des deux conjoints ne peut être saisi et vendu, attendu que telle saisie et vente affecteraient les droits du conjoint non tenu à la dette, et par conséquent il n'est loisible de saisir ni la part du défendeur, ni l'usufruit en entier.—*Bodard & Anctil*, en appel, 6 mai 1886.

Société en nom collectif—Pouvoir des membres.

Jugé, Que les membres d'une société en nom collectif ne peuvent lier la société que pour les obligations qu'ils contractent en son nom, dans le cours des affaires dont elle se mêle.

Que l'association d'une société existante aux affaires d'une personne, pour former avec celle-ci, une autre société, n'est pas une obligation contractée dans le cours ordinaire des affaires de la société, et que semblable association faite au nom de la société par un de ses membres, sans l'autorisation des autres, ne lie pas la société, et n'oblige ni elle ni ses autres membres.—*Singleton* v. *Knight*, C. S., Casault, J., 8 février 1886, confirmé en appel, 4 février 1887.

Vices redhibitoires—Boiterie.

Jugé, 1. En interprétation de l'article 1530, C. C., que la question de "diligence raisonnable suivant la nature du vice et l'usage du lieu," est laissée à la discrétion du juge de première instance; et sa décision ne doit pas être mise de côté à moins d'erreur évidente, en matière d'actions redhibitoires.

2. Que la boiterie intermittente dans un cheval vendu comme étalon reproducteur, avec garantie expresse de tous défauts par acte authentique, est un vice redhibitoire.—*Houle & Côté*, en appel, 5 février 1887.

* 13 Q. L. R.

Revendication—Unpaid vendor.

Held, That in a contract for the sale of moveables, a stipulation that no title shall pass until perfect payment of the price, is lawful, and in default of payment, such moveables may be revendicated in the possession of a third party who has purchased in good faith, unless protected by the exceptions provided for by articles 1488, 1489 and 1490, C. C., or by a prescriptive title under art. 2268.

2. That a sale by a trader of an article in which he does not deal, to a non-trader, is not a commercial matter within the meaning of article 2260 of the Civil Code.—*Gray* v. *L'Hopital du Sacré Cœur*, S. C. Andrews, J., April 6, 1887.

Jury de medietate linguae *en procès pour délit* (misdemeanor).

Jugé, Que dans les procès pour délit (misdemeanor), comme dans ceux pour félonie, le prévenu a droit à un jury composé de personnes dont moitié au moins parlent la langue de la défense.—*Regina* v. *Maguire*, Cour du Banc de la Reine au criminel, Tessier, J., 26 avril 1887.

TRIBUNAL DE COMMERCE DE LA SEINE.

20 mai 1887.

Présidence de M. Levylier.

Deyrolle v. Megnin.

Journaux et écrits périodiques—Articles—Rédacteur — Rétribution — Reproduction—Journaux similaires—Propriété littéraire.

L'écrivain qui, moyennant rétribution, rédige des articles pour un journal, s'interdit par cela même de reproduire ces mêmes articles dans des journaux similaires.

Il en est ainsi surtout lorsque ces articles ont été faits pour une publication spéciale destinée à former un recueil.

Le Tribunal,

Attendu que Deyrolle expose que Megnin, ancien collaborateur de son journal, intitulé l'*Acclimatation*, a créé un journal similaire ayant pour titre l'*Eleveur*, et prétend que la ressemblance entre les deux feuilles est de nature à produire une confusion et à permettre à Megnin de s'emparer de la clientèle du journal l'*Acclimatation*, ce qui constituerait un fait de concurrence déloyale qu'il convient de faire cesser;

Mais attendu que, s'il est vrai que le journal de Deyrolle est intitulé l'*Acclimatation*, et que le même mot "Acclimatation" figure comme sous-titre dans le journal de Megnin, dont le titre principal est l'*Eleveur*, l'emploi de ce mot ne saurait être blâmable que si la disposition du journal incriminé était assez semblable à celle du journal préexistant pour qu'ils puissent être pris l'un pour l'autre; que de l'examen fait par le Tribunal il ressort, au contraire, que l'*Eleveur* diffère de l'*Acclimatation* dans toutes ses parties essentielles: dispositions de la première page, titre, format et couleur de la couverture; qu'aucune confusion n'est possible entre les deux journaux: qu'il n'y a donc pas concurrence déloyale, et que ce chef de demande doit être repoussé;

Sur la défense de publier les articles déjà parus, et sur 20,000 fr. de dommages-intérêts:

Attendu que Megnin prétend, qu'étant l'auteur des articles publiés dans le journal l'*Acclimatation*, dont il n'aurait aliéné la propriété que partiellement et pour la publication dans le journal de Deyrolle seulement, il serait en droit de reproduire ces mêmes articles dans tel journal qu'il lui conviendrait et, notamment, dans le journal l'*Eleveur*, dont il est propriétaire;

Mais attendu qu'il est établi que Megnin, employé à appointements fixes chez Deyrolle, a, en outre, reçu de Deyrolle une rémunération fixée à la ligne pour la rédaction de ces articles dans le journal l'*Acclimatation*; qu'il s'agit, en l'espèce, d'une publication spéciale destinée à former un recueil, ainsi que l'indique la pagination et la table des matières, publiée dans le dernier numéro de l'année; que Megnin, en acceptant de rédiger les articles dont s'agit, s'est interdit, par cela même, de reproduire ces mêmes articles dans des journaux similaires;

Et attendu qu'il est justifié que Megnin a reproduit plusieurs de ces articles dans son journal l'*Eleveur* qui s'adresse à la même clientèle que le journal de Deyrolle; qu'il

convient, en conséquence, de faire défense à Megnin de continuer à reproduire les articles dont s'agit, et sous une contrainte à impartir;

Attendu en outre, que les publications faites jusqu'à ce jour par Megnin ont causé à Deyrolle un préjudice dont il est dû réparation à ce dernier; que le Tribunal, avec les éléments d'appréciation qu'il possède, en fixe l'importance à 200 fr., au payement desquels Megnin doit être tenu;

Sur la publication du jugement à intervenir:

Attendu qu'il est établi, pour le Tribunal, que Deyrolle trouvera dans les dommages-intérêts auxquels va être tenu Megnin une réparation suffisante du préjudice qu'il a éprouvé; que ce chef de demande doit donc être repoussé;

Par ces motifs,

Fait défense à Megnin de publier, à l'avenir, les articles déjà parus dans le journal de Deyrolle, et ce à peine de 50 fr., par chaque contravention constatée;

Condamne Megnin à payer à Deyrolle 200 francs, à titre de dommages-intérêts;

Déclare Deyrolle mal fondé dans le surplus de sa demande, l'en déboute;

Condamne Megnin aux dépens.

NOTE.—La cession faite à un éditeur par un auteur du droit de publier un ouvrage s'entend lorsqu'elle ne contient aucune réserve formelle, de la cession même du droit de propriété; en conséquence elle emporte pour le cessionnaire le droit exclusif de reproduction ou de réimpression. V. Poulet, Propr. litt. et artist., No. 242: Blanc, de la Contref., p. 278. *Sic:* Paris 2 juillet 1834 (Gaz. des Trib. du 3 juillet; Paris 23 juillet 1836 (le Droit du 24 juillet); Trib. civ. Seine 9 février 1870 (Pat. 70.95); Trib. com. Seine 27 juin 1871 (Pat. 71.98). Ces principes s'appliquent-ils aux articles publiés dans un journal? Contrairement au jugement ci-dessus, on admet en général la négative sur ce point: "Le contrat qui se forme entre le journaliste et le directeur du journal dans lequel il publie son article, est, dit M. Pouillet, d'une nature spéciale ou du moins est limité aussi bien par la force des choses que par un usage constant, invariable. Il est en effet certain que le directeur du journal n'acquiert que le droit de publier l'article qui lui est remis et n'en devient pas, comme un éditeur ordinaire l'absolu propriétaire. C'est donc à l'auteur que cet article continue d'appartenir et sauf un délai nécessaire pour que le journal tire de sa publication tous les avantages voulus, l'écrivain reste maître de publier ailleurs, et sous telle forme qu'il lui plaît, son travail." *Sic*: Trib. civ. Seine 2 janvier 1834 (Gaz. des Trib. du 3 janvier); Trib. com. Seine 2 février 1877 (Pat. 77.29).—*Contrà:* Trib. com. Seine 12 septembre 1838 (Droit du 13 septembre). Il faut cependant, croyons-nous avec Dalloz, Vo. Propr. littér., No. 257, admettre un tempérament à cette doctrine absolue; on ne saurait en effet autoriser l'écrivain à insérer ses articles dans un journal faisant concurrence au premier ou à en publier une réimpression dans des conditions défavorables pour ce journal. C'est cette considération d'équité qui a déterminé la décision du Tribunal dans l'espèce ci-dessus rapportée, V. conf. Ruben de Couder, Dict. dr. com. et ind. Vo. Propr. litt., No. 206; Renouard, Tr. des dr. d'auteurs, t. II, No. 164.—*Gaz. du Palais.*

MR. JUSTICE STEPHEN ON THE LAW OF CRIMES BY BRITISH SUBJECTS ABROAD.

The following note is contributed by Mr. Justice Stephen to the current number of the 'Journal du Droit International Privé':—

De l'impuissance de la législation anglaise à punir les nationaux pour crimes ou délits commis à l'étranger.

A propos d'un vol de diamants qui s'est opéré en 1886 en Belgique, entre Ostende et Verviers, on a dit sur le continent:

'Le vol récent de diamants qui a eu lieu en chemin de fer sur le territoire belge par des Anglais qui se sont ensuite réfugiés en Angleterre a attiré de nouveau l'attention des jurisconsultes sur la question de ce que peut, ou de ce que ne peut pas la loi anglaise à l'égard des Anglais qui commettent un délit ou un crime à l'étranger et se réfugient ensuite sur le territoire britannique?

'Nous savons d'une façon générale—et la presse anglaise l'a encore affirmé dans cette espèce—que la loi anglaise ne permet pas de poursuivre en Angleterre un sujet britannique qui a commis un délit ou un crime en territoire étranger. Quant à demander à l'Angleterre l'extradition de ses nationaux, la loi peut ne pas s'y opposer en principe; mais en pratique, c'est une extradition que l'Angleterre n'accorde pas.'

C'est là une vue exacte de la loi anglaise sur cette question J'essayerai d'en donner l'explication historique.

La partie la plus ancienne du droit criminel anglais est celle qui règle la procédure criminelle. Plus tard vinrent les définitions des crimes: elles se perfectionnèrent peu à peu et très imparfaitement. La procédure criminelle anglaise actuellement en vigueur est développée par un progrès dont on peut voir l'origine dans les institutions judiciaires de Henry II et qui datent du douzième siècle. Il euvoyait en tournée ses 'justiciarii' par tous les comtés d'Angleterre. Dans chaque grande ville (county town) venaient des espèces de représentants du comté, c'est-à-dire les personnes d'importance (busones), et de chaque commune (vill) 'quatre hommes et le reeve' (gerefagraf-bailli). De ces personnes on formait les inquests (enquêtes) ou juries. Quelles étaient la composition et la fonction primitive de ces corps? Voilà des questions assez obscures; mais il est bien constaté que les jurés étaient originairement des témoins officiels qui faisaient leur rapport aux justices du roi sur ce qui s'était passé dans leur voisinage. Plus tard ils se divisèrent en deux parties, le grand jury ou jury d'accusation, et le petit jury ou jury de jugement. Les grands jurys ou jurys d'accusation étaient censés savoir ce qui s'était passé dans leur propre comté et pas autre chose. Ainsi ils ne savaient rien d'un crime commis dans un autre comté ou à l'étranger. On tenait à cette règle avec une rigueur si pédantesque que, si un homme en blessait un autre à mort dans un comté, et que le blessé mourut dans un autre comté, le criminel échappait à la répression. On remédiait à cette situation par un acte de parlement passé en 1549 (2 et 3 Edward VI. c. 24). Voici quelques phrases de son préambule ou exposé de motifs:

'It often happeneth that a man is mortally stricken in one county, and after dieth in another county, in which case it hath not been founden in the laws and customs that any sufficient indictment thereof can be taken in any of the said two counties; for that by the custom of this realm the jurors of the county, where such party died of such stroke, can take no knowledge of the said stroke being in a foreign county, although the same two counties and places adjoin very near together; ne the jurors of the county where the stroke was given cannot take knowledge of the death in another county although that death apparently came of the said stroke, so that the Kings Majesty within his own realm, cannot by any laws yet made or known punish such murderers or manquellers for offences in this form committed and done.'

En conséquence, l'acte ordonne qu'en ce cas spécial le criminel sera justiciable dans l'un ou l'autre comté. Quelques exceptions analogues ont été faites de temps en temps par des actes législatifs plus modernes, mais sauf ces exceptions le vieux principe est toujours maintenu. Les exceptions sont curieuses. Elles donnent une idée assez juste de l'esprit de la loi anglaise et de la nature des réformes qui nous conviennent. En effet le résultat général est très commode, mais en même temps excessivement compliqué. Voici les principales exceptions à la règle générale:

'Le Lord High Admiral' avait toujours juridiction sur les crimes commis sur les navires anglais, soit en mer, soit dans un port de mer étranger, soit dans un fleuve étranger en aval du premier pont.

Cette juridiction est exercée à présent par les cours criminelles ordinaires en vertu de plusieurs actes très compliqués. En vertu de cette juridiction, il a été décidé (il n'y a pas bien longtemps) qu'on pouvait poursuivre en Angleterre un citoyen des Etats-Unis d'Amérique qui avait tué un homme à bord d'un navire anglais dans la Garonne, audessous de Bordeaux, mais loin de la mer.

On a aussi décidé que c'était un crime contre la loi anglaise pour un étranger quel-

conque de voler un objet à bord d'un vapeur anglais amarré au quai de Rotterdam. Dans cette espèce un Anglais était poursuivi pour avoir recélé en Angleterre l'objet volé à Rotterdam. La défense se fondait sur l'argument que l'objet recélé n'avait pas été volé selon la loi anglaise. Ce voleur hollandais commit sans doute un crime contre la loi hollandaise, mais non pas contre la loi anglaise. La Cour était d'avis que cet argument aurait été valable si le crime avait été commis sur le quai, mais qu'il n'était pas applicable à un crime commis à bord d'un vaisseau anglais amarré au quai.

2. La règle générale ne s'appliquait jamais aux crimes qu'on poursuivait par voie d'*impeachment* * parlementaire. En 1309 on accusait au Parlement un nommé Segrave d'avoir accusé un certain John Crumbwell devant le roi de France (Philippe le Bel) 'prodictum johannem ad se défendend' in cur' regis Francie adjornavit et certum diem ei dedit et sic quantum in eo fuit subjiciens (sic) et submittens (sic) dominium regis et regni Anglie subjectioni dominii regis Francie.'

En 1786 commençait le procès célèbre de Warren Hastings pour des crimes commis aux Indes.

3. Il y a des lois spéciales qui autorisent la poursuite devant les cours ordinaires des gouverneurs et autres officiers civils et militaires pour des abus d'autorité commis par eux aux colonies et aux Indes.

4. Il y a beaucoup de provisions spéciales qui tempèrent le principe dur et sec du droit commun en certaines espèces ordinaires. Un voleur est censé voler toujours tant qu'il garde la chose volée. On peut donc le poursuivre non seulement au lieu du vol, mais partout où il est en possession de la chose volée.

Si un crime quelconque se compose de plusieurs actions ou événements on peut poursuivre le criminel au lieu où quelqu'une de ces actions a été faite ou quelqu'un de ces événements a eu lieu. Voici la définition de 'high treason' donnée en 1350: 'Quant homme fait compasser ou imaginer la mort nostre seigneur le Roi, madame sa compaigne ou de leur fitz primer et heir' . . . . 'et de ce soit "provablement atteint de overte faite." On peut poursuivre un homme pour ce crime où quelque 'overte faite' que ce soit s'est passé. On a poursuivi Lord Preston pour trahison en Middlesex parce qu'il prit un bateau sur la Tamise pour aller porter des dépêches à Jacques II après sa déposition.

Si l'on commet un crime à une distance moindre de 500 yards (461 mètres environ) de la limite entre deux comtés, on peut poursuivre le criminel dans l'un ou l'autre. Enfin, en bien des cas, on peut poursuivre le criminel partout où il se trouve, quand on l'arrête, par exemple s'il est accusé du crime de faux ou de bigamie. Il y a aussi des provisions spéciales pour les crimes qui se commettent en voyage ou en chemin de fer ou dans une voiture publique.

5. Pour les crimes de *murder* et de *manslaughter* (ces mots comprennent tous les crimes et délits qui occasionnent la mort, même sans intention de la donner), on a fait une exception spéciale. On peut poursuivre en Angleterre tout sujet britannique accusé d'avoir commis un *murder* ou *manslaughter* sur terre, en quelque partie du monde que ce soit, et quelle que soit la nationalité de la victime. (1) C'est un exemple bien caractéristique des petites lacunes qui se trouvent si souvent dans la législation anglaise, que cette disposition ne prévoit pas le cas d'un *murder* ou *manslaughter* commis par un Anglais à bord d'un vaisseau étranger en mer. Si un tel criminel s'échappait et se réfugiait en Angleterre, j'ai peur qu'il n'y restât impunissable.

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* 'Impeachment' (impetitio), 'indictment,' 'appeal,' 'information,' signifient accusation. Impeachment est une accusation portée par le House of Commons devant le House of Lords. 'Indictment' est une accusation par un grand jury. 'Information' est une accusation faite *ex officio* par l'Attorney-General. 'Appeal' est le nom d'une espèce d'accusation qui n'existe plus. C'était une accusation par une partie civile. Si un homme était convaincu sur un appeal, le roi ne pouvait pas lui pardonner.

(1) 24-25 Vic., c. 100, d. 9. Sont également punissables dans le Royaume-Uni quoique commises à l'étranger les offenses en matière d'enrôlement militaire ou naval (Foreign Enlistment Act, 1870) V. Archbold's 'Pleading and Evidence,' p. 29, 30, et 35.—V. Sur la poursuite dans les Iles Britanniques des crimes et délits commis en pleine mer ou à l'étranger envers des étrangers, Magisterial Synopsis d'Oke, Londres, 1872, 11e éd., p. 848.—*Note of the Editor.*

En somme, selon la loi anglaise, un Anglais ne peut être poursuivi en Angleterre pour un crime ou délit commis à l'étranger, à moins qu'il ne tombe sous une des exceptions ci-dessus mentionnées.

La raison est que tout accusé doit l'être par le grand jury de quelque comté anglais, et qu'un grand jury ne peut prendre connaissance, sans l'autorisation expresse d'un acte du parlement, de quelque crime qui se commet hors de son comté.

A cette question:

"Comme corrélatif de cette lacune de la législation anglaise, l'Angleterre admet-elle que la souveraineté sur le territoire de laquelle le crime ou délit a été commis par un Anglais puisse requérir l'Angleterre de lui remettre le délinquant. Il est affirmé, dans les traités qui s'occupent de l'extradition, que l'Angleterre admet en principe l'extradition des nationaux; néanmoins, comme ce principe est en opposition avec celui qui est admis chez les autres peuples, il serait intéressant de savoir si elle passe à l'application et si, en fait, l'Angleterre a jamais remis à une puissance quelconque un de ses nationaux ayant commis un crime ou un délit sur le territoire de la puissance requérante?"

L'extradition est réglée chez nous par un acte du Parlement de 1870 (33 et 34 Vict., c. 52). Cet acte autorise la Reine à faire des traités d'extradition avec telle nation qu'il lui plaira et déclare en effet que, sous certaines conditions, ces traités auront force de loi et seront exécutoires suivant une certaine procédure. L'acte ne défend pas l'extradition des Anglais pour des crimes ou délits commis à l'étranger; mais la plupart, je crois même, tous les traités, portent que les parties contractantes ne pourront pas demander l'extradition des nationaux de la puissance requise.

L'Angleterre a-t-elle jamais remis un sujet britannique à une puissance étrangère requérante? Je crois que non.

J.-F. STEPHEN,

L'un des Juges de la Haute Cour de Justice d'Angleterre.

NOTE (of the Editor).—La France a pour principe de ne pas extrader ses nationaux; mais sa législation prévoit et punit les crimes et délits commis par eux à l'étranger (C. Instr. crim., art. 5 et s.). Les autres puissances paraissent avoir adopté le même principe, et ont inséré dans tous leurs traités, depuis 20 ans, la réserve de la non-extradition des nationaux. V. Billot, p. 73.

En principe, l'Angleterre admet l'extradition des nationaux; elle l'a exclue, il est vrai, de son traité avec la France du 14 août 1876, art. 2; mais elle l'a admise dans son traité avec l'Espagne du 4 juin 1878, encore que cette puissance maintienne la règle de la non-extradition des nationaux. (Heurteau Bull. soc. lég., comp. Mars 1880.)

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, June 25.

Judicial Abandonments.

Auguste Remi Hudon, Lake Weedon, June 22.

George Edmond Morasse, boot and shoe dealer, Sorel, June 18.

T. P. Paradis & frère, Matane, June 17.

Curators appointed.

Re Eusèbe Bourgoing, Ste. Flavie.—H. A. Bedard, Quebec, curator, June 16.

Re Copland & McLaren.—A. W. Stevenson, Montreal, curator, June 16.

Re David Rioux, Trois Pistoles.—H. A. Bedard, Quebec, curator, June 17.

Dividends.

Re Louis Trefflé Dorais.—First and final dividend, payable July 13, P. E. Panneton, Three Rivers, curator.

Re Elie Dufresne, St. Barthélemi.—Dividend. payable July 25, Kent & Turcotte, Montreal, curators.

Re E. Sénécal.—First and final dividend, payable July 9, E. Hanson, Montreal, curator.

Re L. J. Guilmette et al.—Dividend, J. S. Brown, Montreal, curator.

Separation as to property.

Margaret Jane McArthur vs. Milton Pennington, trader, Montreal, June 20.

GENERAL NOTES.

Libel.—"*Crank.*"—An action of libel will not lie for calling a person a "crank," unless special damage is alleged.—*Walker* v. *Tribune Co.*, U. S. C. C., N. D. Ill. 23 Rep., 520.

On annonce la mort du doyen des greffiers de France, M. Paul Fourgeaud. Il s'est éteint à l'âge de 85 ans à Tulle, après avoir exercé près de soixante ans. Il avait siégé, comme greffier, dans la fameuse affaire Lafarge, et c'est de cette époque que datait l'étroite amitié qui l'unissait au grand Lachaud et à nombre d'illustrations de la magistrature et du barreau.

Mrs. Myra Bradwell has been in Springfield since the adjournment of the Legislature, reading and comparing galley proofs of the laws with the original bills, in the office of the Secretary of State. She has performed this service for the past eighteen years.—*Chicago Legal News.*

The Legal News.

VOL. X. JULY 9, 1887. No. 28.

We learn that an important work on Municipal Institutions is in course of preparation by Mr. J. L. Archambault, Q.C. The preface to the work will contain a review of the origin and history of municipal law. Mr. Archambault, after attending to some business before the Privy Council, will proceed to Paris during the present vacation, to complete his investigations on certain points before his interesting work is given to the public.

A further incident is reported in connection with the suicide of Judge Reid, noticed in vol. 7, p. 233. Judge Reid, it may be remembered, committed suicide because he had been assaulted by a ruffianly lawyer against whom he had rendered a judgment, and he felt that public opinion in Kentucky was against him because he did not try to take the life of his assailant. It appears that after the judge committed suicide, his assailant was actually prosecuted and convicted, and the sentence was one cent fine, costs, and imprisonment in the county jail for three years. The case went to appeal, and after some years' delay, the Court of Appeals has decided that the conviction and mode of declaring the punishment were valid at the common law and under the Kentucky statutes, which treat the offence only as a misdemeanor, and that the punishment was not excessive. On the latter part the Court say: "Neither the court nor the jurors could have closed their eyes to the cruelty and enormity of the offence committed. None more humiliating or degrading could have been inflicted upon the person of the injured man, and nothing more calculated to render the life of the wrong-doer more insecure. Such an injury strikes at the very existence of society, and the punishment imposed is only commensurate with the injury done. To have taken the life of the assaulting party would have made Reid guilty of a still greater crime, and the submission by him, without resistance, to the cruel blows, whether from his peculiar mental and physical condition, or his respect and reverence for the law, makes the necessity the greater for vindicating the wrong." However, this declaration of the law availed nothing, for a country justice of the peace thought proper to overrule the Court of Appeals, and ordered the release of the prisoner on a *habeas corpus*, the pretence being that the common law of England, in his opinion, had never been incorporated into the laws of Kentucky.

The Michigan Supreme Court, in *Turner* v. *Mason*, (April 28, 1887), which was an action by an artist to recover the value of a portrait of children, painted for a father, and which the father had refused to accept, held that it was error to instruct the jury to give as damages what the picture was worth, and what the artist's services were worth, taking into consideration the exhausting studies necessary to acquire skill as an artist, and the time consumed and expenses incurred in acquiring professional knowledge and distinction. The Court said: "It appeared on the trial, and is matter of common knowledge, that the compensation of artists is not generally measured by intrinsic merit, either of themselves or of their pictures. Until he is recognized as a celebrity an artist seldom charges, or has a right to expect, very high prices. The pecuniary value of his work cannot, therefore, as a rule, be tested by what some other artist may think of it as a work of art. An opinion may be pertinent concerning its character as a good painting or a poor one, but where a picture is not meant for sale, and would not be readily marketable, its salable value is no test of what the artist earned in painting it. Plaintiff had set up his business at Muskegon, and had dealt with defendant for other pictures. If no fixed price was agreed on for the one in controversy, defendant, if to pay for it what it would be reasonably worth, could not be supposed to contemplate any price not in fair proportion to what was to be paid for the other pictures, or the usual work of this particular artist. The fashionable painters referred to in the record may or may not be more accomplished than plain-

tiff, but in such a controversy as this, he must be judged by his surroundings, and claim no more for his earnings than he is entitled to expect from what he has given reason to believe he would demand. * * * * We do not think the jury had any right to consider, or any means of judging, the value of plaintiff's work by the expense, time or character of his studies, and there was no testimony indicating that he had reached exceptional distinction. The jury knew nothing of him beyond his local experience and standing. Whatever may be his claims to eminence, he was not apparently engaged, so far as outward appearances went, in the higher walks of art. The pictures he made or was to make for defendant were substantially copies from photographs, and not independent original portraits, involving the labor or imagination of an original artist. But while an artist's success and his capacity to make large earnings may be due to his thorough training, yet his work and its pecuniary value cannot be determined by any such standard. There was nothing in the testimony which would have enabled the jury or any one else to determine what toil, or time, or money it cost plaintiff to make him an artist, or how much they contributed to his earnings. Pictures are not valued for what it costs the artist to prepare himself. A man may go through a long course of preparation, and be a very poor artist notwithstanding. And a good artist may find it convenient to do cheap work; and if he does so, he cannot expect to be paid a higher price because he might have done better. This whole subject, even if there had been evidence on the matter, would be irrelevant, unless possibly on the probabilities of plaintiff's capacity to judge of pictures."

CIRCUIT COURT.

PORTAGE DU FORT, (Co. of Pontiac),

June 1, 1887.

Before WÜRTELE, J.

O'CONNOR v. MURTAGH, and THE E. B. EDDY MANUFACTURING CO.

Procedure—Seizure by garnishment in the hands of an incorporated Company—Declaration.

HELD:—*That in the case of a seizure by garnishment in the hands of an incorporated company, the declaration must be made either by an attorney specially authorized, or by an officer or employee of the company who holds a general authorization for that purpose.*

The action in this cause was brought on the 28th April, 1887, on an account for $197.47, and was accompanied by an attachment by garnishment in the hands of the E. B. Eddy Manufacturing Co., returnable on the 17th May.

On the return day S. S. Cushman and W. H. Rowley, the first styling himself the Vice-President and the other the Secretary-treasurer of the company, appeared before the Clerk of the Circuit Court at Hull, and declared that the company owed nothing to the defendant.

The plaintiff, after having given due notice to the garnishee on the 26th May, moved on the 1st June that the declaration so made should be rejected and set aside, among other reasons, because it did not appear that the garnishee had named an attorney to answer as required by law. It was alleged at the hearing of the motion that the plaintiff denied the truth of the declaration, but that as it was a nullity she asked for its rejection instead of contesting it.

PER CURIAM. When a seizure by garnishment is made in the hands of an incorporated company, as in the present case, article 617 C. C. P. requires that the declaration be made by an attorney named to answer on its behalf, and Art, 224 provides that he be named by a special resolution, and that such resolution specify the answer to be given and sworn to. By an amendment passed in 1886, 49-50 Vict. ch. 14, it is provided that the declaration may also be made by the president, manager, secretary, treasurer, or any other officer or employee of the incorporated company, if he holds a general authorization for that purpose, and that the declaration in such case shall be as binding as if it had been made under a special resolution.

In both these cases the person who comes to make the declaration must produce and file his mandate,—in the first case a certified

copy of the special resolution, and in the other case a certified copy of the resolution conferring the general authorization to appear and answer for the company in all seizures by garnishment that may be served upon it.

In the present case neither special resolution nor general authorization is produced or even mentioned; and the declaration is unauthorized and not binding upon the company. It is therefore irregular, insufficient and illegal, and must be rejected; but as the garnishee after a judgment by default would be allowed on payment of costs to appear and declare, the Court will now order the Company to appear and make a proper declaration on or before the 1st Sept., next.

The judgment was recorded as follows:—

"The Court, having heard the plaintiff upon her motion praying that the declaration of the garnishee in this cause made on the 17th of May last, and filed in this Court on the 18th of May last, be rejected and set aside, the said garnishee, although duly served, having made default to appear and answer the said motion;

"Seeing that the officers of the company garnisheed in this cause do not produce either a special resolution naming them its attornies to answer in its place, or a general authorization to answer attachments by garnishment served upon it;

"Doth declare the said declaration to be irregular, null and void, and doth reject the same, with costs in favor of the plaintiff. And the Court doth order the said company garnishee to answer and make a proper declaration on or before the 1st of September next."

C. P. Roney, for plaintiff.

SUPERIOR COURT.

AYLMER (dist. of Ottawa), June 30, 1887.

Before WÜRTELE, J.

FERGUSON v. KIRK, AND GILMOUR & Co., Garnishees.

Procedure—Seizure by garnishment in the hands of a firm—Declaration.

HELD:—*That in the case of a seizure by garnishment in the hands of persons associated in partnership, but not incorporated as a joint-stock company, the firm cannot be represented by an attorney, but one of the partners must appear and make the declaration under oath.*

PER CURIAM. In this case, a seizure by garnishment has been made in the hands of the commercial firm of Gilmour & Co., which carries on business and has an office in this district; and the writ has been served personally upon one of the partners.

On the day of the return, the garnishees made default, but one George L. Chitty, who called himself the agent and attorney of the firm, appeared and made a declaration under oath; and the cause is now inscribed for judgment on this declaration.

Under article 613 C. C. P., the writ of seizure by garnishment orders the garnishee to appear and declare under oath what he may have belonging to the debtor or what he may owe to him; and under article 617, the garnishee is bound to appear and make his declaration in the prothonotary's office, or if he resides in another district than the one in which the writ was issued, then before the prothonotary in the district where he resides. When, however, the seizure by garnishment is made in the hands of an incorporated company, the declaration is made and sworn to, according to the provisions of article 617, by its attorney, who may be either special or general.

When the garnishee is either a natural person or a firm composed of natural persons, the declaration must be made and sworn to by the individual garnishee, or by one of the members of the firm; when on the other hand, the garnishee is an artificial or ideal person, the declaration has to be made and sworn to by an attorney acting on its behalf, as corporations must necessarily be represented and act by an attorney or by one of its officers in such cases.

The declaration made in this cause by Mr. Chitty is therefore illegal and null, and cannot form the basis of a judgment against the garnishees. The inscription for judgment is consequently discharged, in order to allow the plaintiff to take such steps as may to him seem fit.

Inscription for judgment discharged.

W. R. Kenney, for plaintiff.

COUR D'APPEL DE PARIS (4e Ch.)

1er avril 1887.

Présidence de M. Faure-Biguet.

Génin v. Smulders.

Vente—Cheval—Cécité—Manœuvres dolosives, Absence de—Validité.

Le fait par un marchand de chevaux de vendre sciemment un cheval aveugle, sans prévenir l'acquéreur de l'infirmité dont cet animal est atteint, ne suffit point pour entacher la vente de dol.

La cécité constituant un vice apparent, il n'y a pas lieu de prononcer la nullité du marché, lorsque d'ailleurs il n'est pas établi que le vendeur ait employé aucune manœuvre pour cacher l'infirmité de son cheval.

Le sieur Génin avait acheté de M. Smulders un cheval avec garantie de vices rédhibitoires, moyennant le prix de 700 fr., sur lequel il avait versé un acompte de 200 fr.

Le sieur Génin ayant refusé ensuite de prendre livraison du cheval, sous prétexte que celui-ci était aveugle, M. Smulders le fit assigner devant le Tribunal de commerce de la Seine qui rendit le jugement suivant à la date du 3 février 1887 :

" Sur la demande de Génin en résiliation et remboursement de 200 francs et en 200 francs de dommages-intérêts :

" Attendu que Génin prétend que Smulders lui aurait vendu sciemment un cheval aveugle, sans le prévenir de l'infirmité dont il était atteint ; que la vente serait ainsi entachée de dol ; qu'il y aurait lieu d'en prononcer la nullité et d'obliger Smulders au remboursement de l'acompte versé sur le prix de la vente et au paiement de 200 francs de dommages-intérêts pour le préjudice qu'il lui aurait fait éprouver ;

" Mais attendu que le cheval dont il s'agit a été vendu par Smulders avec garantie de vices rédhibitoires ; que la cécité ne constitue qu'un vice apparent que Génin aurait pu constater lui-même ; qu'au surplus, il n'est pas établi que le vendeur ait employé aucune manœuvre pour cacher l'infirmité de son cheval ; que dans ces conditions, il y a lieu de rejeter les conclusions de la demande de Génin...."

Appel.—Arrêt :

La Cour,

Adoptant les motifs des premiers juges,

Confirme.

Note.—Il est de doctrine et de jurisprudence constantes, que, en dehors des cas de vices rédhibitoires, limitativement énumérés dans la loi du 2 août 1884, il y a lieu de prononcer, conformément aux dispositions de l'art. 1166 C. civ., la nullité des ventes entachées de dol. Mais c'est à l'acquéreur qu'il appartient d'établir l'existence des manœuvres dolosives, qui doivent être expressément relevées par les juges du fait. En aucun cas une simple réticence ne saurait suffire pour constituer un dol ; il faut pour cela le concours de la mauvaise foi et de manœuvres frauduleuses. Dans l'espèce, le cheval vendu était d'ailleurs un cheval dont la valeur eût été considérable s'il n'avait pas été atteint de l'infirmité qui le dépréciait ; la bonne foi même du vendeur était donc dans ces conditions hors de cause. D'ailleurs la cécité est un vice à la fois continu et apparent, et la moindre prudence permet à l'acquéreur d'en constater l'existence. Comp. Cass. 17 février 1874 (D. 74.1.193) ; Nancy 1er décembre 1883 (Gaz. Pal. 84.1.54).

L'ADMINISTRATION DES PREUVES.—L'ENQUETE.

On rencontre dans notre législation actuelle deux modes différents d'administration de la preuve testimoniale en matière civile. Le premier c'est l'enquête orale, publique, à l'audience, devant le Tribunal tout entier ; le second est l'enquête écrite, secrète, faite devant un juge commissaire et dont les magistrats qui doivent statuer sur le fond de l'affaire n'ont connaissance que par les procès-verbaux. Le premier mode d'instruction est, de l'aveu de tous, rapide, commode, peu coûteux ; il est admis par le Code de procédure à titre exceptionnel dans les affaires qualifiées de sommaires (art. 407 et suiv.) L'enquête écrite est, au contraire, et cela ne peut être sérieusement contesté, un mode d'instruction d'une application difficile et le plus souvent elle entraîne des lenteurs préjudiciables et des frais considérables ; c'est le système qui est appliqué à toutes les affaires ordinaires.

En présence de la supériorité manifeste de l'enquête orale et publique sur l'enquête écrite et secrète, on peut se demander quelles ont pu être les raisons des rédacteurs du Code de procédure de préférer l'enquête écrite à l'enquête orale et l'on peut être d'autant plus étonné des solutions données par le Code de procédure que, en matière commerciale, devant les tribunaux consulaires et devant les tribunaux civils statuant commercialement, de même qu'en matière répressive, devant les tribunaux correctionnels et devant les cours d'assises, l'enquête écrite a disparu pour faire place dans tous les cas à l'enquête orale.

A celui qui s'étonnerait de l'exception apportée pour l'administration de la preuve testimoniale en matière civile au principe de publicité qui domine toute notre procédure, on pourrait peut-être répondre que le système de l'enquête secrète est de tradition en France.

Cette réponse n'est ni vraie ni décisive. D'abord elle n'est pas décisive, parce que, s'il est établi que le système actuel est entaché de vices graves, c'est en vain que l'on voudrait argumenter des précédents pour maintenir un abus. En second lieu, elle n'est pas vraie absolument. En effet, l'administration secrète de la preuve testimoniale ne s'est introduite en France au moyen âge que lentement et sous l'influence de circonstances particulières (Bonnier, Traité des Preuves, p. 317), que nous ne rappellerons point, notamment par suite de la désuétude du combat judiciaire et c'est seulement sous François 1er en 1539, que le principe de l'enquête secrète fut définitivement consacré. Les ordonnances de 1667 et de 1670 maintinrent le secret après que les raisons de l'innovation s'étaient évanouies. La loi du 27 mars 1791 déclara maintenir provisoirement les dispositions de l'ordonnance de 1667 sur le secret des enquêtes. La loi du 7 fructidor an III revint à l'ancienne règle de la publicité de l'enquête.

Malheureusement ce décret-loi se borna à poser le principe sans régler les détails de l'exécution, ce qui occasionna une grande confusion dans les enquêtes. "Soit que, dit M. Bellot, dans son remarquable exposé des motifs du Code de procédure du canton de Genève, l'essai n'en eût pas été heureux par les vices de ces lois mêmes, ou par la mauvaise composition des tribunaux d'alors, soit que le retour de l'ancienne doctrine ait été dû aux préjugés du barreau ou à la cupidité de cette nuée dévorante d'avoués dont, en vue des cautionnements, la fiscalité venait de couvrir le sol de la France, le chef du gouvernement, abroge de sa seule autorité, par un simple arrêté du 18 fructidor an VIII ces lois nouvelles, pour rétablir les formes de l'ordonnance de 1667."

Le Code de procédure civile de 1806 a, à son tour, sauf quelques modifications de détail, notamment en ce qui concerne le droit des parties d'assister à l'enquête, conservé les formes de l'ordonnance de 1667 sur l'administration de la preuve testimoniale. Il est intéressant de voir les raisons données soit par l'orateur du Tribunal, soit dans les discussions du Conseil d'Etat, pour donner la préférence à l'enquête secrète.

On a dit d'abord (Locré, p. 479) que la publicité de l'enquête imposerait aux témoins une contrainte fâcheuse. On a allégué le désordre que cause nécessairement dans l'esprit du témoin l'appareil dont il est environné et qui est peu propre au recueillement qui lui est nécessaire pour rendre compte de faits souvent éloignés; on a dit que la crainte de se tromper peut lui imposer silence sur les circonstances peut-être les plus intéressantes; que, s'il commet une légère erreur, le murmure qui s'élève autour de lui le déconcerte; que l'amour-propre s'irrite et qu'alors il se croit intéressé à soutenir ce qui dans son principe n'a été qu'une erreur involontaire.

Pour nous, au contraire, et nous ne faisons ici que répéter ce qu'ont écrit des juristes éminents, tels que MM. Bonnier, Boncenne, Bellot, Lavielle, la publicité de l'enquête, loin d'entraver l'exactitude de la déposition, serait la plus précieuse garantie de sa sincérité. Est-ce que le serment et les dépositions des témoins ne seront pas bien plus solennels devant le Tribunal tout entier, devant l'auditoire, sous la surveillance des juges et du public que dans le cabinet du juge commissaire? "Que d'exemples, dit M. Lavielle, de témoins venus à l'audience avec des dispositions trop bienveillantes pour

l'une des parties qui ont senti tout à coup ces dispositions se refroidir et la conscience reprendre sa force dans cette atmosphère de publicité et de justice qui arrache, pour ainsi dire, la vérité à celui qui n'aurait osé la trahir qu'à voix basse et les portes fermées." On veut par le secret protéger la liberté du témoin, paralyser les motifs d'influence. Mais, comme l'exposait M. Bellot, dans un passage empreint de la plus haute philosophie, la liberté qu'on réclame pour le témoin consistera alors à dire non ce qu'il sait, mais ce qu'il veut, si on lui évite les objections indiscrètes d'un contradicteur, la critique et jusqu'aux regards d'un public peu indulgent: "Quant aux motifs d'influence, ils sont de deux espèces: les uns tutélaires, tels que le sentiment religieux, celui de l'honneur, poussent le témoin vers la vérité; les autres séducteurs, l'en éloignent. C'est sans doute à renforcer les premiers et à contenir les derniers que doit tendre le législateur. Mais le secret qu'il introduit ne va-t-il pas à fin contraire? Quelle prise en effet ne donnez-vous point à la haine, à la jalousie, à l'intérêt, à la corruption, à tous ces motifs séducteurs d'influence en les laissant se déployer dans l'ombre sans obstacle?"

Le second reproche que l'on adressait en 1806 au système de la loi du 7 fructidor an III, c'était le danger des altercations, des rixes mêmes qui pouvaient compromettre la dignité du tribunal. C'est, à nos yeux, un danger purement imaginaire. Pour s'en convaincre, il n'y a qu'à regarder ce qui se passe devant les juridictions consulaires, devant les tribunaux correctionnels et devant les cours d'assises et même devant les tribunaux civils en matière sommaire. Jamais on n'allègue pour ces juridictions le danger dont on parle. Le président est du reste suffisamment armé pour la police de l'audience en cas d'altercation des témoins entre eux. D'autre part, les juges n'ayant pas à discuter avec les témoins, mais simplement à les interroger, il n'y a pas lieu de craindre des colloques fâcheux pour la dignité de la justice.

On a allégué enfin, et c'est un argument beaucoup plus sérieux et qui a même fait hésiter M. Bonnier, que la nécessité d'employer le tribunal tout entier pour des enquêtes qui sont actuellement menées par un seul juge, pourrait dans un certain nombre de tribunaux chargés d'affaires entraver le cours de la justice. Lors même qu'il en serait ainsi, ce ne serait pas pour nous une raison suffisante de préférer l'enquête secrète; car il serait de beaucoup préférable de bien juger quelques affaires que d'en décider un plus grand nombre après une instruction défectueuse. Mais, d'ailleurs, il n'est pas exact de dire que les affaires soient plus vite expédiées sur une enquête écrite que sur une enquête orale. Lorsqu'en effet les dépositions ont été faites devant le juge commissaire et consignées par écrit, l'enquête arrive devant le tribunal sous forme de procès-verbal. "Là, dit M. Lavielle, il en est donné plusieurs lectures: la première par le demandeur, la seconde par son adversaire. Le ministère public peut la relire aussi, il le doit souvent. Et dans la Chambre du conseil il peut devenir nécessaire de la relire encore une quatrième fois en tout ou en partie. Ajoutez les commentaires et les observations dont chaque lecture est accompagnée, et nous atteindrons et nous dépasserons bien vite le temps consacré à l'enquête orale." M. Garsonnet enseigne de même, dans son savant traité sur la procédure, que l'expérience prouve que la lecture des dépositions écrites prend plus de temps à l'audience que l'interrogatoire des témoins n'en demanderait. Enfin et ce serait la meilleure réponse à faire à l'objection, on pourrait encore citer l'exemple des affaires commerciales et des affaires sommaires. L'enquête orale y a été admise précisément pour en accélérer l'expédition. Pourquoi n'offrirait-elle pas le même avantage dans les affaires ordinaires.

On ne doit donc s'arrêter à aucune des raisons données dans la discussion au Conseil d'Etat, discussion que Toullier qualifiait de déclamatoire. L'argumentation des partisans du secret de l'enquête aurait dû, si elle avait été exacte, aboutir à la suppression de la publicité en matière répressive où sont en jeu les intérêts les plus considérables, la vie, la liberté ou tout au moins l'honneur des personnes et à sa suppression également en matière commerciale où les affaires

présentent souvent une importance énorme. Cependant personne n'a songé à réformer la procédure devant ces juridictions.

C'est qu'en effet l'enquête orale et publique présente des avantages très précieux que nous signalerons rapidement.

Dans l'enquête secrète, les magistrats qui doivent statuer sur le mérite de l'enquête ne la connaissent que par le procès-verbal rédigé par le greffier. Or ce procès-verbal, si fidèle et si soigneusement rédigé qu'il soit, n'est jamais qu'un compte-rendu assez sec, incomplet nécessairement; car il ne peut faire connaître au tribunal la physionomie des témoins qu'il importe souvent d'observer quand on veut avoir une idée exacte de la valeur du témoignage, de telle sorte qu'on a pu dire sans exagération, qu'il est aussi nécessaire de voir une déposition que de l'entendre. La contenance du témoin, son regard, le ton de sa voix, sa manière de dire assurée ou hésitante, voilà des éléments précieux d'appréciation qui sont perdus pour le tribunal avec le système actuel.

En faisant même abstraction de toutes ces circonstances extérieures de la déposition, en s'en tenant aux paroles mêmes prononcées par le témoin, le procès-verbal pourra souvent renfermer des inexactitudes qui s'imposeront au tribunal. Ce n'est pas en effet une tâche facile de recueillir fidèlement les termes de la déposition, d'exprimer dans le procès-verbal tout ce qu'a voulu le témoin et rien que ce qu'il a voulu. Le greffier fait en définitive œuvre de traducteur; "or on sait que la fidélité des traductions n'est pas proverbiale, mêmes dans les œuvres littéraires, où le traducteur peut néanmoins prendre son temps et s'assimiler la pensée de l'original." (Lavielle.) "Qu'on calcule, disait d'autre part M. Bellot, les aspects divers et toutes les nuances que peuvent présenter certains mots, combien, par d'autres, prononcés de telle ou telle manière, on peut affaiblir ou renforcer un témoignage, l'influence d'une ponctuation ou d'une syntaxe altérée, et ce que doivent ajouter de difficulté la différence qui existe entre les habitudes du témoin et celles du juge chargé de recevoir sa déposition, entre leur manière de sentir et de voir, la variété de sens qu'ils peuvent attacher aux mêmes mots, aux mêmes expressions..." De plus, dans certaines contrées, le juge commissaire est obligé de recourir à un interprète juré, lorsque les témoins ne parlent pas français ou ne connaissent que leur patois local. Dans ce cas, que de chances pour que la déposition arrive devant le tribunal défigurée par cette double traduction.

Un autre avantage de l'oralité de l'enquête est celui de l'économie. Aujourd'hui le procès-verbal de l'enquête écrite doit être signifié, ce qui entraîne des frais considérables. Dans le système de l'enquête à l'audience le procès-verbal ne serait plus nécessaire que dans les affaires susceptibles d'appel et qui peuvent relativement comporter des frais plus grands; il disparaîtrait dans les causes minimes, dans celles où il importe essentiellement de diminuer les frais.

Sans insister plus longuement sur les griefs que l'on pourrait formuler contre l'enquête écrite (et nous sommes loin de les avoir tous signalés), nous conclurons en disant que cette enquête est mauvaise surtout par ce motif qu'elle mène beaucoup moins sûrement que l'enquête orale à la découverte de la vérité. La commission de réforme du Code de procédure l'a reconnu elle-même ainsi qu'en témoigne l'exposé des motifs qui a été publié dans la *Gazette du Palais* des 8-9 novembre 1886. Déjà le projet de la réforme de 1866 supprimait en principe l'enquête écrite et lui substituait dans toutes les affaires civiles l'enquête orale. Il admettait seulement par exception que, à Paris, pour hâter l'expédition des affaires, les diverses chambres du Tribunal de la Seine pourraient ordonner que l'enquête se ferait par les soins d'un juge commissaire, mais publiquement. Le projet actuel a été beaucoup moins loin dans la voie que nous croyons être celle des réformes heureuses. L'art. 5 du titre des enquêtes permet en effet au tribunal de décider si l'enquête aura lieu à l'audience ou devant un juge-commissaire. "En principe, dit l'exposé des motifs, il est à désirer qu'elle puisse avoir lieu à l'audience. Toutefois il était impossible d'en faire une obligation légale. Dans un certain nombre de cas, le nombre des témoins, la longueur présumée des débats, l'encombrement du rôle

du Tribunal, seraient un obstacle sérieux à l'expédition des affaires, si toutes les enquêtes devaient être portées à l'audieuce. Les tribunaux apprécieront." Nous comprenons parfaitement la faculté que l'art. 5 accorde à un Tribunal d'ordonner le huis-clos lorsqu'il y a danger de scandale. Mais nous ne pouvons approuver la faculié beaucoup plus large qu'on donne au Tribunal de conserver l'enquête écrite dans tous les cas où elle le juge à propos. Du moment en effet que l'on est convaincu de la supériorité de l'enquête orale comme mode d'instruction, et tout le monde est d'accord à ce sujet, on doit l'imposer dans tous les cas, peu importe " le nombre des témoins et la longueur des dépositions." Il nous semble même que c'est *a fortiori* que l'on devrait ordonner l'enquête à l'audience dans ces hypothèses où la décision à prendre dépend principalement des témoignages produits.

On objecte le temps que perdrait le Tribunal. Mais nous avons déjà dit que l'enquête orale ne prend pas plus de temps (peut-être moins) que l'enquête écrite. On a d'ailleurs cité, pour répondre à l'objection, l'exemple du Tribunal de commerce de la Seine qui juge sur enquêtes à l'audience des affaires très nombreuses sans que pour cela le cours de la justice soit entravé devant cette juridiction.

La disposition de l'art. 5 du projet de la commission nous semble d'ailleurs très fâcheuse à cet autre point de vue qu'elle permettra l'introduction d'usages très différents dans les divers tribunaux. Les uns, entraînés par la tradition ou croyant n'avoir pas assez de temps pour entendre les témoins à l'audience, continueront à renvoyer devant un juge commissaire ; les autres, plus soucieux de la découverte de la vérité et ne reculant pas devant le surcroit d'occupations (si c'en est un) que pourrait leur causer l'audition des témoins, tiendront pour l'enquête orale. L'uniformalité de législation sera rompue au détriment des justiciables.

Nous espérons que, sur ce point, le projet de la commission qui renferme d'autres innovations très heureuses, rencontrera de l'opposition devant les Chambres. La seule considération de fait invoquée par la commission disparaîtrait par la création de Chambres nouvelles près des tribunaux les plus occupés.

LUDOVIC BEAUCHET,
Professeur de la Faculté de droit de Nancy.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, July 2.

Judicial Abandonments.

L. Philippe Gagnon, trader, St. Roch des Aulnaies, June 27.

Edward C. Hughes, cabinet-maker, Montreal, June 24.

Curators appointed.

Re Ludger Boyer.—Kent & Turcotte, Montreal, curator, June 28.

Re William *alias* Guillaume Gariépy, builder.—H. A. A. Brault and Ovide Dufresne, Montreal, curator, June 24.

Re I. P. Paradis & Frère, Matane.—H. A. Bédard, Quebec, curator, June 23.

Re Joseph Parent.—P. J. Bazin, accountant, Quebec, curator, June 28.

Re Aimé Trudeau.—Kent & Turcotte, Montreal, curator, June 24.

Dividends.

Re L. D. Brasseur.—Dividend payable July 25, Kent & Turcotte, Montreal, curator.

Re Gagnon Frères.—Composition payable July 13, Thos. Darling Montreal, curator.

Re J. J. McCorkell.—First and final dividend, payable July 16, H. A. Bedard, Quebec, curator.

Separation as to property.

Célina Beauchamp vs. Joseph Hormidas Marcotte, Ste. Thérese de Blainville, June 18.

GENERAL NOTES.

Les assises de Londres viennent de rendre un jugement remarquable dans un cas de bigamie. Il s'agissait d'une femme qui, mariée en juillet 1880 à un nommé Riley, avait pris, en février 1883, un second mari, le premier n'étant pas mort. Celui-ci l'avait fort maltraitée, avait été condamné de ce chef et, après avoir subi sa peine, avait déserté le toit conjugal. Le second mari ne valait guère mieux et, ayant eu à son tour maille à partir avec les tribunaux à cause de son inconduite envers sa femme, est allé, par vengeance, retrouver le premier mari avec lequel il s'est entendu pour faire mettre la femme commune entre les mains de la justice. Le président des assises, en prenant la parole pour prononcer la sentence, a dit qu'il avait plusieurs fois condamné aux travaux forcés les coupables convaincus de bigamie, mais que dans le cas actuel on avait affaire à une femme qui avait déjà été bien punie pour la faute qu'elle avait commise et que les rigueurs de la loi relative à la bigamie n'avaient évidemment pas prévu les mariages contractés dans d'aussi douloureuses circonstances. Le magistrat a ensuite condamné l'accusée "à cinq minutes d'emprisonnement," sentence dont l'effet a été de faire mettre la femme immédiatement en liberté. Le public a accueilli la décision du président des assises avec de bruyants applaudissements.

The Legal News.

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CODIFICATION.

In an address by the Hon. U. M. Rose, before the Tennessee State Bar Association, on "the future of our Laws," the following observations were made upon codification :—

Strangely enough, the general mercantile law, especially that of bills of exchange and promissory notes, based chiefly on the customs of merchants and traders, is the most symmetrical part of the law. Owing to this feature, and to its universality, it lends itself readily to the process of codification. As early as 1673 a Commercial Code was adopted in France, which being re-stated and amplified, resulted in the Code de Commerce of 1818. The German Exchange Code, the result of a conference set on foot in 1856, and which was completed and went into effect, March 1, 1862, and was modified in 1869, is international in its character, having been adopted by all the German States and by Austria, with the stipulation that each state may make laws of its own, provided they do not conflict with its provisions. A German work by Bochardt, published in 1871, gives, or purports to give, the statutes of various civilized countries on the subject of commercial law, both in their original tongues and in German translations, from which it appears that in more than forty countries this branch of law has been codified. Perhaps the last country that has codified the law on this subject is England. Mr. M. D. Chalmers, an English county judge, having made a careful digest of the law of bills of exchange, promissory notes and checks, it was through the influence of the present lord chancellor enacted by parliament in August, 1882. The statute contains 100 sections, and according to a statement of its author, it embodies the substance of 2,000 English decisions, and of the seventeen previous statutes, and reduces the law to about one five-thousandth part of its former bulk.

One of the earliest continental codes was that of Wurtemberg, which had its origin in 1492, but was not completed until 1610. From that time to the present it has undergone many revisions. In Bavaria a code was adopted in 1756. In Prussia, Frederick the Great, in the same year, directed his chancellor to prepare a plan for a code, but the latter having died, and the Seven Years' war coming on, nothing was done until 1780, when the king appointed a commission of jurists to carry out his purpose. The work was completed, and was put in force on the 5th day of February, 1794, in the reign of Frederick William II. This code forbids the citation of other law books and the publication of commentaries upon it. It also provides for a perpetual law commission. If the judges of the court of last resort cannot agree on the interpretation of any part of it, a majority of the judges decide, but the question is certified to the Law Commission, which promulgates a rule that shall apply in all future cases involving the same question. At present the declaratory rules thus enunciated far exceed in bulk the original code. The Civil Code of Saxony went into effect on the 1st of March, 1865. It consists of 2,620 articles.

In Austria, Maria Theresa appointed a commission to prepare a code. The work, mostly performed by the jurisconsult, Azzoni, appeared in 1767, in eight folio volumes. It was found to be so prolix, and to deal so much in abstract doctrines, as to be wholly impracticable. It was re-committed to Counsellor Hart, with express directions to leave out everything doctrinal, and to omit matters of mere detail. The first part of the revised code was published in 1786, in the reign of Joseph II, but it was not completed and put in force until the 1st day of January, 1812. It is not operative in Hungary, Croatia, Sclavonia or Transylvania. The first rude attempt at codification in Spain extends far back into the middle ages. Since that time there have been many revisions, the last being that of 1805. It is one of the most singular of all extant compilations. The first articles are devoted to rules of religious belief. Twenty-nine sections are devoted to the sacraments. Under the head of "Hus-

band and Wife," duties with regard to the confessional are prescribed. Under the division relating to penal laws distinctions are made between venial and mortal sins. A separate Commercial Code was adopted in 1829, and a Code of Procedure in 1856. A new Civil Code is now in preparation, some parts of which have passed into statutes. In Portugal the project of a code emanated from the University of Coimbra, in 1859, and under its auspices, a draft of a code was prepared by Viscount Scabara. This was by the government submitted for discussion and revision to a commission of the most eminent jurists in the country, which having completed its labors in July, 1867, the code was enacted, and went into force on the 22nd day of March, 1868. It consists of 2530 articles, and its arrangement is quite different from that of other continental codes.

In Sardinia a code was first promulgated during the reign of Victor Amadeus in 1723. This having been revised in 1770, during the reign of Victor Emanuel III, is known as the Victorian Code. After the union of Sardinia with France, the Code Napoleon was put in force, but on the overthrow of the French dominion the Victorian Code was re-established. In 1820, the king appointed a commission for the preparation of a new code which went into operation on the first day of January, 1838, and is known as the Albertine Code, from the name of the reigning monarch, Charles Albert. The Code Napoleon was never in force in the land of Sardinia, but a special code was enacted there in 1827, which was repealed in 1848 by the enactment of the Albertine Code, which had also been adopted in Piedmont in 1838. On the 1st day of July, 1820, Parma adopted a code, which was adopted from the Code Napoleon and from the Albertine Code. On the 1st day of February, 1852, a code not very different from that of Parma went into effect in Modena. In Naples the Code Napoleon having been introduced by French domination, was maintained by the Bourbons when that domination had ceased. After the accomplishment of the Italian unity, a commission for the formation of a code was appointed on the 25th day of January, 1866. It is chiefly based on the civil law, and contains 2,159 articles.

The latest Danish code went into effect in 1684, Norway being at the time under the same crown. It was promulgated there in 1688. Of late years various efforts have been made in Denmark to have the laws codified, but without success. In 1347 the preparation of a code was entered upon in Sweden, but it was not completed for nearly a hundred years, that is, in 1442. In 1556, another effort to codify the laws resulted in a failure. In 1604 a commission was appointed for the purpose of compiling a code. It reported the draft of one in 1609, but its labors were rejected by the Diet, partly on account of a counter project for a code, reported for certain deputies. In 1686 a new commission was appointed, which after forty years of labor reported a code, which went into effect on the 23rd of January, 1736. The Constitution of Norway of 1814 requires that the laws shall be codified. Several commissions have accordingly been raised for that purpose, but no practical result has been reached as yet.

In Russia the first code was published in 1649. In 1700 Peter the Great took steps to have a new code compiled. Afterward many commissions were appointed, but the immense labor was not completed until 1832, when the code now in force, containing 35,000 laws, was published in several volumes. In Russian Poland the Code of Napoleon, introduced in 1808, remains in force, while Finland, united to Russia in 1809, retains the Swedish Code of 1736. Codification in Switzerland forms an ample and interesting history by itself, but one that is too extensive to be noted here in detail. Out of nineteen cantons and six half cantons, fourteen possess complete civil codes, the earliest of which was promulgated in 1804. They are based in the French cantons largely on the Code Napoleon, in the German Cantons on the Prussian Code, and in certain Protestant cantons on the Code of Zurich, prepared by the eminent jurist Bluntschli.

The Constitution of Greece of 1827 requires that the laws shall be codified. King Otho

intrusted this task to a German jurist, Herr Maurer, who prepared a Code of Civil Procedure, a Code of Criminal Procedure, and a Penal Code. He was engaged very laboriously in the preparation of a Civil Code when differences arose bet ween him and the government. He complained of ill treatment, and left the country, taking the fruits of his labors with him, since which time nothing has been done. It will have been seen that the French Code has had a very important influence on the development of the law in many countries. During the consulate the duty of preparing a code of the French law was assigned to a commission composed of four very eminent judges and jurists, over which Tronchet, president of the Court of Cassation, presided. They despatched their labors with such haste that the work was begun and finished within four months, but it was discussed for four years in the Council of State, where various changes were made upon the original draft, after which it was enacted by sections at different times by the Corps Legislatif. The Civil Code, under the name of the Code Français, was adopted in 1804. With that amazing quality for appropriating the labors of others possessed by Bonaparte, he succeeded in attaching his name to it in 1807, since which time it has been known as the Code Napoleon. The Commercial Code went into effect on the 1st day of January, 1811. A Code of Civil Procedure and a Code of Criminal Procedure are also in effect.

The Code Napoleon is based on the preexisting Germanic customary laws, and the Roman law, to the exclusion of the principles of the feudal law, which had at one time taken deep root in the jurisprudence of France. We have seen how the Code Napoleon was transplanted for a time into Italy. In the same manner it was imposed by the will of the conqueror in Westphalia in 1807, in the city of Dantzig, in the principality of Aremberg, and in Russian Poland in 1808, in Holland, and in the Grand Duchy of Berg in 1809, in Frankfort, the Hanseatic departments, and the Duchy of Anhalt in 1810, in Baden, and in the Kingdom of Illyria in 1811. From all these countries it was expelled on the downfall of the Napoleonic power save from that part of the Grand Duchy of Berg situated on the right bank of the Rhine, a part of Baden, Holland and Russian Poland. It is also in force in Belgium. Codes very similar to the Code Napoleon have been adopted in Hayti, in the Ionian Islands, in Louisiana, and as we have seen, in certain Swiss cantons. The Code Napoleon has also been adopted in Turkey, in so far as not inconsistent with local customs and the precepts of the Koran. It has been copied almost literally in Wallachia and in Moldavia. Since its adoption it has been frequently amended, but the amendments are not so extensive as perhaps might have been expected from the length of time that it has been in force, and the many changes that have taken place in the government and in the political condition of the French people.

In India the Penal Code drawn up by Macauley and presented to the governor-general in 1837, did not become a law until 1860. The Code of Penal Procedure was adopted in 1859, and a Code of Penal Procedure followed in 1861. At present a Civil Code is being prepared, and various chapters are being enacted. In Japan a Civil Code has been adopted in recent years, and it is said that a similar work is in progress in China. In Bolivia a Civil Code was adopted in 1843. Civil Codes were also adopted in the Argentine Republic in 1861, and in Guatemala in 1878. In 1871 a Civil Code was adopted in the state of Mexia, which has been adopted by nearly all the other states of the Mexican Republic.

Whatever has been done in the way of codification in the English-speaking countries, where the common law prevails, has been largely due to the labors of Mr. David Dudley Field, whose name has already been mentioned, and who for a period of nearly forty years last past has devoted much of his time to the cause with unflagging energy, sustained by unusual zeal and ability. He procured a clause to be inserted in the constitution of New York in 1846, providing for a codification of both the substantive and remedial law, under which two commissions were created by the legislature, one having for its object the preparation of

Codes of Civil and Criminal Procedure, and the other a preparation of a code of the substantive law. The Code of Civil Procedure, partly enacted in 1848, was completed in 1850. The Penal Code went into effect on the 1st day of December, 1882. The Civil Code, reported to the legislature in 1866, has twice passed both houses of that body, but has been in both instances vetoed by the governor. On the question as to the propriety of its adoption, the profession in New York, as is well known, is much divided in opinion, as it recurs practically at every meeting of the legislature. The Civil Code, thus rejected in the place of its origin, has been however adopted in California and Dakota. In Georgia a Civil Code, prepared by a commission composed of three jurists, was adopted in 1862, and remains in force.

In England, although there has been a world of controversy on the subject of the codification of the common law, nothing in a practical way has been done up to this time. In 1866 a commission created by Parliament was directed to prepare special digests of three selected branches of the law, with a view to ultimate codification. Their action was such as to delay the work of reform indefinitely; for in 1872 the members reported that it was not advisable to take the proposed action in detail, but that a general digest of the whole law should be undertaken. They were discharged, and their recommendation was disregarded. But by the English Judicature Act of 1873 the Code of Civil Procedure of New York was substantially re-enacted. As a piece of remedial legislation that code may be considered one of the most important and successful of modern times. With slight modification, it is now in force also in twenty-four of our states and territories, and in those states and territories where it has not been introduced its influence has been such as to do away in a large measure with the unmeaning technicalities that characterize the common-law system of special pleading, that last, most persistent and damaging relic of the scholastic subtleties of the logic of the middle ages.

SUPERIOR COURT.

Montreal, June 30, 1887.

Before GILL, J.

ATLANTIC & NORTH-WEST RAILWAY COMPANY, expropriating parties, and JOHNSON, proprietor, and JOHNSON, petitioning for homologation of award of Arbitrators.

Railway Act—Award of Arbitrators.

HELD:—*That an award of Arbitrators cannot be homologated by a judge of the Superior Court, and is informal on its face, when it is not stated in what manner the third Arbitrator has been appointed.*

The Railway Company served the proprietor with a notice of expropriation, offering him $2,000, and in the event of his refusal naming Henry Joseph as their Arbitrator.

Subsequently the proprietor notified the Company that he refused their offer and appointed John L. Brodie as his Arbitrator, and by consent of the Arbitrators F. E. Nelson was appointed as third Arbitrator.

The Arbitrators having been sworn, met together on several occasions for the purpose of discussing the questions at issue, and at their last meeting a majority of them, namely Messrs. Brodie and Nelson, agreed to award to the proprietor the sum of $5,000. and an award was subsequently served upon the parties signed by all three Arbitrators, Henry Joseph however, signing only in order to record his dissent, and without admitting in any respect the legality of the award.

The Railway Company being dissatisfied with the award, served upon the proprietor an action to set it aside on the ground of informality and irregularities, and the proprietor also served the Railway Company with a petition asking for the homologation of the award by a Judge of the Superior Court.

To this latter proceeding, the Railway Company filed a written objection, alleging that the Court and Judge had no jurisdiction to homologate the award as there was no mention of any such proceeding in the Railway Act, and further, setting up that the award was upon its face informal and void,

and that an action had been taken to set it aside.

This petition having been presented and argued, Mr. Justice Gill rendered judgment in which he stated, verbally, that he overruled the objection taken by the Railway Company, to the jurisdiction of the Court, but held that the award was informal and null on the ground that although it was mentioned therein, that Nelson was third Arbitrator, yet neither in the proceedings filed in the record nor in the award itself could he find any mention made of the manner in which Mr. Nelson's appointment had been made, and he, therefore, dismissed the petition for homologation with costs against the proprietor.

The following is the text of the written judgment:—

" La Cour, ayant entendu le dit Charles M. Johnson, propriétaire à exproprier, sur sa requête demandant que la sentence arbitrale rendue par la majorité des arbitres nommés en cette cause soit homologuée, la dite Compagnie de Chemin de Fer n'étant pas représentée lors de l'audition sur le mérite de la dite requête à l'audience le 28 juin courant, mais ayant comparu, a mis au dossier une déclaration à l'effet qu'elle s'oppose à la dite homologation parce que la dite sentence arbitrale est nulle à sa face et que des procédures ont été instituées par une action pour la faire mettre de côté sans autrefois faire connaître les causes de nullité, examiné la procédure et délibéré;

" Attendu que la dite sentence arbitrale dont acte en forme authentique passé devant Mtre W. de M. Marler en date le 31me mai 1887, comporte avoir été rendue par trois arbitres, Mess. John L. Brodie, nommé par le propriétaire, Henry Joseph, nommé par la dite Compagnie, et Frederick E. Nelson, à la majorité d'entre eux, c'est-à-dire Messieurs Brodie et Nelson, qui s'accordent à dire que le propriétaire a droit à $5,000 d'indemnité pour l'expropriation de son terrain et bâtisse, M. Joseph n'agréant pas à ce montant et protestant contre la sentence. Or rien ne fait voir dans la dite sentence ni dans aucune autre pièce ou procédure produite, en vertu de quelle autorité Maître Frederick E. Nelson a pris part à la dite sentence, de sorte qu'elle ne saurait être homologuée dans l'état actuel de la cause, si toutefois elle peut l'être jamais;

" A renvoyé et renvoie quant à présent la dite requête pour homologation du dit C. M. Johnson avec dépens distraits à Messieurs Abbotts et Campbell, procureurs de la dite Compagnie, mais sans honoraire pour audition ou argument, car ils n'ont pas plaidé oralement ni même allégué leurs moyens."

Pagnuelo & Co., for petitioner.
Abbott & Co., for Railway Co.
(R. T. H.)

SUPERIOR COURT.

MONTREAL, July 9, 1887.

Before TASCHEREAU, J.

ATLANTIC & NORTH-WEST RAILWAY Co., expropriating parties, JOHNSON, proprietor, and JOHNSON, petitioning for homologation of award of arbitrators.

Railway Act—Award of Arbitrators—Homologation.

HELD:—*That a Judge has no authority to homologate an award of arbitrators made under the Railway Act.*

In the same case (see preceding report) the proprietor served the Railway Company with another petition, alleging the same facts, and stating how the third arbitrator had been named, and praying for the homologation of the award.

The same defence was raised and argued before Mr. Justice Taschereau, who dismissed the petition, holding that he had no power or right to grant the prayer, as he had no jurisdiction. The power could not be presumed as no mention was made of the Judge's right to homologate in the Railway Act, and therefore no right existed. The learned Judge drew a distinction between the cases where money had been deposited in Court under the Act with an award, so giving to a Judge a right to interfere, and other ordinary cases similar to this one where no jurisdiction of any kind was given.

Pagnuelo & Co., for petitioner.
Abbott & Co., for Railway Co.
(R.T.H.)

COUR SUPÉRIEURE.

MALBAIE, 8 nov. 1881.

Coram ROUTHIER, J.

COLLARD v. LAJOIE et al.

Exception à la forme—Congé-défaut.

JUGÉ :—*Que quand un Bref de Sommation ad Respondendum est rapportable le* 15 *octobre, et que la copie signifiée au défendeur est rapportable le* 1er *octobre, cette informalité ne doit pas être invoquée par motion pour congé-défaut à cette dernière date, qui sera renvoyée avec dépens, mais par exception à la forme lors du rapport de l'action le* 15 *octobre.*

J. A. Martin, procureur du demandeur.

J. S. Perrault, procureur des défendeurs.

(C.A.)

COUR SUPERIEURE.

MALBAIE, 31 janvier 1882.

Coram ROUTHIER, J.

BOUCHARD v. AUDET.

Saisie mobilière et immobilière en Cour de Circuit.

JUGÉ :—*Que dans les causes en Cour de Circuit on ne peut faire saisir les meubles et les immeubles du défendeur en même temps, et que sur opposition afin d'annuler, telle saisie sera déclarée nulle pour le tout.*

J. A. Martin, procureur du demandeur.

J. S. Perrault, proc. du défend.-opposant.

(C.A.)

COUR DE CIRCUIT.

MALBAIE, 26 janvier 1882.

Coram ROUTHIER, J.

FORTIN v. TREMBLAY.

Domestique—Gages.

JUGÉ :—*Qu'une servante engagée au mois, et qui abandonne le service de son maître avant la fin du mois, a droit de réclamer ses gages pour le temps donné, s'il est prouvé qu'elle est partie pour cause de maladie. Et que la demanderesse qui, une semaine après son départ était rétablie, n'était pas tenue d'offrir de terminer le temps de son engagement mais que le défendeur ne l'ayant pas mise en demeure d'y retourner, le contrat se trouve résilié tacitement.*

Action maintenue.

J. S. Perrault, proc. de la demanderesse.

Charles Angers, proc. du défendeur.

(C.A.)

*HIGH COURT OF JUSTICE.**

June 18, 1887.

Crown Cases Reserved.

REGINA v. COLBY.

Embezzlement—Fraud by Clerk or Servant.

The prisoner was found guilty, at the Worcester Sessions, of embezzling certain moneys collected by him on account of poor-rates. It appeared that he was appointed assistant-overseer of the township of Hasbury, by the inhabitants in vestry under 59 Geo. III, c. 12, s. 7, who determined that the duties to be executed and performed by him should be to "duly and correctly prepare, balance, and make up, twice in each year, at such times as he may be required in that behalf, all and every the books and accounts of the overseers of the poor, to pass and verify their accounts for the said township before the district auditor for the time being to be appointed for that purpose, to prepare all receipts, notices, and other writing as may be required during his said office." The question argued was whether, upon the above facts, the conviction could be sustained.

R. H. Amphlett for the prisoner: The terms of the prisoner's appointment were defined by the vestry, and did not embrace the collection of poor-rates. (He was stopped by the Court).

Cranston for the prosecution: The prisoner was clearly the clerk or servant of the inhabitants, and, if so, it is quite immaterial whether or not he exceeded his authority. It is not necessary to show that the prisoner received the money by virtue of his employment. He cited *Regina* v. *Carpenter*, 35 Law J. Rep. M. C. 169; L. R., 1 C. C. R. 29.

The COURT (LORD COLERIDGE, C. J., DENMAN, J., POLLOCK, B., HAWKINS, J., and STE-

* Law J., 22 N. C. 94

PHEN, J.) quashed the conviction, holding, upon the above facts, that the prisoner was not guilty of embezzlement.

Conviction quashed.

Crown Cases Reserved.

June 19, 1887.

REGINA v. LLOYD.

Perjury—Oath taken before Court of Competent Jurisdiction—Examination of Witness continued elsewhere.

This was a case reserved by DAY, J.

The prisoner was tried before the learned judge at the last Liverpool assizes, upon an indictment charging him with wilful and corrupt perjury, alleged to have been committed by him in the course of his examination as a witness in a case of bankruptcy, under section 27 of the Bankruptcy Act, 1883. The evidence for the prosecution showed that the prisoner was duly sworn before the registrar then sitting in the Bankruptcy Court; and a duly appointed shorthand writer made a declaration at the same time that he would take and transcribe the prisoner's evidence. After this both prisoner and shorthand writer retired to a room at the other end of the building, where the former was examined by the solicitor to the official receiver. The registrar was not present or within hearing at the time the answers were given by the prisoner upon which perjury was assigned in the indictment. The jury convicted the prisoner, but he was released on bail, pending the decision of the point reserved. The question for the Court of Crown Cases Reserved was, whether the said indictment was supported by evidence, having regard only to the facts that, although the oath was properly administered before a competent Court, the registrar was to the extent and under the circumstances above described absent when the particular questions were answered, on which answers the perjury was assigned.

The COURT (LORD COLERIDGE, C. J., DENMAN, J., POLLOCK, B., HAWKINS, J., and STEPHEN, J.) held that the examination as taken was not taken 'before' the Court, and that such an examination was not legally admissible against the prisoner.

Conviction quashed.

CHANCERY DIVISION.

June 18, 1887.

Before CHITTY, J.

OAKEY & SONS v. DALTON.

Trade-mark—Action for Infringement—Survivor—Right of Executors to sue—'Actio personalis moritur cum persona.'

The plaintiff in an action for infringement of a registered trade-mark having died, it was contended by the defendant that the legal maxim 'Actio personalis moritur cum personâ' was applicable, and that the action could not be continued by the plaintiff's executors.

CHITTY, J., said that the relief claimed by the plaintiff comprised an injunction, damages, and destruction of infringing documents. The statement of claim alleged loss to the plaintiff caused by the defendant. That being so, the cause of action survived to the executors, on the principle that the estate which had passed into their hands had suffered injury. It was unnecessary to decide any point as to whether the executors could sue for an injunction, although they did not appear on the register as the owners of the mark.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, July 9.

Judicial Abandonments.

D. Caron & Fils, district of Richelieu, July 7.

J. B. Leblanc, Quebec, June 30.

Henry R. McCracken, township of Hinchinbrooke, June 28.

Curators appointed.

Re Victor Aubut, Arthabaska.—Kent & Turcotte, Montreal, curator, June 28.

Re Joseph Corriveau, Magog.—J. J. Griffith, Sherbrooke, curator, July 2.

Re Louis Lavertu, East Angus.—H. A. Bédard, Quebec, curator, July 2.

Re Charles Marcotte.—J. E. Casgrain, l'Islet, curator, June 24.

Re J. T. Morey, Montreal.—John McD. Hains, Montreal, curator, July 5.

Dividends.

Re Joseph Boivin.—First dividend, payable July 25, E. J. Angers, Quebec, curator.

Re Charles McCambridge.—First dividend, payable July 23, C. Desmarteau, Montreal, curator.

Re Telesphore Delage, Coteau Station.—First and final dividend, payable July 24, C. Desmarteau, Montreal, curator.

Re P. G. Delisle.—Final dividend, payable July 27, V. W. Larue, Quebec, curator.

Re Julie Esther Alphosine Mongrain, Bryson.—First and final dividend, payable July 17, W. G. Leroy, Bryson, curator.

Re Arline Filteau, Three Rivers.—First dividend, payable July 28, Kent & Turcotte, Montreal, curator.

Appointment.

Charles Weilbrenner, appointed high constable for the district of Richelieu.

GENERAL NOTES.

La Cour d'assises d'Indre-et-Loire a jugé hier un jeune ouvrier relieur nommé Daout, poursuivi pour tentative d'assassinat sur sa maîtresse.

Le côté intéressant de cette affaire, c'est que l'accusé est un ancien sujet de magnétiseurs célèbres; après avoir été magnétiseur lui-même, il était devenu.... rédacteur de la *Petite France.*

Le ministère public et la défense, celle-ci surtout, ont fortement insisté sur le rôle infâme des magnétiseurs qui ont opéré sur Daout, et l'ont, suivant eux, conduit au crime par l'abrutissement; ce sont eux, a prétendu le défenseur, les premiers coupables; ce sont leurs expériences de catalepsie qui ont enlevé à Daout tout équilibre moral.

Le jury a néanmoins conclu à la responsabilité de l'accusé, qui a été condamné à six ans de réclusion.—*Gaz. Pal.*

Au nombre des personnes qui ont disparu dans la panique occasionnée par l'incendie de l'Opéra-Comique, le 25 mai dernier, se trouvait une demoiselle Elisa-Adrienne Petit-Maître, née à Neufchâtel (Suisse). Son corps n'a pas été retrouvé, mais à la suite des fouilles pratiquées dans les ruines du théâtre, on a découvert un corps carbonisé et méconnaissable, sur lequel on a constaté la présence de quelques lambeaux de vêtements ayant appartenu à Mlle Petit-Maître. Ce corps, déposé à la Morgue sous le No. 344, a été inhumé sous le No. 1494 des inhumations de la mairie du 2e arrondissement, mais aucun acte de décès n'avait été dressé par l'officier de l'état civil.

La famille de Mlle Petit-Maître s'est pourvue devant la Chambre du conseil du Tribunal de la Seine pour obtenir un jugement tenant lieu d'acte de décès: conformément à la requête qui lui était présentée par Me Cortot, avoué, le Tribunal a rendu un jugement donnant acte du décès de la demoiselle Petit-Maître.

Goliath! il s'appelait Goliath!

C'était un nom de fâcheux augure. Mais il n'est point de superstition qui résiste à une rage de dents. Mlle Riguet était donc entrée, la pauvrette, dans l'antre du dentiste Goliath.

Goliath retint longtemps sa cliente. Mais elle ne s'aperçut de rien, tant ce diable d'homme mettait dans son œuvre infernale de prestesse et de force. Quand ce fut fini, il lui présenta de l'air le plus gracieux un miroir. Horreur! Elle avait les joues creuses, les lèvres recroquevillées, tout le squelette du visage saillant et grimaçant. Goliath avait enlevé toutes les dents!

Mlle Riguet alla conter sa peine au commissaire de police, qui lui répondit par un affreux jeu de mots:

"Les histoires du palais ne sont pas de mon ressort."

Il fallut se rabattre sur le juge de paix. Le débat fut violent:

Le juge.—Que demandez-vous, madame?

La plaignante.—Mademoiselle, Monsieur le juge. Je demande justice!

Le juge.—Mais encore faudrait-il....

La plaignante.—Je veux dent pour dent. Voyez en quel état ce bourreau m'a mise.

Le juge.—Il est vrai, mademoiselle, qu'on a peine à vous comprendre. Mais la bible n'est pas notre code, et....

La plaignante.—Eh bien! monsieur, je réclame deux mille francs de dommages-intérêts.

Le juge.—Ma compétence ne va pas jusque-là.

La plaignante.—Cependant, monsieur, vous avez des yeux, et vous pouvez voir qu'avant cette mutilation...

Le juge.—Oh! assurément, madame. Mais mes yeux ne peuvent pas me servir de code. Nous réduirons cela, si vous le voulez bien, à deux cents francs.

Cependant Goliath contemple d'un air souriant et tranquille son œuvre abominable.

Le juge se tourne vers lui avec sévérité:

—Qu'avez-vous à dire pour votre défense?

Goliath.—J'ai à dire que je réclame à Madame cinquante francs pour mes honoraires.

La plaignante.—Ah! c'est trop fort!

Le juge.—Est-ce qu'elle a consenti à se laisser arracher ainsi toutes ses dents?

Goliath.—Mais, monsieur, elle n'a pas bougé.

Le juge.—Eh bien! mademoiselle, que répondez-vous à cela?

La plaignante.—Monsieur, je suis si distraite.

Le juge.—Ah!

Goliath.—D'ailleurs, monsieur le juge de paix, les pièces à conviction sont là. Vous pourrez voir que la bouche à mademoiselle était affreuse: tout était noir, gâté, déchaussé, branlant. Un ratelier était indispensable.

La plaignante.—Ah! voilà le mot de l'énigme. C'était pour me poser un ratelier.

Le juge.—Eh bien! nous allons commettre un expert.

L'expert déclara qu'il lui paraissait bien invraisemblable que Mlle Riguet n'eût rien senti pendant l'opération; il ajouta que les pièces à conviction innocentaient complètement Goliath.

Mlle Riguet perdit son procès et fut condamnée à payer des honoraires.

Elle a interjeté appel. Mais les juges de la septième chambre, fort embarrassés dans cette mystérieuse aventure, ont fait perdre leur procès aux deux plaideurs.

Le dentiste a été condamné à deux tiers des dépens, Mlle Riguet à l'autre tiers. Pauvre Goliath!—*Gaz. du Palais.*

The Legal News.

VOL. X. JULY 23, 1887. No. 30.

In *Delano* v. *Case*, June 17, 1887, the Supreme Court of Illinois affirmed the judgment of the Appellate Court, holding that the directors of banks are trustees for depositors as well as for stockholders, and as such are bound to the observance of ordinary care and diligence to save depositors from loss. Hence, if bank directors are guilty of negligence in permitting their bank to be held out to the public as solvent, when in fact it is insolvent, and thereby induce one to deposit his money with the bank, he may recover of such directors, in an action on the case, the damages sustained. The Court cited *Percy* v. *Millandon*, 3 Louisiana, 568; Wharton on Negligence, § 510; Moore on Banks and Banking, 133.

Sir Matthew Crooks Cameron, Chief Justice of the Common Pleas, who died at Toronto, after a brief illness, on June 25, was the only one of the Ontario Chief Justices, who, on the recent occasion, accepted the proffered honour of knighthood. Mr. Cameron was born in Canada in 1822, educated in his native province, and called to the bar in 1849. He was very successful as an advocate before juries, and a forcible public speaker. In 1863, he was made Q. C., and in 1878, was appointed a *puisné* justice of the Queen's Bench. In 1884, on the removal of Chief Justice Wilson from the Common Pleas to the Queen's Bench, Judge Cameron succeeded to the Chief Justiceship of the former.

We have received a copy of a poetic and loyal effusion, by Mr. G. W. Wicksteed, Q.C., in honour of the Jubilee. The freely-flowing verse in which Mr. Wicksteed celebrates the occasion shows that in his case, years have not exiled the power "that breathes an energy divine, that gives a soul to every line." Mr. Wicksteed is also the author of a national anthem.

A rather poor joke nearly ended in a serious piece of business before an English Court. *Davis* v. *Dalziel* was an action for libel against the publisher of a comic newspaper. The libel complained of was as follows: "Umbrella tricks.—Irate customer: Look here, I bought this compactum umbrella at your shop yesterday. You guaranteed that it would remain small and tidy; and now look at it! I can't fold it up into double its original size. Shopkeeper (blandly, as he inspects the article): I am sure I am very sorry; and I cannot account for it unless —(horrified)—why, my dear sir, you've been using it!" The plaintiff sold only the compactum umbrella, of which he possessed the patent and a copyright, and he complained that the article was calculated to injure him seriously in his business. Baron Huddleston told the jury that the case must be treated by them as men of the world; for if every joke of this kind was made the subject of an action the courts would be fully occupied. It was possible that the plaintiff intended and might by this means get a cheap and excellent advertisement, but they were bound to consider the question as seriously as they could because it was brought before them. To make this a libel they were gravely asked to find that this joke had an innuendo. namely, that the plaintiff fraudulently and deceitfully, and in breach of contract, manufactured and sold the compactum umbrella as one which would shut up in a small compass, well knowing that it would not, etc. It was in their power to give the plaintiff £100,000 for this libel, or they might give him a farthing, or they might find a verdict for the defendant. It was for them to say what they thought of it. The jury found a verdict for the defendant.

LEGISLATION OF LAST SESSION.

The Act 50 Vict., (D.) ch. 14, assented to June 23, to make provision for the appointment of a Solicitor General, enacts as follows:

"1. The Governor in Council may appoint an officer who shall be called the 'Solicitor General of Canada,' and who shall assist the Minister of Justice in the counsel work of the Department of Justice, and shall be

charged with such other duties as are at any time assigned to him by the Governor in Council.

"2. The salary of the Solicitor General of Canada shall be five thousand dollars per annum.

"3. Nothing in the ninth Section of the Revised Statutes, chapter eleven, respecting the Senate and House of Commons of Canada, shall render the Solicitor General ineligible as a member of the House of Commons, or shall disqualify him to sit or vote therein, provided he is elected while he holds such office, and is not otherwise disqualified.

"4. Whenever any person who holds the office of Solicitor General, and is, at the same time, a member of the House of Commons, resigns his office, and within one month after his resignation accepts any of the offices mentioned in subsection three of section nine of the '*Act respecting the Senate and House of Commons*,' and becomes a minister of the Crown, or accepts the office of Controller of Customs or Controller of Inland Revenue created by the Act of the present session intituled '*An Act respecting the Department of Customs and the Department of Inland Revenue*,' he shall not thereby vacate his seat, unless the administration under which he held office as Solicitor General has resigned and a new administration has been formed."

Ch. 15, 50 Vict., (D.) amends ch. 138, s. 4 of the Revised Statutes, respecting the Judges of Provincial courts, by substituting the word "Fourteen" for the word "Thirteen" in the tenth line thereof.

Ch. 16, an Act to amend "The Supreme and Exchequer Courts Act," and to make better provision for the Trial of Claims against the Crown, enacts:—

THE EXCHEQUER COURT.

"2. The Court of Exchequer, now existing under the name of 'The Exchequer Court of Canada,' is hereby continued under such name, and shall continue to be a court of record.

"3. The Exchequer Court shall consist of one judge.

"(2). Any person may be appointed a judge of the court who is or has been a judge of a superior or county court of any of the Provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said Provinces:

"(3). The judge of the court shall not hold any other office or emolument either under the Government of Canada or under the Government of any Province of Canada:

"(4). The judge of the court shall reside at Ottawa or within five miles thereof:

"(5). In case of sickness or absence from Canada of the judge of the court, the Governor in Council may specially appoint some other person having the qualifications mentioned in subsection two of this section, who shall be sworn to the faithful performance of the duties of his office and shall have all the powers incident thereto during the sickness or absence from Canada of the Judge of the court:

"(6). If the judge of the court is interested, in any matter whatsoever, in any case before the court, he shall not adjudicate upon the same, but the Governor in Council may specially appoint some other person having the qualifications mentioned in subsection two of this section, who shall be sworn to the faithful performance of the duties of his office, and shall act as such judge *pro hac vice* and have, in relation to the case in respect of which he is appointed, all the powers of such judge; but nothing in this sub-section contained shall interfere with the judge of the court with respect to any other case.

"4. The judge of the court shall hold office during good behavior, but shall be removable by the Governor General on address of the Senate and House of Commons:

"5. There shall be paid and payable out of the Consolidated Revenue Fund of Canada, the yearly sum of six thousand dollars as and for the salary of the said judge:

"(2). There shall be paid to the said judge for travelling allowances his moving expenses and the sum of five dollars for each day during which he is attending as such judge any court at any place other than the city of Ottawa.

"6. If the judge has continued in the office

of judge of the court for fifteen years or upwards, or in the said office and that of judge of one or more of the superior courts, or of the courts of vice-admiralty, or the county courts, in any of the Provinces of Canada, for periods amounting together to fifteen years or upwards; or becomes afflicted with a permanent infirmity, disabling him from the due execution of his office; and if such judge resigns his office, Her Majesty may, by letters patent under the great seal of Canada, reciting such period of office or such permanent infirmity, grant unto such judge an annuity equal to two-thirds of his salary as such judge at the time of his resignation, and to commence immediately after his resignation and to continue thenceforth during his natural life, and to be payable by monthly instalments, and *pro ratâ* for any period less than a year during such continuance, out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada.

BARRISTERS AND ATTORNEYS.

"12. All persons who are barristers or advocates in any of the Provinces, may practise as barristers, advocates and counsel in the Exchequer Court.

"13. All persons who are attorneys or solicitors of the superior courts in any of the Provinces, may practise as attorneys, solicitors and proctors in the Exchequer Court.

"14. All persons who may practise as barristers, advocates, counsel, attorneys, solicitors or proctors in the Exchequer Court, shall be officers of such court.

JURISDICTION.

"15. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

"16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a.*) Every claim against the Crown for property taken for any public purpose;

(*b.*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work;

(*c.*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d.*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council;

(*e.*) Every set off, counter claim, claim for damages, whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown against any person making claim against the Crown.

"17. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada,—

(*a.*) In all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties, and proceedings by way of information *in rem*, and as well in *qui tam* suits for penalties or forfeitures as where the suit is on behalf of the Crown alone;

(*b.*) In all cases in which it is sought at the instance of the Attorney General of Canada, to impeach or annul any patent of invention, or any patent, lease, or other instrument respecting lands;

(*c.*) In all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer;

(*d.*) In all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner."

The Act 50 Vict., (D.) ch. 49, amends ch. 173 of the Revised Statutes, respecting threats, intimidation and other offences, by substituting the following for section 11:—

"11. Every person who unlawfully and by

force or threats of violence, hinders or prevents or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship laborer or other person employed to work at or on board any ship or vessel, or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed; or beats or uses any violence to, or makes any threat of violence against any such person, with intent to hinder or prevent him from working at or exercising the same, or on account of his having worked at or exercised the same, shall, on summary conviction before two justices of the peace, be liable to imprisonment, with hard labor, for any term not exceeding three months."

Section 268 of the Criminal Procedure Act has been replaced by the following (50 Vict., ch. 50):—

APPEALS AND NEW TRIALS.

"268. Any person convicted of any indictable offence, or whose conviction has been affirmed before any Court of Oyer and Terminer or Gaol Delivery, or before the Court of Queen's Bench in the Province of Quebec, on its Crown side, or before any other superior court having criminal jurisdiction, whose conviction has been affirmed by any court of last resort, or, in the Province of Quebec, by the Court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmance of such conviction; and the Supreme Court shall make such rule or order therein, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect: Provided that no such appeal shall be allowed if the court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney General for the proper Province, within fifteen days after such affirmance:

"2. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter, if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court:

"The judgment of the Supreme Court shall, in all cases be final and conclusive:

"4. Except as hereinbefore provided, a new trial shall not be granted in any criminal case unless the conviction is declared bad for a cause which makes the former trial a nullity, so that there was no lawful trial in the case; but a new trial may be granted in cases of misdemeanor in which, by law, new trials may now be granted:

"5. Notwithstanding any royal prerogative, or anything contained in '*The Interpretation Act*,' or in '*The Supreme and Exchequer Courts Act*,' no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to her Majesty in Council may be ordered to be heard."

"2. Sections sixty-eight and sixty-nine of '*The Supreme and Exchequer Courts Act*' are hereby repealed.

"3. The foregoing provisions of this Act shall not come into force until a day to be named by the Governor General, by his proclamation to that effect.

"4. Section 265 of '*The Criminal Procedure Act*' is hereby amended by striking out the words 'in the Province of Quebec'"

COURT OF QUEEN'S BENCH—IN APPEAL.*

Libel—Report of mercantile agency to subscribers—Malice.

HELD:—That where the report of a mercantile agency to its customers, concerning the standing of a person in business, is true, and no malice is proved, an action of damages for such publication will not be maintained.—*Girard & Bradstreet*, Feb. 15, 1875.

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* To appear in Montreal Law Reports, 3 Q.B.

Libel and slander—Mercantile agency—Circulating erroneous information of a damaging nature—Privileged communication—Damages.

The appellant, a mercantile agency, sent a circular to its subscribers, with the words "call at office" in reference to the respondent, a dry goods merchant of Montreal. Those who enquired at the appellant's office, including a newspaper correspondent who was not a subscriber, were informed by the appellant's employees that the respondent's firm had applied for an extension of time on a large indebtedness to their English creditors. This information was untrue, and was based upon a report which the appellant had not verified. The circulation of the report by the appellant injured the respondent's credit, and embarrassed him in the management of his business, several orders for goods being cancelled, or suspended until the report was shown to be unfounded.

HELD:—(Affirming the decision of LORANGER, J., M. L. R., 2 S. C. 33) that the manager of a mercantile agency comes under the general rule (C. C. 1053), which makes every person capable of discerning right from wrong responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill, and that the appellant was guilty of negligence in circulating through his employees a report of an injurious nature without verifying it, and also in communicating it by circular and verbally to persons who had no interest in being informed of the standing of respondent.

2. It being proved that the circulation of the report was damaging to respondent, it was competent to the Court below to estimate the amount of damages, and the judgment should not be disturbed. — *The Bradstreet Company & Carsley*, May 26, 1887.

CIRCUIT COURT.

PORTAGE-DU-FORT, (Co. of Pontiac), June 2, 1887.

Before WURTELE, J.

TROTTIER v. WALSH.

Procedure— C. C. P. 781, 782 — Coercive Imprisonment—Powers of judge in vacation—Notice of motion for rule—Specification of amount of debt.

HELD:—*When the judgment debtor prevents the bailiff from proceeding to the sale of the effects seized:—*

1. *That a judge in vacation can grant a rule for his imprisonment returnable in term.*
2. *That notice of the motion for the rule is not necessary.*
3. *That the rule must mention the amount, upon payment of which the judgment debtor will have the right to obtain his discharge.*

Execution was issued against the defendant and a seizure of his effects was made on the 21st March last.

The sale was fixed for the 23rd April last, but on that day the defendant prevented the bailiff from proceeding to the sale, and the latter made a return establishing the defendant's hindrance.

On the 20th May last, a motion was presented to the judge in chambers, at Aylmer, for a rule against the defendant for contempt, and a rule returnable on the 31st May last, before the Circuit Court at Portage-du-Fort in term, was granted.

The rule was duly issued, served and returned and asks, unless cause be shown to the contrary, "inasmuch as it appears that "the defendant did resist and obstruct the "bailiff in the execution of his duty under "the writ of execution issued in this cause, "and did prevent him from proceeding with "the sale of the effects seized, that the de-"fendant be held in contempt of court, and "imprisoned in the common goal of this "district for his resistance and obstruction "in the premises."

The defendant answered that the rule should be dismissed, amongst other reasons: 1. Because the motion for the rule had been made to the judge in chambers and the rule ordered the defendant to show cause before the court in term. 2. Because no notice had been given to the defendant of the motion for the rule. 3. Because no option was given in the rule to the defendant to pay the amount of the judgment and costs.

PER CURIAM. Cases of resistance to the seizure and sale of the property of a judg-

ment debtor fall under article 782 of the C. C. P. This article provides that a judge out of court may exercise all the powers of the court, and as the court could, in the present case, have granted a rule returnable on a day in term, the judge to whom the motion for the rule in this cause was presented in chambers had the same power. In this respect, therefore, the rule is regular.

Under article 781 of the C. C. P., a person can only be condemned to coercive imprisonment after having received personal notice of the application. This application must be made by special rule, which must be served upon the party liable to be imprisoned personally; but it is not necessary to give notice of the motion for the rule. Rule 55 of the rules of practice, which decides this point, says, "that no motion can be "received or heard unless previous notice "thereof, of at least one day be given to the "adverse party, *excepting the motions where-* "*upon side-bar rules may be obtained.*" The party liable to be imprisoned must have personal notice of the application, but the law does not require that he should be notified twice. No notice of the motion for the rule was necessary, and therefore in this respect also the rule is regular.

But I have now to deal with a serious objection to the rule. Where the contempt complained of consists of improper behavior towards the Court, the imprisonment imposed is a punishment; but where it consists of neglect to pay a judgment for a debt which by its nature subjects the debtor to imprisonment, or of obstruction to the seizure or sale of property in execution of a judgment, the imprisonment is a means to coerce the judgment debtor to pay the condemnation, and thence it is called coercive imprisonment. In the latter case the judgment ordering the imprisonment must consequently specify the debt to be paid; and the rule which, on being declared absolute, forms the basis of the judgment, must also mention the amount of the debt in principal, interest and costs, as the debtor has every interest to see that only the amount really due by him be entered in the judgment and in the writ under which he may be arrested and imprisoned. Article 782 of the C. C. P. provides that the debtor shall be imprisoned until he satisfies the judgment by which he was condemned to pay his debt; and article 793 provides that he may obtain his discharge by paying, into the hands of the sheriff or of the prothonotary, the amount of the condemnation, in principal, interest and costs. The rule in the present case asks that the defendant be held in contempt of court for having obstructed and hindered the sale of his effects and that he be imprisoned therefor, but it does not specify the amount which he is to be thus coerced to pay. It is defective as the basis of a judgment ordering the coercive imprisonment of the defendant; and it is therefore insufficient, irregular and illegal, and must be dismissed.

The judgment will be recorded as follows:—

"The Court after having heard the parties upon the rule issued in this cause, praying that the defendant be held in contempt of court, for having prevented the sale of the moveable property seized in this cause, and praying that he be imprisoned therefor, and upon the answers thereto;

"Considering that all the reasons given for the dismissal of the said rule are insufficient, except the fifth one;

"Considering that coercive imprisonment can only be ordered against a person in contempt of court by reason of his resistance to the sale of goods seized in satisfaction of a judgment until he satisfies the judgment, and that the amount so to be paid should be specified in the rule;

"Seeing that in the present case the rule does not specify the amount so due, and does not ask that the defendant be imprisoned till he pays the same, but asks that he be imprisoned generally and without term for his contempt;

"Doth dismiss the said rule with costs, &c."

Rule dismissed.

C. P. Roney, for plaintiff.

J. M. McDougall, for defendant.

COUR DE CIRCUIT.

MALBAIE, 3 sept. 1882.

Coram ROUTHIER, J.

LEVESQUE v. MOUSSIN.

Saisie-arrêt—Taxation des frais—Imputation—Contestation de la saisie-arrêt.

JUGÉ :—1. *Qu'une saisie-arrêt après jugement ne peut émaner avant que les frais aient été taxés ; que des à-comptes donnés après le jugement mais, avant la saisie, quand les frais n'ont pas été taxés, et plus que suffisants pour payer les frais, doivent s'imputer seulement sur le capital et les intérêts, en vertu de la règle : que l'imputation n'a pas lieu sur ce qui n'est pas clair et liquide, à moins qu'il ne fût prouvé d'une manière très certaine que les frais ont été payés et que le montant en a été accepté.*

2. *Que c'est à la partie qui prétend que les frais ont été taxés, à le prouver, et que cette preuve se fait par la production du mémoire ou par le plumitif, et que le fait qu'il est dit dans le bref de saisie que les frais ont été taxés ne fait point preuve.*

3. *Que la saisie-arrêt après jugement peut être contestée comme une action sans qu'il soit nécessaire de recourir à l'opposition.*

J. S. Perrault, proc. du demandeur.

Charles Angers, proc. de la défenderesse.

Autorités citées par la défenderesse: C. de proc. 614 et 615 ; 3 L. C. J. 95 ; 1 Q. L. R. 222 ; *Audet* v. *Asselin, & Asselin*, 15 L. C. R 272 ; *Langevin* v. *Martin*, 3 R. L. 447 ; 6 Q. L. R. p. 69, Rev.

Quant à l'imputation : Laromb. Oblig. vol. 3 p. 420, No. 3. Domat, Lois Civ., Liv. 4, tit. 1 S. 4. Pothier, oblig. No. 571.

(C. A.)

COUR DE CIRCUIT.

MALBAIE, 4 sept. 1882.

Coram ROUTHIER, J.

BOUCHARD v. MORISSON ET AL., & MALTAIS, Tiers-saisi, & MORISSON et al., contestants.

Saisie-arrêt avant jugement—Contestation—Juridiction.

JUGÉ :—1. *Qu'on peut contester par exception à la forme, la vérité des allégations de l'affidavit pour obtenir une saisie-arrêt avant jugement, ainsi que les informalités de tel affidavit ;*

2. *Que s'il y a plusieurs défendeurs résidant la même juridiction, on peut les assigner légalement dans le district où l'un d'eux l'a été personnellement, et où la cause d'action n'a point pris naissance, et où ils ne sont point domiciliés.*

J. A. Martin, proc. du demandeur.

Charles Angers, proc. des défendeurs.

(C. A.)

COUR D'APPEL DE DOUAI.

4 mai 1887.

Présidence de M. MAZEAUD, prem. président.

W. v. T.

Responsabilité—Adultère—Complice de la femme—Mari—Enfants—Dommages-intérêts.

1. *Le complice de la femme adultère peut être condamné à des dommages-intérêts envers le mari, lorsqu'il en résulte un dommage pour ce dernier.*

2. *Il est également responsable vis-à-vis des enfants, des événements qui ont suivi, notamment du divorce, et est passible envers eux de dommages-intérêts pour le préjudice matériel et moral qui en a été pour eux la conséquence.*

Le sieur W...., ayant été surpris en flagrant délit d'adultère avec la femme T...., fut condamné correctionnellement à 15 jours d'emprisonnement. Le sieur T...., postérieurement, et à raison de ce fait d'adultère, fut admis au divorce par jugement du Tribunal civil de Béthune en date du 25 juin 1885. Le 9 avril 1885, il actionna W...., en responsabilité civile, et lui réclama des dommages-intérêts, tant en son nom et pour son propre compte, qu'au nom et pour le compte de ses trois enfants.

Par jugement du 3 décembre 1885, le Tribunal civil de Béthune fit droit à sa demande dans les termes suivants :

" Attendu que le complice de la femme adultère peut être condamnée à des dommages-intérêts envers le mari lorsqu'il résulte un dommage pour ce dernier ; que le prin-

cipe de la responsabilité n'est, du reste, pas contesté ;

"Attendu que les éléments de la cause permettent au Tribunal de fixer ces dommages à la somme de 1,200 fr. ;

"Attendu que tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer ; que W ..., en abusant de la confiance qu'il inspirait à T...., et en détournant leur mère de ses devoirs, se trouve responsable vis-à-vis des enfants, des événements qui ont suivi et de leur conséquence dommageable ; que ce préjudice résultant de l'abandon où ils se trouveront désormais, de la perte d'affections maternelles, du fait du mariage de la mère et de la naissance d'un enfant, peut être évalué à 1,000 fr. pour chacun des enfants ; qu'il y a lieu d'ordonner le placement de cette somme en rentes de 3 p. c. sur l'Etat français.

"Par ces motifs,

"Condamne le sieur W... à payer à T... une somme de 1,200 fr. à titre de dommages-intérêts pour les causes susénoncées, et à chacun des trois enfants de T.... celle de 1,000 fr. ;

"Dit que la somme due à chacun des enfants sera placée en rente 3 p. c. sur l'Etat français jusqu'à leur majorité."

Appel de ce jugement a été interjeté par W....—Arrêt :

LA COUR,

Adoptant les motifs des premiers juges,

Confirme.

NOTE.—La jurisprudence n'a jamais hésité à reconnaître que le complice de la femme adultère peut être condamné à des dommages-intérêts envers le mari, lorsqu'il est constant en fait. qu'il est de ce délit résulté pour ce dernier un dommage. V. en ce sens : Poitiers, 4 février 1837 (S. 37.2.374) ; Paris, 8 juin 1837 (S. 37.2.293) ; Cass., 22 septembre 1837 (S. 38.1.331) ; Toulouse, 29 juin 1864 (S. 64.2.155—J. du P. 64.858—D. 64.2.174) ; Aix, 7 juin 1882 (Gaz. Pal. Coll. anc., t. IV. 2.432). *Sic :* Vatimesnil. Encyclopédie du droit, vo. Adultère, No. 57 ; Chauveau et Hélie, Théorie du C. pén., 5me édition, t. IV, No. 1664. Mais c'est la première fois, croyons-nous, qu'une Cour d'appel est appelée, dans l'espèce ci-dessus, à se prononcer sur une demande de dommages-intérêts au profit des enfants, issus du mariage de la femme coupable.—*Gaz. du Pal.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, July 16.

Judicial Abandonments.

Beuthner Bros., merchants, Montreal, July 7.

Jean Marie Duval, farmer and trader, St. Antonin, July 4.

Andrew Fortune, book and shoe-dealer, Huntingdon, July 7.

Jean-Baptiste Phénix, St. Théodore d'Acton, July 12.

Curators appointed.

Re Damase Caron, St. Ours.—Kent & Turcotte, Montreal, curator, July 14.

Re Damase Caron & Fils, St. Ours.—Kent & Turcotte, Montreal, curator, July 14.

Re L. Philippe Gagnon, St. Roch des Aulnaies.—H. A. Bedard, Quebec, curator, July 12.

Re Edward C. Hughes.—Henry Ward and Alex. Gowdey, Montreal, curators, July 5.

Re G. E. Morasse.—A. A. Taillon, Sorel, curator, June 28.

Re Antoine St. Jean, St. Timothé.—Kent & Turcotte, Montreal, curator, July 11.

Dividends.

Re A. T. Constantin & Co.—Second dividend, payable July 25, H. A. Bedard, Quebec, curator.

Re Copland & McLaren.—First dividend, payable Aug. 3, A. W. Stevenson, Montreal, curator.

Re Hubert Pronovost, St. Félicien.—First and final dividend, payable July 28, H. A. Bédard, Quebec, curator.

Re H. D. Somerville, Huntingdon.—First and final dividend, payable Aug 4, W. S. Maclaren and S. Boyd, Huntingdon, joint curator.

Separation as to property.

Aurélie Laforce vs. Roger Dandurand, hotelkeeper, Montreal, July 13.

BAR EXAMINATIONS.

The following is a list of those who have been admitted to the practice and study of law at the recent examinations held at Sherbrooke ;—

Admitted to practice—Messrs. A. B. Major, Auguste Beaudry, H. A. Beauregard, Ludovic Brunet, C. A. Edge, L. P. Berard, R. L. Murchison, Philippe Dorval, H. J. Cloran, G. A. Alain, Forget, Ant. Taschereau, Philippe Jolicœur, L. E. Pelissier, Ovide Robillard, Adelard Turgeon.

Admitted to study—Messrs. R. Lemieux, N. R. Laflamme, Michael Fearn, L. H. R. Boudreau, S. W. Mack, C. L. Cédras, L. G. E. Fiset, J. W. Pagnuelo, A. Trudel, Adolphe Rivard, F. Jasmin, DeMartigny, R. G. Gosselin, I. W. Poitras, H. Pelletier, Jos. Boisseau.

The Legal News.

VOL. X. JULY 30, 1887. No. 31.

The Act 49-50 Vict. ch. 7 (Q.), has been exposed to unusual vicissitudes. It provided for the appointment of a Judge for the district of Terrebonne, the preamble being "whereas *it has become urgent* that there "should be a judge in the district of Terre-"bonne." The Act was assented to June 21, 1886, but was not to come into force until proclaimed by the Lieutenant-Governor in Council. The proclamation, dated January 27, 1887, appeared in an extra of the *Quebec Official Gazette* of January 29, but by what we ventured to describe as "a curiosity in the way of corrections" (p. 49), the *Gazette* of Feb. 5, 1887, announced that the proclamation of Jan. 27 "was published in error." It may be remarked, parenthetically, that a change of government had occurred between Jan. 27 and Feb. 5. The *Official Gazette* of June 11 contains another proclamation, dated June 8, bringing the Act into force from June 11.

Chief Justice Horton has very forcibly condemned the law of Kansas which provides that the death penalty cannot be inflicted until after a year from conviction, and then only in the discretion of the Governor of the State. The Chief Justice believes that the practical effect is that no execution will ever take place in Kansas until the Statute is changed. On the other hand, lynchings are resorted to, to supplement the tardy and ineffectual steps of justice. The existing condition of affairs is not encouraging to those who would do away with capital punishment altogether. "On January 1 of the present year," says the Chief Justice, "there were fifty-one murderers in the penitentiary of the State under sentence of death, and more of the same class are on the way to that institution. During the last few years more fiendish and brutal murders have been committed in Kansas than ever before since its admission as a State ... I think that society already spares the lives of too many of its vicious members, and the more frequent infliction of the death penalty, rather than its abolition, is demanded by the highest considerations of public welfare and the public safety. While the Legislature has virtually abolished hanging as a legal penalty, the practice of hanging atrocious murderers without legal formalities has steadily increased. The opponents of capital punishment seem satisfied with what they consider the progress of legislation in this respect, and yet murderers are executed almost each month by lynch law. Thus public lynchings, with all their demoralizing and brutalizing influences, have been substituted for legal penalties."

A grand jury in Philadelphia have found an indictment unique in its way, and suggestive of old-fashioned proceedings against inconvenient women. It reads:—"That Louisa Ehrline on the 21st of June, 1886, and on each and every day thence continually until the day of the finding of this indictment was and is a common eaves-dropper, and on each and all of said days and times did listen about the houses and under the windows and eaves of the houses of the citizens then and there dwelling, hearing tattle and repeating the same in the hearing of other persons, to the common nuisances of the citizens of this Commonwealth and against the peace and dignity of the Commonwealth of Pennsylvania."

SUPREME COURT OF CANADA.

OTTAWA, July, 1887.

CANADIAN PACIFIC RAILWAY COMPANY, Applt., and ROBINSON, Respdt.

Damages—Mental Suffering—Misdirection.

HELD: (*reversing the judgment of the Court of Queen's Bench, M. L. R.,* 2 *Q. B.* 25), *that it is misdirection to instruct the jury that anguish of mind suffered for the loss of a husband may properly be taken into consideration by the jury in estimating the damages which should be awarded to the widow.*

Taschereau, J:—

I am of opinion that the judge at the trial misdirected the jury in telling them that, in assessing the amount of the damages, they might consider the nature of the anguish and mental sufferings of the plaintiff, or, in other words, that they could make an estimation of her tears, sighs, and sorrows, in pounds, shillings and pence.

Though the French law allowed a larger basis for a pecuniary compensation in such cases, I take it that now, with us, under Art. 1056 of the Code, which is the re-enactment of our statute 10-11 Vic., similar to Lord Campbell's Act, there is no difference between the English law and ours on the subject. The Privy Council held, in *Tremble* v. *Hill*, 5 App. Cas. 342, that when a colonial legislature has passed an act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the courts of the colony. And in *City Bank* v. *Barrow*, 5 App. Cas. 664, in the House of Lords, on the interpretation of an article of our Code, Lord Blackburn said that where a Colony re-enacts an Imperial Statute it is as if the English law was carried over bodily to the Colony, and in construing the Colonial law, the interpretation given to the similar law by the Courts in England should be followed. I think this reasonable rule should be followed in this case.

When by the 10 & 11 Vic., the legislature of the United Canadas re-enacted Lord Campbell's Act, it was the intention not only to provide for damages resulting from death in U. C., but also to put the law in both Provinces on the same footing. This is why the Act was extended to Lower Canada, though the common law then gave a remedy for such injuries. It cannot have been intended by this legislation that if a man was killed in Upper Canada, no solatium should be granted to his wife or legal representatives by way of damages, but that if he was killed in Lower Canada, such a solatium could be given. That in the present case, for instance, this plaintiff can get a solatium, because her husband was killed in Lower Canada, whilst if he had been killed a few miles further west, in Upper Canada, none would be granted under the same statute. The statute and the Code entirely change the law. 1st.—As to prescription, by Art. 2261, C.C., it would be two years. 2nd.—As to the parties entitled to the action. 3rd.—In giving only one action to all the parties injured. 4th.—In denying as in England (*Read* v. *Great Eastern Railway*, L. R. 3 Q. B. 555), the action where the deceased party had himself obtained an indemnity. See *Chemin de fer* v. *Margaud*, Dalloz, 72, 2.97. From this it is evident, in my opinion, that the action now given is an entirely different one from the common law action. And if different in four such important respects, can it be contended that as to a fifth, the measure of damages the principles of the common law action can be engrafted on the statutory action? This obviously would be to set at nought the intention of the legislator, who for no other reason than to have the law in both Canadas on the same footing, has extended this legislation to Lower Canada, and this, no doubt, as it was to principally affect companies incorporated for and running their roads through both Provinces.

It could not be contended, I take it for granted, that, if the English Act had been extended to Scotland, it would not receive there the same construction as is given to it by the Courts of England. A statute would not be held to mean one thing in England and another in Scotland. And, so here, I take it, it cannot mean in Lower Canada what it does not mean in Upper Canada, or give a larger remedy in one Province than in the other. Furthermore, in this section itself (1056) of the Code, there is intrinsic, and to my mind, unmistakeable evidence that the legislature intended that the measures of damages in such cases should be thereafter the same in Lower Canada as in Upper Canada. That is, in the enactment that if the deceased has himself obtained an indemnity, this will be a bar to any action by his consort or legal representatives for their injuries resulting from his death. This, as I have already remarked, is entirely new law. Previously, at common law, the indemnity received by the deceased or the action by him instituted for his injuries, was no bar to his consort or relatives' action for their

own injuries resulting from his death. They were held to be two distinct rights giving rise to two distinct actions. *Re Chemin de fer* v. *Margaud*. But now the Code, as the Statute did, though in no such express words, *Read* v *The Great Eastern* (cited above), clearly refuses a new action to the survivors in such cases. Now, is this not, as Mr. Justice Cross well remarked in the Court below, enacting as clearly as if it were laid down in so many words, that anguish of mind and mental sufferings are not to be the subject of pecuniary compensation. The injured man, if he settled before his death with the party who caused his injury, obviously did not settle for his wife's or children's anguish of mind caused by his death. So that when the action in that case is taken away from said wife or children, it is, it seems to me, equivalent to an express enactment that their anguish of mind is no ground for damages.

The Code, in my opinion, has taken away the common law action and the remedy it gave.

When *Ravary* v. *The G. T. R.*, 6 L. C. J., was decided, before the Code, it might have been a question whether the statute had had that effect; but since the Code, there can be no doubt on the subject, and that case upon that ground is entirely distinguishable.

It is expressly enacted by Art. 2613 thereof, that all laws previously in force are abrogated in all cases in which express provision is thereby made upon the particular matter to which such laws relate. This clearly leaves, for an injury caused by death, nothing but the action given by Art. 1056, and the jurisprudence is all in that sense. *Prevost* v. *Jackson*, judgment of Superior Court, 13 L. C. J. 170; *Ruest* v. *G. T. R.*, 4 Q. L. R. 181; and in appeal 1 L. N. 129; *Godbout* v. *G. T.*, 6 Q. L. R. 63. And if the statutory action only now lies, the statutory damages only can be allowed. Moreover, when *Ravary* v. *G. T.* was decided, *Read* v. *The Great Eastern Railway* had not been decided, and there was not in the statute, as there is now in Art. 1056, the express refusal of the action where the deceased had received an indemnity. That consideration was consequently not before the judges who determined that case. I would for all these reasons hold that the charge of the learned judge at the trial in this case is as illegal here as it would be in Ontario or in England.

But I go further, and hold that even under the French law, supposing that it ruled this case, the charge of the learned judge was illegal by its vagueness. Laurent, Vol. 20, p. 569, would call it dangerous. I would say it is illegal, because it is dangerous. The jury may have been led to believe under the terms it was given that they might consider the anguish of mind and mental sufferings of the plaintiff during the fifteen months that elapsed between the accident to the husband and his death. Clearly these could not be taken into consideration. Then, apart from this, there is not a single authority that sustains such a charge. In this case, there is even no evidence of what the deceased earned at his death; nothing but the speculative opinion of one witness who hardly knew him No evidence whatever of how much it would take to educate the child, to support her or her mother, not a word of all this. Now, all the authorities cited by Mr. Justice Badgley in *Ravary* v. *G. T. R.*, demonstrate that there must be some basis upon which the damages can be assessed. I need not refer to them more particularly here. As said by Mr. Justice Mondelet, in that case in the Superior Court, 1 L. C. J. 286, "If vindictive damages were to be given, without any rule, upon the mere caprice of juries excited by public clamour, there would be no safety for railway companies against the most monstrous fines."

If a jury could be charged as has been in this case, the Court would lose all control over their verdict. In the present case, for instance, a verdict for $10,000 or $20,000 would be unassailable, if this one is. It is not a question of excessive damages. How could the Court say that the damages are excessive, if it has no means to ascertain on what principles and for what they have been assessed. The Court, it seems to me, should direct the jury to state what amount they grant for actual real damages, and what amount for mental sufferings, or anguish of mind. Otherwise, the Court has no check on the verdict. The jury should also be charged that though they may take into consideration the mental

sufferings and anguish of mind of the plaintiffs, yet the damages must not be assessed to an amount out of proportion with the actual pecuniary loss they have suffered. Such are the remarks of the Court of Marseilles in the case cited by Laurent, Vol. 26, No. 525 of *Compagnie per L. M. Olivier*, reported in Dalloz 73-2-57. If in France where the damages are "à l'arbitraire du Juge," these considerations guide the Courts in the assessment of such damages, I think that with us, in a case tried by a jury, the Court should direct them that they also are to be guided by these considerations. The jury should also be told of the rule of law, that, for a death caused by an accident, they cannot give as heavy damages as for a death caused by an assassination or any crime, a rule admitted by all the writers, and mentioned by the Court in the case of Dalloz, respons. No. 196. Laurent, Vol. 20, No. 530. The law authorises vindictive damages and damages for a *préjudice moral* in cases where the party causing the death has acted with malice or committed a *délit*, but not when the death was caused by a *quasi délit*. For this proposition we have no less an authority than that of the Cour de Cassation, the highest tribunal in France, in the case of Roche, Dalloz 53-5-167, who held that "Les dommages-intérêts réclamés en matière criminelle ne doivent pas nécessairement être restreints, comme en matière civile, au préjudice matériel résultant du crime ou du délit; ils peuvent aussi comprendre le préjudice moral causé à la partie civile par ce crime ou par ce délit," said the Court. "Attendu que cet article n'est point applicable aux dommages intérêts résultant d'un délit ou d'un quasi délit; que les dommages-intérêts réclamés en matières criminelles ne sont pas de la même nature, et peuvent n'être pas restreints comme doivent l'être ceux qui sont réclamés en matière civile, que le préjudice matériel résultant d'un crime ou d'un délit peut, en outre, être accompagné d'un préjudice moral qui peut entrer dans les appréciations du juge et, par conséquent, influer sur la quotité des dommages-intérets qu'il accorde à la partie civile;—Rejette &c."

Is this not holding as unequivocally as can be, though in the negative form, that though for a crime, damages for a moral loss can be given, yet for a délit civil, or a quasi délit, none but the real damages for the pecuniary loss are allowable? And it is only for murders or other crimes that all the books and arrêts in France before the Codes allow damages. This remark applies specially to the authorities cited by Sourdat at No. 54. The arrêt of the 3rd of April, 1685, 3 Journal des Audiences, 984 (the reference in Sourdat is wrong) was in a case of a murder. In fact these cases are all trials in the criminal courts.

The respondent has invoked, as supporting the legality of the Judge's charge to the jury, a passage from Sourdat, Vol. 1, No. 33, where the author says that an indemnity is due to a son for the death of his father even if his father had been entirely supported by him. This is a mere opinion of the author, coupled with the argument of a member of the French bar in one of his cases, and then it must be remarked that the author in that passage, as in No. 54 of the same book, speaks of a death caused by a murder. The same remark applies to the passage in Demolombe, Vol. 31, No. 675. To the opinions of those commentators, I find a forcible answer by the annotator to the *Margaud* case, in Dalloz, cited *ante*, in the following words:—"Ces arguments, inspirés par des "réminiscences de notre ancienne législa-"tion, où l'action publique et l'action civile "n'étaient pas nettement distinguées comme "elles l'ont été par notre droit pénal mo-"derne, ne sont conformes ni aux principes "généraux sur la responsabilité ni même "aux sentiments qu'éveille aujourd'hui gé-"néralement dans une famille l'accident ou "même le crime qui lui a enlevé un des "siens. Il ne répugne pas moins à la loi "qu'aux sentiments les plus nobles de l'âme "humaine de faire d'un malheur de famille "une source de vengeance et de gain. La "personne qui a perdu un enfant ou un père "qui était à sa charge ne nous paraît donc "pas fondée à venir demander à l'auteur de "l'accident le prix en argent de sa douleur. "L'individu qui a éprouvé un préjudice "moral, par suite de l'atteinte portée à sa "réputation ou à son honneur est bienvenu "à réclamer une réparation, parce qu'il "craint d'avoir perdu l'amitié, l'estime et le

"respect des honnêtes gens, et qu'il veut "prendre des mesures pour faire taire ou "pour punir le mensonge et la calomnie. "Mais la personne à qui un accident a enlevé un père infirme ou un jeune enfant, "n'a reçu aucune atteinte dans sa considé"ration; son malheur a dû au contraire en "attirer de nouvelles affections et de nou"velles sympathies. Et puis, si de pareilles "questions pouvaient s'agiter devant les "tribunaux, il faudrait permettre d'appré"cier, de discuter et même de nier les sen"timents de tendresse et d'amitié qui exis"taient entre la victime et la réclamante.

"Enfin quel criterium guiderait le juge "dans la fixation des dommages-intérêts? "Il en faut donc revenir à ce principe qu'on "ne peut exiger une réparation pécuniaire "qu'à raison du préjudice souffert dans ses "intérêts matériels ou moraux; mais non "dans ses affections ou ses sympathies.

"Le juge accueillera la demande d'un "père, d'un enfant, d'une veuve, venant "dire: cette mort, qui me frappe dans mes "affections les plus chères, porte aussi un "grave préjudice à ma fortune, à mon "avenir, ou à mon honneur. Mais il ne "prêtera pas l'oreille au plaideur qui osera "dire: cette mort me cause une immense "douleur et des regrets éternels; diminuez "en l'amertume et la durée au moyen d'une "somme d'argent."

Dalloz, rep. vo. instruct. crim. No. 81:— "Il ne suffit pas pour justifier l'intervention "civile, d'une personne, qu'elle ait été "blessée dans ses affections, ses goûts ou "ses habitudes, par un fait criminel: il faut, "que l'action civile soit fondée sur un pré"judice sérieux et appréciable."

And at p. 83, "Une lésion purement mo"rale peut servir de fondement à une action "civile dès que cette lésion résulte d'un "crime ou d'un délit."

And to Mangin, action publique, No. 123, where he says "Il ne suffirait pas non "plus que le délit l'eût blessé dans ses affections."

Also to Larombière, 5 Obligations p. 716, where the writer gives the considerations that should guide the judge in the assessment of damages for mental sufferings, which I hold the judge with us should mention to the jury for their guidance.

In the *Margaud* case, Dalloz, 72.2.97, a widow with her children was suing a railway company for damages caused by the accidental death of her husband. The plaintiff recovered, but there is not a word in the judgment of solatium or damages for mental sufferings, on the contrary, the Court distinctly holds that "la réparation devant "toujours être calculée sur le préjudice réel "et sur la privation plus ou moins grande "imposée à celui qui se plaint."

See also a case of *Boesch* v. *Gitz*, cited in Merlin, quest. de droits, p. 437, vo. réparation civile, where 600 francs ($120) are granted to the widow of a man who had been killed by the defendant, pour dommages réels, but not a word of damages and sorrows and anguish of mind. The same remark applies to the case of *Caderousse-Grammont* S.V.63.1.321.

I refer also to a case of *Toire*, 17 Feb., 1819, C.N.6.2.26. It was there held that "le pré"judice résultant d'un délit ne donne pas "lieu à des dommages-intérêts s'il ne con"stitue qu'un préjudice moral et non un pré"judice pécuniaire."

I am of opinion that the appeal should be allowed and a new trial granted.

Appeal allowed unanimously.

Abbott & Co., for the Appellant.
J. C. Hatton, Q.C., for the Respondent.

COUR SUPERIEURE.

AYLMER (dist. d'Ottawa), 4 juillet 1887.

Devant WÜRTELE, J.

F. ROBILLARD et al., *Requérants*, v. BERNARD SIMARD, *Intimé*.

Election municipale—Contestation.

JUGÉ:—1. *Que l'on ne peut pas demander par la requête contestant une élection municipale, que le siège soit donné à une personne que l'on prétend avoir été élue à une autre élection.*

2. *Que dans un cas semblable on doit procéder par bref de* quo warranto.

3. *Que la personne nommée pour présider une élection municipale dans la cité de Hull,*

est nommée pour une élection particulière et non généralement pour un terme déterminé.

4. *Que la disposition qui veut que le président soit nommé 30 jours avant l'élection est indicative ou directoire, et non impérative.*

Per Curiam :—

Il s'agit dans cette cause de la contestation d'une élection partielle pour un échevin dans le quartier cinq de la cité de Hull.

Lors des élections générales dans cette cité, dans le mois de janvier dernier, l'élection de M. Thomas Fortin avait été contestée et annulée par la cour; et la cour a ordonné, conformément à la charte, qu'une nouvelle élection fût tenue pour remplacer M. Fortin.

Là-dessus, après signification du jugement, le conseil de la cité de Hull a convoqué une assemblée spéciale, dont l'avis comportait qu'elle était convoquée pour procéder à fixer un jour pour l'élection qui devait avoir lieu. A cette assemblée le conseil a procédé à fixer un jour pour la nomination des candidats et un jour pour la votation, et a aussi nommé M. Damien Richer président de l'élection en question.

Aux élections générales précédentes le Dr. Graham avait été nommé président des élections.

Le jour de la nomination de l'élection partielle, le Dr. Graham s'est présenté et prétendit agir comme le président de l'élection. Il a accepté un bulletin de nomination et a déclaré Thomas Fortin dûment élu. En même temps M. Damien Richer procédait à la nomination des candidats conformément à la résolution qui le nommait.

Deux personnes ont été mises en nomination, MM. Bernard Simard et Thomas Fortin; et M. Richer a procédé à faire faire la votation le 2 mai dernier. La votation a donné une majorité de huit voix en faveur de M. Simard, et il a été déclaré dûment élu.

Maintenant on conteste son élection.

La contestation d'une élection, conformément à la charte de la cité de Hull, doit être précédée d'un cautionnement pour les frais. Dans le cas actuel j'ai le cautionnement par devers moi; il fait partie du dossier, et est annexé à la requête. Ce cautionnement est un cautionnement pour les frais qui pourraient résulter de la contestation d'une élection qui a eu lieu le 2 mai dernier.

Maintenant, dans la requête, on allègue d'abord que le Dr. Graham ayant été nommé président des élections tenues dans le mois de janvier dernier, est demeuré président des élections partielles qui pouvaient avoir lieu dans le cours de l'année, qu'il était de droit président de l'élection qui a eu lieu pour remplacer M. Fortin dont l'élection avait été annulée; et qu'il aurait rapporté M. Fortin comme dûment élu. L'on allègue ensuite que Damien Richer aurait rapporté Bernard Simard comme élu. L'on demande par les conclusions de la requête que je déclare cette dernière élection nulle, que je déclare valide l'élection qui aurait eu lieu le 25 avril dernier sous la présidence du Dr. Graham, et que j'ordonne qu'il soit permis à M. Fortin de prendre son siège comme membre du conseil de la cité de Hull.

En vertu de la charte on peut contester les élections sous les articles 35, 36 et 37, et le juge peut faire de trois choses l'une: 1o. confirmer l'élection purement et simplement; 2o. l'annuler purement et simplement; 3o. s'il y a lieu, déclarer un autre élu. Mais pour déclarer un homme élu, il faut qu'il ait été élu à l'élection qui est contestée. La cour ne peut prendre connaissance dans une contestation d'élection, sous les articles de la charte que je viens de mentionner, que de ce qui se rapporte à l'élection ainsi contestée.

La requête conteste l'élection du 2 mai dernier, elle conteste l'élection de M. Bernard Simard; donc je ne peux prendre connaissance que de ce qui a eu lieu à cette élection, et je ne peux pas prendre connaissance d'une autre élection qui n'est pas contestée, et déclarer que M. Fortin a été dûment élu à cette autre élection. Mais s'il était prouvé que M. Fortin a obtenu la majorité légale des voix à l'élection du 2 mai, il pourrait alors obtenir le siége comme ayant été élu à cette élection, mais non pas comme ayant été élu à une autre élection.

Je n'ai pas le droit de m'enquérir en vertu du cautionnement et de la requête de ce qui a eu lieu à l'autre élection. On aurait pu venir devant le tribunal et y soumettre ses droits et ses prétentions de part et d'autre; seulement pour faire cela, il aurait fallu pro-

céder par bref de *quo warranto* en vertu des articles 1016 à 1021 du C. de P. C.

Quand on vient par le bref de *quo warranto* devant le tribunal, on commence par dire que quelqu'un a usurpé une charge et l'occupe illégalement, et on peut alléguer qu'un autre y a droit. Le Code de Procédure Civile dit que dans ce cas " le tribunal peut adjuger " sur le droit de l'une et de l'autre des par-" ties." Sur cela il aurait été de mon devoir de m'enquérir du droit de M. Simard qui occupe la charge d'échevin, et du droit de M. Fortin qu'on prétend avoir été élu à une autre élection, et de déclarer, suivant les circonstances, lequel des deux a droit à la charge.

Mais ici je suis restreint par la loi, par le cautionnement et par la procédure qui a eu lieu devant moi en vertu de la charte de la cité de Hull, à ne m'enquérir que de l'élection du 2 mai seulement.

Par conséquent, je maintiens en partie la défense en droit, et je rejette les trois paragraphes de la requête qui ont rapport à l'élection qu'on prétend avoir eu lieu le 25 avril dernier.

On procède dans la requête à prétendre que l'élection du 2 mai dernier est nulle parce que le président de l'élection n'était pas légalement nommé. On prétend que le Dr. Graham ayant été nommé dans le mois de décembre dernier, comme président des élections générales, restait en charge comme président d'élections, et que lui seul avait le droit d'agir comme président de cette élection partielle. On prétend ensuite que la nomination de Damien Richer est nulle quand même, parce que dans l'avis convoquant l'assemblée des échevins, on n'a pas indiqué qu'on procèderait alors à la nomination d'un président d'élection; et par conséquent, que l'avis n'était pas suffisant.

Je commence par ce dernier point. Je trouve que l'avis est suffisant. Un avis doit indiquer aux échevins ce dont on doit s'occuper à l'assemblée convoquée. Il n'y a pas de formule consacrée pour faire connaître quels sont les sujets dont on doit s'occuper.

Dans le cas actuel l'avis qui a été donné implique qu'on devait faire tout ce qui était nécessaire pour parvenir à tenir l'élection. Si on devait décider à cette assemblée du jour auquel l'élection serait tenue, il est évident qu'on devait aussi y nommer un président, puisque sans président il ne pouvait pas y avoir d'élection. Je répète donc que je suis d'opinion que l'avis est suffisant. Il s'agit donc seulement de savoir si le conseil avait droit de nommer un président.

Eh bien! Nulle part dans la loi trouve-t-on qu'on a créé une charge permanente, ou plutôt pour un temps fixe, d'un président d'élections.

Il n'y a pas telle charge que celle d'un président permanent ou pour un terme fixe.

La charte de la cité de Hull, dans les clauses 19 et 38, indique clairement que la charge n'est créée et n'existe que pour une élection particulière. " On nomme un président *pour cette élection*," dit la clause 19; la clause 38 déclare que le conseil doit se réunir " pour fixer un jour pour faire telle élection municipale annuelle, et pour la nomination *du président de l'élection*."

Nulle part ne parle-t-on de la nomination d'un président *d'élections*.

Comme dans les élections parlementaires, où il faut commissionner un officier-rapporteur pour chaque élection, de même dans la cité de Hull, on doit nommer un président pour chaque élection, qu'elle soit générale ou partielle.

L'élection pour laquelle un président doit agir doit donc être mentionnée dans la résolution qui le nomme. Par conséquent je trouve que la prétention soulevée par le Dr. Graham, qu'il occupe la charge de président d'élections pour un terme déterminé est mal fondée. Je suis d'opinion qu'il n'a été nommé et qu'il ne pouvait être nommé que pour l'élection générale tenue dans le mois de janvier, et que le conseil avait le droit de procéder comme il l'a fait à nommer un président pour l'élection partielle.

Il y a un autre point. On a prétendu que l'élection était nulle quand même, parce que le président n'avait pas été nommé plus de 30 jours avant l'élection. Pour une élection générale, la charte veut qu'il soit nommé 30 jours d'avance par le conseil; mais pour une élection partielle, la section 28, telle qu'amendée par le statut de 1879, déclare que " dans le cas où une élection après avoir été contestée sera déclarée nulle, les électeurs procèderont à l'élection d'une personne pour

remplacer tel échevin sous un mois après que telle élection aura été déclarée nulle."

L'on veut que l'élection ait lieu dans les 30 jours de l'annulation de l'autre élection, et il devient donc impossible de nommer un président plus de 30 jours avant l'élection. Le conseil ne peut pas nommer un président avant de savoir s'il y aura une vacance, avant de savoir que l'élection a été déclarée nulle. Il faut par conséquent concilier cette clause avec l'ensemble de la loi. Cette disposition qui veut que le président soit nommé un mois avant l'époque fixée pour une élection, n'est dans mon opinion qu'indicative ou directoire et non impérative; la loi qui veut la fin doit permettre les moyens. Je réfère à l'appui de ceci aux pages 334 et 337 de Maxwell on Statutes.

Je suis, par conséquent, d'opinion que le conseil avait le droit de nommer un président pour l'élection et que M. Richer a été nommé régulièrement.

Je rejette donc toute cette partie de la requête qui est basée sur la prétendue illégalité de la nomination du président.

Restent maintenant les autres allégations. Après avoir déclaré qu'en droit l'élection du 2 mai était une nullité, on procède à des questions de faits, et on demande l'annulation de l'élection pour différentes causes; pour corruption, manque de qualification des votants, etc. Les faits allégués seraient suffisants pour annuler l'élection s'ils étaient prouvés.

Je maintiens donc en partie la défense en droit; je retranche les parties de la requête qui ont rapport à l'élection tenue par le Dr. Graham; je déclare insuffisantes pour faire annuler l'élection les allégations quant à la prétendue illégalité dans la nomination du président, et j'ordonne aux parties de procéder à la preuve et à l'audition quant aux autres allégations.

J. M. McDougall, pour les requérants.
J. R. Fleming, C.R., conseil.
Rochon & Champagne, pour l'intimé.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, July 23.

Judicial Abandonments.

John McDougall and Robert Logie ("McDougall, Logie & Co."), merchants, Montreal, July 13.

Thomas Potvin, trader, Baie St. Paul, July 19.

Hall Bros., Stanstead, July 9.

Curators appointed.

Re Beuthner Bros., Montreal.—A. F. Riddell, Montreal, curator, July 15.

Re Andrew Fortune, Huntingdon.—J. Bte. Paradis, Montreal, curator, July 18.

Re Hypolite Lanctot.—C. Desmarteau, Montreal, curator, July 19.

Re J. A. Landry. — Kent & Turcotte, Montreal, curator, July 15.

Re John Sharpe and Henry McD. Walters (Sharpe's Express Company), Geo. Daveluy, Montreal, curator, July 18.

Dividends.

Re Butchart Bros. & Co., Rimouski.—First dividend, payable Aug. 6, H. A. Bédard, Quebec, curator.

Re Salomon Goldstone.—Dividend, payable Aug. 12, Kent & Turcotte, Montreal, curator.

Re Maurile Besner, Beauvoir. — Final dividend, payable Aug. 12, Kent & Turcotte, Montreal, curator.

GENERAL NOTES.

Dans la soirée du 25 avril dernier, on retirait d'une fontaine, à une petite distance du village de Sainte-Lumine-de-Clisson, une jeune fille de vingt-deux ans. Eugénie Tessier, domestique de ferme. La pauvre fille n'a pu être rappelée à la vie. Dans un seau, à côté du puits, on trouva quelques lignes écrites au crayon.

La victime déclarait qu'elle se donnait la mort pour échapper à la honte. Eugénie Tessier était, en effet, dans un état de grossesse avancé. Elle désignait comme son séducteur un jeune homme nommé Baron, son voisin.

L'enquête établit que ce dernier était absolument innocent, qu'il ne connaissait même pas la jeune fille, que l'écriture du billet n'était pas celle d'Eugénie Tessier, et qu'enfin la pauvre fille avait été jetée dans la fontaine, après une lutte désespérée: des passants avaient entendu de loin ses cris et ses appels déchirants.

L'opinion publique désigna un nommé Heurtaud, qui s'était fait remarquer par son empressement à retirer le cadavre. Le billet par lequel Eugénie Tessier annonçait son intention de se donner la mort était, à n'en pas douter, de la main du jeune homme Heurtaud était un coureur de filles, un débauché; il était notoirement l'amant de la jeune servante, et lui seul avait intérêt à sa disparition.

Heurtaud vient de comparaître devant la Cour d'assises de la Loire-inférieure. Il s'est défendu avec acharnement et a protesté de son innocence; il a invoqué un alibi. Mais on l'a rencontré auprès de la fontaine quelques instants avant le crime, et les égratignures dont il avait le visage couvert attestaient que c'était bien lui qui avait soutenu contre la victime la lutte suprême dont les passants avaient entendu les échos.

La Cour d'assises a consacré deux audiences à l'examen de cette affaire.

Reconnu coupable, Heurtaud a été condamné à vingt ans de travaux forcés.

The Legal News.

VOL. X. AUGUST 6, 1887. No. 32.

By an order in Council, passed at Ottawa, July 19, 1887, the "Act respecting the Executive Power," passed by the Legislature of Quebec, June 21, 1886, has been disallowed on the ground that it was not competent for the Legislature to pass such Act. The Act, which appears as ch. 98 of the Statutes of 1886, was to form the third title of the Revised Statutes, P.Q.

A statement, says the *Albany Law Journal*, was made recently to the Washington *Critic* by a gentleman, who was a prominent member of the Confederate Congress, to the effect that there was never any Supreme Court in the Confederate States. He says a bill passed the Confederate house providing for the establishment of such a court, but when it reached the Senate it was defeated by Mr. Yancey of Alabama, who took the ground that such a tribunal was antagonistic to the Confederate idea of the sovereignty of the several States, to maintain which principle they had seceded from the Union. Mr. Yancey's views were acquiesced in, but the necessity for such a final arbiter of dispute between States came up some time afterward, when the courts of one State declared that Confederate bonds could be taxed for State revenues and the courts of another State decided just the contrary. The early collapse of the Confederacy prevented further conflicting complications of the State rights doctrine, as advocated by Mr. Yancey and others.

One Penny, styling himself "Neptune the Astrologer," being convicted of unlawfully pretending to tell fortunes and deceive and impose on one Khurt, appealed unsuccessfully. Mr. Justice Denman observed (*Penny* v. *Hanson*, 18 Q. B. D. 478):—"*Res ipsa loquitur*. It is absurd to suggest that this man could have believed in his ability to predict the fortunes of another by knowing the hour and place of his birth and the aspect of the stars at such time. We do not live in times when any sane man believes in such a power. I think the magistrate was right, and that there was an intention to deceive on the part of the appellant in professing his ability to tell the fortune of Khurt." On this expression of opinion, the *Law Quarterly Review* remarks: "These words of Mr. Justice Denman should be noted by Mr. Lecky whenever he publishes another edition of his *History of Rationalism*. They mark the fall of an old belief. It is certain that two centuries ago, men of first rate ability believed that fortunes could be foretold from the aspect of the stars. We may even doubt whether his lordship's enlightenment does not mislead him as to the average condition of modern belief. Not many years have passed since excellent persons believed in table-turning. Educated men have supposed that they could learn a good deal from what a child saw, or said he saw, in a crystal ball. From a theoretical point of view, Mr. Penny might have a good deal to say for himself; practically, it is no doubt desirable that Neptune the Astrologer and the like should be treated as the rogues which they are generally found to be by their dupes."

COUR DE CIRCUIT.

MALBAIE, 14 juin 1881.

Coram ROUTHIER, J.

GUÉRIN v. BOUCHARD et al.

Motion pour congé-défaut.

JUGÉ:—*Que la motion pour congé-défaut peut être faite le premier jour juridique qui suit le jour du rapport de l'action.*

PER CURIAM.—Pour demander le congé-défaut, le défendeur a le même délai que pour comparaître. Ce n'est que le premier jour juridique suivant le rapport que le défendeur peut constater le défaut d'entrer l'action. Le demandeur peut ne rapporter son action qu'à quatre heures précises et même après tant que le greffe est ouvert. Le protonotaire ne peut constater le défaut de comparaître que le troisième jour juridique suivant celui du rapport.

J. S. Perrault, proc. du demandeur.

J. A. Martin, proc. des défendeurs.

(C. A.)

COUR SUPERIEURE.

[En Chambre.]

MALBAIE, 13 juin 1881.

Devant ROUTHIER, J.

HUOT, Requérant en prohibition, v. LA CORPORATION DE LA BAIE ST. PAUL, Intimée.

Dépôt requis pour obtenir Bref de prohibition—Requérant poursuivant in forma pauperis—Motion.

JUGÉ:—1. *Que même si le requérant procède in forma pauperis, il est tenu de faire le dépôt de $30, exigé pour garantir les frais de l'intimé;*

2. *Qu'à défaut de tel dépôt, le Bref de prohibition sera renvoyé sur motion;*

3. *Que si le requérant montre cause contre la motion demandant rejet du Bref pour ce motif, et n'offre de faire le dépôt qu'au moment où jugement va être rendu, sa demande ne sera pas accordée.*

Le juge a fait remarquer, que si le requérant, aussitôt après avis de la motion, eût offert le dépôt requis, en établissant qu'il avait été empêché de le faire par des raisons jugées valables, peut-être que la permission demandée lui eût été accordée.

J. S. Perrault, proc. du requérant.

Charles Angers, proc. de l'intimée.

(C. A.)

COUR DE CIRCUIT.

MALBAIE, 3 septembre 1881.

Coram ROUTHIER, J.

BOUCHARD v. GIRARD.

Frais d'action quand dommages sont de moins de $25.00.

JUGÉ:—*Que dans une action en dommages au montant de $25, si $2 seulement sont accordées, la Cour peut accorder plus de $2 de frais. Et que la règle, que si les dommages accordés s'élèvent à moins de £2.0.0 sterling, les frais ne pourront être plus élevés, ne s'applique pas dans les causes de $25 et au dessous, où le juge a droit de juger suivant l'équité.*

J. S. Perrault, proc. du demandeur.

J. A. Martin, proc. du défendeur.

(C. A.)

COUR DE CIRCUIT.

MALBAIE, 4 novembre 1881.

Coram ROUTHIER, J.

PERRAULT v. DROLET, & PERRON, Tiers-saisi.

Saisie-arrêt—Congé-défaut.

JUGÉ:—*Qu'une motion pour congé-défaut d'un Bref de saisie-arrêt après jugement, quand le Bref n'est pas rapporté au jour du rapport, sera accordée avec dépens.*

J. S. Perrault, proc. du demandeur saisissant.

J. A. Martin, proc. du défendeur.

(C. A.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, June 25, 1887.

Coram THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH.

THE BANK OF MONTREAL (defendant), Appellant, and SWEENY (plaintiff), Respondent.

Shares held "in trust"—Transfer in breach of trust—Responsibility of transferee.

HELD: (*Affirming the judgment of the Supreme Court of Canada, 8 Leg. News, 403*)—*Where R. held shares of a commercial corporation "in trust," and subsequently transferred these shares to a Bank, as security for his private debt, and the transfer showed on its face that he held the shares "in trust,"—that the Bank had express notice that as regard the shares transferred, R. stood to some person in the relation expressed by the words "in trust," and by such knowledge the duty was cast upon the Bank of declining to take the property until they had ascertained that the transfer by R. was authorized by the nature of the trust. And where it appeared that R. had made the transfer in violation of his duty to the owner of the shares, the Bank was bound to account for the same to the owner.*

The appeal (see 9 Leg. News, p. 6) was from the judgment of the Supreme Court of Canada (8 Leg. News, 403), reversing the judgment of the Court of Queen's Bench, Montreal which affirmed the decision of Rainville, J. in the Superior Court, Montreal (5 Leg. News, 66).

PER CURIAM:—

Their Lordships consider it to be proved in this case that Rose held the disputed shares upon a trust not disclosed by the entry in the Company's books; that he transferred them to the Bank in breach of his trust; that at the time of the transfer the Bank knew of Rose's position; and that the plaintiff turns out to be the person in whose favor the trust existed.

It has been argued for the appellants that these things are not proved, because they require a written *commencement de preuve*, and have not got it. But on this point their Lordships stopped the respondent's counsel. They are quite clear that if a written *commencement* is needed, it is to be found in the letters of Crawford and Lockhart coupled with the books of the Rolling Mills Company, and in the transfer executed by Rose to Buchanan on the 3rd June 1876.

Under these circumstances the question arises whether the Bank must not be in the same position as if they had known that the plaintiff was interested in the shares, and that the transfer by Rose was in violation of his duty to the plaintiff. Their Lordships do not impute moral blame to Mr. Buchanan or to any agent of the Bank, for those gentlemen may be guilty of nothing more than a mistake of law. Nor do they think it necessary to examine how far the relations between Rose and the plaintiff may have resembled or differed from those of an English trustee and his beneficiary, or to go into the English doctrines of constructive fraud, or constructive notice. The Bank had express notice that as regards the property transferred to them Rose stood to some person in the relation expressed by the words "in trust," and the only question is what duty was cast upon the Bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose's transfer was authorized by the nature of his trust. In fact they made no inquiry at all about the matter, following, as Mr. Buchanan says, the usual practice. So acting, they took the chance of finding that there was somebody with a prior title to demand a transfer from Rose, and as the plaintiff is such a person they cannot retain the shares against her claim.

Their Lordships are led to this conclusion by the ordinary rules of justice as between man and man, and the ordinary expectations of mankind in transacting their affairs. If indeed they found any principle of Quebec law which absolutely forbad that property should be placed in the name of a person, with a simultaneous notice providing that his power over it should not be absolute but restricted, that would control their decision. That view has been pressed upon them from the bar with great ability and force, but, as they hold, without authority to support it. The authorities cited relate to *mandataires prête-noms*, and are to the effect that, when once property has been placed under the dominion of such an agent, third parties may safely deal with him alone, even though notice is given to them that his principal is not assenting to his acts. Their Lordships think it unnecessary to examine this statement of the powers of a *mandataire prête-nom*, for they find no definition or description of such an agent which does not require that he should have a *titre apparent*, which they understand to mean that he must be ostensible owner, made to appear to the world as absolute owner. They asked whether there was any text or case to show that an agent can be a *mandataire prête-nom* when the instrument conferring the property on him carried upon its face a declaration that his property is qualified. No such authority could be found. In this case Rose was never for an instant held out to the world as absolute owner, and therefore he never could have given a good title to a third party by his own sole authority.

Then it was argued that the words "in trust" do not show a title in any other person, and that they might be merely a mode of distinguishing one account from another in the Company's books. Their Lordships think that they do import an interest in some other person, though not in any specified person. But whatever they mean, they clearly show the infirmity or insufficiency of Rose's title; and those who choose to rely on such a title cannot com-

plain when the true owner comes forward to claim his own.

It is worthy of remark that, in their plea, the appellants claim to be the true owners of the shares upon the very same principle upon which the plaintiff's claim is founded. Rose did not transfer them to the Bank by name, but to Buchanan "in trust." The appellants aver that this transfer was made as security for a debt due from Rose to them, and that the shares "are now legally held for the said Bank."

If that is the essential truth of the transaction as between Buchanan and the Bank, why should it be otherwise as between Rose and the plaintiff?

The result is that their Lordships agree in all material points with the Supreme Court of Canada. They will humbly advise Her Majesty to affirm the decree of that Court, and dismiss the appeal. The appellants must pay the costs.

Judgment affirmed.

W. W. Robertson, Q.C., counsel for appellant.
W. H. Kerr, Q.C., counsel for respondent.

SUPERIOR COURT—MONTREAL.

Action en partage — Exception à la forme —Exception dilatoire—Partie en cause.

Jugé:—Que le fait que dans une action en partage toutes les parties intéressées n'ont pas été mises en cause, ne donne pas lieu à une exception à la forme, mais à une exception dilatoire. *Montchamp* v. *Montchamp et al.*, Gill, J., 6 juin 1887.

Succession—Acceptance of, by tutrix on behalf of her minor children.

Held:—That a tutor cannot accept a succession which falls to his pupil, without an authorization granted on the advice of a family council.—*Johns* v. *Patton*, In Review, Taschereau, Loranger, Ouimet, JJ., Feb. 28, 1887.

Lumber placed without permission on property of Railway Company—Destruction of—New Trial.

Held:—1. The burning of lumber placed on the property of a railway company close to their track, without any permission express or implied, gives the owner no right of action against the company.

2. In considering whether a new trial should be granted on the ground that the verdict was rendered without evidence, or contrary to evidence, it is not enough that the judge who tried the case, or the judges in the Court where the new trial is moved for, might have come to a different conclusion from the jury, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable that the jury should return such a verdict. *Goodhue* v. *Grand Trunk Railway Co.*, In Review, Johnson, Taschereau, Gill, JJ., March 31, 1887.

Municipalité—Secrétaire-trésorier—Minutes des délibérations—Mandamus—Contribuables.

Jugé:—En droit, que tout contribuable peut prendre des procédés judiciaires pour forcer le secrétaire-trésorier d'une municipalité à entrer dans les minutes des délibérations du conseil, toute résolution qui a été régulièrement passée par ce dernier. *Massue* v. *Nadeau*, en révision, Johnson, Taschereau, Gill, JJ., March 31, 1887.

Capias — Recèlement des biens—Libération sur requête sommaire—Créance—Reddition de compte — Agence — Société commerciale — Liquidation—Résiliation de contrat.

Jugé:—1. Que pour qu'il y ait lieu à l'émanation d'un *capias*, il faut que le débiteur ait caché, cache ou soit sur le point de cacher ses propres biens; qu'une personne arrêtée sous *capias* pour avoir caché des biens appartenant au créancier qui a fait émaner le *capias*, a droit, en vertu de ce principe, de se faire libérer par une requête sommaire;

2. Que la dissolution et la liquidation d'une société commerciale met fin aux contrats intervenus entre elle et ses agents, et ces derniers peuvent être forcés de rendre leur compte;

3. Qu'une personne qui a contre son agent une action en reddition de compte ne peut faire arrêter ce dernier sous *capias*, en se basant sur la créance qui doit résulter en sa faveur de la dite reddition de compte. *Gay et al.* v. *Denard*, en révision, Doherty, Papineau, Loranger, JJ., 31 mai 1887.

*QUEBEC DECISIONS.**

Libelle—Liste des Jurés—"Stand aside."

Jugé, 1. Que l'accusé n'a pas droit, avant que les jurés soient appelés, d'obtenir communication de la liste des petits jurés.

2. Qu'en cette cause, la poursuite étant publique, le substitut du procureur général a droit d'exercer le "stand aside" au premier appel de la liste des jurés.

3. Que les noms des jurés dans un procès avec jury mixte, doivent être appelés alternativement de la liste des noms anglais, et de celle des noms français, à mesure que l'un des jurés dans chaque liste est choisi et assermenté, en commençant par le nom qui suit le juré appelé.—*Reg.* v. *Maguire*, B. R., 27 avril 1887, Dorion, C. J., et Tessier, J.

Evidence—Grand Jury—Deposition of absent witness.

Held, That affidavits taken at a preliminary investigation before a magistrate, but not in presence of the accused, cannot be used as evidence before the Grand Jury, in the absence of the witnesses.—*Reg.* v. *Carbray*, Q. B., Crown side, April, 1887, Dorion, C. J.

Association incorporée—Règlements illégaux—Responsabilité.

Jugé, Qu'une association incorporée est civilement responsable des actes illégaux que ses règlements prescrivent à ses membres. Que l'incorporation de la société des ouvriers de bord en fait une société de bienfaisance dont le seul but est de fournir des secours à ceux de ses membres que la maladie met dans l'indigence, ainsi qu'à leur famille de leur vivant et après leur mort; qu'elle n'a le pouvoir de faire des règlements que pour cet objet, et que tous les règlements de cette association qui tendent à réglementer le travail et son prix sont *ultra vires*, illégaux et nuls. *Paradis* v. *La Société des ouvriers de Bord*, Cour de Circuit, Casault, J.

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* 13 Q. L. R.

Unpaid vendor—Privilege of—Saisie-conservatoire.

Saisie-conservatoire, by unpaid vendor, of goods sold *à terme*, to secure payment by privilege from proceeds of sale, the purchaser having become insolvent within 15 days of delivery. The goods, 7,000 cigars in boxes, had been packed and shipped in one large wooden case, which had been opened by purchaser and the boxes exposed for sale. Some of the latter were broken, but 6,675 of the cigars remained in their respective boxes, with factory mark, number and revenue stamp intact, and these only were seized. *Held*, that the goods, to the extent seized, were entire and in the same condition as when sold, notwithstanding the opening of the outer bale or case, and the seizure thereof was declared good and valid. —To support a *saisie-conservatoire*, the unpaid vendor must establish the clear and certain identity of the object seized with the object sold, this being the text sanctioned by the jurisprudence of our courts, and the true one to be applied as well under the articles of the *Coutume de Paris* as of our Civil Code.—*Goulet & Green*, in appeal, Dorion, C. J., Tessier, Baby, Church, JJ., May 9, 1887.

Eau courante—Servitude—Action négatoire.

Celui dont l'héritage est traversé par une eau courante peut s'en servir, à la charge de la rendre, à sa sortie, à son cours naturel.

Depuis au-delà de trente ans, au moyen d'une saignée pratiquée dans la rivière Port Joli, en amont du terrain du demandeur, le défendeur détournait, sans la rendre ensuite à son cours naturel, et au préjudice du demandeur, une partie des eaux de la dite rivière. Et le demandeur l'a poursuivi au moyen d'une action négatoire pour faire cesser ce détournement.

Jugé, Que le défendeur n'ayant, pour justifier l'exercice de cette servitude, aucun titre émanant du demandeur ou de ses auteurs, le détournement qu'il faisait d'une partie des eaux de la rivière Port-Joli était illégal, et défense lui est faite de continuer l'exercice de la dite servitude, et ordre lui est donné de faire tous les travaux requis pour rendre à leur cours naturel toutes les

eaux de la dite rivière.—*Bélanger* v. *Dupont*, Cour Supérieure, Angers, J., 16 février 1886.

Durée de l'usufruit—Arts. 479 et 481 C. C.—Prescription des dommages réels.

Jugé, Qu'une réserve de coupe de bois établie dans un acte de donation en faveur d'un enfant du donateur, *à prendre à son besoin tant qu'il y en aura*, est de la nature d'un usufruit, prend fin à la mort de la personne avantagée, et ne passe pas à ses héritiers.

Que les dommages représentant la valeur du bois pris sur la propriété du demandeur par le défendeur ne se prescrivent pas par deux ans.—*Pelletier* v. *Caron*, C. S., Montmagny, Angers, J., 12 mai 1887.

Usurpation de terrain—Possessoire—Bornage.

Jugé, Que dans notre droit, il existe une action pour forcer l'usurpateur d'un terrain à prendre titre, si mieux il n'aime déguerpir ou en payer la valeur réelle.—*Guay* v. *Chrétien*, en appel, Dorion, C. J., Monk, Tessier, Cross, Baby, JJ., 4 février 1887.

Vente non enregistrée d'un vaisseau sujet à l'enregistrement—Responsabilité du vendeur, propriétaire enregistré, après cette vente.

Jugé, Le propriétaire réel, quoique non enregistré, d'un vaisseau sujet à l'enregistrement, est seul responsable des avances faites à ce vaisseau, et le fournisseur n'a pas de recours contre le vendeur, bien que ce dernier, par les registres de la douane, semble être encore le seul propriétaire du navire.—*Hudson* v. *Tremblay*, cour de circuit, Casault, J., 6 avril 1887.

Assignment—Consideration—Surety—Discussion.

Appellant sold real estate, notarially, making price payable to the respondent accepting, but no value was alleged for the assignment. One J. J. became a party to the deed as surety for the purchasers, in favor of respondent. Appellant bound himself to pay respondent the amount so transferred, should purchasers fail to do so. The latter became insolvent before complete payment, and the respondent sued appellant for the balance due. She had previously granted a year's delay to the surety J. J., but took no action against him. The appellant pleaded, (1) That respondent showed no interest and had given no consideration for the transfer; (2) That no demand appeared to have been made upon the parties primarily liable; (3) Novation, the debt having become that of J. J. by the additional delay granted him.

Held, 1. That the appellant could not controvert his own deed of conveyance to the respondent of the money she was delegated to receive, and it must be presumed that he had received consideration for such conveyance.

2. That owing to the insolvency of the principal debtors, no demand upon them was necessary nor could have been effective, beyond the filing of a claim in insolvency, which the respondent must have done in order to receive a dividend as alleged by appellant.

3. That no novation was operated by the granting of delay to the surety J. J., who was bound, not to the appellant, but to the respondent.—*Shaw & Lloyd*, in appeal, Dorion, C. J., Monk, Tessier, Cross, Baby, JJ., Feb. 4, 1882.

COUR D'APPEL D'AIX.

24 mai 1887.

Présidence de M. Bessat, premier président.

Consorts Hémelot v. Consorts Desoudin.

Testament olographe—Date—Rectification—Enonciations—Pouvoir des Tribunaux—Caractères imprimés—Nullité.

1. *Dans un testament olographe, une date erronée, insuffisante ou incomplète peut être rectifiée par des éléments de détermination nette, précise, certaine, puisés dans le testament lui-même.*

Spécialement le testament écrit sur une feuille de papier à lettres, dont l'en-tête et les trois premiers chiffres du millésime 1884 *sont imprimés, est valablement daté lorsqu'il est possible de compléter la date au moyen d'énonciations du testament.*

2. *La présence sur la feuille où est écrit ce testament de signes graphiques sans valeur et inutiles (dans l'espèce l'en-tête imprimé et les chiffres du millésime) n'a point pour effet d'entraîner la nullité du testament comme contenant un ou plusieurs mots tracés d'une main étrangère.*

A la date du 13 décembre 1886, jugement du tribunal civil de Barcelonnette.

Sur appel, la Cour a infirmé le jugement de la cour inférieure, en ces termes:

La Cour,

Attendu qu'il a été reconnu en fait par toutes les parties que le testament de Jules Desoudin, versé au procès par Alphonse Desoudin, a été écrit sur une feuille de papier à lettre dont l'en-tête est imprimé; que les trois premiers chiffres du millésime 1884, c'est-à-dire que les chiffres 188 sont imprimés et que le chiffre 4 a été écrit de la main du testateur.

Attendu qu'en l'état de ces faits il y a lieu de résoudre deux questions:

Primo: le testament est-il daté?

Secundo: le testament est-il vicié par la présence, sur la feuille où il est écrit, de mots émanés d'une main autre que celle du testateur?

Sur la première question:

Attendu que les trois premiers chiffres du millésime n'étant pas écrits par le testateur sont sans valeur et doivent être considérés comme inexistants en tant qu'on voudrait les employer comme élément de la date; qu'il en résulte que la date est incomplète, n'énonçant que le quantième et le mois, et non l'année;

Attendu qu'une date erronée, insuffisante ou incomplète, peut être rectifiée ou complétée; en d'autres termes, qu'il peut être suppléé à la date en termes exprès par des éléments de détermination nette, précise, certaine, puisés dans le testament lui-même et *non aliunde;*

Attendu que c'est ce qui se réalise clairement dans l'espèce; qu'en effet le chiffre des unités du millésime étant de la main du testateur n'a pas besoin d'être suppléé, que le chiffre du siècle l'est sans la moindre ambiguité possible par la personnalité du testateur qui est né et mort au dix-neuvième siècle; que l'écriture et la signature de cette œuvre, émanée incontestablement de lui, ne peuvent être d'un autre siècle;

Attendu que le chiffre des dizaines est mis au-dessus de toute incertitude et absolument fixé par le texte du testament lui-même où il est fait l'allusion la plus claire au mariage de Mlle Juliette Desoudin, où le testateur parle du mari de cette personne, subordonne son legs à l'hypothèse de la séparation des époux, leur reproche de s'être mariés sans contrat, et parle de la façon étrange dont ils se sont comportés "le jour de leurs noces" qui ont été célébrées en 1879, ce qui exclut toute date antérieure; or il n'existe depuis 1879 qu'un millésime renfermant le chiffre 4 écrit de la main du testateur, savoir 1884:

Sur la deuxième question:

Attendu que des exigences de l'art. 970 C. civ., il faut sans doute tirer la conséquence que la présence dans le testament d'un seul mot non écrit par le testateur entraîne la nullité du testament; que, alors même que ce mot serait superflu dans le testament, on pourrait à la rigueur arriver à la même conséquence; mais que cette rigueur ne saurait se justifier que par l'application du principe d'après lequel le testament olographe doit être l'œuvre exclusive du testateur, et par la crainte qu'une collaboration quelconque ou même que la présence et l'intervention d'une tierce personne même, se manifestant seulement par des indices matériels, ait altéré, ne fût-ce que dans la plus faible mesure, l'entière liberté d'esprit du testateur;

Attendu que ces considérations ne sauraient s'appliquer à l'existence, sur la feuille du papier où est couché le testament, des signes graphiques, sans valeur inutiles, ainsi que cela a été établi ici sur la première question, à la réunion des éléments de validité de l'acte, apposée par une main étrangère et, comme ici encore, à l'aide d'un procédé mécanique bien antérieurement à la confection du testament, de telle façon qu'il est certain que le testateur n'en est pas moins resté seul en face de cette feuille sur laquelle, sans l'intervention d'aucun tiers, il a tracé de sa propre main tous les termes de l'acte desquels résultent l'énonciation de sa volonté et toutes les indications constituant un testament valable;

Attendu, par conséquent, que le testament dont s'agit doit sortir à effet;

Sur la qualité de la partie de Me Jourdan;

Attendu que l'acte par elle demandé doit lui être concédé avec franchise des dépens;

Par ces motifs,

Met l'appellation, et ce dont est appel, au néant;

Emendant,

Déboute le sieur Victor-Alexandre Hémelot, ès-qualités, des fins de la demande en partage formée par François Antonin Hémelot, avant d'être frappé d'interdiction légale;

Dit que le testament olographe du 25 mai 1884, ouvert régulièrement et déposé aux minutes de Me Arnaud, notaire à Barcelonnette, en vertu duquel la demoiselle Delphine Desoudin et le sieur Alphonse Desoudin ont été envoyés en possession suivant ordonnance rendue par M. le président du Tribunal de Barcelonnette, en date du 7 août 1884, sera exécuté suivant sa forme et teneur;

Concède acte à Philippe-Jules Lemonnier, ès-qualités, de ce qu'il a déclaré s'en rapporter à justice;

Condamne Victor-Alexandre Hémelot, ès-qualités, à tous les dépens de première instance et d'appel.

NOTE.—Sur le premier point: Jurisprudence constante.

Sur le deuxième point: Le testament olographe est nul lorsqu'il s'y trouve un ou plusieurs mots d'une main étrangère, à moins que ces mots ne fassent pas partie du testament ou qu'ils n'y aient été ajoutés à l'insu du testateur, V. Montpellier 28 janvier 1873 (S.73,2.241) et la note de M. Lyon-Caen. *Sic:* Aubry et Rau, VII, § 668 p. 102, texte et note 2; Demolombe, t. XXI, Nos. 62-69; Merlin, Rép., Vo. Testament, sect. II, § 4, art. 3 No. 3; Toullier, V, No. 358. Comp.: Demante, IV, 115 *bis;* Vazeille, sur l'art. 970, No 2.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, July 30.

Judicial Abandonments.

Alice Mary Swalwell and Margaret McKenna ("The Boston Millinery Rooms"), Montreal, July 27.

Curators appointed.

Re Albina Beaupré (Mrs. Foy).—Kent & Turcotte, Montreal, curator, July 21.

Re Wm. Daoust.—C. Desmarteau, Montreal, curator, July 26.

Re Auguste Remi Hudon, Lake Weedon.—H. A. Bedard, Quebec, curator, July 25.

Re L. H. Marchand, Batiscan.—Kent & Turcotte, Montreal, curator, July 25.

Re McDougall, Logie & Co.—A. F. Riddell, Montreal, curator, July 22.

Re Thomas Potvin, Baie St. Paul.—H. A. Bedard, Quebec, curator, July 27.

Re Jacob G. Schynman ("A. Beaudry & Co.")—W. A. Caldwell and M. Sternberg, Montreal, joint curator, July 19.

Re S. A. Valois.—C. Desmarteau, Montreal, curator, July 22.

Dividends.

Re Victor Aubut.—Dividend, payable Aug. 19, Kent & Turcotte, Montreal, curator.

Re Aimé Trudeau, St. Isidore.—Dividend, payable Aug. 19, Kent & Turcotte, Montreal, curator.

Separation as to property.

Margaret Miller vs. Simon Zelatus Derick, St. Georges de Henryville, July 25.

Appointments.

H. C. Cabana and G. F. Bowen, Sherbrooke, to be joint prothonotary of the Superior Court, clerk of the Circuit Court, clerk of the Crown and clerk of the Peace for the district of St. Francis, July 12.

SIR HENRY JAMES'S ADDRESS TO LAW STUDENTS.—The annual dinner of the United Law Students' Society was held, on May 25, at the Holborn Restaurant, when nearly 100 students and guests sat down. Sir Henry James presided, and in proposing the toast of the evening, 'The United Law Students' Society,' dwelt upon the absolute necessity of self-help, self-examination, and self-instruction, and went on to observe that no profession was so unjustly dealt with as theirs. He knew of no profession which allowed itself to be spoken of as theirs was. If ministers or officers of the army were so referred to, explanation would immediately be called for; but lawyers had to be content and make no reply. He believed there was no profession that had borne itself more honourably and more truly than the profession of the law. There were prizes to be obtained; but, although there were not so many as in the past, there were enough. Those prizes, however, great as they were, were nothing unless they were obtained by fair and honourable means; and in any course he had felt compelled to adopt he was compensated by the approbation of his fellow-men.

The Legal News.

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We publish this week the text of the opinion delivered by their lordships of the Judicial Committee, in the case which so deeply affects the Province of Quebec - the validity of the provincial Act imposing taxes on commercial corporations doing business within the province. Their lordships affirm the decision of Justices Ramsay, Tessier and Baby, of our Court of Queen's Bench, reported in M. L. R., 1 Q. B. 122—199. The case was one which the late Mr. Justice Ramsay examined with the most profound attention, and he never entertained the slightest doubt as to the soundness of the conclusion arrived at by the majority of the Court, though he freely admitted that it was possible to construct a very plausible argument against it. The Judicial Committee, having probably examined the case before the hearing, did not think it necessary to call upon counsel for the respondent.

The *Law Journal* (London) criticizes one portion of the judgment, as follows:—"The citation by the Judicial Committee of the Privy Council of John Stuart Mill for a definition of indirect taxation in an Act of Parliament was not happy. For purposes of legislation and political economy Mill's distinction that indirect taxes are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another, was sufficient. His point of view was that of the statesman; but, when the powers of a Legislature are concerned, it is necessary to look, not at the intention of the Legislature, but at the effect of its Act. Is a tax on the paid-up capital of companies carrying on business within the province a direct tax, which form of tax the Legislature of Quebec had, under the British America Act, 1867, power to impose, or was it an indirect tax? The Judicial Committee appear properly to have decided that it was a direct tax. It is true that it would reduce the amount available for shareholders' dividends, and thereby perhaps increase the amount extracted from the customers of the company; but if the fact that the taxpayer endeavours to make more income because he has to pay more tax, is to turn a direct tax into an indirect tax, it is difficult to see how there can be a direct tax, except perhaps a tax on fixed incomes. The Committee appear also properly to have declined to scrutinise closely the possibility of the Act of the Provincial Legislature affecting persons outside the province, as, for example, passengers on a line of railway outside the province belonging to a railway within it. It would seem enough if the legislation substantially acts within the province. We do not know what Lord Cairns would have said to the confession at the end of the opinion delivered by Lord Hobhouse that 'the result was not wholly for the same reasons.' This is no technical breach of the order that 'how the particular voices go' is not to be divulged; but to reveal that there was any difference of opinion even as to reasons is to break the spirit of the rule. It is an indication, however, of the impossibility of attempting to produce a seeming unanimity among half a dozen lawyers on a question of law. We hope some day to see the Judicial Committee give their reasons *seriatim* in the good old common-law fashion."

Whatever may be the merits of their lordships' decision, and however unfortunate it may be as regards the peculiar position of the Province of Quebec, this criticism does not appear to us to be a "happy" one. In the first place their lordships expressly repudiate Mills' explanation as a legal definition, and only refer to it as the one preferred by the appellants' counsel, and are only disposed to make use of it so far as it may be assumed to throw light upon the intention of the Imperial Parliament (not of the provincial legislature) in using terms, the vagueness of which has often been criticized. The concluding observations of the *Law Journal* are based upon a misconception of the observation of Lord Hobhouse. It is clear from the report that what his lordship meant to say, and did

say, was that the Judicial Committee did not altogether agree with the reasons given by the Court of Queen's Bench—not that the Committee differed among themselves.

Pandorf & Fraser, the rat case, noted in vol. 9, p. 247, has been reversed by the House of Lords. The appeal was from the judgment of the Court of Appeal, which reversed the decision of Lopes, J. The action was for damage done to a cargo of rice. The excepted perils mentioned in the charter-party were dangers and accidents of the sea. The damage was caused by sea water which flowed in through a hole gnawed in a metal pipe by rats. The first Court thought that the case was within the exception. The Court of Appeal, however, considered that the effective cause was the gnawing through of the pipe by the rats, and that this was not a peril of the sea. The House of Lords (Lord Chancellor Halsbury, and Lords Watson, Bramwell, Fitzgerald, Herschell and Macnaghten), have now restored the original ruling. The *Law Journal* says: "The decision of the Lords that the letting in of sea-water by a rat gnawing through a pipe is a peril of the sea is in accordance with common sense, and Lord Bramwell's judgment makes historic the definition by Lord Justice Lopes of 'peril of the sea' as 'sea damage at sea and no one in fault'."

The Lord Chancellor, on July 28, replying to a deputation from chambers of commerce on the subject of tribunals of commerce, made the following observations:—"The matter is, in my judgment, of very great importance. As I think was said by a judge of the last century, the City has given the law to Westminster Hall. I quite follow that in the ever-varying nature of commerce it may be that there ought to be a degree of elasticity both in the law and in the tribunals which administer the law which, perhaps, the crystallised form of our tribunals does not always recognise. I should like you to consider whether you are all perfectly familiar with what our present system of administration is. When I first remember Westminster Hall and the City of London I believe better tribunals than we had then for the administration of the commercial law it was impossible to obtain. You had the first merchants of the City serving as jurors, and though they were not called commercial judges they were in truth commercial judges. You had the direction of the law from the judge, and you had sitting in the jury box, as a general rule, twelve special jurymen of the City of London, all of them engaged in commerce and generally persons in a very high position. I do not say that that is so now. I quite admit that a change has come over the system by reason of an alteration, right or wrong, of the jury system, and that under the changing circumstances it may be necessary to make some alteration in the system. The matter shall receive my most careful attention."

The Selden society, the formation of which was noticed on p. 65, is about to bring out as its first publication a volume of thirteenth century Pleas of the Crown, from the Eyre Rolls preserved in the Public Record Office. Many of these criminal cases, it is said, are very interesting, and they throw more light than cases of almost any other class on the manners and customs of the people.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

London, July 9, 1887.

Coram Lord Hobhouse, Lord Macnaghten, Sir Barnes Peacock, Sir Richard Baggallay, Sir Richard Couch.

The Bank of Toronto, Appellant, and Lambe, Respondent; The Merchants Bank of Canada, Appellant, and Lambe, Respondent; The Canadian Bank of Commerce, Appellant, and Lambe, Respondent; The North British Mercantile Insurance Company, Appellant, and Lambe, Respondent.

Constitutional Law—45 Vict. (Q.) ch. 22—Direct and indirect taxation—B. N. A. Act, 1867, *s.* 92, *s.s.* 2, 16.

Held:—(*Affirming the judgment of the Court of Queen's Bench, M.L.R.*, 1 *Q.B.* 122), *that the taxes imposed on corporations by*

the Act 45 Vict. (Q.) ch. 22, are direct taxes, and such as are authorized by sect. 92, sub-sect. 2 of the B.N.A. Act, 1867.

2. *A corporation doing business in the Province is subject to taxation under sect. 92, sub-sect. 2, though all the shareholders are domiciled or resident out of the Province.*

Lord Hobhouse:—These appeals raise one of the many difficult questions which have come up for judicial decision under those provisions of the British North America Act 1867, which apportion legislative powers between the Parliament of the Dominion and the Legislatures of the Provinces. It is undoubtedly a case of great constitutional importance, as the appellants' counsel have earnestly impressed upon their Lordships. But questions of this class have been left for the decision of the ordinary courts of law, who must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes. A number of incorporated Companies are resisting payment of a tax imposed by the Legislature of Quebec, and four of them are the present appellants. It will be convenient first to deal with the case of the Bank of Toronto, which was argued first.

In the year 1882 the Quebec Legislature passed a statute entitled "An Act to impose "certain direct taxes on certain commercial "Corporations." It is thereby enacted that every Bank carrying on the business of banking in this province; every Insurance Company accepting risks and transacting the business of insurance in this province; every incorporated Company carrying on any labour, trade, or business in this province; and a number of other specified Companies, shall annually pay the several taxes thereby imposed upon them. In the case of banks the tax imposed is a sum varying with the paid up capital, and an additional sum for each office or place of business.

The appellant Bank was incorporated in the year 1855 by an Act of the then Parliament of Canada. Its principal place of business is at Toronto, but it has an agency at Montreal. Its capital is said to be kept at Toronto, from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the province of Quebec, and the amount disposable for the Montreal agency, are respectively much less than the amount belonging to other persons and the amount disposable elsewhere.

The Bank resists payment of the tax in question on the ground that the Quebec Legislature had no power to pass the statute which imposes it. Mr. Justice Rainville sitting in the Superior Court took that view, and dismissed an action brought by the Government Officer, who is the respondent. The Court of Queen's Bench, by a majority of three Judges to two, took the contrary view, and gave the plaintiff a decree. The case comes here on appeal from that decree of the Court of Queen's Bench.

The principal grounds on which the Superior Court rested its judgment were as follows:—That the tax is an indirect one; that it is not imposed within the limits of the province; that the Parliament has exclusive power to regulate banks; that the Provincial Legislature can tax only that which exists by their authority or is introduced by their permission; and that if the power to tax such banks as this exists, they may be crushed out by it, and so the power of the Parliament to create them may be nullified. The grounds stated in the decree of the Queen's Bench are two, viz., that the tax is a direct tax, and that it is also a matter of a merely local or private nature in the province, and so falls within Class 16 of the matters of provincial legislation. It has not been contended at the bar that the Provincial Legislature can tax only that which exists on their authority or permission. And when the appellants' counsel were proceeding to argue that the tax did not fall within Class 16, their Lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds have been argued very fully, and their Lordships must add very ably, at the bar.

To ascertain whether or no the tax is lawfully imposed, it will be best to follow the method of inquiry adopted in other cases.

First, does it fall within the description of taxation allowed by Class 2 of Section 92 of the Federation Act, viz., "Direct taxation "within the province in order to the raising "of a revenue for provincial purposes"? Secondly, if it does, are we compelled by anything in Section 91 or in the other parts of the Act, so to cut down the full meaning of the words of Section 92 that they shall not cover this tax?

First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

After some consideration, Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows:—

"Taxes are either *direct* or *indirect*. A *direct tax* is one which is demanded from the very persons who *it is intended or desired* should pay it. *Indirect taxes* are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the *excise* or *customs*."

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

It is said that Mills adds a term,—that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the Legislature.

Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious *indicia* of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

Now whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec Legislature must have intended and desired that the very Corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the Bank apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the Bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the Bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the Bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government. For these reasons their Lordships hold the tax to be direct taxation within Class 2 of Section 92 of the Federation Act.

There is nothing in the previous decisions on the question of direct taxation which is adverse to this view. In the case of the *Queen Insurance Company*, 3 App. Ca. 1090, the disputed tax was imposed under cover of a license to be taken out by insurers. But nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was to be stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under Class 9 of Section 92, which relates to licenses. In *Reed's* case, 10 App. Ca. 141, the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most, instances would certainly not be paid by the person first chargeable with it. In *Severn's* case, 2 Sup. Court of Canada p. 70, the tax in question was one for licenses which by a law of the Legislature of Ontario were required to be taken for dealing in liquors. The Supreme Court held the law to be *ultra vires*, mainly on the grounds that such licenses did not fall within Class 9 of Section 92, and that they were in conflict with the powers of Parliament under Class 2 of Section 91. It is true that all the Judges expressed opinions that the tax, being a license duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question is not either in substance or in form a license duty, further examination of that point is unnecessary.

The next question is whether the tax is taxation within the province. It is urged that the Bank is a Toronto Corporation, having its domicile there, and having its capital placed there; that the tax is on the capital of the Bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that Class 2 of Section 92 does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may legally be taxed there if taxed directly. This Bank is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the Bank, any more than its profits. The Bank itself is directly ordered to pay a sum of money; but the Legislature has not chosen to tax every bank, small or large, alike, nor to leave the amount of tax to be ascertained by variable accounts or any uncertain stan-

dard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay. The banks are to pay so much, not according to their capital, but according to their paid-up capital, and so much on their places of business. Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the province, it is for the Legislature, and not for Courts of law, to judge of its expediency.

Then, is there anything in Section 91 which operates to restrict the meaning above ascribed to Section 92? Class 3 certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the Provincial Legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two Sections was noticed by way of illustration in the case of *Parsons*, 9 L. R. App. Ca. Their Lordships there said (page 108):—"So 'the raising of money by any "mode or system of taxation' is enumerated "among the classes of subjects in Section "91; but, though the description is sufficiently large and general to include 'direct "taxation within the Province, in order to "the raising of a revenue for provincial "purposes,' assigned to the Provincial Legislatures by Section 92, it obviously could not "have been intended that, in this instance "also, the general power should override the "particular one." Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the Provincial Legislatures.

It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within Class 2, viz. the regulation of trade and commerce; and within Class 15, viz. banking, and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words "regulation of trade and commerce" are indeed very wide, and in *Severn's* case it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But since that case was decided, the question has been more completely sifted before the Committee in *Parsons'* case, 7 App. Ca., and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the Provincial Legislatures. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parsons'* case, they would be straining them to their widest conceivable extent.

Then it is suggested that the Legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of Classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit

on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great Judge in a parallel case. But he was dealing with the Constitution of the United States. Under that Constitution, as their Lordships understand, each State may make laws for itself, uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a Constitution, Chief Justice Marshall found one of those limits at the point at which the action of the State Legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the Provincial Legislatures under Section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under Section 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself, except under the control of the whole acting through the Governor General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within Section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament.

It only remains to refer to some of the grounds taken by the learned Judges of the lower Courts, which have been strongly objected to at the bar. Great importance has been attached to French authorities who lay down that the *impôt des patentes*, which is a tax on trades, and which may possibly have afforded hints for the Quebec law, is a direct tax. And it has been suggested that the Provincial Legislatures possess powers of legislation either inherent in them, or dating from a time anterior to the Federation Act and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondents' counsel, and therefore possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent on these points. They cannot think that the French authorities are useful for anything but illustration. And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the Provincial Legislatures rests with the Parliament.

The result is that, though not wholly for the same reasons, their Lordships agree with the Court of Queen's Bench. And they will humbly advise Her Majesty to affirm their decree, and to dismiss the appeal of the Bank of Toronto.

The other three cases possess no points of distinction in favour of the appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants' Bank of Canada has its principal place of business in Montreal, and to that extent, loses the benefit of one of the arguments urged in favor of the other Banks. The Insurance Company is taxed in a sum specified by the Quebec Act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favor of the Banks. The cases have been treated as substantially identical in the Courts below, and their Lordships will take the same course with respect to all of them.

The appellants in each case must pay the costs of the appeal.

Appeal dismissed.

W. H. Kerr, Q.C., Counsel for the Appellants.

C. A. Geoffrion, Q.C., Counsel for the Respondent.

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*COURT OF QUEEN'S BENCH—MONTREAL.**

Pleading—Misnomer—45 *Vict.* (*D.*) *ch.* 23, *s.* 20—*Commercial Companies—Proceedings against company after order for liquidation.*

Held:—1. A misnomer is ground for an exception *à la forme*, and cannot form the subject of a plea to the merits,—more particularly where the error complained of is trivial and unimportant, *e.g*, the description of the defendant as "La Corporation des Commissaires d'école d'Hochelaga" instead of "Les Commissaires d'école d'Hochelaga."

2. The Act 45 Vict., ch. 23, (D.) applies to incorporated commercial companies, the *erratum* distributed by the Queen's Printer with the statutes, which supplied an omission in section one, forming an integral part of the Act in question.

3. Under section 20 of said Act, when a winding-up order has been made, no proceeding can be taken against the company in liquidation without the permission of the Court, and therefore in the present case the immoveables of the company could not be sold in ordinary course for school taxes without such permission.—*La Corporation des Commissaires d'Ecole d'Hochelaga*, appellant, and *Montreal Abattoirs Co.*, respondent; Dorion, Ch. J., Tessier, Cross, Baby, JJ., Feb. 22, 1887.

Sale à réméré—Term—Notice—Mise en demeure—Chose Jugée.

Held:—1. Where a property was sold, and the purchaser bound himself to re-convey it to the vendor within three months from the time he (the purchaser) should have completed a house then in course of construction thereon, on being paid $3,000,—that it was the duty of the purchaser to notify the vendor of the completion of the house; and, in default of such notice, the right of redemption might be exercised by the vendor after the expiration of the three months.

2. The exception of *chose jugée* cannot be pleaded where the conclusions of the second action are materially different from those of the first. And so, where by the first action the plaintiff sought to exercise a right of redemption without complying with the conditions agreed on, it was held that the dismissal of such action was not *chose jugée* as regards an action brought subsequently, offering to comply with the conditions. *Léger*, Appellant, and *Fournier*, Respondent, Dorion, Ch. J., Tessier, Cross, Baby, JJ., Dec. 31, 1886.

* To appear in Montreal Law Reports, 3 Q.B.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 6.

Judicial Abandonments.

L. Polydore Gagnon, trader, St. André.

Curators appointed.

Re J. M. Duval, St. Antoine.—L. N. Paquet, Rivière du Loup Station, curator, July 28.

Re Nazaire Garon, Notre Dame de Sacré Cœur.—Kent & Turcotte, Montreal, curator, August 2.

Re J. B. Phénix, St. Théodore d'Acton.—J. O. Dion, St. Hyacinthe, curator, July 30.

Dividends.

Re C. Berthiaume & Cie., hatters and furriers.—Dividend, Seath & Daveluy, Montreal, curators.

Re Louis Lamontagne, wood and coal dealer, Ste Cunégonde.—Dividend, Seath & Daveluy, Montreal, curator.

Separation as to property.

Delphine Charest *vs.* Louis Bisson, tailor, Montreal. August 2.

Caroline Brien *dit* Lapierre vs. Alexandre Sigouin plumber, Montreal, August 2.

Appointments.

J. B. Resther, architect, Alfred Perry, underwriter, and F. X. Berlinguet, architect, to be official arbitrators of the Province.

GENERAL NOTES.

Lord Coleridge was much exercised some time ago on learning, for the first time, that no means exist for giving effect to a judgment of the House of Lords but a motion in the court below. The motion which the Chief Justice has carried without opposition in the Upper House, remedies this defect by providing that the judgments of the House shall in future be formally notified to the courts which are affected by them. This we presume means that henceforth, when a judgment of the Court of Appeal is reversed, judgment will thereupon be finally entered in that court in accordance with the decision of the House of Lords, without further expense to the parties. It is highly characteristic of the haphazard way in which our national institutions get into shape, that this result has only been reached at the present date.—*Law Times.*

The Legal News.

VOL. X. AUGUST 20, 1887. No. 34.

The benchers of Lincoln's Inn have made an edifying innovation upon the ordinary style of legal banquet. On the 3rd August, they entertained 600 poor children of the neighbourhood in the gardens of the Inn. Tea was provided in two large marquees, and when the children left at 8 o'clock they were each presented with a toy and a bun and a glass of milk. In addition to the most ample provision for refreshment, Punch and Judy shows and marionettes were provided for the amusement of the children. Lord Justice Cotton, Mr. Justice Kekewich, Mr. Barber, Q.C., and other well-known members of the bar, assisted by ladies, did their utmost to make the outing a success, and to contribute to the enjoyment of the children.

The sale of a wife in England, noticed in 7 Leg. News, 7, is matched by the following account of an exchange of wives in France, from the *Gazette du Palais* of July 7. It is rather curious that in each case the same amount of punishment was administered:—

La femme Jules Aubrioux comparaissait hier avec son beau-frère Romain Aubrioux devant la neuvième Chambre du Tribunal correctionnel. Tous deux sont prévenus d'adultère.

Voici ce qu'a répondu Romain Aubrioux aux questions que lui posait M. le président.

—Monsieur le président, il y a six ans j'ai été habiter avec ma femme chez mon frère qui était maçon comme moi et marié comme moi... Pendant deux ans nous avons vécu tranquilles... chacun battait ou aimait sa chacune... on se chamaillait chacun de son côté... ça allait bien... Pourtant au bout de la seconde année, j'ai vu que ma belle-sœur me faisait des agaceries... J'ai rien dit d'abord... mais un jour, comme elle m'embrassait, je lui ai dit que c'était honteux, que je le dirais à mon frère.—Ton frère, qu'elle me dit, ton frère, c'est un joli salaud... je l'ai pincé avec ta femme.—Ma femme?—Ta femme... Alors je leur ai tombé dessus. Eh bien, tu ne sais pas ce qu'il m'a dit .. Il m'a dit:—Eh bien! couche avec mon frère si tu veux, je m'en fiche... D'abord j'ai pas voulu; mais il me pousse tout le temps, pour que je lui flanque la paix... c'est lui qui le veut... tant pis!— Dame, monsieur le président, ça m'a salement abruti... Ma femme, cette femme, tout ça, ça m'embrouillait. Enfin j'ai été avec ma belle-sœur; et nous sommes restés comme ça encore un an, très tranquilles... Mais, au bout d'un an, mon frère a filé avec ma femme, et m'a laissé la sienne... Tant pire, que j'ai dit à Louise; ton mari file; je te garde! Mais deux ans après, ma femme est morte... Alors mon frère qu'avait besoin d'une femme, est venu reprendre la sienne. Justement, on venait de m'enfermer dans un asile, parce que j'avais été un peu fêlé .. Quand je suis rentré chez moi, plus de Louise .. Tant pire, que je me suis dit... Mais un jour voilà Louise qui revient. "Mon mari me bat, qu'elle me dit, reprends-moi." Je l'ai encore gardée et alors mon frère nous a fait piger... Vous voyez, Monsieur le Président, ça n'est pas tout à fait notre faute...

Le plaignant n'a pas démenti ces assertions.

Les prévenus ont été condamnés chacun à six jours de prison.

The *Law Journal* (London), referring to the Libel Bill before the Imperial Parliament, says:—"The bill to amend the law of libel, which is backed by Sir Algernon Borthwick, Mr. Jennings, Mr. John Morley, and Mr. Lawson, when amended, as it should be in the calm interval of the recess, will make a useful legal project. The words 'published in any newspaper' should be struck out of all its clauses. It is bad policy to suggest a change in the law applicable only to a special industry, and there is no reason why the protection asked should not be shared by books, pamphlets, and publications generally. By clause 3 it is proposed to give an absolute privilege to fair reports of proceedings in Court. This goes too far, as it would privilege a malicious person to supply a newspaper with a report of proceedings which otherwise would not be published at all, and thus injure his enemy, and he might even contrive to have the necessary libellous matter introduced in Court for this purpose and afterwards published. What is 'any Court exercising judicial authority'? Does it include an arbitration? If so, it would destroy the privacy of arbitrations so often advantageous. Clause 4, which deals with the reports of public meetings, appears to suggest issues in regard to the reasonableness of the explanation declined to be inserted which cannot very easily be determined. Clause 5, which adds to the effect of an apology by requiring that the plaintiff shall prove special damage, is clumsily contrived. It ought to create a substantive defence which would appear on the pleadings, and not raise a defence in the event of some-

thing being pleaded. Clause 7 gives power to require security for costs in an action of libel from a plaintiff who has ever been adjudicated a bankrupt, and is already sufficiently and better provided for by the County Court Act, 1867. Clause 8, which is to absolve innocent proprietors from criminal liability, would apply to seditious libel, which is not expedient; and the question arises generally whether, in return for these privileges, newspaper proprietors ought not to have imposed upon them a liability to give up the name of the writer of a libel in their publication, or in the alternative take their chance in the action as his representative."

COUR SUPERIEURE.

SAGUENAY, 31 janvier 1887.

Coram ROUTHIER, J.

PICHETTE v. LAJOIE.

Billet promissoire—Défaut de considération—Cessionnaire de bonne foi.

JUGÉ:—*Que le cessionnaire après maturité d'un billet promissoire consenti sans considération, peut cependant en recouvrer le montant, s'il lui a été cédé par un porteur apparemment de bonne foi, qui l'avait reçu avant maturité.*

PER CURIAM.—L'action est fondée sur un billet promissoire consenti par le défendeur à J. L. Martineau, endossé par ce dernier *avant l'échéance* à J. S. Budden, et par celui-ci *après l'échéance* à Pichette, le demandeur—pour valeur reçue.

Le défendeur ne paraît pas avoir reçu considération pour ce billet; mais la question est de savoir s'il peut opposer ce moyen au demandeur qui paraît être *porteur de bonne foi* du dit billet.

Il n'est pas douteux que si le billet n'avait été transporté à Budden *qu'après son échéance*, la défense eut pu être déclarée bien fondée. Mais Budden en est devenu le porteur légitime *avant l'échéance*, et si l'action eut été prise par ce dernier il est incontestable que le défendeur n'aurait pas pu lui opposer le *défaut de considération*. Or par l'endossement du billet en faveur du demandeur, Budden lui a transporté *tous ses droits*, et le défaut de considération qui aurait pu être opposé à Martineau, mais non à Budden, ne peut l'être non plus au demandeur qui est aux droits de Budden.

Les autorités suivantes ne laissent aucun doute sur cette question. Journal du Palais —13 *juillet* 1820.

La jurisprudence généralement adoptée, c'est: "que le sort de l'effet de commerce est irrévocablement *fixé dans la main de celui qui s'en trouve propriétaire au moment de l'échéance.*" *Répertoire* juris. vbo. endosseur, No. 107.

Story on Prom. Notes, No. 178. "If the transfer is made after the maturity of the note, the holder takes it as a dishonored note, and is affected by all the equities *between the original parties*, whether he has any notice thereof or not. Still, however, subject to such equities, the holder by indorsement after the maturity of a note *will be clothed with the same rights and advantages as were possessed by the indorser*, and may avail himself of them accordingly."

Chitty on Bills, ch. 6 (p. 247) No. 217. In the transfer of an overdue note, "the indorsee takes it on the credit of the indorser, and must stand *in the situation of the person who was holder at the time it was due;* and this latter opinion is now the law." No. 218. "In other words, the rule is that a person who takes a bill or note after it is due takes it subject to all objections and equities affecting the instrument itself, and to which it was liable in the hands of the person from whom he takes it." No. 220. "A party, however, to whom an overdue bill has been indorsed is *clothed with all the advantages of the party from whom he received it;* and therefore it has been decided that in an action by the second indorsee against the acceptor of a bill of exchange, if the person who indorsed to the plaintiff could himself have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in smuggling, although it was indorsed to the plaintiff after it had become due." *Chalmers* v. *Lanion*, 1 Campb. p. 383.

Perkins, annotateur de Chitty, 13ème édition américaine, p. 250, résume la jurisprudence américaine sur ce point dans la note suivante:

"When a note is negotiated in season, it may afterwards pass from one indorsee to another after it is due; and the holder will be equally with the first indorsee protected in his title." 3 Kent (5th edit.) 92. *Smith* v. *Hiscock*, 14 Maine, 449. *Thompson* v. *Shephard*, 12 Metcalf, 311.

2 *Parsons* on Notes, p. 26. "The indorsee has all the rights *of his immediate indorser*, and sometimes more."

Action maintenue.

J. S. Perrault, proc. du demandeur.

Charles Angers, proc. du défendeur.

(C. A.)

QUEBEC DECISIONS.*

Cession de biens—Reddition de compte—Déclaration de tiers saisi—Défenses—Enquête.

Jugé :—1. Que les cessionnaires des biens d'un insolvable doivent au cédant un compte de leur administration;

2. Que ni la déclaration qu'ils font comme tiers-saisis, ni sa justification, sur contestation, ne peuvent tenir lieu de ce compte;

3. Que la dénégation de l'obligation de rendre compte et l'offre d'un compte sont des moyens contradictoires et incompatibles; que la contestation ainsi liée ne l'est que sur la demande à fin de compte, qui doit être vidée avant qu'il soit procédé au débat du compte offert;

4. Que si les cessionnaires ont, sur la contestation liée, examiné, pour prouver le compte offert, des témoins que la partie adverse a transquestionnés, cette preuve peut, à la discrétion du tribunal, être réservée pour servir, plus tard, sur les débats et soutennements.—*L'Heureux* v. *Lamarche et al.*, en révision, Stuart, J. C., Casault, Caron, JJ., 31 janvier 1885, confirmé par la Cour Suprême, 12 Can. S. C. R. 460.

Capias—Cession de biens—Pouvoirs législatifs.

Jugé :—1. Que la saisie et vente des biens apparents d'un débiteur par un de ses créanciers n'empêche pas la demande de cession de ses biens;

2. Que la jonction d'une dette, pour laquelle il y a instance pendante, à une autre dette excédant $40 n'invalide pas le *capias ad respondendum*, qui reste valide pour la seconde;

3. Que, pour l'obtention légale du *capias ad respondendum*, il suffit que la déposition, outre la dette, constate que le défendeur est un commerçant, qu'il a cessé ses paiements et a refusé de faire cession de ses biens pour le bénéfice de ses créanciers;

4. Que l'Acte 48 Vict. (Q.) ch. 22, n'est pas *ultra vires*; et que la cession de biens et leur distribution, que cet Acte autorise, ainsi que l'émanation du *capias ad respondendum* qu'il permet, sont compris dans les sujets sur lesquels "The B. N. A. Act, 1867," l'autorise à législater.—*Parent* v. *Trudel*, en révision, Stuart, J. C., Casault, Caron, JJ., 28 février 1887.

Pétitoire—Possesseur de bonne foi—Fruits et revenus—Impenses—Améliorations—Compensation—C. C. 411, 412.

Jugé :—Le possesseur de bonne foi en vertu d'un titre, a droit de retenir l'immeuble sur lequel il a fait des améliorations utiles, jusqu'à ce que le propriétaire lui ait payé la plus value donnée à l'immeuble par ces améliorations.—*Nugent & Mitchell*, en appel, Dorion, J. C., Monk, Tessier, Cross, Baby, JJ., 5 février 1887.

* 13 Q. L. R.

COUR D'APPEL DE DOUAI.

20 juin 1887.

Présidence de M. Mazeaud, premier président.

Demoiselle C... v. R...

Séduction—Responsabilité—Promesse de mariage—Preuve

1. *Une demande en dommages-intérêts, formée par une fille séduite contre son prétendu séducteur, et fondée sur le préjudice à elle causé par une promesse de mariage que celui-ci lui aurait faite, et la séduction qui s'en serait suivie, ne peut être accueillie qu'autant qu'il est établi, qu'il y a eu réellement promesse de mariage, et que cette promesse a été antérieure à la séduction.*
2. *Et il y a lieu, pour la preuve de cette promesse de mariage, d'appliquer les principes du droit commun en matière de preuve, c'est-à-dire que la preuve testimoniale n'en est admissible qu'appuyée d'un commencement de preuve par écrit.*

"Attendu que Marie C... a assigné Emile R... en 4,000 fr. de dommages-intérêts pour réparation du préjudice causé et allègue à l'appui de sa demande, qu'étant domestique chez les époux R..., leur fils Emile lui promit de l'épouser, finit par la séduire en lui réitérant ses promesses, et qu'à la suite des rapports intimes qui s'établirent entre eux, elle devint grosse et accoucha le 11 septembre 1885; que subsidiairement, et avant faire droit, elle demande à prouver un certain nombre de faits énumérés en ses conclusions;

"En droit:

"Attendu que, s'il est indiscutable que la demoiselle C... puisse former contre R... une demande en dommages-intérêts, basée sur le préjudice à elle causé par la promesse de mariage, la séduction qui s'en serait suivie et l'inexécution de cette promesse, ce droit est soumis à une double condition expresse; qu'il faut, en effet, que la promesse soit antérieure à la séduction et qu'elle soit préalablement établie;

"Attendu que rien dans l'espèce n'autorise de déroger aux principes formulés aux art. 1341 et 1348, C. civ.;

"Attendu que la demoiselle C... ne rapporte pas dès à présent cette preuve; qu'elle ne peut résulter des termes de la lettre du 20 mars 1885, qui même ne pourrait constituer un commencement de preuve par écrit; qu'en effet, les termes de cette lettre, postérieure de quatre mois à la grossesse, ne sont ni formels, ni clairs, ni précis; qu'il n'y est fait aucune allusion à une promesse de mariage antérieure à la séduction et l'ayant motivée;

"Attendu que ce fait qui est l'élément essentiel du délit reproché à P... est formellement dénié par celui-ci;

"Attendu que la promesse de mariage n'étant pas établie dès à présent, il n'y a pas lieu de s'arrêter aux conclusions subsidiaires;

"Par ces motifs,

"Déboute la demoiselle C... de sa demande, fins et conclusions."

"Sur appel de la demoiselle C..., arrêt:

LA COUR,

Adoptant les motifs des premiers juges,

Confirme.

NOTE.—Il n'est point douteux, dans l'état actuel de la jurisprudence, que la séduction, qui a été exercée au moyen d'une promesse de mariage, puisse donner ouverture au profit de la fille séduite contre le séducteur à une action en dommages-intérêts. V. Colmar 31 décembre 1863; Grenoble 18 mars 1864 et Rouen 15 janvier 1865 (S.65.2.169); Nimes 2 janvier 1867 (S. 67.2.39); Rennes 1? mai 1885 (Gaz. Pal. 85.1.719); Bordeaux 23 novembre 1886 motifs (Gaz. Pal. 87.1.284). Mais il a été déjà jugé qu'une action de cette nature ne peut être reconnue fondée qu'autant qu'il est établi que la promesse de mariage a été antérieure à la séduction: Grenoble 18 mars 1864 et Bordeaux 23 novembre 1886 (*loc. cit.*) Quant à l'application des règles du droit commun, pour l'administration de la preuve de la promesse de mariage, V. dans le sens de l'arrêt ci-dessus: Paris 19 janvier 1865 (S. 65.2.5). *Sic:* Laurent, t. II, No. 310. *Contrà:* Demolombe, Mariage, t. I, No. 33.—*Gaz. Pal.*

COUR DE CASSATION (CH. DES REQUÊTES).

27 juin 1887.

Présidence de M. BÉDARRIDES.

EPOUX LELÉDY v. POISSON-MILON.

Donation—Testament—Dol—Suggestion—Captation—Nullité.

Une donation et un testament sont nuls, lorsque le donateur ou testateur, induit en erreur par des manœuvres trompeuses, n'eût point donné ou légué s'il n'y avait été déterminé par ces manœuvres et s'il eût connu la vérité. La volonté de donner ou de léguer, qui est de l'essence des dispositions à titre gratuit, fait, en effet, en pareil cas défaut.

La constatation du caractère dolosif et l'effet déterminant des moyens de captation ou de suggestion suffit pour motiver l'annulation de la disposition à titre gratuit, qui en est infectée, quels que soient, d'une part, le bénéficiaire de la disposition, et, d'autre part, l'auteur des manœuvres dont il s'agit.

LA COUR,

Sur le premier moyen du pourvoi (sans intérêt, manque en fait):

Sur les deuxième et troisième moyens réunis pris l'un et l'autre de la violation de

l'art. 1116 C. civ. et en outre pour le deuxième moyen, de la violation de l'art. 7 de la loi du 20 avril 1810:

Attendu que la volonté de donner ou de léguer est de l'essence des dispositions à titre gratuit; que cette volonté n'existe pas lorsque le disposant, induit en erreur par des manœuvres trompeuses, n'eût point donné ou légué s'il n'y avait été déterminé par ces manœuvres, et s'il eût connu la vérité; qu'en conséquence, la constatation du caractère dolosif et de l'effet déterminant des moyens de captation ou de suggestion suffit pour motiver l'annulation de la disposition à titre gratuit qui en est infectée quels que soient, d'une part, le bénéficiaire de cette disposition et, d'autre part, l'auteur des manœuvres dont il s'agit;

Attendu que l'arrêt attaqué, après avoir exposé avec détails les manœuvres employées à l'égard de la dame Poisson-Lefèvre pour l'amener à disposer de ses biens au détriment de son petit-fils, constate que les faits relevés par les enquêtes constituent au plus haut degré une captation dolosive au moyen de laquelle on a obtenu de la dame Poisson, induite en erreur, tant la donation du 7 décembre 1883, que le testament du 11 décembre même année; qu'ainsi l'arrêt attaqué, dont les motifs satisfont aux prescriptions de l'art. 7 de la loi du 30 avril 1810 et reposent sur une base légale, n'a point violé l'art. 1116 C. civ.;

Rejette.

NOTE.—Sur le premier point: l'art. 47 de l'ordonnance de 1735 mentionnait spécialement la suggestion et la captation comme cause de nullité des dispositions testamentaires. Aucune disposition du Code ne mentionne, au contraire, cette cause de nullité des dispositions à titre gratuit. Cependant la jurisprudence et les auteurs n'ont jamais hésité à l'admettre dans notre droit actuel, et cette manière de voir se trouve, en effet, pleinement justifiée par les travaux préparatoires du Code. Le projet du Code civil de l'an VIII contenait d'abord une disposition ainsi conçue: "La loi n'admet point la preuve que la disposition n'a été faite que par haine, colère, suggestion ou captation." On craignit que cette disposition, qui devait avoir pour objet de tarir la source de ces sortes de procès, dont la fréquence, dans l'ancien droit, aurait le champ trop libre à la vexation et à la calomnie, ne dépassât son but; on craignit, comme l'a dit Bigot-Préameneu (Exposé des motifs), que la fraude et les passions ne fussent enhardies et encouragées, en croyant trouver, dans la loi elle-même, un titre d'impunité, et l'on supprima toute disposition spéciale à cet égard dans le Code, pour s'en remettre à la sagesse des tribunax.

La captation et la suggestion sont donc, en principe, restées sous l'empire du Code, comme sous l'empire de la législation antérieure, une cause d'annulation des dispositions à titre gratuit, lorsqu'elles ont été empreintes de dol, c'est-à-dire, comme le disent Aubry et Rau, § 654, t. VII p. 67, lorsqu'elles ont été accompagnées de pratiques artificieuses ou d'insinuations mensongères, et qu'il résulte des circonstances que le testateur ou donateur n'eût pas disposé s'il eût connu la vérité des faits. V. Cass. 14 novembre 1831 (S.31.1.427): 15 mai 1861 (S.62.1.1049 — J. du P. 63.298 — D.62.1.32). Comp.: Douai 12 mars 1867 joint à Cass. 21 juillet 1868 (S. 68.1.411—J. du P.68.1099—D. 69.1.40); Caen 28 juillet 1873 (S. 74.2.139—J. du P.74.605—D.74.5.165); Chambéry 9 août 1876 joint à Cass. 6 août 1877 (S.78.1.272—J. du P.78.677—D.78.1.163). *Adde:* Duranton t. VIII, n. 161; Demolombe, Donations, t. I, Nos. 384 et suiv. Massé et Vergé, t. III, § 422, notes 3 et 4; Aubry et Rau, *ubi suprà;* Laurent, t. XI, Nos. 132 et 133.

Sur le premier point: V. conf.: Besançon 26 novembre 1856 (S.57.2.224—J. du P. 56.2. 584—D.57.2.138); Cass. 16 mars 1875 (S.77.1. 117—J. du P.77.275—D.76.1.491); 2 janvier 1878 (S.78.1.103—J. du P. 78.251—D.78.1.136). *Sic:* Aubry et Rau, t. VII, § 651, note 6; Demolombe, Donations, t. I, No. 383; Laurent, t. XI, No. 132.—*Gaz. Pal.*

A GENERATION OF JUDGES.

The author of "A Generation of Judges," does not give his name, simply calling himself "their reporter," though he might with reason have revealed his identity. There is nothing in his book to be ashamed of; nothing to be particularly proud of; it is simply an intelligent account, illustrated by anec-

dotes, of the judges of the past generation, beginning with Cockburn and ending with Jessel, and including some great names of lawyers—like Benjamin — who were very near the Bench but did not quite reach it. Cockburn, the first on the list, will always, we think, be a memorable figure in the modern history of the English bench. A scholar, especially a master of modern tongues, a wit, an orator, a gentleman of fascinating presence, he had also great industry and great powers; and every gift he had he used to its fullest capacity. Indeed, he was as a young man given up to all the pleasures of the great world of London. "Whatever happens," he is reported to have said, "I have had my whack," a sentiment which has been uttered more elegantly but to the same effect in classic poesy and in English literature as well. It is the opinion of the reporter of these judges that the reputation of having passed a stormy youth gave Lord Cockburn a certain popularity. This is possible. Public favor is very eccentric; it is given to extremes. Pitt and Fox, respectability and recklessness, shared between them a great popularity. Disraeli and Gladstone were men certainly of very opposite characters, yet each commanded public support. Reckless "good-fellowship" and evangelical rectitude, each has a certain constituency, the boundary lines of which it is not easy to draw. There is a window in the robing room of the Castle of Exeter, out of which Cockburn, when on circuit, had once to escape. He did not willingly choose that circuit in after years. To the last he continued to be a man of fashion as well as a man of law :—

"Cockburn's days and nights during the term were spent with a regular irregularity. He would return from his work at court and after dinner he would be found at the opera or a concert indulging his love for music; or at a reception, or perhaps he entertained a party of his own friends, indulging, it might be, the prima donna of the day, at the famous table of which he was the life and soul. He always went to bed between one and two in the morning, with a nightcap of whiskey and water. His habit of moderate hours and strict temperance was in a life the duties and pleasures of which were both laborious, perhaps the cause of his reaching his seventy-eighth year. He did not rise early in the morning, but just in time to take a hurried breakfast and dash into his carriage with the words 'To Guildhall as hard as you can go.'"

His two great cases were the Tichborne case and the Washington treaty, or Geneva arbitration affair, both of which have been impressed on the public mind. But the professional mind will probably retain longest his marvellously industrious and learned judgment in the Franconia case, which bears upon our own claim of territorial jurisdiction in the matter of the fisheries. The decision in the Franconia case has always seemed to me to have been misunderstood on this side of the water as being adverse to the claim of territorial jurisdiction, a marine league from shore, in the matter of the fisheries. Now, the case was discussed in three courts under various aspects, and Mr. Benjamin, who may be taken to have been the ablest counsel in the case, expressly gives up the argument against fishery jurisdiction, and confined himself mainly to the point of the jurisdiction of the English Admiralty court, either in criminal cases or in the form of action brought under Lord Campbell's act against the owners of the Franconia.

Mr. Justice Lush was a judge of quite another character. His name is not suggestive of sanctity, but he was a regular preacher at a Baptist chapel in Regent's park. But he did not carry his peculiar theology into court, his only exhibition of difference from other judges being that when he sentenced a prisoner, instead of "And may God have mercy on your soul," he would say "And may you be led to seek and find salvation." But he was not austere and, like a fine old English gentleman all of the olden time, he kept up the delightful, but dangerous habit of finishing a bottle of port after dinner. He would have been wiser had he stuck to claret which, when properly corked, insinuates itself into the intellect without disturbance and prolongs conversation without shortening life. Of Baron Cleasby, who does not figure largely, one good characteristic anec-

dote is given. He was a mild mannered, timid man, a Tory, of course, and hated to sentence people to disagreeable sentences. "*You are one of the worst men I ever tried,*" Cleasby would say, "*and the sentence of the court is that you be imprisoned for one month!*" There are some good things about Byles, whose book on "Bills" is so familiar to law students. He had a sorry nag which the profession called "Bills," so that they could say, "There goes Byles on "Bills;'" but he and his clerk called the beast "Business," so that when he was riding, of which he was very fond, it could be said that he was "out on Business." This same wag was the cause of a very good joke which can be appreciated only by lawyers who know the seventeenth section of the statute of frauds. "Suppose," said Mr. Justice Byles to a counsel in a case, "that I were to agree to sell my horse, etc.," and he gave an illustration too apt for the counsel to get over, so the only resource he had was to say, maliciously, "Oh, my Lord, the section only applies to *things of the value of ten pounds!*" Once a prisoner was tried before him for theft, and medical testimony was given that the man was subject to kleptomania. "Yes," said the judge, "that is what I am sent here to cure." Mr. Justice Martin was an oddity who had a great disregard for all displays of learning, for obvious reasons. On one occasion in a real property case a very learned counsel referred to the laws of Howel Dha. "I don't believe there was such a person," said Baron Martin. The same dreadful baron was once found reading Shakespeare. "Why, Martin," said a brother judge, "I had no idea you were a student of Shakespeare." "Well," said the baron, "I never read him before, but I have been reading him for the last twenty minutes, and from what I have seen of him *I think him a very overrated man.*" He was fond of cock fighting, and once a prisoner on being called for sentence said: "I hope your lordship will not be hard on me; and perhaps your lordship would *accept a beautiful game cock I have at home.*" The judge gave him not a very severe sentence, and then said, "Mind, don't send me that game cock."

The sketch of Lord Hatherley is edged with a certain amount of satire. "On Sundays," says the reporter, "he taught in a school, and every anniversary of his wedding day he wrote a sonnet to his wife. *With all this* he would not have been chancellor but for an accident. He was a man after Mr. Gladstone's heart, who could give a most tenderly conscientious aid to everything his party chief wished to accomplish." His father was the Alderman (afterwards mayor) Wood who was one of Queen Caroline's friends in the contest with the king, and who was mercilessly satirized by Theodore Hook in the "John Bull." Lord Cairns, who comes next, was also a religious and even theological judge. He ran his race in life under very disadvantageous conditions. His health was simply wretched and for many years he was simply "kept alive" by various medicaments. Nevertheless he was a Q.C. at thirty-seven, and solicitor-general at forty. He was never rich; and a relative had to endow his peerage for him. He cast a certain gloom about him. "Not to stay to prayers at Cairns' house after a reception was supposed to be fatal to the chances of the aspirant." Cairns was a great favorite with Disraeli, as Hatherly was with Gladstone. He made a greater number of appointments than most occupants of the woolsack; from 1874 to 1880 he appointed Archibald (a Nova Scotian, brother of Sir Adam Archibald), Field, Lindley, Huddleston, Manisty, Hawkins, Lopes, Fry, Stephen and Bowen. Of Jessel, who died only in 1883, at least one good story is told. He was of the Israelitish race and he dropped his *h's*. An old story arises out of this habit. When at the Bar he was cross-examining a French witness through an interpreter in a patent case, in regard to a certain chemical compound of a poisonous character. "If you 'eat it?" asked Jessel. "Si vous le mangez?" said the interpretor. "Mangez!" said the witness, lifting up his hands in horror, "Mais, ce n'est pas pour manger!" It was some time before Jessel could get on sufficiently intimate terms with the evasive letter to induce the interpretor to ask what would happen "si vous l'échauffez?" We have also an account here of Judah Benjamin, whose career certainly contains all the elements of a great and success-

ful romance. He was born a British subject, at St. Croix, in the West Indies; he was of the Jewish race; he was a senator of the United States; he was Attorney-General of the Confederation under Jeff. Davis; he lived in England and died in Paris, having become a domiciled resident of Paris. "Benjamin was not possessed of any graces of manner or appearance. He was a short round man with a strong American accent, pronouncing jury as if it were 'jewery.'" He made great sums as a lawyer, and but for his Confederate history, and his age no doubt, he would surely have gone to the bench. But it would not have been a wise thing to do to appoint such a man to such a position, even many years after the fall of the Confederacy. It is noticeable that in these accounts of famous English judges, there are hints of many weaknesses of temper, of industry, and sometimes even of moral character. "I have seen all the great English journalists," said George Augustus Sala, "and none of them are ten feet high." It is quite likely that if we could transplant men like the late Judge Ramsay, the present Chief Justice Hagarty, or the ex-Equity Judge Ritchie, of Nova Scotia, to the bench of England they would shine there by virtue of learning, of industry, of keenness of intellect, of dignity of manner and of probity of character, and even by virtue of a certain wit repressed in some cases on account of the too short distance which in some ways separates the bench from the bar.—"*M.J.G.*" *in the Gazette.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 13.

Judicial Abandonments.

E. Beaudet et al., Quebec, August 2.

Nazaire Fournier, Sherbrooke, August 8.

J. Levi Gaudette, Montreal, August 2.

Curators appointed.

Re Louis S. Bisson, Montreal.—Kent & Turcotte, Montreal, curator, August 9.

Re Alice Mary Swalwell and Margaret McKenna, (The Boston Millinery Rooms).—J. M. M. Duff, curator, Montreal, August 9.

Re J. Levi Gaudette.—C. Desmarteau, Montreal, curator, August 9.

Re L. H. Lafleur, Yamaska.—Kent & Turcotte, Montreal, curator, August 4.

Re Damase Rocheleau.—C. Desmarteau, Montreal, curator, July 22.

Dividends.

Re Clément Berthiaume, Contrecœur.—First and final dividend, payable August 30, A. E. Gervais and A. L. Kent, Montreal, joint curator.

Re Eusèbe Bourgoing, Ste. Flavie.—First and final dividend, payable August 24, H. A. Bedard, Quebec, curator.

Re J. A. Landry, Montreal.—First and final dividend, payable September 5, Kent & Turcotte, Montreal, curator.

Re F. X. Rinfret, Matane.—First and final dividend, payable August 24, H. A. Bedard, Quebec, curator.

Re Félix Vachon, St. Eugène.—First and final dividend, payable August 24, H. A. Bedard, Quebec, curator.

Separation as to property.

Minnie J. Condy vs. Charles F. Pharaoh, trader, Cowansville, August 5.

Sophronie Monbleau vs. Odilon Rémillard, farmer, Ste. Marguerite de Blairfindie, July 8.

GENERAL NOTES.

A ludicrous illustration of the proneness often shown by counsel to identify themselves with their clients, has been contributed in the course of hearing a breach of promise case at the Liverpool Assizes. The plaintiff, described as "an attractive-looking widow of about thirty-five," brought an action against a local licensed victualler named William Henry Veevers, to recover damages, and was awarded [illegible] The plaintiff was represented by Mr. Segar, who observed, in the course of his opening statement, "Our case is that for a considerable time, since the end of 1885, the defendant has been courting us." This extraordinary attribution of affection to the defendant elicited from Mr. Justice Wills the query, "Are you and the solicitor, then, coming into the courtship?" After this illustration of counsel's identification with client, there is no longer occasion to doubt the veracity of the anecdote about the barrister appealing to the judge, on behalf of a woman just found guilty of murder, in the startling words, "My lord, we are on the point of becoming a mother."—*Irish Law Times.*

Disons-le, parce que c'est si invraisemblable que ça doit être vrai: les époux Guyot, chiffonniers, prévenus de vol, paraissent assurément de bonne foi dans leurs explications.

En chiffonnant, à Aubervilliers, ils ont trouvé une montre et une alliance; ces deux objets ils les ont vendus à un brocanteur; tel est le vol qui leur est reproché.

Or, la montre et la bague ont été, leur dit M. le président, trouvées dans les décombres de l'Opéra-Comique.

Le prévenu.—Mais, mon président, nous n'en savions rien, ma femme ni moi; nous avons trouvé ça à Aubervilliers, dans la décharge de la rue du [illegible] quand le tombereau est arrivé, et qu'on l'a déchargé, nous y avons couru, comme d'autres chiffonniers; nous trouvons une vieille montre toute noire......

M. le président.—Eh bien, cela aurait dû vous indiquer qu'elle avait été noircie dans un incendie.

Le prévenu.—Nous n'avons pas pensé à ça.

M. le président.—En tout cas, vous avez bien [illegible] à aller vendre la montre et la bague, au lieu d'aller les porter au commissaire de police.

Le prévenu.—Je n'ai jamais entendu dire qu'il fallait porter les objets chiffonnés chez le commissaire de police.

M. le président.—Les chiffonniers savent parfaitement cela.

Le Tribunal les a condamnés chacun à six jours de prison.

The Legal News.

VOL. X. AUGUST 27, 1887. No. 35.

An interesting and important work is said to be in preparation by Lord Justice Bowen. It is a history of the English law during the fifty years of the Queen's reign. Mr. Block, his lordship's clerk, has also published a table of the Judges of England during the same period.

In a communication to the London *Times* on the subject of inquests on fires, Sir Sherston Baker states that, "until the year 1860, coroners frequently held inquests on fires, although the same were unattended by loss of life. In that year this desirable practice was stayed by the decision of the Court of Queen's Bench in *Regina* v. *Herford*, prohibiting a coroner from making inquiry into fire when unattended by loss of life—a question which I have investigated at some length in the columns of the last May number of the *Law Magazine and Review*. The Coroners Bill now in the House of Lords affords, in my humble judgment, a very excellent opportunity for repairing the evil effects of the result of the decision in *Regina* v. *Herford*. Section 48 of the above bill provides that coroners 'shall not hold inquests of felonies except felonies on inquisitions of death.' Therefore no inquests can be held by a coroner in a case of arson unaccompanied by death. I submit that the words 'and except in cases of suspected arson or of fire from an unknown cause,' or words to that effect, should be added to the above sentence. The colony of New South Wales have already provided for such cases by passing an Act, immediately after the decision in *Regina* v. *Herford*, enabling the coroner of the place where any property is damaged by fire to make an inquisition into the cause of the same. The costs of a fire inquest in England, would, in the absence of further legislation, be payable as heretofore—namely, by the person requesting the coroner to hold the inquiry."

Mr. Justice Lawson, of the Irish Queen's Bench Division, who died Aug. 10, was born in 1817. He took his degree at Trinity College, Dublin, in 1838. In 1840 he was called to the Irish Bar. Subsequently, he was appointed to the Whately Professorship of Political Economy in Dublin University, as successor to the late Isaac Butt. He soon obtained a large practice in the Courts of Equity, and was made Q.C. in 1857. Subsequently he held the office of Solicitor-General in 1859, and of Attorney-General in 1865. In 1868, he was appointed a Judge of the Common Pleas, and in 1882 was transferred to the Queen's Bench Division. In November of that year an attempt was made upon his life by a man named Delany, who was mixed up in the Phœnix Park murders. The *Law Journal* says:—"With most of the good qualities which belong to cultivated Irishmen, warmth of heart, wit, a liberal tincture of literature, and the power of speech, he was a learned lawyer, free from the fault of some of his countrymen, over whom rhetoric and imagination are apt to have too great a command."

NEW PUBLICATIONS.

DICKSON ON THE LAW OF EVIDENCE IN SCOTLAND, recast, adapted to the present state of the law, and in part re-written, by P J. H. Grierson, B.A., Advocate. Edinburgh, T. & T. Clark. Toronto, Carswell & Co.

This is a new edition of a standard work. Mr. Dickson published his treatise on the law of evidence in Scotland in 1855. A second edition was issued in 1864 under the superintendence of Mr. Skelton, in which the original text was retained. The present edition aims to express accurately the law as it is to-day. All that is obsolete, or that is of purely historic interest is omitted. The work treats first of the admissibility and effect of evidence, and under this (1) of the primary rules of evidence, (2) of the secondary rules of evidence, (3) of primary and secondary evidence, and (4) of restrictions of the mode of proof. The second book relates to instruments of evidence, and herein is treated (1) of written evidence, (2)

of the oaths of the parties to the cause, and of affidavits, (3) of testimony, or the evidence of persons examined as witnesses, and (4) of real evidence. The text is extremely clear and concise, the references are comprehensive, and brought down to the latest date, and the arrangement generally excellent. Mr. Grierson's part in the present edition is much beyond that of the ordinary editor of a new edition, and enhances the value of an excellent treatise. The work may be consulted with advantage by the lawyer in this Province.

SUPERIOR COURT—MONTREAL.*

Promissory note — Collateral security— Imputation of payments—Laches—Art. 1161 *C.C.*

Where a bank took a note endorsed by a customer as security for past advances amounting to about $10,000, and after the maturity of this note, deposits amounting to more than $100,000 were passed to his credit in the books of the bank:—

Held, That in the absence of any special imputation of payments or reserve as to the application of the subsequent deposits, these deposits were to be imputed in payment of the oldest debt, and the customer's liability at the maturity of the collateral security being more than paid by the subsequent deposits, the collateral was discharged, and the bank's action against the maker and first endorser of said note would be dismissed.—*Exchange Bank* v. *Newell et al.*, Doherty, J., May 14, 1887.

Règlement de la cité de Montréal concernant les "maîtres et apprentis"—Engagé à la pièce —Juridiction.

Jugé, Qu'une personne qui est "*engagée*" par écrit à une autre personne qui se qualifie de "*bourgeois ou maître*," pour un an, pour travailler de son métier soit à l'entreprise, à la pièce, ou à la quantité, *e. g.* tant de mille, doit être considérée comme tombant sous l'effet du règlement de la cité de Montréal concernant les "maîtres et apprentis," et peut être légalement condamnée à l'amende et à la prison par le Recorder au cas d'abandon de son service sans permission.—*Dinelle* v. *Gauthier*, Gill, J., 6 juin 1887.

Opposition à jugement—Statut de 1883, 46 *Vict., ch.* 26—*Jugement sous les articles* 89, 90 *et* 91, *C. P. C.*

Jugé, Que le statut de 1883 (46 Vict., ch. 26) qui permet de faire une opposition à jugement dans les causes par défaut ou *ex parte* obtenu soit en terme soit en vacance, ne s'applique qu'aux jugements rendus en vertu des articles 89, 90 et 91 du Code de Procédure Civile. —*Ross* v. *Leprohon, et Leprohon*, oppt., Jetté, J., 6 juin 1887.

Venditioni exponas—Autorisation de la cour ou du juge.

Jugé, Qu'un bref de *venditioni exponas* émané sans l'autorisation préalable de la cour ou du juge est nul.—*Trust & Loan Co.* v. *Monbleau, & Brosseau*, oppt., Jetté, J., 6 juin 1887.

Dommages—Etendue—Dol—Quasi-délit—Articulation de faits.

Jugé, 1o. Que les dommages que l'on peut réclamer d'une personne coupable de dol ou de quasi-délit ne sont que ceux qui en résultent directement et en sont une suite immédiate, et non pas ceux dont la faute n'a été que l'occasion indirecte;

2o. Qu'une partie qui ne produit pas ses articulations de faits devra payer les frais de sa propre enquête si la partie adverse en fait la demande.—*Kimball* v. *La Cité de Montréal*, Mathieu, J., 15 juin 1887.

QUEEN'S BENCH DIVISION.

LONDON, Aug. 6, 8, 1887.

CROFTS V. TAYLOR.*

Beer—Retail Dealer—Blending Strong and Small Beer—Dilution—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), s. 8, *subs.* 2.

This was a special case stated by one of the metropolitan magistrates, who had convicted the appellant, the licensed occupier of a public-house, under section 8 of 48 & 49 Vict. c. 51, upon an information laid by an Inland Revenue officer for diluting beer. It

* To appear in Montreal Law Reports, 3 S.C.

*Law Journal, 22 N.C. 127.

appeared that the appellant had obtained a puncheon of seventy-two gallons of beer from Barclay & Co., and a thirty-six gallon cask of small beer fram a beer dealer at Haggerstone. Barclay's beer contained 10·30 proof spirit, whilst the small beer contained but 4·62. The difference in gravity was equivalent to four gallons of water. The appellant drew off nineteen and a half gallons of Barclay's beer from the seventy-two gallon puncheon, and filled it up with eighteen gallons of the small beer and one gallon of finings. This mixture showed a density of 1010·42, an original gravity of 1045·84, and proof spirit 8·5. The contention of the appellant was that this was not a dilution, and that blending was not a dilution within section 8, sub-section 2. The respondent contended that such mixing was a dilution of the stronger beer. The question for the opinion of the Court was whether such mixing or blending of beers was a dilution within the meaning of the statute.

Reid, Q.C., and *Bodkin* (*Poland* with them) for the appellant.

The Solicitor-General (*Sir E. Clarke, Q.C.*), *R. S. Wright, Danckwerts* (*Sir R. E. Webster, Q.C., Attorney-General*, with them), for the respondent.

Cur. adv. vult.

The COURT (GROVE, J., and HUDDLESTON, B.), having considered their judgment, held that a dilution within the meaning of sub-section 2 of section 8 of the statute had taken place, and that the conviction must be affirmed.

Appeal dismissed.

TRIBUNAL CIVIL DE LA SEINE.

(7EME CHAMBRE).

25 mai 1887.

Présidence de M. TAILLEFER.

G.... v. BRIN.

Huissier—Responsabilité—Créance—Acompte—Poursuite—Suspension.

Si en principe l'huissier ne doit point suspendre une poursuite sans en avoir, au préalable, obtenu l'autorisation de son mandant, il ne commet aucune faute de nature à engager sa responsabilité lorsqu'en suspendant les poursuites sur le paiement d'un acompte, il avait de justes motifs de croire qu'il ne faisait que se conformer aux intentions de son mandant.

Il en est ainsi surtout lorsque dans aucun cas le mandant n'aurait pu être payé, le produit de la vente poursuivie étant absorbé en totalité par des créances préférables à la sienne.

LE TRIBUNAL,

Attendu que G.... est appelant d'un jugement du Tribunal de paix du deuxième arrondissement, en date du 15 octobre 1886, qui l'a condamné à rembourser à Brin à titre de dommages-intérêts, tous les frais faits à la requête de ce dernier pour le recouvrement de sa créance sur le sieur Polychroni ; que cet appel est régulier en la forme ;

Au fond,

Attendu que le premier juge s'est fondé pour motiver sa condamnation sur la faute qu'aurait commise l'huissier G...., d'interrompre une procédure commencée en recevant sans ordre un acompte ; que cette faute ayant causé la perte de la créance et des frais engagés, G.... devait en supporter les conséquences et indemniser son mandant ;

Attendu que G.... prétend, au contraire, qu'il n'avait commis aucune faute en raison des circonstances de fait qui l'ont déterminé à suspendre les poursuites dirigées contre Polychroni et que d'ailleurs ce n'est pas cette faute qui a entrainé la perte de la créance ;

Attendu qu'il y a lieu, en conséquence, de rechercher si le premier juge a fait une juste appréciation de tous les faits de la cause, et qu'il importe de constater avant tout que certains faits et documents n'ont pas été portés à sa connaissance ;

Attendu qu'il est constant et reconnu qu'un jugement du Tribunal de paix du 23 avril 1885, condamnait par défaut Polychroni à payer à Brin la somme de 20 fr. que ce dernier lui avait prêtée et commettait l'huissier G.... pour signifier le jugement ;

Attendu que ce jugement ayant été maintenu sur opposition, le 13 mai, G.... se mettait en mesure de le faire exécuter ; mais que, le 24 juillet, Brin lui faisait donner l'ordre d'arrêter les poursuites, par suite du versement d'un acompte de 10 fr. ;

Attendu que, le 14 décembre, G.... recevait l'ordre de reprendre les poursuites en

même temps que Brin lui consignait une provision de 10 fr. ; qu'il signifiait de suite tous les actes judiciaires pour arriver à la vente des meubles saisis sur Polychroni et que cette vente était affichée pour le 24 décembre ;

Attendu, cependant, que, le 24 décembre, G.... recevait un nouvel acompte de 10 fr., qui soldait le principal de la condamnation, prit sur lui de ne pas donner suite à la vente ;

Attendu qu'en agissant ainsi, il dépassait évidemment son mandat ; qu'il ne lui appartenait pas, en effet, de suspendre une poursuite sans en avoir, au préalable, obtenu l'autorisation de son mandant ;

Mais attendu qu'il avait de justes motifs de croire qu'il ne faisait que se conformer aux intentions de ce dernier, qui, créancier de 20 fr. en principal, lui avait déjà fait interrompre les poursuites pendant cinq mois, à raison d'un premier versement de 10 fr. ; qu'il servait ses intérêts en recevant cette nouvelle somme de 10 fr., tandis que des poursuites rigoureuses devaient avoir pour résultat d'augmenter les frais qui, en fin de compte et par suite de l'insolvabilité de Polychroni pouvaient rester à la charge du créancier ; que de cette façon, tout en sauvegardant les intérêts de son client, il s'inspirait de ces sentiments de modération dont les officiers ministériels ne doivent jamais se départir dans l'exercice de leurs fonctions ;

Attendu qu'en raison de ces circonstances de fait, l'huissier G.... n'a pas commis une faute pouvant engager sa responsabilité ;

Attendu d'ailleurs que cette suspension de poursuites n'a en aucune façon causé la perte de la créance et des frais exposés ; qu'en effet Brin, ayant cru devoir faire une plainte contre G...., ce dernier prévint Polychroni, le 6 mars 1886, qu'il allait reprendre les poursuites et envoyer le 8 mars une lettre chargée à Brin pour lui demander ses instructions et une provision ;

Attendu qu'à ce moment la vente des meubles saisis pouvait encore avoir lieu à la requête de Brin ; mais que ce dernier n'ayant pas répondu de suite à G.... et ayant attendu jusqu'au 15 juin pour lui donner des ordres et lui consigner 10 fr., il en résulte que dans l'intervalle et à la date du 27 mai, soit près de trois mois après la lettre de G...., le mobilier de Polychroni a pu être vendu à la requête d'un autre créancier ; que Brin ne peut donc s'en prendre qu'à lui-même si G.... n'a pu mener à fin en temps utile les poursuites de vente ;

Attendu enfin qu'il résulte des renseignements fournis par G.... et non contredits par Brin, présent à l'audience, et interpellé sur ce point ; que la vente du mobilier Polychroni a produit 253 fr. ; que cette somme n'a même pas suffi pour payer les contributions dues et que le propriétaire de Polychroni, créancier privilégié, n'a pu toucher la moindre somme ; que Brin n'aurait donc pu rien recevoir sur sa créance ;

Attendu, en conséquence, et à ces divers points de vue, que le premier juge a fait une inexacte appréciation des faits en décidant que la perte de sa créance était le résultat de la faute commise par G....; que cette perte est due à l'insolvabilité du débiteur et qu'il n'existe dans la cause aucune raison de faire supporter à l'huissier G.... les conséquences de cette insolvabilité ;

Par ces motifs,

En la forme, reçoit G.... appelant du jugement du 15 octobre 1886 ;

Au fond dit qu'il a été bien appelé, mal jugé, déclare Brin mal fondé dans sa demande, l'en déboute, décharge en conséquence G.... des condamnations prononcées contre lui ; ordonne la restitution de l'amende et condamne Brin aux dépens de première instance et d'appel, etc.

NOTE.—Cette décision paraît aussi équitable que juridique. Le mandataire est responsable envers le mandant des fautes qu'il a commises dans sa gestion et du dommage qu'il peut lui avoir occasionné par l'inexécution totale ou partielle du mandat (art. 1991 et 1992 C. civ.). Dans l'espèce, non-seulement la faute n'existait pas, mais il n'y avait même point eu préjudice causé au mandant. L'action en responsabilité ne pouvait qu'être dans ces conditions déclarée mal fondée.—*Gaz. du Pal.*

TRIBUNAL DE COMMERCE DE LA SEINE.

8 juin 1887.

Présidence de M. Ouachée.

Carnaud v. Paillard et de la Forest.

Mandat—Marchandises—Vente—Mandataire—Tiers—Courtier—Détournement — Responsabilité.

Le mandataire qui accepte des marchandises pour les vendre est responsable de ces marchandises lorsque, sans l'autorisation de son mandant, il les a confiées à un courtier qui les a détournées.

Le Tribunal,

Reçoit Paillard et de la Forest opposants en la forme au jugement contre eux rendu par défaut par ce Tribunal le 6 novembre 1886 ;

Et statuant au fond sur le mérite de leur opposition ;

Attendu que les défendeurs soutiennent que s'ils se sont dessaisis des tapisseries, objet du litige, ils n'ont livré les dites marchandises que sur l'ordre de Carnaud dans les conditions par lui fixées ; que si les tapisseries en question ont été dérobées, ils n'ont commis aucune faute pouvant engager leur responsabilité ; que Carnaud ne peut s'en prendre qu'à sa propre imprudence ; mais qu'ils ne sauraient être tenus de rembourser la valeur des objets volés ;

Mais attendu que des débats il appert que Carnaud a confié aux défendeurs, d'abord pour les réparer et ensuite pour les vendre, un lot de tapisseries Louis XVI, et ce, moyennant salaire, si elles trouvaient amateur au-dessus de 8,000 fr., et qu'ils ont accepté le dit mandat;

Attendu que les tapisseries en question ont été confiées à un courtier par les défendeurs, et détournées par le dit courtier ;

Attendu que les défendeurs n'apportent pas la preuve que Carnaud les ait autorisés à se dessaisir des dites tapisseries, comme ils le prétendent ; que, dans ces circonstances, ils n'ont cessé d'être les mandataires et dépositaires, responsables envers Carnaud, du dépot à eux confié ; qu'il convient de les obliger de payer à Carnaud la valeur des tapisseries dont s'agit, soit la somme que le Tribunal fixe à 7,000 francs, en tenant compte des réparations exécutées par les défendeurs et dont ils étaient en droit de réclamer la rémunération ;

Par ces motifs,

Déboute Paillard et de la Forest de leur opposition au jugement du 6 novembre 1886 ;

Ordonne, en conséquence, que ce jugement sera exécuté selon sa forme et teneur, nonobstant la dite opposition, mais à concurrence de 7,000 francs de principal ensemble des intérêts de la dite somme suivant la loi et des dépens ;

Les condamne en outre aux dépens.

Note.—Application pure et simple de l'art. 1994 C. civ. aux termes duquel le mandataire répond de celui qu'il s'est substitué dans la gestion quand il n'a pas reçu le pouvoir de se substituer quelqu'un.—*Gaz. du Pal*

*QUEBEC DECISIONS.**

Collocation—Paiement de l'indu—Solidarité—Conclusions spéciales.

Jugé, 1. Que le propriétaire d'un immeuble vendu en justice a l'action directe pour se faire rembourser le montant touché, en vertu d'un jugement de collocation, pour une dette hypothécaire antérieurement acquittée et éteinte ; et qu'il peut conclure que le remboursement soit fait au shérif qui a fait la vente, pour le montant être distribué à ses créanciers.

2. Que les héritiers colloqués, pour une dette hypothécaire éteinte par le paiement qui en avait été fait à leur auteur, ne sont pas solidairement tenus à son remboursement.—*Thibault* v. *Beaubien et al.*, C. S., Casault, J., 20 décembre 1886.

Location minière—Bornage—Tenants et aboutissants—Superficie.

Les auteurs des appelants ont acheté un certain lopin de terre (location minière) décrit dans l'acte par superficie et par tenants et aboutissants, "avec la faculté de changer la course des lignes et bornes, sans en augmenter l'étendue, en suivant la course de la veine de quartz."

Jugé, Que si ces auteurs ont exercé cette

* 13 Q. L. R.

faculté de changer la course des dites lignes et bornes et ont fait dresser un plan et posé des bornes en conséquence, les arpenteurs-experts nommés en justice pour borner le dit lopin, doivent suivre ces mêmes plan et bornes.—*McArthur & Brown*, en appel, Dorion, Ch. J., Tessier, Cross, Baby, Church, JJ., 7 mai 1887.

Livres de marchands—Indivisibilité.

Jugé, Que lorsque la seule preuve offerte contre les héritiers et ayants cause d'un marchand consiste en la production de ses livres, celui qui veut les invoquer ne peut les diviser en admettant ce qui lui est favorable et en refusant d'admettre ce qui est contraire à sa prétention.

Que les entrées de ces livres ne peuvent être divisées, et qu'on ne peut y invoquer ce qui est au débit du marchand sans admettre ce qui est à son credit.—*Bilodeau* v. *Lemieux*, en révision, Casault, Caron, Andrews, JJ., 31 mai 1887.

FIRE INSURANCE.

Contract of Renewal of Policy on same Terms, but Policy containing different Provisions—Not reading Policy, when excuse for Signer. — A policy of insurance may be reformed, although the insured has held the policy until after a loss, in silence and in ignorance, from the omission to read the policy or a careless reading, of the necessity for such reformation. Where an insurance company agrees to renew an insurance upon the same terms and conditions as those of a policy previously issued by it upon the same property, which had expired, solicits the renewal of the insurance, and a material and variant condition is by mistake inserted in the policy issued by it in pursuance of such contract of renewal and the stipulated premium is received and retained,—in an action to reform the last policy, the court will not hear the claim of the company that it is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change. In the company's promise to renew the insurance upon the same terms and conditions as those of the previous policy, there is a legal justification for the omission of the insured to examine the new policy delivered, and for his assumption that there is no designed variance. The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read. *Palmer* v. *Hartford Fire Ins. Co.*, S. C. Conn., 4 N. E. Rep. 470.

Proof of Loss—Arbitration to Party named in Contract binding, but not so where Arbitrators are to be named—Agreement not to sue within Sixty Days.—When a policy of insurance stipulates that certain proofs of loss shall be furnished within sixty days after its occurrence, the company has a right to insist upon compliance, although it promptly received a notice of the loss which contained all necessary information. The acceptance of proofs of loss after the expiration of the time mentioned for furnishing them is a waiver of the right to require them within the time. When the parties to an executory contract agree that all disputed questions shall be submitted to the arbitrament of a single individual or tribunal named, they are bound thereby; but when the agreement does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party, and such a provision is not adequate to oust the jurisdiction of the court. When a policy stipulates that no suit shall be brought upon it until sixty days after proofs of loss are furnished, a mere notice of total loss is not sufficient, unless the company, by silence or otherwise, signifies that it is willing to accept it as such. If proofs are demanded, there is no right of action until sixty days after they are given. *Howard Insurance Co.* v. *Hocking*, S. C. Pa., 44 Phila. L. I. 293.

ASSAULT—STRUGGLE FOR POSSESSION OF RAILROAD.

In *Denver & R. G. Railway Co.* v. *Harris* (36 Albany Law J., 96), the plaintiff in an action to recover damages for injuries to his

person, was the employee of a railroad company in actual and peaceable possession of a line of railroad. The defendant railroad company, with an armed body of men, attempted to drive away the agents and servants of the former company, and in the attempt plaintiff received his injuries. The plaintiff had armed to protect himself and the property of which he and his co-employees were in possession. The Supreme Court of the United States held that the defendant railroad company was liable, without reference to the question of legal title or right of possession. It was a demonstration of force and violence, that disturbed the peace of the entire country along the line of the railway, and involved the safety and lives of many human beings. It is a plain case, on the proof, of a corporation taking the law into its own hands, and by force and the commission of a breach of the peace, determining the question of the right to the possession of a public highway established primarily for the convenience of the people. The courts of the territory were open for the redress of any wrongs that had been, or were being committed against the defendant by the other company. If an appeal to the law, for the determination of the dispute as to the right of possession, would have involved some delay, that was no reason for the employment of force, least of all, for the use of violent means under circumstances imperiling the peace of the community and the lives of citizens. To such delays all, whether individuals or corporations, must submit, whatever may be the temporary inconvenience resulting therefrom. We need scarcely suggest that this duty, in a particular sense, rests upon corporations, which keep in their employment large bodies of men, whose support depends upon their ready obedience to the orders of their superior officers, and who being organized for the accomplishment of illegal purposes, may endanger the public peace, as well as the personal safety and the property of others beside those immediately concerned in their movements. A corporation is liable for all torts committed by its servants and agents, by authority of the corporation express or implied. In *Philadelphia, W. & B. R. Co.* v. *Quigley* (21 How. 207), the court held that a railroad corporation was responsible for the publication by them of a libel. The court, upon a full review of the authorities, held it to be the result of the cases "that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." In *State* v. *Morris & E. R. Co.* (23 N. J. Law, 369), it was well said that, "if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. * * * The result of the modern cases is that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of their corporation constituting the agency or authorizing the act." See also *Salt Lake City* v. *Hollister* (118 U. S. 256, 260); *New Jersey Steamboat Co.* v. *Brackett*, (7 Sup. Ct. Rep'r. 1039, present term); *National Bank* v. *Graham* (100 U. S. 699, 702). One who while in the employ of a railroad company in peaceable possession of a line of railroad is injured by the agents of another company, who are the governing officers of the company, in the latter's attempt to gain possession of the road, may recover punitive damages from the latter company, if the said agents acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the road, and in doing so caused the injury complained of. The right of the jury in some cases to award exemplary or punitive damages is no longer an open question in this court. In *Day* v. *Woodworth* (13 How. 371), which was an action of trespass for tearing down and destroying a mill-dam, this court said that in all actions of trespass, and all actions on the case for torts, "a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant,

having in view the enormity of his offence rather than the measure of compensation to the plaintiff;" and that such exemplary damages were allowable "in actions of trespass where the injury has been wanton or malicious, or gross or outrageous." The general rule was recognized and enforced in *Philadelphia, W. & B. R. Co.* v. *Quigley*, which as we have seen, was an action to recover damages against a corporation for libel; in the latter case the court observing that the malice spoken of in the rule announced in *Day* v. *Woodworth*, was not merely the doing of an unlawful or injurious act, but the act complained of must have been conceived "in the spirit of mischief, or of criminal indifference to civil obligations." See also *Milwaukee, etc., R. Co.* v. *Arms* (91 U. S. 492). *Missouri Pac. Ry. Co.* v. *Humes* (115 id. 512, 521); *Barry* v. *Edmunds* (116 id. 550, 562, 563), The doctrine of punitive damages should certainly apply to a case like this, where a corporation, by its controlling officers, wantonly disturbed the peace of the community, and by the use of violent means endangered the lives of citizens in order to maintain rights for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 20.

Judicial Abandonments.

Louis Dupuy, district of St. Francis, August 15.

Edmond Emond and Louis Philippe Ste. Marie (Emond & Ste. Marie), Montreal, August 13.

Johnson & Co., St. Hyacinthe, August 17.

Louis Trépanier, hotel-keeper, Montreal, August 15.

Curators appointed.

Re L. Polydore Gagnon, St. André.—H. A. Bédard, Quebec, curator, August 16.

Re John Sharpe and Henry McD. Walters (Sharpe's Express Co.) — Geo. Daveluy, Montreal, curator, July 13.

Dividends.

Re David Rioux, Trois-Pistoles. — First dividend, payable Sept. 3, H. A. Bedard, Quebec, curator.

Re Germain E. Robitaille, Sherbrooke. — Second and final dividend, payable Sept. 3, H. A. Bédard, Quebec, curator.

GENERAL NOTES.

Un souteneur Victor-Edmond Allard, dit Legrand. âgé de 27 ans, marchand de coco patriotique à Longchamp les jours de revue (!), comparaissait aujourd'hui devant la 8e Chambre de police correctionnelle présidée par M. Vanier sous l'inculpation de "tirer habituellement sa subsistance du fait de pratiquer sur la voie publique la prostitution d'autrui."

A l'audience M. le président donne lecture de quelques lettres fort drôles adressées de Lille, où Allard était souteneur, à sa mère Mme Allard.

Voici l'une de ces lettres :

Ma chère bonne mère,

"...Je peux enfin t'envoyer un peu d'argent. Je regrette de ne pas faire plus, mais dans ce moment je ne suis pas riche... Les affaires vont de plus en plus mal à Lille où les souteneurs sont chassés comme des lièvres.

On en fait ici un sacré ravage ! ils sont condamnés à des quatre mois et même six mois de prison avec la déportation .. Aussi, ma chère bonne mère, fais apprendre à travailler à mon frère Arthur. Ça vaudra mieux."

Allard est condamné à trois mois de prison.

Le 13 juin dernier, Courtois l'anarchiste, Courtois le socialiste, Courtois le partisan des gueux, était saoûl comme un capitaliste.

Des agents l'arrêtèrent, tandis qu'il titubait sur la voie publique.

—Ah ! c'est vous les sergots, s'écria-t-il ; je vous ai dans le nez, vous savez, et à la prochaine je vous ferai votre affaire, vous savez. Oui, oui, allez, emmenez-moi ; maintenant je suis un pauvre homme pas solide, mais à la prochaine je vous ferai votre affaire, sergots de malheur, sergots de....

Hier Courtois comparaissait devant le tribunal correctionnel de la Seine. Il a prononcé lui-même sa défense et a déposé des conclusions "en droit" et "en science."

Les conclusions "en droit" n'apprendraient rien à nos lecteurs, car elles ne contenaient rien de juridique.

Les conclusions en science présentent quelque intérêt. Courtois a pratiqué l'ivrognerie en dilettante et en curieux. Il sait la nature de son vice. Il a sur l'ivresse des idées personnelles. Il en parle en maître.

"Attendu, dit-il, que le concluant est inculpé d'ivresse manifeste et qu'il ne résulte nullement que la chose ait été constatée par un certificat de médecin : qu'en effet l'ivresse est classée dans le cas de folie et que seul un docteur en médecine est capable de diagnostiquer en pareille matière ; qu'il résulte de l'état d'ivresse un cas pathologique qui ne peut être constaté par des agents de police, et que le seul fait d'être sous l'empire de la boisson provoque un malaise général qui nécessite des soins médicaux ;

"Le fait de n'avoir pas appelé auprès de Courtois un médecin, s'il était en état d'ivresse, serait un outrage à l'humanité, et si cela n'a pas été fait c'est que les agents ont estimé que Courtois était seulement surexcité par la fièvre et que conséquemment il n'était pas en état d'ivresse manifeste."

Le Tribunal néanmoins ne lui a su aucun gré de sa science, et l'a condamné à un mois de prison et cinq francs d'amende.—*Gaz. Pal.*

The Legal News.

VOL. X. SEPTEMBER 3, 1887. No. 36.

An Act of the Imperial Parliament (50 & 51 Vict., ch. 25), which received the royal assent on Aug. 8, is of some interest. The object is to permit the conditional release of first offenders in certain cases. It applies to convictions for larceny or false pretences, or any other offence punishable with not more than two years' imprisonment before any Court. If no previous conviction is proved, and it appear to the Court that, having regard to the youth, character, and antecedents of the offender—these conditions are cumulative and not alternative—to the trivial nature of the offence, or to any extenuating circumstances, it is expedient that he be released, he may be released on recognisances, with or without sureties, to come up for judgment and be of good behaviour, but he may have to pay costs. It is provided that the offender or his surety must have a fixed place of abode or regular occupation.

In the case of the convict Lipski, cable despatches made it appear that the Home Secretary had been overruled by the Queen, and his discretion interfered with. The *Law Journal* puts the matter in its true aspect: "The appeal made to the Queen personally on behalf of the condemned person was a much more serious subject of regret in the case. It met, as might have been expected, with the rebuff it deserved—that is, it was referred to the proper quarter like a misdirected letter. Any personal interference by the Sovereign with the exercise of the prerogative of mercy is now altogether unconstitutional. An invitation to Her Majesty, however well meant, and however palliated by the desperate nature of the occasion, to exercise her prerogative in accordance with her own personal feelings, is to insult the Sovereign's appreciation of her duties." The *Law Journal* makes the suggestion that the Home Secretary should have the power of treating acts prejudicial to the exercise of his jurisdiction in these matters as contempts of Court.

A correspondent of the *Law Journal* gives the following information concerning Crown windfalls:—A remarkable return recently presented to the House of Commons, styled 'Crown's Nominee Account,' shows the receipts and expenditure of the Treasury solicitor during the past year in the administration of estates reverting to the Crown by reason of the owners thereof dying intestate without known kin, from lapsed legacies, etc. The receipts amounted to £148,789 10s. 6d., the largest sum yet received in one year since the passing of the Treasury Solicitor Act, 1876, under which these estates are administered. The totals for the ten years amounted to nearly one million sterling, thus:—

Year	£	s.	d.	Year	£	s.	d.
1877...	127,876	9	11	1882...	141,077	10	8
1878...	139,769	9	3	1883...	45,414	14	4
1879...	140,879	3	5	1884...	64,093	17	5
1880...	56,448	13	11	1885...	67,218	19	8
1881...	64,827	5	10	1886...	148,789	10	6

THE LAW OF NEGLIGENCE.

The case of *Wakelin* v. *The London and South-Western Railway Company*, 56 Law J. Rep. Q. B., 229, is one of those cases on evidence which are worth reporting when they reach the House of Lords, but not before. Dealing as it does with negligence, a subject on which opinion is very apt to vary according to the temperament of those who discuss it, at the hands of lawyers coming from the three corners of the United Kingdom, it suggests that, in spite of Lord Selborne and other reformers, the existence of the House of Lords as a final tribunal is a very great advantage to English law. On a subject of this kind, the Irishman is apt to be sympathetic, the Scotchman to be hard, and the Englishman to be business-like; and it is useful to have representatives of all those qualities when questions have to be decided which, although they are laid down by judges, really are questions of fact. In this case there was no conflict of nationality as there was in *Walker* v. *The Midland Railway Company*, when the law lords last year were divided, Irishmen against Scotchmen and Englishmen, on the question whether a man who walks into a service-room in a hotel, and falls down a lift, has any case against the innkeeper. The present case deals

not only with the evidence of negligence, but with the relation of negligence to contributory negligence and the onus of proof, topics which come to the surface daily in the Courts, and on which authoritative views are of great practical value. When the case was before the Court of Appeal, some demur was made in the profession to certain observations of the Master of the Rolls, which were supposed to suggest that the plaintiff must in some cases negative contributory negligence. His words, however, hardly bore that construction, and the case, with great discretion, was at that stage not reported; but the words used now afford a text for the illustration of the views of the law lords.

The facts in question were brief and bare. They concerned a public level crossing on a part of the defendant's railway between Chiswick Station and Chiswick Junction. Mr. Wakelin lived in a cottage which was ten minutes walk from the crossing. He left his home after tea-time on the day in question, and his body was found on the down line the same night. Those were really all the material facts. On the part of the company it was admitted that Mr. Wakelin was killed by one of their trains. This, as Lord Halsbury pointed out, only admitted that his death was due to contact with the train, but whether he ran against the train or the train against him was left in doubt. There was evidence that from eight in the evening to eight in the morning, a watchman was in charge of the gates; but, as the exact hour of the occurrence does not seem to have been fixed, nor was there any indication one way or the other that the absence of a watchman affected the event, this fact was not material. It appeared, too, that the railway was so placed that a man standing on the down side near the line would have seen a down train approaching a mile off. It was probably this fact that struck the Master of the Rolls, and gave rise to the double view, so to speak, of the case which he took. In considering the question whether there was evidence of negligence on the part of the company, it was of course open, and, in fact, imperative, not to overlook the characteristics of the place where the event happened. This, however, would not be to insist that the plaintiff must show that he has not been guilty of contributory negligence, but rather to understand the conditions of the situation to see whether the defendants' servants had been guilty of negligence. Mr. Justice Manisty allowed the case to go to the jury, who gave the plaintiff, Mr. Wakelin's widow, £800. Mr. Justice Manisty must not be taken to have had an opinion on the question whether there was evidence of negligence. He was simply carrying out his own invariable practice, common with other judges, and especially appropriate in this case, of taking the verdict of the jury to save the parties a possible new trial, and leaving the unsuccessful party to his remedy in the Court. Probably no lawyer would form the opinion that on these facts there was evidence fit to be left to the jury. The judges in the Divisional Court set aside the verdict and entered judgment for the defendants, and this decision was affirmed by the Court of Appeal. In fact, the only glimmer of reason to be found in the verdict was the vague impression that if a railway train and a passer-by came into collision, the train being the bigger and the least likely to be hurt, is most likely to have been in the wrong. The rest was purely the usual prejudice for a widow and against a rich corporation.

Lord Halsbury contented himself almost entirely with discussing the actual question in point, but Lords Watson and Fitzgerald entered to some extent into the more general discussion which the case had raised. After pointing out that there must be both negligence on the part of the defendant and an absence of negligence on the part of the plaintiff to entitle him to succeed, he proceeds to distribute the burden of proof, and puts it on the plaintiff to show the defendant's negligence, and on the defendant to show plaintiff's negligence in the first instance—that is, subject to the defendant being able to show some *primâ facie* evidence of negligence in the plaintiff which, unexplained, would amount to contributory negligence. At the same time he points out the source of the error that the plaintiff need deal with contributory negligence at the onset, by observing that in many cases it is impossible to separate the facts tending to show the defendant's negligence from those tending to show the plaintiff's

There is nothing, it is said, in *The Dublin &c., Railway Company* v. *Slattery*, L. R. 3 App. Cas. 1,155, having a contrary tendency. Lord Watson, however, cites with apparent approval, a passage in Lord Hatherley's opinion in that case which seems to require comment. 'If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses, while establishing negligence against the defendants, I do not think that there is anything left for the jury to decide, there being no contest of fact.' It may be that there is no contest of fact, but there may be a contest of inference: and Lord Hatherley's words are only true when the plaintiff's negligence is of such a kind that he practically killed himself. When there are cross-charges of negligence, each supported by reasonable evidence, it does not follow that the plaintiff must fail, as the jury may find that the plaintiff's negligence was not a *sine qua non* of his damage. An acquaintance with Nisi Prius would have saved Lord Hatherley this mistake. Lord Fitzgerald is the only peer who directly deals with the *dicta* of the Master of the Rolls. He attributes to the Master of the Rolls the opinion that the plaintiff must give 'affirmative evidence of the negative proposition that he did not negligently contribute to the accident.' Lord Fitzgerald desires to guard himself against being supposed to assent to it. He adds, what Lord Halsbury had already hinted, that the difficulty is probably a matter of words. In regard to the question of pleading, Lord Fitzgerald is right in saying that the rule under Lord Campbell's Act is the same as in other claims of negligence. The difference arises, however, under the Judicature Act. Before that Act, the defence of contributory negligence might be raised on a plea of 'not guilty;' since that Act, it is usual to plead contributory negligence. The passage from the shorthand note of the judgment of the Master of the Rolls does not, we think bear the possible meaning attributed to it by Lord Fitzgerald—that, if on the evidence, the jury might really find for either party, the case must be withdrawn from the jury. What Lord Esher meant, and probably what he said, was merely that in such a case the rule that the plaintiff must on the whole, make out his case, applies to guide the jury.—*Law Journal* (London).

COUR D'APPEL D'ORLEANS.

11 juin 1887.

Présidence de M. DUBEC.

CAMILLE HABERT v. ADRIEN HABERT.

Propriété—Immeuble—Dessus—Dessous—Maison—Cave—Présomption de l'art. 552 *C. civ. —Preuve contraire.*

La disposition de l'art. 552 *C. civ.*, (*C. C. B. C.* 414), *aux termes duquel la propriété du sol emporte celle du dessus et du dessous, n'établit qu'une présomption de droit, qui peut être detruite même par de simples présomptions contraires.*

Spécialement une cave, établie à la fois sous deux maisons voisines, n'est pas nécessairement la propriété commune des propriétaires de ces deux maisons. L'un de ces propriétaires est recevable à prétendre et à administrer la preuve, soit par titre, soit même par simples présomptions que la dite cave est, en totalité, sa propriété exclusive.

LA COUR,

Considérant que, par exploit du 10 juillet 1884, Camille Habert a assigné Adrien Habert pour se voir déclarer seul propriétaire de la cave existant dans son magasin; qu'il se fonde, pour établir sa propriété, sur l'adjudication par licitation qui lui a été faite, le 23 novembre 1884, de la maison comprenant ce magasin; que la cave litigieuse n'ayant pas été spécialement désignée au cahier des charges, Camille Habert invoque l'art. 552 C. civ., aux termes duquel la propriété du sol emporte celle du dessus ou du dessous;

Considérant qu'Adrien Habert se prétend, de son côté, propriétaire de la cave revendiquée par son frère, comme ayant toujours fait partie de la maison, située à Mer, qui lui a été attribuée par acte de partage intervenu entre lui et Camille Habert devant Fleury, notaire à Avaray, le 20 novembre 1879; que cet acte renferme cette énonciation: "cave sous le bâtiment, dont la descente se trouve dans l'escalier;" que cette mention est insuffisante pour donner elle-même à Adrien Habert la propriété de la cave en tant qu'elle existe dans la maison de Camille Habert;

Mais attendu qu'il résulte des documents de la cause qu'au jour du partage, 20 novembre 1879, et antérieurement à cette époque, la cave dépendant de la maison, attribuée à Adrien Habert, se composait de deux parties : l'une située sous cette maison ; l'autre sous la maison voisine ; que ces deux parties communiquaient par un passage voûté à ce spécialement destiné, pratiqué dans le passage commun, de 1 m. 30 c. de largeur et de 1 m. 90 c. de hauteur, construit en maçonnerie ; que cette cave était entourée, dans toute son étendue, d'un mur en maçonnerie, d'une épaisseur de 60 cent. environ ; que ce mur ne formait des deux parties qu'une cave unique réunie à la maison d'Adrien Habert ; qu'enfin la maison voisine n'avait avec cette cave aucune communication ;

Considérant qu'Adrien Habert a toujours eu la jouissance exclusive de cette cave depuis le partage de 1879 ; que, si cette jouissance a pu être considérée par l'appelant comme ayant lieu, de la part de son frère, à titre d'usufruitier, elle a perdu à ses yeux, ce caractère, le 23 septembre 1883, date de la cessation de l'usufruit ; que, pendant plus de trois années, depuis cette époque jusqu'au jour du procès, Adrien Habert a donc joui exclusivement de la cave comme propriétaire, au vu et au su de l'appelant ;

Attendu que l'art. 552 C. civ. invoqué par ce dernier, n'établit qu'une présomption de droit qui peut être détruite par des présomptions contraires ; qu'il résulte des constatations ci-dessus faites, non-seulement des présomptions qui annihilent celle de l'art. 552 ; mais encore la preuve que, malgré les termes insuffisants de la désignation de la cave dans l'acte de partage de 1879, la commune intention des parties contractantes a été de comprendre cette cave entière dans les dépendances de la maison attribuée à Adrien Habert ; que, s'il en avait été autrement, les contractants auraient indiqué la séparation de cette cave, comme ils ont indiqué, avec grand soin, toutes les autres séparations de la maison voisine ; qu'on ne s'explique pas comment cette cave n'aurait pas été comprise dans la désignation très exacte du cahier des charges du 23 novembre 1884, si elle avait dû être réunie, pour une portion, aux biens à adjuger ; qu'enfin il a été stipulé dans l'acte du 20 novembre 1879, que l'adjudicataire prendrait les biens dans l'état où ils se trouveraient au moment de l'entrée en jouissance tels qu'ils se poursuivraient et comporteraient à cette époque, et qu'il est à remarquer que les parties avaient une connaissance particulière de la maison dont se poursuivait et comportait la cave en litige ;

Par ces motifs,

Confirme.

NOTA.—V. conf. sur le principe : Cass. 30 novembre 1853 (S.54.1.679—J. du P. 55.2.576—D.54.1.17) ; 24 novembre 1869 (S.70.1.32—J. du P. 70.50—D.70.1.274).

THE AUTHORITY OF A GENTLEMAN'S GARDENER.

At the Halifax County Court, on June 14, before His Honour Judge Snagge, the case of *Eastwood* v. *Wheelwright* was heard, and it was decided that a gardener has no implied authority to pledge his master's credit for plants and flowers. This was an action brought by Charles Eastwood, nurseryman, to recover from J. G. Wheelwright, banker, Halifax, the sum of 7*l.* 8*s.* for goods sold and delivered under the following circumstances: In 1883, Mr. Wheelwright, who has somewhat extensive gardens and conservatories attached to his house, had a gardener of the name of Robinson, who ordered goods, chiefly consisting of greenhouse plants, from the plaintiff to the amount of 7*l.* 8*s.* The invoice was made out to Mr. Wheelwright, but was sent to Robinson, 'care of Mr. Wheelwright,' and was never brought to the notice of Mr. Wheelwright until some two months afterwards, when Robinson showed it to him. Mr. Wheelwright at once told him that he had never had any transaction with Eastwood, ordered Robinson to return the goods, and declined to pay for them, but made no communication to the plaintiff until July, 1884, when an invoice was for the first time sent by plaintiff direct to the defendant, after Robinson had left defendant's service. The defendant then returned the invoice, and denied all liability for any goods supplied to Robinson.

Evidence was adduced on behalf of plaintiff to show an express authority, which was

denied by defendant. Plaintiff's counsel contended that there was a usage amongst gardeners to purchase plants on credit for their master, and that it came within the scope of their authority as being incidental to their employment; and further, that as soon as the defendant became aware of the invoice, although sent to Robinson, it was a duty incumbent upon him to have at once communicated with the plaintiff and repudiated his liability, and that by his not having done so, he had adopted the contract of his servant and was therefore liable.

His honour gave judgment for the defendant, holding that, even if such a usage did exist, it would be most unreasonable, and in the present case, fraudulent, as from the evidence it appeared that the gardener was receiving a handsome commission from the nurseryman; and further, that it did not come within the scope of a gardener's authority to purchase valuable plants, such as those the subject of the action, without his master's express instructions, which in this case he found had not been given. And on the second point, that there was no obligation on the part of Mr. Wheelwright to communicate with the plaintiff on seeing the invoice in Robinson's hand, and that the defendant had done nothing by which he could be deemed to have adopted his servant's contract.

The plaintiff's counsel asked for leave to appeal, which the judge granted on the first point, but refused on the second.—Verdict for defendant, with costs.

THE UNITED STATES SUPREME COURT.

Chief Justice Waite came to the Supreme bench in the maturity of his powers—he was fifty-seven years of age—and so vigorous is his constitution, physically and mentally, that although he has now passed his seventieth birthday, he shows as yet no indications of the approaching feebleness of age. As he walks along Pennsylvania avenue in Washington, where he may be seen almost any fine day on his way between his home and the Supreme Court room at the capitol, his step is as light and as springy as that of a boy; and when he reads a carefully prepared opinion in a complicated case, it bears evidence in every line, not only of the most patient research and close analysis, but also of growing rather than of waning powers. In personal appearance Chief Justice Waite is not imposing—a man who is only of medium height rarely is—but there is a substantial solidity about his figure that makes him far from the reverse. There is no stoop to his broad shoulders, and he carries erect his large, well-formed head, covered as it is with hair that is now iron gray. His face is reflective and genial, with well marked features, and keen, piercing eyes. He impresses a stranger as being a clean-cut, positive, determined man. His charming simplicity of manner and quiet, unassuming demeanor make a deeper impression of his greatness than any conscious assumption of dignity could do. There is something that satisfies our ideas of the highest propriety in the manner in which the chief justice lives in Washington. His house is a comfortable, large brick edifice in an eminently respectable but not ultra-fashionable quarter of the national capital. The interior is that of the residence of a man of culture and ample means (not great wealth, as the world goes to-day); with spacious rooms about whose furnishing and ornamentation there is an air of homelike repose. Judge Waite's "den," as he calls his workshop, is in the second story over the dining-room, well-lighted, ventilated, and tastefully carpeted and papered. A bright fire in the grate casts a warm glow throughout the apartment, when the season requires it, and a rich rug in front of it invites the visitor to a siesta in one of the great easy chairs. But it is not a place for idleness, as the piles of legal-looking papers that rise from the desk and peep out from the drawers testify, and the law-books arranged in rows in the book-cases on the sides attest. The spaces of the walls are occupied by engraved portraits of chief justices, his predecessors, and large photographs of Webster, Clay, Grant, Hayes, and other public men. A large stuffed owl, that emblem of wisdom, looks down as if it was the guardian spirit of the place. Here the chief justice does his work. Rising early, a cup of coffee is brought to his study, and with that mild stimulant

alone, he applies himself closely until his breakfast hour, ten o'clock; and returning, does not generally leave his desk until it is time to go to the capitol to be present at the opening of the Supreme Court at noon. Members of the Supreme Court and their families constitute the most select circle of official society in Washington, and the social exactions upon the chief justice are very great. Scarcely an evening passes during the fashionable season that his presence is not demanded at a reception, or a dinner or a party, and during the winter he gives a series of entertainments himself. These are marked by a cordial hospitality and refined absence of display that are more impressive than any extravagance. It is a high social honor to be a guest of the chief justice.

When Mr. Lincoln selected Mr. Miller for a place upon the Supreme bench, which became vacant in 1862, he was already one of the prominent lawyers of the west, although only about a dozen years had passed since his admission to the bar; and so well and favorably known was he in Washington that the senate unanimously confirmed his nomination on the day on which it was received, and without reference to a committee, a compliment rarely paid to a man not previously a member of the senate. While perhaps not so profoundly learned in some departments of the law as several of his colleagues, Justice Miller is distinguished among American jurists for the quickness and accuracy with which he seizes upon the essential points of an involved controversy and clears away what is immaterial or confusing. His judgment is almost unerring. But it is for the long series of remarkably able opinions upon constitutional questions, written and delivered during the past twenty-four years, that Justice Miller is best known. In their breadth, scope of argument, and clearness of statement they rank with those of Chief Justice Marshall. To him was assigned the duty of preparing the first decision of the court involving the thirteenth, fourteenth and fifteenth amendments to the Constitution; and adopted by the court, his opinion stands as one of the few that may be called anchors of the government. Justice Miller is not as methodical in his habits of thought and work as some of his associates. He generally makes his pen wait upon his inclination, but when he takes a seat at his desk he works with wonderful rapidity, completing his task in the least possible time. But this does not prove an absence of the most careful research and mature reflection, for he frequently goes carefully over the whole ground of a case, gets his authorities, and reaches the conclusions before he puts pen to paper. Then he writes his opinion very rapidly, and in a bad hand. A stranger in Washington, to whom one of the justices of the Supreme Court was pointed out on Pennsylvania avenue, said he thought he must be a judge when he saw him. "They are generally pretty large," he said, "when they get on the Supreme bench, and they get bigger after they sit, like a hen on her eggs. Whether it is the sitting that makes them large, or the brooding, or whether they were of the Plymouth Rock breed to begin with, I cannot say." Justice Miller contributes his share to the avoirdupois of the court. Though of only middle height, his form is well filled, and he surpasses in physical vigor many a younger man. He has an immense head, bald on the top; a clean-shaven ruddy face from which he cannot drive, if he would, the evidence of his refined, sympathetic, sensitive nature. His Washington house is on Highland Place, overlooking the Thomas statue, and one of his nearest neighbours is Secretary Bayard. The mansion is an imposing one of brick and brown stone, with tower and Mansard roof, richly and tastefully but not extravagantly furnished. The study is in the basement, a large room crowded with book-cases, big sofas, lounges and easy chairs. Justice Miller is not a hermit in his workroom; he seems more at home entertaining his friends there than in the drawing-room above. He and Mrs. Miller enjoy great social popularity, and entertain generously and with good taste.

The lives of few public men have been so varied and stirring as that of Justice Field. Sent to Greece at the age of thirteen that he might perfect himself in the study of language, he returned after nearly three years in Athens and Smyrna, to enter Williams College, from

which he was a graduate in 1837. His preceptor in law was his distinguished brother, David Dudley, with whom he remained in New York until 1848, when he again visited Europe. Returning in 1849, he joined the "Argonauts," who sought their fortunes in the gold fields of California, and upon his arrival there was elected the first alcalde of Marysville. In administering the old Mexican laws in the midst of a disorderly state of society, Mr. Field had many an exciting adventure. A member of the California Legislature in 1850, he may be said to have been almost the father of the judiciary system, and of the civil and criminal codes of procedure in the new State. In 1857, he went upon the Supreme bench of California, and in 1859 became chief justice of the State. During this time he did the State almost inestimable service by his influence in securing the passage of the law placing real estate titles on a solid basis, and by decisions on the subject, in which he delivered the opinions of the court. He became associate justice of the United States Supreme Court in 1865, and in the last twenty-two years has steadily grown in the respect of his colleagues, the bar and the country. He was a candidate for the democratic nomination for president of the United States in 1880. Justice Field's residence is on First street, east, facing the capitol and grounds. It is a historic house, being part of the building erected by citizens of Washington for the accommodation of Congress while the capitol was being rebuilt after its destruction by the British in 1814. In front of it James Monroe and John Quincy Adams were inaugurated presidents of the United States, and within its walls Henry Clay resided three terms as speaker of the House. Subsequently it became a boarding-house, and there dwelt together Jefferson Davis, Robert Toombs, Alexander Stephens; and John C. Calhoun, who died there. During the war it was used as a military prison, but when peace was restored it was re-modeled into three dwellings, one of which was purchased by Senator Evarts, another by General McKee Dunn, of the army, and the third by Cyrus W. Field, who presented it to his brother, the associate justice. The library, where Justice Field does his work, is in an annex, also fronting the capitol and park, and is well furnished with books, while the walls are covered with portraits, either engravings or photographs. The justice himself is tall, stoops slightly, has an unusually large head (bald on the front and top), and a full beard. He wears gold spectacles constantly, and carries his age so lightly as to look at least twenty years younger than he really is. His extensive travels and varied experience make him a most entertaining conversationalist upon almost any subject.

Justice Bradley is still upon the bench, and is the oldest member of the Supreme Court, having been born at Berne, near Albany, New York, in 1813. His early education was very limited, but his thirst for knowledge was insatiable, and it is related of him that when he was a charcoal-burner in the Helderberg mountains he used to go to Albany upon a load of coal, studying Latin on the way. He was once asked what he intended to do when he grew to manhood, and replied that he had not made up his mind whether he would be president of the United States or chief justice of the Supreme Court. Justice Bradley lives in the house once owned by Stephen A. Douglas, at the corner of Second and I streets in Washington, which in its day was one of the most imposing private residences in the national capital. The great ball-room added by Mrs. Douglas is now used by the judge as his library, which contains the best private collection of law-books in the country. He is a genial, companionable man, and when he and Mrs. Bradley give a dancing party, his library is temporarily converted once more into a ball-room. The brilliant lights and splendid costumes, the hum of merry voices, the music, and the rhythmic movement of the dancers are in strange contrast with the long rows of law-books, each in its formal sheepskin cover.

Justice Harlan is a good representative of the best type of the Kentucky soldier, statesman and jurist. He organized the 10th regiment of United States Kentucky Volunteers, of which he became colonel. Promoted to the rank of brigadier-general for meritorious service, the death of his father made it

necessary for him to resign his commission in 1863, and in doing so he wrote: "I beg the commanding general to feel assured that it is from no want of confidence either in the justice or ultimate triumph of the Union cause. That cause will always have the warmest sympathy of my heart; for there are no conditions upon which I will consent to a dissolution of the Union; nor are there any conditions consistent with a republican form of government which I am not prepared to make in order to maintain and perpetuate that Union." In person, Justice Harlan is a man of commanding presence, with a powerful and admirably built frame, large head and impressive countenance. He is a close student and careful judge, a jurist of constantly growing powers, and an eloquent and forcible speaker. Justice Harlan formerly kept house in Washington, but for five years after the death of his daughter, Mrs. Linus Child, he and Mrs. Harlan did not go into society. During a portion of this time he resided in the country a few miles from Washington, but has lately bought some land in the city, and is now building himself a house.

Justice Matthews is a man of versatile genius, a brilliant lawyer, an effective speaker, and is developing rare qualities as a judge. He is still in the prime of his mature powers, and ought to be good for many years of valuable and honorable service. He has been married a second time since his appointment in the judiciary, and lives in Washington in a style befitting his position.

Justice Gray physically is the giant of the Supreme Court, towering above all his associates, large men as they almost all are, and possessing an intellect as powerful and as finely developed as his frame. His appointment and that of Judge Blatchford have more than preserved the court from deteri orating—they have actually raised the average of ability in it. Justice Gray is the only bachelor in the Supreme Court, but he keeps house in Washington, on Rhode Island avenue, his sister spending the winter with him, and assisting him in the discharge of his social duties.

Justice Samuel Blatchford, of New York, is the junior member of the court in length of service, but not in years or experience. For more than a third of a century his name has been familiar to the bar of the country as the compiler of some of the most important law reports, and for twenty years he has sat upon the bench where he has been distinguished for his learning and the clearness and correctness of his decisions. His first experience upon the bench was as judge of the District Court, in 1867. In 1878 he was made, by President Hayes, judge of the United States Circuit Court, and during the four years that he served in that capacity it became necessary for him to render decisions in a number of very important cases. All these decisions were remarkable for their ability, and very few of them were reversed on appeal. Justice Blatchford is very wealthy, and at his Washington residence on the corner of Fifteenth and K streets entertains during the season with great elegance and very refined taste. Mrs. Blatchford, who is the daughter of Eben Appleton, of Boston, and a sister-in-law of Daniel Webster's daughter Julia, is a lady of the old school.—*American Magazine, August.*

GENERAL NOTES.

Mme Roy exerce le métier original et lucratif de cousine des blessés.

La brave femme se promène tous les jours dans les rues de Paris à la recherche d'accidents. Quand elle a le bonheur de voir la foule s'amasser auprès de la boutique d'un pharmacien, elle se hâte d'accourir. Elle s'approche de la vitrine du pharmacien et examine si la personne blessée à laquelle on prodigue des soins, à encore sa connaissance. Puis, après cette petite enquête, elle se précipite dans la boutique:

—Mais c'est Hector, s'écrie-t-elle, mon pauvre cousin Hector!...

Et elle embrasse le malheureux. Puis se retournant vers les personnes présentes:

—Je suis la cousine du blessé, dit-elle... Je vais l'emmener à son domicile... Eugénie, sa pauvre femme, doit être bien inquiète!...

On hèle un fiacre. On y dépose le blessé, auprès duquel monte la cousine. Chemin faisant Mme Roy fait main basse sur le porte-monnaie et les objets de valeur qu'elle trouve sur son compagnon.

Elle donne ensuite l'ordre au cocher de la voiture:

—Reconduisez seul le blessé à son domicile, dit-elle... Moi, pour ne pas perdre de temps, je vais aller chercher tout de suite le médecin.

Elle descend. Et le tour est joué!

Poursuivie pour vol au préjudice d'un pauvre diable d'épileptique, Mme Roy a été condamnée à trois mois de prison.

Ce n'est pas cher.—*Gaz. du Palais.*

The Legal News.

VOL. X. SEPTEMBER 10, 1887. No. 37.

In *Blaidsdell* v. *Ahern*, 4 N. Eng. Rep. 347, May 7, 1887, the plaintiff, an attorney, contracted with the defendants who were domestic servants, to prosecute a suit in their behalf for the recovery of certain property in New Hampshire. By the contract, the plaintiff was to receive nothing if nothing was recovered, but liberal fees, not exceeding fifty per cent. of the amount recovered, if he succeeded. After a defeat in the trial court in New Hampshire and an appeal, the parties quarreled, the defendants employed other counsel and finally recovered over $9,000. The plaintiff then brought action to recover his fees. The trial court held that he could not recover, but its judgment has been reversed by the appellate court. The latter held that, under the contract, if the plaintiff had succeeded he would have been entitled to recover as a debt, liberal fees from the defendants, that this was inconsistent with the idea of champerty, of which the very essence is a division of the thing recovered. It added that it is immaterial that the money to be recovered is the only fund out of which the debt could possibly be paid. If there is to be a division of the recovery and no personal liability is incurred, the case is one of champerty. But where the compensation is not limited to the avails of the suit, although they may be pledged as security, the agreement is not champertous.

In *Mack* v. *Jones*, U. S. Cir. C., West Dist. Tenn., Judge Hammond stated rather pointedly the reverse side of the charge of purchasing goods fraudulently. He said: "Briefly, the proof here shows that the defendant, a young man who had been a dry goods clerk, launched out for himself by buying at an insolvent assignment a stock of goods, at very low figures. To these he added other goods, and after the year was done, he had been very successful. He did not owe a dollar, and had more and better goods than he had started with, though he had some of the old stock left. He had paid his purchases promptly, and taken the benefit of the discounts allowed for cash. He was dazed with his success, and thought he could enlarge his business. So were the drummers who lived round about him, and were his friends, every one of them. They drummed him to death; even extorting promises that he should buy only from them, respectively, they thought it was such a good thing. It is difficult to say which was most to blame, the defendant or the drummers; but certainly, those orders and promises should not be now taken to mean that the defendant had then cunningly contrived a scheme to get the goods, and pocket the money for their sales, as is now alleged, in the desperation of the desire to save this attachment; for they are wholly consistent with an honest purpose to conduct the business as successfully as before."

It is not unusual, says the *Solicitor's Journal*, for spinster testatrixes to provide by their wills for their domestic pets. Mr. Justice Chitty, the other day, had a case before him where a lady had made provision for the maintenance of several dogs during their lives; and the learned judge remarked that the proper way of making such gifts was to give an annuity to a person, to cease at the death of the animal. He also said that doubts had often crossed his mind as to whether such gifts might not violate the rule against perpetuities. There can be no doubt that the life contemplated in the rule against perpetuities is the life of a human being, and it apparently could not be a violation of the rule to make a gift to a living dog or cat, as the duration of life of such animals is usually shorter than that of a human being. But take the case of an elephant. Would it be legal to give an annuity to a person to cease at the death of an elephant when, as is well known, an elephant's life is far longer than the life of a man?

A recent description of Sir Charles Russell, Q.C., the eminent English counsel, says:—"Look at him as he stands up to speak in the chamber, or moves through the lobby, and you will understand why he is so successful.

When nature built up the composition of Charles Russell, she blended in his "predestine plot of earth and soul" all the qualities which best make for success. The handsome face, with the clear-cut, regular features and the curious gray pallor of complexion, shows determination, courage, endurance in every line. The squarely set-up, massive body, of somewhat rugged outline, is saturated, if we may use the expression, with physical strength. The keen, bright eyes, which seem to scrutinize mankind with the impartial pertinacity of a gimlet, would alone have marked him out as a heaven-sent cross-examiner. He has had need of all his qualities, and he has used them all to their utmost. He has reached his present position by no easy paths; he has known poverty; he has had to fight a hard and stubborn fight, which would have smashed a weaker, less persistent man; he has known what it is to have what Americans call "a bad time," but he has pulled through it all, and stands close to the summit. He does not take his ease now—it is not the man's nature to take his ease—but he is able to enjoy himself in his own way, and he does. The court-house and the Senate are still his battle-fields, wherein he fights as hard as ever; but his relaxation has little to do with either of them. Sir Charles Russell's weakness—if so adamantine an individual can be said to have a weakness—is that noble animal, the horse."

COUR SUPERIEURE.

St. Jean (Dist. d'Iberville), 2 mai 1887.

Coram Loranger, J.

Mongeau v. Robert.

Bail de ferme sans terme préfix—Durée.

Jugé:—1. *Que le bail d'une ferme ou d'un fonds rural, sans mention de terme préfix, est censé être fait pour la durée nécessaire pour permettre au fermier de recueillir les fruits de l'immeuble*;

2. *Que dans l'espèce le défendeur a loué la ferme de la demanderesse à une époque où les travaux de labours avaient été faits et lorsqu'il ne restait que la semence à déposer et les travaux de récolte à faire; qu'ayant recueilli cette récolte dans le cours de l'année du bail, et avis de congé ayant été donné en temps utile, le bail a expiré à la fin de cette année.*

Per Curiam.—Le 29 mars 1886 la demanderesse a loué au défendeur, par bail sous seing privé et *sans terme préfix*, une ferme située à Sherrington. Le 6 novembre suivant le défendeur a reçu avis de déguerpir à l'expiration de l'année, et nonobstant cet avis, il a persisté à occuper les lieux contre le gré de la demanderesse; de là, la présente action en expulsion.

Le défendeur admet qu'il a possédé audelà de l'année, et plaide que le bail étant fait sans terme préfix, n'expirera que le premier octobre prochain; que de plus il (le défendeur) avait droit à un avis de congé de trois mois avant cette dernière date; que cet avis ne lui a pas été donné, et, conséquemment, que l'action est prématurée.

Les faits sont admis, et il ne reste qu'une question de droit à juger. Il s'agit d'un bail à ferme sans terme préfix; ce bail a-t-il pris fin le 29 mars 1887, c'est-à-dire à l'expiration de l'année, ou bien au contraire, doit-il durer jusqu'au premier octobre prochain, époque à laquelle le bail à ferme sans terme préfix, est censé finir? La solution de cette question se trouve dans l'interprétation à donner aux articles 1653 et 1657 du Code Civil.

Art. 1653:—"Le bail d'une ferme ou d'un "fonds rural, à défaut de terme préfix, est "présumé bail annuel finissant au 1er jour "d'octobre de chaque année, sauf la signi- "fication de congé qui suivant l'art. 1657, "doit être de trois mois avant cette date."

L'action a été intentée dans le courant du mois d'avril. Le défendeur il est vrai, a reçu dans le cours du mois de novembre précédent, avis de congé pour le 29 mars suivant; mais si le bail ne doit expirer que le 1er octobre cet avis est insuffisant et l'action serait prématurée. L'article 1653 de notre Code n'est que la reproduction de l'article 1774 du Code Napoléon qui lui-même ne fait, en réalité, que reproduire le droit ancien sur le sujet. Or, voici quelle est la doctrine des anciens auteurs et notamment celle de Pothier au traité du contrat de louage.

"Le temps que doit durer le bail est ordi-
" nairement exprimé par le contrat. Si l'on
" a omis de l'exprimer, le bail ne laisse pas
" d'être valable, dit Pothier; et si c'est le
" bail d'un héritage dont les fruits se re-
" cueillent tous les ans, le bail, lorsque le
" temps n'est pas exprimé par le contrat, est
" censé fait pour un an. Lorsque le bail est
" d'un héritage dont les fruits ne se recueil-
" lent qu'après plusieurs années, le bail est
" censé être fait pour tout le temps qui est
" nécessaire pour que le fermier en puisse
" percevoir les fruits." L'auteur cite des
" exemples. Ainsi dit-il, " lorsque les terres
" d'une métairie sont partagées en trois soles
" ou saisons, où une partie s'ensemence en
" blé, une autre partie en avoine et autres
" menus grains qui se sèment au mois de
" mars, et une autre se repose; si le temps
" que doit durer le bail n'est pas exprimé
" par le contrat, et qu'il soit dit seulement
" que le bail est fait *à raison de tant par an*,
" le bail doit être présumé être fait pour le
" temps de trois ans."

" Par la même raison, lorsque les terres sont
" partagées en deux saisons, dont l'une, tour à
" tour est ensemencée, et l'autre se repose, le
" temps du bail, lorsqu'il n'est pas exprimé
" par le contrat, doit être de deux ans."

Telle est aussi sous le droit nouveau l'opinion de Laurent et Troplong. Ce dernier ajoute que lorsque la nature de l'héritage est telle que tous les fruits se recueillent dans une année, le bail est censé fait pour un an. Tel est le bail d'un pré, celui d'une vigne, tel serait aussi celui d'une partie de terre à ensemencer en blé ou de toute autre manière. La récolte étant faite, le bail expire de plein droit.

" Le bail d'une ferme ou de tout autre
" fonds dont les fruits se recueillent en entier
" dans le cours d'une année, dit Laurent, est
" censé fait pour un an...... Les baux à
" ferme ont une durée fixe, quoiqu'ils soient
" faits *sans écrit, ce qui dans le langage du Code*
" *signifie que les parties n'ont pas stipulé de*
" *terme dans le contrat.* La nature des choses
" et l'intention des parties contractantes,
" suffisent pour déterminer la durée de la
" jouissance du fermier; celui-ci en prenant
" un héritage à ferme, veut nécessairement
" en recueillir tous les fruits; le bail doit
" donc durer tout le temps nécessaire pour
" que le preneur puisse faire la récolte."

Les codificateurs du Code Civil tout en adoptant ces vues, ont dû cependant eux aussi consulter les usages et les coutumes du pays pour régler les rapports entre locateurs et locataires, ainsi qu'ils le déclarent dans leur quatrième rapport.

Ainsi l'article 1651 qui decrète que si le bail est pour deux années ou plus, le locataire dans le cas de perte de la récolte en tout ou en partie par cas fortuit ou force majeure pendant la durée du bail, ne peut demander aucune diminution du prix, est de droit nouveau. Les codificateurs ont été induits à faire cette suggestion par la considération que les récoltes dépendent en grande partie du mode de culture, de l'habileté et de la diligence du fermier dans le choix et l'arrangement de ses semences; et que dans ce pays, où il est d'usage de cultiver sur chaque ferme une variété de semences, la destruction d'une récolte est d'ordinaire compensée par l'abondance d'une autre. Il leur a paru juste de décider que le locataire doit balancer les mauvaises années avec les bonnes, et comme règle simple, évitant toute incertitude et tout litige, ils ont jugé convenable d'en laisser le risque au locataire.

Les mêmes considérations les ont engagés à adopter l'article 1653 de notre Code qui déclare que le bail d'une ferme ou d'un fond rural, à défaut de terme préfix, est présumé bail annuel finissant *au premier jour d'octobre chaque année, sauf la signification de congé*, au lieu de l'article 1774 du Code Napoléon qui veut que le bail sans écrit d'un fond rural soit censé être fait pour le temps qui est nécessaire, afin que le preneur recueille tous les fruits de l'héritage affermé, et de l'article 1775 du même Code, qui déclare que le bail des héritages ruraux, quoique fait sans écrit, cesse de plein droit à l'expiration du temps pour lequel il est censé fait, selon l'art. 1774.

(Voir le 4me Rapport des Codificateurs, page 27.)

Comme on le voit, l'article 1653 n'est pas en principe de droit nouveau; il ne fait que déterminer d'une manière absolue l'époque à laquelle doit expirer, dans notre pays, le

bail d'une propriété rurale. Il en a limité la durée à une année et fixé cette durée à une époque déterminée qui est celle de la clôture de la récolte. Suivant les usages du pays, les travaux de labour préparatoires à recevoir la semence se font après le premier octobre; la semence elle-même se fait au printemps et la récolte est terminée le premier octobre. Le fermier a donc occupé tout le temps qui lui est nécessaire pour recueillir les fruits du terrain qu'il a loué. Il ne peut être évincé, après le premier octobre, à *moins d'un avis de congé préalable*; congé qui n'est pas nécessaire en France, et cela s'explique par le fait que les fruits des fonds ruraux dans ce pays ne se perçoivent comme dans le notre à une seule et même époque de l'année.

Prenant donc l'ensemble du droit français tant ancien que nouveau comparé au nôtre, il résulte qu'en l'absence de terme préfix, le bail est censé être fait pour la durée nécessaire pour permettre au fermier de recueillir les fruits de l'immeuble, c'est-à-dire dans notre pays, pour une année; et que le locataire qui reçoit son congé conformément à la loi, est obligé de quitter les prémisses à l'expiration de cette année. L'art. 1653 contient deux choses; d'abord, la présomption que le bail est annuel et 2e l'obligation de déguerpir, lorsque le congé a été donné. Si aucun congé n'est donné le bail est censé, quelque soit la durée de l'occupation, être pour une année expirant le 1er octobre; mais s'il y a congé, il est nécessairement fait pour une année, à dater du jour du bail même. Telle est la distinction à faire.

Ainsi, dans le cas actuel, la demanderesse a loué le 29 mars 1886, sans terme préfix; le bail a expiré le 29 mars 1887. Si le défendeur n'avait pas reçu congé il aurait pu se prévaloir avec avantage de l'article 1653; mais il a reçu son congé; il est, aux termes de l'article 1657, tenu de déguerpir à l'expiration de l'année. Il y a plus, en référant au bail intervenu entre les parties, il est facile de se convaincre que leur intention était de faire un bail annuel expirant le 29 mars 1887. Lorsque le défendeur a pris possession des lieux, les travaux d'automne avaient été faits et le défendeur s'oblige de les payer à un prix convenu, ou de les remettre arpent par arpent à la fin du bail. Interrogé comme témoin, le défendeur reconnaît qu'il a fait durant l'automne de 1886 autant de guérets qu'il en avait été faits l'automne précédent pour remplacer ceux-ci; il en a même fait quatre de plus. Il reconnaît avoir offert à la demanderesse avant le 1er octobre dernier de lui remettre sa terre, à la condition qu'il ferait certains travaux et notamment qu'il ferait les 21½ arpents de guérets qu'il avait trouvés tout faits sur la propriété.

Le défendeur a profité des travaux faits par la demanderesse l'automne précédent et recueilli les fruits récoltés sur l'immeuble pendant la durée de son bail; il a depuis remis les travaux qu'il s'était obligé de remettre. Si d'un côté, il a rempli les conditions de son bail, d'un autre côté il en a reçu tous les avantages; son objet en louant était de retirer les fruits de l'année; or, il les a retirés. L'objet du bail est donc accompli.

Il est en preuve que la demanderesse a voulu reprendre sa propriété au mois d'octobre dernier. Elle était dans son tort; outre que le bail n'était pas expiré, elle n'avait pas donné l'avis requis. Elle a réitéré son avis subséquemment et en temps utile; la mise en demeure de quitter les lieux est du 6 novembre 1886 et le bail expirait le 29 mars. Ce congé est suffisant.

Sur le tout je suis d'avis que l'action de la demanderesse est bien fondée et qu'elle doit être maintenue avec dépens.

Action maintenue.

M. Messier, pour le demandeur.
MM. Paradis & Chassé, pour le défendeur.

NEWSPAPER LIBELS ON PUBLIC MEN.

On July 7, before Mr. Justice Stephen and a special jury, the case of *Johnson* v. *The Midland Constitutional Newspaper Company* was tried. It was an action for libel against the proprietors of the *Derby Express* and the *Derby Mercury* for two libels in those papers, which in effect said that the appointment of the plaintiff to be a magistrate would be a direct insult to the borough bench. The defendants pleaded that the alleged libels related to matters of public interest, and were

published *bonâ fide* and without malice, in the honest belief that they were true and fair comments; also that they were true in substance and in fact; and they counter-claimed against the plaintiff for a libel published in the *Derby Daily Telegraph*.

Evidence having been called, and counsel on both sides having addressed the jury, the learned judge summed up, saying it was an action for libel, on the law of which he would say a few words before going into the actual facts. There were two pleas—(1) that which the defendants said they said by way of fair comment on a matter of public interest; (2) that it was true. If they believed either of these pleas, then there would be a verdict for the defendants; but if not substantially true, then a verdict for the plaintiff, with damages. He wished to make the remark that, though theoretically and legally the two defences were quite distinct and each separately a justification, yet in practice it was very difficult to keep them distinct. Fair comment involved more or less an admission that the thing was not true. When they came to the question of damages, they had a right to look at the facts attempted to be justified. The defendants had raked up every event of the plaintiff's life and thrown them at his head. They might very fairly ask themselves how far the malicious character of the publication was shown by the attempt to justify. Coming to the facts, the libel came to this—that the appointment of the plaintiff would be a direct insult to the borough bench. The defendants said that was merely fair comment, and if they had thrown no imputations on the plaintiff, and remarked upon his occupying himself very much in politics, as no doubt he did, he should have asked them to consider whether it was not one of the misfortunes that a public man experiences from the fact of his being a public man, and set off what the plaintiff said about the *Express*—an illustration of the old saying, 'When gentlemen meet, compliments pass;' but the defendants had done nothing of the sort. They set up an inquiry about the plaintiff's sons and their misfortunes, which it was wholly unnecessary to bring up. He then commented on the evidence of the witnesses, and said a great many little things had been mentioned which they were to consider if they had any effect on the question. If a newspaper libelled a man, forced him to go into the witness-box and give evidence, and then asked him about his sons and his widowed sister, to his mind it was adding insult to injury. With regard to the counter-claim, they were to consider whether 40*s*. was a sufficient sum to satisfy the defendants' claim for damages; if so, then the plaintiff would be entitled to their verdict. If they found for the plaintiff, they would say what sum he was entitled to. The question of damages was entirely one for them, and he would not say one single word about them.

The jury found for the plaintiff on the claim and counter-claim for 400*l*.—His lordship gave judgment for that amount, with costs.

JOINT OR SEVERAL CONTRACT AND RESTRAINT OF TRADE.

At the Marylebone County Court, on Friday, July 8, before his Honour Judge Stonor, judgment was given in the case of *Haywards* v. *Burnell* as follows: The plaintiffs, Charle and John Hayward, are brothers, and in November, 1885, were carrying on the business of a grocer in partnership at Notting Hill, and the defendant at the same time was carrying on the business of a baker in the same locality. The plaintiffs, in order to increase their business as grocers, purchased bread from bakery establishments at wholesale prices and sold the same at little or no profit, and consequently at a lower price than it was sold at by neighbouring bakers. The latter combined together, and threatened the plaintiffs with establishing a grocery business opposite theirs and underselling them, but ultimately adopted the more pacific course of offering the plaintiffs 10*s*. a week, so long as they did not sell bread at a lower price than the trade price in the neighbourhood.

Ultimately the following agreement was signed by the defendant (acting, no doubt, for his fellow-tradesmen as well as himself,) and was accepted by the plaintiffs and acted on by both parties: 'This is to certify that I, Thomas Burnell, do agree to give Messrs.

C. & J. Hayward the sum of ten shillings per week, providing the said C. & J. Hayward do not sell bread less in price than the said Thomas Burnell and the trade generally in this particular district of Princes Road, Notting Hill, and St. Anne's Road, of the same Notting Hill, the first payment being due at the end of the first week the said C. & J. Hayward sell bread at the trade prices as above mentioned, which by agreement they do agree to commence doing November 23, 1885; further, if the said Thomas Burnell fail to keep this agreement, the said C. & J. Hayward will be at liberty to take their own course. (Signed) THOMAS BURNELL [stamp 6*d*.], 10th day of November, 1885.'

From the date of this agreement the plaintiffs sold bread at the trade price, and the payment of 10*s*. a week was regularly made to them by the defendant up to July, 1886, about which time the plaintiffs dissolved partnership, and subsequently the plaintiff John Hayward continued to carry on the same business alone and to sell bread only at the trade price, and the defendant continued to pay him the 10*s*. a week up to January 24 last, when the defendant, without notice, discontinued such payment. The plaintiffs now bring their joint action for the arrears of that payment up to April 25 last, amounting to 7*l*.

The first thing to be considered is the legal construction of this extraordinary agreement, and which must be made with strictness, as it is in restraint of trade. Now, it appears to me clear that this document contains only on the part of the plaintiffs a joint covenant or agreement for their joint acts as partners, and not separate covenants for their separate acts, and indeed, if there were any ambiguity in the words employed, such would be the implication or construction of law, as the words implied would, according to the rule laid down in 'Shepherd's Touchstone,' p. 166, 'have an import corresponding to the interest of the covenantors, so as to be joint where their interest is joint, and several where their interests are several,' and this construction stands to common sense. Suppose a covenant by or with a numerous partnership or company composed (say) of twenty or two hundred persons, it would be absurd to contend that after the dissolution of the partnership every member of the partnership or company would be bound by or entitled to the benefit of such covenant in his individual capacity, and I can see no difference in this respect between two, twenty, or two hundred partners. This agreement, therefore, amounts only to a contract that the plaintiffs will not jointly as partners sell bread at a lower price than the trade price of the district in question; and consequently, on the dissolution of their partnership, it ceased altogether, and each of the plaintiffs was at liberty to sell bread at such lower price, and after that date the covenant of payment of 10*s*. by the defendant in my opinion also ceased under the express terms of the agreement, and I think also independently of such terms, inasmuch as the absence of mutuality in the agreement would then render it unreasonable and void, at all events in equity.

Another and a wider question arises in this case—viz., whether the present agreement was not, in its inception, invalid and void, as being in restraint of trade. The rule is, that every agreement in restraint of trade is void, except where it fulfils the following conditions; First, it must be partial in respect of space; second, it must be supported by an adequate consideration; and third, it must be reasonable (see 'Smith's Leading Cases,' *Mitchell* v. *Reynolds*, and the cases there cited). Now, there is no doubt that the present agreement fulfils the first two conditions; but, in my opinion, it does not fulfil the third, on account of its direct tendency to enhance the price of bread and create a monopoly, and the nature of the consideration. I am, of course, aware that the statutes against the offences of regrating and enhancing the price of provisions at markets have been repealed, and those offences abolished at common law, and that many cases have been decided in favour of mutual agreements between railway companies and between individuals which tend to keep up the charges of conveying passengers and carrying goods, and the prices of certain commodities; but I am not aware of any case in which such an agreement as the present to keep up the price of the necessaries

of life in consideration of a fixed money payment has ever been supported. The case where a business of this kind has been sold, and the vendor covenants not to carry on the trade within certain limits for a certain period does not appear to me to be in point, inasmuch as such covenant has no direct and, except in very few cases, no indirect tendency to enhance the prices of goods or produce monopolies. Upon the whole, I find for the defendant, but with some doubt, and I shall give liberty to appeal generally; and, in conclusion, I must express my regret that I have not been able to give this case all the consideration I should have wished, owing to the great pressure of business in all my Courts.

Judgment for the defendant, with costs.

NOTICE OF JUDGMENTS.

The Editor of the LEGAL NEWS:

Sir,—Might I venture to suggest that our Superior Court Judges should all adopt the custom of one or two of their number, viz., to send a note or postal card, advising counsel when judgments are to be rendered in their cases, which have been taken under advisement.

It would save members of the Bar a great deal of time, if the judges would, on day of judgment, cause to be posted in the Court House, a list shewing the decisions to be rendered, and the order in which they would be pronounced. M.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 27.

Judicial Abandonments.

Jules Eggert, Montreal, jeweller and watchmaker, Aug. 18.

John H. Mooney, Montreal, leather merchant, Aug. 22.

Curators appointed.

Re John Crilly.—Wm. Angus, Montreal, curator, Aug. 25.

Re Emond & Ste. Marie.—C. Desmarteau, Montreal, curator, Aug. 20.

Re Nazaire Fournier, Scotstown.—Kent & Turcotte, Montreal, curator, Aug. 24.

Re Louis Laberge, dry goods.—Kent & Turcotte, Montreal, curator, Aug. 19.

Re Henry R. McCracken, Hinchinbrooke.—W. S. Maclaren, Huntingdon, curator, Aug. 20.

Re Alexander Ross et al., Scottstown.—J. McD. Hains, Montreal, curator, Aug. 19.

Dividends.

Re Louis S. Bisson.— Dividend, payable Sept. 19, Kent & Turcotte, Montreal, curator.

Re Albina Beaupré (Mrs. Foy).—Dividend, payable Sept. 19, Kent & Turcotte, Montreal, curator.

Re Victor Ollivon.—First dividend, payable Sept. 13, A. C. Wurtele, Montreal, curator.

Separation as to property.

Adeline Dumas vs. Louis Philippe Gagnon, St. Roch des Aulnaies, Aug. 2.

Denise Monty vs. Evariste Moquin, St. Bruno, farmer, Aug. 22.

Exilma Plamondon vs. Napoléon Godbout, merchant, St. Louis de Bonsecours, Aug. 19.

Appointment.

P. L. Toussignant, to be sheriff of the district of Arthabaska, in place of A. Quesnel.

Quebec Official Gazette, Sept. 3.

Judicial Abandonments.

Jane Atchison (James Murray & Co.), Montreal, Aug. 29.

Curators appointed.

Re James Baxter, Three Rivers.—W. A. Caldwell, Montreal, curator, Aug. 24.

Re H. R. Beveridge & Co.—A. W. Stevenson, Montreal, curator, Aug. 26.

Re Alfred Cloutier.—Kent & Turcotte, Montreal, curator, Aug. 30.

Re James H. Douglas.—A. W. Stevenson, Montreal, curator, Aug. 26.

Re Louis Dupuy.—W. A. Caldwell, Montreal, curator, Aug. 27.

Re Jules Eggert.—W. A. Caldwell, Montreal, curator, Aug. 30.

Re W. E. Elliott & Co.—A. W. Stevenson, Montreal, curator, Aug. 30.

Re Napoleon Houlé.—Kent & Turcotte, Montreal, curator, Aug. 30.

Re Johnson & Co., Marieville.—Kent & Turcotte, Montreal, curator, Aug. 27.

Re Wm. Mansfield, hotel keeper.—C. Desmarteau, Montreal, curator, Aug. 30.

Re John H. Mooney, leather merchant.—Geo. Hyde, Montreal, curator, Aug. 30.

Re H. M. Mulligan.—C. Millier and J. J. Griffith, Sherbrooke, curator, Aug. 26.

Dividend.

Re L. H. Marchand, Batiscan.—Dividend, payable Sept. 25, Kent & Turcotte, Montreal, curator.

Appointments.

L. E. Pacaud, Q.C., to be legislative councillor for division of Kennebec, *vice* E. Gerin, deceased.

G. Bryson, Jr., for division of Inkerman, *vice* G. Bryson, resigned.

GENERAL NOTES.

Il y avait promesse de mariage entre M. Jules Baillet, herboriste, et une jeune italienne, Mlle Juliette Salari, couturière.

Le fiancé venait chaque jour apporter à la jeune fille le bouquet traditionnel. Il lui adressait des vers, la comparait à une déesse, et jurait qu'il n'aurait pas de plus grand bonheur que de passer sa vie à ses genoux.

Bref, il semblait fort épris, le jeune herboriste et Mlle Juliette pouvait croire que l'époque de son mariage serait plutôt avancée que retardée.

Hélas! jugez de sa surprise, quand dernièrement elle reçut de son futur, le billet que voici:

"Mademoiselle,

"Si grand que soit mon amour pour vous, de l'avis de toute ma famille, je dois renoncer à l'union projetée.

"Il m'a été révélé une circonstance qui motive ma conduite actuelle.

"J'aurais voulu douter, mais j'ai vu, de mes yeux vu, imprimé dans une brochure, ce que vous m'aviez toujours caché.

"Je ne vous en veux pas: d'abord ce n'est pas de votre faute, et puis vous croyez sans doute et je le crois aussi, que vous n'avez absolument plus rien à craindre pour l'avenir.

Mais, enfin, malgré moi, j'ai peur, et je ne veux pas jouer mon bonheur, celui des enfants que nous pourrions avoir, sur un *aléa* aussi grave.

"Vous dire ce que je souffre serait impossible. Car je vous aime, mademoiselle, je vous aime comme je n'avais jamais aimé.

"Mais la raison commande ma décision. Pardonnez-moi et oubliez-moi. Je suis bien malheureux."

Mlle Juliette lut et relut la lettre. Elle n'en pouvait croire le témoignage de ses yeux. Qu'est-ce que cela voulait dire? De quelle brochure voulait parler le jeune homme?

Comme c'est une femme de tête, elle alla tout droit trouver le fiancé, qui lui montra un papier contenant un boniment-réclame ainsi conçu:

"*Nouveau mode de guérison des cancers.* A la page 28 on lisait:

"No. 20824.—GIULIA SALARI DE FLORENCE.

"A senti les premières atteintes du mal vers l'âge de quinze ans. Vit pharmaciens, médecins, qui tous déclarèrent à sa mère qu'elle était atteinte d'une tumeur cancéreuse. En 1876, elle dut s'aliter; la tumeur avait pris un développement inquiétant.

"On parla de lui faire subir une opération qui pouvait entraîner la mort; c'est alors que je la visitai: je la soumis à mon traitement par l'électricité et les compresses. Après, la grosseur avait beaucoup diminué. Au bout d'un mois, la malade put sortir. Il n'y avait plus trace de tumeur... J'ai revu Giulia, en 1881, à mon passage à Florence; elle m'a déclaré qu'elle n'avait jamais eu de rechutes."

Mlle Juliette avait à peine achevé la lecture de cette lettre, qu'elle s'écria: "Mais c'est une indignité! Jamais je n'ai eu de cancer! Je ne sais pas ce que cela veut dire."

Le jeune homme hocha la tête. Elle reprit vivement: "Jamais, vous entendez bien. Je me rappelle, en effet, que le docteur qui a publié cette brochure, le docteur Languilhomme m'a soignée quand j'étais petite; mais c'était à la suite d'une chute. Je m'étais foulé le bras. C'est la seule maladie que j'aie eue, je vous le jure."

Le jeune homme persistant à douter, Mlle Salari vient d'assigner le propriétaire, ou pour mieux dire, le lanceur de l'onguent pour la guérison des cancers.

Elle demande la suppression du passage où elle est désignée, la publication du jugement dans trois journaux à son choix et quinze mille francs de dommages-intérêts.

Mais avant qu'un jugement soit rendu, le mariage viendra peut-être réparer le préjudice causé. *Gaz. Pal.*

CONSOLATIONS OF A CROSS OLD LAWYER.

I'm growing blind;—
I am not hourly forced to see
Unpleasant forms of trickery;
Faces I hate; experience relief
From pleading, wrong opinion, tedious brief,
Inflicted on humanity
By dull, pedantic mind.

My hearing's thick;—
I heed not noisy lawyers' strife,
Nor curtain lectures from my wife,
Nor judges dull, nor singers out of tune,
The bar's stale jokes, nor prate of "hottest June,"
Nor lies with which my club is rife,
Nor whack o' policeman's stick.

I am quite bald;—
I do not need to part my hair
Nor suffer in a barber's chair;
Clients can't say, "your hair is growing thin,"
Nor make a foolish sympathetic din;—
When they observe my head so bare
These comforters are galled.

My smell is dull;—
I'm not disturbed by noisome stench
Of city slums or musk on wench,
Of cabbage cooking weekly for my meal,
Or miscreant odors which malignant steal
About the magistrate on bench
From wrangling court-room full.

I have the gout;—
Highly respectable disease,
Confined to our first families,—
Scarlett-swathed foot and Chatham's padded crutch
To aches plebeian I prefer by much;
I bear my sufferings with ease
Though I can't stand and "spout."

I'm rather poor;—
No new-made, vulgar millionaire,
At whom the populace may stare;
No land to care for save a burial lot;
Text-books, reports, law journals fright me not;
I'd rather have my frugal fare
Than be an affluent boor.

My time is short;—
Well, human life's a dismal bore;
We do the same thing o'er and o'er,—
We eat, we drink, we sleep, we laugh, we cry,
Marry, divorce, grow sick, and then we die:
I hope upon the other shore
There's a less doleful port.

I. B. in *Albany Law Journal.*

The Legal News.

VOL. X. SEPTEMBER 17, 1887. No. 38.

The case of *The Bradstreet Co. & Carsley*, M. L. R., 3 Q. B. 83, has been settled, and the questions involved will, therefore, not be submitted to a higher tribunal. A case much resembling this, has lately been decided by the New Jersey Court of Appeals, *King* v. *Patterson*, 9 Atl. Rep'r, 705. The Court held that a communication made by the proprietor of a mercantile agency, in respect to the character and financial standing of a trader, is privileged when made to those of its patrons who have a special interest in the information communicated. But this privilege does not extend to publications made to patrons who have no such interest in the subject-matter. The publication by mercantile agency of a notification sheet, which is sent to its subscribers irrespective of their interest in the plaintiff's standing and credit, is not a privileged communication, and the proprietors are liable for a false report of the plaintiff's financial condition in such publication.

The *Law Journal* (London), referring to the retirement of Mr. Justice Grove, who has been succeeded by Mr. Charles, Q.C., in the Queen's Bench Division, says: "The characteristic by which Mr. Justice Grove will be remembered by the profession was his simple and laborious love of justice. He might be relied on to try every case that came before him with an anxious desire to arrive at the truth, which was not diverted a hair's breadth by any of the smaller judicial vices, such as vanity, ambition, or the love of applause. He has a constitutional abhorrence of shams and a native common sense which stood him in good stead on the bench. A peculiarity about his career was that he was the only man of science, in the special application of the word, on the bench of his time, but that no judge's judgments were less scientific in form, and that cases requiring scientific knowledge, such as patent cases, by some perversity of chance seldom came in his way. On one occasion, we believe, there was a serious collision between his judicial and experimental characters. Trying a gang of coiners on circuit, Mr. Justice Grove listened patiently, but with an amused smile, to a policeman describing the use to which an implement of the coiners' art, which he had captured, was put by them. He expatiated on the value of it to coiners from the smallness of its size, characterising it, from the point of view of the Queen's revenue, as the most 'mischievous' thing that ever was made. 'I believe, my lord,' he added, 'they call it a Grove battery.'"

A question of some interest to tenants of portions of a building has been decided by the Supreme Judicial Court of Massachusetts (*Lowell* v. *Strahan*, June 30, 1887, 12 Northw. Rep. 401). The Court held that a lease of the "first floor" of a building includes not only the interior, but also the front wall of that part of the building, as parcel of the leased premises, and gives the lessee not merely a privilege or easement appurtenant to the building to use the wall for certain purposes, such as putting out signs, but the right to the exclusive use thereof.

COUR SUPERIEURE.

FRASERVILLE, 22 juin 1887.

Coram CIMON, J.

ANCTIL v. MARTIN, Esqté.

C. C. Arts. 165, 166, 169, 170.—*Obligation du père de nourrir, entretenir et élever ses enfants.*

JUGÉ:—*Que le père a droit d'exiger que les revenus personnels de ses enfants mineurs satisfassent à leurs dépenses d'entretien, de nourriture et d'éducation; ou, en d'autres termes, que le père n'est pas obligé d'encourir ces dépenses sur ses biens personnels, si ses enfants ont des revenus.*

Le défendeur est le tuteur des six enfants mineurs du demandeur. Celui-ci allègue que chacun de ces enfants ont un revenu personnel de douze piastres par année; que ces enfants demeurent avec lui, qu'il leur donne tous les soins et les entretient, les

nourrit et pourvoit à leur éducation, et il réclame du tuteur, pour l'indemniser d'autant des dépenses qu'il (le demandeur) encourt à ce sujet, ce revenu annuel de douze piastres. Le défendeur a plaidé, entr' autres choses, que, par l'art. 165 du C. C., "les époux con-"tractent par le seul fait du mariage, l'obli-"gation de nourrir, entretenir, et élever leurs "enfants," et que le père est obligé d'encourrir à ce sujet toutes les dépenses nécessaires sans pouvoir y faire contribuer les biens des mineurs, et que le demandeur a, d'ailleurs, des moyens personnels pour lui permettre de rencontrer ces dépenses.

Sur cette partie de la contestation, en prononçant le jugement, *Cimon*, J., s'est exprimé comme suit:

L'art. 165, en disant que les époux sont obligés de *nourrir, entretenir et élever* leurs enfants, ne fait qu'insérer dans le code civil une obligation de droit naturel. Puis l'art. 166 fait de même en disant: "Les enfants "doivent des aliments à leurs père et mère "et autres ascendants *qui sont dans le besoin.*" Et l'art. 169 a une disposition générale: "Les "aliments ne sont accordés que dans la pro-"portion du besoin de celui qui les réclame "et de la fortune de celui qui les doit." Les parents doivent à leurs enfants, non seulement la nourriture et l'entretien, mais encore ils doivent *les élever*, ce qui comprend des devoirs d'ordre purement moral, *comme de former leur cœur, développer leur intelligence, régler leurs habitudes et leurs mœurs* (4 Demolombe No. 9), et tout cela par ces attentions délicates, ces bons avis, ces bons exemples et cette surveillance que la tendresse d'un cœur paternel dicte si naturellement. Ces devoirs d'ordre moral, il n'y a aucun doute, les parents doivent les remplir sans pouvoir prétendre à aucune récompense pécuniaire sur les biens qui appartiennent à leurs enfants. Aussi ces devoirs ne sont pas réciproques, en ce sens, comme l'exprime si bien Marcadé, qu'ils sont seulement de haut en bas, et non de bas en haut, c'est-à-dire que les enfants ne les doivent pas à leur père et mère. Mais, en outre de cela, les parents doivent à leurs enfants une éducation en rapport avec leur état: ce devoir n'est encore que de haut en bas; mais il entraine des dépenses pécuniaires, comme le salaire des précepteurs, etc., et ces dépenses, comme celles de nourriture, d'entretient et de logement, les pères doivent-ils les encourrir sur leurs biens personnels, si leurs enfants ont eux-mêmes des biens? Telle est la question à décider en cette cause.

La dette des aliments est réciproque; mais les arts. 165 et 166, dans leur rédaction, ont une différence. Ainsi, l'art. 165 dit tout simplement: "Les époux contractent, par le "seul fait du mariage, l'obligation de nourrir, "entretenir et élever leurs enfants." Et l'art. 166 s'exprime ainsi: "Les enfants doivent "des aliments à leurs père et mère et autres "ascendants *qui sont dans le besoin.*" Or l'art. 165 n'a pas ces derniers mots: *qui sont dans le besoin*. Est-ce à dire que les parents doivent à leurs enfants les déboursés pour leur nourriture, entretien et éducation, même si ces enfants ont des moyens personnels pour les rencontrer? Sous le Code Napoléon, on explique l'omission de ces mots: *qui sont dans le besoin*, dans le premier article, en disant qu'il est rare que les enfants en minorité qui ont leurs père et mère aient des biens personnels, tandis que les parents, (père, mère ou autres ascendants) sont toujours présumés en avoir. En effet, ces articles 165 et 166 contiennent deux préceptes généraux. Quand bien même l'art. 166 n'aurait pas ces mots: *qui sont dans le besoin*, il est certain que les enfants ne devraient les aliments à leurs père et mère que s'ils sont dans le besoin; de même, bien que l'art. 165 ne l'explique pas, il est également certain qu'en posant la règle générale, il n'était pas nécessaire de donner l'exception, car pourquoi les père et mère devraient-ils des aliments à leurs enfants si ceux-ci en ont? La loi n'ordonne des aliments qu'à ceux qui n'en ont pas. Et cette obligation des père et mère, de même que celle des enfants, est subordonnée à l'art. 169 qui prescrit que les aliments ne sont accordés que dans la proportion *du besoin* de celui qui les réclame et de la fortune de celui qui les doit; et aussi à l'art. 170 qui décrète: "Lorsque celui qui "fournit ou qui reçoit des aliments est re-"placé dans un état tel que l'un ne puisse "plus en donner, *ou que l'autre n'en ait plus "besoin*, en tout ou en partie, la décharge ou "réduction peut en être demandée." Et De-

molombe, après avoir dit que ces arts. 169 et 170 sont inséparables de l'art. 165 comme de l'art. 166, ajoute: "il est effectivement très "équitable que les père et mère, moins riches "peut-être que leur enfant, ne soient pas "tenus de payer pour lui les dépenses aux-"quelles il peut personnellement satisfaire." 4 Demolombe, No. 13. Et si le père est pauvre et que le fils soit riche, n'est-il pas naturel que le fils devra être élevé pour faire honneur à la position à laquelle sa fortune l'appelle, et comment le père pourra-t-il l'élever ainsi, lui qui n'en a pas les moyens? C'est donc la fortune du fils qui pourvoira à ses dépenses. L'art. 165 oblige les parents à nourrir et entretenir leurs enfants, sans limiter cette obligation à la minorité seule de l'enfant; ainsi, que l'enfant soit majeur, *s'il est dans le besoin*, son père lui devra des aliments, (Pothier, mariage, No. 385). De même, l'art. 166, en obligeant les enfants aux aliments envers leurs père et mère, ne distingue pas si ces enfants sont mineurs ou non. Que l'enfant soit au berceau, s'il a une fortune personnelle, et que ses parents *soient dans le besoin*, sa fortune devra contribuer à fournir les aliments aux parents dans la proportion de leurs besoins et de cette fortune. C'est déjà un bienfait immense que les parents ont fait à l'enfant, en lui donnant le jour; pourquoi, s'il peut subvenir à ses dépenses, la loi en chargerait-il ses parents?

L'art. 384 du Code Napoléon dit: "Le père, "durant le mariage, et après la dissolution "du mariage, le survivant des père et mère, "*auront la jouissance des biens de leurs enfants*, "jusqu'à l'âge de dix-huit ans accomplis, ou "jusqu'à l'émancipation qui pourrait avoir "lieu avant l'âge de dix-huit ans." Et l'art. 385 du même code ordonne que "les frais de "cette jouissance seront...... 2o. *la nourriture, l'entretien et l'éducation des enfants selon "leur fortune*......" Demolombe (vol. 5, No. 14) prétend que si les revenus de l'enfant ne suffisent pas à ses dépenses d'entretien et d'éducation, il est plus conforme au vœu de la loi que les parents supportent personnellement le surplus, *lorsqu'ils sont dans l'aisance*, plutôt que d'entamer le capital de l'enfant, et plusieurs jugements en France sont en ce sens. Mais Proudhon, t. 1, No. 18, usufr., enseigne que le capital même de l'enfant doit y satisfaire; et Demolombe finit par dire que, dans tous les cas, il faudrait que le conseil de famille en décidât.

Mais, ici, le demandeur ne réclame que des revenus. Les principes, la doctrine et la jurisprudence sont unanimes en sa faveur. *Dalloz, vo. mariage, No.* 613; *Favard de Langlade, repert., vo. aliments; Guyot, repert., vo. aliments.*

Notre loi n'a pas les dispositions du Code Napoléon donnant aux parents, en vertu de la puissance paternelle, la jouissance des biens de leurs enfants. Ne serait-il pas injuste envers les parents de voir tous les ans, jusqu'à l'âge de majorité de l'enfant, les revenus de ce dernier s'accumuler au capital, et le père être obligé de prendre sur le prix de son travail pénible l'argent nécessaire pour payer les dépenses de cet enfant?

Sous le Code Napoléon, le père n'a pas toujours la jouissance des biens de son enfant; et lorsqu'il l'a, elle finit, dans tous les cas, lorsque l'enfant a atteint ses 18 ans révolus; et, cependant, la jurisprudence et la doctrine sous le Code Napoléon, sont résumées par Aubry et Rau, vol. 6, p. 72, comme suit: "lorsque les enfants possèdent des biens "personnels, dont les père et mère n'ont pas "la jouissance légale, ceux-ci sont autorisés "à prélever, sur les revenus de ces biens, les "dépenses d'entretien et d'éducation des "enfants."

Sous l'ancien droit français, dans quelques coutumes, la jouissance paternelle donnait aux parents la jouissance des biens de leurs enfants, et, dans ces cas, la coutume obligeait *spécialement* les parents à payer les dépenses de leurs enfants. Ainsi, dans la coutume de Paris, il y avait *la garde noble* et *la garde bougeoise;* c'est-à-dire que *le père noble* ou *la mère noble*, pouvait, après le décès de l'un d'eux, accepter *la garde noble* de son enfant; et *le père, bourgeois de Paris*, ou *la mère, bourgeoise de Paris*, pouvait aussi, après le décès de l'un d'eux, accepter *la garde bourgeoise* de son enfant mineur. Or l'art. 267 de la Cout. de Paris disait que *le gardien noble* et *le gardien bourgeois* avaient "l'administration des "meubles et fait les fruits siens durant la "dite garde de tous les immeubles, tant hé-"ritages que rentes, appartenant aux mi-"neurs, assis en la ville ou dehors; à la

"charge de payer et acquitter par le dit gar-"dien les dettes et arrérages de rente que "doivent les dits mineurs; *les nourrir, alimen-"ter et entretenir selon leur état et qualité...*" Or, pourquoi, si les parents sont tenus, quand même leur enfant mineur a des biens, à supporter personnellement les dépenses de nourriture, d'entretien et d'éducation de cet enfant, l'art. de la coutume de Paris, en donnant au gardien noble, ou au gardien bourgeois, qui était ou le père, ou la mère, la jouissance des biens de leur enfant mineur, leur aurait-elle prescrit *spécialement* de nourrir, alimenter et entretenir cet enfant? C'est donc que du moment que l'enfant peut pourvoir à ces dépenses, les parents n'y sont plus tenus. C'est ce qu'exprime Guyot, vo. aliments, p. 317: "*Il est de principe* que l'enfant "qui a par lui-même une fortune ou des "ressources suffisantes pour se nourrir et "entretenir, ne peut pas demander d'aliments "à son père et à sa mère. Cela est établi par "la loi 5, *ff. de agnoscendis et alendis liberis.*"

Sous l'ancien droit romain, la question ne pouvait se présenter, puisque le père était le maître absolu des biens de son enfant comme de sa personne. Mais cette règle a été modifiée par l'introduction des pécules, et le fils a pu, par la suite, avoir des biens séparément de ceux du chef de famille; et alors le père n'était plus tenu aux aliments envers son enfant. Voici ce qu'on lit au Digeste, liv. 25, tit. 3, ff. 5, § 7. C'est un fragment d'Ulpien: "*Sed si filius possit se exhibere, æstimare judices "debent, ne non debeant ei alimenta decernere.*"

Il est donc certain que le père a droit de faire payer les dépenses de nourriture, d'entretien et d'éducation de [illegible]nfants, par leurs revenus personnels[illegible]

Juge[illegible]séquence.

LeBel & Dessaint, [illegible]mandeur.
Alfred Dionne, [illegible] défende[illegible]

C[illegible]

défendeurs nommément, et non aux huissiers, dans la forme d'un Bref ordinaire, sera renvoyé sur exception à la forme.—C. proc. art. 1031, 1023, *et* 35 *Vict., C.* 6 *S.S.* 21 *et* 22 (*Québec*). *Henry* v. *Simard*, 16 *L. C. R.* 273.

A. Dessaint, pour le demandeur.
A. H. Simard, pour les défendeurs.
(C. A.)

COUR SUPERIEURE.

MALBAIE, 7 février 1887.

Coram CIMON, J.

PELLETIER v. BOUCHARD.

Opposition à jugement—Dépôt—Permission de parfaire—Art. 138, *C. proc.*

JUGÉ:—1. *Que l'opposant à jugement pris ex-parte doit déposer avec son opposition non seulement les déboursés encourus pour prendre tel jugement, mais aussi les honoraires de l'avocat, savoir: pour ces derniers, $5, différence entre les items* 2 *et* 4 *du tarif de la Cour Supérieure, dans les causes de première classe;*

2. *Que sur motion demandant le rejet de l'opposition pour insuffisance du dépôt, même si l'opposant montre cause et soutient que le dépôt est suffisant, il lui sera accordé un certain délai pour parfaire;**

3. *Que la motion signifiée le huitième jour après la production de l'opposition, et en demandant le renvoi pour insuffisance du dépôt, sera cependant déclarée signifiée en temps utile, bien que l'article* 138 *C. proc. déclare que si la réponse à un plaidoyer contient des moyens déclinatoires, dilatoires, ou à la forme, le délai pour répondre est de quatre jours seulement.*

Charles Angers, procureur du demandeur.
[illegible] S. Perrault, procureur de l'opposant.
(C. A.)

COUR SUPERIEURE.

SAGUENAY, 12 mai 1882.

Coram ROUTHIER, J.

B. DUFOUR v. J. DUFOUR.

[illegible]on pétitoire—Interruption de prescription.

* L'opposant avait déposé $1.30 en produisant son opposition, *sauf à parfaire.*

Le 31 octobre 1831, le demandeur se fit concéder une terre située en la paroisse St. Fidèle, la posséda pendant deux ans, et l'abandonna pour s'en aller aux Etats-Unis où il demeura quarante-deux ans.

Le défendeur, son frère, voyant cette propriété abandonnée, s'en mit en possession, vers 1840, y fit des défrichements assez considérables, et l'ensemença chaque année, jusqu'à 1880. Le demandeur revenu des Etats-Unis, voulut ravoir sa propriété. Le défendeur refusant, une action pétitoire fut instituée contre lui. A cette action, le défendeur plaida prescription de 30 ans. Le demandeur répondit que la possession du défendeur n'avait pas été à titre de propriétaire, et qu'elle avait été interrompue.

La preuve constata que le défendeur avait possédé pendant 37 ans, mais de plus,

1. *Qu'en 1854, il s'était fait concéder l'arboutant de l'immeuble revendiqué et qu'il était dit en l'acte de concession, que cet arboutant était borné à la terre de Basile Dufour (le demandeur).* 2. *Que le défendeur avait coutume de dire au sujet de terrain revendiqué : " Si mon frère revient, il reprendra sa terre et paiera mes travaux."*

JUGÉ :—1. *Que l'acte de 1854 comportait une reconnaissance suffisante du droit de propriété pour interrompre la prescription.*

2. *Que les paroles du défendeur, " si mon frère revient, il reprendra sa terre et paiera mes travaux," démontraient clairement qu'il n'avait point possédé à titre de propriétaire.*

Et qu'en conséquence, le plaidoyer de prescription devait être débouté.

Le 31 septembre 1882, ce jugement fut confirmé unanimement en Révision, Meredith, J. C., Stuart et Caron, JJ. Autorités citées à l'appui de la demande : 2183 et 2227, C. C. Marcadé, Prescription, p. 205, 6ème. édition, 145 et 117. Mourlon, vol III, Nos. 1882-1856 et seq. Dalloz, Verbo prescription, Nos. 570 et seq., et 585. Troplong, Prescription, No. 617, où il cite Delvincourt. Troplong, Nos. 915, 924, 927. Pothier, obligations, No. 692.

Charles Angers, procureur du demandeur.
J. S. Perrault, procureur du défendeur.

(C. A.)

*SUPERIOR COURT—MONTREAL.**

Collection—Paiement par débiteur solidaire—Subrogation—Preuve—Aveu.

Jugé, 1o. Qu'un débiteur qui paie une dette à laquelle il est tenu conjointement et solidairement avec un autre, est de plein droit subrogé au créancier payé contre ce dernier débiteur.

2o. Que dans ce cas l'aveu du créancier payé ou de son procureur est suffisant et est une preuve légale du paiement qui a opéré la subrogation.—*Shorey* v. *Guilbault & McVey*, en révision, Johnson, Taschereau, Gill, JJ., 30 avril 1887.

Jugement rendu à l'étranger — Prescription — Dénégation—Documents authentiques.

Jugé, 1o. Que dans une action pour rendre exécutoire un jugement rendu sur billet promissoire dans un pays étranger, le défendeur ne peut opposer la prescription de cinq ans.

2o. Qu'une simple dénégation du jugement rendu et des faits y contenus est nulle et non avenue, le défendeur doit procéder contre le jugement comme la loi l'indique pour les pièces authentiques. — *Dunbar* v. *Almour*, Jetté, J., 27 juin 1887.

Vente judiciaire d'immeuble—Annonces—Erreur—Frais.

Jugé, 1o. Qu'il y a une erreur suffisamment grave pour faire maintenir une opposition afin d'annuler à une saisie-exécution d'un immeuble, lorsque les annonces du shérif pour la vente judiciaire de cet immeuble le décrètent comme ayant 108 acres de superficie, tandis qu'en réalité il en a 195.

2o. Que toutefois lorsque le saisi a eu connaissance de cette irrégularité dès le commencement, n'en a pas averti le shérif en temps utile, alors qu'il pouvait faire, mais, au contraire, a attendu à la veille de la vente pour faire une opposition, il devra payer les frais de la saisie et de l'opposition jusqu'à la date de la contestation de cette dernière par le saisissant. — *Exchange Bank* v. *Lauzon* Jetté, J., 27 juin 1887.

* To appear in Montreal Law Reports, 3 S. C.

Usufruitier—Taxes municipales—Donation—Clause d'insaisissabilité—Vente judiciaire.

Jugé, 1o. Que les taxes municipales et autres impositions publiques sont à la charge de l'usufruitier.

2o. Qu'un donateur ne peut, par une clause d'insaisissabilité, soustraire les biens donnés aux charges et contributions imposées dans l'intérêt public; et que malgré cette clause d'insaisissabilité les biens qui y sont sujets peuvent être vendus pour taxes municipales.—*La Cité de Montréal* v. *Bronsdon*, Jetté, J., 27 juin 1887.

Succession vacante—Curateur—Vente des biens—Formalités.

Jugé, Que les formalités imposées par la loi pour la vente par le curateur des biens meubles et immeubles d'une succession vacante, sont impératives, et sous aucune circonstance le juge ne peut sur simple requête en permettre la vente.—*Ex parte* Lamothe, Taschereau, J., 16 avril 1887.

Abandonment of Property—Appointment of Provisional Guardian.

Held, 1. That the Provisional Guardian appointed to property judicially abandoned must be resident within the Province of Quebec.

2. The decision of the prothonotary appointing a Provisional Guardian may be revised by the Court or judge.

3. Where the interests of the Provisional Guardian appointed by the prothonotary are adverse to those of the creditors generally, his appointment may be set aside.—*McDougall* v. *McDougall et al.*, & *Munro*, Davidson, J., July 15, 1887.

Tariff of Fees—Petition under Liquidation Act of 1882.

Held, That Nos. 41 and 42 of the Tariff of Fees are applicable to a petition praying that liquidators under the Liquidation Act of 1882, be ordered to deliver up property in their possession.—*In re Adams Tobacco Co.*, & *Henshaw*, Petr., Mathieu, J., June 28, 1887.

LAW AND RELIGION IN THE PROVINCE OF QUEBEC.

A recent discussion on the exclusion of persons disavowing the existence of a Supreme Being, and of a future state of rewards and punishments, from testifying in a court of justice, introduces us to the consideration of the much broader and important question of the effect of the quasi-religious system of law of our Province upon the status of those citizens who acknowledge no religious belief.

The French code, entitled the Code Napoleon, was adopted as the model upon which our Civil Code was framed, but in many instances, either from design or negligence, innovations were introduced, and departures from the spirit, as well as the text, were made in our codification, which have tended to contrast the latter unfavourably with the universally appreciated code of France.

Under the Code Napoleon, no disqualification ensued on account of any religious belief; its enactments were confined to rules of law, governing the intercourse between man and the State, and were not rendered dependent for their maintenance upon the performance of any obligation towards a Supernatural Being.

Our codifiers have seen fit, in the matter of acts of civil status, to cling to the old opinions, and have ignored the judicious provisions of the French law. Under the latter code, the celebration of marriage and its registration, as well as the registration of births and deaths, were declared to be matters purely civil, and left to the officers of the State to perform; under our law, the Church takes the place of the State in these important duties, and to it, only, is allotted this power.

It is unnecessary to dilate upon the absolute importance of the proper celebration of these ceremonies, and of the official recognition and proof of births, marriages, and deaths, the three great epochs of human existence. Some very cogent reasons must be advanced why the duties thereof should be allotted to any particular set of individuals unconnected in any official capacity with the State.

To illustrate, the law and practice in force here require that at the beginning of each

year the minister or priest of a congregation should procure from the court a blank book initialled, page by page, by one of its officers; and, having at all times in his possession the church register, the minister is ordered to enter in the register and in the blank book mentioned, which is to be an annual duplicate of such register, all the ceremonies he performs of christening, of marriage, and of burial, and he must have these entries signed by the contracting parties and their witnesses, in cases of marriage, and in the other instances, by the nearest relatives.

It requires no legal training to perceive at a glance how inefficient is this method, and how the door is opened to the encouragement of fraudulent practices,—and this is more evident in the case of births—as the lapse of time between the birth and christening of a child may vary considerably with the health of the infant, of its parents, and of the surrounding circumstances. The law fixes no time within which the ceremony should be performed, or that it should be performed at all, and provides no penalty for non-compliance, and such are the ignorance and laxity of many ministers, that instances are not wanting, where in lieu of the parents, relatives, or those required to sign the registers, so doing, the whole entry and signatures are written by the officiating clergyman himself; and again, although in every register the law upon these matters is printed, we have seen the custodians of such registers retaining possession of the duplicate —which should be returned to the court within six weeks of the close of the year—for a period of six years.

These defects apply to the imperfect administration of the law, but the greater question is the imperfection of the law itself.

The law constituting the pastors of congregations the celebrants of these ceremonies and the custodians of these registers, the query which naturally suggests itself is, "In what manner are these ceremonies to be performed, and how is the registration of acts of civil status, in which a person, who is attached to no religious congregation, is concerned, to be made?" The answer would be, "None." The law simply made no provision for any such case. Our codifiers could evidently not realise that a person could so offend as not to be born into some religion, and marry and die in it, and consequently treated not of absurdities. Yet it was in the latter half of this enlightened century—in 1865—that our code was promulgated.

Tolerance is a word not newly coined, but growing in significance daily; it implies more now than perhaps at its origin was conceived. Under its banner, Church in State must go, and all solely religious reference in laws be erased. It may be that law owes its origin to religion, or rather that religion was the means of promulgating and, preserving laws, hampering them, however, very soon with extraneous matter; *i.e.*, supernatural obligations. Commendable as its inception may be, and thankful as we are for the cause which originated and fostered the law, we find it necessary, in the exercise of equal justice to all, to distinguish between the mundane and the supernatural, the secular and the religious, the acknowledged and the debatable.

Religious belief and ceremonies change and alter. Differences arise between the adherents of the old school and the followers of the new; to avoid conflict, the whole matter of difference, which is not immediately essential to our existence and government, must be placed without the pale of the law. This once acknowledged, the *raison d'être* of any religious qualification in the subject or citizen, in his intercourse with the State, ceases.

In the eyes of the law all must be equal. No examination can be made into the religious belief or disbelief of a man—his thoughts are his own inviolable property, his conscience is not subservient to any other man's dictates. Other and comprehensive worldly tests as to his capacity to enjoy any or all the rights of citizenship, must and elsewhere have been introduced.

Applying these principles to the question proper, there can be no valid reason given for the sole deputing of celebration and of registration of births, marriages, and deaths to clergymen, or of surrounding them with any religious observances. A man who professes no religious belief, or a belief different to that of any established congregation, has

as equal a right to have his marriage, the birth of his child, or other *acte* of civil status, in which he is interested, properly and legally celebrated and acknowledged, as has the most professed religionist. A clergyman is not obliged to celebrate or register the marriage of a man who does not profess his religion; and we find, as a matter of fact, that men who cannot conscientiously ally themselves to any of the known religious dogmas, have to throw themselves upon the mercy of a neighbouring minister in order to procure a legal certificate of what should primarily be a civil ceremony. The marriage must be performed under the cloak of some religious belief. Is, then, the object of the law to foster hypocrisy? For such, in reality, is the effect.

One would think that, so palpable is the injustice of our legislation upon this subject, agitation would have been long since rife for its amelioration; but so strong a hold has the Church, even at this day, upon this benighted Province, that any attempt to assimilate our law in this respect, to that of all civilised countries, would be futile. Until the average intelligence of our people equals that attained years ago by other nations, so long will this outrageous state of things exist.—"*Nemesis*," *Montreal, in the* "*Week*."

RESPONSIBILITY FOR A POTMAN.

A case of interest to licensed persons was heard at the Epsom County Court, on August 19, before His Honour Judge Lushington, having been remitted from the High Court. Jane Crawford, a married woman, of Sutton, sued Mr. J. H. Brown, landlord of the Robin Wood Hotel, Sutton, for 250*l.*, damages claimed for the wrongful act of the defendant's servant. The facts were briefly as follow: On February 2, plaintiff went to defendant's house, and after staying some time was put out by the potman, it being alleged on her behalf that she was thrown out by the man, who kicked her and broke her leg; and on the defendant's behalf that she was put out quietly, but being intoxicated slipped and fell. His Honour held that there was no case to go to the jury, seeing that there was no evidence to show that the landlord gave instructions for the potman to be violent, or that, even supposing the violence alleged was used, which was not admitted, it was of such a nature as could have been prevented by the defendant, and the plaintiff was therefore nonsuited.—*Law Journal.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Sept. 10.

Judicial Abandonments.

Déry & Larue, traders, St. Charles, Sept. 6.

Hogle & Co., carriage manufacturers, Sherbrooke, Aug. 30.

Ovila St. Charles, Montreal, Aug. 31.

Richard Swalwell, Montreal, Sept. 8.

Louis O. Villeneuve, dry goods, Quebec, Sept. 5.

Curators appointed.

Re Beaudet & Chinic.—D. Rattray and E. W. Methot, Quebec, curator, Sept. 6.

Re Ferdinand Biron.—C. Millier and J. J. Griffith, Sherbrooke, curator, Sept. 6.

Re Desjardins & Martel.—L. G. Lepine, Quebec, curator, Sept. 6.

Re Marie Euphemie Laforce (P. E. Labelle & Co.), Terrebonne.—Kent & Turcotte, Montreal, curator, Sept. 2.

Re William Garbutt, butcher.—Fulton & Richards, Montreal, curator, Sept. 8.

Re Ovila St. Charles.—C. Desmarteau, Montreal, curator, Sept. 8.

Dividends.

Re Jas. A. Douglas.—First and final dividend, payable Sept. 28, A. W. Stevenson, Montreal, curator.

Re Patrick Thomas Gibb, wire-worker.—Dividend, Seath & Daveluy, Montreal, curator.

Separation as to property.

Marie Louise Goyer vs Jean Bte. Langevin *alias* Lacroix, St. Laurent, Sept. 7.

Marie Malvina Grenier vs. Jean Baptiste Garneau, farmer, Notre Dame de la Nativité de Beauport, Aug. 31.

Sophie Laurier vs. Victor Théodule Daubigny, veterinary surgeon, Montreal, Sept. 8.

Victoire Meunier vs. Isaie Choquette, blacksmith, Iberville, Sept. 7.

Ezilda Therrien vs. Jean Bte. Paquet, St. Vincent de Paul, Aug. 8.

Eugénie Warrieur vs. Louis Riendeau, Montreal, Aug. 6.

Appointments.

John Sleep Honey, Arthur Benoni Longpré and Adolphe Cherrier, to be joint prothonotary, Superior Court and clerk of Circuit Court for district of Montreal.

GENERAL NOTES.

Nous avons le regret d'annoncer la mort de Me Bonenfant, ancien avoué près le Tribunal civil de Nogent-sur-Seine.

Me Bonenfant avait exercé ses fonctions pendant près de cinquante-sept ans: il ne s'en était démis en 1885 que malgré lui, vaincu par l'âge. Il laissera le souvenir d'un homme profondément loyal et honnête: il avait le culte du droit et à une expérience consommée des affaires il joignait un talent de parole auquel tous s'accordaient à rendre l'hommage le plus mérité.

Me Bonenfant est décédé à Nogent-sur-Seine à l'âge de quatre-vingt-cinq ans.

The Legal News.

VOL. X. SEPTEMBER 24, 1887. No. 39.

The diminution of the appeal list at Montreal, anticipated on p. 177, was nearly borne out by the fact, the September list containing but 89 appeals, against 109 in the list for September, 1886. An examination of the previous lists shows that the court has about completed the hearings in cases set down in January last, in addition to Crown and other privileged cases. Seven judgments were rendered in cases heard during the September term, the appeal being dismissed in every case.

Mr. Charles, Q. C., has been appointed to the vacancy in the Queen's Bench Division, caused by the resignation of Mr. Justice Grove, referred to in our last issue. The *Law Journal* says of the new judge: "Sir William Grove's successor is a man who for some years has only not been made a judge when there was a vacancy, because what is everybody's business is nobody's business. He has declared himself a Conservative in politics, but his seat on the bench was a matter altogether independent of everything but his fitness for it. Mr. Charles has borne the burden and heat of the day at the bar as a junior on circuit, a reporter in the Exchequer, and as a leader in heavy cases involving profound law. His practice has been varied, but his breadth of view has not been spoilt even by the subtleties of ecclesiastical disquisition. In the opinion of his circuit, which on this head is generally infallible, he is a man of fine temper, actively good-natured, but strong-willed. Like Lord Herschell and the late Mr. Justice Quain, he entered on the world from the London University College. High expectations of a new judge are said to be unlucky, but Mr. Charles' qualities are of a kind about which there is no uncertainty."

The following, from the *Albany Law Journal*, is suggestive of one of the inconveniences of the judicial office:—"Our advice to lawyers about vacation has been followed by at least two very high judicial dignitaries of this State, who attend base-ball matches together. Probably they find the benches rather less easy than that which they are accustomed to sit on as magistrates. For ourselves, we never attend a ball game without recalling an anecdote of a celebrated Vermont judge, of whom one of the 'side judges' once said that the former never asked the latter his opinion more than once, and that was at the close of a tedious day's session, when he turned to him and said, 'I ache like fury! Don't you?'—or words to that effect."

COUR SUPERIEURE.

MALBAIE, (Dist. de Saguenay), 5 sept. 1887.

Coram ROUTHIER, J.

POTVIN v. LUCIEN TRUCHON, et JOS. TRUCHON Opposant.

Opposition à une saisie-immobilière émanée de la Cour de Circuit—Affidavit.

JUGÉ:—1o. *Qu'après l'émanation d'un bref de "Fieri facias de terris" contre les biens immobiliers du défendeur, rapportable à la Cour Supérieure, la juridiction de la Cour de Circuit est épuisée, et que toutes les procédures subséquentes relatives à l'exécution sont de la juridiction de la Cour Supérieure.*

2o. *Qu'en conséquence une opposition afin d'annuler la saisie immobilière doit être adressée à la Cour Supérieure, et que l'affidavit accompagnant cette opposition ne doit pas être assermentée devant le greffier de la Cour de Circuit.* (*C. P. C. art.* 1088—*S. R. B. C. s. s.* 203-206).

La motion demandant le rejet de l'opposition est accordée avec dépens.

J. S. Perrault, pour le demandeur contestant.

A. H. Simard, pour l'opposant.

(C. A.)

COUR DE CIRCUIT.

SAGUENAY, 31 janvier 1883.

Coram ROUTHIER, J.

DUFOUR v. DUFOUR.

Droit de rétention—Fruits et revenus—Impenses et améliorations.

JUGÉ:—*Que le tiers retenteur condamné à rendre l'immeuble qu'il détient après liquidation des fruits et revenus et des impenses et améliorations, sous la réserve de son droit de rétention s'il y a excédant en sa faveur, a droit de percevoir les fruits de l'immeuble revendiqué jusqu'au jugement final, sauf à rendre compte au propriétaire.*

Au mois de mai 1881, le demandeur en cette cause institua contre le défendeur une action revendiquant la propriété d'un immeuble et concluant de plus à ce que le défendeur fût condamné à lui payer une somme de $1200, pour les fruits et revenus par lui perçus depuis 40 ans.

Le défendeur contesta le droit de propriété du demandeur, et plaida de plus qu'il avait possédé de bonne foi, et qu'il avait droit de retenir l'immeuble jusqu'au remboursement de la somme de $1600, pour ses impenses et améliorations.

Par jugement en date du 12 mai 1882, le fut déclaré propriétaire, et la cour ordonna que les fruits et revenus et impenses et améliorations seraient évalués par des experts.

Dans le cours de l'hiver 1881 et 1882, alors que la cause ci-dessus était en délibéré, le défendeur fit couper et enlever sur la terre en litige, une trentaine de cordes de bois de chauffage.

Tel que dit ci-dessus, le 12 mai suivant, le demandeur fut déclaré propriétaire, les experts furent nommés pour évaluer les impenses et fruits, mais seulement jusqu'à l'institution de l'action, savoir: au mois de mai 1887.

Le demandeur institua alors contre le défendeur une saisie-revendication du dit bois. Outre les faits ci-dessus, il alléguait que le défendeur n'avait ainsi détérioré l'immeuble qu'en prévision du jugement qui déclara le demandeur propriétaire; que les experts d'après l'ordonnance les nommant, ne pouvaient évaluer les fruits et revenus, qu'à venir à l'institution de l'action pétitoire, en mai 1881, et ne pourraient en conséquence tenir compte du bois coupé, et qu'à tout évènement le demandeur en était propriétaire.

Le défendeur plaida qu'il avait un excédant d'impenses en sa faveur, et avait droit de retenir l'immeuble comme les fruits et revenus en provenant, jusqu'au remboursement de tel excédant, et à tout évènement jusqu'à ce que l'expertise et le jugement final eussent établis les droits des parties.

Jugement:—

"La cour, considérant que le demandeur n'a pas prouvé les allégués de son action en cette cause;

"Considérant qu'en vertu du jugement de de la cour supérieure de ce district, en date du 12 mai 1882, invoqué dans l'action en cette cause, et qui a déclaré le demandeur propriétaire de l'immeuble décrit en la dite action, le défendeur a droit de rétention sur le dit immeuble jusqu'à ce qu'il ait été remboursé des impenses et améliorations par lui faites, sauf déduction des fruits et revenus;

"Considérant que les dites impenses et améliorations auxquelles a droit le défendeur, ne paraissent pas avoir été liquidées, et que le droit de rétention du défendeur existe encore;

"Considérant qu'à titre de rétenteur du dit immeuble, le défendeur a droit d'en percevoir les fruits à charge d'en rendre compte au demandeur, et de les imputer sur les impenses et améliorations que le demandeur lui doit et qu'il avait droit en conséquence de couper le bois revendiqué en cette cause sauf à en rendre compte; mais que le dit demandeur n'a pas droit de saisir-revendiquer le dit bois comme lui appartenant, au moins quant à présent;

"Renvoie l'action du demandeur avec dépens, sauf le recours du demandeur pour se faire rendre compte du dit bois et des autres fruits et revenus du dit immeuble, s'il y a lieu."

Charles Angers, procureur du demandeur.
J. S. Perrault, procureur du défendeur.

(C. A.)

COUR DE CIRCUIT.

SHERBROOKE, 30 avril 1887.

Coram BROOKS, J.

CHARLAND et al. v. STENSON, et LA MUNICIPALITÉ DE WOTTON.

Election municipale—Contestation.

JUGÉ:—1. *Que la contestation d'une élection municipale, d'après les articles 346 et su-*

vants du C. M., et la demande en cassation d'une nomination faite par le conseil municipal, en vertu de l'article 100 *du C. M., peuvent se faire par une seule et même requête, s'il y a allégation de fraude, collusion et conspiration ;*

2. *Qu'en ce cas les requérants ne sont point tenus d'opter, attendu que les deux demandes ne sont point incompatibles :*

3. *Que la requête en pareil cas peut être présentée plus de* 30 *jours après l'élection, pourvu qu'elle ait lieu dans les trente jours suivant la nomination par le conseil, et qu'en cette cause la présentation de la requête le* 15 *février est suffisante ;*

4. *Qu'en pareil cas, à défaut de preuve de fraude, collusion et conspiration, la Cour sans prononcer là-dessus s'appuiera sur la nullité de l'élection pour déclarer la nomination faite par le conseil illégale et nulle ;*

5. *Qu'en pareil cas, il n'y a point lieu d'accorder une nouvelle élection, la Cour laissant la loi suivre son cours ;*

6. *Qu'en pareil cas, tous les frais, y compris ceux d'enquête, doivent retomber sur la municipalité, bien qu'elle n'ait point contesté la requête quant à la validité de l'élection, mais qu'elle ait seulement défendu la nomination du conseil, nonobstant le fait qu'elle n'a point assigné de témoins.*

Il s'agit d'une requête par cinq électeurs municipaux pour faire annuler *l'élection* de l'intimé Stenson, déclaré élu conseiller municipal de Wotton, le 10 janvier dernier, en vertu des articles 346 et suivants du Code Municipal. En même temps, et par la même requête, on demande que la *nomination* de l'intimé Stenson comme tel conseiller par le conseil, en date du 19 janvier dernier, soit déclaré nulle, et qu'une nouvelle élection ait lieu.

Voici les faits : le 10 janvier, l'assemblée des électeurs eut lieu sous la direction de J. H. C. Lajoie, président de l'élection. Les candidats suivants furent proposés : Cyprien Gosselin, point d'opposant, déclaré élu ; P. M. Belisle et Adolphe Allard, l'un contre l'autre ; Amédée Turcotte, point d'opposant, déclaré élu ; M. T. Stenson. Il y avait donc cinq candidats pour remplir trois siéges, savoir : ceux de MM. J. B. Richard, Amédée Turcotte et P. M. Belisle. La difficulté vint de ce que les électeurs des deux partis entrèrent aussitôt en pourparlers afin d'éviter une contestation. Non-seulement l'heure réglementaire après la présentation des candidats s'écoula à discuter, si bien qu'il passait une heure, au dire des témoins, lorsque le différend fut réglé à l'amiable et d'un commun accord par l'élection de M. Stenson à l'unanimité des suffrages, les deux candidats Belisle et Allard s'étant retirés en sa faveur. Quelques jours après, M. Plamondon, chef du parti opposé à M. Stenson, se mit en frais de revenir sur ce qui avait été fait, prétendant que l'élection était nulle. De là la contestation. Il s'agit de savoir si, dans ces circonstances, les électeurs municipaux ont le droit de faire un arrangement à l'amiable, non défendu, sinon autorisé par la loi. Il est admis que tout a été fait de bonne foi des deux côtés. Les requérants ont allégué *fraude, collusion et conspiration* de la part de l'intimé Stenson et de ses partisans, mais il n'y a aucune preuve de cela, comme la cour l'a déclaré à l'enquête et encore en rendant le jugement. Au contraire, il est amplement prouvé que M. Stenson ne voulait point être candidat et qu'il a fait tout en son pouvoir pour se retirer, afin de ne point priver les gens du 16 rang de leur conseiller.

Aussitôt après l'élection, M. Stenson,—qui est inspecteur d'écoles et comme tel exempt des charges municipales, et qui se croyait incompétent pour d'autres motifs,—adressa au secrétaire-trésorier une déclaration qu'il refusait d'accepter la charge de conseiller. De là la nomination du 19 janvier par le conseil, M. Stenson s'étant mis en règle dans l'intervalle quant aux autres motifs de refus et ayant consenti à ne point réclamer le bénéfice de l'exemption.

Il est bon d'observer que dès le début les intimés avaient mis, au moyen d'une requête à cette fin, les requérants en demeure d'opter entre *l'élection* et la *nomination*. M. Stenson disait : "Moi, je n'ai rien à voir dans la procédure qui a pour objet de faire annuler ma *nomination*, en vertu de l'article 100 du C. M., je n'ai à répondre que de l'élection du 10 janvier." De son côté, la municipalité disait : "Nous n'avons rien à voir dans la contestation de *l'élection* de M. Stenson. Pourquoi

serions-nous forcés de répondre à cette partie de la requête?"

La cour passa outre à cette demande, pour le motif qu'il y avait aussi allégation de fraude, collusion et conspiration et qu'il fallait attendre la preuve.

Les deux intimés se virent donc forcés de plaider au mérite de la requête en entier.

M. Stenson, pour toute défense, relata les faits et déclara qu'il s'en rapportait à la justice.

La municipalité, de son côté, plaida qu'elle n'était point responsable de *l'élection* du 10 janvier, et que la *nomination* faite par le conseil le 19 janvier était parfaitement légale et valide.

A l'enquête, les requérants firent entendre un grand nombre de témoins pour prouver leurs allégations de fraude, collusion et conspiration. Ils échouèrent complètement sur ce point, tellement que la cour arrêta la défense au cours du contre-interrogatoire, déclarant qu'il n'y avait aucune preuve de ce chef.

Les faits, tels que rapportés ci-dessus, furent prouvés en substance, tant par le rapport du président de l'élection et les extraits du livre des délibérations, que par les témoins entendus de part et d'autre.

La municipalité ne fit point entendre de témoins, tous les témoins assignés l'ayant été dans la contestation entre les requérants et l'intimé Stenson.

Voici le texte du jugement:

"La Cour, etc.

"Considérant que les requérants ont prouvé que, le 10 janvier dernier, la prétendue élection de l'intimé Michael T. Stenson, à une assemblée convoquée des électeurs de Wotton, était entièrement illégale, nulle et contraire aux dispositions du Code Municipal; que le refus subséquent d'accepter telle charge de conseiller municipal pour le motif d'exemption, et l'acceptation par l'intimé et la nomination par résolution du conseil municipal du canton de Wotton, étaient illégaux et nuls.

"En conséquence, déclare le dit acte du dit conseil en date du 19 janvier dernier, nommant l'intimé, M. T. Stenson, conseiller municipal, pour remplir la vacance, illégal, nul et de nul effet, et l'annule et met à néant, avec dépens contre l'intimée, la municipalité de Wotton;

"Et, vu que le dit M. T. Stenson n'a point contesté la requête des requérants, pour autant qu'elle a rapport à la légalité de la dite élection et de la dite nomination telles qu'alléguées, mais s'en est rapporté cependant à la décision de cette cour;

"Maintient la requête des requérants jusqu'au point de mettre à néant la dite résolution, mais sans frais contre le dit Michael T. Stenson; et rejette la demande de l'intimé Stenson pour permission d'amender sa défense, sans frais."

Ives, Brown & French, pour les requérants.

Bélanger & Genest, pour Wotton.

J. H. N. Richard, pour Stenson.

(L.C.B.)

CHANCERY DIVISION.

LONDON, Aug. 9, 1887.

Coram STIRLING, J.

THE LEEDS ESTATE BUILDING AND INVESTMENT COMPANY (LIM.) v. SHEPHERD.

Company — Directors — Misfeasance — Payment of Dividend out of Capital — False Balance-sheets — Auditor's Liability.

In 1869 the plaintiff company was formed and registered under the Act of 1862 for the purpose of dealing in lands and lending money on mortgage. In 1882 it went into voluntary liquidation.

By article 63 it was provided that when the company paid a dividend of 5 per cent the directors were to receive 10s. for every meeting attended by them, and the remuneration was to be increased by 2s. 6d. for every additional 1 per cent. of dividend.

By articles 79 and 80 the directors were authorised to declare a dividend upon such estimate of profits as they might think proper to recommend, but no dividend was to be payable except out of profits.

Articles 86 to 89 provided that the directors should cause true accounts to be kept, and should lay before the company once in every year a statement of the income and expenditure, and also a balance-sheet in the form prescribed by Table B. of the Companies Act, 1862.

Articles 90 to 101 related to the auditing of the accounts, and provided that the auditors should state in their report whether in their opinion the balance-sheet was a full and fair balance-sheet, properly drawn up so as to exhibit a true and correct view of the state of the company's affairs.

The articles also provided for the appointment of a manager and secretary, whose remuneration was to be fixed by the directors.

Except in 1876 the company made no profits during the whole period during which it carried on business.

This action was brought by the company in liquidation against the directors, the manager, and the auditor of the company to make them liable in respect of certain sums paid out of capital for dividends, and for fees and bonuses to the directors and manager respectively.

The balance-sheets were false and misleading and contained fictitious items, and were framed with a view to the declaration of a dividend. They were prepared by the manager and examined by the auditor. In examining the balance-sheets, the auditor was not furnished with a copy of the articles, and he did not comply with their provisions. The directors did not investigate the accounts, but trusted entirely to the manager and the auditor; and they did not know that the company had been paying dividends out of capital, or that the balance-sheets were inaccurate. The balance-sheets were not shown to the shareholders as required by the articles.

Sir Horace Davey, *Q.C.*, *Buckley*, *Q.C.*, and *W. Baker* for the plaintiff company.

Sir Henry James, *Q.C.*, and *E. W. Byrne*; *Pearson*, *Q.C.*, and *Swinfen Eady*; *Graham Hastings*, *Q.C.*, and *Ashton Cross*; *Finlay*, *Q.C.*, and *Farwell*; *Tindal Atkinson*, *Q.C.*, and *D. Sturges*; *Bardswell* and *Ingle Joyce* for the several defendants.

STIRLING, J., held, following *In re The Oxford Benefit Building and Investment Society*, 56 Law J. Rep. Chanc. 98, that the directors were bound to make good the several sums paid out of capital, and that the manager and auditor were liable for damages to the like amount. With reference to the case against the auditor, his lordship said that it was the duty of the auditor not to confine himself merely to the task of ascertaining the arithmetical accuracy of the balance-sheet, but to see that it was a true and accurate representation of the company's affairs. It was no excuse that the auditor had not seen the articles when he knew of their existence. The Statute of Limitations had been pleaded on his behalf, and the plea had not been resisted, so that his liability would be limited to the dividends paid within six years of the commencement of the action.—*Law Journal*, 22 N.C. 130.

COUR D'APPEL DE PARIS (4e Ch.)

29 juillet 1887.

Présidence de M. FAURE-BIGUET.

G. v. P.

Puissance paternelle—Garde des enfants—Droits du père—Droits des aïeuls—Visites.

Il est de l'intérêt même de l'enfant qu'il existe entre lui et ses grands-parents des relations suivies et continues qui lui conservent leur affection.

En conséquence, les grands-parents peuvent être autorisés à envoyer chercher, à des jours déterminés, leurs petits enfants chez le père à charge de les y faire ramener à une heure fixée.

Et le père prétendrait vainement à cet égard les obliger à se contenter de visites faites en sa présence ou en présence d'une personne désignée par lui.

M. G..., demeurant dans les environs de Corbeil, a marié sa fille à M. P..., négociant dans la même ville; la jeune femme est morte en donnant le jour à son premier enfant. Peu après M. P... s'est remarié; des difficultés se sont élevées entre le grand-père et le gendre à l'occasion de l'enfant issu du premier mariage. M. P... a prétendu que M. G... avait sans doute le droit de venir voir l'enfant au domicile paternel, mais qu'il ne pouvait l'emmener chez lui pendant plus ou moins de temps; que les visites du grand-père devaient d'ailleurs avoir lieu en sa présence à lui ou en présence d'une personne qu'il désignerait. C'est dans ces circonstances que le Tribunal de Corbeil a rendu le jugement suivant:

"Attendu que les liens du sang qui rattachent le demandeur à l'enfant du défendeur, rendent légitime et naturel le désir qu'il manifeste de le voir; qu'il peut être donné satisfaction à la demande sans qu'il soit porté atteinte aux droits dérivant de l'autorité paternelle; qu'il est de l'intérêt même de l'enfant qu'il existe entre lui et ses grands parents des relations suivies et continues, qui lui conservent leur affection; que les rapports tendus entre G... et P... exigent que les visites n'aient pas lieu au domicile de ce dernier et soient réglées en dehors de tout contact entre les parties; que d'ailleurs de simple visites ne donneraient pas suffisamment droit aux légitimes prétentions de G...; que l'éducation et la santé de l'enfant ne sauraient avoir à souffrir des journées passées chez son grand'père, dont la tendresse est une garantie suffisante que tous les soins qu'il exige lui seront amplement prodigués;

"Par ces motifs,

"Dit que tous les premiers et troisièmes dimanches de chaque mois, le mineur Ferdinand P... sera conduit chez le père du défendeur demeurant à Corbeil, où G... pourra le prendre ou l'envoyer chercher à l'heure ci-dessus fixée, et qu'il sera ramené par le demandeur au même domicile à six heures du soir;

"Dit que P... sera tenu à l'exécution du jugement, sous une astreinte de 25 francs par chaque contravention aux dispositions ci. dessus, etc."

Sur appel interjeté par P... contre ce jugement, la Cour a rendu l'arrêt suivant:

La Cour,

Adoptant les motifs des premiers juges;

Confirme.

Note.—La question soumise à la Cour est très controversée. M. Demolombe enseigne que les tribunaux peuvent suivant les circonstances, enlever pendant un temps plus ou moins long la garde de l'enfant au père pour la confier aux grands parents. (De la puissance paternelle, 386 et suiv.) C'est en ce sens que la Cour de Cassation, Chambre des requêtes, a décidé que si, pour des raisons graves et exceptionnelles il peut appartenir au père d'interdire tous rapports entre ses enfants et leurs ascendants, les tribunaux, en cette matière comme en toute autre, sont investis du droit d'apprécier s'il y a de la part du père usage légitime ou abus du droit de la puissance paternelle; qu'ainsi ils peuvent autoriser l'aïeul à recevoir l'enfant et même à le recevoir chez lui dans certaines conditions, même à le faire sortir une fois sur trois sorties ordinaires et à le garder plusieurs jours lors des grandes vacances (D.71.1.218). La Cour de Lyon a statué dans dans le même sens. (27 mars 1886. Gaz. Pal. 6.2.543). D'autre part, la Cour de Cassation, Chambre civile, a jugé que s'il appartient aux tribunaux de régler ce qu'exigent d'une part l'intérêt du père et de l'autre l'intérêt des enfants, ainsi que la réciprocité des droits et des devoirs établis entre eux par la loi morale et la loi civile, la latitude des tribunaux ne saurait aller jusqu'à ordonner hors des cas expressément déterminés par la loi que les enfants seront confiés pendant un temps plus ou moins long à tel ou tel des ascendants; qu'ainsi un tribunal ne peut, sans porter atteinte au principe de la puissance paternelle, autoriser l'aïeul non seulement à visiter son petit-fils dans le pensionnat où le père l'a placé, mais encore à le faire sortir un certain nombre de fois dans le cours de l'année scolaire (D.71.1.217). Cette opinion est professée énergiquement par M. Laurent (Principes du droit civil, t. IV, 271 et suiv.) Elle a été consacrée par plusieurs arrêts: Bourges 8 décembre 1884 (Gaz. Pal. 85.1.288); Paris 2 juillet 1885 (Gaz. Pal. 86.1 supp. 18).—*Gaz. Pal.*

LES PREROGATIVES DES AVOCATS.

Le Tribunal correctionnel de Montpellier va statuer prochainement sur une affaire curieuse et intéressante, tant au point de vue juridique, qu'au point de vue des prérogatives de l'ordre des avocats. Voici les faits:

Le 22 avril 1887 la 2e Chambre de la Cour d'appel de Montpellier avait à juger l'appel d'un procès venu du Tribunal de commerce d'Agde (Hérault). Un des plaideurs, domicilié à Bordeaux, avait confié la défense de ses intérêts à une personne qui se présenta au président, à l'avocat général, à l'avocat adverse, au bâtonnier de Montpellier, comme étant: "M. M. J. D..., avocat à la Cour d'appel de Bordeaux." On plaida:

M. J. D... parut *en robe* à la barre de la Cour, exposa, discuta et perdit son procès.

A peine les débats étaient-ils terminés, que l'Ordre des Avocats de Montpellier apprit que *cet avocat étranger n'était point avocat:* on avait découvert en effet, après coup et trop tard, parmi les pièces du dossier un imprimé portant ces mots: "M. J. D.... *ancien notaire, ancien avocat, ancien agréé*, à Bordeaux." Le barreau de Montpellier s'émut de la chose, et le bâtonnier s'adressa incontinent à son confrère et collègue de Bordeaux.

Celui-ci ne tarda pas à lui répondre que M. M. J. D.... n'était pas avocat à la Cour de Bordeaux; que c'était un ancien notaire, admis au stage des avocats en 1866, éliminé en 1867, comme ayant acquis une charge d'agréé près le Tribunal de commerce de Bordeaux, rétabli au stage des avocats en 1881, et actuellement négociant en vins.

M. J. D.... n'était donc pas avocat. Le Conseil de l'Ordre de Montpellier se saisit de l'affaire et chargea un de ses membres les plus éminents, Me Bonès, ancien bâtonnier, de lui présenter un rapport. De ce rapport, savamment élaboré, il résulte que la loi ne protège pas la profession d'avocat contre l'usurpation du titre ou l'exercice illégitime de la fonction, mais que le sieur M. J. D...., s'il ne saurait être poursuivi de ce chef, avait, en se présentant et en plaidant *en robe d'avocat*, revêtu du *costume légal et exigé* chez l'avocat, commis le délit prévu et puni par l'art. 359 C. pén., édicté contre toute personne qui a publiquement porté un costume qui ne lui appartient pas.

En conséquence le Conseil de l'Ordre des avocats de Montpellier a décidé de poursuivre, à la requête de son bâtonnier, devant le Tribunal correctionnel de Montpellier, le sieur D...., pour s'entendre condamner comme coupable du port illégal du costume d'avocat, à 1 fr. de dommages-intérêts et à la publication du jugement dans les journaux de Bordeaux et de Montpellier, sauf à M. le procureur de la République à prendre contre lui telles réquisitions que de droit; 2o. il a décidé en outre qu'une copie de la délibération serait transmise à M. le procureur général près la Cour de Montpellier et au bâtonnier de Bordeaux.

THE AUTHORITY OF A COMPANY'S SECRETARY.

Two cases on the liability of companies for the acts of their secretaries, reported side by side in the August number of the Law Journal Reports, throw much light on a subject which is rather bare of authority. In both, the company were held not liable. In the case of *The British Mutual Banking Company* v. *The Charnwood Railway Company*, 56 Law J. Rep. Q. B. 449, there was a fraudulent representation by a secretary, whom the company had held out to make representations of the kind. In *Barnett & Co.* v. *The South London Tramway Company*, 56 Law J. Rep. Q. B. 452, there was an innocent misrepresentation, or what was assumed to be a misrepresentation, by a secretary who was not held out or otherwise authorised to make any such representation. The ground of the latter decision was purely and simply that the secretary had no authority; of the former, that, though he had authority in regard to that kind of information, in this case he made the representation to suit his own purposes, not in the business of his employers. In both cases, the position of a secretary is minimised; but in the first, the matter in question—namely, an issue of shares—may be taken to be in the secretary's department; while in the second, a statement in regard to the state of a contractor's account with them by the secretary of a tramway company, would not seem to come within the ordinary scope of a secretary's duties, although they are rather multifarious. In the first case the defence raised would have been applicable to a misrepresentation by any officer of the company, but from the second we obtain no hint whether if the representation had been made by a director, by the managing director, or any other officer of the company, the result would have been different.

It is not at all clear whether there really was any misrepresentation in *Barnett's Case*. Certain contracters had a contract for work on the defendants' tramway, the terms of which were payment by instalments, according to the progress of the work, and a certain sum to be retained from each instalment until completion. The plaintiffs, who were bankers, lent money to the contractors, who

purported to assign a sum of 2,000*l*. retention moneys in the hands of the defendants. Thereupon the plaintiffs wrote to the defendants giving them notice of the charge. The defendants' secretary wrote back to say that they noted that "the contractors had charged the retention money in their hands to the amount of 2,000*l*., which they held to the plaintiffs' order." The secretarial style in this instance became confused, and it is not easy to see whether the writer meant that the charge was 2,000*l*., and that he held whatever retention money there was to meet it, or that the retention money was 2,000*l*. and he held it charged to an equal amount. The bankers wrote back hopefully, but not without some appearance of misgiving, to ask whether they might assume that this 2,000*l*. was absolutely free from any existing or possible claims on the part of the company or anyone else. The secretary somewhat rashly replied that the moneys they held had no further charge on them except the possible claim of the company upon the contractors to keep up their works for six months after the expiration of their contracts. This was literally correct, but it turned out that the amount was not 2,000*l*. but 675*l*., which sum the defendants paid to the plaintiffs. Whether the plaintiffs could have extracted a representation that the sum was 2,000*l*. out of the letter is matter of some doubt, but there was the preliminary difficulty of the authority of the secretary to make any such representation. The Master of the Rolls repeated what he had said in the case of *Newlands* v. *The National &c., Accident Association*, 54 Law J. Rep. Q. B. 428. In that case it is held that the company is not responsible for the fraudulent misrepresentation of its secretary, by which persons were induced to take shares, so that they can neither rescind nor recover damages. The Master of the Rolls repeated that a secretary is a mere servant,and no one can assume that he has any authority to represent anything at all. Lord Justice Fry threw out a suggestion that possibly, if it were proved that by the course of business, a secretary was considered to represent the company, the plaintiff might recover, but not otherwise.

The Charnwood Railway Case belongs more to the class of cases in which the servant of a company is guilty of an independent act, as if a railway servant were maliciously to alter the signals, or a coachman strike a man with his whip from the seat of his master's carriage. The secretary appears to have been in league with a person who had been issuing forged debenture stock of the company, and when a transfer of some of this stock was presented to the secretary he said that they were in order. and that the stock was in the company's office. It was a banker who confided in this secretary too. He advanced money on the debentures, but when he brought his action, it was held that he could not recover. Lord Justice Bowen, borrowing from Goldsmith's Mad Dog, laid down that a secretary who committed a fraud of this kind, to gain his private ends, did not make his company responsible. An attempt was made to show an estoppel, but this was crushed by Lord Justice Bowen saying that the secretary could not estop the company if he could not contract for it, and Lord Justice Fry pointing out that to estop the company was tantamount to their ratifying the stock, which would be *ultra vires*. It was also argued that benefit to the master was not necessary when the act was of an authorised class, but the argument was not allowed to prevail. All these cases show the difficulties of dealing with a company, and the necessity of going in all cases as near the fountain-head as possible. What is the fountain we are not told, but it is obvious from these cases that to put one's trust in secretaries is *sectari rivulos*.—*Law Journal*, (London.)

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, *Sept.* 17.

Judicial Abandonments.

Irving & Sutherland, Montreal, Sept. 10.

William Skinner Thomson, (W. S. Thomson & Co.) Montreal, Sept. 9.

Curators appointed.

Re Dame Jane Atchison, (James Murray & Co., Montreal.—J. McD. Hains, curator, Sept. 8.

Re Patrick P. Kelly, St. Stanislas de Kostka.—Wm. S. Maclaren, Huntingdon, curator, Sept. 7.

Re D. S. Robichaud.—C. Desmarteau, Montreal, curator, Sept. 13.

Dividend.

Re Adam Darling.—Supplementary dividend, payable Oct. 3, P. S. Ross, Montreal, curator.

The Legal News.

Vol. X. OCTOBER 1, 1887. No. 40.

An especially hard case of a man being ruined and made bankrupt by a law suit, though he was successful before the highest Court, is that of Mr. T. G. Dixon, a justice of peace for Flintshire, and late owner of the Nant Hall Estate, near Rhyl, and of a small estate in Cheshire. At the close of the examination in bankruptcy, the bankrupt said that in 1847 he held certain shares in an agricultural insurance company started in Edinburgh. That company was eventually amalgamated with a London company, and he was strongly advised to withdraw from it, which he did by paying the balance due on his shares. Twenty-three years afterwards, he received notice to appear in London to show cause why he should not be a contributory to this very thing. The upshot was, the case went into Court before the Chief Clerk, who gave his decision against Mr. Dixon. The bankrupt then went before the Master of the Rolls, who decided clearly in his favour. The other party then took the matter before the Lords Justices of Appeal, and their lordships, while acknowledging it to be the hardest case they had ever tried, said in strict law they must give their decision against him. The matter being a very serious one, and involving a very considerable sum of money, Mr. Dixon decided to appeal to the House of Lords. They gave a decision in his favour on every point, with costs, but notwithstanding this final success, the litigation had cost him just £5,000.

The law with regard to public meetings is stated as follows in the *Law Journal* (London): "In the first place, the idea that a proclamation not made under the special powers of a statute has any legal effect whatever must be placed out of sight once for all. Nothing is clearer than that the executive cannot make law by putting it in the mouth of a town crier or placarding walls with it. If the law they proclaim is bad law, or if the action taken upon the proclamation is illegal, every person concerned in enforcing it is liable to legal proceedings. In regard to criminal proceedings, the executive may, under circumstances which can justify it to the Attorney-General's conscience, maintain their own law by entering a *nolle prosequi*; but no such counter-move is open to them in civil proceedings, and civil proceedings are sufficient for the protection of the law-abiding subject when a meeting is proclaimed. He has only to proceed to the place of meeting accompanied by one or two of the more discreet of his fellows, and if he finds it occupied by a body of police to assert his right, protest, and go the nearest way to his lawyer's. Upon an action brought the defendants would have to prove that the object of the meeting was unlawful, or that it was likely to lead to a breach of the peace. They would not be bound, as Sir W. Harcourt supposed, to prove that the avowed object was unlawful; it would be enough if the real object was unlawful. As to the reporter, he has neither more nor less right to be present than anyone else; but if as a Government reporter he is obnoxious to the majority, the police are entitled to assert his right to be present, using no more force than is necessary, just as private persons might assert their right to be present if it was purposely obstructed."

SUPERIOR COURT.

St. Johns, dist. d'Iberville, May 14, 1887.

Coram Loranger, J.

Lavallee v. Surprenant.

Compensation—Délit of wife—C. C. 1294.

To an action of damages brought by the plaintiff personally as well as being head of the community, alleging that the defendant had slandered plaintiff's wife, the defendant pleaded in compensation that the plaintiff's wife had slandered defendant, without specifying the occasion, or alleging that the plaintiff was present or had approved of the words uttered.

Held:—*That the plaintiff not being responsible for slander committed by his wife without his knowledge or approval, such slander could not be pleaded in compensation.*

The judgment is in the following terms :—

La Cour,

Après avoir entendu les parties au mérite et leurs témoins, avoir examiné la procédure et délibéré :

Attendu que le demandeur, époux commun en biens de Malvina Denaud, réclame du défendeur des dommages pour injures verbales proférées à l'adresse de sa femme, le 8 septembre 1886 ;

Attendu que le défendeur plaide entr'autres choses, que le dit jour 8 septembre, la femme du demandeur l'a injurié en se servant d'expressions propres à nuire à sa réputation et affecter son honneur ; que ces injures lui ont causé des dommages au montant de $1000, que le dit défendeur offre de compenser à l'encontre de l'action ;

Attendu que le demandeur a répliqué en droit à ce plaidoyer : 1o. qu'il n'y a pas lieu à compenser les dommages en question ; 2o. que le défendeur n'allègue pas que les prétendues injures proférées par son épouse à l'adresse du défendeur, ont été dites en présence du demandeur, ni qu'elles ont été approuvées par lui ; 3o. que le défendeur ne fait pas voir que les prétendues paroles injurieuses ont été dites dans l'occasion même où le défendeur a injurié la femme du demandeur ;

Considérant que pour que deux dettes puissent être compensées, il faut qu'elle soient liquides l'une et l'autre et également exigibles ; que bien que la créance en dommages-intérêts puisse être compensée, cette compensation ne s'opère que du moment que la quotité des dommages a été établie, et que ce n'est que de ce moment que cette créance devient liquide ;

Considérant que le défendeur n'allègue pas que les injures proférées par l'épouse du demandeur, à son adresse, ont été dites en la présence du demandeur, ni qu'elles ont été autorisées ou ratifiées par ce dernier ;

Considérant que le demandeur a poursuivi non-seulement comme chef de la communauté, mais qu'il a demandé en son nom personnel, une condamnation contre le défendeur ;

" Considérant qu'aux termes de l'article 1294 du C. C., le demandeur n'est pas responsable du délit qu'aurait commis sa femme en son absence ou hors sa connaissance, et que l'on ne peut opposer à la demande qu'il fait en son nom personnel, les dommages causés par sa dite épouse, à son insçu et hors sa présence ;

" Considérant que le défendeur ne fait pas voir que les prétendues injures ont été proférées à l'instant même où les paroles injurieuses qu'on lui reproche ont été prononcées : qu'en conséquence il n'y aurait pas lieu à compensation, et que le défendeur doit se pourvoir par une demande incidente ;

" Considérant que la réplique en droit est bien fondée ;

" Maintient la dite réplique et renvoie cette partie du plaidoyer du défendeur avec dépens."

Girard & Quesnel, avocats du demandeur.
Paradis & Chassé, avocats du défendeur.

COUR D'APPEL DE PARIS (2e Ch.)

26 juillet 1887.

Présidence de M. Ducreux.

COUR D'APPEL DE PARIS (4e Ch.)

9 juillet 1887.

Présidence de M. Faure-Biguet.

Compagnie des Petites Voitures v. Vve Bergeret.

Responsabilité—Animal—Dommage—Cheval—Palefrenier—Preuve.

Aux termes de l'art. 1385 *C. civ. le propriétaire d'un animal est responsable du dommage causé par cet animal ; et il ne peut échapper aux conséquences de cette responsabilité légale que s'il prouve que l'accident est le résultat d'un cas fortuit, d'une circonstance de force majeure ou de l'imprudence de la victime elle-même* (1re et 2e espèces).

Et la victime de l'accident, en prenant l'initiative d'une enquête relative aux circonstances dans lesquelles le dit accident s'est accompli, ne peut se priver ainsi du bénéfice de la présomption que l'art. 1385 *établit en sa faveur* (2e espèce.)

Le propriétaire d'un cheval vicieux ne peut reprocher comme une imprudence au palefrenier, blessé par cet animal, en se fondant sur ce que celui-ci, connaissant les vices de ce cheval, n'aurait pas pris certaines pré-

cautions spéciales, s'il est constant que ces précautions n'étaient pas compatibles avec les nécessités du service (1re espèce.)

2e Ch.—26 juillet 1887.

Le 24 novembre 1886, le Tribunal civil de la Seine avait rendu le jugement suivant:

"Attendu que, le 18 septembre 1883, Bergeret, alors palefrenier au service de la compagnie des Petites-Voitures, a été tué d'un coup de pied, lancé par une jument appartenant à la compagnie défenderesse;

"Attendu qu'aux termes de l'art. 1385 C. civ. le propriétaire d'un animal est responsable du dommage causé par cet animal, à moins qu'il ne fournisse la preuve qu'il est le résultat d'un cas fortuit, d'une circonstance de force majeure ou de l'imprudence de la victime elle-même;

"Attendu qu'au moment où cet accident s'est produit, Bergeret réintégrait dans l'écurie un cheval qu'il venait de panser et passait pour les besoins de son service derrière la jument qui a lancé la ruade; que Bergeret, sachant cet animal vicieux, avait pris soin, selon l'usage et les règles, de lui parler de manière à éviter qu'il fût surpris ou frappé; que c'est en vain que la compagnie des Petites-Voitures fait grief à Bergeret d'avoir marché à la tête du cheval qu'il conduisait au lieu de s'etre placé derrière lui du côté opposé à la jument vicieuse; qu'un tel surcroit de précautions n'est pas compatible avec les nécessités du service incessant des palefreniers dans des écuries renfermant un très grand nombre de chevaux; que la compagnie défenderesse est, au contraire, en faute d'avoir conservé dans sa cavalerie un cheval vicieux ou tout au moins de ne pas l'avoir placé dans une partie de l'écurie où les palefreniers ne fussent pas constamment obligés de passer derrière lui;

"Attendu que, par suite de la mort de son mari, qui subvenait à ses besoins, la veuve Bergeret a éprouvé un préjudice dont il lui est dû réparation; que le Tribunal possède les éléments nécessaires pour fixer à 8,000 fr. l'indemnité qui lui est dû;

"Par ces motifs,

"Condamne la compagnie des Petites-Voitures, etc."

Sur appel de la compagnie des Petites-Voitures, arrêt:

La Cour,

Adoptant les motifs des premiers juges;

Confirme.

QUEBEC DECISIONS.*

Action for seduction of minor.

Held, Reversing the judgment of Superior Court, Quebec (15 L. C. R. 42), that the father cannot bring, in his own name, an action for the seduction of his minor daughter.—*Taylor & Neill*, in Appeal, Quebec, Sept. 18, 1865.

Arbitrator—Power of Court to appoint.

Held, That the Court has power to appoint an arbitrator to act on behalf of a party refusing to appoint an arbitrator, where the parties have covenanted that the matter in dispute shall be determined by arbitration.—*Quebec Street Ry. Co. & Corp. of Quebec*, in Appeal, Quebec, May 9, 1887, Baby and Church, JJ., *diss.*

Nullité de décret–Fausse description–C.P.C. 714.

Le shérif, à une vente judiciaire, vendit par décret les *quinze-cinquièmes* d'un lot de terre situé en la paroisse des Eboulements, et l'adjudicataire présenta une requête en nullité de décret, se plaignant qu'on lui avait vendu une chose indéterminée et indéterminable, et qui n'existait point.

Jugé, sur défense en droit, que sa demande était bien fondée en loi, l'objet mentionné dans le décret ne pouvant exister, et les trois moyens contenus en l'article 714 du Code de Procédure Civile n'étant pas les seuls donnant lieu à la demande en nullité de décret. —*Perron* v. *Bouchard*, Cour Supérieure, Saguenay, Routhier, J.

Vente—Vice redhibitoire—Délai.

Jugé, Qu'une action en résiliation de vente pour vice redhibitoire, peut, suivant les circonstances, être maintenue, quoiqu'elle ne soit intentée qu'un mois et huit jours après la vente.—*Picard* v. *Morin*, C. C., Montmagny, 12 oct. 1885, Angers, J.

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* 13 Q. L. R.

COPYRIGHT IN LECTURES.

It is satisfactory to have at last attained at the hands of the House of Lords, an authoritative exposition of the law governing copyright in lectures. For fifty years or more the question has been a moot one, and now, in *Caird* v. *Syme*, it has been laid to rest by Lord Watson. The question is whether the oral delivery of a professor's lectures to the students attending his class, is in law equivalent to communication to the public. The answer is emphatically, No.

The question was first asked in 1825, before Lord Eldon, in *Abernethy* v. *Hutchinson*, 3 L. J. O. S. 209, Ch.; and by permission, in 1 H. & T. 28. The chancellor, as his manner was, "doubted," and would not, in the first instance, make any order. The case stood over on more than one occasion and was re-argued; and upon the ultimate argument, an additional affidavit which had been made was read, stating in effect that Dr. Abernethy had given his lecture orally and not from written composition; but that he had notes which amounted to a great mass of writing, written in a very succinct manner, from which he delivered the lecture, and that a very considerable portion of such notes had been extended and put into writing with a view to publication, and that at the time of delivering his lecture he did not read or refer to any writing, but delivered it orally from recollection of his notes. Upon that additional evidence, after very mature consideration, the chancellor delivered judgment. He stated that where the lecture was orally delivered, it was difficult to say that an injunction could be granted upon the same principle upon which literary composition was protected, because the court must be satisfied that the publication complained of was an invasion of the written work; and this could only be done by comparing the composition with the piracy. But it did not follow, that because the information communicated by the lecturer was not committed to writing but orally delivered, it was therefore within the power of the person who heard it to publish it. On the contrary, he was clearly of opinion, that whatever else might be done with it, the lecture could not be published for profit. That is, every person who delivers a lecture which is not committed to writing, but which is orally delivered from memory, has such a property in the lecture that he may prevent anybody who hears it from publishing it for profit. Lord Eldon was of opinion, that when persons are admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling.

Next in the year 1835, the Legislature intervened. By the Lecture Copyright Act (5 & 6 Will. 4, ch. 65,) it is provided that the author of any lecture, or the person to whom he has sold or otherwise conveyed the copy in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture; and that if any person shall, by taking down the same in shorthand, or otherwise in writing, or in any other way obtain or make a copy of such lecture, and shall print or lithograph or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied or published, without leave of the author thereof, or of the person to whom the author has sold or otherwise conveyed the same, and every person who knowing the same to have been printed or copied and published without such consent, shall sell, publish or expose to sale, or cause to be sold, published, or exposed to sale, any such lecture, shall forfeit such printed or otherwise copied lecture or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published or exposed to sale contrary to the true intent and meaning of that Act; the one moiety thereof to His Majesty, his heirs and successors, and the other moiety thereof to any person who shall sue for the same. The second section provides that any printer or publisher of any newspaper who shall

without such leave as aforesaid, print and publish in such newspaper, any lecture, shall be deemed to be a person printing and publishing without leave within the provisions of the Act, and liable to the aforesaid forfeitures and penalties in respect of such printing and publishing. The third section declares that no person allowed for certain fee and reward, or otherwise, to attend any lecture delivered at any place, shall be deemed and taken to be licensed or to have leave to print, copy, and publish such lectures only because of having leave to attend such lecture or lectures. Unfortunately however the fourth section excludes from the protection of the act, all lectures of the delivery of which notice in writing shall not have been given two days previously to two justices living within five miles of the place of delivery. This notice must be given every time such lecture is delivered, and therefore the omission, says Mr. Copinger (the Law of Copyright [2d ed.,] p. 56, n.,) in any one instance to give the requisite notice would render any person at liberty to obtain a copy, and the lecturer would be unable to prevent him publishing. Further, those lectures are unprotected by the Act which are delivered in any university, or public school, or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment or foundation.

Nearly twenty years later, in 1854, the House of Lords gave judgment in what may perhaps be considered the most important case on the entire law of copyright. *Jefferys* v. *Boosey*, 4 H. of L. Cas. 815. The judges were summoned, and eleven attended and gave their advice. The importance of the case, from the present point of view, is as regards the effect of publication. The author of a lecture, or of any other original composition, retains a right of property in his work, which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public. Since *Jefferys* v. *Boosey*, it must be taken as settled law, that upon such communication being made to the public, whether orally or by the circulation of written or printed copies of the work, the author's right of property ceases to exist. Copyright, which is the exclusive privilege of multiplying copies after publication, is the creature of statute, and with that *Caird* v. *Syme* was not directly concerned. Now the author's right of property in his unpublished work is undoubted, and it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right.

Coming now to more modern days, the case of *Abernethy* v. *Hutchinson*, *ubi sup.*, and indeed the whole question of the publication of lectures, was fully discussed by Mr. Justice Kay in *Nicols* v. *Pitman*, 1884, 50 L. T. Rep. N. S. 254; 26 Ch. Div. 374. There the plaintiff, an author and a distinguished lecturer upon various scientific subjects, delivered at the Working Men's College, Great Ormond street, a lecture upon "The Dog as the Friend of Man." The admission to the room was by tickets issued gratuitously by the committee of the college. The defendant was present during the delivery of the lecture and took notes, nearly *verbatim*, in shorthand, and then, eighteen months afterward, published in shorthand characters in a number of his periodical, *The Phonographic Lecturer*. The plaintiff proved that he had written this lecture in 1882, and delivered it for the first time at the Working Men's College; that the MS. was his own property, being written and composed entirely by him, and was not a compilation, but was based upon and contained the results of many years' personal observation, experience and study of the physical and mental characteristics of various races of dogs; that all his lectures were written with a view at first to oral delivery, and ultimately to publication; that he had since delivered the same lecture at various places in the country, and that at each place where he had delivered it, no persons had any right to be present in the room except those who were admitted to that privilege by himself, or by the committee of the governing body of the institution or college at which the lecture was delivered. At the Great Ormond Street College, none except the holders of tickets have any right to be present, and the secretary of the college stated that it had always been understood that the privilege of attend-

ing and hearing the lectures there did not confer upon the persons who heard them any right to print or publish them for their own benefit, but that the sole and exclusive right of printing and publishing them belonged to the several lecturers by whom they were delivered, and that he always considered that there was an implied contract between the lecturers and the committee on the one hand, and the lecturers and the audience on the other hand, that neither the committee nor any of the audience should be at liberty to publish the lectures, or any part thereof, without the consent of the lecturers. Mr. Justice Kay could not regard the publication of the lecture in shorthand characters, the key to which might be in the hands of any person who chose to buy the paper, as being different in any material sense from any other mode of publication. And he held that where a lecture of this kind is delivered to an audience, limited and admitted by tickets, the understanding between the lecturer and the audience is, that whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes they can or please for their own personal purposes, but they are not at liberty to use them afterward for the purpose of publishing the lecture for profit. The defendant consented to treat the motion for an injunction as the trial of the action, and accordingly a perpetual injunction was granted against him, any inquiry as to profits or damage being waived.

It remains only to notice the general effect of the recent decision (June 13, 1887,) of the House of Lords in *Caird* v. *Syme*. The appellant was the well-known professor of moral philosophy in the University of Glasgow, and the respondent was a bookseller and publisher in Glasgow. Professor Caird delivered certain lectures to his class in the course of the winter sessions of the university, and Mr. Syme published the substance of the lectures. The action was brought for the purpose of preventing this publication of the lectures being continued. The sheriff-substitute granted perpetual injunction as craved, and ordained the respondent to deliver up to the appellant all copies of the publications complained of remaining in his hands or within his control. By his interlocutor he found that "the said books or pamphlets are in substance reproductions, more or less correct, of the lectures in use to be delivered by the pursuer to his class of moral philosophy in the University of Glasgow," and he further found that "such lectures are the property of the pursuer, and that the defender has not shown that the pursuer has in any way lost his right of property therein, or that he has acquired from the pursuer, or in any other lawful way, a right to publish or reproduce said lectures." On an appeal to the Second Division, the cause, with minutes of debate, was ordered to be laid before all the judges of the court for their opinion. The result was that of the thirteen judges consulted a majority of nine were of opinion that the publications in question were substantially a reproduction of the professor's lectures. The Second Division however found that the pursuer's legal rights had been in no way infringed. The House of Lords reversed the judgment of the Second Division, in so far as it was adverse to Professor Caird, and restored the interlocutor of the sheriff-substitute. In effect, Professor Caird was held entitled, notwithstanding the delivery of the lectures as part of his ordinary course, to restrain the whole world of publishers from publishing the lectures without his consent, on the ground that the delivery of the lectures was no publication. It is unfortunate that Lord Fitzgerald could not see his way to concurrence in this view. In his eyes it seems that the professor's reading of the lectures was equivalent to publication to the public at large.—*London Law Times*.

NEGLIGENCE IN INVESTING TRUST FUNDS.

On August 9, judgment was given by Mr. Justice Stephen in the case of *Pretty et al.* v. *Fowke*. This was an action for negligence against a solicitor. The plaintiffs were trustees and their *cestuis que trustent*, for whom the defendant, a solicitor in Birmingham, had acted in an investment of certain of the trust moneys upon leasehold security.

The defendant was employed in 1880 to find a good security for 500*l.*, and himself employed a Mr. Edwards to value the property now in question, consisting of manufacturing premises. The valuers reported that the property was a sufficient security for 500*l.*, which sum the trustees advanced upon it. The interest at once fell into arrear, the mortgagor became bankrupt, the property remained unlet, and the trustees, being unable to realise, brought this action against their solicitor. The negligence imputed was that the defendant had neglected to inform Edwards, the valuer, of the terms of a tenancy under which one Smith held the premises of the mortgagor, Ward. Edwards was instructed by the defendant that Smith held at a rent of 80*l.*, and that there was no written agreement between him and Ward, whereas in fact there was a written agreement for a lease, under which the landlord was liable to pay the rates and taxes, amounting to over 20*l.* In his evidence, Edwards said that had he known the terms of this tenancy he should not have reported the property as a good security for 500*l.* The defendant, on the other hand, had, at the commencement of the negotiations, inquired of the mortgagor the nature of the tenancy, and had been informed by him that Smith held as a yearly tenant at a rent of 80*l.* At the completion of the mortgage, the mortgagor, being asked whether there was any written agreement in existence with reference to the tenancy, replied that there was none. He also purported to convey 'free from incumbrance.' The question, therefore, was whether the defendant had sufficiently instructed Edwards in telling him what he had heard from the mortgagor, or whether, as the plaintiffs contended, he ought to have ascertained from Smith himself the terms of the tenancy. At the trial, which took place on June 24, the jury found that the defendant had not made reasonable inquiries as to the terms of Smith's tenancy. They found, further, that if such inquiry had been made, the valuer's report would have been affected, supposing the agreement created a fourteen years' lease, to the extent of 350*l.*; that the premises were a good security for 150*l.*; that their actual value in 1880 was 300*l.*, and at present 200*l.* The case was argued on further consideration on August 6, when it was submitted on behalf of the plaintiffs that on the findings of the jury they were entitled to judgment for 500*l.*, or at the least for 350*l.* The recent case of *Learoyd* v. *Whiteley*, in the House of Lords, reported in the Court of Appeal, 55 Law J. Rep. Chanc. 864, and affirmed by the House of Lords; *Chapman* v. *Chapman*, L. R. 9 Eq. 276, and other cases, were cited.—On the other side it was argued that, as the agreement between Ward and Smith contained a clause empowering the landlord to mortgage in his own name as owner, Ward was entitled to a mortgage free of incumbrance, and the tenancy was in reality void as against the mortgagees. Apart from this it was urged that there was no negligence, and that the defendant was not bound to make further inquiries than he had done.—Mr. Justice Stephen, in giving judgment, said that, having regard first of all to the facts found by the jury that proper inquiries had not been made by Mr. Fowke; having regard also to the expression of the jury's opinion as to the value of the security itself; and, lastly, having regard to the fact that Mr. Fowke knew that his clients were trustees; taking all these considerations together, he was of opinion that he must give judgment for the plaintiffs for 400*l.*—350*l.* as the difference between the value of the security actually obtained and the sum which was to be advanced on it, and the remaining 50*l.* as a round sum in consideration of arrears of interest and other matters. His lordship arrived at this conclusion with some degree of doubt, and not without considerable regret, because it was certain that Mr. Fowke had acted quite *bonâ fide*. It had not even been suggested that he had acted otherwise. Judgment was given accordingly, but the learned judge granted a stay of execution on motion of appeal being given by Friday next.—*Law Journal.*

TRAVELLING ON A RAILWAY.

At Bristol, on August 9, before the Lord Chief Justice, without a jury, the cause *Brown* v. *The Accident Insurance Company* was heard. In 1852 the plaintiff insured himself with

the defendants in a policy against railway accidents, whereby 2,000*l* was to be paid in case of his death by accident, and in case of an accident not causing death the plaintiff was to receive 'such sum by way of compensation as should appear just and reasonable and in proportion to the injury received.' In March, 1884, the plaintiff was knocked down by an engine at Risca Station on the Great Western Railway and seriously injured. The plaintiff now sued the defendants on this policy to recover compensation in respect of the injuries he received on that occasion. The defendants, however, contended that the accident was not an accident happening while the plaintiff was travelling on a railway, or within the terms of the policy. Also that the plaintiff had already obtained compensation in respect of the accident in an action which he had successfully brought against the Great Western Railway, and consequently was not in law entitled to recover any further compensation from them in respect of the accident. The facts were undisputed. The plaintiff on the day of the accident, having taken his ticket, was crossing the line to reach the proper platform, when he was knocked down by a train of empty carriages. In his action against the Great Western Railway he recovered 750*l*. The only points to be argued, therefore, were the two mentioned above.—Mr. Bullen argued that the plaintiff was at the time of the accident travelling on a railway within the meaning of the policy, citing *Theobald* v. *The Railway Passengers' Insurance Company*, 23 Law J. Rep. Exch. 249; 10 Exch. Rep. 45, and an American case in support of this view. As to the second point, he cited *Bradburn* v. *The Great Western Railway*, 44 Law J. Rep. Exch. 9; L. R. 10 Exch. 1, and *Dalby* v. *The India and London Life Assurance Company*, 24 Law J. Rep. C. P. 2; 15 C. B. 365.—Mr. Charles, for the defendants, argued that the policy did not apply to such an accident as this; and, further, that it was a contract of indemnity.—The learned judge said in his opinion the particular policy was a contract of indemnity; and, further, that it was only intended to cover an accident received while the assured was actually travelling in a train, which the plaintiff was not doing when he met with this accident. He accordingly gave judgment for the defendants, with costs.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Sept. 24.

Judicial Abandonments.

J. A. Giard, trader, Montreal, Sept. 21.

Arsène Neveu, trader, Montreal, Sept. 20.

Louis Philippe Pleau, trader, Three Rivers, Sept. 17.

Louis F. Rheaume, St. Henri, Sept. 15.

Bowen & Woodward, railway contractors, Sherbrooke, July 12.

James R. Woodward, Sherbrooke, July 12.

Curators appointed.

Re Pierre Beaudreau, hotel keeper, Montreal.—T. B. Lamarche, Montreal, curator, Aug. 30.

Re Irving & Sutherland.—A. W. Stevenson, Montreal, curator, Sept. 20.

Re Dolor Poirier, Valleyfield.—Kent & Turcotte, Montreal, curator, Sept. 15.

Re Trefflé Vanier.—Kent & Turcotte, Montreal, curator, Sept. 22.

Re Louis O. Villeneuve.—H. A. Bédard, Quebec, curator, Sept. 20.

Dividends.

Re Toussaint Boyer, hotel keeper, Salaberry de Valleyfield.—Dividend, C. Desmarteau, Montreal, curator.

Re L. Polydore Gagnon, St. André.—First and final dividend, payable Oct. 8, H. A. Bédard, Quebec, curator.

Re Arthur Léonard.—First and final dividend, payable Oct. 12, C. Desmarteau, Montreal, curator.

Re Damase Rocheleau.—First and final dividend, payable Oct. 14, C. Desmarteau, Montreal, curator.

Re Emond & Ste. Marie.—First dividend, payable Oct. 11, C. Desmarteau, Montreal, curator.

Separation from bed and board.

Marie Anne Cloutier vs. Joseph Cloutier, restaurant keeper, Three Rivers, Sept. 16.

Appointments.

Louis Rainville, N.P., Arthabaskaville, to be Prothonotary of Superior Court, Clerk of Circuit Court, Clerk of Crown and Clerk of Peace, for district of Arthabaskaville.

Cadastre.

Subdivision of 1496, Jacques Cartier Ward, Quebec.

Circuit Court.

Circuit Court for County of Kamouraska to be held in village of Kamouraska.

GENERAL NOTE.

CONTRACTING FOR COOLNESS.—A refrigerating company is liable for damage caused to fruit stored by it, by reason of decay of such fruit, caused by raising the temperature of its storehouse to a height above that agreed upon; and the diminution in the market value by reason of such decay may be considered as an element of the damage (*Hyde* v. *The Mechanical Refrigerating Company*, Sup. Jud. Ct. Mass., 4 New Eng. Rep. 253.

The Legal News.

VOL. X. OCTOBER 8, 1887. No. 41.

In *Paul* v. *Travellers Ins. Co.*, 45 Hun, 318, the Court decided an interesting question arising under an accident insurance policy. The policy covered injury and death through "external, violent and accidental means," but excepted bodily injuries "of which there shall be no external and visible sign upon the body," and death "by the taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation or medical treatment." This policy was held to cover a death by the accidental inhaling of escaping illuminating gas while the insured was asleep. The Court got over the difficulty caused by the words "inhaling of gas" among the various provisions exempting the company from liability, by assuming that the words were used to designate the common uses of gas in dentistry, surgery, etc. This seems rather a violent assumption, but the Court observed, "If the language of the policy is capable of two constructions, that most favorable to the insured should be adopted. It will not do to sacrifice the substance of the contract to the letter, if such a result can be reasonably avoided." The Court also held that the accidental inhaling of escaping gas was a death through violent means.

The New York Court of Appeals, in *Mayor etc., of New York* v. *New Jersey Steamboat Transportation Co.*, June 7, 1887, passed upon what constitutes a ferry. The Court held that a line of boats adapted to carry travellers, with their horses, vehicles and other property, running from pier 18, Hudson river, New York city, to various points on the shore of Staten Island and the New Jersey coast, and return, the round trip making about twenty-four miles, constituted a ferry between New York city and Staten Island. The distance is not so great as to preclude the idea of a ferry, and the business does not lose that character because the boats stop at points on the New Jersey as well as the Staten Island shore.

A Ceylon correspondent of the *Law Journal*, referring to the action of the governor of the colony, in frequently pardoning natives undergoing sentences without first referring to the judges who sentenced them, asks whether it is usual for the Queen to grant free pardons to criminals without referring such cases in the first instance to the tribunals before which they were condemned. The editor replies in the negative. "In the first place, the Queen never grants a free pardon of her own motion at all. If she were to do so, and the Secretary of State disagreed with the act, it would be his duty to resign. That protest is all the sanction provided by the Constitution, and no doubt the criminal would legally be pardoned. The circumstances in Ceylon no doubt are different; but we assume in favour of the Governor that he is his own Secretary of State. The practice of consulting the judges is very much older than the present constitutional relation of the sovereign to the Secretary of State in regard to the prerogative of mercy. When questions of law were involved, the judges were from early times consulted, and the convicted person pardoned or executed according to their decision, a practice which was the origin of the Court for the Consideration of Crown Cases Reserved. We believe it to be the practice in England, that the Secretary of State never interferes with a conviction without receiving the report of the convicting tribunal, whether judge of the High Court or justice at petty sessions. The practice arises not only in the interests of justice to the convicted person, but in order that the tribunal may vindicate its action, and that there may be no weakening of the judicial authority by any apparent slight being cast on its decision. The Secretary of State is responsible for the maintenance of this practice to Parliament, but in Ceylon the duty exists although there is no mode of enforcing it except by complaint at the Colonial Office."

The names of the members of the commission for the revision of the Code of Civil Procedure, have been published in the daily papers. If the list be authentic, which seems to be doubtful, the most noticeable fact is the large number of members, nine names being mentioned. This is to be regretted, for the work could be done better by a smaller committee, and the real work must devolve upon a few. Of the names mentioned there can be no question as to the eminent fitness of Mr. Justice Jetté. Some of the others names are able lawyers, but not every able lawyer possesses the peculiar qualifications required for a codifier of the law of procedure.

Chief Justice Wilson, of the Court of Queen's Bench, Ontario, who, it was stated, declined the honor of Knighthood at the time it was conferred on the late Chief Justice Cameron, now accepts it. Sir Adam Wilson has been twenty-four years on the bench, and proposes, it is said, to retire at an early date.

The office of judge of the Exchequer Court of Canada, created by the Act of last Session, has been filled by the appointment of Geo. Wheelock Burbidge, Q.C., heretofore deputy minister of Justice.

The place of Mr. Justice Monk, in the Court of Queen's Bench, is to be filled temporarily by Mr. Justice Doherty, of the Superior Court, who is appointed assistant judge until Dec. 13.

SUPREME COURT OF CANADA.

ONTARIO.]

PLUMB v. STEINHOFF.

Title to land—Old grant—Starting point to define metes and bounds—How ascertained.

In an action of ejectment, the question to be decided was whether the *locus* was situated within the plaintiff's lot No. 5, in concession 18, or within defendant's lot adjoining, No. 24, in concession 17. The grant through which the plaintiff's title was originally derived, gave the southern boundary of lot 5 as the starting point, the course being thence 84 chains, more or less, to the river. The original surveys were lost, and this starting point could not be ascertained.

HELD:—affirming the judgment of the court below, Strong and Taschereau, JJ., dissenting, that such southern boundary could not be ascertained by measuring back exactly 84 chains from the river.

Moss, Q.C., and *Scott, Q.C.*, for the Appellants.

Atkinson, Q.C., for the Respondents.

ONTARIO.]

ST. CATHARINES MILLING CO. v. THE QUEEN.

Indian lands—Reserves—Surrender—Title of Crown.

HELD, (affirming the judgment of the Court of Appeal, 13 Ont. App. R. 148,) Strong and Gwynne, JJ., dissenting, that the land surrendered by the Indians to the Dominion Government in 1873, by what is known as the N. W. Angle treaty, were not, previous to such surrender, lands reserved for the Indians within the meaning of sec. 91, item 24, of the B. N. A. Act, but were public lands under sec. 92, item 5, and passed to the Province of Ontario, absolutely on such surrender. Only lands specially set apart for the use of the Indians are reserved under sec. 91, item 24.

McCarthy, Q.C., for the Appellants.

Cassels, Q.C., and *Mills*, for the Respondents.

NOVA SCOTIA.]

MOTT v. BANK OF NOVA SCOTIA.

Insolvent Bank—Winding up proceedings—45 Vic. cap.—47 Vic. cap. 137—Bank already insolvent placed in liquidation—Proceedings under what statute.

The Bank of Liverpool was placed in insolvency in 1879, under the Insolvent Act of 1875, and the Bank of Nova Scotia appointed assignee. In 1884, the assignee applied to have the insolvent Bank placed in liquidation under 45 Vic. cap. 23 and 47 Vic. cap. 39. The Chief Justice of Nova Scotia granted

the petition and appointed the Bank of Nova Scotia liquidator, holding that sections 2 & 3 of the act of 1884 applied to banks. The Supreme Court of Nova Scotia affirmed this order. On appeal to the Supreme Court of Canada:

HELD, Strong & Gwynne, JJ., dissenting, that these sections do not apply to banks, but an insolvent bank must be wound up with the same formalities as in the case of a bank not insolvent according to sections 99 to 102 inclusive of the Act of 1884, and three liquidators must be appointed in the manner therein provided.

Henry, Q.C., for the appellants.

Sedgewick, Q.C., and *Borden*, for the respondents.

BRITISH COLUMBIA.]

SEA v. MCLEAN.

Sale of Land—Sale by executors—Powers under Will—Advertisement—Description—Words "more or less"—Breach of trust.

By the terms of the testator's will, executors were empowered to sell so much of the real estate as might be necessary to pay off a mortgage thereon, and any other debts that the personal estate was insufficient to discharge. The executors offered for sale land described in the advertisement as "some 60 acres (more or less) etc., Victoria District." The advertisement stated that the property to be sold adjoined M. Rowland's land and had a frontage on the Burnside Road, and on the road known as "Carey's road."

At the sale, a plan was annexed to the advertisement, showing a lot coloured pink, bounded by the above named roads. The auctioneer stated that the quantity was not known, but would have to be determined by a survey, to be made at the joint expense of vendor and purchaser. The land was offered for sale by the acre, and knocked down to one S. at $36 per acre.

After the sale, a survey was made and the land was found to contain 117 acres. S. claimed the whole quantity and tendered the price and a deed for signature to the executors. They claimed, however, that they only intended to sell 60 acres measured on the side adjoining Rowland's land, and to sell more would be a breach of trust on their part, as they only wanted some $2,000 to pay the mortgage and debts of the estate. S. brought a suit for specific performance.

HELD, (reversing the judgment of the Supreme Court of British Columbia,) Gwynne, J., dissenting, that S. was entitled to the 117 acres.

Robinson, Q.C., and *Eberts* for the appellant.

ONTARIO.]

GRAND TRUNK RAILWAY CO. v. BECKETT.

Railway Co—Negligence—Death caused by Running through town—Contributory negligence—Insurance on life of deceased—Reduction of damages for.

In an action against the G. T. R. Co., for causing the death of the plaintiff's husband by negligence of their servants, it was proved that the accident occurred while the train was passing through the town of Strathroy; that it was going at a rate of over thirty miles an hour, and that no bell was rung or whistle sounded, until a few seconds before the accident.

HELD, (affirming the judgment of the Court of Appeal, 13 Ont. App. R. 174,) that the company was liable in damages.

For the defence, it was shown that the deceased was driving slowly across the track with his head down, and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching, when he whipped up his horses and endeavoured to drive across the track and was killed. As against this there was evidence that there was a curve in the road which would prevent the train being seen, and also that the buildings at the station would interrupt the view. The jury found that there was no contributory negligence.

HELD, per Ritchie, C. J., and Fournier and Henry, JJ., that the finding of the jury should not be disturbed. Strong, Taschereau & Gwynne, JJ., *contra.*

The life of the deceased was insured and on the trial the learned judge deducted the amount of the insurance from the damages assessed. The Divisional Court overruled

this and directed the verdict to stand for the full amount found by the jury. This was affirmed by the Court of Appeal.

HELD, that the judgment in this respect should be affirmed.

Osler, *Q.C.*, for the appellants.

Blake, *Q.C.*, and *Folinsbee*, for the respondent.

QUEBEC.]

BRADY v. STEWART.

Litigious rights—Sale of—Arts. 1582-83 *C.C.*

B. became holder of 40 shares upon transfers from D. & al., in the capital stock of the St. Gabriel Mutual Building Society. At the time of the transfers the shares in question had been declared forfeited for non payment of dues. Subsequently by a judgment of a Court rendered in a suit of one C., whose shares had also been confiscated for similar reasons, the shares were declared to be valid and to have been illegally forfeited. Thereupon B., by a petition for writ of mandamus, asked that he be recognised as a member of the society and be paid the amount of dividends already declared in favour of and paid to other shareholders. B's action was met, amongst other pleas, by one, setting forth; that B had acquired under the transfers in question, certain litigious rights and that, by law, he was only entitled to recover from the respondents the amount he had actually paid for the same, together with legal interest thereon and his cost of transfers.

HELD, (affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q. B. 272) Fournier & Henry, JJ., dissenting, that at the time of the purchase of said shares, B was a buyer of litigious rights, and under Art. 1583, C.C., could only recover the price paid with interest thereon.

Appeal dismissed with costs.

Doherty, *Q.C.*, for appellant.

Curran, *Q.C.*, for respondent.

QUEBEC.]

PION v. NORTH SHORE RAILWAY CO.

Navigable river—Access to by riparian owner—Right of—Railway Company responsible for obstruction — Damages — Remedy by action at law—When—43 Vic. (P.Q.) ch. 43, sec. 7, s.s. 3 & 5.

HELD, (reversing the judgment of the Court of Queen's Bench, Quebec, 9 Leg. News, 218), Taschereau, J., dissenting, that a riparian owner is entitled to damages against a railway company, although no land is taken from him, for the obstruction and uninterrupted access between his property and the navigable waters of a river, and the injury and diminution in value thereby occasioned to the property.

2. That the railway company in the present case not having complied with the provisions of 43 & 44 Vic. (P.Q.) ch. 43 sec. 7, ss. 3 and 5, the appellant's remedy by action at law was admissible.

Appeal allowed with costs.

Langelier, *Q.C.* for appellants.

Irvine, *Q.C.*, & *Duhamel*, *Q.C.*, for respondents.

QUEBEC.]

ROBINSON v. CANADIAN PACIFIC RAILWAY CO.

Damages—Misdirection as to solatium—New Trial—Art. 1056 *C.C.*

In an action for damages against a railway company brought by the widow of a servant of the company killed in the discharge of his work, the learned judge at the trial directed the jury that in assessing the amount of damages if they found for plaintiff they might consider the nature of the anguish and mental sufferings of the widow and child of the deceased.

HELD, (reversing the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q.B. 25) that there was misdirection. Effect of Art. 1056, C.C., considered. (See 10 Leg. News 241).

Appeal allowed with costs and new trial ordered.

Scott, *Q.C.* & *H. Abbott*, for the appellants.

J. C. Hatton, *Q.C.*, for the respondents.

QUEBEC.]

LEGER v. FOURNIER.

Sale à réméré—Term—Notice—Mise en demeure—Chose Jugée—Improvements.

HELD, (affirming the judgment of the Court

of Queen's Bench, Montreal, M.L.R., 3 Q.B. 124) where the right of redemption stipulated by the seller entitled him to take back the property sold within three months from the day the purchaser should have finished and completed houses in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the houses, and in default of such notice, the right of redemption might be exercised after the expiration of the three months.

2. The exception of *chose jugée* cannot be pleaded where the conclusions of the second action are materially different from those of the first, and so, although the present respondent attempted to exercise his right of redemption in a prior action for a less sum than stipulated, it was held that the dismissal of the first action was not *chose jugée* as regards the present action offering to pay the amount on conditions stipulated.

Taschereau & Gwynne, JJ., were of opinion in this case that appellant was entitled to $302 for improvements over and above the stipulated price instead of $40 allowed by the Court below.

DeLorimier, for appellant.

Laflamme, Q.C., for respondent.

THE PRIVILEGE OF COMMUNICATIONS TO SUITORS AND THEIR ADVISERS.

The case of *Young* v. *Holloway*, 56 Law J. Rep. P. D. & A. 81, reported in the September number of the *Law Journal Reports*, decides a point of considerable interest and importance in professional practice, and marks an advance in the application of the principle that communications made to professional advisers are privileged from disclosure to the other side. It arose upon certain anonymous letters which were written to the plaintiff and to her solicitor and counsel retained in a probate action, claiming revocation of a grant of probate of the will of the plaintiff's brother, on the ground that the testator was not of sound mind, and that the execution of the will was obtained by undue influence. Nothing turned on the point that the letters were anonymous. But the fact that out of the four letters three were signed in the names of the 'friends' of the respective families concerned, illustrates the growth of the practice of writing anonymous letters. Whether the writing of an anonymous letter is to be justified at all is a question of conscience with which the professional man has nothing to do. If anyone has information to give him he would rather have it in an anonymous letter than not at all, but of course it is more useful to him if it comes with the name and address of his correspondent. As direct evidence it is, of course, valueless; but it may put the solicitor on inquiry, the result of which will be valuable, and by not signing the letter, the correspondent takes back again half of the benefit he apparently intends to confer.

The question in the case arose out of the affidavit of documents in pursuance of the usual order obtained by the defendants, the executors and legatee of the will. In her answer the plaintiff claimed privilege for documents described in the schedule merely as 'certain anonymous documents,' on the ground that they were privileged as being communications to her solicitor and counsel from witnesses in support of her claim, containing evidence in support of it, and obtained for the purposes of the action. On so vague a description, an order for a further affidavit was inevitable. This produced an identification of the four documents, each by their signatures and addressees. One of the signatures, that is of the letter addressed to counsel, represented the writer's own name, and of the anonymous letters, two were addressed to the plaintiff herself and the other to her solicitor. Mr. Justice Butt ordered all four to be produced. The Court of Appeal divided them into the two classes of letters written to the party and letters written to her confidential advisers, and they excluded the first class from the privilege and included the second. The only difficulty in holding the second class privileged which occurred arose from the vagueness of the affidavits, which did not state plainly that the letters were sent to the professional advisers in their professional capacity. The judges, however, rightly drew the inference that such was the fact. Then the question

arose whether the privilege extended to documents volunteered to the professional adviser, and not produced as the result of inquiries by him or otherwise by his own intervention. The Court properly declined to draw any distinction between the two cases, and it would undoubtedly be a difficult matter in many instances to decide whether evidence was properly volunteered or whether it was not more or less indirectly due to the operations of a solicitor or a counsel. For example, counsel might make a speech in which he suggested the possibility of the existence of certain facts, and a correspondent might volunteer information in regard to it. This would be to some extent obtained by the counsel, and similarly a solicitor might make inquiries of one man and another might hear of it and volunteer information. The rule, therefore, laid down embraces all documents sent to a professional adviser in his professional capacity, but it excludes documents sent to the party himself. Such documents do not seem to come within the principle of the privilege. When they are sent to the party himself, they are not part of the fighting apparatus of the cause, but are part of the facts of it, and the action taken by the party on such a communication might be very material to the issue in the cause. It may be said that the distinction is somewhat fine, and asked whether, if a man acts as his own solicitor he has the privilege? The answer is that he has not, as the privilege only arises when there is the relation of solicitor and client which it is the object of the law to protect. If a party should make himself a sort of assistant to his solicitor for the purpose of obtaining evidence, in such a case there would be privilege, especially if the solicitor acted for several parties.

The moral to be drawn from the decision is, in the first place, that the affidavit supporting a claim of privilege for letters of this class should set out facts showing that the communication was made to the adviser in his professional capacity; secondly, persons who have information to give in regard to pending suits may feel that their information, if sent to the proper quarter, will be confidential, and will not immediately be exposed to the gaze of the opposite party. This state of the law cannot fail to encourage persons possessing information to give it, and it may encourage them so far that when they give it they add their names. The decision seems therefore to do something in a small way for the elucidation of truth and the advancement of justice.—*Law Journal.*

CONTEMPT OF COURT.

On August 31, in the case of *Jonas* v. *Long*, a motion was made to commit Mr. George Johnson, a solicitor, of 16 Union Court, Old Broad Street, for assaulting a solicitor within the precincts of the Court. It was stated that a summons was heard on August 16, and, after leaving the judge's room, Mr. Johnson, in the passages of the Royal Courts, used strong language to Mr. Robinson, the solicitor on the other side, and put his hands up to him in a threatening attitude. Two acts of contempt were complained of—namely, an assault or improper conduct in the presence of the judge, and conduct to intimidate and obstruct the course of justice within the precincts of the Court. *Kirby* v. *Webb*, a case before Mr. Justice Chitty, referred to in these columns on July 16; *The Republic of Costa Rica* v. *Erlanger*, 36 L. T. 333; and *Ex parte Wilton*, 1 Dowling, N. S. 805, were referred to.—Mr. Justice Kekewich said that the acts that constituted the contempt should appear on the face of the order. The order would recite the particular facts in the affidavit, and would go on, "the Court being of opinion that these facts constitute a contempt of Court," &c. The applicant was, in his lordship's opinion, entitled to the order in the absence of the respondent; if he had anything to say he could move to discharge it.—*Law Journal*, (London.)

BIGAMY AND ONUS OF PROOF.

At Liverpool, on August 10, before Mr. Justice Day, the case of *Regina* v. *Maguire*, was tried. It appeared that in August, 1885, the prisoner made the acquaintance of Amelia Boadicea Gillmore, who was a widow,

and, after a short courtship, during which he represented himself to be a bachelor, they became engaged, and were married at Christ Church, Kensington, Liverpool, in December, 1885. They lived together for some time, but in July, 1887, the second wife discovered that her supposed husband had in 1860 married a girl called Mary Ham at the Roman Catholic Church at Newton Forbes, county Longford, and that this first wife was still alive. The prisoner before the magistrates made the following statement: 'I left my wife ten years ago, and I have not seen or heard of her since. I thought she was dead.' Counsel for the prosecution admitted that he had no evidence to show whether the prisoner had left his wife or not, or whether the prisoner knew at any time during the last seven years that she was alive. —The learned judge held that the prisoner must prove continual absence from his wife for seven years, and that then it would be for the prosecution to satisfy the jury that he knew at some time during the last seven years that his wife was alive.—A witness was called for the defence, who said that he had been a fellow workman of the prisoner's during the last eight years in Liverpool, and that he had never heard the prisoner mention his first wife during that time.—Upon this his lordship directed the jury to acquit the prisoner.

THE NATIONAL LEAGUE PROCLAMATION.

In the House of Lords, on August 9, the Marquis of Salisbury said: 'My lords, it may be convenient to your lordships that I should announce that the Lord-Lieutenant of Ireland, by and with the advice of the Privy Council, has to-day by proclamation declared the National League to be a dangerous association under section 6 of the Crimes Act, and has thus taken power under that statute to prohibit and suppress that association by order in any district where such a step may be required to prevent intimidation and interference with the administration of the law. The proclamation, which I will lay on the table, is in the following terms: "By the Lord-Lieutenant and Privy Council in Ireland. A Special Proclamation. Whereas we are satisfied that there exists in Ireland an association known by the name of 'The Irish National League,' and that the said association in parts of Ireland promotes and incites to acts of violence and intimidation, and interferes with the administration of the law. Now we, the Lord-Lieutenant-General, and General Governor of Ireland, by and with the advice of the Privy Council, by virtue of section 6 of the Criminal Law and Procedure (Ireland) Act, 1887, and of every power and authority in that behalf, do by this our special proclamation, declare from the date hereof the said association known as the Irish National League to be dangerous. This proclamation shall be promulgated by the same being published in the *Dublin Gazette*, and by a printed copy thereof being posted at every police station or barracks, and every place in which Divisional Police Courts or petty sessions are held respectively in Ireland. Given at the Council Chamber, Dublin Castle, this 19th day of August, 1887. God save the Queen."' A similar announcement on the same day was made by the secretary to the Lord-Lieutenant of Ireland in the House of Commons.

DAMAGES AGAINST A BANK CLERK.

On August 18, at the Middlesex Sheriff's Court, Red Lion Square, before Mr. Under-Sheriff Burchell and a special jury, the case of *The London and Brazilian Bank* (*Lim.*) v. *Kester Wilson Sefton* came on for hearing. Judgment had been allowed to go by default, and the case was heard for the assessment of damages.—Mr. C. T. Gyles, barrister, who appeared for the plaintiffs, stated that the defendant entered into the service of the bank under an agreement for three years from November 1, 1884, at a salary of 360*l.* a year, together with his expenses to Rio, where he was employed, amounting to 40*l.* Although the defendant had his salary voluntarily raised by the bank to 450*l.*, he suddenly left without notice or permission on December 22, 1886, ten months before the expiration of the agreement, and forthwith went into the service of the International

Bank, an opposition firm.—Mr. Gordon, manager of the plaintiffs, proved these facts in evidence. He said that the defendant was a very valuable servant, and the bank were put to great inconvenience by his leaving.—The jury, after a brief retirement, found a verdict for the plaintiffs, damages 111*l*.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 1.

Judicial Abandonments.

Louis Bonville, Ste Cunégonde, Sept. 17.

Zotique Deschamps, saddler, Montreal, Aug. 15.

Louis Collin & Frère, dry goods, St. Sauveur de Québec, Sept. 30.

Joseph Perreault, Montreal, Sept. 27.

Olivier Seguin, tailor, Montreal, Sept. 6.

Jacques Villeneuve, trader, Montreal, Sept. 23.

Curators appointed.

Re Bessette, Lefort & Co.—Kent & Turcotte, Montreal, curator, Sept. 27.

Re Dery & Larue, traders, St. Charles.—H. A. Bedard, Quebec, curator, Sept. 26.

Re Zotique Deschamps, saddler, Montreal.—Henry Ward, Montreal, curator, Aug. 23.

Re Elliott, Finlayson & Co., Montreal.—Kent & Turcotte, Montreal, curator, Sept. 10.

Re J. A. Giard.—C. Desmarteau, Montreal, curator, Sept. 27.

Re Hogle & Co.—H. A. Odell, Sherbrooke, curator, Sept. 19.

Re Frederick Keasey, grocer.—Hy. Ward and Alex. Gowdey, Montreal, curators, Aug. 12.

Re Jean-Bte. Leblanc, St. Sauveur de Québec.—H. A. Bedard, Quebec, curator, Aug. 19.

Re Hermenegilde Morin, saloon keeper.—H. Ward and Alex. Gowdey, Montreal, curators, Sept. 19.

Re Arsène Neveu.—C. Desmarteau, Montreal, curator, Sept. 29.

Re L. J. Rhéaume, St. Henri.—Kent & Turcotte, Montreal, curator, Sept. 27.

Re Louis Robinson, tailor.—A. W. Stevenson, Montreal, curator, Sept. 27.

Dividends.

Re Zotique Deschamps, saddler.—First and final dividend, Henry Ward, Montreal, curator.

Re Louis Phillippe Gagnon, St. Roch des Aulnets.—First and final dividend, payable Oct. 15, H. A. Bedard, Quebec, curator.

Re C. E. Kapps, Chute aux Iroquois.—First and final dividend, payable Oct. 18, Kent & Turcotte, Montreal, curator.

Re Max Kert.—Dividend, W. A. Caldwell, Montreal, curator.

Re Louis Laberge.—First dividend, payable Oct. 18, Kent & Turcotte, Montreal, curator.

Circuit Court, Ottawa Co.

Special term ordered, to be held at Hull, from 12th to 15th October.

Notice.

To incorporated companies to make declaration of corporate name, &c., under penalty imposed by 45 Vic. ch. 47.

Canada Gazette, Oct. 1.

Procedure in Criminal Cases.

Sections 1 and 2 of 50 & 51 Vict. ch. 50, to come into force Oct. 1.

Thanksgiving Day.

November 17 appointed.

GENERAL NOTES.

'RES GESTÆ.'—The declarations made by one of the defendant's servants while assisting another in enforcing its regulation as to deck passengers held admissible in evidence as part of the *res gestæ* (*The New Jersey Steamboat Company* v. *Brockett*, Sup. Ct. U.S. 19 Ch. Leg. N. 299).

WITH the five cases disposed of according to the House of Lords Register this week, the House has decided twenty-six appeals in the course of the year from the Court of Appeal, and has overruled that Court twelve times. The average of reversals has been increased by the four cases in which the appeal has been allowed during the week.—*Law Journal.*

IN *Blackburn, Low & Co.* v. *Vigors* (55 Law J. Rep. Q.B. 347), the House of Lords reversed the Court of Appeal, and upheld the view of the Master of the Rolls that information affecting the risk possessed by an agent who had been employed with a view to the insurance, but through whom the insurance in question was not made, was not information which can be imputed to the principal.—*Ib.*

THE degradation of words in common speech gave countenance to the contention in *Crofts* v. *Taylor*, that dilution necessarily means mixing with water. A man dilutes his claret with water, but shandygaff is not ordinarily called a dilution, and a mixture of two wines is called not dilution, but, by a horrible misapplication of a good word, a '*blend.*' In an Act of Parliament, the word has of course its proper meaning—that is, any mixture of stronger with weaker liquids, the effect of which is to wash away a part of the strength of the stronger. To mix Barclay's beer with small beer is, therefore, obviously dilution.—*Ib.*

ONE of the morals to be drawn from the Lipski case is that, if the practice of respiting persons condemned to death for the purpose of allowing further inquiry to be made by their professional advisers is to be generally adopted, the one great advantage of the present system—namely, the reasonably expeditious disposal of criminals—will be prejudiced. That system consists of magisterial inquiry, the grand jury's inquest, the summing-up of a judge, the verdict of a jury, and if appealed to, the decision of the Home Secretary. The last stage should be the shortest of all, and should not be lengthened out by introducing into it functions which properly belong to a much earlier stage—namely, the exhaustive investigation of the facts by the convict's solicitor.—*Ib.*

The Legal News.

VOL. X. OCTOBER 15, 1887. No. 42.

The English law with reference to the guardianship of infants, which is depicted in so unfavorable an aspect by William Black in one of his recent romances (*Sabina Zembra*), was amended in 1886, 49 & 50 Vict., c. 27. An interesting case, *In re Witten*, has occurred, illustrating the benefit of the increased power which the Court now possesses to deprive the father of the custody of an infant child, and to deliver the child to its mother. The father, a man of 53 years of age, was accused of having formed an improper connection with a young lady of six-and-twenty, who was under his tuition in medicine. He denied any impropriety, pretending that he had adopted the young lady in question, and that he never acted towards her in any other way than a father ought to act towards his daughter. The lady, however, admitted in an affidavit that her character had been destroyed by the association, and it also appeared that the defendant had lost a position of trust in consequence of being unable to meet the charge of impropriety. The wife, moreover, for the same reason had commenced proceedings for a judicial separation, and she had been informed that her husband intended soon to go to Morocco with the young lady and the child (a boy of ten years of age), and to live there permanently. In these circumstances, Mr. Justice Kay said he had no hesitation in granting the mother's application for the custody of the child. His lordship hoped that the father's relations with the young lady were innocent, though it was rather difficult to believe it. But if the relations were as innocent as possible, such conduct on the part of a married man was inexcusable. The order was made that the boy be delivered into the custody of the mother, and the only concession made was that he might reside with his father for a fortnight in the summer and a week in the winter holidays, in any house in which the lady was not, and to which she did not come. If she attempted to associate with the boy in any shape or way, his lordship would at once interfere. The *Law Times* doubts whether the application would have been successful without the legislation of 1886.

Another case relating to the custody of the father, *In re Coram*, has occurred in New Brunswick. A father, being in poor circumstances, left his infant daughter, then aged seven years, with her uncle and aunt upon the understanding that she should be considered as their child, and that they should support and educate her as such. She remained with her uncle and aunt until she was nearly fifteen years of age, and was educated by them, the father contributing nothing toward her support. During this time she became much attached to them, and was unwilling to leave them. The Supreme Court were divided on the right of the father to obtain the custody of his child. The majority of the Court (Allen, C.J., Wetmore, King and Tuck, JJ.,) held that the father had the legal right to resume the custody of the minor, notwithstanding his agreement, even though his object was that she should assist in the work of his house, and thereby her duties would be more laborious, and her mode of living less easy and comfortable than she had been accustomed to in her uncle's house—there being no imputation against her father's character, or that she would not be properly cared for in his house. It was also held that the fact of her having been brought up by her uncle as a Presbyterian, and that her father was a Methodist, was no ground for refusing the father's application. The dissentient judges (Palmer and Fraser, JJ.) were of opinion that in applications of this kind, the principal thing to be looked at was the welfare of the child; that it would not be for the interest of the child that the father should exercise his right of custody and force her into a different position in life from that which her education and the habits she had acquired had led her to believe she would occupy; and that, so far as he could, her father had emancipated her from her duty to submit to his control, and therefore his application ought not to be granted.

In Ohio, the subject of chewing-gum has engaged the attention of the courts, and it has been decided (*Adams* v. *Heisel*, U.S. C.C., 31 Fed. Rep. 279) that a trade-mark cannot be obtained for the form of the sticks in which this article is made, nor for the peculiar shape and decorations of the boxes in which it is put up for the market, nor for the manner in which the gum is arranged in the boxes.

NEW PUBLICATION.

APPEAL CASES, with Notes and Definitions of the Civil and Criminal Law of the Province of Quebec. By the late THOMAS KENNEDY RAMSAY, Justice of the Court of Queen's Bench. Edited by C. H. Stephens, Advocate. — Montreal, A. Periard, Publisher.

The profession have reason to be thankful that Mr. Justice Ramsay lived to complete this important work, to which so many hours that might fairly have been given to much needed rest were laboriously devoted. Having had the privilege of spending a few vacation days with the author, about the time the digest was commenced, we are able to speak from personal observation of the unquenchable ardor with which the formidable task was planned, and undertaken, and we had numerous opportunities afterwards to observe the conscientiousness, the thoroughness, and the untiring industry with which it was prosecuted. It is now placed before the profession, and will stand as no inconsiderable monument of a notable figure in our judicial annals. The volumes of factums, over one hundred in number, many of them of colossal proportions, from which it was compiled, now form part of the collection of the editor of this journal, and we may take this opportunity to say that we shall be happy to give communication to members of the profession who desire to consult them. It should be remembered, to prevent disappointment, that Mr. Justice Ramsay undertook only to digest the cases in which he took part. There are several hundred cases omitted,—more particularly cases of recent years—which were decided while he was engaged in holding the criminal terms of the Court, or otherwise absent. It would be superfluous to commend this work to the profession; the learning, ability, and experience of the lamented author are too well known to all our readers. It may be mentioned, however, that the editor has included a table of cases carried to the Supreme Court and Privy Council, and also the text of opinions of the Judicial Committee in cases which were appealed to England. The work is handsomely printed and bound, and will naturally find a welcome in the office of every lawyer, and the library of every member of the bench.

SUPREME COURT OF CANADA.

QUEBEC.]

THE CENTRAL VERMONT RAILWAY CO. v. TOWN OF ST. JOHNS.

Railway bridge and railway track—Assessment of, Illegal—40 Vic. ch. 29, *secs.* 326 & 327—*Injunction—Proper remedy—Extension of town limits to middle of a navigable river—Intra vires of local legislature*—43 & 44 *Vic. ch.* 62 (*P. Q.*)

HELD, (reversing the judgment of the Court of Queen's Bench, Montreal,) Fournier and Taschereau, JJ., dissenting, that the portion of the railway bridge built over the Richelieu river, and the railway track belonging to appellant's company within the limits of the town of St. Johns, are exempt from taxation under sections 326 & 327 of 40 Vic. ch. 29 (P. Q.)

2. That a warrant to levy rates upon such property for the years 1880-83 is illegal and void, and that writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same.

As to whether the clause in the Act of incorporation of the town of St. Johns, P. Q., extending the limits of said town to the middle of the Richelieu river, a navigable river, is *intra vires* of the legislature of the Province of Quebec, the Supreme Court of Canada affirmed the holding of the Court below that it was *intra vires*.

Appeal allowed with costs.

Church, *Q.C.*, for appellant.

Robidoux, *Q.C.*, for respondent.

ONTARIO.]

BURGESS v. CONWAY.

Sale of land—Consideration in deed—Evidence—Sale of land, or of equity of redemption.

B. sold to C. a lot of land mortgaged to a loan society, claiming that it was a sale of the land for $1,400. C. claimed that it was merely a sale of the equity of redemption for $104.50 which B. had accepted as the amount due him, according to the representation of C. who had figured it out, B. being incapable of figuring it himself. In the deed executed by B. the consideration was declared to be $1400. C. paid off the mortgage for $1081. In an action to recover the difference:

HELD, Taschereau and Gwynne, JJ., dissenting, that the deed itself would be sufficient evidence of a sale of the land for $1400, in the absence of proof of fraud or mistake, and B. was entitled to recover the difference between that sum and the amount paid on the mortgage less the sum already paid.

Moss, Q.C., for appellants.

Robinson, Q.C., for respondents.

QUEBEC.]

THE MAGOG TEXTILE & PRINTING COMPANY v. DOBELL.

Joint stock company—31 Vict. ch. 25 (P. Q.)—Action for calls—Subscriber before incorporation—Allotment—Non-liability.

D. signed a subscription list, undertaking to take shares in the capital stock of a company to be incorporated by Letters Patent under 31 Vic. ch. 25 (P.Q.), but his name did not appear in the notice applying for Letters Patent incorporating the Company. The Directors never allotted shares to D. as required by 31 Vic. ch. 25, sec. 25, and he never subsequently acknowledged any liability to the company.

In an action brought by the company against D. for calls due on the company's stock:

HELD, affirming the judgment of the Court of Queen's Bench, Quebec (9 Leg. News, 348), that D. could not be held liable for calls on stock.

Appeal dismissed with costs.

Bossé, Q.C., and *Béique, Q.C.*, for appellants.

Irvine, Q.C., and *Stuart*, for respondents.

ONTARIO.]

McLEAN v. WILKINS.

Mortgagor and mortgagee — Assignment of mortgage—Purchase of equity of redemption by sub-mortgagee—Sale of same—Liability to account.

M., executor of a mortgagee, assigned the mortgage to C, who brought suit for foreclosure, but settled such suit by assigning the mortgage to H., one of the defendants. Prior to this the mortgage had been deposited with H. as collateral security for a loan to M. H. then purchased the equity of redemption, which he sold for a sum considerably in excess of the claim of C. and his own claim. In a suit by H. to foreclose M's interest:

HELD, reversing the judgment of the Court of Appeal (13 Ont. App. R. 467), and restoring that of the Common Pleas Division (10 O. R. 58), that H., as sub-mortgagee, was bound to account to M. for the proceeds of the sale of the equity of redemption.

Blake, Q.C., and *Cassels, Q.C.*, for appellants.

Moss, Q.C., for the respondents.

COUR DE CIRCUIT.

FRASERVILLE, 22 septembre 1887.

Coram CIMON, J.

BLAIS v. JULIEN.

Exécution—Portraits de famille—Insaisissabilité.

JUGÉ :—*Que les portraits de famille sont insaisissables.*

CIMON, J.—Parmi les objets que le demandeur a fait saisir chez le défendeur se trouvent des portraits de famille. Le défendeur-opposant prétend qu'ils sont insaisissables. Le code de procédure ne les exempte pas nommément de saisie. Mais il est certain qu'en outre des objets que le code spécialement soustrait à la saisie, il y en a encore, bien qu'il n'en parle pas du tout, qui, cependant, à cause de leur nature, sont considérés insaisissables. Ainsi, on lit dans Dalloz, répert., vbs. saisie-exécution, No. 160, ce qui suit: " Indépendamment des choses déclarées insaisissables par les dispositions formelles de la loi, il y a des choses tellement saintes et en dehors du commerce des hommes, que la loi n'a pas

même en besoin, pour qu'elles soient insaisissables, de les déclarer telles." Les portraits de famille sont considérés pour ainsi dire choses sacrées de la famille, hors du commerce ordinaire ; *ils ne doivent point sortir de la famille.* Ferrière, dictionnaire de pratique, vbo. portrait : " Portraits ou tableaux de famille, " avec les bordures, appartiennent à l'ainé des " enfants du défunt, hors part et sans confu- " sion. *Ils ne tombent jamais dans le legs uni- " versel qu'un testateur aurait fait, mais ils doi- " vent être rendus aux héritiers ab intestat,* " comme il a été jugé par arrêt du parlement " de Paris rendu en la grande chambre le 11 " mai 1719." Et Pothier, communauté, No. 682, dit : " *Les portraits de famille ne sont pas " non plus des choses qui soient censés faire par- " tie d'une communauté de biens, ni même d'une " succession ; et, en conséquence, ils ne doivent " pas être inventoriés. Chacune des parties doit " prendre les portraits de sa famille. Le portrait " du conjoint prédécédé doit être laissé à l'autre " conjoint pendant sa vie, à la charge de le " rendre, après sa mort, à l'ainé de la famille du " prédécédé.*" J'ai entendu, quand j'étais étudiant, le 25 février 1869, l'honorable juge Jean Thomas Taschereau, à Québec, dans une cause à la Cour de Circuit, où un nommé Brassard était défendeur, juger que les portraits de famille étaient insaisissables. J'adopte ce précédent sans hésiter.

Les portraits de l'épouse et des proches parents du défendeur seraient saisis, achetés par n'importe qui, pour être ensuite, peut-être, attachés aux murs d'une taverne, ou de lieux pires encore ! Certes, toute conscience se révolte à l'idée d'une pareille profanation ! Ces portraits sont tellement hors du commerce ordinaire qu'ils n'ont, pour ainsi dire, aucune valeur réelle en dehors de la famille.

La Cour a annulé la saisie des portraits de deux des proches parents du défendeur.

Lebel, pour le demandeur.

Dessaint, pour le défendeur-opposant.

NOTE.—Vide *Michaux*, des liquid. et partages, No. 1840 : " On ne comprend pas dans " la masse...... les objets d'affection, *comme " les portraits de famille*, etc." No. 2308 : " *Les " portraits de famille* ne sont pas non plus " compris dans la masse active de la succes- " sion." Nos. 2824 à 2835.—No. 2831 : " Mais " jamais ces objets ne seront assimilés au " mobilier de la succession pour en suivre le " sort, comme l'ont prétendu MM. Dutruc " (466) et Mollot (346). Comment ! l'étoile " de l'honneur qui brillait sur la poitrine du " père, *la toile qui conserve les traits chéris d'une " mère*, seraient vendus à l'enchère publique, " sans plus d'égard que le stère de bois du " bûcher ! Cela n'est pas admissible. Mieux " vaudrait, au besoin, tirer ces objets au sort, " entre les héritiers, comme l'a décidé le tri- " bunal de Caën, le 12 mai 1830." No. 2834 : " Jugé, cependant, que les portraits de fa- " mille laissés par le défunt doivent être com- " pris dans le partage de la succession sans " qu'ils puissent être attribués à l'ainé des " enfants. Et si ces portraits ne peuvent " être partagés en nature, ils doivent être " licités entre les héritiers, *sans concours d'é- " trangers ;* sauf à ceux de ces héritiers qui " ne se rendraient pas adjudicataires, le droit " d'en faire prendre copie à leurs frais dans " un délai déterminé (Lyon, 20 décembre " 1861, P. 63, 275)." 15 Demolombe, Nos. 700 et 701 ; 10 Laurent, No. 339 ; Dalloz, répert. contrat de mariage, No. 666 et 667.

COUR SUPÉRIEURE.

SHERBROOKE, 31 mars 1887.

Coram BROOKS, J.

GRAHAM v. WEBB.

Exception à la forme—Description—Certificat de service.

JUGÉ : —1o. Que la description du requérant dans un bref de *mandamus* faite de la manière suivante : " *John Henry Graham, of the town of Richmond, in the " District of St. Francis, doctor of laws, " esquire,*" est suffisante quoique le requérant ait reçu son titre d'une université étrangère, aux Etats-Unis, et qu'il ait toujours été un professeur dans un collège au Canada.

2o. Que le retour de l'huissier mentionnant que la signification a été faite au défendeur sans mentionner son nom, est suffisant, même dans le cas où il n'y a pas de défendeur de décrit au bref, les parties y étant nommées comme requérant

et intimé, le mot "*défendeur*" étant un terme employé pour toute personne défendant à une action.

Sur le premier point: *Bradley* v. *Logan*, 3 L. N. 200, S. C. 1880.

Sur le second point: 7 L. C. J. 291: *Beaudry* v. *Desjardins* et *Thomas*, 4 R. L. 555.

Exception à la forme renvoyée.

J. H. Richard, avocat du requérant.

Jos. L. Terrill, avocat de l'intimé.

(J. J. B.)

CIRCUIT COURT.

MONTREAL, Sept. 21, 1887.

Before GILL, J,

HENRY et al. v. SMITH.

Lessor and Lessee—Repairs ordered by municipal authority—Notice.

The plaintiffs' action was for $58.05, cost of a safety valve placed by them upon a boiler in premises leased by them and for certain other repairs, the allegation being that when they leased from defendant the premises were in urgent want of repairs which defendant had failed to make though notified so to do, and that the plaintiffs had had to make them themselves.

The defendant pleaded that plaintiffs had no right to make the repairs without a judgment of Court or at least without having put him in default, which they had not done, and further that plaintiffs had taken over the lease of one Lajeunesse under which the tenant was chargeable with repairs. A plea of compensation was also filed.

Dorion, for plaintiffs: The repairs claimed for were urgently required, the plaintiffs being exposed to the possibility of having their engine stopped by the boiler inspector. *Mise en demeure* is not always *de rigueur*: Sirey & Gilbert (Edition Belge) Art. 1730-1732 p. 531. Vol. II, No. 13. Moreover the defendant benefited by the repairs as they were left at the expiry of the lease.

Cross, for defendant: The lessor should have been put in default, but knew nothing of the alleged repairs until sued. The claim might as well be for $500 as for $58.05. No case can be cited where a lessee has recovered without having put the lessor in default to make the repairs by a suit or at least by a notice. The decisions are all the other way.

The judgment is as follows:—

"La Cour....

"Attendu que les grosses réparations que les demandeurs ont faites aux machineries louées du défendeur, étaient absolument urgentes et ordonnées par l'inspecteur officiel des bouilloires à peine d'arrêter toutes opérations dans l'établissement loué; qu'il est prouvé que les prix chargés pour ces réparations sont les prix courants et que le défendeur n'a pas prouvé qu'il eût pu les faire exécuter plus avantageusement, ou mieux qu'elles ne le furent, ou à meilleur marché;

"Attendu qu'il a été prouvé que les réparations réputées locatives que les demandeurs ont faites étaient devenues nécessaires par suite de vétusté;

"Considérant que les demandeurs ont droit de recouvrer le coût des dites réparations grosses et menues du défendeur, s'élevant selon les comptes produits et prouvés à la somme de $58.05;

"Considérant que les demandeurs ne sont pas les continuateurs du bail fait à Lajeunesse, rien ne prouvant qu'ils aient assumé les obligations de Lajeunesse ou pris le bail aux mêmes conditions que lui, au contraire la condition principale du bail, savoir le montant du loyer étant changée, en sorte qu'il n'y a pas lieu d'admettre en compensation ce que le défendeur aurait payé pour primes d'assurance;

"Considérant cependant qu'il y a lieu d'admettre en compensation la valeur des appareils à gaz enlevés par les demandeurs, de bonne foi et avec les leurs, mais appartenant au défendeur, laquelle valeur peut être fixée au maximum de $18, ce qui étant déduit de la somme susdite de $58.05, laisse une balance due aux demandeurs de $40.05 que le défendeur est condamné à leur payer avec dépens distraits ainsi que demandé."

Geoffrion, Dorion, Lafleur & Rinfret, for the plaintiffs.

Laflamme, Laflamme, Madore & Cross, for the defendant.

(A. G. C.)

*SUPERIOR COURT—MONTREAL.**

Acte des chemins de fer, Québec—Paiement de la sentence arbitrale sur dépôt—Prolongation de délai.

JUGÉ:—1o. Que d'après l'Acte des chemins de fer de Québec, un propriétaire exproprié de son terrain a droit, après que la sentence arbitrale a été signifiée, de s'en faire payer le montant à même le dépôt fait par la compagnie, quand même cette dernière aurait exercé quelque recours contre la sentence arbitrale, et notamment qu'elle aurait intenté une action pour la faire annuler.

2o. Que lorsque le délai dans lequel devait se rendre la sentence arbitrale, sous l'acte susdit, a été prolongé du consentement des arbitres et des parties, aucune des parties ne peut se plaindre que la sentence a été rendue après le délai originairement fixé. *La Compagnie de Chemin de Fer de Québec et Ontario* v. *Les Curé, etc.* de *Ste. Anne de Bellevue*, Taschereau, J., 16 juillet 1887.

Election municipale—Mandamus—Serment d'office—Entrée dans les minutes.

JUGÉ: — 1o. Que lorsqu'une corporation municipale déclare illégalement que le siége d'un conseiller est vacant, le remède de ce dernier est un *mandamus* contre la corporation.

2o. Que la prestation du serment d'office par un conseiller municipal est une chose essentielle, mais que la disposition du Code municipal qui veut qu'une entrée de la prestation du serment soit faite dans le livre des délibérations du conseil n'est que directoire et n'est pas à peine de nullité. *Savaria* v. *La Corporation de la Paroisse de Varennes*, Würtele, J., 5 août 1887.

DOMICIL AND MARRIAGE CONTRACTS.

The case of *In Re Cooke's Trusts*, 56 Law J. Rep. Chanc. 637, reported in the August number of the *Law Journal Reports*, illustrates the working of the law of domicil in an interesting way, and marks a stage in the controversy on the question whether the domicil of parties is the test of their capacity to contract or whether it depends on the law of the place of the contract. It will be remembered that in *Sottomayor* v. *De Barros*, 47 Law J. Rep. P. D. & A. 23, the Court of Appeal, consisting of Lords Justices James, Baggallay, and Cotton, held that the capacity to contract a marriage depended on the law of the domicil of the parties when they both had the same, and not on the law of the place. This decision, it appeared, was based on a mistake in fact, for on the case coming before Sir James Hannen on a second occasion (49 Law J. Rep. P. D. & A. 1) he found that the parties had different domicils, and that the law of the place applied in such a case, at the same time taking the opportunity of showing that the previous decision did not commend itself to his private judgment, especially as it went so far as to include contracts of all kinds. Besides this decision there is *Brook* v. *Brook*, 9 H. L. Cas. 227, the well-known case in the House of Lords, which holds that domiciled British subjects in the relation of deceased wife's sister and deceased sister's husband to one another cannot construct a valid marriage in a country in which it is legal. Of this case Lord Justice Cotton said: "The judgment in that case only decided that the English Courts must hold invalid a marriage between two English subjects domiciled in this country who were prohibited from intermarrying by an English statute, even though the marriage was solemnised during a temporary sojourn in a foreign country." Thus domicil, citizenship, and place of contract combine to complete the complication of this subject.

The facts of the present case were of a somewhat romantic kind. It arose out of a petition presented by Mr. W. Briggs for payment to him as residuary legatee of a lady whose maiden name was Nicholson of a moiety of a residuary estate left to her by the will of Mr. H. P. Cooke. Miss Nicholson was born in England of English parents. In 1839, being a minor, she married a French viscount at Boulogne, and previously to the marriage a notarial contract was entered into between them, by which a separation of goods took place, and the intended wife was to have free enjoyment and disposition of

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* To appear in Montreal Law Reports, M. L. R., 3 S. C.

her property. There were children of the marriage, but in 1845 or thereabouts the lady separated from her husband, went with her children to live with her father in Jersey, and did not return to France. In 1846 the testator died. Eight years afterwards news reached the viscountess that the viscount was dead, and next year she married Mr. Briggs, the present claimant of her money, with whom she and her children went to New South Wales, and lived with until her death in 1879. It appeared that the news of the viscount's death was untrue, and he did not in fact die till 1877. The viscountess made her will in 1878. The money was claimed by Mr. Briggs under the viscountess's will, and by the viscount's children under the French law that their mother could not disinherit them. The first question Mr. Justice Stirling proposed to himself was, What was the lady's domicil? It was by origin English, and French by marriage down to her husband's death. At her husband's death she had been for more than thirty years separated from him and out of France, and for twenty years at the other side of the globe. The intention to give up her French domicil which these acts evidenced was frustrated of its effect so long as her husband lived, but after his death they could not be put out of sight in considering her intention in remaining where she was. Mr. Justice Stirling comes to the conclusion that she had elected a new domicil in New South Wales, or at all events she had abandoned her French domicil, and according to *Udny* v. *Udny*, L.R. 1 Sc. App. 441, her domicil of origin revived without making a fresh choice. These inferences appear to have been justified by the facts, but more difficulty arose in applying them to the case in question. It was argued on behalf of the viscount's children that the effect of the prenuptial contract into which the lady had entered was that the children were entitled to their share according to the law of France, as the husband must have assumed that this would be so when he assented to the contract. This point was little argued; but it seems far from clear whether the law of France on this subject is not positive law, and not a result arising by implication from a contract in which there is a separation of goods. In the former case it would be necessary to show that the lady was a domiciled Frenchwoman when she died; in the latter, that she was bound by the laws of France when she made the prenuptial contract. With regard to her status when she made the prenuptial contract, it seems to have been contended that whatever her status after marriage she had an English domicil before it, and when she entered into the antenuptial contract. But that she was an infant there could be no foundation for that contention; for, after all, the question what law binds is a question of intention, and no one could suppose that the parties could have meant the law of England to apply. The fact of the lady's infancy, therefore, made it necessary, in disposing of the question of any contractual obligation under French law that there might be, to face the question whether in regard to the capacity to contract the law of the domicil governs or the law of the place. Mr. Justice Stirling was asked to discuss *Sottomayor* v. *De Barros*, but he declined to do so. He found it there laid down that the question of personal capacity, whether in the marriage contract or other contracts, depends on the laws of the domicil. It was possible to distinguish *Sottomayor* v. *De Barros* on the ground that the decision applied to a contract of marriage only; but such a distinction would have been merely mechanical, and Mr. Justice Stirling did not make it. He accordingly decided that the law of England, whether in virtue of a domicil by election in New South Wales or by reversion in England, applied, and that the prenuptial contrart, assuming it to have the effect of controlling her power of disposition according to French law, was invalid, having been made when she was a minor.

It might turn out in this case, as in the other, that the facts necessary to be investigated before a domicil can be fixed with precision had not been exhausted. It is possible that the lady's father may have elected a French domicil for her, although we suppose that no such presumption would arise from the fact of an English family living in Boulogne, especially in the year 1839. The important question whether the law of domi-

cil governs in regard to incapacity will, perhaps hardly be settled until the House of Lords has pronounced upon it; but it would be the natural and reasonable law. Questions of incapacity depend, so far as years of discretion are concerned, upon views taken of maturity, which largely depend on climate, and so far as coverture is concerned, on the habits of domestic life, while so far as mental decay or natural weakness is concerned, there is not likely to be much divergence between the laws of different countries. It is reasonable enough that as a man goes from country to country he should conform in each to the laws of contract of each, but it seems somewhat absurd that as he crosses a border, he should come of age, only to sink into minority as he crosses another. Sir James Hannen's judgment in the second case of *Sottomayor* v. *De Barros* was full of references to numerous authorities, and we agree with him that the ground on which Lord Justice Cotton's judgment distinguishes *Simonin* v. *Mallac*, 2 Sw. & Tr. 6, a decision of Sir C. Cresswell, Baron Channell, and Mr. Justice Keating—namely, that the consent of parents must be considered part of the ceremony of marriage—is not satisfactory. As to the distinction which Sir James Hannen considered himself justified in drawing, that both parties must be of the same domicil, it was disregarded by Mr. Justice Stirling because it was not so in the case before him. We confess that, when the question is one of incapacity, we cannot see how the situation of the other party to the contract can affect the matter. It can only do so on the ground of intention, and that is to beg the question *Law Journal* (London).

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 8.

Judicial Abandonments.

Zoël Bessette, Granby, Sept. 23.

Achille Gagnon, Arthabaskaville, Sept. 28.

Hugh O'Hara, Chambly, Oct. 4.

Curators appointed.

Re Louis Bonville.—C. Desmarteau, Montreal, curator, Oct. 4.

Re La Compagnie de Moulins à Bardeau Chanfreigné.—Kent & Turcotte, Montreal, liquidators, Sept. 21.

Re Joseph Descoteau, fils.—C. Millier and J. J. Griffith, Sherbrooke, curator, Sept. 21.

Re Joseph Perreault.—C. Desmarteau, Montreal, curator, Oct. 4.

Re William Skinner Thomson (W. S. Thomson & Co).—J. M. M. Duff, Montreal, curator, Sept. 29.

Dividends.

Re Guillaume *alias* William Gariépy.—Dividend, payable Oct. 22, H. A. A. Brault and O. Dufresne, Montreal, curators.

Separation as to property.

Rosalie Brosseau vs. Dalphis Cusson, trader, Iberville, Oct. 5.

Elisabeth Camirand vs. Calixte Bernard, miller, Farnham, Sept. 23.

Edesse Forand vs. Abraham Fournier, farmer, St. Hyacinthe, Oct. 6.

Delphine Guévremont vs. Norman Guilbault, baker, Sorel, Oct. 5.

Célina Rhéaume vs. Narcisse Roch, farmer, Iberville, Aug. 19.

Marie Louise Adélaide Odille Turcotte vs. J. Bte. Gailloux, high constable, Three Rivers, Sept. 27.

Terms of Court altered.

Superior Court, Saguenay, for this year only, to be held from 17th to 20th of October. Circuit Court, Saguenay, for this year only, from 21st to 23rd October.

Cadastre deposited.

Parish of St. Hippolyte. Provisions of C. C. 2166 to apply from Nov. 3.

Appointments.

Joseph Geoffrion, to be Registrar for county of Verchères, in the place of Aimé Geoffrion, resigned.

Aimé Geoffrion, N.P., to be Inspector of Registry Offices, in the place of J. A. Hervieux, deceased.

GENERAL NOTES.

M. Sélin, maire de Viliot, près Sarlat, ayant perdu sa femme, proposa sa main à la sœur de la défunte, qui l'accepta.

M. Sélin arrivait donc, il y a deux mois, à la mairie, en compagnie de sa fiancée et belle-sœur et pénétrait dans la salle des mariages.

Quel animal que ce Collard ! s'écria M. Sélin. Il ne peut jamais arriver à l'heure !

—Qui est-ce Collard ? dit la jeune fiancée.

—C'est l'adjoint qui doit nous marier.

—Oh ! comme c'est embêtant ! fit la jeune fiancée.

On attendit quinze minutes. On s'impatienta.

—Dis donc, Georges ! murmura la jeune fiancée.

—Quoi ?

—Dis donc, si tu nous mariais ?

—C'est une idée !

Le maire tira son écharpe de sa poche, courut aux régistres, se jura à lui-même de prêter aide et protection à son épouse, signa, fit signer sa femme, s'en fut et le soir consomma le mariage.

Dans sa précipitation amoureuse, le maire avait cependant négligé quelques formalités.

Le parquet de Sarlat, à la suite d'une enquête, demanda au Tribunal de cette ville de prononcer la nullité du mariage ; ce qu'elle obtint.

M. Sélin néanmoins se remariera ; et Collard, cette fois, remplira à l'heure exacte ses fonctions.—*G. Pal.*

The Legal News.

VOL. X. OCTOBER 22, 1887. No. 43.

The law of resistance to the police has acquired special importance in view of recent occurrences in Ireland. On the 14th of September, in the House of Lords, in the course of the discussion on the murder of Head Constable Whelehan, Lord Bramwell said (*Times* report):—"His justification for rising to address their lordships was this. Supposing a case in which the police were in the wrong—interfering and doing things which they had no right to do. In the presence of lawyers, who he was sure would not contradict him, he said it was unlawful to resist them by beating them, or throwing stones at them, by charging them with horses, or in any other way than by as peaceful and pacific resistance as could possibly be shown. After the police had left the scene of disturbance the notion that they were to be chased and pelted and beaten when on the ground was to suppose a condition of the law which was utterly untrue. In such a case as that, the police had a right to resist with extreme measures. He was anxious not to be misrepresented. He did not say that if a stone was thrown at a policeman he had a right to fire on the person who threw it. He had no such right, but if his life was imperilled from continued stone throwing and manifestations of violence—if he did not know but what his life would be sacrificed, or the lives of his comrades lying disabled on the ground—he then said that there was no doubt the policeman had a right to resist the people, even to the extent of taking the lives of those committing the illegality. It was desirable that this should be known, and he challenged any one to deny that it was the law."

The challenge of Lord Bramwell elicited the following from Mr. Christopher Page Deane:—"Lord Bramwell maintains that opposition to a wrongdoing policeman must be only passive and pacific. I do not know where he would draw the line between this rule and the exceptions he must make to it in order to reconcile his doctrine with common sense. I will put two cases, which he might say are exceptional—*e.g.* a policeman endeavouring to commit a murder or a rape. In these the victim of the attempt is justified in unlimited resistance, even to the extent of homicide. To come down to a more ordinary level, if policemen attempt to search my house without a warrant, my resistance is not limited to that which is passive and pacific. I claim full liberty to use all such force and means as may be requisite to expel any policeman in my house on such an errand. Or, again, if I am playing lawn-tennis on a Sunday in my garden, and a fanatical policeman, or half-a-dozen of them, come and forbid me and prevent my playing, I claim that I may in this case also expel them. I cannot conceive a case to which Lord Bramwell's doctrine of passive and pacific resistance to wrongdoing can apply, and I make bold to say he as completely misconceives the law as does Lord Randolph Churchill. No "divinity doth hedge" a policeman. He is but a guardian of public order, with certain specific powers of applying and enforcing (*e.g.* by arrest of offenders) those who transgress the laws relating to public order. If he is himself a transgressor the public have an inherent, necessary right to maintain order in spite of him and in opposition to him, to resist force by force, to meet an assault by a counter-assault with a view to disarm the offender. He is merely the deputy of the public. The amount of force which the public is entitled to use in self-defence against wrong-doing policemen is, however, strictly limited to that which is necessary for maintaining order. Throwing stones at them, chasing them from any place where they have a right to be, beating them after aggression has ceased—these are contrary to public order, and therefore do not come within the right of the public."

The impetuosity of Mr. Deane's reply does not disturb the equanimity of Lord Bramwell. He endorses Mr. Deane's law in a rejoinder which runs as follows:—"Mr. Deane says I completely misconceive the law and am hopelessly astray as to the "rights and

powers" of the police. This is pretty strong, and I hope incorrect for both our sakes—his and mine. For I entirely agree with his sensible letter, and think it would do (not for a definition, Mr. D.), but for an instruction to the police."

COUR SUPERIEURE.

SAGUENAY, 15 juin 1884.

Coram ROUTHIER, J.

MAILLOUX v. DESMEULES.

Mismomer—Exception à la forme.

Le demandeur poursuivait pour pénalité, et se dénommait "Georges." Le défendeur plaida à la forme, que les prénoms du demandeur étaient Georges Félix. Le demandeur répondit spécialement qu'il était généralement connu sous le prénom de "Georges." A la preuve, il fut constaté qu'en effet le demandeur ne portait généralement que le prénom "Georges," bien qu'il se fût dénommé "Georges Félix" dans son contrat de mariage.

Exception à la forme renvoyée avec dépens.

J. S. Perrault, procureur du demandeur.
Charles Angers, procureur du défendeur.
(C. A.)

COUR DE CIRCUIT.

SAGUENAY, 3 novembre 1880.

Coram ROUTHIER, J.

WARREN v. WARREN.

Signification des procédures dans les causes non-appelables.

JUGÉ:—*Que conformément à la pratique suivie en ce district, la signification des procédures dans les causes non-appelables n'est pas requise, que la production au greffe suffit.*

Charles Angers, faisant motion pour rejet.
J. S. Perrault, contra.
(C. A.)

COUR DE CIRCUIT.

SAGUENAY, 26 janvier 1884.

Coram ROUTHIER, J.

DUCHESNE v. LAPOINTE.

Bref de sommation—Changement de la date du retour.

JUGÉ:—*Qu'après l'émanation du bref de sommation, le jour du retour ne peut être changé par le greffier ; et que, si tel changement a lieu, le bref sera déclaré nul et l'action renvoyée sur exception à la forme et inscription en faux avec dépens.*

L'action était *qui tam.*

J. S. Perrault, procureur du demandeur.
Charles Angers, procureur du défendeur.
(C. A.)

QUEBEC DECISIONS.*

Poursuite entre locateurs et locataires—Loyers—Juridiction — Exception déclinatoire—Exception à la forme.

Jugé, Que les poursuites sommaires entre locateurs et locataires, autorisées par les articles 1624 et 1644 du Code Civil et 887 et suivants du Code de Procédure, ne peuvent pas être adoptées pour le recouvrement exclusifs des loyers dus ; que la juridiction qu'exercent les Cours Supérieure et de Circuit, en vertu de ces dispositions de la loi, est spéciale et exceptionnelle, et que c'est par une exception déclinatoire, et non par une exception à la forme, que le défendeur doit attaquer l'assignation pour y répondre à une demande pour loyer seulement.—*Hinds* v. *Donovan*, In Review, Stuart, C. J., Casault, Andrews, JJ., 30 janvier 1886.

Opposition à jugement—Special answer—Motion to strike—Procedure.

Held, 1. That a new *moyen* pleaded by special answer in support of an opposition *à jugement*, will be rejected on motion without the necessity of a demurrer.

2. That where such motion asks in general terms for the rejection of the whole pleading, or such portion thereof as the Court shall see fit, the Court will examine the special answer and reject such portion thereof as may constitute a new *moyen*.—*Campbell & The Dominion of Canada Freehold Estate & Timber Co.*, In Appeal, Tessier, Cross, Baby, Church, JJ., (Cross, J., *diss.*), May 28, 1887.

Malicious Damage to Property—Squatter.

The appellant cut firewood on a lot of land occupied and improved by his brother, a

* 13 Q. L. R.

squatter thereon, with the latter's permission. On complaint of the respondent, the actual owner of the lot, appellant was arrested therefor and convicted by a magistrate, under sec. 26 of 32-33 Vict., ch. 22, " An Act respecting malicious injuries to property."

Held, on appeal to the Queen's Bench, that under the circumstances, there was no malice, that the act did not apply to such a case, and conviction quashed.—*Dumais & Hall*, Arthabaska, Plamondon, J., March 1, 1880.

Partnership—Action pro socio—Prescription—Compensation.

Held, That a member of a dissolved corporation, who has paid in full a judgment rendered against the firm, cannot, by action of debt, recover from his co-partner the portion of such judgment due by the latter, but must have recourse to the action *pro socio*.

2. That where a debt, which under ordinary circumstances would be prescribed, is offered in compensation to an unprescribed judgment, the action on the latter will be dismissed if it appear that prior to the prescription of the former, both debts had come within the conditions necessary for compensation.—*Lydon & Casey*, In Appeal, Dorion, C. J., Tessier, Cross, Baby, Church, JJ., (Tessier, J., *diss.*), May 9, 1887.

Mandamus—Juridiction du Surintendant de l'éducation.

Jugé, 1. Que le pouvoir de supprimer un arrondissement d'école est laissé par la loi aux commissaires d'école.

2. Qu'il n'y a pas d'appel au surintendant de l'éducation des décisions des commissaires d'école dans les cas où ceux-ci ont exercé la discrétion que leur laisse la loi d'accorder ou refuser une demande des contribuables.

3. Que dans l'espèce, le mandamus émané pour faire exécuter la sentence du surintendant doit être renvoyé, la dite sentence étant illégale.—*Trudelle* v. *Les Commissaires d'Ecole de Charlesbourg*, C. S., Stuart, C. J., 6 avril '82.

Havre de Québec—Quais — Navigation — Obstruction—Dommages—Responsabilité.

Jugé, Que les propriétaires de quais, dans le hâvre de Québec, ne sont pas responsables des dommages causés à un vaisseau par un obstacle qui n'est pas leur fait et qui n'est pas sur leur propriété, quoique tout près, sur la propriété voisine.

2. Que les commissaires du hâvre de Québec ne sont pas responsables des dommages causés par une épave, ou un débris de vaisseau effondré, qu'ils ne sont pas obligés d'en indiquer l'existence ni la position, et que le vaisseau endommagé par le heurt de l'épave, ou du débris, n'a de recours que contre le propriétaire de ceux-ci, tant que les commissaires du hâvre n'en ont pas pris possession. —*Levasseur* v. *Les Commissaiaes du Hâvre*, en révision, Casault, Caron, Andrews, JJ., (Caron, J., *diss.*), 31 mars 1887.

APPEAL REGISTER—MONTREAL.

Thursday, September 15.

Macdougall & Prentice.—Petition to take up *instance* granted.

Rascony Woolen & Cotton Co., & Glasgow & London Ins. Co.—Heard on petition for leave to appeal.—C.A.V.

Thurston & Viau—Petition for appeal from C. C. Ottawa.—Case entered.

Tudor & Hart.—Motion for leave to appeal from interlocutory judgment.—Motion dismissed.

Corporation Comté de Berthier & Plante et al.—Motion *en déchéance d'appel.*—C.A.V.

Lemieux & Fournier.—Motion for distraction granted by consent.

Downie & Francis.—Motion to have record returned.—Motion discharged without costs.

Fellows Medical Manufacturing Co. & Lambe, —Appeal discontinued.

Redfield & La Banque d'Hochelaga.—Heard, C.A.V.

Allan & Merchants Marine Ins. Co.—Heard. C.A.V.

Skelton & Evans.—Part heard.

Friday, Sept. 16.

Skelton & Evans.—Hearing concluded.—C.A.V.

Saturday, Sept. 17.

Canadian Pacific Railway Co. & McRae.—Motion for leave to appeal from interlocutory judgment. Rejected with costs.

Corporation Comté de Berthier & Plante et al.—Motion *en décheance d'appel* granted.

Laviolette & La Corporation de Napierville.—Judgment confirmed, Baby, J., *diss.*

Goodhall & Exchange Bank.—Judgment confirmed, Church, J., *diss.*

Benoit & Benoit.—Judgment confirmed.

Lowry & Routh.—Judgment reversed, Baby, J., *diss.* A new hearing was subsequently ordered on Sept. 24.

Gilman & Exchange Bank.—New hearing ordered.

Barnard & Molson.—Judgment confirmed. Motion for leave to appeal to Privy Council granted.

Wade & Mooney—Judgment confirmed.

Selbach & Stevenson.—Judgment reversed, Baby and Church, JJ., *diss.*

Dorion & Dorion.—Judgment confirmed.

Newton & Seale.—Judgment confirmed.

Newton & Hammond.—Judgment confirmed.

Archambault & Lalonde.—Judgment confirmed.

Gadoua & Pigeon.—Judgment confirmed.

Shea & Prendergast.—Judgment confirmed.

Ulster Spinning Co. & Foster.—Judgment confirmed.

Bulmer & Exchange Bank.—Judgment confirmed.

Wattie & Beautronc Major.—Motion for *congé d'appel*, granted for costs only.

Foster & Hamilton.—Motion for dismissal of appeal, granted for costs only.

Baxter & Bruneau.—Appeal dismissed by consent.

Monday, Sept. 19.

Joyce & La Cité de Montréal.—Heard on motion for leave to appeal to Privy Council. C.A.V.

McTavish & Fraser.—Motion to relieve from foreclosure from filing reasons of appeal. Granted by consent.

Macfarlane & Stimson.—Heard. C.A.V.

De Bellefeuille & Desmarteau.—Heard. C.A.V.

Tuesday, Sept. 20.

Joyce & City of Montreal.—Motion for leave to appeal to Privy Council, rejected.

Palliser & Strong.—Judgment confirmed.

Fletcher & Chevrier.—Judgment confirmed.

Stephens & Chaussé.—Judgment reformed. Damages reduced to $3,000; each party to pay his own costs in appeal.

Ryan & Sanche.—Judgment reversed, Tessier, J., *diss.*

Beaudry & Courcelles Chevalier & Lord.—Judgment confirmed.

Gauvin & Leclaire.—Heard. C.A.V.

Ville de Ste. Cunegonde & Berger.—Heard. C.A.V.

Ross & Paul.—Heard. C.A.V.

Wednesday, Sept. 21.

McGillivray & Watt—Heard. C.A.V.

Christmas & Robertson.—Heard. C.A.V.

Latham & Kennedy.—Part heard.

Thursday, Sept. 22.

Downie & Francis.—Motion granted for costs.

Latham & Kennedy.—Hearing concluded. C.A.V.

Communauté des Sœurs des SS. NN. de Jésus et Marie & Corporation du Village de Waterloo.—Heard. C.A.V.

Labrecque & Cie. de Tabac Joliette.—Heard. C.A.V.

Senécal & Croisitière.—Part heard.

Sénecal & Champagne.—Part heard.

Sénecal & Sylvestre.—Part heard.

Friday, Sept. 23.

Rolland & Laframboise.—Motion for dismissal of appeal granted for costs only.

Rascony Woollen & Cotton Co. & Glasgow & London Ins. Co.—Motion rejected without costs.

Gilmour & Lapointe; Gilmour & Paradis; Gilmour & Daoust; Gilmour & Paradis; Gilmour & Boissonneau; Gilmour & Paradis; Gilmour & Brouillard; Gilmour & Mauroit; Gilmour & Allaire.—Judgment in each case confirmed, but reformed. Cross and Church, JJ., *diss.*

Massue & Corporation de St. Aimé.—Judgment reversed, and writ of injunction maintained, Dorion, C.J., and Cross, J., *diss.*

Aubry & Rodier.—Judgment reversed, Baby, J., *diss.*

Kelly & Holiday.—Judgment confirmed.

Beckett & La Banque Nationale.—Judgment confirmed.

Senécal & Croistière; Senécal & Champagne; Senécal & Sylvestre.—Hearing concluded. C.A.V.

Taylor & Webster.—Heard. C.A.V.

Saturday, Sept. 24.

Canadian Pacific Railway Co. & Chalifoux.—Judgment confirmed, Cross, J., *diss.*

Canadian Pacific Railway Co. & Cadieux.—Judgment confirmed, Cross, J., *diss.*

Cie. du Grand Tronc & Lebeuf.—Judgment confirmed, Cross, J., *diss.*

Cité de Montréal & Labelle.—Judgment confirmed, Cross, J., *diss.*

Redfield & La Banque d'Hochelaga.—Judgment confirmed.

Macfarlane & Stimson.—Judgm't confirmed.

McGillivray & Watt.—Judgment confirmed.

Brosseau & Forgues.—New hearing ordered.

Lowrey & Routh.—New hearing ordered.

Gilmour & Lapointe, and the eight other cases enumerated above.—Heard on motion for appeal to Privy Council. C.A.V.

McTavish & Fraser.—Application to be heard by preference. Referred to Clerk of the Court.

Monday, Sept. 26.

Smith & Wheeler.—Heard. C.A.V.

Cie. de Pret & Crédit Foncier & Sansterre.—Part heard.

Tuesday, Sept. 27.

Senécal & Beet Root Sugar Co.—Motion for dismissal of appeal, granted for costs only.

Gilmour & Lapointe, and the eight other cases enumerated above.—Motion for appeal to Privy Council granted.

Giles & Jacques.—Judgment reversed, Tessier, J., *diss.*

Primeau & Giles.—Judgment reversed, Cross, J., *diss.*

Exchange Bank & City & District Savings Bank.—Judgment confirmed.

Latham & Kennedy.—Judgment confirmed.

Senécal & Croistière; Senécal & Champagne; Senécal & Sylvestre.—Judgment confirmed in each case.

Gilman & Gilbert.—Re-hearing ordered.

Canadian Pacific Railway Co. & Chalifoux.—Motion for appeal to Privy Council granted.

Cie. de Pret & Crédit Foncier & Sansterre.—Hearing concluded. C.A.V.

Mullarky & Kronig.—Heard. C.A.V.

The Court adjourned to Nov. 15.

REWARDS FOR APPREHENDING CRIMINALS.

Rewards offered for the discovery of crime have long been part of the procedure resorted to in this country, for however public-spirited may be the majority of citizens, there are so many ramifications in the occasions and consequences of criminal acts, that no organization is equal to the speedy administration of this class of remedies. The older acts of parliament abound in inducements to public informers, and though these are seldom introduced in modern acts, the disposition to trace out and punish delinquencies is fortunately a very common attendant upon every species of wrong. Yet, as everybody knows, it is no uncommon occurrence for the government or for individuals to offer rewards for the discovery of offenders, and this quickens the diligence not only of constables, but of that large class of persons who are always looking out for employment. In working out this practice, some interesting and useful decisions have been from time to time come to in the courts, for, as may be supposed, the offer of a reward brings forward many competitors who jealously watch each other's claims, and as there is more of chance than merit in the prizes, the successful winner is subject to double scrutiny. The public policy of offering rewards has indeed often been doubted, especially where constables are concerned. A constable is bound by his very duty to search for criminals and bring them to justice. And it has been well remarked by several judges that the expectation of rewards must offer great temptation to delay an active search, by which delay the criminal might escape, or to delay taking into custody a criminal who gives himself up, so that the constable might appear to use exertions to procure complete information and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes or to seek promises of reward from persons anxious to recover their property, and unless such were offered, to be inert in their efforts.

On the other hand even private individuals are too apt at times to be careless of the public advantage, if only they can by any

means whatever recover the possession of their property in those cases where it has been stolen. Many persons are quite willing in the circumstances to condone any crime, or by the expenditure of a small sum to pay to the first comer whatever will induce the surrender of the proceeds of crime. Hence the legislature has thought fit to subject to a penalty those publishers of newspapers who lend themselves to the same views by circulating advertisements that no questions will be asked if stolen property shall be returned to the owner. The Larceny Act of 24 & 25 Vict. (ch. 96, s. 102), containing this enactment, in turn created hardships occasionally by enabling informers to sue publishers vexatiously for these penalties. And at last by the statute of 33 & 34 Vict. ch. 65, a restriction was put on these informers to this extent, that the consent of the attorney-general was in future to be required before any such action could be brought, and a short period of limitation was also prescribed.

The offer of a reward for the discovery of a particular criminal is a species of contract which is an exception to the usual rule, whereby both parties must be known and defined and must agree on something definite and such as is mutually assented to, before they can create the obligations of contract. This difficulty is got over by one party defining certain conditions which the unknown co-contractor is to fulfil, and which are so distinct that the unknown person and no other becomes at length the obligee whenever the circumstances arise which had been anticipated as a proper basis of a contract. It is a contract *cum omnibus* in one sense—at least in the beginning, and it develops into a contract with another individual only when the latter creates or fulfils the character which was described in the offer. Hence the disputes which usually arise in the course of these undertakings take the form of a contention that the unknown party has not done the kind of services which was to be the basis of the obligation—and though the criminal may have been discovered, yet that the discovery was not made directly or immediately by the claimant to the reward, and hence that the reward has not been earned by the person claiming it. This difficulty has presented itself under many forms, and the cases already decided involve much useful comment on the evidence and the doctrine of proximate and remote causes which arises out of such transactions.

In the case of *Williams* v. *Carwardine*, (4 B. & Ad. 621) the plaintiff had been in company with a man found murdered, and gave no information which was of value. At a later date, however, she had been severely beaten on another occasion, and when on the point of death, as was then supposed, she relieved her conscience by telling some particulars of the murder, which followed up led to the discovery and conviction of the murderer. The plaintiff did not die, but recovered, and then sued for £20, the reward that had been offered for discovery. The jury found that she did give the information, but that it was not given in consequence of the offer of a reward. Three judges, however, held that the plaintiff fulfilled the conditions on which the reward had been offered, and hence that she was entitled to the money.

In another case of *Lancaster* v. *Walsh*, (M. & W. 16), an offer of a certain reward had "been made on application to the defendant." The plaintiff had not made any communication to the defendant, but made it to a constable whose duty it was to search for the offender. The question came to be, whether in that event the plaintiff was entitled to the reward, and it was contended that the constable by his own activity followed up the clue and was the person entitled. But the court held that the plaintiff was entitled, for that the communication to the constable led to the discovery. As Alderson, B., put it, information means the communication of material facts for the first time, and the constable was was merely a channel of communication but not the originator of the information.

Again, in *England* v. *Davidson*, (11 A. & E. 857) the constable of the district apprehended the criminal and sued for the reward; whereupon it was contended that it was contrary to public policy to allow the constable to sue, for it was part of his ordinary duty to arrest criminals. The court there held that the fact of the person giving the inform-

ation being a constable did not necessarily disentitle him on the ground of want of consideration. And Lord Denman, C.J., observed that there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. In short, a constable as such was said not to be disentitled to a reward of this description. In *Moore* v. *Smith*, (1 C. B. 438) the plaintiff also was a police constable, but was temporarily suspended, and he apprehended a burglar, who, after his apprehension, voluntarily confessed. And the court held him entitled to the reward, as it was by the constable's suspicions, and apprehension in consequence of them, that the criminal was really discovered. In *Thatcher* v. *England*, (3 C. B. 254) the defendant, who had been robbed of jewelry, published an advertisement headed "£30 reward," describing the article stolen, and concluding thus: "The above sum will be paid by the adjutant of the 41st regiment on recovery of the property and conviction of the offender, or in proportion to the amount recovered." A soldier on the 10th of June informed his sergeant that B had admitted to him that he was the party who had committed the robbery, and the sergeant gave information at the police station. On the 13th of June the plaintiff, a police constable, learning from one C that B was to be met with at a certain place, went there and apprehended him. The plaintiff by his activity and perseverance afterwards succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict B. The court of common pleas held that the plaintiff was not, but that the soldier was, the party entitled to the reward.

About twenty years ago an interesting case of this kind arose out of a great robbery of watches at a jeweler's shop in London. In *Turner* v. *Walker*, (L. R. 2 Q. B. 301) soon after that robbery, a handbill was circulated by the defendant, who offered a reward in these terms: "A reward of £250 will be given to any person who will give such information as shall lead to the apprehension and conviction of the thieves. A further reward of £750 will be paid for such information as shall lead to the recovery of the stolen property, or in proportion to any part thereof recovered." After the publication of the handbill, Roberts brought a watch to the plaintiff to be repaired. The plaintiff, suspecting it to be one of the stolen watches, arranged with Roberts that the latter should call again and bring some more, and on the same day, the plaintiff gave information to the defendant. In consequence thereof, the police were employed, and Roberts was captured, and two other stolen watches were found upon him. After Roberts had been in custody three days, he told the police that some female friends had informed him that the burglars were to be heard of at an eel-pie shop in 120 Whitechapel. The police accordingly there captured the burglars, who were subsequently convicted at the central criminal court. Roberts was viewed as only a receiver of the goods. The plaintiff sued for the reward, and the judge, Blackburn, J., left it to the jury to say whether the information given by the plaintiff led to the apprehension and conviction of the thieves. The judge was disposed to think that the plaintiff's information was too remote, and that the real discovery was made by the police on Robert's information, but as the jury were in favor of the plaintiff, the question was afterwards fully argued before a court of three judges. Blackburn, J., on the argument, was still disposed to hold that the plaintiff's information was too remote, but the other two judges held it was not, and that the plaintiff gave the clue or started the discovery. The case went to the exchequer chamber, and that court of seven judges unanimously held the plaintiff to be entitled. Kelly, C. B., said it was true that the arrest ought, in such cases, to be the immediate consequence of the information given by the plaintiff. But there was no reason why the fact of there being several steps should make any difference, if the first information led to the discovery and apprehension of the thieves. That was so in this case, and, therefore, the plaintiff was justly entitled to the reward.

This last case was one of no small difficulty, as it illustrated the complication caused by the first step leading to a series of other natural steps, all of which ended in the ap-

prehension and conviction of the criminal. And the decision arrived at was one preeminently where common sense agreed with the rules of law. In a later case of *Bent* v. *Wakefield and Barnsley Bank*, (C. P. D. 1), a somewhat puzzling case arose which involved the question whether any person can be entitled to such a reward when the criminal voluntarily surrenders himself. In this last case a handbill was published by the defendants as follows: "£200. Whereas, William Glover, shoddy dealer, absconded from Ossett, after commiting various forgeries. Notice is hereby given that the above reward will be paid to any person or persons giving such information to Mr. W. Airton, police superintendent Dewsbury, as will lead to the apprehension of the said William Glover." The plaintiff was the chief constable at Exeter, and sued for the reward under the following circumstances: "One day a person (who turned out to be Glover) came to the plaintiff at the police office and said, "You hold a warrant for me; I am wanted for forgery." Thereupon names and particulars were entered upon, and the plaintiff, thinking the man might be out of his mind, searched the *Police Gazette*, and ended by telegraphing to Dewsbury and getting instructions to detain Glover. The latter was detained accordingly, and all ended by Glover being locked up and ultimately tried and found guilty. The present action was brought, and one of the defences was, that it was contrary to public policy that the plaintiff should succeed, as he did no more than his public duty and as the criminal had surrendered himself. The question was ultimately considered in connection with the previous authorities, and the judge (Grove, J.), held that the judgment should be for the defendants. The court had, according to the learned judge, already decided in *England* v. *Davidson*, that actions by constables, though not necessarily excluded, yet require very clear grounds to support them, and he thought there was no clear ground in this case.

The discovery in this last case seems to have been a mere accident without any meritorious exertion by the police superintendent, who was almost passive. Nevertheless, he took pains to make inquiry and did his duty well. But all he did was merely by way of satisfying himself whether the criminal was the real man and not a sham. Certainly there was nothing which the constable did beyond his bare duty; he did not originate or discover anything, but simply reported to headquarters. And the judge cannot be supposed to have gone wrong by deciding against an action so entirely without special merits.—*Justice of the Peace, Eng.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 15.

Judicial Abandonments.

Wilfrid Etienne Brunet, druggist, St. Sauveur de Québec, Oct. 10.

Joseph Charron, jr., St. Hyacinthe, Oct. 10.

J. A. Michaud & Co., Carleton, Oct. 13.

Joseph Ritchot, grocer, Montreal, Oct. 11.

George W. Swatman, Shawville, June 10.

Louis Tremblay, grocer, Montreal, Oct. 8.

Curators appointed.

Re Camille Gauthier, trader, Montreal.—W. A. Caldwell, Montreal, curator, Oct. 11.

Re Hugh O'Hara, Chambly Canton.—Thos. Darling, Montreal, curator, Oct. 13.

Re Joseph Ritchot, grocer, Montreal.—H. Ward and Alex. Gowdey, Montreal, curators, Oct. 11.

Re Richard Swalwell, plumber and gasfitter, Montreal.—David Seath, Montreal, curator, Sept. 15.

Dividends.

Re L. Boyer, Montreal.—Dividend, payable Nov. 3, Kent & Turcotte, Montreal, curator.

Re Andrew Fortune, boot and shoe dealer, Huntingdon.—First and final dividend payable Nov. 3, at office of McCormick, Duclos & Murchison, Montreal. J. B. Paradis, curator.

Re Montreal Abattoir Co.—Second dividend, payable Nov. 2, P. S. Ross, Montreal, curator.

Re D. Poirier, Valleyfield.—Dividend, payable Nov. 3, Kent & Turcotte, Montreal, curator.

Re Olivier Seguin, merchant tailor.—First dividend, H. Ward and A. Gowdey, Montreal, curators.

Separation as to property.

Rosalie Brosseau vs. Dalphis Cusson, trader, St. John's, Oct. 5.

Adeline Constantineau vs. Jean Bte. Doré, *alias* Doray, carter, Montreal, Oct. 4.

Aimée Guay vs. James Eagan, St. Joseph de Lévis, Oct. 12.

Annie McCaffrey vs. Louis Raymond dit Lajeunesse, Montreal, Oct. 7.

Hermine Robitaille vs. Etienne Robitaille, St. Sauveur, Oct. 11.

Circuit Court.

Special term for county of Temiscouata, to be held at L'Isle Verte, on Nov. 22.

The Legal News.

VOL. X. OCTOBER 29, 1887. No. 44.

Chief Justice Waite, of the U. S. Supreme Court, speaking at a breakfast given to the Justices of that Court by the Bar of Philadelphia, referred to the crowded docket of his Court in the following terms:—"The law which fixes at this time the appellate jurisdiction of the Supreme Court was enacted substantially in its present form at the first session of Congress, nearly one hundred years ago. With few exceptions, and these for all practical purposes unimportant to the point I wish to make, the jurisdiction remains to-day as it was at first, and consequently, with a population in the United States approaching 60,000,000 and a territory embracing nearly 3,000,000 square miles, the Supreme Court has appellate jurisdiction in all of the classes of cases it had when the population was less than 4,000,000 and the territory but little more than 800,000 square miles. Under such circumstances it is not to be wondered at that the annual appeal docket of that court has increased from 100 cases, or perhaps a little more, half a century ago, to nearly 1,400, and that its business is now more than three years and a half behind; that is to say, that cases entered now, when the term of 1887 is about to begin, are not likely to be reached in their regular order for hearing until late in the term of 1890. In the face of such facts it cannot admit of a doubt that something should be done, and that at once, for relief against this oppressive wrong. It is not for me to say what this relief shall be, neither is this the time to consider it. My present end will be accomplished if the attention of the public is called to the subject and its importance urged in some appropriate way on Congress. What is required is a reduction of the present appellate jurisdiction of the Supreme Court, and if this is insisted upon it will be easy to find very many classes of cases which need not necessarily be taken to that court for final determination, and which can be disposed of with much less expense and quite as satisfactorily by some proper inferior court having the necessary jurisdiction for that purpose, and having sufficient character and dignity to meet the requirements of litigants. Such a court will not be the Supreme Court, but it will be the highest court of the United States which can under the Constitution, be afforded for the hearing and determination of such causes. I ask the Bar of Philadelphia to do what it can in this behalf and thus help to make the Supreme Court what its name implies, a powerful auxiliary in the administration of justice, and not what unfortunately with its present jurisdiction it now is, to too great an extent, an obstacle standing in the way of a speedy disposition of appealed cases. It is worthy of, and certainly was intended for better things."

The delays in the administration of justice in the district of Montreal have recently been discussed at considerable length, and also with considerable warmth. The criticisms of the bar have provoked retorts from the bench. These differences are hardly conducive to the good feeling which should exist between the parties concerned. No one has ventured to state that the majority of the judges are not anxious to facilitate the dispatch of business, and the object in view would probably be better attained by a conference at which the difficulties could be freely discussed.

SUPREME COURT OF CANADA.

The following order, entitled "General Order No. 83," has been passed by the Judges of the Supreme Court:—

Whereas by "The Supreme and Exchequer Courts Act," sec. 109, as amended by chap. 16 of the Act passed in the 51st year of Her Majesty's reign intituled "An Act to amend 'The Supreme and Exchequer Courts Act' and to make better provision for the trial of claims against the Crown," it is provided that the judges of the Supreme Court, or any five of them, may, from time to time,

make general rules and orders for certain purposes therein mentioned, and among others for empowering the Registrar to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the practice of the Court, was at the time of the last mentioned act, or might be thereafter, done, transacted, or exercised by a Judge of the Court sitting in Chambers, and as might be specified in such rule or order. It is therefore ordered:

1. That the Registrar of the Supreme Court of Canada be and is hereby empowered and required to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the practice of the Court, was at the time of the passing of the said last mentioned Act, and is now, or may be hereafter, done, transacted, or exercised by a Judge of the said Court sitting in Chambers, except in matters relating to:—

(*a*.) Granting writs of *habeas corpus* and adjudicating upon the return thereof.

(*b*.) Granting writs of *certiorari*.

2. In case any matter shall appear to the said Registrar to be proper for the decision of a Judge, the Registrar may refer the same to a judge, and the Judge may either dispose of the matter, or refer the same back to the Registrar with such directions as he may think fit.

3. Every order or decision made or given by the said Registrar sitting in Chambers, shall be as valid and binding on all parties concerned, as if the same had been made or given by a Judge sitting in Chambers.

4. All orders made by the Registrar sitting in Chambers, are to be signed by the Registrar.

5. Any person affected by any order or decision of the Registrar may appeal therefrom to a Judge of the Supreme Court in Chambers.

(*a*.) Such appeal shall be by motion, on notice setting forth the grounds of objection and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by a Judge of the said Court or the Registrar.

(*b*.) The motion shall be made on the Monday appointed by the notice of motion, which shall be the first Monday after the expiry of the delays provided for by the foregoing sub-section, or so soon thereafter as the same can be heard by a Judge, and shall be set down not later than the preceding Saturday in a book kept for that purpose in the Registrar's office.

6. For the transaction of business under these rules, the Registrar, unless absent from the city, or prevented by illness or other necessary cause, shall sit every juridical day, except during the vacations of the Court, at 11 a.m., or such other hour as he may specify from time to time by notice posted in his office.

October 17th, 1887.

SUPERIOR COURT.

SWEETSBURGH, September 30, 1887.

Coram TAIT, J.

HON. H. MERCIER es qual. v. THE WATERLOO & MAGOG RAILWAY COMPANY.

Recusation—Procedure—C. C. P. Arts. 178-181, 183 & 184.

HELD:—1. *That the delay provided by Art.* 181 *applies only to the proceeding of the party making recusation, and not to the case where the judge recuses himself or the grounds of recusation are notorious.*

2. *That whilst the parties must be heard, the truth of the grounds of recusation is the only subject for adjudication.*

3. *That no notice is necessary previous to communication to the judge recused, of the petition in recusation.*

4. *That inscription and not motion is the proper proceeding to have a petition in recusation brought up for trial.*

PER CURIAM.—On the 15th June last, the plaintiff in his quality of Attorney General

of this Province, presented a petition to Mr. Justice Brooks at Sherbrooke, asking for an injunction against defendants. That Honorable Judge declared in writing upon the petition that he was incompetent to receive the same or to make any order thereon, as he was a Director of the Company. The petition was then, on the same day, presented to Mr. Justice Plamondon, who happened to be in Chambers, at Sherbrooke, and he ordered that a copy of the petition should be served upon the defendants, together with a copy of the order which he then made requiring them to appear before him in Chambers at Arthabaskaville, on the 20th June, to show cause against issue of writ.

The service of the petition and declaration of Judge Brooks, and the order of Judge Plamondon was duly made, and at Sherbrooke on the 2nd July following, that learned Judge ordered the writ to issue on security being given, and the writ was issued and returned into the Superior Court on the 2nd August.

The defendants thereupon filed a *défense en droit*, and other pleas, issue was joined thereon, and the defendants inscribed the case on 13th August, for hearing on the *défense en droit*, for 17th August.

On the 16th August, defendants made a petition addressed to the Superior Court, at Sherbrooke, setting forth that Judge Brooks was the sole Judge residing in that district, and was a director and Vice-President of the Company defendants, and therefore disqualified from sitting. This petition, without any previous notice or service upon plaintiff, was communicated to Judge Brooks, and he thereupon made a declaration in writing that he had received communication of it; that the grounds of recusation and disqualification therein set forth were true, and designated the district of Bedford, as that to which the record should be transmitted.

On the same day, the defendants served a copy of the petition in recusation, and of the declaration of the Judge upon the plaintiff, and gave him notice to govern himself accordingly. The record was not transmitted to this district until about the 7th of the present month. There are now two motions presented to me, one by each of the parties.

The plaintiff by his motion asks that the petition in recusation, and the declaration of the Judge thereon, be rejected from the record, and the record be transmitted back to St. Francis District, for several reasons, which may be stated in substance as these: 1st, Because Mr. Justice Brooks had already recused himself when the petition for the injunction was first presented; and the writ had been granted by Judge Plamondon at Sherbrooke, who was seized of the case and still is seized with it in the District of St. Francis. 2nd. Because the petition in recusation had been filed without notice to plaintiff. 3rd. Because the defendants having inscribed the case for hearing on the *défense en droit* this court could not hear it, and moreover defendants had by inscribing waived their right to have the record brought here.

The Counsel for the plaintiff urged in support of his motion that the defendants being aware of the declaration made by Judge Brooks *in limine litis*, they were bound under Art. 181 C. C. P., to proceed within eight days to have the declaration acted upon, and having failed to do this they are now too late. He contended therefore that Judge Plamondon who granted the writ at Sherbrooke, on the 2nd July, is still seized with the case: that no new declaration of disqualification could be made by Judge Brooks after eight days from service of first declaration upon the defendants: that no petition in recusation could be based upon any subsequent declaration, and that all the proceedings in recusation are null, and the case is now pending at Sherbrooke, before Mr. Justice Plamondon, or any other Judge who may happen to take it up and hear it there.

The defendants by their motion ask that the grounds of recusation be declared well founded, and that the Prothonotary of this Court be ordered to forthwith place the cause upon the roll in the same manner that it was when transmitted from St. Francis District, and that the Court or Judge thereof do forthwith proceed and adjudicate upon all proceedings in the cause to final judgment. I will deal with the motions in the order stated. [The learned Judge here read the Articles of the C. P. 178-184.]

As already mentioned, the petition for injunction was presented to Judge Brooks without previous notice to defendants, and upon his declaration before mentioned, plaintiff, without any notice to defendants, went before Judge Plamondon, who happened to be there, and he gave the order to appear before him in Arthabaskaville. It was only when Judge Plamondon had become seized of the case, that the petition and Judge Brooks' declaration were served upon defendants together with the order to appear at Arthabaskaville, which defendants did apparently under protest. The plaintiff did not evidently question Judge Brooks' declaration, but acquiescing in it, was no doubt glad, in a case like this requiring despatch, to avail himself of the presence of Judge Plamondon. That Honorable Judge remained seized with the case till he rendered judgment on the 2nd July, ordering the writ to issue. I would only be too happy if I could hold that he is still seized with it, either at Arthabaskaville or Sherbrooke. It is impossible of course to hold that the case is pending at Arthabaskaville, for the learned Judge of that district only heard the argument there as a matter of convenience,—the case was before him as a judge acting for St. Francis district in which he received the petition and rendered his judgment. Nor do I think the contention that he is seized with the case at Sherbrooke well founded. While there temporarily he was seized with it, to determine an incident connected with it, but that did not seize him with it to final judgment. His duty was performed when he determined the question before him, and if any other view were adopted it would bring the administration of justice into the greatest confusion. How could that Honorable Judge be required to leave his district whenever the parties required his presence at Sherbrooke? In the matter of injunctions section 7 of the Injunction Act has, in order to avoid any doubt, expressly provided that in any proceedings commenced under the Act, *any judge* of the Superior Court shall at any stage of the proceedings, have the same power to act therein as the Judge before whom such proceeding was commenced. There seems to be something contradictory about the position taken by the plaintiff in saying on the one hand that the Hon. Mr. Justice Plamondon is seized with the case, and on the other that the proceedings in recusation are null and void, for if the latter pretention is correct Judge Brooks, as the resident judge of the district, is the proper judge to try the case.

The really important questions are, whether I should order the record to be returned because (1) the defendants did not within the delay of eight days from the date when they were served with Judge Brooks' first declaration take proper steps to recuse him as required by Art. 181; and because (2) plaintiff was not served with the petition in recusation before it was communicated to Judge Brooks and filed. Now what strikes me at the outset is, that here is an important case to be tried which is pending in a district where there is but one resident judge, who has performed his duty by declaring from the first moment the case was brought before him certain grounds of disqualification. Both parties have by their proceedings practically acknowledged the force of the grounds given by the learned Judge. The plaintiff immediately on the grounds being made known to him took the case before another judge and does not now pretend that Judge Brooks should hear the case, while the defendants have actually taken proceedings in recusation. If I send the case back it must be because I think Judge Brooks should try it as he is not properly recused,—or because I think another judge should be provided to try it at Sherbrooke. I do not consider I should be justified in adopting either of these reasons under the circumstances of this case, even if the procedure preliminary to the petition in recusation does not come up to the precise standard required by the Code of Procedure, which is itself indeed, not as clear as it might be.

The plaintiff claims that the declaration made by Judge Brooks on the petition for injunction, on the 15th June, is to be considered as a declaration of disqualification under Art. 179 C. C. P., and that the defendants are not within the delay of eight days mentioned in Art. 181, nor had the delay been extended by the Court as required by that

article. It is evident to me that those who framed that article upon the provisions of the Ordinance of 1667 did not sufficiently consider the state of things existing in this Province where in many districts there is but one judge who holds the Court, and therefore, speaking in a certain sense, no Court to adjudicate upon an application for delay except one presided over by that judge. Our judicial organization is not the same as it was in France, as there were and are still in each district or jurisdiction there a number of judges sitting in the same tribunal, and whenever a recusation was offered it was adjudicated upon by the colleagues of the recused judge. But in our rural districts the provision of the article regarding extension of delay by a Court is difficult to put in practice. Apart from this, however, the ordinance throws some light on this question of the eight days delay.

The words of the French version of Art. 181 are: "Après lequel délai elle n'y est plus "reçue, à moins que le tribunal n'étende le "délai pour cause suffisante." The words of the Ordinance are: "Après lequel temps il "n'y sera plus reçu," that is, the party will be prevented from filing a recusation. Jousse in his commentaries on that Ordinance (art. 20 of title 24) says: note 1. *Après lequel temps il n'y sera plus reçu.* C'est à dire que le juge alors restera juge, s'il s'agit d'un procès civil, et il ne peut pas être récusé, *à moins que la cause de récusation ne fût notoire, et du nombre de celles qui fassent présumer l'opinion du juge, auxquels cas il est plus prudent au juge de se récuser lui-même, etc.*

This, it appears to me, shows that the delay of eight days, enacted as well by our Code as by the Ordinance, applies only to the proceedings of the party making the recusation, but does not apply when the judge recuses himself, or when the grounds for his recusation are notorious or sufficient to indicate what would be his opinion. It seems to be unreasonable to hold that a judge who has recused himself on what appear to be, *prima facie*, good grounds should be forced to hear the case, because of the failure by one of the parties of the observance of some formality — in other words to make the judge's recusation of himself depend upon matters beyond his control. Besides this I may say that I doubt very much if I ought in a case like this, to go behind the petition in recusation and the declaration of the judge and his order transmitting the record here, to examine closely a mere question of delay in presenting the petition. The judge has declared himself disqualified on certain grounds, and on looking at articles 183 and 184 C. C. P., it seems to me my duty is confined to determining if these grounds are well founded or not. Art. 183 says the petition must contain the *grounds* of recusation. Art. 184 says the judge is to declare whether the grounds are true or not, and that another judge is to determine whether the recusation is founded or not—and the subsequent articles in the same section shew that this is really what is before me, viz: whether the *grounds* of recusation are founded or not. If they are well founded, then this Court remains seized of the case (Art. 188 C. C. P.) There is nothing to justify me in sending the record to Sherbrooke to be tried by some Judge other than Judge Brooks. Of course the plaintiff must have an opportunity of being heard, and this brings me to his objection that he should have been served with the petition in recusation before it was communicated to Judge Brooks or filed.

The object of giving plaintiff notice of petition would be, that he might be heard upon it, but this petition was not to be heard before Judge Brooks. He was given communication of it under Arts. 184 and 185 in order that he might declare in writing whether the grounds of recusation were true or not, and designate the neighboring district where the record should be transmitted to have such grounds tried. He did declare them true, and thereupon the petition and declaration were served upon plaintiff, and he has now an opportunity of being heard upon the petition before the tribunal which has been properly designated to hear and determine it.

As to plaintiff's claim that this Court cannot hear this petition and that defendants have waived any rights by reason of the inscription for hearing on the *défense en droit*, I do not think it is well founded. And finally I may say that this petition ought not to be met by a motion. Upon the whole

therefore I am of opinion that the plaintiff's motion should be dismissed.

As to defendants' motion it does not appear to me to be the proper proceeding to adopt. The petition in recusation is a proceeding in itself which should be disposed of as petitions usually are. The plaintiff has a right to contest it and to make proof. The parties must be heard upon the petition and not upon the motion, and judgment must be rendered upon the petition itself, declaring whether or no it is well founded. I cannot give judgment declaring it well founded on a motion. It seems to me it should be brought either before the Court on an inscription or before me in Chambers after notice to the opposite party of its intended presentation. It is for the defendants to adopt the proper course to have it brought up for trial, and I do not think a motion asking that I declare it well founded is the proper course. I therefore reject defendants' motion also. No costs will be allowed either party as they each fail.

Mercier & Co., for petitioner.

L. C. Belanger, Q. C., & H. D. Duffy, Counsel.

J. P. Noyes, Q. C., for defendants.

Wm. White, Q. C., Counsel.

(J. P. N.)

NOTE.—Defendants subsequently inscribed on the petition, and thereupon the recusation was declared well founded and the record ordered to remain in the district of Bedford.

COUR DE CIRCUIT.

MONTREAL, 30 juin 1887.

Coram MATHIEU, J.

VALADE v. LEVY *et al.*

Interdiction — Curateur — Choses nécessaires à la vie.

JUGÉ:—*Que le créancier a un droit d'action contre le curateur es-qualité à un interdit, pour les choses nécessaires à la vie, qu'il aurait vendu personnellement à l'interdit, sans l'assistance du curateur.*

Le défendeur Lévy était interdit pour prodigalité, et alors qu'il résidait loin de son curateur, il acheta du demandeur un certain nombre de minots de patates et lui fit faire des travaux dans son jardin, le tout au montant de $8.50.

L'action du demandeur pour ces $8.50 était dirigée contre l'interdit et son curateur es-qualité. Ce dernier plaida que Lévy était interdit et n'avait aucun droit de contracter de dettes sans l'autorisation de son curateur, que par suite, il ne pouvait être poursuivi pour les obligations qu'il aurait contractées personnellement.

La Cour a rendu jugement pour le demandeur sur le principe que la marchandise vendue consistait en choses nécessaires à la vie, et que les services rendues étaient aussi nécessaires, vu l'état de fortune de Lévy; que le curateur qui vivait loin de l'interdit était censé consentir à ce que l'interdit contracta dans des bornes raisonnables et pour des choses nécessaires, suivant ses moyens.

Jugement pour le demandeur.

J. J. Beauchamp, avocat du demandeur.

Chapleau, Hall & Nicolls, avocats des défendeurs.

(J. J. B.)

COURT OF QUEEN'S BENCH—MONTREAL. *

Action en reddition de compte—Saisie-arrêt avant jugement.

Dans une action en reddition de compte une saisie-arrêt avant jugement fut émise pour saisir et retenir entre les mains du demandeur le montant d'un jugement que le défendeur avait obtenu contre lui. Trois ans avant l'institution de cette action, le défendeur avait recélé certains de ses effets pendant 15 jours pour se mettre à l'abri d'un jugement obtenu contre lui par le défendeur, lequel jugement fut subséquemment renversé. A la même époque, le défendeur avait aussi transporté des immeubles à son neveu sous une condition résolutoire accomplie avant l'institution de la présente action.

Jugé, 1o. Qu'un créancier peut saisir avant jugement entre ses propres mains;

2o. Que dans une action en reddition de compte il n'y a pas lieu à une saisie-arrêt avant jugement;

3o. Que, pour les fins d'une saisie-arrêt avant jugement, il faut que le défendeur recèle présentement lors de la date de l'affidavit ou qu'il soit sur le point de recéler.—*Do-*

* To appear in Montreal Law Reports, 3 Q. B.

rion & Dorion, Dorion, J.C., Tessier, Cross, Baby, JJ., 17 septembre 1887.

Filiation—Identité—Preuve.

Jugé, Que l'adjudicataire d'un immeuble substitué, autorisé à garder entre ses mains partie du prix de l'adjudication jusqu'à l'ouverture de la substitution sous condition de la rapporter lors de cette ouverture, est lié par la reconnaissance, faite par ses auteurs, de l'état civil du grevé qui demande le rapport des deniers.—*Beaudry & Courcelles Chevalier*, Dorion, J.C., Cross, Baby, Church, JJ., 20 septembre 1887.

Husband and wife—Household Expenses—Credit given to wife—C. C. 165, 1317—Responsibility of the Wife where nothing remains to the Husband.

Held, (affirming the decision of Loranger, J., M. L. R., 1 S. C. 335):—Where a wife *séparée de biens*, living with her husband, orders goods for the maintenance of the family, and the goods are charged to her in the books of the vendor, and the husband is without means, the wife is liable for the whole cost thereof, under the provisions of C.C. 1317, notwithstanding the fact that by the marriage contract the husband alone was bound to pay the expenses of the household.—*Griffin et vir & Merrill et al.*, Dorion, C.J., Tessier, Cross, Baby, JJ., Jan. 24, 1887.

SUPERIOR COURT—MONTREAL.*

Prescription—Taxes municipales—Action hypothécaire—Tiers détenteur.

Jugé, 1. Que le tiers détenteur poursuivi hypothécairement peut opposer à l'action tous les moyens que le débiteur personnel pourrait y opposer lui-même.

2. Que l'action hypothécaire n'interrompt pas la prescription à l'égard du débiteur personnel, qui peut intervenir dans cette action et plaider la prescription acquise depuis la signification de l'action au tiers-détenteur.—*La Cité de Montréal* v. *Murphy*, Taschereau, J., 13 mars 1886.

* To appear in Montreal Law Reports, 3 S. C.

Responsibility—Damage to Mare at time of connection.

Held, That the proprietor of a stallion is not responsible for the death of a mare, where the death is the result of an error *de voie* committed by the stallion at the time of the connection, unless it be proved that the error had for its cause some fault on the part of the owner of the stallion, or of the servant of the owner.—*Brouillet* v. *Coté*, In Review, Torrance, Buchanan, Mathieu, JJ., (Mathieu, J., *diss.*), June 30, 1886.

Opposition—Affidavit—Connaissance personnelle—Rejet sur motion.

Jugé, Que dans un affidavit au soutien d'une opposition afin d'annuler, le déposant doit jurer d'après sa connaissance personnelle et non suivant les informations qu'il aurait reçues ; qu'ainsi lorsque le déposant dépose que les faits "*sont vrais, en observant* "*toutefois qu'il n'a été informé des faits sui-* "*vants mentionnés dans l'opposition ci-dessus* "*que d'après les déclarations de son avocat,*" l'affidavit est illégal et irrégulier, et l'opposition pourra être renvoyée sur motion.—*Morin* v. *Morin*, Mathieu, J., 27 juin 1887.

Allégations vagues dans un plaidoyer—Demande de rejet sur motion—Délai.

Jugé, Que dans une action en dommage pour libelle, une motion demandant le rejet, du plaidoyer, de certaines allégations trop vagues et insuffisamment libellées, est de la nature d'une exception à la forme, et doit être faite dans un délai raisonnable.—*Chapleau* v. *Trudelle*, Mathieu, J., 16 mai 1887.

Communauté de biens—Marchande publique—Séparation judiciaire de biens—Responsabilité de la femme.

Jugé, 1. Que lorsqu'un demandeur reconnait, dans son action, la qualité de femme séparée de biens à la défenderesse, il ne peut ensuite lui contester cette même qualité ;

2. Qu'une femme mariée non séparée de biens et qui fait commerce comme marchande

publique, ne s'engage pas personnellement, mais seulement comme commune;

3. Que la renonciation à la communauté de biens que fait une femme en se séparant de biens judiciairement d'avec son mari, la libère entièrement de toutes les obligations qu'elle a pu encourir comme commune en biens avant la séparation.—*Bourgouin* v. *Roy*, Jetté, J., 27 juin 1887.

Sale—Jus disponendi—C. C. 1025.

Held, Where a person who sells goods on time, shows by his acts his purpose to retain the property therein until the conditions of sale be complied with,—as, for example, by consigning the goods to his own agent in the city where the purchaser resides, with instructions not to part with the bill of lading until the purchaser shall have accepted a draft for the price,—the right of property does not pass to the purchaser, and the agent of the vendor may retain the goods in the event of the purchaser refusing to accept a draft for the price payable at the expiration of the term of credit.—*McGillivray* v. *Watt*, In Review, Johnson, Torrance, Mathieu, JJ., June 30, 1886.

Procedure—Summons—C. C. P. 69—*Leave to serve writ in Ontario.*

Held, That leave to serve a writ of summons in Ontario under Art. 69 C.C.P., is sufficient, if annexed to the writ, on a separate sheet, without being endorsed in writing upon the writ.—*Kilburn* v. *Ward*, In Review, Johnson, Rainville, Jetté, JJ., Dec. 30, 1880.

Liste électorale de Québec—Révision par le conseil municipal—Nouveaux noms—Radiation d'électeurs—Avis.

Jugé, 1. Que le Conseil d'une corporation municipale n'a pas le droit de réviser la liste électorale sous l'*Acte électorale de Québec* et d'y ajouter et d'y retrancher des noms sans que des plaintes aient été déposées devant lui, et sans donner avis aux personnes dont les noms doivent être ainsi retranchés.

2. Que tout électeur a droit de se plaindre de cette illégalité et d'en appeler à un juge de cette décision du Conseil municipal.—*Robertson* v. *La Corporation de la Paroisse de St. Vincent de Paul*, Tait, J., 28 juin 1887.

GENERAL NOTES.

A BIG Q.C.—A learned Queen's Counsel in the city of Winnipeg has, we are informed, put up at the doorway of his office a huge black signboard, four feet long and three feet wide, on which are printed in large gold letters; 'X. Y. Z——, Q.C., Barrister, &c.,' the letters Q.C., being three times the size of the others.—*Canada Law Journal.*

A prominent railway lawyer and another known for his antagonism to corporations, got themselves somehow elected delegates to a farmers' convention. The latter introduced a resolution condemning railroads for this, that and the other. Thereupon the railway attorney moved to amend the resolution so that it should read: "Resolved, that the Revised Version of the Scriptures be hereby adopted." The grangers roared, and the railway attorney felt himself to be the master of the situation. The other lawyer, however, arose very calmly and said: "Mr. Chairman, I am inclined to accept the gentleman's amendment; and, in fact, I am perfectly willing to do so on condition that one verse be left as it stands in the Old Version: 'The ox knoweth his owner, and the ass his master's crib.'"

'MALA FIDE' EXERCISE OF RIGHTS.—Plaintiff, a mulatto woman, purchased a ticket on defendant's railroad for a ten-mile journey. She passed through the front car, and attempted to enter the rear car, which, by a regulation of the company, was set apart for white ladies and gentlemen. She was stopped on the platform and told to ride in the front car, which she refused to do, and refused to give up her ticket unless allowed to ride in the rear car. She was ejected from the train. Held, that as plaintiff's purpose evidently was to harass the defendant with a view to bringing this action, and her persistence was not in good faith, with a view to obtain a comfortable seat for the short ride, the judgment in her favour in the Court below should be reversed (*The Chesapeake, &c., Railway Company* v. *Wells*, Sup. Ct. Tenn., 4 S. W. Rep. 5).

ROSEBUDS IN COURT.—The dreary monotony of a divorce case was dragging its soiled length along in Judge Hick's court yesterday. The woful contestants were listening eagerly, when a handsome, broad-shouldered youth entered the room with a young lady on his arm. He was overflowing with joy. His face was constantly wreathed in smiles which seemed to fill the gloomy court room. She was happy, too; bashfully, surreptitiously happy, and she looked shyly from behind her stalwart lover's arm. They wanted to be married. The divorce suit was suspended at once, for the court will stop unmaking a marriage to make one any time. The ceremony was performed. The young man drew out a $5 bill and placed it before the judge. With his brightest smile and a speech as gallant as a Chesterfield could make, he presented it to the bride. The little lady accepted the money, and with a quick, graceful movement, she drew the bouquet of roses from her bosom and placed it before the judge. With a bow he received the rosebuds, and a few minutes later he returned to the divorce suit, but the sweet odor pervaded the dingy court room all that day. —*Ex.*

The Legal News.

VOL. X. NOVEMBER 5, 1887. No. 45.

The Supreme Court of the United States has decided against the Chicago anarchists, and it is to be hoped that this pestilent brood will now be removed, without further delay, from opportunity for mischief. The *Albany Law Journal* comments on the case as follows:—"A perusal of the opinion of the Illinois Supreme Court in the anarchists' case ought to convince any lawyer that the defendants had a fair trial, as free from error as possible in judicial proceedings, and that they are all guilty, and richly deserve extirpation. A more depraved set of scoundrels never infested the earth, and society will be safer for their permanent absence. 'Throttle the law or the law will throttle you,' said one of them in his incendiary speeches. So it will, if there is any justice under the heavens, and any backbone in society. 'Ruhe'—peace—was the preconcerted word published in their newspaper as the signal for the uprising. Society will get no peace until it makes a few examples of these socialistic firebrands, haters of mankind, spoilers of property, defiers of God and judgment. We recommend to every lawyer to read Judge Magruder's opinion. A more masterly and convincing one was never uttered. It should always stand as a monument to his intellectual powers. It is marked also by perfect calmness and impartiality, stating the *pros* and *cons* of the voluminous and sometimes conflicting evidence with admirable clearness and absence of bias. The evidence against all the prisoners but two is direct and overwhelming, and as to those two it is sufficient to justify the finding of the jury. The prisoners are all of German birth or descent but two, who are respectively English and American. The indictment was for an executed conspiracy to murder Policeman Degan. The bomb which killed him destroyed six other policemen and wounded sixty more. The evidence showed that Spies, Schwab, Parsons, Engel and Fielden, by numerous speeches and writings of the most bloodthirsty description, counselled the workingmen to arm for a conflict with the police and militia, and that they (excepting Engel and Fischer) were engaged in handling bombs and experimenting with dynamite. That Engel and Fischer organized a conspiracy to throw bombs into the police stations and shoot down the escaping policemen, as a preliminary to a general attack on capitalists and property. That Spies continually incited the attack through the columns of his newspaper, the *Arbeiter Zeitung*, with the co-operation of Schwab, an editorial writer for his newspaper, and that the two composed and published bloodthirsty circulars, and announced the time for striking by publishing in the newspaper the agreed signal 'Ruhe' on the evening in question. The Fielden, the Englishman, delivered an incendiary speech in the Haymarket, the scene of the conflict, on the evening in question, and fired several shots at the police. That Parsons, the American, played a similar part as to speech-making on the evening in question. That Lingg manufactured bombs of peculiar form and materials, like that which did the work, and distributed them among the socialists on the evening of the murder. That Spies not only made an incendiary speech on that occasion, but actually handed the bomb to Schnaubelt and lighted it, after which Schnaubelt threw it. (This last evidence was strongly controverted, as was also that of Fielden's shooting, but there was amply enough to justify the finding of direct action as to both.) That Neebe was a socialist, stockholder in the newspaper, and next to Spies and Schwab, the most active in its management; active in preparing for the movements counselled, presiding at meetings where the use of dynamite against the police was urged, distributing incendiary circulars on the night before the attack in question, his house full of arms and a red flag in it. The whole case shows that the socialists had been armed, drilled and instructed in the manufacture and use of dynamite-bombs for many months, and that a preconcerted attack on the police was fixed for about May 1, 1886. On Monday, May 3rd, the police broke up a strike riot

and killed one of the strikers, and this precipitated the attack in question on the next evening, in obedience to the publication of the signal 'Ruhe.' The evidence also showed that some of the policemen were wounded by pistol shots. The evidence against Parsons and Neebe is only somewhat less direct as to active participancy on the night of the murder; that they counselled such an attack, Parsons on the scene, and Neebe at other times and places, there can be no sort of question. In deference to the doubt about Neebe his punishment is fixed at imprisonment for fifteen years." Our contemporary urges that the report of the case should be read, and "then the community will wake up to a realization of what a volcano they have been sleeping on; what a viper this free and hospitable land has taken to its hearth. But we are prepared for the usual chorus of sentimental priests and whining women begging for pardon or mercy for a band of lawless Thugs who would despise them for their softness and cut their throats for their money. The might of Law for Dynamite! say we."

Experimental evidence was curiously illustrated in the case of *Osborne* v. *City of Detroit*, U. S. Circuit Court, E. D. Michigan, Oct. 25, 1886, (32 Fed. Rep. 36) The action was for injuries occasioned by a defective sidewalk, where the plaintiff claimed to be paralyzed by the fall. It was held not error to permit her medical attendant, who had not been sworn, to demonstrate her loss of feeling to the jury by thrusting a pin into the side plaintiff claimed to be paralyzed. The Court said: "Objection was made to this upon the ground that the doctor was not sworn as to the instrument he was using, nor was the plaintiff sworn to behave naturally while she was being experimented upon. It is argued that both the doctor and plaintiff might have wholly deceived the court and jury without laying themselves open to a charge of perjury, and that plaintiff was not even asked to swear whether the instrument hurt her when it was used on the left side, or did not hurt her when used on the right side; in short, that there was no sworn testimony or evidence in the whole performance, and no practical way of detecting any trickery which might have been practised. We know, however, of no oath which could be administered to the doctor or the witness touching this exhibition. So far as we are aware, the law recognizes no oaths to be administered upon the witness stand except the ordinary oath to tell the truth, or to interpret correctly from one language to another. The pin by which the experiment was performed was exhibited to the jury. There was nothing which tended to show trickery on the part of the doctor in failing to insert the pin as he was requested to do, nor was there any cross-examination attempted from the witness upon this point. Counsel were certainly at liberty to examine the pin and to ascertain whether in fact it was inserted in the flesh, and having failed to exercise this privilege, it is now too late to raise the objection that the exhibition was incompetent. It is certainly competent for the plaintiff to appear before the jury, and if she had lost an arm or a leg by reason of the accident, they could hardly fail to notice it. By parity of reasoning, it would seem that she was at liberty to exhibit her wounds if she chose to do so, as is frequently the case where an ankle has been sprained or broken, a wrist fractured, or any maiming has occurred. I know of no objection to her showing the extent of the paralysis which had supervened by reason of the accident, and evidence that her right side was insensible to pain certainly tended to show this paralyzed condition. In criminal cases it has been doubted whether the defendant could be compelled to make profert of his person, and thus, as it were, make evidence against himself. The authorities upon this subject are collated in 15 Cent. Law J. 2, and are not unequally divided, but we know of no civil case where the injured person has not been permitted to exhibit his wounds to the jury. In *Schroeder* v. *Railroad Co.*, 47 Iowa, 375, it was held not only that the plaintiff would be permitted, in actions for personal injuries, to exhibit his wounds or injuries to the jury, but that he might be required by the court, upon proper application therefor by the defendant, to submit his

person to an examination for the purpose of ascertaining the extent of such injuries, and upon refusal might be treated as in contempt. See also *Mulhado* v. *Railroad Co.*, 30 N. Y. 370."

Lord Fitzgerald, in the House of Lords, Sept. 14, in commending the claim of the widow and children of Head-Constable Whelehan, murdered in the discharge of his duty, to the favorable attention of the Government, remarked that as far back as the time of Alfred, if an individual lost his life in an endeavour to capture a criminal, the judge who tried the case had power to award compensation to bereaved relatives; and it was paid by the sheriff and recouped by the Treasury.

COUR SUPÉRIEURE.

SAGUENAY, 1886.

Coram ROUTHIER, J.

BURY v. LESLIE et al., et STOCKWELL, Adjudicataire, et FORSYTH, requérant en nullité de décret.

Signification entre procureurs.

JUGÉ:—*Que la signification de procédures entre procureurs, faite avant neuf heures du matin, est irrégulière.*

L'adjudicataire plaida à la requête en nullité de décret, par exception à la forme, que telle requête ne lui avait jamais été signifiée.

Le requérant, par motion, demanda le rejet de l'exception à la forme, vu qu'elle avait été signifiée avant neuf heures du matin.

Motion accordée et exception à la forme rejetée avec dépens.

Charles Angers, proc. du requérant.

J. S. Perrault, proc. de l'adjudicataire.

[C.A.]

Coram ROUTHIER, J.

MÊME CAUSE.

Rapport d'huissier—Requête pour s'inscrire en faux.

Dans son rapport de signification, l'huissier exploitant déclarait avoir signifié la requête en nullité de décret à l'adjudicataire, bien qu'il n'eût jamais fait telle signification.

L'adjudicataire voyant son exception à la forme rejetée pour les raisons ci-dessus, demanda par requête, permission de s'inscrire en faux contre l'exploit.

Requête en faux renvoyée avec dépens, parce que l'adjudicataire ayant comparu, ne se trouvait plus dans les délais pour invoquer l'irrégularité de l'assignation, son exception à la forme ayant été déboutée.

Charles Angers, proc. du requérant en nullité de décret.

J. S. Perrault, proc. du requérant en faux.

[C.A.]

MÊME CAUSE.

SAGUENAY, 17 octobre 1887.

Coram ROUTHIER, J.

Requête en nullité de décret—Assignation des parties absentes.

JUGÉ:—*Que l'assignation d'un absent sur une requête en nullité de décret, peut être faite par la voie des journaux en la manière ordinaire.*

Quelques-unes des parties intéressées en la présente cause, étant domiciliées en Europe, l'adjudicataire avait fait motion qu'il ne fût pas tenu de plaider au mérite avant que telles parties eussent été assignées. Sursis fut accordé jusqu'à assignation régulière et légale.

Sur motion en la forme ordinaire, avis fut donné par les journaux de comparaître sous deux mois.

Ce délai passé, demande fut faite des plaidoyers au mérite, et forclusion prise contre les parties en défaut, et spécialement contre l'adjudicataire.

Le 17 octobre 1887, ce dernier demanda le rejet de la forclusion, prétendant que la requête en nullité de décret devait être signifiée même aux absents, personnellement ou à domicile. Art. 715, Code de procédure.

Motion renvoyée avec dépens et assignation par les journaux déclarée valable.

Charles Angers, proc. du requérant en nullité de décret.

J. S. Perrault, proc. de l'adjudicataire.

[Appel doit être interjeté de cette décision.]

[C.A.]

SUPERIOR COURT.

SHERBROOKE, District of St. Francis.

Coram GILL, J.

LORD v. OLIVER.

Lien de droit — Contract for maintenance— Breach.

HELD, 1. *That if A, in consideration of a gift "inter vivos," made to him by B, of all the movable and immovable property of the latter, bind and oblige himself to maintain and support B in his own house, till B's death, and to pay for all necessary medical attendance, which might be rendered to B, and to pay B's funeral expenses; he will be bound, on B's leaving his house, to provide for her support and maintenance elsewhere, if B's departure from his house was justified by the treatment she had received there; and that if C in such circumstances, gives B board and lodging, and provides for B nursing and attendance, rendered necessary by her illness; and further, pays for necessary medical services rendered B, and for B's funeral expenses; he may recover from A the fair value of such board, lodging and attendance, as well as the amount paid out by him for the medical services rendered B, and for B's funcral expenses; although no contract have been previously entered into between A and C, with regard to such board, lodging, &c.*

2. *That if A, on being called upon by C, to pay him for the board and lodging so provided B, and the expenses so incurred on B's behalf, say that he is ready to do "what is right" with regard to the support of B by C; this will constitute an admission on the part of A, that he is indebted to C in such amount as is justly due the latter for his support of B, and for the expenses he has incurred on her behalf.*

3. *That A and C having made a submission to arbitrators of the matters in dispute between them, such submission, though informal, should nevertheless, under the circumstances, be taken as a further admission of A's indebtedness to C.*

4. *That by reason of these various admissions, all that remained to be done, was to establish the amount of A's indebtedness to C.*

The written judgment of the Court gives a sufficient *résumé* of the pleadings, and of the facts of the case:—

"The Court.... considering that the plaintiff alleges in his declaration, that the defendant was bound by a certain deed of donation *inter vivos* dated on the eighth day of November, 1881, before J. Fraser, Notary, made in his favour by Mark Bean, defendant's father-in-law, and by Mehitable F. Ford, the second wife of the said Mark Bean, and at the time living with him, of certain movable and immovable property, to maintain and provide for all the wants of the said Mehitable F. Lord, by keeping her in his own family; but that by ill-treatment and abuse, both by acts and by words, from the said defendant and his family, the said Mehitable F. Lord was actually driven out from and forced to leave defendant's house, and obliged to apply elsewhere for her support; that she at first provided for her own living by working, but that she afterwards fell sick, and took refuge at the plaintiff's, her brother, who took care of her and provided for all that she required, chiefly during her last illness, which lasted from October, 1884, to June, 1885, when she died, and the plaintiff now asks that the defendant be condemned to pay him $335.50 for the support of the said Mehitable F. Lord, and extra nursing and care during her sickness, as having paid the physician who attended her, and for all her burial expenses; plaintiff further alleging that two arbitrators having been appointed by the said parties to determine the amount plaintiff was entitled to, for said support, care and expenses, that the said arbitrators decided that the defendant should pay to plaintiff the above stated amount of $335.50.

"To which action and demand, the defendant pleaded the want of *lien de droit* between him and plaintiff, and that he was bound to maintain and support the said Mehitable F. Lord, only in his own house and family, which he had never refused to do, and never sent her away, nor ill-treated or abused her, and that she left of her own accord and free will, and that being of an irascible mood, she was herself the only cause of any dissatisfaction she may have met with during her stay with defendant's family; that the pretended arbitration was informal and fraudulent, and of

no legal effect whatever; that he never agreed to be bound by it, nor accepted it, but admits his liability to pay the doctor's bill, when properly called upon to do so, and the funeral expenses, for which he confesses judgment to the amount of $30.00 and costs of that amount uncontested.

"Considering that it is proved that the said Mehitable F. Lord did not agree with the defendant or his family, and that it was hardly possible, not to say impossible, for her to live in defendant's house and with him; and considering that the defendant has admitted his liability towards paying for the maintenance and support of the said Mehitable F. Lord, out of his own house, under the circumstances the parties were in, firstly by stating that he was ready to do what was right or fair concerning said support; and, secondly, by consenting to the arbitration referred to in plaintiff's declaration, for although the paper-writing signed by plaintiff and defendant, referring the matter to arbitration, did not constitute a formal deed of submission made out according to the Code of Civil Procedure, in all its requirements, so that the defendant should be held bound by the decision of the arbitrators, still it is an acknowledgement on the part of the defendant of indebtedness toward the plaintiff, the amount alone remaining to be determined.

"Considering there is abundant proof of the facts alleged, as to the support of the said Mehitable F. Lord by the plaintiff, her sickness and her extra nursing, and the care she required, the physician's attendance secured by the plaintiff, and the funeral expenses paid by him, arbitrating the amount to be paid by the defendant for the whole, taking into consideration all the circumstances of the case as gathered from the evidence, and the condition of life of the parties, doth condemn the defendant to pay the plaintiff the sum of $140.00 currency," &c.

Judgment for plaintiff.

J. L. Terrill, Q. C., for plaintiff.

Hall, White & Cate, for defendant.

(D. C. R.)

COUR D'APPEL DE DOUAI (AUDIENCE SOLENNELLE). 12 mai 1887.

Présidence de M. MAZEAUD, premier président.

PERSYN-GARS v. PERSYN.

Désistement—Interdiction—Ordre public.

L'action en interdiction, touchant à l'ordre public, doit suivre son cours normal, et ne saurait être arrêtée par le désistement du demandeur.

A la date du 14 janvier 1887, le Tribunal civil de Dunkerque avait rendu le jugement suivant:

"Attendu que de l'interrogatoire et des documents de la cause, il ne résulte pas que le sieur Charles Persyn soit en état d'imbécillité, de démence et de fureur; qu'il en ressort même que généralement il raisonne juste, et que, s'il présente une faiblesse d'esprit naturelle qui le gêne parfois pour établir certains comptes, il n'est ni démontré ni même allégué qu'elle ait entraîné de sa part des prodigalités, ou même eu pour lui des conséquences qui puissent y être assimilées; que, dès lors, il n'y a lieu d'accéder ni à la demande d'interdiction, ni pour le Tribunal de pourvoir d'office Charles Persyn d'un conseil judiciaire;

"Par ces motifs,

"Déclare Persyn-Gars mal fondé dans ses demandes, fins et conclusions, l'en déboute; le condamne aux dépens."

Le sieur Persyn-Gars interjeta appel de ce jugement, puis il se désista de son appel, en offrant de payer les frais suivant droit; sur refus de l'intimé, la cour de Douai trancha l'incident par l'arrêt suivant:

La Cour,

Attendu que la nature de l'affaire légitime le décrètement du désistement de Persyn-Gars, que c'est donc avec raison que Persyn a refusé d'accepter purement et simplement ce désistement; que l'offre de Persyn-Gars est donc insuffisante;

Par ces motifs,

Décrète le désistement signifié par le sieur Persyn-Gars par acte d'avoué à avoué en date du 5 mai 1887, enregistré à Douai le 6 du même mois:

Donne acte au sieur Persyn des offres par lui faites;

Les déclare insuffisantes;

Condamne l'appelant aux dépens.

NOTE.—V. Poitiers 5 août 1831 (S. 32.2.205); Douai 8 décembre 1858 (Jurispr. de Douai, 1859, p. 42); Lyon 14 juillet 1853 (S. 53.2.618); Nancy 15 juin 1865 (S. 66.2.151); Cass. 14 juin 1842 (S. 42.1.742); Demolombe, Minorité, t. II, No. 474; Aubry et Rau, t. I, § 124, texte et note 9; Chauveau sur Carré, supp., questions 3013 *quater*, et 3031 *bis*; Laurent, t. V, No. 248.—*Gaz. Pal.*

TRIBUNAL CIVIL D'ESPALION.

26 septembre 1886.

Présidence de M. DEVIC.

M. GAUZIT, notaire, v. CAYRON-JUÉRY.

Notaire—Déboursés et honoraires—Action solidaire contre les cosignataires d'un acte—Intervention d'une femme dotale.

Le notaire qui reçoit un acte est seul juge de l'opportunité de la présence ou de l'intervention de l'une des parties dans l'acte.

S'il accepte comme partie dans l'acte une femme mariée sous le régime dotal, qui pouvait être représentée par son mari, il n'a point contre elle pour le recouvrement de ses frais et honoraires l'action solidaire qui est généralement reconnue au profit du notaire contre chacun des cosignataires d'un même acte.

LE TRIBUNAL,

Attendu que les parties de M. Cambournac, et Jeanne Bézamat, mère de François Cayron, ont fait opposition au commandement à elles signifié à la requête de Gauzit pour avoir paiement des déboursés et honoraires qu'il prétend lui être dus par les susnommés à propos de deux actes passés par lui les 1 mai et 15 juin 1881, pour régler sinon l'ordre au moins la situation des créanciers de François Cayron et Jeanne Bézamat;

En ce qui touche cette dernière:

Attendu qu'elle est décédée; que son décès a été dénoncé, que Gauzit déclare ne point vouloir suivre contre elle; qu'il y a donc lieu de lui donner acte de sa déclaration et d'examiner l'opposition formée par les autres parties;

En ce qui touche Jeanne Juéry, femme Cayron:

Attendu qu'elle n'avait rien à faire dans les actes passés par Gauzit et que dans tous les cas l'on ne voit pas quel intérêt elle y aurait; qu'en effet on n'y liquide point ses reprises, l'on ne lui en garantit point le recouvrement; que le notaire se borne à mentionner qu'elle se propose de faire restreindre son hypothèque légale que pour cela il a déjà réuni les parents indiqués par la loi, et lui a fait en tant que de besoin donner main-levée de son hypothèque légale; qu'en fait l'acquéreur des biens dont le notaire voulait distribuer le prix a été obligé de purger; et que, par suite, l'intervention de la femme, inutile d'ailleurs, puisqu'elle ne pouvait donner main-levée de son hypothèque, étant mariée sous le régime dotal, n'a servi de rien;

Attendu d'autre part que, aux termes de l'acte d'échange passé entre les opposants d'une part et Goutal, père et fils, d'autre part, les frais à faire pour purger les hypothèques dont les biens seraient grevés étaient à la charge, de ceux dont elles proviennent, et que Antoinette Juéry en donnant main levée pouvait penser s'engager à payer les frais d'un ordre consensuel que se proposait de faire le notaire; et que, par suite, Gauzit qui sans doute s'est trompé de bonne boi aurait dû faire connaître à Antoinette Juéry sa situation, et ne saurait profiter de son erreur.

En ce qui touche François Cayron:

Attendu qu'il faut bien reconnaître que les actes dont Gauzit réclame le coût n'ont point obtenu le résultat que recherchaient soit le sieur Cayron, soit le notaire; qu'en effet, l'ordre dans lequel doivent être attaqués les créanciers n'est point déterminé; que leurs créances y sont liquidées, mais provisoirement, et que ces actes n'auraient d'autre utilité que de faire accepter par les créanciers le prix de la vente ou plutôt le montant de la soulte stipulée au profit des parties de Me Cambournac; que, par suite, la demande de Gauzit est exagérée et qu'il y a lieu de la réduire;

Attendu que les dépens suivent le sort du principal et doivent être distribués dans le sens de la présente décision;

Par ces motifs,

Donne acte à Me Gauzit de ce qu'il renonce à toute action contre Jeanne Bézamat;

Et faisant droit à l'opposition, etc.

NOTE.—Sans nier l'action solidaire généralement accordée au notaire contre chacune

des parties qui figurent dans un acte pour le recouvrement de ses déboursés et honoraires, le jugement ci-dessus décide en principe que le notaire doit s'établir juge de l'opportunité de l'intervention ou de la présence de l'une des parties, et qu'au cas où la nécessité de cette intervention n'apparaît point clairement, le notaire est dépourvu de toute action contre cette partie.

Dans l'espèce, le Tribunal ajoute que le notaire a à s'imputer de ne pas avoir prévenu la femme de l'inutilité de son intervention à l'acte et de l'obligation qu'elle contractait solidairement avec les autres parties de payer les frais de l'acte; ce dernier motif nous paraît manquer en fait rien n'indiquant dans le jugement que le notaire a négligé d'éclairer la femme soit sur l'inopportunité de son intervention, soit sur les conséquences de cette intervention.

Reste la question de savoir s'il était loisible au notaire de refuser son ministère soit à la femme, soit aux autres parties qui exigeaient la présence de la femme sous le prétexte qu'il jugeait, lui, cette présence inutile. Ce serait, ce nous semble, pousser bien loin les conséquences du principe admis en doctrine et en jurisprudence, qu'il incombe au notaire d'éclairer les parties ignorantes et illettrées qui viennent requérir acte de leurs conventions. Les conventions insérées dans l'acte retenu par Me Gauzit entre la femme Cayron et les autres parties ne paraissent présenter aucun des caractères de dol, de fraude ou d'immoralité qui, en certaines circonstances, peuvent autoriser le notaire à refuser son ministère.

Sur le principe de l'action solidaire du notaire contre chacune des parties qui ont figuré dans l'acte, solidarité basée sur l'art. 2002, C. civ., V. notamment: Cass. civ. 9 avril 1850 (D.50.1.124;—Journ. des not., art. 14047); Toulouse, 23 avril, 1847 (Jour. des not., art. 13183); Riom 18 décembre 1838 (*ibid.*, art. 10387); Paris 28 aout 1836 (*ibid.*, art. 9467; Cass. 10 novembre 1828 (*ibid.*, art. 6744).—*Gaz. Pal.*

THE IRISH PROSECUTIONS.

Lord Bramwell, who is noted for his outspoken utterances on the questions of the day, castigates Mr. Mundy pretty severely. Some points of interest are involved. His lordship says:—

Mr. Mundy tells you that he is an American lawyer, and that he writes as a lawyer. I should not say so.

He says, 'I am an American lawyer who has'—he means 'have'—'been travelling through Ireland to see what there was of the Irish question.' To see what there was of it? He says *he* suggested the defect in the *law* pointed out to the magistrate in the Lord Mayor's case. Now, there was no defect in the law. If there was any defect, it was in the proof, as M. Mundy proceeds to show. He says, 'As I said, *non constat* it was a Sunday-school meeting.' He means *non constat* it was *not* a Sunday-school meeting. He says the way to prove to the contrary would be by somebody who was present. He proceeds, 'There is a point, however, in the case at bar (the Lord Mayor's case) upon which I am afraid in the case proposed the judge will reverse the judgment.' Mr. Mundy is very fond of the word 'case.' He reminds me of the learned counsel who said, 'If ever a case was a hard case, this case is that case.' Mr. Mundy's case is that the judgment may be reversed, as the defendant said it was a meeting of the League. This, 'together with all other proven facts and circumstances, it may be held, makes out a *primâ facie* case for the Crown. The magistrate was right in his law, but the question is, Will not the higher Court hold that the proof was there, and that it lay with the defence to overcome it?' I offer no opinion on a matter *sub judice*. But Mr. Mundy does not say that the higher Court would be wrong—does not say that the suggestion he made was not an idle one—does not say that both law and evidence were sufficient. He says he thinks it poor policy to prosecute the proprietors of newspapers for publishing such things. But he very correctly adds, 'That is neither here nor there.'

He proceeds to deal with O'Brien's case, and asks how the conviction can stand. 'A man is charged with two offences; that is enough to defeat them both.' My answer is that this is downright nonsense. 'Besides, the Court would not compel the Crown to elect which offence it would try.' So is that. Mr. Mundy proceeds, 'When there are two counts

in one indictment, the prosecution must elect on which count it will go to trial; but two offences in one indictment is'—he means 'are' —'bad for duplicity.' This is a hash of blunders. There was no indictment in this case. *Two* counts are never bad for duplicity. Duplicity is a fault in *a* count, not in forming several. If two separate felonies are put in one indictment, it may be quashed, or the prosecution compelled to select one to go on. But in misdemeanors any number of different offences may be stated. And the charges against O'Brien were misdemeanors. Mr. Mundy proceeds: 'The witness was allowed to read from a memorandum made the next day, and that before he had exhausted his memory or recollection. Did any lawyer ever hear of such practice before?' Yes, always when the case arose. 'A witness may refresh his memory by referring to any writing made by himself at the time of the transaction, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory' (Stephen's 'Digest of Evidence,' 128). Nor is he bound to try first if he can remember without. 'Again,' says Mr. Mundy, 'the witness swore he could not swear to the words used,' and asks whether men can be deprived of their liberty on such a flimsy pretext. Did Mr. Mundy never hear of evidence to the 'best of the knowledge and belief' of the deponent? Mr. Mundy says he was sorry to see such things in an English Court. Will it console him to remember that the Court was Irish? He says, 'When I return to America I shall be compelled to tell our people' dreadful things about the English —of one thing he says, 'if it was not horrible it would be laughable.' I will borrow his words with a change. His letter, if it was not laughable, would be horrible—if 'his people' agreed with it.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 22.

Judicial Abandonments.

Damase Moineau, trader, Montreal, Oct. 18.

Curators appointed.

Re Zoël Bessette, Granby.—J. L. Dozois, Granby, curator, Oct. 7.

Re Norris Best, hotel-keeper, Bord-à-Plouff.—Fulton & Richards, Montreal, curators, Oct. 20.

Re L. Collin & frère.—H. A. Bedard, Quebec, curator, Oct. 15.

Re Augustin Groulx.—R. Kornmaier, Montreal, curator, Oct. 15.

Re Dolphis Sigouin, saddler.—G. R. Falere, Montreal, curator, Oct. 11.

Re Louis Tremblay.—C. Desmarteau, Montreal, curator, Oct. 18.

Dividends.

Re Ferdinand Aubry.—Dividend, payable Nov. 9, at office of C. Desmarteau, Montreal, curator.

Re Joseph Corrivault. — First dividend, payable Nov. 11, J. J. Griffith, Sherbrooke, curator.

Re Hypolite Lanctot.—Dividend, payable Nov. 10, C. Desmarteau, Montreal, curator.

Re Myer Myers.—Dividend, W. A. Caldwell, Montreal, curator.

Separation as to property.

Sarah Raines vs. James Pringle, trader, Montreal, Oct. 12.

Vitaline Rousseau vs. Donville Gingras, mechanic, Ste. Pudentienne, Oct. 18.

Appointments.

Jean Octave Chalut, N. P., to be clerk of the Circuit Court, co. of Berthier, in the place of Pierre Tellier.

Quebec Official Gazette, Oct. 29.

Judicial Abandonments.

Fletcher Thompson, trader, Sherbrooke, Oct. 26.

Curators Appointed.

Re Bowen & Woodward, contractors.—J. A. Archambault, Sherbrooke, curator, Oct. 20.

Re Wilfred E. Brunet, St. Sauveur de Québec.—H. A. Bedard, Quebec, curator, Oct. 25.

Re Joseph Charron, *fils*, St. Denis.—J. O. Dion, St. Hyacinthe, curator, Oct. 22.

Re André Gagnon, Lévis.—Kent & Turcotte, Montreal, curator, Oct. 25.

Re A. L. Lassonde, St. Zéphirin.—Kent & Turcotte, Montreal, curator, Oct. 21.

Re Israël Lemay.—C. Fortin, Beauharnois, curator, Oct. 14.

Re Rosario Roussil.—O. Forget, district of Terrebonne, curator, Oct. 13.

Dividends.

Re Nazaire Garon, Rimouski.—Dividend, payable Nov. 14, Kent & Turcotte, Montreal, curator.

Re Louis Houle.—Dividend on privileged claims, payable Nov. 14, Kent & Turcotte, Montreal, curator.

Re Hugh O'Hara, Chambly Canton.—Composition sheet prepared, payable Nov. 9, Thos. Darling, Montreal, curator.

Re Treffié Vanier.—Dividend, payable Nov. 14, Kent & Turcotte, Montreal, curator.

Separation as to Property.

Marie Azilda Charlebois vs. Joseph Ludger Damase Brasseur, trader, St. Policarpe, Oct. 27.

Asilda Hatte vs. Adolphe *alias* Delphis Papineau, Montreal, Oct. 17.

Maria Santa Impini vs. Bormetti Francesco, laborer, Montreal, Oct. 26.

Alice McGarvey vs. Arsène Neveu, trader, Montreal, Oct. 11.

Appointment.

Hon. Auguste Real Angers, Justice of the Superior Court, to be Lieutenant Governor of the Province of Quebec, Oct. 24.

The Legal News.

VOL. X. NOVEMBER 12, 1887. No. 46.

An English solicitor, who has been in New South Wales for some time, relates his experience in terms which should deter his brethren of the profession from rashly trying their luck in new fields. He says he made an unsuccessful endeavour to obtain a clerkship, and wasted five months in the attempt, notwithstanding the backing of some of the most influential residents. "There are only between 300 and 400 solicitors in Sydney, and they will not take into their employ an English solicitor. I know of my own knowledge that nine English barristers applied to one firm of solicitors for a clerkship in one week; and there are hundreds of English professional men walking about and doing all kinds of menial labour so as to obtain sufficient to keep life within them." He adds: "Professional men are not wanted in the colonies, which want mechanics and agriculturists with capital to open out the country," which is as true with reference to Canada as to New South Wales.

Lord Justice Bowen has been lightening the fatigue of his official duties by translating Virgil into English verse, and the work is to be given to the world and the tender mercies of the critics in a few days. The *Law Journal* says, "its appearance will revive the tradition, of late years somewhat faded, that judges should be men of letters. Since the days when Talfourd and Alderson were on the bench together, no judge has made any name in the general literature of his country. Lord Justice Bowen happily illustrates the fact that even at the end of the nineteenth century the qualities that make a man a scholar and a poet do not disqualify him for success at the bar and on the Bench."

Chief Justice Sir A. A. Dorion, in his charge to the Grand Jury, Nov. 2, at the opening of the term of Queen's Bench, observed:—"It is well that I should mention what is a libel and what are your duties with regard to the cases that may be brought to your notice. A libel is the publication of any injurious writing against the character, position or standing in society of any person or persons. It is not necessary that the writing should be of such a character as to impose a material injury upon the person who complains of the libel, but it is sufficient that the writing is calculated to bring the person against whom the writing is directed into contempt, or even ridicule. Your duty is to see whether in reality the writing in question contains anything injurious to the good name of the complainant or brings him into contempt. When you are satisfied that such a libel has been published you will see whether the person accused of publishing it is really responsibly connected with the publication of the libel. It is not necessary for you to see whether there is any legal defence to be made to the accusation. This is not the province of the grand jurors, unless it clearly appeared by the evidence adduced by the prosecution that the accusation is either frivolous or malicious, in which case you might throw out the bill."

SUPREME COURT OF CANADA.

Quebec.]

UNION BANK OF LOWER CANADA v. BULMER.

Promissory note—Accommodation—Made by partner without authority — Renewal — Knowledge of holder.

In an action on a promissory note, the defence was that the note of which it was a renewal was given for the accommodation of the payee by the defendant's partner, who had no authority to make it, and that the plaintiffs, when they took the renewal, knew its defective character.

Held, that as it did not appear that such knowledge attached when the original note came into plaintiffs' possession, they were entitled to recover.

Irvine, Q.C., for appellants.

A. W. Atwater, for the respondent.

Quebec.]

THE EXCHANGE BANK OF CANADA v. THE PEOPLE'S BANK.

Bank cheques—Acceptance by Cashier and President at a future date—Liability of Bank.

In 1881, G., having business transactions with the Exchange Bank, agreed with C., President and Manager of the Bank, that in lieu of further advances the Bank would accept his cheque, but made payable at a future date. On the 19th October, 1881, G. drew a cheque on the Exchange Bank, and after having it accepted as follows: "Good on February 19th, 1882, T. Craig, Pres.," got the cheque discounted by the People's Bank and deposited the proceeds to his credit in the Exchange Bank. This cheque was renewed on the 23d of May, and it was presented at the Exchange Bank and paid. Thereupon another cheque for the same amount was accepted in the same way and discounted by the People's Bank on the 7th September, 1883. At the time of the suspension of payment by the Exchange Bank, the People's Bank had in its possession four cheques signed by G. and accepted by T. Craig, President of the Exchange Bank, which were subsequently presented for payment on the dates when they were payable, and duly protested, and also after the three days of grace.

The total amount of these cheques was $66,020.64, and one of them, viz., the one dated 7th September, 1883, for $31,000, was a renewal of the cheque the proceeds of which had been paid to the credit of G. in the Exchange Bank. C. was manager as well as president of the Exchange Bank.

On an action brought by the People's Bank against the Exchange Bank, for the recovery of the sum of $66,020.74, based on the four cheques in question, the Exchange Bank pleaded *inter alia* that C. had not acted within the scope of his duties and within the limits of his powers, and that the Bank had never authorized or ratified his acceptance of G.'s cheques.

Held, affirming the judgment of the Court of Queen's Bench (Strong, Taschereau and Gwynne, JJ., dissenting), that under the circumstances the Exchange Bank was liable for the acceptance by their president and manager of G.'s cheques discounted by the People's Bank in good faith and in due course of business.

Appeal dismissed without costs.

Macmaster, Q. C., for appellants.

Geoffrion, Q.C., for respondents.

Quebec.]

GILLESPIE v. STEPHENS.

Reddition de comptes—Settlement by mandator with his mandatary without vouchers, Effect of—Action en redressement de compte.

Held, affirming the judgment of the Court below, that if a mandator and a mandatary, labouring under no legal disability, come to an amicable settlement about the rendering of an account due by the mandatary, without vouchers or any formality whatsoever, such a rendering of account is perfectly legal, and that if subsequently the mandator discovers any errors or omissions in the account his recourse against his mandatary is by an action *en redressement de compte*, and not by an action asking for another complete account.

Appeal dismissed with costs.

Nicolls and *Fleming*, Q.C., for appellant.

Carter, for respondent.

DUFFUS v. CREIGHTON.

Sheriff—Action against—Execution of writ of Attachment—Abandonment of seizure—Estoppel.

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S. who undertook that the same should be held intact. The sheriff made a return to the writ that he had seized the goods. The sheriff subsequently sold the goods under executions of the creditors. In an action against the sheriff:

Held, reversing the judgment of the Court below, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the sei-

zure, and if it was, the sheriff was estopped by his return to the writ from raising the question.

Held, also, that the fact of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

Russell, for the appellants.

Gormully, for the respondent.

Nova Scotia.]

CASSELS v. BURNS.

Ships and shipping—Charter party—Damage to ship—Nearest port—Deviation.

A ship sailed from Liverpool in September under charter to load lumber at Bathurst, N.B. Having encountered heavy weather the captain found it necessary to make repairs, and proceeded to St. John for that purpose. By the time the repairs were completed it was too late to go to Bathurst and carry out the charter. In an action against the owners for breach of charter the plaintiff obtained a verdict, the jury finding that the repairs could have been made in Sydney, C.B., and if made there could have been completed in time to load at Bathurst.

Held, affirming the judgment of the Court below, (20 N. S. Rep. 13) that going to St. John to repair the ship was such an unnecessary deviation from the voyage as to render the owners liable for breach of charter party.

Skinner, *Q.C.*, for the appellants.

W. Pugsley, for the respondents.

Nova Scotia.]

ELLIS v. BLACK.

Trespass—Disturbing enjoyment of right of way —User—Easement.

E. and B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in the right of way was in S., but E. founded his claim on a user of the way by himself and his predecessors in title for upwards of fifty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots.

Held, affirming the judgment of the Court below, (19 N. S. Rep. 222) Ritchie, C. J., and Gwynne, J., dissenting, that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action.

Sedgewick, *Q.C.*, for the appellant.

Drysdale, for the respondent.

MOONEY v. MCINTOSH.

Trespass—Title to land—Boundaries—Easement—Agreement at trial—Estoppel.

In an action for damages by trespass by McI. on M.'s land and closing ancient lights, defendant claimed title in himself, and pleaded that a conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff in title. On the trial the parties agreed to strike out of the pleadings all reference to lights and drains, and to try the question of boundary only.

Held, affirming the judgment of the Court below, Ritchie, C. J., and Gwynne, J., dissenting, that independently of the conventional boundary claimed by the defendant, the weight of evidence was in favor of establishing a title to the land in question in the defendant, and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over twenty years.

Semble, that if it was open to him, such user was not proved.

Sedgewick, *Q.C.*, for the appellants.

Henry, *Q.C.*, for the respondents.

Ontario.]

EXCHANGE BANK v. SPRINGER.

Surety—Cashier of Bank—Buying and selling stocks—Negligence of Directors.

In an action against the sureties of an absconding cashier it appeared that the bank had become possessed of certain stock on the security of which advances had been made, and to save loss the stock was put on the market and other stock bought to affect the

price. An account was kept in the books of the bank called the "C. R. M. Trust account," in which these stock transactions were recorded. The cashier used this account to assist him in some private speculations, and having become a defaulter in a large amount he absconded.

Held, affirming the judgment of the Court below (13 Ont. App. Rep. 390), that even if this dealing in stocks by the bank was illegal it would not relieve the sureties of the cashier from liability on their bonds.

Robinson, Q.C., and *Malone*, for the appellants.

Bain, Q.C., for the respondents.

New Brunswick.]

GREENE v. HARRIS.

Practice—Set off—Not pleaded in action—Right to set off judgment—Equitable assignment.

G. and H. brought counter actions for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which was granted, and in June, 1885, he signed judgment. In April, 1884, G. assigned to H. all his interest in the suit against H., and gave notice of such assignment in May, 1884.

In February, 1885, H. signed judgment against G. on confession.

Held, reversing the judgment of the Court below (25 N. B. Rep. 451), Strong, J., dissenting, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to H.

Weldon, Q.C., for the appellant.

CIRCUIT COURT.

SHERBROOKE, October 31, 1887.

Coram BROOKS, J.

PIJON v. LA COMPAGNIE TYPOGRAPHIQUE DES CANTONS DE L'EST.

Affidavit to be made by publisher of newspaper— C.S.L.C., ch. 11.

HELD:—*That that portion of chapter* 11 *C. S. L. C., which relates to the affidavits to be made by persons publishing newspapers, and to the penalties to be incurred in default of making such affidavits, is repealed by* 40 *Vic. (Que.) ch.* 15 *and amending Acts, as being inconsistent therewith.*

Plaintiff sued defendants for a penalty of $20, alleged to have been incurred under chapter 11 C. S. L. C. This statute provides that every person publishing a newspaper shall make an affidavit as therein prescribed, setting forth the names and additions of the printer or publisher of the paper, and of the owners, or of two of them, if there be more than two in all; and that in default of such affidavit he shall incur a penalty of $20.

Defendants pleaded that they are an incorporated company; that by 40 Vict. ch. 15, and acts amending the same, all incorporated companies (except banks and insurance companies) are ordered, under a penalty of $400, to make a declaration stating the name of the company, when and how incorporated, and the situation of its chief place of business within the Province; and that this act was a virtual repeal of the act under which plaintiffs sued.

The following is the substance of the learned judge's remarks:—

The statute sued on by plaintiff had never been expressly and in terms repealed. But Dwarris says, a statute may be repealed by a subsequent statute in which it is not referred to, if it be inconsistent with the subsequent statute. Was there such inconsistency in this case? The Court thought there was. Defendants are an incorporated company. The later acts apply to all incorporated companies whatsoever, saving special exceptions which did not affect defendants. It prescribed the declaration, on the giving of which such companies may lawfully carry on business. The declaration was intended to attain the same object as the affidavit, viz., to furnish third parties with the proper means of suing such companies, and may, therefore, under the circumstances, well be held to have taken the place of the affidavit. It was not alleged that defendants had not made such declaration. The action could not be maintained.

Action dismissed.

J. H. N. Richard, for plaintiff.

Ives, Brown & French, for defendants.

(D. C. R.)

*COURT OF QUEEN'S BENCH—MONTREAL.**

Patent — Infringement — Measure of Damages.

Held, 1. A patent of invention of machinery may be infringed by the use of a machine dissimilar in appearance, if the principle patented be interfered with.

2. The measure of damages for infringement of a patent of invention, by using a patented machine purchased of a manufacturer of the invention, and not the inventor, is not the profit which the purchaser derived from the use of the patent. The true measure is the loss suffered by the patentee. *Pinkerton et al. & Coté,* Dorion, Ch. J., Monk, Ramsay, Cross, Baby, JJ., June 30, 1886.

Larceny as a Bailee—32-33 Vict., ch. 21—Deposit of sum of money—Evidence.

The prisoner was indicted for larceny, as a bailee, of a sum of money. The complainant produced a receipt, taken at the time of the deposit in the hands of the prisoner, by which it appeared that the deposit was "en attendant le paiement qu'il pourrait faire d'une même somme à R. A. Benoit."

Held :—That this receipt implied that the prisoner was to pay a similar sum, and not actually the same pieces of money, and that there was no larceny.

2. That parol testimony could not be admitted to vary the nature of the transaction. *Reg.* v. *Berthiaume,* Dorion, Ch. J., Ramsay, Tessier, Cross, Baby, JJ. (Baby, J., *diss.*,) Sept. 25, 1886.

Contract—Modification —Evidence — Statement of account by bookkeeper.

The respondent, by notarial agreement, leased to appellant the right to mine for asbestos, on certain property belonging to the respondent. Subsequently, the respondent agreed to reduce the amount of royalty he was to receive; but to what extent, the appellant and respondent did not agree. The appellant kept no regular books, but his son-in-law and agent, at all events for some purposes, kept full accounts, and the appellant was in the habit of referring those who dealt with him to this agent, and he had even paid respondent on the statements of this agent.

HELD :—That the appellant was bound by the statement of account of such agent, the amount so fixed being less than the respondent would be entitled to under the original agreement. *Jeffery & Webb,* Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. (Cross, J. *diss.*), June 30, 1886.

* To appear in Montreal Law Reports, 3 Q. B.

*SUPERIOR COURT—MONTREAL.**

Droit hypothécaire—Enregistrement—Description—Erreur.

JUGÉ :—1. Que la description d'un immeuble, pour les fins d'enregistrement d'un droit hypothécaire, est complète aux yeux de la loi en mentionnant le lot et le rang, ou partie du lot et le rang ;

2. Que, dans l'espèce, l'erreur commise dans l'acte constitutif d'hypothèque, par suite d'une erreur de clerc, quant au numéro de la subdivision du lot, n'affecte point la validité de l'hypothèque, attendu que l'identité de l'immeuble est bien établie et qu'il n'en est résulté aucun préjudice au défendeur ;

3. Que, dans l'espèce, le débiteur personnel qui a constitué l'hypothèque étant aussi l'auteur du défendeur, ce dernier se trouverait sans titre à l'immeuble, si celui de son auteur était illégal, insuffisant ou irrégulier, —ce qui ne saurait être, pusique le défendeur lui-même invoque le titre de son auteur comme parfait ;

4. Que, dans l'espèce, le défendeur a reconnu lui-même la validité de l'hypothèque et a même gardé entre ses mains, sur le prix de son achat, une somme suffisante pour payer la dite hypothèque au demandeur, à l'acquit de son auteur, et que, partant, sa défense est entachée de mauvaise foi, attendu qu'il a invoqué une prétendue irrégularité dont il n'a souffert aucun préjudice et qu'il a effectivement couverte par sa conduite et ses promesses.—*Boisvert* v. *Johnson,* en Révision, Jetté, Mathieu, Taschereau, JJ., 30 juin 1887.

*To appear in Montreal Law Reports, 3 S. C.

RECENT ENGLISH DECISIONS.

Sale—Set-off.—In an action against a purchaser for the price of goods sold through brokers, who, to the knowledge of the purchaser, sold sometimes for themselves and sometimes for principals, the purchaser cannot set off his general account with the brokers (*Isaac Cooke & Sons* v. *Eshelby*, 56 Law J. Rep. Q. B. 505).

Sheriff—Negligence.—An action for the balance of the proceeds of an execution may be brought by execution creditors against the executors of a deceased under-sheriff without waiving a claim for negligence joined with it (*Gloucestershire Banking Company* v. *Edwards*, 56 Law J. Rep. Q. B. 514).

Shipping—"Strike."—A 'strike' in a charter-party held not to include the workmen deserting their work through fear of cholera, for the purpose of exempting from demurrage (*Stephens* v. *Harris*, 56 Law J. Rep. Q. B. 516).

Insurance, Marine.—The co-owner of a ship, insured by another owner and member in a mutual association, not being himself a member, cannot be sued for a contribution (*United Kingdom Assurance, &c., Association* v. *Nevill*, 56 Law J. Rep. Q. B. 522).

Admiralty Law.—In a collision between a vessel in motion and a vessel at anchor, the burden of proof is on the former to show that the collision was not caused by any negligence on her part (*The Indus*, 56 Law J. Rep. P. D. & A. 88).

Collision Rule, Art. 3.—The placing of the side lights so as to be obscured from right ahead to the extent of three degrees, but so as to show otherwise a bright light over ten points of the horizon, held a compliance with the regulation (*The Fire Queen*, 56 Law J. Rep. P. D. & A. 90).

Wills.—An erasure of the testator's and witnesses' signatures with a knife by the testator held a revocation (*The Case of the Goods of Morton*, 56 Law J. Rep. P. D. & A. 96).

Criminal Law—Perjury.—A conviction for perjury committed in the absence of the registrar in bankruptcy, who had sworn the witness and left the evidence to be taken by a sworn shorthand writer, was quashed, as committed *non coram judice* (*Regina* v. *Lloyd*, 56 Law J. Rep. M. C. 119).

Contract—Consideration.—Forbearance by request to sue a debtor without binding contract, held a good consideration for promising to pay the debt (*Crears* v. *Burnyeat*, 56 Law J. Rep. Q. B. 518).

COPYRIGHT IN GOVERNMENT PUBLICATIONS.

The following Treasury minute dealing with the copyright in Government publications has been issued:—

Treasury Minute, dated August 31, 1887.

My Lords take into consideration the correspondence which has passed between the Treasury and the Stationery Office on the subject of copyright in Government publications.

The law gives to the Crown, or the assignee of the Crown, the same right of copyright as to a private individual. Consequently, if a servant of the Crown, in the course of his duty for which he is paid, composes any document, or if a person is specially employed and paid by the Crown for the purpose of composing any document, the copyright in the document belongs to the Crown as it would in the case of a private employer.

The majority of publications issued under the authority of the Government have no resemblance to the works published by private publishers, and are published for the information of the public and for public use, in such manner as any one of the public may wish, and it is desirable that the knowledge of their contents should be diffused as widely as possible.

In other cases the Government publishes at considerable cost works in which few persons only are interested, but which are published for the purpose of promoting literature and science.

These works are of precisely the same character as those published by private enterprise.

In order to prevent an undue burden being thrown on the taxpayer by these works, and to enable the Government to continue the publication of works of this character to the same extent as heretofore, it is necessary to

place them, as regards copyright, in the same position as publications by private publishers. If the reproduction of them, or of the most popular portions of them, by private publishers is permitted, the private publisher will be able to put into his own pocket the profits of the work, which ought to go in relief of the general public, the taxpayers.

The question, then, is, what are the classes of works the reproduction of which is to be restricted, or to be left unrestricted?

Government publications may be classified as follows:—

1. Reports of select committees of the two Houses of Parliament, or of royal commissions.
2. Papers required by statute to be laid before Parliament—*e.g.* Orders in Council, rules made by Government departments, accounts, reports of Government inspectors.
3. Papers laid before Parliament by command—*e.g.* treaties, diplomatic correspondence, reports from consuls and secretaries of legation, reports of inquiries into explosions or accidents, and other special reports made to Government departments.
4. Acts of Parliament.
5. Official books—*e.g.* Queen's regulations for the army or navy.
6. Literary or *quasi*-literary works—*e.g.* the reports of the Challenger expedition, the Rolls publications, the forthcoming State trials, the *Board of Trade Journal.*
7. Charts and Ordnance maps.

As respects the first five classes of publications, the reproduction of them, with certain exceptions, should not be restricted in any form whatever. Indeed, in most cases it is desirable that they should be made known to the public as widely as possible.

The first exception is, that Acts of Parliament and official books should not, except when published under the authority of the Government, purport on the face of them to be published by authority.

The second exception is, where a work of a literary or *quasi*-literary character comes accidentally within these classes. For example, the reports of the Historical Manuscripts Commission would, but for the fact that they were produced under the direction of a commission instead of under the Master of the Rolls, be published in the ordinary manner like the Rolls publications, and come within class 6.

So, again, a report to a Government department may be laid before Parliament made by a person of eminent scientific knowledge who is willing to give the Government and the public the advantage of his knowledge, but not to allow it to be reproduced for the private benefit of an individual publisher. Mr. Whitehead's reports on injurious insects are an instance of this case.

Other exceptions will, no doubt, from time to time occur, which can only be dealt with as they arise.

As regards the sixth and seventh classes above mentioned, it seems desirable that the copyright in them should be enforced in the interests of the taxpayer and of literature and science. For, as pointed out above, unless copyright is enforced, cheap copies of the works, or of the popular portion of them, can be produced by private publishers, who reap the profit at the expense of the taxpayer. And as such works are in any case a burden on the taxpayer, the greater the burden the fewer works can the Government, with justice to the taxpayer, undertake.

Notice of the intention to enforce the copyright in any work should be given to the public. In the case of future works this notice can be given by prefixing to the work a notice to the effect that the rights of copyright are reserved. In the case of past works it will be desirable to inform the publishing trade of the works the reproduction of which, without permission, is forbidden.

As respects Acts of Parliament, the Government, in obedience to the wishes of Parliament expressed by select committees, are bound to publish an edition of them by authority as cheaply as practicable, and a nearly similar remark applies to official publications. For this purpose the controller of the Stationery Office shall be appointed her Majesty's printer, but care will be taken not to infringe on any existing privileges granted by the Crown.

Let instructions be given to the controller of the Stationery Office and to the solicitor, in pursuance of this minute.

SALVAGE AND LIFE POLICIES.

The case of *Falcke* v. *The Scottish Imperial Insurance Company*, 56 Law J. Rep. Chanc.

707, reported in the September number of the Law Journal Reports, will help to dispel some not unnatural notions about the efficiency of paying the premiums on a policy of insurance. There is a certain natural justice about giving a special privilege to a person who keeps up the premiums. If he does it at the request of the person entitled to the policy, of course, he can recover what he has paid in respect of premiums. If, in consideration of such request, the policy is given to him, no doubt the law would imply that he was to be entitled to hold it until he was recouped—in other words, that he has a lien upon it. Whether he ever has a lien on a policy which is not in his hands is a question which, if decided in the negative, would have disposed of the present case at the outset. Lord Justice Fry touches upon it, but does not decide it, although the bent of his opinion is undoubtedly against the lien. The cases in which the policy is at large and is in the hands of the person fully entitled, and can be delivered to the person paying the premiums, are simple cases, but further difficulties arise under more complicated conditions such as existed in the case in question. There could hardly be a case where the policy upon which such lien was claimed played so slight a part, because the policy appeared all the time when events of any import were occurring to have been comfortably reposing in the strong-box of the office of its own origin, which had a first charge on it for advances.

The policy in question was for a large sum on the life of a French duchess, with a premium of over £1,000 a year. Having run two years, it was bought by one Emanuel for £100, and he appears immediately to have mortgaged it to the Scottish Imperial Insurance Company, the defendants, whose policy it was, for £1,000, and subsequently for more. Emanuel had a friend named Benn Davis, a solicitor, who had as a client Mr. Falcke, whose executrix and widow the plaintiff was. Benn Davis was entrusted with £6,500 to invest for Mr. Falcke, and one of the securities he took for £6,000 of this was a second charge on the policy covenanting to pay the premiums. Then came the crash. Emanuel filed his petition for liquidation in 1882, and obtained his discharge, one of the terms being that the equities of redemption of securities remained in him. None of the incumbrancers would pay the premiums; but Emanuel paid two through Davis, as he alleged at the request of Davis acting on behalf of all the incumbrancers, and also under an arrangement with Benn Davis to buy the policy for £50. Two years afterwards, Falcke died, and Benn Davis absconded. The plaintiff's action was brought against the company, Emanuel, and others to enforce her charge. The policy was sold, and the salvage, after paying off the company's mortgage, amounted to something like two thousand pounds. This was claimed by Emanuel in virtue of his having paid the premiums. The way in which it was put was that Emanuel had an interest in the policy, or thought he had, under the inchoate agreement, and that if he paid the premiums, he was entitled to be recouped by the incumbrancers. There were many difficulties about this contention. In the first case, it was not shown that Benn Davis had any authority to make the request from Falcke; and if he had, Emanuel's claim would be a debt against Falcke's estate, and not a lien. It was not a case in which Emanuel could plead a set-off, as the produce of the policy was in no sense in his hands. The value of the case, however, depends on the fact that many things were assumed for the purposes of argument by the Lords Justices, and the law laid down. Lord Justice Cotton enters into a full explanation of the authorities on the question. The cases cited on behalf of Emanuel all turned out to be cases in which the inference of request was or might have been drawn, while in this case there was no suggestion of a request, except from Benn Davis. The only case which told the other way was a decision in *Shearman v. The British Empire Mutual Life Assurance Company*, 41 Law J. Rep. Chanc. 466, in which Lord Romilly had allowed premiums made by a mortgagor as in the nature of salvage money as against the mortgagee. Lord Justice Cotton is unable to agree with this case, if that was the ground of its decision. Lord Justice Bowen and Lord Justice Fry concurred in the view of Lord Justice Cotton and Lord Justice Bowen took occasion in the course of the argument to state what should be noted—namely, that in his opinion the note to *Lampleigh v. Brathwait* in Smith's 'Leading Cases' is too broadly expressed when it says that, if a man takes the benefit of payments made, he must be taken to have adopted them and ratified them. The breadth of this proposition is such that it would impose a liability on a man who was asked to dinner to pay his host's butcher's bill.

On principle there was not much to be said for the contestation set up. The analogy of salvage at sea was picturesque but hardly seriously made, although Lord Justice Bowen takes the trouble to dispose of it by showing that goods at sea are different from goods on land, and that the law of salvage does not arise from general principles, but from special circumstances of the sea, and from maritime custom. At the same time the case is of considerable value as disposing of an idea which certainly does run through certain cases and books, that a volunteer who incidentally confers some benefit on another or his property is entitled to be recouped, apart from the ordinary laws of contract. — *Law Journal* (London).

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SUPERIOR COURT.

SHERBROOKE, October 31, 1887.

Before BROOKS, J.

THE CORPORATION OF THE TOWNSHIP OF CLIFTON v. THE CORPORATION OF THE COUNTY OF COMPTON.

Action—Interest—Verification of Payment.

HELD:—*That if A pays a debt which he owes to B, and takes from B a receipt sous seing privé, and the latter afterwards deny that such a payment has been made, and dispute the genuineness of the receipt, A may bring an action against B for the purpose of having the receipt verified.*

Plaintiffs alleged, that they are a municipal corporation within the County of Compton, that a certain by-law had been passed by the county council of the defendant corporation, whereby the County of Compton took certain shares in the capital stock of the International Railway Co. That the said County of Compton issued debentures to pay for its said shares; and that to meet the interest and sinking fund of the said debentures, there had been imposed upon the plaintiffs in common with the other municipalities then within the said county, a certain annual tax. That plaintiffs had paid the said tax for the year 1882 to the secretary-treasurer of the said Corporation of the County of Compton, and taken in acknowledgement of said payment the *sous seing privé* receipt of the said secretary-treasurer. That notwithstanding such payment and the giving of such receipt, defendants had denied that the said tax had been paid, and declared that the said receipt was a forgery. And plaintiffs asked that the judgment declare the receipt to be verified, and that defendants be ordered to direct their secretary-treasurer to credit plaintiffs with the payment of the tax in question on the books of the Corporation of the County of Compton.

Defendants among other pleas, filed a demurrer, alleging that the plaintiffs disclosed by their declaration no such interest as would entitle them to bring their action, and that the conclusions of the declaration did not flow from the allegations.

At the argument, it was argued on behalf of defendants, that they could not be called upon to direct their secretary-treasurer to make the entries in the books of the corporation, as asked for by plaintiffs; because the secretary-treasurer, is, as regards the manner in which he must keep the books of the corporation, the servant of the Provincial Secretary; and article 162, M. C., was cited in support of this pretension. The court, however, was of opinion that the article cited formed no obstacle to the granting of plaintiffs' conclusions.

The sole question to be determined, in the opinion of the court, was that of plaintiffs' interest. Supposing the allegations of the declaration to be proved; had plaintiffs such an interest as would support their action? The court thought they had. If forced to wait till defendants brought an action, they might be unable to make their proof, on account of the death or absence of necessary witnesses. Interest and right of action are co-extensive, and an action may be brought when the right arises. Ramsay's appeal cases, 16 and 20. It had been objected that the secretary-treasurer's signature had never been formally denied in the manner provided by article 145, C. C. P., but this article applied only to the procedure in cases before the courts. It had been further argued that the denial of payment and receipt, to give plaintiffs a right of action, would have to be made by resolution of the county council, and no such resolution had been alleged. The corporation could not be bound by what individual councillors might have said. This question, the court said, might arise, after the proof had been made, but the denial (though the plaintiffs might fail to prove it) had been sufficiently alleged. The demurrer must be dismissed.

The following is the written judgment of the court:—

"The Court . . . . . . considering that the plaintiffs have disclosed in their declaration

a right of action, to have the alleged receipt and payment set up in their declaration as made by them to defendants' officer, to wit, their secretary-treasurer, and which plaintiffs allege that defendants deny, pretending the said receipt to be a forgery, verified and declared genuine; and that as against the allegations of plaintiffs' declaration, the *défense en droit* of defendants is unfounded; doth dismiss the said *défense en droit* with costs."

Demurrer dismissed.

Camirand, Hurd & Fraser, for plaintiffs.

Ives, Brown & French, for defendants.

(D. C. R.)

COUR DE CIRCUIT.

MONTRÉAL, 10 novembre 1887.

Coram TASCHEREAU, J.

CAUMARTIN v. ARCHAMBAULT ET AL.

Succession—Renonciation—Frais.

JUGÉ :—*Que des héritiers peuvent renoncer à une succession même après enquête et audition au mérite, dans une cause où ils sont poursuivis comme tels, mais que tous frais seront à leur charge.*

Le 5 septembre dernier (1887), M. Edmond Caumartin poursuivit les défendeurs pour la balance d'un compte de pain ($31.25) à lui due par feue Dame Adéline Senécal, la mère des défendeurs.

Le demandeur alléguait que les défendeurs Ludger Archambault, Marie-Louise Archambault, Caroline Archambault et Azélie Archambault, étaient issus du mariage de feu Alexandre Archambault et de feue Adéline Senécal; que ces deux derniers étaient décédés *ab intestat:* le père depuis une douzaine d'années, la mère le 27 mars 1885; que les défendeurs demeuraient avec leur mère à son décès; qu'il avait fourni le pain nécessaire à la subsistance de la famille durant une couple d'années avant mars 1885; qu'à cette date feue Adéline Senécal lui devait le montant réclamé par l'action, et que les défendeurs refusaient de le payer malgré qu'ils fussent les héritiers apparents de la dite Dame Adéline Senécal, leur mère, et qu'ils fussent restés en possession de tous ses biens; que de plus ils avaient fait des actes d'addition d'hérédité et qu'ils devaient être condamnés à lui payer la balance de son compte.

Les défendeurs plaidèrent qu'ils n'avaient jamais accepté la succession de leur mère et conclurent au renvoi de l'action.

A l'enquête il fut prouvé que feue Adéline Senécal tenait avant son décès une maison de pension sur la rue St-Hubert, mais que tous les meubles qui garnissaient la maison appartenaient aux trois défenderesses, à titre de donation entre-vifs faite par une de leurs tantes qui de plus avait payé pour leur éducation et avait continué après leur sortie du pensionnat à payer leur pension à feue Adéline Senécal jusqu'au décès de cette dernière; que la dite feue Adéline Senécal n'avait jamais contribué en aucune façon à l'ameublement de la maison, et qu'elle ne possédait que ses hardes et linges de corps, qu'un de leurs beaux-frères s'était approprié pour s'indemniser de ses déboursés pour frais funéraires et de dernière maladie.

Le demandeur ayant failli dans sa preuve quant à son allégation d'addition d'hérédité, les défendeurs demandèrent à renoncer en justice, ce qui leur fut accordé par la Cour dans les termes suivants:

"La Cour donne acte aux défendeurs de leur déclaration judiciaire qu'ils renoncent à la succession de leur mère, et renvoie l'action quant au montant réclamé, mais condamne les dits défendeurs aux frais, attendu qu'ils n'ont pas renoncé avant l'action, distraits à MM. Lavallée et Olivier, avocats du demandeur."

Lavallée & Olivier, pour le demandeur.

Duhamel, Rainville & Marceau, pour le défendeur.

(L. A. L.)

*SUPERIOR COURT—MONTREAL.**

Transfer of debt—Action of transferee—Signification—C. C. 1571.

HELD:—That service of an action by the transferee of a debt, setting up the transfer, is equivalent to signification of the transfer. *Nicholson* v. *Prowse*, Doherty, J., March 9, 1887.

*To appear in Montreal Law Reports, 3 S. C.

Reddition de compte—Forme—Charges du notaire — Pension — Prescription — Preuve testimoniale—Legs particulier—Intérêt.

JUGÉ :— 1o. Qu'une personne tenue de rendre compte de son administration, peut faire son compte sous seing-privé, en brevet ou portant minute devant un notaire, à son choix, et en charger le coût dans son compte;

2o. Que les charges de $75.00 pour un inventaire et $75.00 pour une reddition de compte portant minute, dans une succession où le montant en partage est minime, mais où les actes ont été longs et détaillés, ne sont pas exorbitantes et n'excèdent pas ce que permet de charger le tarif des notaires ;

3o. Que lorsqu'une personne pensionne pendant plusieurs années chez une autre sans ne lui rien payer, mais dans son testament met un legs de $6.00 par mois pour sa pension, déclarant d'ailleurs qu'il n'entend payer sa pension qu'à sa mort, les héritiers de ce pensionnaire défunt ne peuvent plaider prescription à une action en recouvrement de cette pension ;

4o. Que l'on peut prouver par témoins le paiement de diverses sommes d'argent au-dessous de $50.00 chacune, payées à diverses époques quoique le total excède $50.00 ;

5o. Que les héritiers ont droit aux intérêts que produisent les legs particuliers tant qu'ils n'ont pas été acquittés par l'exécuteur testamentaire. *Mayer et al.* v. *Léveillé*, Papineau, J., 17 oct. 1887.

Vente pour argent comptant—Défaut de paiement —Livraison— Saisie-revendication.

JUGÉ :—1o. Que dans une vente pour argent comptant, si l'acheteur refuse de payer comptant et n'offre que des valeurs commerciales, la vente est en loi sans effet ;

2o. Que dans le cas où, sous ces circonstances, l'objet vendu a été livré, le vendeur restant propriétaire peut le faire saisir-revendiquer. *Pominville* v. *Deslongchamp*, Ouimet, J., 30 sept. 1887.

Locateurs et locataires — Baux de meubles — Juridiction.

JUGÉ :—Que les procédures spéciales permises par l'article 887 du Code de Procédure Civile entre locateurs et locataires ne s'appliquent qu'aux baux d'immeubles et non à ceux de meubles. *Lusignan* v. *Rielle et vir*, Gill, J., 3 juin 1887.

Maître et ouvrier—Responsabilité—Echafaudage.

JUGÉ :—1o. Que le maître est responsable du dommage causé par son ouvrier à un autre ouvrier, dans l'exécution des fonctions auxquelles il est employé ;

2o. Que par suite, il est responsable du dommage causé à un de ses employés, par l'écroulement d'un échafaud construit par un autre de ses ouvriers, sur son ordre. *Bélanger* v. *Riopel*, Mathieu, J., 19 oct. 1887.

COURT OF QUEEN'S BENCH — MONTREAL.*

Account — Settlement between Principal and Agent—Action en réformation de compte.

HELD :—That where a principal, during a long course of years, has accepted without any objection the accounts rendered by his agent of his administration, he is not entitled to sue for a complete account of the entire period of administration. Where errors in the accounts rendered are discovered subsequently, the proper preceeding is an action *en réformation de compte*, asking that such errors be corrected, and that the balance due be paid. *Stephens & Gillespie*, Dorion, Ch. J., Monk, Ramsay, Cross, JJ., Nov. 23, 1885.

Constitutional Law—37 Vict. (Q.), ch. 51—39 Vict. (Q.), ch. 52—Taxation of Ferry Boats —Jurisdiction of Harbour Commissioners.

HELD (affirming the judgment of Loranger, J., M. L. R., 2 S. C. 18):—1. The Acts 37 Vict. (Q.), ch. 51 and 39 Vict. (Q.), ch. 52, in so far as they authorized the levying of a tax upon ferry-boats, including steamboats, carrying passengers between Montreal and places distant not more than nine miles, are not *ultra vires* of the local legislature, ferries within a province being a subject of exclusive provincial legislation, and being also a matter pertaining to municipal institutions, and of a local nature in the province, and

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* To appear in Montreal Law Reports, 3 Q. B.

moreover, the power to tax ferry-boats being possessed by the city before Confederation.

2. The jurisdiction of the Harbour Commissioners of Montreal within certain limits, does not exclude the right of the city to tax and control ferry-boats within such limits.

4. An Act consolidated in similar terms by a subsequent Act is not repealed by such consolidation, but is continued in force thereby. *La Compagnie de Navigation de Longueuil & La Cité de Montréal*, Dorion, Ch. J., Tessier, Cross, Baby, JJ., (Cross, J., *diss.*), March 26, 1887.

Action—Property registered in name of owner's agent— Costs.

HELD:—That while a creditor has a right of action against the agent of his debtor, in whose name real estate of the debtor is registered, to have it declared that such property really belongs to the debtor, yet where it appears that the action is unnecessary, the judgment maintaining it will be confirmed without costs in either Court. *Schwob & Baker et al.*, Monk, Ramsay, Tessier, Cross, Baby, JJ., June 30, 1886.

SERVANTS' WAGES DURING ILLNESS.

A recent decision of the courts reversing a decision of a magistrate, where an apprentice, who had been disqualified by illness from work, was held, nevertheless, entitled to claim the usual wages during this disability, shows that justices are apt to go wrong on this point. And as the subject is of great practical interest and the circumstances must be of frequent occurrence, it will be useful to notice some of the authorities, so that justices may be able more accurately to discriminate the important elements of the question. In the case of domestic servants, the difficulty caused by illness is mitigated by this circumstance, that owing to the ready way of determining the contract by a month's notice, the loss can seldom be very serious if deemed irksome; but as a rule, the master requires to determine the contract altogether, in order to escape the duty of paying the usual wages while the servant is disabled, for as an old case expresses it, "the master takes his servant for better and for worse, for sickness and for health." Common charity has not allowed this point to be often contested in the case of domestic servants, but in the case of workmen and apprentices and skilled artists, there have been occasional litigations, and some of them attended with nicety. Again, there are peculiar contracts where it is necessary for a court to consider whether the good health of the contracting party was not necessarily assumed as a condition of the contract or a basis on which the whole contract was founded. The simplest of the cases may however first be looked at.

In *Harmer* v. *Cornelius*, 5 C. B. (N. S.) 236, the question arose whether an artisan who has been engaged for a term to work in his art, and proved incompetent, could be discharged on that account, and the right to dismiss servants for illness, and the relations between master and servant were carefully considered by judges of great insight. A scene painter had been employed at wages of £2 10s. per week, to work at Manchester. An advertisement had been put in a theatrical newspaper asking for two first-rate panorama and scene painters, and the plaintiff was engaged and was set to paint some scenes, but in a short time was dismissed as incompetent. He then sued the employer for damages. After time taken to consider, Willes, J., delivered the judgment of the court to the effect, that when a skilled laborer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. If there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. Here the correspondence showed that there was an express representation that the plaintiff did possess the requisite skill. So the plaintiff lost his cause.

This decision paved the way to another, more closely bearing on the subject of a servant's illness, namely, *Cuckson* v. *Stones*, 1 E. & E. 248. In that case, the plaintiff had entered into an agreement to serve the defendant for ten years in the capacity of a brewer, at weekly wages of 50s. with dwelling-house

and coals in addition. During the service, he was taken ill at Christmas, 1857, was confined to his bed until March following, and was unable to attend to work till June 19 following, when he tendered his services and was again employed as before; but the employer refused to pay the wages during his illness, and for this sum, the servant sued. It was admitted that the contract had never been rescinded. Lord Campbell, C. J., said the court agreed with what Willes, J., said in *Harmer* v. *Cornelius*, and if the plaintiff, from unskilfulness, had been wholly incompetent to brew, or by the visitation of God, he had become, from paralysis or any other bodily illness, permanently incompetent to act as brewer, the employer might have determined the contract. He could not be considered incompetent by illness of a temporary nature. But if he had been struck with disease, so that he could never be expected to return to his work, the employer might have dismissed him, and employed another brewer in his stead. Instead of being dismissed, the servant returned to the service, and was employed as before. The contract accordingly being in force, and never rescinded, there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that under this contract there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force, there was no difference between his being so disabled for a day, or a week, or a month. Hence the servant succeeded in recovering his wages.

In the case of an apprentice becoming disabled, something obviously turns on the language of the indenture. In one remarkable case of *Boast* v. *Firth*, L. R., 4 C. P. 1, the father of the apprentice had covenanted that the apprentice would honestly remain with and serve the plaintiff as his apprentice during all the term agreed upon. And the master sued the father on the ground that this covenant was broken. The defence was that by the act of God, the apprentice had become permanently ill, and the father thereby was excused from performance of his covenant. The question raised was whether permanent illness caused by the act of God, and which commenced after the making of the indenture, was an answer. The court said that the whole contract was of a personal nature, and it must be taken that permanent illness or death must have been within the contemplation of the parties, and would override the liability of the parties under the covenant. A condition was obviously implied that the apprentice should continue in such a state as to be able to perform the service. And on that footing the father was held to be excused.

A case of a similar contract occurred in *Robinson* v. *Davison*, L. R., 6 Ex. 269. The plaintiff was a contractor for musical entertainments, and had agreed to pay £20 to the husband of Arabella Goddard so that she would perform on the piano with other artists, but she failed to appear at the appointed time. The reason was that she was too ill to perform. The plaintiff sued for damages for breach of the agreement. The defendant accordingly set up this excuse as an answer to the action. The question again was, whether illness was an excuse, and the point was argued at length. Kelly, C. B., in giving judgment, quoted another decision in *Hall* v. *Wright*, E. B. E. 746, where it was laid down as law that all contracts for personal services which can be performed only during the life-time of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by a painter to paint a picture within a reasonable time would be deemed subject to the condition that if the painter became paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death. So in this case of the artist engaged to play the piano, the parties must have known their contract could not be fulfilled unless the defendant's wife was in a state of health to attend and play at the concert on the day named. The court at the same time held that it was the duty of the lady to give early notice of her

inability, so as to lessen the loss that might fall on the plaintiff.

Thus the servant is, as a rule, entitled to the wages during illness, and if sued, can set up illness as an excuse for performance. Here again arises a distinction that might occur to most people, namely, whether if the illness is caused by the servant's imprudence or misconduct, the same consequence follows. This very point was decided in *R.* v. *Raschin*, 38 L. T. (N. S.) 38. The plaintiff was a merchant's clerk engaged at a salary of £120 a year. He became unwell on 30th of July, and obtained permission to be absent from work till 6th August following. He remained away, and was under medical treatment and unable to return till the first week in September, when he tendered his services, which were declined. The employer had meanwhile, on 20th August, given him notice terminating the employment from that date. He claimed wages from 1st August to 20th September, during the absence; but the employer declined, on the ground that the clerk had by his own misconduct (which was proved at the trial) rendered himself incapable of performing his duties. The plaintiff being nonsuited, leave was given to enter a verdict for the plaintiff, and after argument, the court held the plaintiff to be entitled. Cleasby, B., said that the question was, whether or not illness was such an excuse as to disentitle him to recover wages during his absence from the employment in consequence of it. *Prima facie* illness is to be attributed to the act of God, and the court is not justified in going back for any length of time and entering into an investigation as to what may have been the cause of it. The effect of disability from illness is not to be extended. The illness which rendered the plaintiff unable to perform his duties for a time came upon him unexpectedly, and the court cannot go back to first causes and into the question of how it arose. The maxim, *causa proxima non remota spectatur*, is applicable. As to how precisely the disease arose there may be different opinions and the greatest uncertainty. It was merely a misfortune which could not have been foreseen at the time the contract was made, and the servant was entitled to wages.

The case of *Carr* v. *Hadrill*, 39 J. P. 246, may also be referred to as confirming the previous cases. A biscuit baker had been employed on the terms of a week's notice. One day he sent word that he was ill and unable to attend, and on inquiry this was found to be correct. After an absence of five weeks he returned, when the master refused to allow him to resume work. No notice had been given by the master to quit the service. The Court of Queen's Bench held that the contract was not discharged by the servant's absence from illness, and being still a servant, was entitled to his wages, and to return to work till he got a week's notice to leave.

The same doctrine was fully confirmed in the case of *Poussard* v. *Spiers*, 1 Q. B. D. 410. The plaintiff agreed to sing and play in a female part in a new opera at a weekly salary of £11 for three months. The first performance was to be on the 28th November. She attended several early rehearsals, but the final rehearsal had not arrived when the plaintiff was taken ill. She continued unwell and unable to attend the rehearsals for the first performance on 28th November, so that another artist had to be engaged temporarily. On the 4th December, the plaintiff was well enough to perform and tendered her services, but these were declined. The question of importance was whether the employer was entitled to rescind the contract when it was discovered that the plaintiff was so ill as to endanger the success of the opera. And the court held that as the inability to attend the first performance went to the root of the matter, it entitled the employer to rescind the contract.

The recent case of *Patten* v. *Wood*, was scarcely needed in order to ascertain the law bearing on these matters, but as the magistrate made a mistake, it obviously requires to be borne in mind how the law stands. The appellant, a plumber, had taken as apprentice the respondent, and the deed covenanted that he should pay the apprentice, after a certain date, 14s. a week. During that year. the apprentice had a tumor in his right hand, and it required him to go to a hospital to be treated, and he became an in-patient for a fortnight and underwent an operation. For

the next fortnight he was an out-patient. The apprentice claimed wages during his absence, and the master refused, whereupon the application was made to justices under 38 & 39 Vict., ch. 90, for an order on the master to pay these. The magistrate refused, and held that the master was not liable. The court however held that the magistrate was wrong, and that the series of cases which had established the right of the servant had been overlooked. Such a point can scarcely indeed be argued when the authorities are properly understood and applied.—*Justice of the Peace.*

PRESUMPTIONS AND THE DATE OF DEATH.

The case of *Rhodes* v. *Rhodes*, 56 Law J. Rep. Chanc. 825, reported in the October number of the Law Journal Reports, deals with a very interesting question of domestic law. In the year 1850 Alfred Rhodes emigrated to South Australia, and was last heard of in 1873. Administration to his personal estate was taken out some time after 1880, and it appeared that the persons who would be his next-of-kin if he died in 1873 were altogether a different set of persons from his next-of-kin if he died in 1880—that is to say, no one person filled the character of one of the next-of-kin at both dates. Again, the persons who filled the character of next-of-kin in 1880 would not have filled that character in, say, 1875, or if they filled it they would have taken a different proportion of his personalty at that date. The case, which arose before Mr. Justice North under an originating summons, consisted of claims by the next-of-kin in 1873 and claims by the next-of-kin in 1880, and he decided that he could give the property to no one of those persons, because it was impossible to say that the presumption of law was in favor of the deceased having died immediately after his being last heard of, and equally impossible that it should exclude all persons who were next-of-kin at dates between the termini at any one of which the deceased might have died. The facts were perhaps rather exceptional, but they suggest some interesting questions in regard to this branch of the law of presumptions.

In the first place it may be as well to get rid at once of the idea that the law presumes the death to have taken place at the *terminus a quo.* The suggestion has really only been thrown out as a *reductio ad absurdum* of the notion that there is a presumption in favor of the death at the *terminus ad quem.* Lord Justice James is, we believe, responsible for the suggestion when he said, in the case of *In re Lewes' Trusts*, 40 Law J. Rep. Chanc. 602, that "if anything is to be presumed it would be that the death took place on the the first day of the seven years," as to which Mr. Justice North says truly, "I do not think that was the opinion of the Lord Justice." It is impossible to say that the law presumes that because a man has been unheard of for seven years he died at the very moment when he was last heard of. The other view, which was actually taken by Vice-Chancellor Malins in the unreported case of *Re Westbrook's Trusts*, that the date is at the end of the seven years, is more plausible. The argument is that, as the law does not presume him dead till seven years are passed, he must be taken to have died at the end of the seven years. This, however, is a confusion of one date with another. It is not correct to say, as is sometimes said, that the law does not presume that he died at any particular date. It presumes that he died at a date represented by, say, 1877-1883, which is as much a date as November 1. It is not so detailed a date, but the same difficulty might arise in regard to the hour of a man's death. Suppose, for instance, a man is missed on a Wednesday, and is found dead early on Thursday morning, and it is material whether he died on the one day or the other, the law has no presumption on the subject; and if a succession to property depended on the fact, and there was no reasonable evidence one way or the other, the law falls back on its ultimate resource *ei incumbit probatio qui dicit,'* and the party who has to prove the fact fails. Similarly in regard to two persons being drowned in the same shipwreck, although other systems of law have artificial distinctions in regard to age and sex, the English law has

none. Sometimes, of course, the period of seven years is a sufficiently close date for the purposes of the succession to the dead man. If his heir was the same person at the beginning of the seven years as at the end, he must have been his heir when he died, because the law presumes that he died during that period. If his wife was alive during the whole of the seven years she would have her half share, because, whenever he died, as it is presumed he did, she must have been his widow, aithough, if no one of the next-of-kin occupied that potential position during the period, the other half would go to the Crown.

The law, in fact, was fully settled in the case of *Doe* v. *Nepean*, 7 Law J. Rep. Exch. 335, by the decision of the Exchequer Chamber. It disposes by anticipation of the view of Vice-Chancellor Malins by saying: "Of all the points of time the last day is the most improbable," which is no doubt true. If the considers a man dead after a silence of seven years, it is because of an experience that a man does communicate with his friends once in seven years, and the nearer the seven years are to elapsing, the more likely is it that he would have communicated if he were not already dead. Lord Justice James's proposition that "if anything is to be presumed it would be that the death took place on the first day of the seven years" was evidently intended to clinch the proposition that the last day is the least probable, but it is more epigrammatic than true, because it cannot even be said that the first day is the most probable. All that can be said is that the probabilities are in favor of the date being in the course of the first year, but even that would depend on the habits of the deceased in writing home. The law, however, does not encourage speculations of this kind. Other systems of law, desiring to be universal, invent ingenious tests to decide the survivorship of commorientes and the like, but the English law does not pretend not to have gaps, and is content in many cases, when there is no reasonable evidence or presumption one way or the other, to leave legal rights as they stand.—*Law Journal* (*London*).

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Nov. 5.

Curators Appointed.

Re Alphonse Lafontaine, hotel keeper, Montreal.—J. A. Porlier, Montreal, curator, Oct. 27.

Re Damase Moineau, trader, Montreal.—W. A. Caldwell, Montreal, curator, Oct. 27.

Dividends.

Re Dery & La Rue, St. Charles.—First and final dividend, payable Nov. 19, H. A. Bedard, Quebec curator.

Re Irving & Sutherland, Montreal.—First and final dividend, payable Nov. 23, A. W. Stevenson, Montreal, curator.

Re Ferdinand Jobin.—First and final dividend, payable Nov. 26, Ed. Begin, Quebec, curator.

Re Pinkerton & Turner, Montreal.—Second and final dividend, payable Nov. 23, A. W. Stevenson, Montreal, curator

Re Sharp & McKinnon, Montreal.—Second and final dividend, D. L. McDougall and David Seath, Montreal, joint curators.

Re Chas. A. St. Pierre.—First and final dividend, payable Nov. 26, Ed. Begin, Quebec, curator.

Quebec Official Gazette, Nov. 12.

Judicial Abandonments.

Eugène Pommier, St. Chrysostome, Nov. 3.

Curators appointed.

Re Audet & Robitaille.—W. H. Brown, Quebec, curator, Nov. 2.

Re F. J. Cross.—James Alexander, Richmond, curator, Nov. 8.

Re Marie Barlow, widow of F. Beauchemin, Becancour.—Kent & Turcotte, Montreal, curators, Nov. 2.

Dividends.

Re Louis Collin & Frère, dry goods, Quebec.—First dividend, payable Nov. 25, H. A. Bedard, Quebec, curator.

Re A. T. Constantin & Co., dry goods, Quebec.—Third dividend, payable Nov. 25, H. A. Bedard, Quebec, curator.

Re S. Desormeau, Buckingham.—First and final dividend, payable Nov. 25, John McD. Hains, curator.

Re McDougall, Logie & Co.—First dividend, payable Nov. 29, A. F. Riddell, Montreal, curator.

Re McKenzie & Co., Buckingham.—First and final dividend, payable Nov. 17, J. McD. Hains, Montreal, curator.

Re James Murray & Co.—First and final dividend, payable Nov. 17, J. McD. Hains, Montreal, curator.

Re L. F. Rhéaume.—First dividend, payable Nov. 30, Kent & Turcotte, Montreal, curator.

Re Jacques Villeneuve.—First and final dividend, payable Dec. 1, C. Desmarteau, Montreal, curator.

Separation as to property.

Elizabeth Chrétien vs. Joseph Rivais, farmer, St. Norbert, Oct. 31.

Marie Louise Gagné vs. Louis Philippe Pleau, merchant, Three Rivers, Sept. 21.

Catherine Smith vs. James Farrell, clerk, Montreal, Sept. 17.

Appointment.

Edwin Ruthven Johnson, advocate, to be registrar of Sherbrooke *vice* Daniel Thomas, Nov. 9.

The Legal News.

VOL. X. NOVEMBER 26, 1887. No. 48.

The *Law Journal* (London) gives the following explanation of the incidents attending Mr. O'Brien's incarceration, which were confused in the cable despatches:—"The course adopted by the Recorder of Cork in first holding that Mr. O'Brien must not leave the building, then that he ought to be permitted to go out, and, thirdly, in explaining that he did not mean to interfere, and allowing Captain Stokes, the divisional magistrate, to take him into custody, is somewhat puzzling, and has naturally given rise to misapprehension. The truth is that the Recorder of Cork, although his sense of his own dignity or that of the Court which he represents cannot be said to be high, acted within the strict letter of his rights. The only duty which he and his Court had performed was that of confirming Mr. O'Brien's conviction by the Court of Summary Jurisdiction. As to Mr. O'Brien's detention or release, like Gallio, he cared for none of these things. The conviction was not the conviction of the recorder, nor of the Cork Quarter Sessions, and Mr. Hamilton had no concern in it, except so far as all the Queen's subjects are concerned in the execution of the law, none the less when they happen to be recorders and are sitting in their own Court. On the other hand, the action of Captain Stokes was not only justifiable, but obligatory. Mr. O'Brien had been convicted of a criminal offence, and sentenced to a term of imprisonment by a Court of competent jurisdiction. No warrant is required to detain a person so situated, and a police officer set to do his duty in a Court of law would be guilty of something like what the law calls an escape if he permitted his departure. Under the English Summary Jurisdiction Acts when a conviction is confirmed on appeal, the law is left to take its course. The Court of Summary Jurisdiction, no doubt, issues a warrant in due course for the protection of the gaoler, but no one ever heard before that between the confirmation and the issuing of the warrant the convict was entitled to a run for his liberty. Under the Irish Summary Jurisdiction Act the form is for the clerk of the peace, after the decision of the Court of Appeal, to return a certificate of it to the petty sessions, and when the order has been confirmed the justices are to issue a warrant accordingly; but the legal consequences of a conviction are not suspended until this form is gone through. The fact that Mr. O'Brien had signed recognizances binding him 'to prosecute his appeal and not depart the Court without leave,' must have brought this state of the law home to him with great force."

In *Evans* v. *Von Laer*, the U. S. Circuit Court, Dist. Mass., Sept. 8, 1887, held that Montserrat being the name of an island from which both parties import lime juice, the complainants, in the absence of fraud, were not entitled to the exclusive use of the word "Montserrat" as a designation for lime juice, although their article may have acquired a high reputation for purity and strength, while that of defendant may be of an inferior quality. In the absence of fraud the complainants cannot enjoin the defendant from the use of a geographical name. This was settled in the case of *Canal Co.* v. *Clark*, 13 Wall. 311, where the Court refused to enjoin the defendant against calling their coal "Lackawanna Coal," and where it was held that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation. The fact that such use by another person may cause the public to make a mistake as to the origin or ownership of the product can make no difference, if it is true in its application to the goods of one as to the other. Purchasers may be mistaken, but they are not deceived by false representation, and equity will not enjoin against telling the truth.

The following judicial appointments are gazetted for the Province of Quebec:—Louis Tellier, Esq., Q.C., of St. Hyacinthe, to be a

puisné Judge of the Superior Court, *vice* the Hon. L. V. Sicotte, resigned. Alfred Napoléon Charland, Esq., Q.C., of St. John's, to be a puisné Judge of the Superior Court, *vice* the Hon. H. W. Chagnon, resigned.

In the Province of Ontario a number of appointments and changes have been rendered necessary by the death or resignation of late occupants of the Bench. The Hon. John Douglas Armour, one of the Justices of the High Court of Justice, has been appointed President of the Queen's Bench Division, with the title of Chief Justice, *vice* Sir Adam Wilson, resigned. Mr. Justice Thos. Galt has been appointed Chief Justice of the Common Pleas, *vice* Sir Matthew Crooks Cameron, deceased. Wm. C. Falconbridge, Q.C., has been appointed a Justice of the Queen's Bench Division.

In Manitoba, Mr. Justice Taylor has been appointed Chief Justice of the Queen's Bench, *vice* Chief Justice Wallbridge, deceased; and the place of Mr. Justice Taylor has been filled by the appointment of John F. Bain, Esq., of Winnipeg.

At a recent meeting of barristers, solicitors and students in the Inner Temple Hall, a resolution in favor of the amalgamation of the two branches of the profession was carried by a majority of two.

The profession in England are complaining of a falling off in business. At Manchester the cause list consisted of only fourteen cases, two for trial by special jury, six for trial by common jury, and six non-jury cases. "One remarkable feature of the present sittings in the Queen's Bench Division," says the *Law Times*, "has been the almost entire absence of important causes. Eliminate actions for libel and slander, and the lists would be seriously diminished. But non-jury causes present the most singular absence of substance, the proportion of undefended being large, and many cases involving very small issues."

SUPERIOR COURT.

SWEETSBURG, Nov. 14, 1887.

Coram TAIT, J.

HON. HONORÉ MERCIER es qual. v. THE WATERLOO & MAGOG RAILWAY CO.

Injunction — Waterloo & Magog Railway — Change of location—Rights of the Crown— 46 Vict. (Q.,) ch. 97.

HELD:—*That any lien which the Crown might otherwise have had on the defendants' railway, arising out of the payment of subsidy, was waived by authorizing the company to sell their road, and particularly by 46 Vict., ch. 97 (Q.,) authorizing them, without any reserve whatever, to cancel the bonds issued under their act of incorporation and to issue new bonds, and to convey the road to trustees with power, in certain circumstances, to take possession thereof, free and clear from all liability for other debts contracted by the company; and hence the Crown has no interest by injunction to prevent a change of location.*

2. *That if any lien still exists in favor of the Crown, it would follow the road into the hands of the company to whom the defendants propose to sell it.*

3. *That the proposed changes in the line of the railway are not contrary to what was contemplated when the Government subsidy was granted to it, and are authorized by sec. 7, s.s. 17, of the Provincial Railway Act of 1869.*

PER CURIAM:—

This is a petition by the Attorney-General of this Province, asking that a writ of injunction be issued ordering defendants to suspend "all acts, proceedings and works respecting the change of the present location of their railroad and the change of its grades and alignments, and respecting the removal of the rails and materials of the said railway and the discontinuance of the use of any portions of it for railway purposes."

An interlocutory order was granted, enjoining defendants in the terms of the demand, at the time the petition was presented. Proof was taken and the case argued before me on the 4th instant, and now comes up for final judgment.

The petitioner set up the incorporation of the defendants, and alleged that under certain statutes mentioned, defendants had received from the Crown, by the Provincial Government, subsidies amounting to over $100,000; that defendants cannot change the course and direction of their railway without approval of the Legislature of Quebec; that they are subject to the provisions of subsections 4, 5, 6, 7 and 8 of section 5 of the Provincial Act 32 Vic. cap. 52, which gives the Lieutenant-Governor in Council the right to order a special inspection of the road, and provides that upon refusal to make required reparation after inspection, or upon interposing or allowing any obstruction to such inspection, the entire railway and all its appurtenances and franchises shall, *ipso facto*, become and be vested in the Crown for the public uses of the province. The petitioner then alleged that the Crown had, therefore, a large interest in the railway which might become its property, should defendants refuse to conform to law, and charged that defendants "now intend and are immediately about to change the present location of their railway, its grades and alignments and to remove the rails and materials, and discontinue the use of certain portions for railway purposes; and that in fact it is the intention of defendants to remove entirely its railway and to destroy and remove the road, rails and property in which the Crown has an interest and a lien for the subsidies granted to defendants."

The defendants pleaded, first, a demurrer, upon which an order, *preuve avant faire droit*, was made, and in which they stated in substance that the petitioner was not entitled to the writ because the Crown did not show sufficient interest, or that it had suffered or was liable to suffer irreparable injury, by any act done or being done, or contemplated by defendants.

By other pleas the defendants denied that they intended doing as charged, or that they had violated any provincial law; and they alleged affirmatively that the subsidy was granted upon the representation that the road might, at some future time, become a part of the transcontinental railroad, extending from the Atlantic to the Pacific; that after the subsidy was granted, defendants were given authority by the Quebec Legislature to sell their railway with that object in view, and all they have been contemplating is the sale of it to the Atlantic and Northwest Railway Co., which company, if the sale was carried out, would make such changes only as would be an improvement to the road, and such as are permitted by the Provincial and Dominion railway acts, and are for the public advantage, in accordance with plans and surveys which have been made and filed according to law; that the principal change contemplated, is to the north side of "Little Magog lake" between Magog and Sherbrooke, which change is in the interest of the railway, and was the intended location at the time the provincial subsidy was granted.

Defendants further pleaded that their railway had been declared by the Federal Parliament to be a work for the general advantage of Canada, and that it is now under Federal authority and was authorized by Dominion Act 50 Vic. cap. 69, to change the location thereof, at any points where it might be necessary or desirable to improve its grades and alignments.

The petitioner replied, putting in issue defendants' affirmative allegations and alleging that the Dominion Act referred to was *ultra vires*.

By section 1 of the Injunction Act it is provided that a writ of injunction may issue to prevent a corporation from acting or taking any proceeding beyond its powers, or without having fulfilled the formalities prescribed by law or its act of incorporation, and to prevent any corporation from destroying or removing any property belonging to the Crown or in which the Crown has any right or interest. The interest of the Crown in defendants' railway is based upon the payment of the subsidy and the right of inspection and forfeiture resulting therefrom. It has been proved that the defendants received a subsidy of $4,000 per mile, amounting to $172,000, but I feel it is unnecessary for me to discuss whether or no the Crown has, under the particular statutes cited in the petition, the right of inspection and lien claimed, because I am satisfied that whatever lien or rights may, in ordinary cases, follow the payment of sub-

sidy, the Crown has waived them *quoad* this particular railway, by authorizing the company to sell their railway, with all its property, privileges and franchises, to any other incorporated railway company, and particularly by authorizing defendants, by 46 Vic., cap. 97 (1883), without any reserve whatever, to cancel all bonds issued under their Act of incorporation and to issue new bonds to the amount of £135,000 sterling, and, upon resolution of the majority of stockholders, to transfer and convey to trustees the lands, franchises, road-beds and property of the company, with power to the trustees, upon default of payment of principal or interest, to take possession of the railway and property conveyed by said deed and hold the same, free and clear from all liability for other debts contracted by the company; and control and hold the same for the benefit of all the holders of the bonds. Shortly after the passing of this Act the old bonds were cancelled and new bonds were issued under this authority to the amount authorized, and the property of the defendants was conveyed to trustees to secure the payment thereof. A considerable part of the money was paid after this Act was passed and a trust deed executed. Under these circumstances, I think I am justified in arriving at the conclusion that the Crown abandoned any lien it might otherwise have had arising out of the payment of subsidy, and that it has not the interest in defendants' railway which the petitioner alleges it has. But should I be mistaken in this, it appears to me that if any lien or rights still exist in favor of the Crown, they would follow the road into the hands of the Atlantic & Northwest Company, to whom defendants propose to sell it as mentioned hereafter. I do not think the petitioner is justified in complaining that something is about being done that was not contemplated when Government aid was given to this road, for it appears that when additional subsidy was applied for, before the completion of the road, one of the principal reasons assigned for such application was, that the road might ultimately form part of the "Short Line" system. Mr. Colby, then a director of the company, and subsequently one of the corporators of the Atlantic & Northwest Railway company, wrote a lengthy letter to the then Premier of the Province, in November, 1886, in which he pointed out the desirability of the subsidy being increased as much as possible, so that the road might be constructed up to the standard of other roads which it was then contemplated would form part of such system.

He says, amongst other things, "When the Waterloo and Magog road was classified with the less important roads, it was regarded merely as a local enterprise and was subsidised accordingly. I am sure the Treasurer of that day so considered it. But the times have changed, and it seems to me we should not be heedless of the change. Our contract with the Central Vermont will compel that company to improve the ten miles now built according to the exigencies of traffic. But, for what we have yet to build, is it not better that the Government, by increasing that subsidy, should enable us to construct a better road-bed, and for us to at once modify our arrangement with the Central Vermont, so that it will put on a better superstructure? By this means we may have a road which will be equal in all respects to the International, the Stanstead, Shefford and Chambly, and the other roads which will constitute the same line."

So that when the Lieutenant-Governor-in-Council increased the subsidy to $4,000 per mile as authorized by the Act assented to on the 28th of December, 1876 (40 Vic., cap. 3), it was contemplated and expected that this road would serve as part of the great transcontinental highway from ocean to ocean. I am also forced to the conclusion upon the evidence adduced, that the petitioner is equally weak when he stands upon the ground that he represents the public, and that what defendants propose to do is against the public interest. There is no complaint from any of the municipalities through which the road now passes, in fact the municipality of the village of Waterloo has expressed itself through its council, by a resolution which is of record, strongly approving of the sale of the road to the "Short Line," as better means of communication would be provided. And that village, if any complaint could be made, would have the best ground to make it, as

the main line of the "Short Line" does not pass through the village. The defendants are now practically insolvent, the road, which is run by the Central Vermont Railway company under a lease, is in poor condition and the service defective; while there can be no doubt that if it passes into the hands of the Atlantic & Northwest the road will be improved by changing the location where it may be necessary to reduce gradients and lessen curves, a better road will be made and improved service provided, and the public in every respect benefited by the proposed change.

We may now enquire whether defendants really intend departing from their charter, or propose doing anything which they have not been permitted to do by competent authority.

The preamble of the defendants' Act of incorporation shows that they asked to be authorized to construct a railroad from Waterloo in the general direction of Stukeley, Bolton and Magog, to connect with the Massawippi Valley railway, and they were authorized to construct one from Waterloo, or in the direction desired by the company, from any point between Waterloo and the westerly boundary of the township of Magog, thence to the outlet of Memphremagog lake, thence to the town of Sherbrooke, or to such point as should best secure a favorable connection with the Massawippi Valley railway, and defendants were authorized to construct the different sections of the railway in such order as they saw fit, keeping in view the general direction hereinbefore provided. It is not stated that the road should run through any particular townships. The road was constructed running from Waterloo, through the Township of Stukeley, to Magog, the outlet of Lake Memphremagog, and from there to Sherbrooke, following the south side of Little "Lake Memphremagog." Some changes of the line have taken place, but the general course and direction of the railway has not been altered. Mr. Moore, the secretary-treasurer, says that there was never any resolution passed in regard to changing the present location grades, or alignments, or the course or direction, or to destroy or remove the road or appurtenances, nor was the subject ever discussed or entertained at any meeting of directors or shareholders.

Now, the Quebec Legislature in 1881, anthorized the defendants to sell their railway, and the Atlantic & Northwest Railway company are authorized by their charters and by the Dominion Act of June last, to buy it. A resolution was passed by the defendants' directors in June, 1886, in which they set out that the surveyed line of the Atlantic & Northwest railway, if built, would be parallel to the defendants' railway and seriously interfere with its traffic and largely reduce its present value; that overtures had been made to purchase or lease it upon fair and reasonable terms, and that such arrangements wonld be beneficial both to the defendants and to the public. The Hon. Mr. Smith was appointed with full power to sell or lease the road, and to execute the necessary papers, subject to the approval of the shareholders of the company. The shareholders, in July following, approved of the sale, and the directors were authorized to cause an indenture of sale to be executed conformable to one then produced. This did not go through, and it appears that in April last, an agreement was entered into between the Atlantic & Northwest Railway company and Mr. Ross, who is a holder of a very large amount of the bonds so issued by defendants, by which the former company were to buy the road, and, among other conditions, it was stipulated that the Dominion Government should be got to agree to procure from Parliament authority to use the line and to make any changes that might be necessary.

It was said at the argument that it was the opinion of some of those interested that as this road crossed the Grand Trunk railway at Sherbrooke, it was a work for the general advantage of Canada and subject to the legislative authority of the Dominion under section 121 of the Dominion Railway Act, which declares every road crossing the Grand Trunk railway to be such a work and to be subject to Federal authority, and hence the stipulation just referred to, which resulted in the passing of the Dominion Act in June last, giving authority to defendants or to the Atlantic & Northwest Railway company in case it acquired the defendants' railway, to change the present location of the railway at any point or points where it might be necessary

or desirable in order to improve its grades and alignments, or to render its service more efficient, or its connection more convenient with the main line of that company, and upon such change being effected, to remove the rails and materials upon the portion of the present line so diverted, and to discontinue the use of such portions for railway purposes, and declaring the defendants' railway to be a work for the general advantage of Canada. The defendants' railway crosses the Grand Trunk railway at Sherbrooke by an overhead bridge, but whether this is or is not a crossing within the meaning of the Railway Act does not seem to have much bearing on the case, in view of the Act of June last, by which, as already stated, the Federal Parliament declared the defendants' railway to be a work for the general advantage of Canada. Now, this agreement with Mr. Ross has never been ratified by the defendants, but the evidence establishes, and there can be no doubt, that if the proposed sale is carried out the road will not run entirely over the line as now constructed. There will be a railway connection between the village of Waterloo and a point near a place called Foster, about 3½ miles south-east from Waterloo, and from thence the line will run in the same general direction as the present road to Stukely, crossing it between the two points, the distance apart between Foster and such crossing varying from 3½ miles to nothing. After the crossing the projected road runs almost parallel with the present line at a distance of from 500 to 1,000 feet to Stukely. As the new line between Stukeley and Magog has not really been located, it is impossible to say how much of the present line will be utilized, but where it is not used the variation will be less than a mile. From Magog to Sherbrooke the new road will take the same general direction, but will follow the north side of Little Lake Memphremagog, which appears to have been the original location selected, when the subsidy was granted, being shorter and having an easier grade, but changed in order to run into a mining locality, from which it was expected business would be obtained, but from which none is now expected, as the mines have been abandoned. The projected road, Mr. Lumsden says, will be a much better road as far as curves and grades are concerned, and altogether will be a much improved line. It appears to me that, as to its general course and direction, it will be as much the road contemplated by the charter granted to the defendants as the present line, and will fulfil all public requirements in a much more satisfactory manner than the existing road.

If the Dominion Act of June last is constitutional, there cannot be any doubt of defendants' right to do as they propose, but it is claimed that that act is not constitutional, because the Federal Parliament could not declare a road for the general advantage of Canada under section 92 of the B. N. A. Act, 1867, sub. sec. 10 (*a*), for the mere purpose of putting it out of existence. But this act does not put the road out of existence; it authorizes the acquiring road to change the location where it may be necessary or desirable in order to improve its grades and alignments and render its service more efficient.

Apart, however, from this Dominion Act, the Provincial Railway Act of 1869 (sec. 7, sub-section 17), gives the company power to change the location of the line of railway in any particular for the purpose of lessening a curve, reducing a grade, or otherwise benefiting such line of railway, or for any other purpose of public advantage.

Of course this must be done in the manner pointed out by the Act, but as the defendants have done nothing as yet, except to negotiate for the sale of their road, I am not called upon to decide any question as to their mode of proceeding.

Upon the whole I am of opinion that the petitioner, in his quality of Attorney-General, has not the interest, as representing the Crown, or the public, which he claims to have to enable him to maintain this suit; that neither the Crown nor the public will suffer any injury by what it is proposed to do; that the defendants have not done and do not contemplate doing anything they are not authorized to do by competent authority, and I therefore dismiss the petition with costs.

Mercier & Co., for petitioner.

L. C. Bélanger, Q.C., and *H. D. Duffy*, counsel.

J. P. Noyes, Q.C., for defendants.

Wm. White, Q.C., counsel.

SUPERIOR COURT.

AYLMER (District of Ottawa), Nov. 22, 1887.

Before WURTELE, J.

COLE v. BROCK.

Costs—Opposition to judgment.

HELD:—*That the costs to be reimbursed, and for which a deposit must be made on the filing of an opposition to a judgment rendered on default, do not include any fee to the plaintiff's attorney, but include the prothonotary's fee and the law stamp for taxing such costs.*

PER CURIAM.—Judgment was rendered on default by the prothonotary, and the defendant has made an opposition and has deposited $3.80 to meet the costs incurred after the return of the writ up to the judgment.

The plaintiff contends that the deposit is insufficient to meet such costs, as they should, according to her, include, in addition to the items allowed, a fee of $10 for her attorney, and 90 cents for the fee and law stamp on the taxation of the costs incurred; and she has moved that the defendant be required to deposit an additional sum of $10.90, and that in default of so doing the opposition be rejected.

An opposition to a judgment is held to be and is in reality a defence to the action. (C. C. P., art. 490.) It places the parties in the same position as if a plea had been duly filed and no judgment had been rendered. In order, however, to reinstate the plaintiff, all disbursements uselessly made by him should be reimbursed, and a deposit of a sufficient sum is therefore required.

Do the disbursements include any fee to the plaintiff's attorney on the suppressed proceedings? The tariff provides none and on the contrary provides only one block fee for the management of an action. And I find a passage in Pothier's Treatise on Civil Procedure which shows that the opposition to a judgment, being a defence to the action and not a new issue, does not give rise to any additional fee to the plaintiff's attorney: No. 415. "Les oppositions aux jugements "rendus par défaut . . . ne forment "point de nouvelles instances, et par consé- "quent ne doivent pas donner lieu à de "nouveaux droits de conseil."

The article of the Code of Procedure (C.C.P., art. 486,) which provides for the repayment of the disbursements and requires the deposit of a sufficient sum to meet them, also provides that such costs shall be taxed; and this is a proceeding entailing a disbursement which is occasioned by the defendant's fault and must be borne by him. The deposit should, therefore, cover the fee and stamp for the taxation.

I consequently pronounce the following judgment:—

"The Court after having heard the parties by their counsel upon the motion respecting the alleged insufficiency of the deposit made in this cause with the opposition against the judgment rendered on default by the prothonotary and having examined the record;

"Considering that the costs for which a deposit must be made with an opposition to a judgment under article 486 of the Code of Procedure consist only of the disbursements made after the return of the action, and do not include any fees to the plaintiff's attorney, but should include the prothonotary's fee and the law stamp for the taxation of the costs to be reimbursed;

"Seeing that the plaintiff's attorney claims a fee of $10.00, to which he is not entitled, and that the sum deposited was only $3.80, which was and is insufficient to cover the prothonotary's fee and the law stamp for the taxation of the costs in addition to the other disbursements;

"Doth order the defendant and opposant to deposit an additional sum of ninety cents within three days, costs compensated, reserving to the plaintiff her recourse in case of default on the defendant and opposant's part to complete the deposit."

Motion granted in part.

Henry Aylen, for Plaintiff.

Rochon & Champagne, for Defendant and Opposant.

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*COURT OF QUEEN'S BENCH—MONTREAL.**

City of Montreal—42-43 Vict. (Q.), ch. 53, s. 12—Assessment roll—When it comes into force—Prescription of action to annul.

HELD:—That an assessment roll comes into force from the date of its final completion,

and deposit by the commissioners in the office of the city treasurer, and the prescription of three months under 42-43 Victoria, chap. 53, s. 12, runs from that date.—*Joyce & La Cité de Montréal*, Dorion, Ch. J., Tessier, Cross, Baby, Church, JJ., May 26, 1887.

Malicious arrest—Probable Cause.

Appellant, a jeweller, desiring to increase his business, obtained advances from respondent, a wholesale dealer, and gave as security a hypothec on his property, on which he declared there were mortgages, but he only specified one of a certain amount. There was really another. Shortly afterwards, the appellant became insolvent, and the respondent arrested him on the charge of obtaining property on false pretences.

HELD:—That there was probable cause for the arrest, though it appeared that the appellant did not intend fraudulently to conceal the mortgage.—*Grothé & Saunders*, Dorion, Ch. J., Ramsay, Cross, Baby, JJ., January 16, 1886.

Cadastre—Omission to enter constituted rent.

HELD:—That an omission to enter in the *cadastre* a constituted rent to represent the former seigniorial rent, cannot be rectified.—*La Corporation Episcopale Catholique Romaine du Diocèse de St. Hyacinthe & The E. T. Bank*, Dorion, Ch. J., Monk, Ramsay, Cross, Baby, JJ., Sept. 21, 1886.

Appeals on questions of appreciation of evidence —Quantum meruit.

HELD:—That where it is not a matter of contract, and no question of law or principle is involved, and the case resolves itself into a mere question of appreciation of evidence, *e.g.* as to the value of services, the Court of Appeal will not disturb the judgment of the Court below, unless a serious injustice has been done to the appellant.—*The St. Lawrence Steam Navigation Co. & Lemay*, Dorion, Ch.J., Monk, Ramsay, Cross, JJ., Nov. 25, 1885.

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* To appear in Montreal Law Reports, 3 Q. B.

Municipal Law—M. C. 932—County Council—By-law of Local Council—Powers of County Council.

A local council passed a by-law which was amended by the county council on appeal. The local council, without new proceedings or any effort to amend, passed a by-law in similar terms to the former by-law, which was then again taken to the County Council on appeal, when the following resolution was proposed and adopted:—"Attendu que la "question en litige sur le présent appel a été "réglée par ce Conseil, en homologuant le procès-verbal de Louis Parent en octobre dernier; et attendu que le Conseil Municipal "de la paroisse de St. David, au lieu de "mettre à exécution le dit procès-verbal et "de respecter la décision de ce Conseil, a "adopté à sa session du 7 avril dernier, un "règlement mettant à néant la dite décision "de ce Conseil;

"Que l'appel porté devant ce Conseil par "requête de Dolphis Lessard et autres, en "date du 12 avril dernier, soit maintenu; et "que le règlement dont est appel, adopté "par le Conseil Municipal de la paroisse de "St. David, à sa session du 7 avril dernier, "ainsi que tous les procédés, ordres et résolutions du dit Conseil Municipal de la paroisse "de St. David, adoptés à sa dite session du 7 "avril dernier, amendant le dit procès-verbal "de Louis Parent, soient, et ils sont par la "présente résolution, cassés, annulés et mis à "néant à toutes fins que de droit, avec dépens "contre Régis Crépeau, père (and four others), "de la paroisse de St. David, qui ont par requête en date du premier mars dernier sollicité du Conseil Municipal de la paroisse de "St. David la passation du dit règlement, "savoir les intimés sur le présent appel."

HELD:—That the county council, in thus setting aside the by-law of the local council, acted within its jurisdiction.—*La Corporation du Comté d'Yamaska & Durocher*, Monk, Ramsay, Tessier, Cross, Baby, JJ., Jan. 21, 1886.

GENERAL NOTES.

GUILLY AND GUITTY.—In *Partain* v. *State*, 2 S.W. Rep. 854, the Texas Court of Appeals laid down that the failure of the jury to cross the 't' in the word 'guilty,' does not vitiate a verdict in a criminal case. 'Guilly' the Court could stand, but 'guitty' was a little too much for them; and now sliding back into the beggarly elements of technicality they hold that a verdict which holds the defendant 'guitty' is no better in law than if it were to find him 'giddy.'—*American Law Review.*

The Legal News.

VOL. X. DECEMBER 3, 1887. No. 49.

Notice is given in the *Official Gazette*, that the new Court House at Quebec, to replace the building which was destroyed by fire on the 1st February, 1873, will be ready for occupation on Dec. 21, and from that date will be used for the purposes of the administration of justice and registration of deeds for the registration division of Quebec.

The following additional appointments to the Bench of Ontario have been gazetted:—William P. R. Street, Esq., Q.C., of London, is appointed a Justice of the High Court of Justice for Ontario, and a member of the Queen's Bench Division, *vice* Mr. Justice O'Connor, deceased. Hugh MacMahon, Esq., Q.C., of Toronto, is appointed a Justice of the High Court and a member of the Common Pleas Division, *vice* Mr. Justice Galt, appointed President of that Division.

Lord Coleridge, according to the *Law Times*, has been indulging in sarcasm at the expense of the Justices in Appeal. His lordship "has formed a very definite opinion as to the source of all the evils arising out of the last Bills of Sale Act. That source is not any infirmity in the Act; the 'mental intention' of Parliament was well known, and the result has been a simple, plain, and unambiguous enactment. Unluckily, decisions upon it came up for review before the court of appeal. Then confusion began: 'powerful and ingenious minds' were brought to bear upon simple words of the English language. Consequence: fog impenetrable. Moral: If it is desired to keep the law clear and certain, abolish the Court of Appeal."

In a recent contempt case, *In re Johnson*, Nov. 7, the English Court of Appeal decided that it was not necessary that the contempt complained of should take place in Court, or be a contempt of a Judge who was sitting in Court. All that was necessary was that it should be a contemptuous interference with judicial proceedings, the judge acting in his judicial capacity as a judge of the High Court. This case (of which we shall publish a fuller note in a future issue), supports the ruling of Mr. Justice Mackay in a case which occurred here some years ago, *In re Lanctot*. The defendant sent a letter to the judge through the post office, declaring that a judgment which had been rendered by the learned judge was absurd and oppressive. Mr. Justice Mackay proceeded against him for contempt. The judge asked him from the bench, "Did you send me this letter?" Mr. Lanctot said, "Yes." The proceedings for contempt were stayed upon Mr. Lanctot making an apology.

SUPERIOR COURT.

AYLMER (District of Ottawa), Nov. 16, 1887.

[In Chambers.]

Before WURTELE, J.

GILMOUR et al. v. MONETTE.

Costs—Capias—Cases between $100 and $200—Fees of advocates and bailiffs—Articulations of facts.

HELD:—1. *That in cases in the Superior Court between $100 and $200, instituted by writ of capias ad respondendum, the advocates' and bailiffs' fees on the action are to be taxed as in a case in the Circuit Court over $100, and the prothonotary's and and sheriff's fees as in a case in the Superior Court under $400.*

2. *That in such cases the costs on a petition to quash the writ of capias are to be taxed according to the tariffs for the Superior Court.*

3. *That in such incidental proceedings, when the contestation is founded upon the falsity of the allegations of the affidavit, the advocates are entitled to fees on articulations of facts.*

PER JUDICEM. The action in this cause was founded on a claim for $186, and was instituted in the Superior Court by writ of *capias ad respondendum*. The defendant presented a petition to quash the capias, and contested the truth of the allegations of the affidavit; issue was regularly joined upon the petition and articulations of facts were

filed. The petition was dismissed, and judgment was rendered condemning the defendant for a sum exceeding $100 and maintaining the capias.

In taxing the plaintiff's bill of costs the prothonotary taxed the advocate's fees on the action, as in a case in the Circuit Court, for the amount of the judgment, and allowed the same advocate's fees on the incidental proceeding as are allowed in the Circuit Court on the contestation of a writ of attachment before judgment, but disallowing the fees for articulations of facts. I am now asked to revise this taxation.

Article 16 of the tariff of advocates' fees in the Superior Court provides that in actions under $200 instituted by writ of *capias ad respondendum* the costs are the same as in actions over $100 in the Circuit Court. Then we have the general rule adopted in December, 1870, that in all suits in the Superior Court between $100 and $200 the fees to be allowed to advocates and bailiffs shall be those allowed in actions of the same class in the Circuit Court. These provisions, however, only apply to fees allowed to advocates and bailiffs. No special provision for these cases is made in the tariffs regulating the fees payable to prothonotaries and sheriffs; and in all suits in the Superior Court, whether the amount be over or under $200, the tariffs made for that court must be applied. These officers are, therefore, entitled to the fees allowed in actions of $400 and under, which is the lowest class mentioned. The prothonotary has taxed the costs on the action in this cause according to these principles, and I maintain his taxation.

The contestation of the capias, whatever may be the amount of the action, is an incidental proceeding that concerns the liberty of the subject and that essentially appertains to the Superior Court, which alone has jurisdiction in matters of capias. No provision for such an incidental proceeding is made in the tariffs for the Circuit Court; but full provision is to be found in the tariffs for the Superior Court. The fees allowed by the tariffs for the Superior Court on a petition to quash a capias must consequently be allowed even when the suit is for a sum under $200. I therefore overrule the prothonotary's taxation, and allow the fees fixed by the tariffs of the Superior Court on the petition to quash.

Article 821 of the Code of Civil Procedure says that if the contestation of a capias is founded upon the falsity of the allegations of the affidavit, issue must be joined upon the petition *in the ordinary course* and independently of the contestation upon the principal demand. All the incidents of the procedure in a principal demand consequently apply *in the ordinary course* to such an incidental proceeding, including articulations of facts. I am of opinion, therefore, that the advocates in this cause are entitled to their fees on the articulations of facts filed in the issue on the petition to quash; and I allow them.

My ruling will be recorded as follows:—

"Having heard the parties upon the application of the plaintiffs for the revision of the taxation of their bill of costs as well on the action as on the petition to quash the capias in this cause;

"I, the undersigned judge of the Superior Court, rule and order that the costs on the action, which was for a sum under $200, and was instituted by writ of *capias ad respondendum*, be taxed as regards the advocate's and the bailiff's fees as in an action over $100 in the Circuit Court, and as regards the prothonotary's and the sheriff's fees as in an action under $400 in the Superior Court, and that the costs on the incidental proceeding or petition to quash the capias be taxed according to the tariffs for the Superior Court; and I further rule that the advocates are entitled to fees for articulations of facts and answers thereto on such incidental proceeding, and I order that such fees, as well as the prothonotary's fees on the production of such articulations and answer, be allowed to the plaintiffs;

"And proceeding to revise the taxation of the prothonotary, I tax the plaintiffs bill of costs as follows:—&c., &c."

Taxation revised.

H. A. X. Talbot, for plaintiffs.

Rochon & Champagne, for defendant.

CIRCUIT COURT.

AYLMER (District of Ottawa), Sept. 16, 1887.

Before WURTELE, J.

LAPIERRE v. BRIÈRE.

Sale of Intoxicating Liquors to be drunk on the spot—Traveller—C.C. 1481.

HELD:—*That when a traveller, lodging in a hotel, has spent the evening drinking in the bar-room with a number of the inhabitants of the locality, and has ordered intoxicating liquors, in his turn as his treats, the exception contained in article* 1481 *of the Civil Code does not apply to such traveller, and that the tavern-keeper has no action against him for the price of such liquors.*

PER CURIAM.—The plaintiff, a tavern-keeper of the village of Buckingham, has sued the defendant, a farmer of the township of McGill, on an account including a number of items, for five glasses of liquor each, on the 17th January and 31st March of last year.

The defendant has pleaded that the plaintiff has no action for the recovery of the price of this liquor, which was drunk on the premises; and the plaintiff has answered that it was sold to the defendant and drunk by him and his friends, while they were travellers, lodging in his hotel.

The plaintiff quoted article 1481 of the Civil Code, which, while depriving hotel-keepers of the right of action for the recovery of the price of intoxicating liquors sold to be drunk on the spot, makes an exception with respect to liquors sold to and used by travellers.

The proof showed, however, that on the two occasions in question the defendant had spent the evening talking and drinking with a number of the inhabitants of the village, each paying his treats in turn.

The general rule laid down in the customs of Paris and Orleans was that tavern-keepers had no action for liquors sold to be consumed in their houses; but jurisprudence restricted the denial of action to the case of liquors sold to the inhabitants of the locality, and allowed the action in the case of travellers. The article of our code is founded upon the articles above mentioned of these two customs, but the modification introduced by jurisprudence has been incorporated in the text.

The end had in view by the customs was the repression of carousing and of debauchery, while jurisprudence protected the tavern-keeper who merely provided travellers with liquors for their reasonable wants.

I must apply these reasons in interpreting the article of our code. When the tavern-keeper gives liquors to a traveller for his ordinary use and reasonable wants, the exception gives him an action, and, consequently, a lien on the traveller's baggage for the price of such refreshments; but when the tavern-keeper aids and abets the traveller in indulging in base appetites and in committing excesses, he cannot claim the benefit of the exception. When, as in the present case, the traveller joins a number of the inhabitants of the place in a carousal and contributes for his share of the expense, he ceases to have an exceptional character, and no distinction can be made between him and his companions as to the tavern-keeper's rights for the liquors supplied to them.

I am of opinion that, under the circumstances, the plaintiff has no action for the price of these treats, and I strike the items from the account.

Judgment for the balance.

F. A. Baudry, for plaintiff.

Thos. P. Foran, for defendant.

CIRCUIT COURT.

HULL (County of Ottawa), Oct. 17, 1887.

Before WURTELE, J.

FOX v. BEATON, AND WOODBURN, intervener.

Circuit Court—Jurisdiction of—Action for seaman's wages.

HELD:—*That the Circuit Court has no jurisdiction, except in certain exceptional cases, for the recovery of wages due to seamen employed on steamboats of more than twenty tons, or on other vessels of more than fifty tons, registered in Canada and navigating its inland waters.*

PER CURIAM.—The plaintiff alleges that at the city of Ottawa, on the 25th June last, he was engaged as engineer on board of the

"Swan," a steamboat of 25 tons, registered in Canada and employed in navigating the River Ottawa, by the defendant, acting as master of the vessel, and that on the 30th August last the defendant abandoned his vessel. The plaintiff has brought suit for the recovery of a balance of $34 due to him on his wages, and has seized the vessel on a writ of attachment before judgment.

The defendant is stated to reside in Ottawa, but the writ was served on board the vessel, speaking to one of the seamen; and the defendant has made default to appear.

Woodburn, the registered owner of the steamboat, who also resides in Ottawa, has intervened; and he pleads the nullity of the seizure, alleging in the first place that there are fatal irregularities in the proceedings, and then that the plaintiff could not enforce his claim for wages due to him by the defendant against the vessel, which was the registered property of the intervener and had only been leased to the defendant for the season.

The certificate of registry and the lease have been filed; and the plaintiff's engagement by the defendant and the latter's abandonment of the vessel have been proved.

Under the law regulating merchant shipping, both the owner and the master are liable for the plaintiff's wages, and he has also a maritime lien for their recovery on the vessel.

But is the mode adopted in this case the proper one, and has this court jurisdiction in the matter?

In the assignment of subjects made by the British North America Act, navigation and shipping fall under the exclusive legislative power of the Parliament of the Dominion; and all matters respecting seamen employed on steamboats of more than twenty tons, and on other vessels of more than fifty tons, registered in Canada and used in navigating the inland waters of Canada above the harbor of Quebec, have been regulated by chapter 75 of the Revised Statutes of Canada, known as "The Inland Waters Seamen's Act." Section 30 prescribes the mode of recovering from any master or owner the wages due to any seaman or apprentice to an amount not exceeding $200; and section 33 provides how in default of sufficient distress such wages may be levied on the vessel on board which they were earned.

Summary jurisdiction for the recovery of such wages is conferred on any judge of the Superior Court, any judge of the Sessions of the Peace, any stipendiary magistrate, and also on any two justices of the peace, acting at or near the place where the service of the complainant has terminated, or where he has been discharged, or where the master or owner is or resides; and power is given to such judge, magistrate or justices to cause the amount of the wages awarded to be levied by the distress and sale of the goods and chattels of the person condemned, and in default of sufficient distress by the sale of the vessel.

And it is in fact specially enacted that no suit for the recovery of wages under the sum of $200 shall be instituted or had in any Superior Court, unless the vessel is under arrest or has been sold by process of such court, or unless the case has been referred by the summary court to such court for adjudication, or unless neither the master nor the owner is or resides within twenty miles of the place where the seaman or apprentice has been discharged or put ashore.

In the present case the exceptions above mentioned do not apply, and the Circuit Court clearly has no jurisdiction in the matter; the parties must therefore be dismissed out of court. But as the intervener has not pleaded the incompetency of the court, I will not allow any costs.

The judgment will be recorded as follows:—

"Le tribunal se déclare incompétent, et renvoie les parties sans frais."

Rochon & Champagne, for plaintiff.

Arthur McConnell, for intervener.

COUR D'APPEL DE PARIS.

25 janvier 1887.

Présidence de M. Mulle.

LAGARDE v. LAPAYRE.

Propriété artistique—Contrefaçon—1o. Faillite—Action en justice—2o. Statue religieuse—Copie.

1o. *La faillite de l'auteur d'une œuvre d'art ne*

saurait le priver du droit, de poursuivre une usurpation, qui l'atteint dans son honneur artistique. Il est donc recevable à poursuivre personnellement, nonobstant sa faillite, le contrefacteur de son œuvre.

2o. *Si la plupart des statues religieuses, faites en fabrique, présentent de grandes ressemblances entre elles, par suite du programme très précis, sur lequel elles sont composées, il ne s'ensuit pas qu'elles doivent forcément affecter le même aspect, et être la reproduction servile d'un modèle unique, et qu'elles ne puissent jamais constituer une œuvre personnelle.*

Spécialement une statue de la Vierge de Lourdes, qui diffère du type commun par une plus grande étude de détails, par des arrangements de plis heureux, et par une certaine délicatesse d'exécution, constitue entre les mains de son auteur une propriété artistique, dont il est en droit de poursuivre la contrefaçon.

Le 10 juillet 1886, jugement du Tribunal correctionel de la Seine ainsi conçu :

" Attendu que le 28 juin 1884, sur la réquisition de Lapayre, Guérin, commissaire de police à Paris, s'est transporté dans les magasins de Lagarde, rue de la Chaise, 26, et dans ses ateliers, rue Oudinot, 10, et y a saisi trente et une statuettes qui d'après Lapayre étaient la contrefaçon d'une statuette de la Vierge de Lourdes dont il se disait le propriétaire ;

" Attendu que Lapayre ayant cité Lagarde en police correctionnelle sous l'inculpation de contrefaçon, Lagarde a pris des conclusions tendant à faire déclarer l'action du demandeur non recevable en son état de faillite ;

" Attendu que la faillite de l'auteur d'une œuvre d'art ne saurait le priver du droit de poursuivre une usurpation qui l'atteint dans son honneur artistique ;

" Attendu d'ailleurs que Lapayre a fait citer Lagarde en police correctionnelle le 25 septembre 1884, antérieurement au jugement du 11 novembre 1884, qui l'a déclaré en faillite et a obtenu son concordat le 10 avril 1885, antérieurement à la citation du 28 mai 1886 par laquelle il a repris ses conclusions contre Lagarde ; qu'en l'état, son action est recevable ;

" Au fond :

" Attendu que le Tribunal avant faire droit a ordonné une expertise à laquelle il a été procédé par Barrias, statuaire ;

" Attendu que d'un commun accord des parties les seules statuettes qui ont été soumises à l'expert sont les statuettes formant les scellés 1, 2, 4, 5, 9, 16, 18, 23, 26 et 29 ;

" Attendu qu'il résulte de l'expertise que, si les statuettes portant les numéros 4, 5, 23, 22 et 29 ne semblent pas particulièrement inspirées par la statuette de Lapayre, il est établi, au contraire, que celles qui portent les numéros 1, 2, 9, 16, sont malgré certaines inversions non-seulement inspirées par celle de Lapayre, mais encore copiées sur elle ;

" Attendu, il est vrai, que Lagarde oppose à Lapayre, qu'il ne justifie d'aucun titre de propriété sur la statuette dont il poursuit la contrefaçon : qu'en tout cas la statue de la Vierge de Lourdes appartient au domaine public et que celle dont Lapayre serait propriétaire ne se distingue du type commun par aucun caractère particulier propre à l'auteur de la statue ;

" Mais attendu que Lapayre justifie qu'il était propriétaire de sa statuette dès 1878 par un certificat de dépôt effectué au ministère de l'intérieur d'une photographie de la dite statuette le 3 avril 1878, et que Lagarde n'offre même pas de prouver que les statuettes contrefaites sont la reproduction d'un type lui appartenant et créé avant cette époque ;

" Attendu, d'autre part, que si la plupart des statues religieuses faites en fabrique présentent de grandes ressemblances par suite du programme très précis sur lequel elles sont composées, il ne s'en suit pas qu'elles doivent forcément affecter le même aspect et être la reproduction servile d'un modèle unique et qu'elles ne puissent jamais constituer une œuvre personnelle ; que spécialement, en ce qui concerne la statuette de Lapayre, elle diffère du type commun de la Vierge de Lourdes par une plus grande étude de détails, par des arrangements de plis plus heureux et par une certaine délicatesse d'exécution ; qu'elle constitue dès lors entre ses mains une propriété artistique dont il est en droit de poursuivre la contrefaçon ;

" Attendu qu'il résulte de ce qui précède que Lagarde a commis le délit de contrefaçon prévu et puni par l'article premier de

la loi du 19 juillet 1793, et les art. 425, 427 et 429 C. pén.;

"Condamne Lagarde à 200 francs d'amende;

"Prononce la confiscation des statuettes et moules saisis, et attendu que le fait dont il s'agit a causé à Lapayre un préjudice dont il lui est dû réparation;

"Ordonne que les statuettes et moules saisis lui seront remis et attendu que le Tribunal n'a pas, quant à présent, les éléments pour fixer le supplément des dommages-intérêts, ordonne qu'il sera fixé par état."

Lagarde a interjeté appel de ce jugement. Arrêt:

La Cour,

Adoptant les motifs des premiers juges: Confirme.

Note.—Sur le premier point: V. en ce sens: Pouillet, Propriété litt. et artist. No. 635; et Brev. d'invention, Nos. 756 et suiv.; Ruben de Couder, Dict. de dr. comm. et marit., vo. Faillite, No. 239. *Contrà*: Renouard, Droit d'auteurs, t. II, p. 216.

Sur le deuxième point: V. conf.: Paris 13 février 1884 (Gaz Pal. 84, I. sup. 44), et sur pourvoi: Cass. 27 décembre 1884 (Gal. Pal. 85, I. 176); Paris, 23 novembre 1885 (Gaz. Pal. 2, 766).—*Gaz. Pal.*

SUPERIOR COURT—MONTREAL.*

Contract in fraud of creditors—C. C. 1032-1035—Knowledge of insolvency.

One of the defendants sold real estate to the other defendant, who was his nephew, as well as book-keeper of a firm in which the uncle was a partner; and the sale took place at a time when, in the opinion of the court, the insolvency of the uncle was generally known.

Held, That the nephew must be presumed to have had knowledge of the uncle's insolvency, and the sale, under C.C. 1035, was annulled.—*La Banque Nationale* v. *Chapman et al.*, In Review, Taschereau, Loranger, Ouimet, JJ., May 31, 1887.

Procedure—Writ of summons—Service.

A writ of summons was issued in the district of Saint Francis, and directed to any bailiff of that district. The writ was served personally upon the defendants in the district of Beauce by a sheriff appointed for the district of Beauce.

Held, 1. That a Superior Court writ cannot be validly served by any other than one of the bailiffs to whom it is directed; and that the writ in question having been directed to any of the bailiffs district of Saint Francis, the service of such writ by a bailiff of the district of Beauce, was null and void.

2. That the plaintiffs having obtained judgment by default, under article 89, C.C.P., defendants had properly proceeded against said judgment, and all other proceedings subsequent to the issue of the writ, by an opposition styled an opposition *à fin d'annuler*, and that defendants were entitled, by means of such opposition, to have the said judgment and other proceedings set aside on account of the nullity of the service.

3. That in such case, neither the opposition, nor the affidavit accompanying the same, need comply with the provisions of 46 Vict., c. 26, sec. 4, the said statute applying only to suits in which the defendants have been validly served.

4. That the opposition need not be accompanied with the deposit required with an exception to the form.—*The Eastern Townships Bank* v. *Wright*, In Review, Jetté, Taschereau, Mathieu, JJ., June 30, 1887.

Communauté de biens—Licitation volontaire—Partage—Propres—Indivis.

Jugé, 1. Que dans le cas où un père possède par indivis avec ses enfants des immeubles dont il est propriétaire pour moitié, et les enfant pour l'autre moitié comme représentant leur mère, la licitation volontaire, autorisée par justice en ce qui regarde les mineurs, est un véritable partage et en a tous les effets;

2. Que sous ces circonstances si le père achète directement ou par personne interposée, il sera censé avoir toujours été propriétaire des immeubles, et, par suite, ces biens ne seront pas tombés dans la communauté de biens qu'il aura créé en se remariant en secondes noces, mais lui seront restés propres.—*Dufort* v. *Chicoine*, Mathieu, J., 8 oct. 1887.

* To appear in Montreal Law Reports, 3 S.C.

Bail verbal—Expulsion—Dommages.

Jugé, 1. Que lorsque le bail quoique verbal est défini et le loyer payable memsuellement, le locateur peut demander la résiliation du bail quand il y a un mois de loyer de dû;

2. Que le locateur qui poursuit en expulsion pour un terme de loyer dû, savoir, $16.66, peut en même temps réclamer la somme de $133.33, balance de loyer à devenir dû sur un bail verbal d'un an, à savoir, de $200.00, comme dommages résultant de la résiliation du bail.—*Robert* v. *Chateauvert et al.*, Gill, J., 25 oct. 1887.

Désistement—Comment il prend effet.

Jugé, Qu'un défendeur pour prendre avantage d'un désistement de l'action signé par le demandeur, ne peut obtenir de la Cour la permission de plaider de nouveau, mais doit simplement produire le désistement dans la cause, lequel aura ainsi tout l'effet qu'il peut avoir.—*Brunet* v. *Brunet*, Jetté, J., 6 juin 1887.

Inscription pour jugement—Signification à la partie et non au procureur.

Jugé, Que lorsqu'une partie a comparu par procureur *ad litem* les pièces de procédure doivent être signifiées à ses avocats; un jugement obtenu par défaut sur une inscription signifiée à la partie même et non à ses procureurs *ad litem* sera renversé en révision.—*Dumouchel* v. *La Cie. du chemin de fer du Pacifique*, en révision, Johnson, Papineau, Taschereau, JJ., 24 sept. 1887.

APPEAL REGISTER—November Term.

Montreal, Tuesday, November 15.

McTavish et al. & Fraser.—Appeal from judgment granting a *séquestre*, declared privileged. Hearing for 21st.

Tassé & Ouimet Bastien.—Heard on motion for leave to appeal from interlocutory judgment. C.A.V.

McLeish & Dougall et al.—Heard on motion for leave to appeal from interlocutory judgment. C.A.V.

Parent & City of Montreal.—Motion to dismiss appeal. Granted for costs only.

Boxer & Judah, & Kimber.—Heard on petition for leave to appeal from interlocutory judgment. C.A.V.

Linton et al. & Henderson Lumber Co.—Motion for leave to appeal from interlocutory judgment.—Motion rejected with costs.

Spencer & McQuillan, & Browning.—Motion for leave to appeal from interlocutory judgment. Motion rejected without costs; Cross, J., *diss.*, as to costs.

Spencer & McQuillan, & Cusson.—Motion for leave to appeal from interlocutory judgment. —Motion rejected without costs; Cross, J., *diss.* as to costs.

Fraser & Brunette.—Heard on motion for dismissal of appeal. Judgment reserved.

Gilman & Exchange Bank of Canada.—Rehearing. Part heard.

Wednesday, November 16.

Fraser & Brunette.—Motion for dismissal of appeal rejected with costs.

Tassé & Ouimet Bastien.—Motion for leave to appeal from interlocutory judgment, rejected with costs.

McLeish & Dougall et al.—Motion for leave to appeal from interlocutory judgment, rejected with costs; Doherty, J., *diss.* as to costs.

Hénault & Chapdeleine, & Fauteux—Petition to take up the *instance* granted.

Rascony Woolen & Cotton Manufacturing Co. & The Lancashire Insurance Co.—Heard on motion for leave to appeal from interlocutory judgment. C.A.V.

Gilman & Exchange Bank of Canada.—Rehearing concluded. C.A.V.

Gilman & Gilbert et al.—Re-hearing. Part heard.

Friday, November 18.

Boxer & Judah, & Kimber.—Petition for leave to appeal from interlocutory judgment, rejected with costs.

Rascony Woolen & Cotton Munufacturing Co. & Lancashire Insurance Co.—Motion for leave to appeal, rejected with costs.

Allan et al. & Pratt.—Heard on motion to send record to Court below. C.A.V.

Gilman & Gilbert et al.—Re-hearing concluded. C.A.V.

Lowrey & Routh.—Re-hearing. Appellants file a *retraxit.* C.A.V.

Brosseau & Forgues.—Re-hearing. C.A.V.

Saturday, November 19.

Massue & Corporation Paroisse St. Aimé.—Heard on petition for leave to appeal to Supreme Court. C.A.V.

Sherbrooke Gas & Water Co. & Corporation of City of Sherbrooke.—*Acte* granted by consent of discontinuance of appeal without costs.

La Cité de Montréal & Les Ecclésiastiques du Séminaire de St. Sulpice.—Heard on merits. C.A.V.

Banque d'Hochelaga & Rielle.—Part heard.

Monday, November 21.

Banque d'Hochelaga & Rielle.—Hearing concluded. C.A.V.

Thompson & Molsons Bank.—Heard. C.A.V.

The Mayor et al. & Brown.—Heard. C.A.V.

Banque d'Hochelaga & Ewing et al.—Heard. C.A.V.

Tuesday, November 22.

Allen & Merchants Marine Insurance Co.—Judgment confirmed.

De Bellefeuille & Desmarteau.—Judgment reversed, with costs in three courts.

Gauvin & Leclaire et al.—Judgment rever'd.

Ross & Paul.—Judgment confirmed with costs in three courts.

Christmas & Robertson.—Judgment confirmed, Tessier, J., *diss.*

Communauté des SS. NN. de Jésus et Marie & Corporation of Waterloo.—Judgment confir'd.

Massue & Corporation de la Paroisse St. Aimé.—Petition for leave to appeal to Supreme Court (after expiration of the 30 days), rejected with costs.

Allan et al. & Pratt.—Motion to have record sent to Court below for execution granted.

Mercier & Waterloo & Magog Railway Co.—Argument on petition for leave to appeal from interlocutory judgment united to argument on the merits of the appeal taken from the final judgment.

Beckett & Merchants Bank.—Heard. C.A.V.

Wednesday, November 23.

Guevremont & Guevremont.—Heard. C.A.V.

Galarneau & Guilbault.—Heard. C.A.V.

Rivard & Paquette.—Heard. C.A.V.

Larivière & Arsenault.—Heard. C.A.V.

Thursday, November 24.

Downie & Francis.—Heard on motion for dismissal of appeal. C.A.V.

Ex parte John Spears.—Heard on petition for *habeas corpus.* C.A.V.

Fairbanks & O'Halloran, & Montreal, Portland & Boston Railway Co., T.S.—Heard upon petition of M. P. & B. Co., garnishee in the Court below, to be allowed to make a new declaration. C.A.V.

Mail Printing Co. & Laflamme.—Hearing resumed.

Friday, November 25.

Downie & Francis.—Motion granted; eight days allowed to file factum upon payment of $10 and costs of motion.

Fairbanks & O'Halloran, & Montreal, Portland & Boston Railway Co.—Ordered that the hearing on the motion be united to the hearing on the merits. Costs reserved.

Ex parte John Spears.—Application rejected.

Ville de Ste. Cunégonde & Berger et al.—Judgment confirmed.

Taylor & Webster.—Judgment confirmed.

Mullarky & Kronig.—Judgment reversed, Dorion, Ch. J., dissenting.

Baldwin & Corporation of Barnston.—Motion for substitution granted.

Mail Printing Co. & Laflamme.—Hearing concluded. C.A.V.

McTavish & Fraser.—Hearing postponed until next term.

Saturday, November 26.

The following causes were declared *perimées* for default to proceed within the year:—

Senécal & Coté.—Appeal dismissed.

Smith & Fairbanks.—Do.

Jodoin & Banque d'Hochelaga.—Do.

Windsor Hotel Co. & Lunn et vir.—Do.

Exchange Bank & Montreal Coffee Co.—Do.

Gaudry & Gagnon.—Do.

Barré & Picard.—Do.

Beckett & Banque Nationale (No. 42).—Do.

Racine et al. & Morris.—Petition granted by consent, but as to costs only.

Labrecque & Cie. de Tabac de Joliette.—Judgment reversed.

Skelton & Evans. — Judgment reversed, Church, J., *diss.*

Senécal & Rouillard.—Heard on merits. C.A.V.

The Court adjourned to December 22.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Nov. 19.

Judicial Abandonments.

Isaïe Caillié, mill-owner, township of Acton, Nov. 14.
Henry Dinning & Co., shipbuilders, Quebec, Nov. 3.
Elzéar Alexandre Emond, merchant, Quebec, Nov. 10.

Curators appointed.

Re Geo. Lamontagne, Quebec.—W. A. Caldwell, Montreal, curator, Nov. 10.

Re Frank Langlands (James Langlands & Son).—S. C. Fatt, Montreal, curator, Nov. 16.

Re Eugène Pommier, Beauharnois.—W. A. Caldwell, Montreal, curator, Nov. 15.

Re Fletcher Thompson.—H. A. Odell, Sherbrooke, curator, Nov.

Dividends.

Re Estate of late Mrs. M. A. N. Mercer.—Dividend payable Dec. 12, John W. Molson, Montreal, curator.

Re Israël Lemay, Beauharnois.—First dividend on privileged claims, payable Dec. 5, C. Fortin, Beauharnois, curator.

Separation as to property.

Cédulie Audelin vs. Joseph Hughes Cadieux, joiner, St. Hyacinthe le Confesseur, Nov. 14.

Susan Ellen Cain vs. Francis Bartels, general agent, St. Hyacinthe, Nov. 9.

Célina Courtemanche vs. Hilaire Péloquin, clerk, St. Hyacinthe.

Virginia Dumas vs. Léon Samoisette, farmer, parish of St. John's, Nov. 12.

Quebec Official Gazette, Nov. 26.

Judicial Abandonments.

Zélire Brouillette (E. Beauchamp & Co.) *marchande publique*, Montreal, Nov. 18.
Anastase Joubert *et al.*, butchers, Montreal, Nov. 22.
Jean Baptiste Scott, Nicolet, Nov. 19.
Aug. O. Turcotte, St. Pierre, Nov. 4.

Curators appointed.

Re Isaïe Caillié.—J. O. Dion, St. Hyacinthe, curator, Nov. 22.

Re Chateauvert & Desroches.—E. Hanson, Montreal, curator, Nov. 18.

Re Richard Duckett.—Kent & Turcotte, Montreal, curator, Nov. 18.

Re Antonin Giguère, trader, Ste. Justine.—H. A. Bédard, Quebec, curator, Nov. 21.

Re J. A. Michaud & Co., Carleton.—J. B. E. Letellier, Quebec, curator, Oct. 30.

Re Charles O'Brien.—C. Desmarteau, Montreal, curator, Nov. 22.

Re Perry & Simpson.—C. Desmarteau, Montreal, curator, Nov 24.

The Legal News.

VOL. X. DECEMBER 10, 1887. No. 50.

The danger which may lie in a name was illustrated by the case of *Milwaukee Malt Extract Co.* v. *Chicago, etc. Co.* The plaintiffs manufactured an article which they called "New Era Beer," and they wished to have a consignment of it carried into the State of Iowa. The transportation of intoxicating liquors into that State being prohibited, the defendants refused to carry it. The plaintiffs, alleging that their fluid was not intoxicating, applied for a writ of *Mandamus* to compel the defendants to perform their duty as common carriers. The Supreme Court of Iowa decided against the plaintiffs, holding that as they called their manufacture "New Era Beer," the presumption was that it really was beer, and the Statute law of Iowa declared that beer was an intoxicating liquor. "The words 'New Era' added to the word 'beer' (observed the Court) indicated nothing as to the character of the product. Suppose the plaintiffs had tendered to the defendants, for transportation, any article denominated simply 'brandy;' would the plaintiffs be entitled to maintain their action for *mandamus* to compel the defendants to receive the article, upon an allegation that it was a new kind of brandy which had no intoxicating quality? We think not. The defendants would discover by the name that the article is apparently prohibited, and could not determine otherwise without resorting to chemical analysis, or some other kind of evidence. The determination would call for the exercise of a discretion as to what evidence should be resorted to, and what should be deemed satisfactory. Where an act is to be performed or omitted in the discretion of a party, the performance cannot be enforced by an order of *mandamus*. In High, Extr. Rem. the author says: 'Stated in general terms, the principle is that *mandamus* will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that, as to all acts or duties, necessarily calling for the exercise of judgment or discretion, upon the part of the officer or body, at whose hands their performance is required, *mandamus* will not lie. The fact, then, that the product in question is not intoxicating, does not, in our opinion, give a right to this action. From the name of the product the defendant had a right to infer that the transportation was prohibited, and we think it was not bound at its peril to correctly analyze the product, or determine otherwise that it was not in fact intoxicating. We think that the demurrer was properly sustained."

The London *Lancet* does not share the opinion recently put forward by some morbid philanthropists, that hanging is a barbarous method of extinguishing the life of persons who are condemned to death. It says: "At length it is beginning to be recognized in France that the brain of a decapitated criminal lives, and consciousness is maintained for an appreciable time, which to the victim may seem an age, after death —an opinion we strongly expressed many years ago. This ghastly fact, as we have no doubt it is, being perceived, it is beginning to be felt that executions cannot any longer be carried out by the guillotine. Prussic acid is now proposed. If instantaneous death be desired, this is clearly inadmissible. The period taken to terminate life by poison of any kind must needs vary greatly with the individual. In not a small proportion of instances we fancy death by prussic acid would be considerably protracted, and, although long dying is not so horrible as living after death, so to say, yet it is strongly opposed to the interests of humanity to protract the agony of a fellow creature dying by the hand of justice. Electricity is another agent suggested. We doubt the possibility of applying this agent so as to destroy life instantly. We confess that, looking at the matter all round, we incline to think that hanging, when properly performed, destroys consciousness more rapidly, and prevents its return more effectually than any other mode of death which justice can employ. It is against the bungling way of hanging we

protest—not against the method of executing itself. That it is, on the whole, the best, we are convinced."

The mode in which a thief intends to dispose of the stolen property, so long as the owner is deprived of it, does not affect the character of the offence. Is it larceny if the owner is not really deprived permanently of his goods, but is only made to pay a fraudulent charge upon them? That was the question presented to the Supreme Court of Alabama in *Fort* v. *State*, June 20, 1887 (9 Crim. Law Mag. 935). Farm laborers, who were hired to pick cotton at a certain price per hundred pounds, entered a cotton-house, and removed some cotton with the intent to place it with some that they had picked, and which had not been weighed. The Court came to the conclusion that this taking, being with the intent of depriving the owner of property, and placing it where the taker could claim a lien on and hold it until the ordinary compensation for picking was paid, was larceny. The Court cited *Reg.* v. *Richards*, 1 Car. & K. 532, and some United States decisions.

COUR DE CIRCUIT.

SAGUENAY, 4 septembre 1885.

Coram ROUTHIER, J.

BOURGOING v. SAVARD.

Action d'injures—Plaidoyer de justification.

Le demandeur poursuit le défendeur pour injures et diffamation, parce que ce dernier aurait dit et répété qu'il est un malhonnête homme, un voleur, etc.

Le défendeur plaide par exception : " Que tout ce qu'il a pu dire au sujet du demandeur diffère des allégations de la déclaration en cette cause, et que tout ce qui sera prouvé avoir été dit par lui est vrai ; que les paroles qu'il a pu proférer au temps et dans les circonstances en question ne sont pas de nature à causer des dommages au demandeur, ce dernier étant connu aux endroits mentionnés en la déclaration, pour ses transactions commerciales et autres auxquelles avaient trait les paroles du défendeur."

Motion du demandeur que ces allégués de l'exception soient rejetés du dossier :

I. Parce que les allégués de la dite exception sont trop vagues et ne font pas voir sur quoi repose la défense du défendeur ;

II. Parce que l'exception ne dit pas quelles paroles le défendeur a prononcées, ni ne fait voir si les propos qu'il a pu tenir sont de nature à nuire au demandeur ;

III. Parce que la dite exception ne dit pas quelle est la réputation du demandeur au sujet de ses transactions commerciales.

A l'argument le défendeur cita : *Delisle* v. *Beaudry*, 12 L. C. J. p. 221 (1868), Beaudry, J. : " Qu'un défendeur peut plaider légalement que tout ce qu'il a dit diffère de ce que le demandeur allègue dans sa déclaration, et que tout ce qu'il a dit est vrai."

Jugement : Motion du demandeur accordée avec dépens pour les motifs y mentionnés.

Charles Angers, procureur du demandeur.

J. S. Perrault, procureur du défendeur.

(C.A.)

COUR SUPERIEURE.

SAGUENAY, 1886.

Coram ROUTHIER, J.

I. GAUTHIER v. R. GAUTHIER *et al.*, & le dit R. GAUTHIER, opposant, & les dit I. GAUTHIER *et al.*, contestants.

Taxation de mémoire de frais — Honoraires quand plusieurs défendeurs se défendent séparément—Frais d'expert et procureur distrayant.

JUGÉ :—1o. *Que si par une erreur de calcul en additionnant les différents items d'un mémoire de frais, l'on forme un total de* $119.00 *au lieu de* $159.00, *et que le mémoire de frais est taxé à la première de ces sommes, conformément à l'avis de taxation donné, une exécution ne peut ensuite émaner que pour cette somme de* $119.00 *à moins que l'erreur ne soit corrigée par une révision régulière ; Que sur exécutoire pour* $159.00 *sans que telle révision ait eu lieu, le montant réclamé sera réduit à* $119.00 *sur opposition à la saisie ;*

2o. *Que trois défenses séparées par trois défendeurs qui invoquent les mêmes moyens, mais qui ont comparu et plaidé par le même procureur, donnait à ce dernier droit à trois honoraires ;*

3o. *Que le procureur distrayant a droit d'inclure dans son mémoire, et de réclamer par exécu-*

tion le montant des frais d'un expert sans taxation spéciale, même quand il appert qu'il n'a point payé tel expert, ni fait de déboursés à son sujet.

Le demandeur avait poursuivi les défendeurs conjointement et solidairement, parce qu'ils auraient coupé une certaine quantité de bois sur sa propriété. Les défendeurs comparurent et plaidèrent séparément les mêmes moyens par le même procureur. Après expertise par un arpenteur, l'action fut renvoyée faute de preuve.

Le procureur distrayant des défendeurs fit préparer son mémoire, et chargea un honoraire sur chaque défense ; mais par une erreur de calcul, le total des différents items ne fut porté qu'à $119.00 au lieu de $159.00, et le mémoire fut certifié à $119. Après avis de taxation, le mémoire fut taxé à cette dernière somme. Le procureur distrayant prit un exécutoire en son nom, mais au dernier moment, s'apercevant de l'erreur de calcul commise, il fit émaner le bref pour $159.00, sans aucune formalité de révision, ni avis à la partie adverse.

Mais, dans le montant des frais réclamés se trouvait comprise une somme de $80.00, frais de l'arpenteur, expert qui avait agi dans la cause.

Le demandeur fit opposition afin d'annuler pour partie, alléguant qu'un seul honoraire devait être accordé ; que l'on ne pouvait réclamer plus de $119.00 vu les raisons ci-dessus, et surtout que le procureur distrayant ne pouvait inclure dans son mémoire et réclamer par exécution les $80.00 dues à l'expert, n'ayant jamais déboursé toute ou partie de cette somme.

Et à l'appui, l'opposant disait : Le mémoire de l'expert doit être taxé séparément. C'est à ce dernier à prendre l'initiative, Ordonn. de 1667, art. 15, et les parties ont intérêt à le discuter directement avec lui. L'arpenteur ne se peut trouver en position meilleure que le Shérif qui doit faire taxer son compte avant de réclamer, Art. 705, C. proc., et qu'un tiers-saisi, 15 L. C. R. p. 152.

La saisie a été pratiquée au nom du procureur distrayant, et bien que ce soit les défendeurs qui contestent l'opposition, n'empêche pas que ce soit lui qui réclame en vertu de la distraction qu'il a obtenue. Le droit à la distraction repose sur la présomption que les déboursés ou la plus grande partie d'iceux ont en réalité été faits par l'avocat. C. proc. français, art. 133. Merlin commentant cet article, Répert. vol. 4, p. 631, col. 7, fait remarquer : Au surplus, l'article 133 du code de procédure ne permet aux avoués de demander la distraction des dépens à leur profit qu'en affirmant lors de la prononciation du jugement qu'ils ont fait la plus grande partie des avances. De là, l'arrêt, etc.

Bioche, Dict. de procéd., vol. 3, p. 98 : "La distraction des dépens est le droit accordé à un avoué *de toucher ses déboursés* et honoraires sur les dépens adjugés à la partie, etc. Il y a plus, les avances ayant été réellement faites par l'avoué, etc." Pigeau, proc., vol. I., p. 419, liv. 2, part. 3, tit. 2, ch. 4, est encore plus explicite.

Comme on le voit, il s'agit toujours de protéger l'avocat ou l'avoué pour les déboursés qu'il a réellement faits et pas plus.

Il est vrai que notre code n'exige pas l'affirmation connue en France ; mais le principe sur lequel repose la distraction est le même chez nous qu'en droit français. Il est prouvé que le procureur distrayant n'a fait aucune avance à l'expert.

La raison qui engageait l'opposant à insister sur l'application rigoureuse des principes qui régissent la distraction de frais, c'est qu'il y avait des créanciers hypothécaires qui risquaient de perdre partie de leurs créances si les frais de l'arpenteur étaient colloqués par privilège au même rang que les autres frais ; ce qui ne pouvait manquer d'avoir lieu, vu 33 Vict. C. 17, amendant l'art. 606 du code de procédure, et *Tansey & Bethune*, M. L. R., 1 Q. B. 28.

L'opposant faisait aussi motion pour faire réviser le mémoire et spécialement pour faire retrancher les frais de l'expert.

Les contestants répondaient :

Que l'erreur cléricale commise dans l'addition des frais pouvait être corrigée par le protonotaire, sans révision du mémoire.

Que plusieurs défendeurs ont droit de se défendre séparément, même quand leurs moyens de défense sont les mêmes.

Que sous notre code, le procureur distrayant peut inclure dans son mémoire tous les

frais taxables et dûs.—*Beauchesne & Pacaud*, et *Desprè & Leclerc*, 15 L. C. R. 193.

Que le fait d'inclure dans le mémoire les frais de l'expert équivaut à la taxation spéciale à la diligence de ce dernier, que l'opposant prétendait être de rigueur.

Jugé : Que les trois honoraires devaient être accordés. La somme réclamée réduite à $119.00, et l'opposition renvoyée quant au surplus, sans frais.

La Cour faisant observer qu'il eût été plus régulier de faire taxer spécialement le compte de l'arpenteur ; que l'opposant aurait pu faire suspendre les procédés sur la saisie, pour faire taxer régulièrement ce compte, mais ne pouvait s'opposer à la saisie afin d'annuler.

Charles Angers, procureur de l'opposant.
J. S. Perrault, procureur des contestants.
(C. A.)

QUEBEC DECISIONS.*

Action par femme commune en l'absence de son mari.

JUGÉ :—Qu'une femme commune, dont le mari est absent depuis dix ans, ne peut poursuivre en son nom pour réclamer des biens mobiliers à elle spécialement donnés pendant l'absence de son mari; ces biens tombent dans la communauté, et la femme ne peut porter une action, même autorisée de justice, avant de se faire envoyer en possession provisoire des biens de son mari absent, si elle a droit (C. C. 636). La femme, dont le mari est absent, peut être autorisée par justice à ester en jugement (C. C. 180); mais ce ne peut être que pour la poursuite des droits qui lui sont propres, et non de droits appartenant à la communauté qui n'est pas dissoute et dont elle n'a pas l'administration.—*Dasylva* v. *Lizotte*, Cour de Circuit, Casault, J., 28 mai 1881.

Bail—Réparations—Saisie-gagerie—Droit de suite—Frais.

JUGÉ :—Qu'un locataire avant de quitter les lieux qu'il occupe en vertu d'un bail authentique et qu'il prétend être inhabitables, doit mettre en demeure son locateur d'avoir à les réparer sous un délai déterminé, et à défaut par le locateur de se conformer à la sommation, le locataire peut se pourvoir en justice pour faire résilier le bail;

2. Que s'il y a dans le bail une clause spéciale par laquelle il est dit que le locateur ne sera tenu à aucune réparation pendant toute la durée du bail, pas même à tenir les lieux clos et couverts, le locataire sera lui-même tenu aux réparations s'il devient nécessaire d'en faire ;

3. Que si un locataire quitte les lieux et enlève ses meubles avant l'expiration du bail, une saisie-gagerie par droit de suite pourra émaner pour la balance du loyer tant échu qu'à écheoir, et le jugement pourra condamner le défendeur à payer sans délai le loyer échu, et quant au loyer à écheoir au fur et à mesure qu'il deviendra dû et échu, et la saisie-gagerie par droit de suite sera déclarée tenante jusqu'à complète exécution du jugement ;

4. Que dans une cause de cette nature, le montant des frais sera déterminé par le montant du loyer tant échu qu'à écheoir, et non par le montant du loyer échu au moment de l'action.—*Simmons* v. *Gravel*, Cour de Circuit, Caron, J., 25 février 1884.

Abandonment of property—Joint curator.

HELD :—That although articles 763 *et seq.* C. C. P., as amended by 48 Vict., ch. 22, use the expression "a curator," there is nothing in the law to exclude a joint curatorship composed of two or more persons.

2. That the appointment of a curator is in the Court or judge, and not in the creditors, but creditors attending the meeting will be heard, and their suggestions as to the appointment will be considered by the Court. —*In re Beaudet & Chinic*, S. C., Stuart, Ch. J., September 6, 1887.

Billet promissoire—Novation.

JUGÉ :—Que la délivrance par un débiteur à son créancier du billet promissoire d'un tiers en paiement d'une dette, n'opère pas novation, à moins que l'intention du créancier qu'il y ait novation ne soit expressément et clairement exprimée.—*Lagueux* v. *Joncas*, Cour de Circuit, Caron, J., 21 mai 1886.

* 13 Q. L. R.

Criminal information—Libel—Option of remedy.

HELD:—1. That the remedy by a criminal information, for a misdemeanor of a gross and notorious kind, filed in the Court of Queen's Bench, at the instance of an individual, by the Clerk of the Crown, exists in this province;

2. That such information can only be filed by leave of the Court, the exercise of such remedy being thus placed within the discretion of the tribunal;

3. That the Court will take into consideration all the circumstances of the charge before it will lend its assistance to this extraordinary mode of prosecution;

4. That when the prosecutor has chosen another remedy, which he has not expressly renounced, he cannot obtain leave to file a criminal information.—*Ex parte O'Farrell*, Court of Queen's Bench, criminal side, Cross, J., October, 1887.

Donation, Action to revoke—Saisie-conservatoire.

HELD:—That a donor demanding the revocation of a donation for cause of ingratitude, may cause the issue of a *saisie-conservatoire*, pending the action, to attach in the hands of the donee the effects donated, and also any moveables replacing those donated. —*Cryan* v. *Cryan*, S. C., Beauce, Angers, J.

Exécuteur testamentaire—Nomination par le tribunal—Destitution—Durée de l'exécution.

JUGÉ:—1. Que la nullité de la nomination par justice d'un exécuteur testamentaire, l'échéance du temps fixé pour la durée de ses pouvoirs, et sa mauvaise administration, ne sont pas des moyens incompatibles, et qu'ils peuvent être tous les trois joints dans une action pour sa destitution et sa dépossession;

2. Que des prêts amplement garantis faits l'un à un des légataires en usufruit, pour lui permettre de faire un voyage que requiert sa santé et que lui prescrivaient ses médecins, et l'autre à la mère des légataires pour réparer une propriété appartenant à elle et à tous les légataires moins un, quoiqu'ils ne soient pas l'emploi des deniers spécifié dans le testament, ne sont pas, en l'absence d'une preuve qu'ils eussent pu être avantageusement placés de la manière voulue par le testateur, une cause de destitution;

3. Que, lorsque, dans un testament qui a reçu son exécution par la mort du testateur avant la mise en force du Code Civil, le testateur a exprimé la volonté que l'exécution du testament fut continuée jusqu'à l'arrivée d'un évènement déterminé, et que les exécuteurs sont morts sans se donner les successeurs que le testateur les avait chargés de nommer, le tribunal, ou le juge, peuvent, en vertu des pouvoirs que leur en confère l'article 924 C. C., et sans donner à cet article un effet rétroactif, nommer un exécuteur pour continuer l'exécution du testament;

4. Que l'arrivée de l'évènement indiqué par le testateur comme terme de l'exécution de son testament y met fin, lors même que les exécuteurs n'ont pas pu compléter ce dont ils paraissent avoir été chargés.—*Chouinard* v. *Chouinard*, C. S., Casault, J., 22 nov. 1886.

COURT OF APPEAL.

LONDON, Nov. 7, 1887.

Before the MASTER *of the* ROLLS *and* LORDS JUSTICES BOWEN *and* FRY.

IN RE JOHNSON.

Contempt—Interference with the administration of justice—Acts not committed in face of the Court.

This was an appeal by Johnson, a solicitor, from an order of Mr. Justice Kekewich, sitting as Vacation Judge, for committal to prison for contempt of court. It appeared that there was an action of "*Jonas* v. *Long et al.*" in the Lambeth County Court, in which a solicitor named Robinson was acting for the plaintiff, and Johnson was acting as solicitor for Harris, one of the defendants. On the 16th of August, an application was made to Mr. Justice Kekewich, sitting as Vacation Judge in Chambers, to stay proceedings under an order made by the County Court Judge in the above action pending an appeal to the High Court. Robinson and Johnson were both present before the judge, and after the application had been disposed of, it appeared, as stated in the affidavits filed on behalf of the plaintiff and Robinson, that when they got into the hall outside the judge's chambers, Johnson began to abuse

Robinson, and continued to do so until they arrived downstairs at the Temple Bar entrance to the building, when Johnson called Robinson a "liar" and a "d——d perjured scoundrel," and shook his fist in Robinson's face, without, however, actually striking him. Robinson also stated in his affidavit that while in the judge's chambers Johnson would not let him see the judge's endorsement on the summons, but snatched it from his hands, and the judge rebuked Johnson. Next day, on Robinson's application, Mr. Justice Kekewich gave leave to serve Johnson with notice of motion to commit him for contempt. This notice was not served personally, and when the motion came on in court on August 24, as Johnson did not appear, Mr. Justice Kekewich ordered the motion to stand over till August 31, and copies of the notice of motion to be sent by registered letter to Johnson's address. This was done, the affidavits in support of the motion being sent in the registered letter. Johnson did not appear on August 31, and Mr. Justice Kekewich made an order of committal, the order stating that "it appearing by the evidence that the said Johnson did within the precincts of this court threaten, assault and intimidate the said Charles Robinson, and this court being of opinion, upon consideration of the facts disclosed by such evidence, that the said Johnson has been guilty of contempt of this court, it is ordered that the said Johnson be committed to prison for his said contempt." From this order Johnson appealed, and filed an affidavit, in which he denied having used the language attributed to him or having intimidated Robinson, and stated that he was at the time suffering from personal trouble, and that he regretted his language and acts. He also denied that he was personally served with the notice of motion, and said that he had no knowledge of the notice of motion until August 23.

Mr. *Oswald* (Mr. *F. Watt* with him), for Johnson, contended that there was no contempt of court. A judge sitting at Chambers did not constitute a court, and there was no power in a judge at Chambers to fine or imprison. (*R.* v. *Faulkner*, 2 Cr. M. & R., 525.) The Judicature Acts had not enlarged his powers. There could be no "contempt of court" where what took place occurred at Chambers. Further, even if the judge at Chambers was sitting in court, there was no contempt here, what happened being mere personal abuse, and not an attempt to interfere with the course of justice. There was no insult to the judge (*Ex parte Wilton*, 1 Dowl. N.S. 805; *Republic of Costa Rica* v. *Erlanger*, 46 L.J., Ch., 375); and considering where the alleged violent language took place, the contempt, if any, was not committed within the precincts of the court. He also contended that the proceedings were irregular, as the notice of motion to commit had not been personally served, and no sufficient notice of the application had been given to the solicitor.

Mr. *Johnston Watson*, for the respondents, was not called upon to argue.

The Court dismissed the appeal.

The Master of the Rolls said that he would take no notice of what took place before the judge at Chambers on the day in question, but when the solicitors left the room, Johnson began his infamous conduct (whether close to the judge's door or within a particular building was immaterial), and continued it down the stairs to the door of the building. His disgraceful conduct consisted in his using vile language to the other solicitor in connection with the proceedings before the judge, who had given a decision against him. Was that an insult to the administration of justice? No doubt it was intended to be an insult to the administration of justice and to bring it into contempt, and there could be no doubt that it was an insult to the administration of justice. The matter then came before the judge in court. His Lordship (the Master of the Rolls), having dealt with the argument that Johnson had no notice of the motion before the judge, said that he was clear that Johnson had actual notice of the application, as the notice and affidavits were sent by registered letter to his office and private address and not returned through the Post Office, and Johnson had not sworn that they did not come to his notice. The judge having made an order for his committal, the solicitor, instead of going before the judge and apologizing, appealed to this

court, and it was argued on his behalf that no contempt had been committed in the court. It did not follow, however, that there was no contempt of court. It was also argued that a judge sitting in Chambers was not sitting in court, and therefore what occurred was not a contempt of court. It was not necessary, however, that the thing should take place in court, or be a contempt of a judge who was sitting in court. All that was necessary was that it should be a contemptuous interference with judicial proceedings, the judge acting in his judicial capacity as a judge of the High Court. That was laid down by Chief Justice Wilmot, in a prepared judgment in *R.* v. *Almon*, set out at length in "Opinions and Judgments of Wilmot, C. J.," at p. 265, which judgment, however, it was not necessary to deliver. The doctrine there laid down was approved by Lord Lyndhurst in *Ex parte Van Sandau* (1 Phillip's Reports, 445). That doctrine was applicable to proceedings before a judge, where a judge was acting judicially in his office as a judge of the High Court, whether in court or in a private room; and any one who interfered with that judicial proceeding so as to bring it into contempt was guilty of contempt, not of the judge, but of the court of which that judge was a member. That doctrine applied to what was done by the judge, wherever sitting, if he was exercising his judicial functions. Moreover, it was not confined to a judge, but applied to a master of the court. That appeared from *Ex parte Wilton* (1 Dowl. N.S., 805). The act here took place immediately after the decision of the judge, and it was intended to throw contumely and insult upon what the judge had done and to interfere with the administration of justice. Whether a judge sitting at chambers was or was not a court he would not decide, but at any rate the judge was acting for the court, and the insult was a contempt of the court whose representative the judge was. The solicitor was then summoned to appear in court before the judge, and the solicitor, having notice of the application, deliberately abstained from appearing before the judge in court on the 31st of August. The judge then had power to order his committal, and the order was perfectly right.

Lord Justice BOWEN said that the law had armed courts of record with the power of preventing and of punishing *brevi manu* attempts to interfere with the administration of justice. It was upon that ground that insults to judges, witnesses, and jurors were not allowed. And it was upon that ground that persons engaged in judicial proceedings in courts of justice were protected both in going to and returning from the courts. Had that principle been broken here? At the entrance to the building the solicitor insulted and all but assaulted, if he did not actually assault, the other solicitor. Was not that a gross interference with the administration of justice? It was immaterial whether the offence was committed in the face of the court, provided it amounted to an interference with the administration of justice. It was not necessary to consider the power of the judge at chambers to commit for contempt, as the judge was sitting in court when he made the committal order, though the contempt occurred in connection with proceedings at Chambers. The protection thus afforded to persons attending the judge at Chambers would equally apply to persons attending the other officers of the court, such as the masters. The punishment inflicted by the learned judge was quite right and was richly deserved, and the appeal must be dismissed.

Lord Justice FRY was of the same opinion, and had nothing to add, except to express his surprise that an officer of the court should have brought this appeal, and it might be that other persons would have to consider the conduct of this solicitor.

FAILURE TO PAY OVER CLIENT'S MONEY.

On November 1, before Mr. Justice Manisty and Mr. Justice Charles, an application on the part of the Incorporated Law Society against Charles George Barnes, a solicitor, of Hastings, was heard. In July, 1885, he, as solicitor for one Jenner, administrator for Mary Jenner, had received various sums of money owing to the estate, amounting to £214. Various applications were made by

his clients for payment, but without effect. In July, 1886, another firm of solicitors were instructed by them to apply to him for payment, and he wrote to them making various excuses—that he was very busy, or out of town, or suffering from rheumatism, &c. Failing to obtain payment, the solicitors brought the matter before the Incorporated Law Society, who, in November last year, made a communication to him, in answer to which he wrote a long letter, the substance of which was that he had received a notice from a trustee in bankruptcy of his client not to part with the money, and he sent an account which made the balance due £126. On January 8, however, he wrote another letter, stating that the notice had been withdrawn, but nevertheless, notwithstanding repeated applications, he had not paid the money. The case had been once adjourned, at the request of the solicitor, but he filed no affidavit until, after a further indulgence to two o'clock, he filed an affidavit which ascribed his failure to pay over the money—first, to the notice not to pay it, and next to the withdrawal of a secret partner who had given a guarantee to their bankers which he in March last withdrew, in consequence of which they closed the account, which was overdrawn. Owing to this, he said, he had not been able to pay the money, which, however, he now undertook to pay within forty-eight hours.

Mr. Justice Manisty said the case was not one in which there appeared to have been a deliberate design to deprive the client of the money. Nevertheless, it was a case which could not be passed over without a sentence of some severity, though the Court did not think it a case for striking the solicitor off the rolls. The order must be that he be suspended from practice for twelve months, and also that within forty-eight hours he must pay the money due or be struck off the rolls.—*Law Journal.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Nov. 26.

Dividends.

Re Arsène Neveu—First and final dividend, payable Dec. 10, C. Desmarteau, Montreal, curator.

Re Joseph Parent—First and final dividend, payable Dec. 13, P. J. Basin, Quebec, curator.

Separation as to Property.

Marie Anne Cloutier vs. Joseph Cloutier, *restaurateur*, Three Rivers, Sept. 16.

Délima Dault vs. Israël Lemay, Beauharnois, Nov. 22.

Philomène Laurendeau vs. Joseph Corriveault, Magog, Nov. 21.

Elizabeth Renaud vs. Adolphe Ethier, carpenter, Ste. Cunégonde, Nov. 4.

Quebec Official Gazette, Dec. 3.

Curators appointed.

Re Zélire Brouillette (E. Beauchamp & Co.)—C. Desmarteau, Montreal, curator, Nov. 26.

Re J. D. E. Boisvert, Drummondville.—J. McD. Hains, Montreal, curator, Nov. 24.

Re Etta Carpenter (Henry Dinning & Co.).—Thos. O'Neill, Quebec, curator, Nov. 28.

Re E. A. Emond.—H. A. Bedard, Quebec, curator. Nov. 30.

Re Harris, Heenan & Co., leather merchants.—S. C. Fatt, Montreal, curator, Nov. 29.

Re Joubert & Pepin.—C. Desmarteau, Montreal, curator, Dec. 1.

Re Théodore Pelletier.—C. Millier and J. J. Griffith. Sherbrooke, joint curator, Nov. 29.

Dividends.

Re Alice M. Swalwell *et al.*—First and final dividend, payable Dec. 20, J. M. M. Duff, Montreal. curator.

Re L. H. Lafleur, Yamaska.—First dividend, payable Dec. 22, Kent & Turcotte, Montreal, curator.

Separation as to property.

Marie Alice Boilard vs. Eugène Charles Carbonneau, clerk, township of Montminy, Nov. 26.

Flore Fauteux vs. Désiré Drainville, physician, Berthier, Nov. 14.

GENERAL NOTES.

La Cour d'assise de Moscou a jugé dernièrement une aventurière, d'un genre tout à fait extraordinaire, qui était connue sous le nom de "Main d'or."

Cette dame a passé toute sa vie à voyager en Europe et à faire des dupes. Elle s'est mariée dans différents pays seize fois, dont une seulement en Russie. Deux de ses mariages ont été contractés à Paris et trois en Allemagne. Elle vivait plusieurs mois avec chacun de ses maris et, après l'avoir dépouillé de sa fortune, disparaissait pour aller à la recherche d'une nouvelle dupe.

Il y a quelques années, la "Main d'or" avait été jugée déjà à Moscou pour escroqueries et on l'exila en Sibérie. Là, elle sut séduire le commandant de la place où elle était internée. Il l'épousa et s'enfuit avec elle à Constantinople.

La "Main d'or" abandonna encore son mari russe et revint en Russie, où, pendant deux ans, elle continua à vivre d'expédients de toute sorte. On l'arrêta enfin sur la plainte d'une nouvelle dupe qu'elle avait faite et elle échoua sur les bancs de la Cour d'assises, qui vient de la condamner encore une fois à la déportation.

The Legal News.

VOL. X. DECEMBER 17, 1887. No. 51.

Mr. Justice Tait, in the Shefford election case which will be found in the present issue, has stated very clearly the grounds upon which he rests his decision that the session ought to be counted in the six months under the election law. Mr. Justice Bourgeois, at Three Rivers, has decided that the session cannot be counted. In this view it is understood that Justices Taschereau and Davidson concur. On the other hand Mr. Justice Caron has given a judgment in the same sense as that rendered by Mr. Justice Tait.

An interesting question of club law was presented in *Gebhard* v. *The New York Club* (N. Y. Daily Reg., Nov. 15, 1887). The The Supreme Court of New York (Barrett, J.) dissolved a temporary injunction granted to the plaintiff enjoining the club from taking proceedings for his expulsion from membership. The Court observed:—"It surely needs no extended discussion to point out that the issue raised by the plaintiff's earnest denial of the charges is an appropriate one to be tried by the club itself under its constitution and by-laws. These are questions of honor between gentlemen with which the courts have primarily nothing to do. When the plaintiff became a member of this club, he agreed to its constitution, which expressly provides the code regulating such offences, the tribunal for their trial and the procedure. The board of directors is, in fact, expressly authorized to expel a member for conduct which it shall consider dangerous to the welfare, interests or character of the club. Now, surely the board may lawfully say that it considers the conduct of the plaintiff—should the charges be proved—as coming within this provision. It certainly would be dangerous to the character of any association of gentlemen to have among them a member who has secured money, however honestly earned, by dishonorable means, and who retains it, even legally, by discrediting a fellow member's word, and repudiating his own. The club, therefore, has ample jurisdiction to try the plaintiff upon these charges, while this court is entirely without jurisdiction in the specific premises. A court of equity will undoubtedly see to it that the accused member has a fair hearing, and that the club proceeds in accordance with the principles of natural justice. Thus the member is entitled to due notice of the hearing, to a statement of the charges, to hear what his accusers have to say, and to an opportunity of explanation. Unless these and still other rights, not necessary to be here specified in detail, are accorded, a court of equity will treat the proceedings and judgment as null and void. But before the club can be charged with having denied these rights, it should at least be permitted to grant them. The question of a fair hearing can only be solved when all the proceedings thereon are before us. Upon the hearing, the plaintiff can object to any particular member of the board, and if good and sufficient reasons for his challenge are furnished, the member may retire. If he remains, the reasons can subsequently be weighed when the court is asked to reinstate upon the claim that the ordinary principles of natural justice have been violated. But such reasons must be substantial. The jurors provided for in the organic law of the club are not to be lightly set aside. They are disqualified only when their sitting in judgment is, under clear and convincing facts, manifestly repugnant to those principles of justice which should govern in every inquiry however formal. So as to the denial of counsel. The president had no more authority in this matter than any other member of the board. The plaintiff, if he desired to raise this point effectively, should have appeared with his counsel before the board, at the time and place appointed for the hearing, and should then and there have claimed his privilege. He may still do so. If it is denied, the question will then be properly up for decision. I may say, however, that my impression favors the plaintiff's contention in this regard, and I should deeply regret to learn that the assistance of counsel had been denied to any man struggling against an accusation involving

not only his interests, but his honor, by a respectable and enlightened body of American gentlemen. My conclusion is that the plaintiff must exhaust his remedy within the club before appealing to the courts; that he cannot stop a proceeding of this character *in limine*, and that thus far, the club has acted strictly within its lawful jurisdiction under the constitution, to which the plaintiff (as well as all other members) has given his written assent."

The attempt to make Mrs. Langtry a citizen of the United States was beset by some difficulties. It appears from 31 Fed. Rep. 879, that Mr. Justice Field, of the U. S. Supreme Court, holding the Circuit Court at San Francisco, doubted the legality of the declaration of citizenship made by Mrs. Langtry at her hotel. He did not think the statutes gave authority for the clerk to take the records from the court, or to take a declaration anywhere but in open court. To permit the proceeding to pass without comment would establish a dangerous precedent, and gross abuses; those wishing to receive the sacred trusts of citizenship should attend at the place of the legal custody of the records. The law of 1876, 19 St. 2, c. 5, permitting the declaration to be taken before the clerk, did not authorise the clerk or deputy to remove records. Her counsel replied, that in the case of the widow of President Barrios of Guatemala, the records were taken to her hotel. Mr. Justice Field was not aware of that fact; the precedent was bad, and he suggested that Mr. Barnes inform Mrs. Langtry of the Court's doubt as to the legality of her declaration, which she could remove by repeating the declaration before the clerk at his office, or in open Court. The Court says in a note that the public journals state that Mrs. Langtry is not a *feme sole;* that her husband lives in Engand. If this be so, a wife is, by law, a citizen of her husband's country. No person can be a citizen of two countries.

SUPERIOR COURT.

SWEETSBURGH, Nov. 24, 1887.

Coram TAIT, J.

THE DENTAL ASSOCIATION OF QUEBEC v. GRAHAM.

Dental Association Act—Action for Penalty—Popular action.

HELD:—*That a suit, to recover a penalty under the Dental Association Act, is not a popular action within the meaning of Chap. 43 of 27-28 Vic., when instituted by the Association, and therefore an affidavit is unnecessary.*

PER CURIAM. The plaintiffs are incorporated by 46 Vic., cap. 34 (Q.), and section 19, as amended and replaced by Sec. 4 of the Act 49-50 Vic., cap. 36, enacts that prosecutions instituted for the recovery of any penalty imposed by the Act may be instituted and sued for in the name of the association, or by any person in his own name in the same form and under the same rules of procedure as ordinary civil actions for the recovery of debt in the Circuit or Superior Court, as the case may be, and by section 21 of said first cited Act all fines imposed by said Act are payable to the Treasurer of the Association and form part of the funds thereof.

The present action has been instituted by and in the name of plaintiffs, under said section 19, to recover penalties alleged to be due by defendant under said section, for having practised in this province as a dentist for remuneration, etc., not being licensed by the Association or registered as a member thereof.

The defendant pleads that this is a popular action within the meaning of the Act of the late Province of Canada, 27-28 Vic., cap. 43, requiring an affidavit.

The object of that statute was to prevent defendants from causing such actions (*i.e.*, *qui tam*, or popular actions), to be instituted by friends of theirs who were in collusion with them in order to frustrate and delay such actions. But here the plaintiffs are authorized to bring and have brought the action in their own name, to recover penalties imposed for their own benefit and protection, and, although the statute says the

action may also be instituted by any person in his own name, yet when it is instituted by and in the name of the Association, I do not think it is a popular action within the meaning of the Act above cited. The circumstances seem to repel the possibility of the action having been instituted by a friend of defendant in collusion with him, when plaintiffs sue for penalties which the statute gives them as a protection against the violation of their own charter. I think, therefore, the *exception* should be dismissed.

J. P. Noyes, Q. C., for plaintiff.

T. Amyrauld, for defendant.

(J. P. N.)

SUPERIOR COURT.

BEDFORD, Nov. 25, 1887.

Before TAIT, J.

Re SHEFFORD ELECTION, GAGAILLE v. AUDET.

Dominion Controverted Elections Act—Limit of Six Months under sections 32 and 33.

HELD:—1. *That the word "trial" in section 32 of the Dominion Controverted Elections Act means a separate and distinct part of the general process, and only begins at the time fixed by the notice given under section 31.*

2. *The limit of six months within which the trial of an election petition must be commenced, according to section 32 of the above Act, is counted from the time the petition has been presented, and where no application has been made to enlarge the time for the commencement of the trial the petition will be dismissed at the expiration of the six months, although Parliament may have been in session during a portion of this period.*

PER CURIAM.—The respondent moved on the 2nd instant that the election petition in this matter be dismissed, inasmuch as it was presented on the 29th of April last, and more than six months have since elapsed and the trial has not yet been commenced.

The record shows that the petition was presented on the day mentioned, and that no application was made before the expiration of six months, or before the motion was made, either to fix a day for the trial or to have the time for its commencement enlarged.

On the 29th of April Parliament was in session, and it is admitted that six months have not elapsed since the close of the session.

The petitioner says that the six months only began to run from the end of the session, and even if this is not so, the trial was commenced within the six months from the presentation of the petition by the preliminary examination of the respondent. I have, therefore, to decide what is meant by the word "trial," and from what time the delay of six months commenced to run in this case.

Sections 32 and 33 of the Act read as follows:—

32. "The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over; but if, at any time, it appears to the court or a judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament, and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included.

"(2) If, at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the court or a judge thinks just.

33. "The court or a judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on an application for that purpose, supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary."

It appears to me there can be little difficulty in determining what is meant by the word "trial" as used in section 32. The Act is, as it were, divided into different parts, each dealing with separate and distinct portions of the whole process connected with the case. Sections 5 to 13 come under the heading of "Petitions," 14 to 23 under "Prelimin-

"ary Examination of Parties," 24 to 28 "Pro-"duction of Documents," and 29 to 42 under the heading of "Trial of Petitions." By section 14 any party to an election petition, whether petitioner or respondent, may, at any time after such petition is at issue, *before* or pending the trial thereof, be examined before a judge or examiner, etc. Under section 24 any party to any election petition, whether petitioner or respondent, may at any time after such petition is at issue, *before* or pending the trial thereof, obtain a rule ordering the adverse party to produce documents relating to the matters in question, etc. Section 29 provides that the clerk of the court is to keep a list of all petitions which are at issue, and that they are to be *tried* in the order in which they stand in such list. By section 31 notice of the time and place at which the election petition will be *tried* is to be given in the prescribed manner not less than fourteen days before that on which the *trial* is to take place, and by section 33 the court or judge may enlarge the time for the commencement of the *trial*, if it is shown that the requirements of justice render such enlargement necessary. So that the word "trial" in section 32 means a separate and distinct part of the general process, and only commences at the time fixed by the notice given under section 31.

In this case the preliminary examination of the respondent took place *before* the trial, under the authority of section 14, and such examination does not fall within the meaning of the word "trial" in section 32.

We have now to consider from what time the six months commence to count. Respondent contends that the time occupied by the session cannot be counted in computing this delay;—that whether the respondent's presence is or is not held to be necessary at the trial, it is all the same—the time occupied by the session is not to be included in the delay of six months. I have to try to the best of my ability to interpret the true meaning of the language used in this section.

It is evident that the dominant idea is *dispatch*, for it is most undesirable that there should be any doubt as to the right of any person to sit in Parliament unless he has been lawfully elected to represent those whom he claims to represent; hence the imperative language, the trial "*shall be commenced* within six months from the time the petition has been *presented*," and "*shall be proceeded with from day to day*" until it is over. The statute then provides that "if at any time it appears to the court or a judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament, because, no doubt, while on the one hand he ought not to be called away from his important duties, on the other hand it would not be just to him or to the parties to have the trial proceeded with during his absence, if his presence is really necessary. Then we have the disputed clause separated from the previous one by a semi-colon, "and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by *such* session of Parliament shall not be included."

It is said this is an independent clause, dealing with delays irrespective of whether the presence of respondent at the trial is necessary or not. I do not interpret it in that way. I think this clause simply states one of the results of the court or judge holding the respondent's presence at the trial necessary. The first result is that the trial shall not be commenced; the second is that the delays shall not run. The clause in my opinion should be interpreted as if it read: "And in such case (*i.e.* when respondent's presence is found necessary at the trial), the time occupied by such session of Parliament shall not be included in the computation of any delays allowed." It appears to me that the session of Parliament during which the delays are not to run is the same session during which the trial is not to be commenced because the respondent's presence is held necessary at the trial. The Act says, if such presence is held necessary the trial shall not be commenced during *any session of Parliament*, and then it says that in the computation of delays, etc., the time occupied by *such session* shall not be included.

It is evident that the trial may be commenced and may proceed during any session of Parliament if nothing is said about res-

pondent's presence or if the court or judge hold it is not necessary at the trial; why should not delays run under these circumstances during such session? If a trial should be commenced and should be proceeding during a session of Parliament (there being no question raised as to the respondent's presence at it), would not "any time or delay allowed for any step or proceeding in respect of such trial" run as if the trial was going on outside the time of the session? Suppose the court or judge gave some order upon the parties, either before or during such trial, to do something within a delay which expired while the trial was proceeding, would this not be a "delay allowed for a step or proceeding in respect of such trial," and could the party so ordered come and say, there is a session of Parliament now going on, and all delays are suspended? It seems to me he might say this if we are to hold that this clause in question is entirely independent and distinct from the preceding clause under which the trial is only postponed when respondent's presence is necessary; and if such an answer could be made to an order of the court it would come to this, that while the Act allows the trial to be commenced during a session of Parliament if respondent's presence is not necessary at the trial, yet the court could not enforce its own orders during the trial, because in the delays allowed for any proceeding in respect of such trial the time occupied by the session is not to be included.

I do not think it is any hardship upon the petitioner or upon those interested on his side, that this petition should be dismissed. Sub-section 2 of section 32 allows any elector to come in after the expiration of three months from the presentation of the petition to carry it on if a day for the trial has not been fixed, and section 33 gives the court or judge jurisdiction to enlarge the time for the commencement of the trial if the requirements of justice render such enlargement necessary. The statute enacted in the public interest required petitioner to proceed with the trial within six months. If a longer delay was necessary to him in the interest of justice, he had the means at hand to obtain it. He has not done so, and from the view I take of the law, the motion must be granted and the election petition in this matter must be dismissed with costs. *

O'Halloran & Duff, for the petitioner.

G. B. Baker, Q. C., for the respondant.

CIRCUIT COURT.

PORTAGE-DU-FORT, (County of Pontiac),
October 22, 1887.

Before WURTELE, J.

SMITH v. BROWNLEE.

Animals impounded—Damages—Right of retention, M.C. 447.

HELD:—*That the owner of a farm, who, under the authority of article 447 of the Municipal Code, has impounded animols found straying or trespassing on his premises, has no right to retain them for the payment of damages which he pretends to have been done by such animals on previous occasions.*

PER CURIAM.—The defendant found the plaintiff's two horses straying on his farm, and he took and impounded them on his own premises, as he was authorized to do by article 447 of the Municipal Code. The plaintiff immediately reclaimed his horses, and offered the fine of twenty-five cents for each horse imposed by article 440; but the defendant refused to deliver them up until he was paid the sum of $5.00, which he claimed for damages done on his farm by the horses on that and on other previous occasions.

The plaintiff contended that the horses had only been a few minutes on his neighbour's farm, and that they had done no damage whatever; but as he then wanted his horses for ploughing, he paid the $5.00 exacted, under protest, and he now sues to recover back the amount.

The evidence adduced shows that no damage had been done on the occasion in question, but that there had been previous trespasses, when some damage had been done,

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* A similar judgment was given in the Missisquoi case, in which *Charles Short et al.* were petitioners and *George Clayes* respondent, the only difference between the two cases being that the preliminary examination of the respondent in the Missisquoi case had not taken place.

although the horses had not been impounded nor the amount of the damage ascertained.

Article 432 provides that the owner of an impounded animal can get it released and delivered to him upon payment of the fine, the expenses and costs incurred, and such damages as may be agreed upon or may be ascertained; and article 442 prescribes that in case of contestation and of the absence of the owner, the damages are determined by experts on view thereof. When the fine, expenses, costs and damages are not paid, the animal is sold, and article 436 says that the proceeds are employed in paying what is due *in consequence of the impounding of the animal*, and that any balance is placed in the hands of the secretary-treasurer. Then article 444 provides that a right of action lies against the owner of an animal which has trespassed and has not been impounded, for the damages done.

It is clear from all this that an animal can only be detained for the damages done on the occasion on which it was impounded, and not for other damages previously done. The defendant had, therefore, no right to detain the plaintiff's horses until he paid the damages claimed, and should have given them up on the tender of the sum of fifty cents due for the fines incurred.

The action brought is the action "*condictio* "*sine causâ*, qui donne la répétition de tout ce "qui a été donné ou payé sans aucun sujet "réel," (Pothier, Usure, No. 156), and the plaintiff is entitled to recover the amount which he paid without cause and under protest. On the $5.00 paid, the defendant was entitled only to fifty cents, and I give judgment in favor of the plaintiff for the rest.

Judgment for Plaintiff for $4.50.

C. P. Roney, for plaintiff.

D. R. Barry, for defendant.

COURT OF QUEEN'S BENCH—MONTREAL. *

Chemin public à travers une érablière—Art. 904, C. M.

Jugé :—Qu'un conseil municipal ne peut ouvrir un chemin à travers une érablière située dans un rayon de 400 pieds de la maison habitée par l'occupant de telle érablière sans le consentement par écrit du propriétaire;

2o. Que le fermier habitant la maison appartenant au propriétaire d'une érablière affermée est "*occupant*" de telle érablière, dans le sens de l'article 904, C. M.—*Massue et al. & La Corporation de la paroisse de St. Aimé*, Dorion, Ch. J., Tessier, Cross, Baby, Church, JJ. (Dorion, Ch. J. et Cross, J., *diss.*), 23 sept. 1887.

Quasi-délit—Absence de malice—Dommages-intérêts.

Jugé :—Que dans les cas de dommages résultant de la négligence du défendeur, quand il n'y a pas de malice de sa part, il n'est pas passible de dommages-intérêts exemplaires, mais seulement des dommages réels que sa négligence aurait causés.—*Stephens & Chaussé*, Dorion, Ch. J., Cross, Baby, Church, JJ., 20 sept. 1887.

Security for costs—Opposition à fin d'annuler by absent defendant.

Held, that an opposant who is absent from the country, even if he is a defendant opposant *à fin d'annuler*, is bound to give security for costs.—*Beckett & La Banque Nationale*, Dorion, Ch. J., Cross, Baby, Church, JJ., Sept. 23, 1887.

Execution—C.C. 1994—C.C.P. 606—Privilege for costs.

Held, 1. (Reversing the judgment of the Court of Review, M.L.R., 1 S.C. 443), that the plaintiff's privilege for the costs of suit, under C.C. 1994 and C.C.P. 606, § 8, as amended by 33 Vict. (Q.) ch. 17, s. 2, extends only to the costs incurred in the Court of first instance. And so, where the plaintiff obtained judgment in the Superior Court against three defendants jointly and severally, and the judgment was reversed by the Court of Queen's Bench sitting in appeal, and, on appeal to the Privy Council, the original judgment was restored, it was held that the plaintiff was entitled to be collocated by privilege on the proceeds of defendants' movables only for the costs incurred in the Superior Court.

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* To appear in Montreal Law Reports, 3 Q. B.

2. (Affirming the judgment in Review), that the plaintiff's privilege for the costs of suit, where the suit has been with a firm, has priority even as regards the personal effects of the individual members of the firm, over the lien of the landlord for the rent of premises leased to such members.—*Beaudry et al. & Dunlop et al.*, Dorion, Ch. J., Tessier, Cross, Baby, JJ., March 18, 1887.

COURT OF APPEAL.

Nov. 21, 1887.

Before LORD ESHER, M.R., BOWEN, L.J., FRY, L.J.

REGINA v. LORD PENZANCE.

Ecclesiastical law—Contumacious clerk—Disobedience to order of suspension—Writ 'de Contumace Capiendo'—Issue of writ after expiration of order of suspension—Habeas Corpus—5 *Eliz.*, c. 23, s. 10; 53 *Geo. III.*, c. 127, s. 1.

Appeal from the judgment of the Queen's Bench Division, reported 56 Law J. Rep. Q. B. 532, making absolute a rule *nisi* for a writ of *habeas corpus*.

In April, 1885, a suit was instituted under the Church Discipline Act, 1840 (3 & 4 Vict., c. 86), against the Rev. James Bell Cox for offences against ritual, of which offences Mr. Cox was found guilty. On September 5, 1885, a monition was served upon Mr. Cox directing him to refrain from the practices of which he had been found guilty. Mr. Cox disobeyed this monition, and on June 13, 1886, he was suspended *ab officio* for six months. The term of suspension would consequently expire on December 13, 1886. Notwithstanding this suspension, Mr. Cox, on June 20, 1886, officiated in his church, and on July 30, 1886, he was adjudged to have so acted, and in August, 1886, a *significavit* was issued. Up to this date Mr. Cox had not appeared in the suit, but upon this latter date he obtained from the Queen's Bench Division a rule *nisi* for a prohibition, and this rule was discharged on March 11, 1887, the judgment being affirmed by the Court of Appeal on April 28, 1887. On May 2, 1887, a writ *de contumace capiendo* was obtained by the complainant, and Mr. Cox was imprisoned under it. Mr. Cox thereupon obtained a rule *nisi* for a writ of *habeas corpus*, on the ground that the writ *de contumace capiendo* could not be lawfully issued after the period of six months' suspension had expired, the order of suspension for disobedience of which Mr. Cox had been imprisoned being no longer in existence. The Queen's Bench Division made the rule absolute.

The complainant appealed.

Their Lordships, having decided that under section 19 of the Judicature Act, 1873, an appeal lay from a judgment of the Queen's Bench Division on an application for a writ of *habeas corpus*, reversed the judgment appealed from. The object of section 1 of 53 Geo. III., c. 127, was not merely to compel obedience in the future, so that when the object of imprisoning the person had come to an end the person was entitled to his release. That section had abolished the sentence of excommunication (except in certain instances), and put instead thereof the decree of contumacy, reserving for the new decree the consequences formerly attaching to the sentence of excommunication, as far as they were applicable. Upon the true construction of that section, which incorporated the provisions of 5 Eliz., c. 23, a person pronounced contumacious could only obtain release from prison by bringing himself within the latter part of that section (which Mr. Cox had not done), or by making submission and satisfaction in the Ecclesiastical Court under 5 Eliz., c. 23, s. 10.—*Law Journal.*

COURT OF APPEAL.

Nov. 21, 1887.

Before COTTON, L.J., SIR JAMES HANNEN, LOPES, L.J.

PEEK, BART., v. DERRY.

Directors—Misrepresentation—Measure of Damages.

In this action the plaintiff sued the defendants, who were the directors of a company which was being wound up, for damages on the ground that he had been induced by misrepresentations contained in the company's prospectus to invest £4,000 in the shares of the company. The Court of appeal decided that the plaintiff had a good cause of action, but directed a further argu-

ment upon the mode in which the damages were to be ascertained.

The plaintiff discovered the fraud in October, 1884, and commenced his action on February 4, two days after a petition had been presented for the winding up of the company.

Bompas, Q.C., and *E. W. Byrne*, for the plaintiff, contended that the actual loss sustained was the true measure of damages.

Graham Hastings, Q.C., and *Phipson Beale*, for one of the defendants, argued that the mode of computing the damages was to ascertain the difference between the price paid and the value of the shares at the date of the purchase; and, alternately, that the value ought to be ascertained at the moment when the fraud was discovered.

Their Lordships held that the measure of damages was the difference between the price paid for the shares and the value of the shares immediately after the date of the purchase; that such value was not the market value, but the real value, which might be ascertained by the light of subsequent events, showing that the shares were originally worthless; and that the plaintiff had not acted so unreasonably in not selling his shares upon the discovery of the fraud as to disentitle him to take into account events which happened subsequently; and they directed an inquiry upon that footing.—*Law Journal*, 22 *N.C.* 145.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 10.

Judicial Abandonments.

J. A. Dufresne, Cacouna, Dec. 1.

Thomas McCord, Quebec, Dec. 7.

Isaïe Riopel, Joliette, Nov. 26.

Curators appointed.

Re James Dalrymple, Montreal.—J. McD. Hains, Montreal, Dec. 6.

Re Langlois and Ellison.—G. E. A. Jones, Quebec, curator, Dec. 1.

Re W. Pringle.—W. C. Simpson, Montreal, curator, Dec. 7.

Re C. Robert & Co., furriers.—J. McD. Hains, Montreal curator, Dec. 1.

Re A. O. Turcotte, Broughton.—H. A. Bedard, Quebec, curator, Dec 9.

Re George Walker.—James G. Ross, Quebec, curator, Dec. 6.

Dividends.

Re François Allard.—First and final dividend, A. A. Taillon, Sorel, curator.

Re Copland & McLaren.—Second and final dividend, payable Dec. 28, A. W. Stevenson, Montreal, curator.

Re Guillaume Gariépy.—Dividend of 33¼ p.c., payable Dec. 27, H. A. A. Brault and O. Dufresne, Montreal, joint curator.

Re Louis Labelle.—Dividend, A. A. Taillon, Sorel, curator.

Re L. Lassonde, St. Zephirin.—Dividend, payable Dec. 30, Kent & Turcotte, Montreal, curator.

Re Wm. Mansfield.—First dividend, payable Dec. 30, C. Desmarteau, Montreal, curator.

Re Hermyle Parant, Rivière Blanche.—Second and final dividend, payable Dec. 18, H. A. Bedard, Quebec, curator.

Re Olivier Proulx.—First and final dividend, A. A. Taillon, Sorel, curator.

Separation as to Property.

Georgine Archambault vs. Damase Perrault, trader, Montreal, Dec. 1.

Hélene Grenier vs. Achille Fereol Fleury, physician, Lanoraie, Dec. 1.

Marie S. Hudon vs. George Chaussé, carpenter, Montreal, Dec. 1.

Exilma Plamondon vs. Napoléon Godbout, merchant, St. Marcel, Aug 19.

Anna Savaria vs. Omer Dufresne, trader, Montreal, Sept. 3.

Cadastre.

Sub-division of lot No. 1006, St. James Ward, Montreal, deposited.

Court Terms.

District of Iberville:—Court of Queen's Bench, criminal terms to be hold 25th October and 25th March. Superior Court terms to be held 23rd January, March, May, September and November; and from 15th to 20th of February, April, June, October and December. Circuit Court, district of Iberville, 11th to 14th of February, April, June, October and December. For County of Iberville, 6th to 10th of February, June and October. For County of Napierville, 1st to 5th of February, June and October.

GENERAL NOTES.

Un incident comique est venu égayer jeudi l'audience correctionnelle de Saint-Julien (Haute-Savoie).

Un jeune homme de dix-neuf ans comparaissait pour répondre à une accusation de vol. On introduit le premier témoin, vieux bonhomme à la mine rusée et chafouine qui porte gaillardement ses soixante-quinze ans et sa vareuse de campagnard endimanché. C'est à lui qu'appartenait la paire de bottes, cause de l'accusation, et on peut lire sur son visage tout le desir qu'il a de retrouver le voleur de ses chaussures.

Reconnaissez-vous, lui dit le president en lui désignant l'accusé, cette personne pour celle qui a volé vos bottes?

Notre paysan, se faisant un abat-jour de ses deux mains et se plaçant à une distance respectueuse de l'accusé, le lorgne et l'examine un instant en silence, puis ne pouvant se prononcer, il s'approche de l'inculpé, le palpe, le retourne, lui caresse le menton, lui passe la main dans les cheveux et hésite encore. Il s'en empare de nouveau, le fait pirouetter; quand frappé soudain d'une idée lumineuse, il lui saisit une mâchoire de chaque main; puis ni plus ni moins que s'il avait affaire à un taureau ou à une jument, s'écrie: "Montrâme la dent," et satisfait de son examen: "N'y est pas cé z'itie, Mons le president." Ce n'est pas celui-la, Monsieur.

Il est inutile d'ajouter que cette sortie inattendue fut accueillie dans l'auditoire par un fou rire dont les magistrats eux-mêmes ne purent se défendre.

The Legal News.

VOL. X. DECEMBER 24, 1887. No. 52.

In bringing to a close the last issue of the year, which is also the last of the decade, we have to record our obligations to a very large number of correspondents, who have contributed valuable assistance to the current volume. In no year since the commencement of the work have we received so many interesting contributions from all parts of the Province.

The appointment of Mr. Benjamin Globensky, Q.C., as judge of the Superior Court, is announced in the *Canada Gazette* of Dec. 17. Mr. Globensky has been long associated with the Hon. Mr. Lacoste, Q.C., in a firm with a very extensive *clientèle*, and has enjoyed unusual opportunities of becoming thoroughly conversant with every department of professional business.

DISALLOWANCE — MANITOBA AND THE NORTH-WEST.

The Disallowance Question in Manitoba has been much written about in newspapers and periodicals, but a few words on some points from their legal aspect, not generally adverted to in articles on this most important question, may be useful to a right understanding of the subject. In the Act respecting the Canadian Pacific Railway, 44 Vict., chap. 1 (1881), it is recited in effect that the construction of the railway (C. P. R.) was stipulated by the terms of the admission of British Columbia into the Union,—that Parliament preferred its construction and operation by an incorporated company rather than by the Government,—that the greater portion was still unconstructed,—and that in conformity with the expressed desire of Parliament, a contract had been entered into for its construction and permanent working, a copy whereof was annexed to the Act and submitted to Parliament for its approval; and the first section of the Act approves and ratifies this contract and authorizes the Government to carry out its conditions according to their purport. It is enacted that the company shall have the right to build and work branches on any point on the main line to any point or points within the Dominion; that for twenty years from the date of the contract (21st October, 1880) no line of railway shall be authorized by the Dominion Parliament to be constructed south of the Canadian Pacific Railway from any point at or near the Canadian Pacific Railway, except such as shall run south-west or to the westward of southward, nor to within fifteen miles of latitude 49; and that in the establishment of any new province, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period.

The Governor is then authorized to grant a charter of incorporation to the contracting company in the form appended to the contract and to the Act, and granting them the franchises, privileges and powers embodied in the contract, which being published in the *Canada Gazette*, shall be held to be an Act of incorporation of the company, and have effect as if it were an Act of the Parliament of Canada. Under this contract so confirmed, the company have acted and are acting, and claim the exclusive privilege therein stipulated for twenty years from its date, and the right of constructing branches as therein provided at any time, under the conditions mentioned in the contract: and the words "The Canadian Pacific Railway" are declared by the contract to be intended to mean the entire railway as described in the Act 37 Vict., c. 14, *i.e.*, from a point near to and south of Lake Nipissing, to its terminus at some point in British Columbia on the Pacific Ocean. This provision as to branches does not exclude the construction of other railways by other companies as the twenty year monopoly clause does, though it has been objected to as being too extensive, and as in some cases virtually preventing their construction.

The twenty year monopoly clause has given rise to much difficulty. The Manitoba Legislature, holding that it did not apply to that province as originally constituted and bounded, passed an Act authorizing the construction of a railway from Winnipeg to the southern Provincial boundary; and this Act was disallowed by the Governor under the

B. N. A. Act. The Manitoba Government undertook to make the railway under their Provincial Public Works Act, or of their own right. Exceedingly unpleasant litigation and bad feeling have been and are the consequence; and the Dominion Government has been violently abused for the disallowance, and I think improperly and unjustly. The Provincial Act seems to have been beyond the powers of the Provincial Legislature under sec. 92 of the B. N. A. Act (*a*), as relating to a railway "extending beyond the limits of the province," if not according to the *letter*, certainly according to the spirit of the said sec. 92, which expressly applies to railways connecting one province with another, and could hardly be intended not to apply to a railway connecting, as this was avowedly intended to do, a province with a foreign country. Sec. 91 of the B. N. A. Act expressly subjects ferries between a province and any foreign country to the *exclusive* jurisdiction of the Dominion Parliament; and for good reason, any such ferry (and *a fortiori* any such railway as that in question) requiring attention and regulation by the Dominion Customs Department as a port of entry. At any rate, if there be doubt, the unquestionable duty of the Dominion Government was to use its power of disallowance, as well as others it might possess, to give effect to the contract between Parliament and the Canadian Pacific Railway Company, and to keep the faith and honour of Canada intact. And this duty will devolve also on any other Government succeeding that in power when the contract was made, or Canadian bonds will become of small account on the world's exchanges. Whether the contract was good and wise or not, does not affect this point. The contract must not be broken without the consent of the Canadian Pacific Railway Company or its failure to perform the conditions it undertook. What any member or minister may have said in the House or out of it matters not; there is no doubt that Parliament, by the said Act, grants, and must have intended to grant, the twenty year monopoly, and it was part of the consideration for which the company undertook to make the railway, and made it.

G. W. W., *Ottawa.*

NEW PUBLICATION.

A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS, by Lewis Hochheimer, of the Baltimore Bar. Baltimore, John Murphy & Co.

This is a work of some proportions upon a very interesting branch of the law. The author states that he has sought to cover the whole ground of the law relating to the custody of infants,—to collect and cite, in their proper places, all the important reported cases upon the subject that have been decided in the United States and Great Britain, —to arrange, in their proper sequence and relation, all the doctrines relating to the subject,—and above all, to set forth and emphasize, at every turn of the discussion, the true underlying principles that govern the subject. The chapters, ten in number, treat (1) of the nature and limitations of the right of custody; (2) Interference of Courts of Chancery in questions of custody; (3) & (4) Interference of the Courts upon writs of *habeas corpus*; (5) The remedy by *habeas corpus*; (6) Probate and testamentary guardians; (7) Disposal of the custody upon applications for divorce; (8) Illegitimate children; (9) Apprentices; (10) Juvenile institutions. About four hundred cases are cited, some of them very fully. The work appears to have been very carefully planned and executed, and cannot fail to be of service to the profession in their examination of questions arising under this branch of the law.

ELECTORAL DISTRICT OF OTTAWA.

AYLMER (Dist. of Ottawa), Sept. 28, 1887.

Before WURTELE, J.

Ex parte CHARTIER, applicant.

Quebec Election Law—42-43 Vict. (Q.) ch. 15—Recount—By Whom Asked For.

HELD:—*That a recount of votes need not necessarily be asked for by a candidate, but that it may be asked for either by a candidate or by any elector of the electoral district.*

An election for a member to represent the electoral district of Ottawa in the Legislative Assembly, took place on the 14th of Septem-

ber, 1887, at which Narcisse E. Cormier and Alfred Rochon were candidates, and on the final addition of the votes cast, the returning officer found that Mr. Rochon had a majority of the votes.

Within the four days prescribed by the Quebec Election Law, an application was made for a recount, by Léon Chartier, a duly qualified elector of the electoral district.

On the day appointed for the recount, when the returning officer produced the parcels containing the ballots, Mr. Rochon objected to the recount, on the ground that it had not been asked for by the other candidate, and that only a candidate had the right to demand a recount; and he moved that the judge declare himself incompetent to proceed.

PER JUDICEM. The amendment to the Quebec Election Law, which provides for a recount (42-43 Vict., cap. 15), does not specify by whom the application must be made; it merely provides that on the production of the affidavit of any credible witness, and on the deposit by the applicant of the sum of $50, within four days after that on which the final addition of the votes has been made, the judge shall appoint a time for a recount of the votes.

A recount is granted when it is affirmed that any deputy returning officer, in counting the votes, has improperly counted or rejected any ballot-papers, or that the returning officer has improperly summed up the votes. The application for a recount is a contestation of the regularity of some of the proceedings at an election, and of the declaration of the returning officer, and a demand for a revision of such proceedings and for the rectification of the declaration. It is of the nature of the contestation of an election, although a summary and not a final proceeding. All persons qualified to contest an election and present an election petition, have, therefore, the same interest and consequently, in the absence of any provision of law to the contrary, the same right to demand a recount.

Under the Controverted Elections Act, an election may be contested, either by one or more electors who were duly qualified to vote at the election questioned, or by one or more candidates at such election; and I am of opinion that any elector whose name is duly entered on the list of electors which availed at an election, is likewise entitled to demand a recount.

As the applicant, Léon Chartier, appears to be a duly qualified elector, I therefore over-rule the objection taken; and I will proceed to make the recount.

Recount proceeded to.

Henry Aylen, for applicant.

L. N. Champagne, for candidate declared elected.

SUPERIOR COURT—MONTREAL.*

Costs—Distraction—Action by client who has paid costs to attorney—Prescription—Company—Authority of managing director—Unlawful acts—Malicious seizure—Probable cause.

HELD:—1. That an attorney, to whom distraction of costs has been awarded, is the personal creditor for such costs, and if his client pays them and obtains a transfer, the transfer must be served upon the debtor before action can be brought therefor.

2. Prescription of any right of action which may arise out of a pleading does not run from its date, but from its disposal by the Court.

3. Unlawful acts of the managing director of a company, designed to bring about the ruin of a copartnership firm, do not bind the company or make it responsible for damages, unless approved or ratified by the company.

4. Where the stock and machinery of a firm were already under seizure at the instance of another creditor, upon an affidavit charging insolvency and fraudulent secretion, and one of the partners had declared himself insolvent, and had attempted to make an assignment in the name of the firm, that the defendants, overdue creditors and unpaid vendors, had reasonable and probable cause for making a seizure in revendication of their own goods.

5. The allegations of the declaration in this case make the action one of damages for malicious proceedings, and not for libel or slander.—*Bury* v. *The Corriveau Silk Mills Co.* Davidson, J., Nov. 15, 1887.

* To appear in Montreal Law Reports, 3 S. C.

COUR D'APPEL DE TOULOUSE.

16 mai 1887.

Présidence de M. Fabreguettes, premier président.

Delcamp et al. v. Arnoux et Cie d'assurance le Languedoc.

Louage— Incendie — Locataire — Propriétaire occupant l'immeuble — Responsabilité — Preuve.

Sous l'empire de la loi du 5 janvier 1883, modificative de l'art. 1734 C. civ., comme sous l'empire de la législation antérieure, la présomption de faute établie par l'art. 1733 contre le preneur, en cas d'incendie de l'immeuble loué, ne peut être invoqué par le propriétaire, qui s'était personnellement réservé l'usage et la jouissance de certains locaux dépendant du dit immeuble. La responsabilité du premier est subordonnée, en ce cas, à la preuve, qui incombe au propriétaire, que l'incendie n'a pas commencé dans la partie de l'immeuble qu'il s'était réservée.

Il en est ainsi spécialement au cas où le propriétaire s'est réservé dans l'immeuble un réduit, servant de magasin pour les matériaux divers, propres aux réparations locatives que comporte le dit immeuble, et que le concierge, qui y dépose les provisions de ménage, a l'occasion de visiter fréquemment.

La Cour,

Attendu que le sieur Arnoux, assuré à la compagnie le Languedoc, est propriétaire à Toulouse, rue Saint-Antoine-du-T, d'un très vaste hôtel, dont l'un des corps de bâtiment, se composant de trois étages, a été incendié dans la soirée du 10 août 1885 ;

Attendu qu'il résulte du rapport des experts commis, ainsi que des témoignages par eux recueillis, que l'incendie n'a pris naissance et ne s'est manifesté qu'au troisième étage; que ce troisième étage divisé par un corridor longitudinal était occupé par Delcamp, Laynevèze, Vallier et Arnoux le propriétaire, lequel s'y était réservé un réduit servant de magasin pour les matériaux divers, propres aux réparations locatives que comporte son important immeuble; qu'il faut aussi préciser que le concierge, préposé du propriétaire, faisant dépôt, dans ce réduit, de certaines de ses provisions de ménage, avait par conséquent fréquemment l'occasion de le visiter ;

Attendu, d'autre part, qu'il est établi que ce troisième étage affecté à des galetas et formé de doubles cloisons en planches dont l'intérieur était garni de copeaux de bois, présentait une surface à ce point combustible que le feu, commençant sur un point quelconque de son étendue, devait se développer avec la plus grande rapidité jusqu'aux extrémités : que les premier, deuxième et troisième témoins ont vu les premières flammes sortir du côté de la rue Dutemps, par la fenêtre A près de laquelle se trouve le réduit du propriétaire; que les secondes flammes aperçues par les premier et deuxième témoins ont jailli de la fenêtre B, pratiquée dans le réduit même du propriétaire ; que l'embrasement s'est immédiatement après manifesté au dehors, dans toute la partie comprise entre le logement d'Anna Labat situé dans un deuxième corps de bâtiment et la rue de Phalsbourg (déposition des cinquième, sixième et septième témoins) : que le vent du sud-sud-ouest, qui soufflait avec violence au moment de l'incendie, a projeté naturellement les flammes par les fenêtres A et B et qu'il est impossible, dès lors, de déterminer sur quel point le feu s'est déclaré ;

Attendu que, pour considérer le grenier Laynevèze comme point initial de l'incendie, le Tribunal se fonde, avec les experts, sur ce que : 1° le plancher du deuxième étage n'a été brûlé que sur la partie correspondant au grenier; 2° les murs du deuxième étage, à peu près intacts sur tous les autres points où ils ont conservé partie de leurs tapisseries, sont complètement dégradés en cet endroit ;

Attendu qu'il résulte des renseignements fournis et des photographies produites : 1° que les papiers des tentures sont, au contraire, beaucoup mieux conservés sur ce point que sur les autres ; 2° que les poutres qui recouvraient le grenier Laynevèze et n'étaient situées qu'à un mètre 60 centimètres au-dessus du plancher, subsistent encore, tandis que partout ailleurs elles ont disparu ; qu'au reste, conclure de l'intensité des ravages sur un point à la durée de l'incendie, c'est émettre une conjecture hasardeuse, puisque la force, l'intensité du feu,

peuvent tenir non à sa durée, mais plutôt à la nature et à la qualité des matières qu'il a eu à dévorer; que c'est le cas dans l'espèce, puisque le grenier dont s'agit servait au dépôt des meubles et d'objets d'ébénisterie dont Laynevèze fait un commerce important;

Attendu que les intimés soutiennent, sans en rapporter aucune preuve, que l'incendie serait dû à un vice de construction résultant de l'existence d'une ventouse pratiquée dans la cloison en briques simples, séparant la cuisine d'Anna Labat du grenier Laynevèze et ouverte à tort du côté de ce grenier; qu'ils prétendent que, par l'effet de cette disposition vicieuse, une étincelle a pu et dû pénétrer dans le galetas Laynevèze;

Attendu que tout démontre que, du côté de Laynevèze, cette ventouse était complètement obturée et qu'elle n'a cessé de l'être que par l'effet de l'incendie qui a désagrégé le mortier et fait tomber l'obtacle; qu'en effet: 1° les angles extérieurs de la brique ont été abattus avec un marteau de maçon dans le but évident de permettre plus facilement et plus sûrement la prise du mortier qui scellait la brique de fermeture; 2° les débris de ce mortier existent encore d'après les constatations faites, et il n'a pu être employé qu'à la clôture de la ventouse; 3° l'épaisseur de la brique formant les lèvres de la ventouse du côté de Laynevèze n'a subi aucun contact de fumée et a conservé sa couleur naturelle, tandis que l'intérieur de la ventouse est rempli de suie; 4° un fragment de brique trouvé dans la ventouse n'est revêtu de suie et noirci de fumée que dans la partie regardant l'ouverture de la ventouse dans la cheminée d'Anna Labat; 5° le grenier de Laynevèze n'a jamais été envahi par la fumée;

Attendu que les experts affirment, contre toute raison, que les briques du côté de Laynevèze ont pu être lavées par un courant d'eau fourni soit par les pompes, soit par les tuyaux de l'eau de la ville; que cette hypothèse ne supporte pas l'examen;

Attendu, d'autre part,—à supposer que la ventouse ne fût point fermée,—que cette ventouse qui avance de dix-sept centimètres dans la cheminée n'a qu'une ouverture de trois centimètres, qui s'élargit au milieu du canal seulement, pour atteindre douze centimètres; qu'il faut donc supposer qu'une étincelle, au lieu de monter verticalement dans le canon où se produisait le tirage actif, aurait rétrogradée de dix-sept centimètres pour s'engager dans un orifice fort étroit, obstrué en partie par une brique; qu'elle aurait, évitant cette brique et pénétrant dans le grenier Laynevèze, couvé depuis midi (seul moment de la journée où Anna Labat a allumé un sarment) jusqu'à neuf heures du soir où l'incendie a éclaté;

Attendu, en cet état de faits, qu'il faut donc revenir à cette constatation que l'incendie a éclaté au troisième étage, sans que l'on sache avec certitude où il a pris naissance et par quelle cause il a été occasionné;

Attendu, par suite, qu'Arnoux et son assureur le Languedoc ne peuvent invoquer les art. 1733 et 1734 du C. civ. qu'en prouvant que l'incendie n'a pu s'allumer dans le réduit occupé par Arnoux; que cette preuve, loin d'être faite, serait dans une certaine mesure démentie par les inductions à tirer des dépositions des 1er, 2e et 3e témoins;

Attendu que la loi du 5 janvier 1883 n'a en rien affirmé la jurisprudence formée sous le Code civil de 1804; que vainement on voudrait prétendre que, d'après le rapporteur de la commission du Sénat: "La part de la "maison occupée par le propriétaire est assi-"milée à la part qu'occuperait un autre loca-"taire"; qu'il résulte, au contraire, expressément des rapports de MM. Batbie et Durand, que la loi nouvelle n'a été faite que pour supprimer la solidarité entre locataires (V. d'ailleurs Batbie, Revue critique, 1884, p. 736 et suiv.);

Attendu que, dans l'incertitude des lieu et cause de l'incendie, les locataires n'ont aucune action contre le propriétaire et qu'ils n'établissent pas, dans les termes de l'art. 1382 C. civ., une faute quelconque à la charge d'Arnoux;

Attendu, en ce qui concerne la Société d'agriculture, qu'à tort elle avait été mise en cause en première instance et appelée devant la Cour; qu'en effet, elle n'était locataire qu'aux premier étage et rez-de-chaussée du bâtiment incendié, alors qu'il était certain, avant tout litige, que l'incendie ne s'était produit qu'au troisième étage;

Par ces motifs,

Infirmant le jugement rendu par le Tribunal civil de Toulouse, à la date du 30 novembre 1886;

Dit que l'incendie qui a éclaté le 10 août 1885, à 9 heures du soir, dans une aile de l'hôtel Arnoux, rue Saint-Antoine-du-T, s'est produit au troisième étage de ce corps de bâtiment dans lequel le propriétaire occupait un réduit constituant une véritable cohabitation de sa part;

Déclare que cet incendie n'a ni cause connue ni lieu d'origine établi et qu'il ne peut être attribué à aucun vice de construction; quoi faisant, rejette comme irrecevable l'action d'Arnoux et du Languedoc contre Delcamp, Laynevèze et Vallier.

NOTE.—La jurisprudence admet sans difficulté, depuis la loi du 5 janvier 1883, comme sous l'empire de la législation antérieure, que le bailleur, en communauté d'habitation avec le locataire dans l'immeuble incendié, ne peut invoquer contre le dit locataire la présomption de faute établie par les art. 1733 et 1734 C. civ. V. en ce sens: 5 février 1887 et la note de M. May (Gaz. Pal. 87. 1. 338: Bordeaux 4 janvier 1887 (Gaz. Pal. 87.2.406); Pau 11 juin 1887 (Gaz. Pal. n° des 12-13 octobre 1887). Mais la communauté d'habitation, nécessaire pour faire disparaître la présomption de faute qui pèse sur le locataire, résultait-elle suffisamment des circonstances relevées par la Cour de Toulouse dans l'espèce ci-dessus? Nous sommes très sérieusement portés à en douter. Sa décision nous parait, en tous cas, incompatible avec celle d'un arrêt de la Chambre civile de la Cour de cassation en date du 26 mai 1884 (Gaz. Pal. 85.2. supp. 98), qui décide dans une espèce, présentant avec l'espèce actuelle la plus grande analogie, que la seule circonstance de l'occupation d'un grenier dans l'immeuble loué par le propriétaire ou le concierge, son préposé, est insuffisante pour faire écarter, en faveur d'un locataire, l'application des art. 1733 et 1734 C. civ. Comp. également en ce dernier sens: Chambéry 9 décembre 1884 (Gaz. Pal. 85.1.602); Cass. 20 octobre 1885 (Gaz. Pal. 85.2.565) et les notes.—*Gaz. Pal.*

COUR D'APPEL DE PARIS.

11 novembre 1887.

Présidence de M. LEFEBVRE DE VIEFVILLE.

SOCIÉTÉ DU PETIT JOURNAL v. LE PETIT JOURNAL FINANCIER.

Journal—Titre—Propriété—Enseigne commerciale—Modification—Confusion.

Le groupement des mots qui forment le titre d'un journal constitue l'enseigne commerciale de ce journal.

Par suite, les tribunaux peuvent ordonner la modification, dans le titre d'un journal, de la partie de ce titre qui pourrait faire supposer que ce journal est une publication annexe d'un journal préexistant.

Le 29 mai 1886, le Tribunal de commerce de la Seine avait rendu le jugement suivant:

"Attendu que la Société demanderesse justifie qu'elle est propriétaire du titre *le Petit Journal*;

"Attendu que de Grammont publie une feuille périodique à laquelle il a donné le titre *le Petit Journal financier*;

"Attendu que la société demanderesse demande que le défendeur soit tenu de supprimer de son titre le mot "Petit," et de le supprimer également de tous numéros, exemplaires, affiches, insertions, imprimés et papiers de commerce;

"Attendu qu'il est établi que le journal dont de Grammont est le gérant présente par son titre toutes les apparences d'un journal qui constituerait une publication annexe au *Petit Journal*;

"Attendu que la désignation donnée au *Petit Journal*, lors de sa fondation, est devenue pour cette feuille une dénomination commerciale et, par l'usage, sa véritable propriété; que le groupement des mots constituant son titre est aujourd'hui sa véritable enseigne commerciale; que le titre "Petit Journal" est de nature à amener une véritable confusion avec le véritable *Petit Journal*; que la société demanderesse est donc fondée à réclamer la cessation de cette confusion;

"Attendu toutefois qu'il n'est justifié ni de mauvaise foi de la part de Grammont, ni d'un préjudice appréciable;

"Par ces motifs,

"Dit que, dans la huitaine de la signification du présent jugement, de Grammont sera

tenu de supprimer le mot "Petit" du titre de son journal, ainsi que de ses enseignes, affiches, insertions, imprimés et papiers de commerce;

"Dit que, faute par lui de ce faire, dans le dit délai et icelui passé, il sera fait droit;

"Déclare la société demanderesse mal fondée en sa demande en paiement de dommages-intérêts, l'en déboute;

"Et condamne de Grammont par les voies de droit aux dépens."

Appel, arrêt:

La Cour,

Adoptant les motifs des premiers juges;

Confirme.

TRIBUNAL DE COMMERCE DE LA SEINE.

15 novembre 1887.

Présidence de M. Raffard.

Webb v. Norbert Estibal.

Obligation—Cause illicite—Prix d'une distinction honorifique—Nullité.

Est nulle comme contraire à la morale publique, par application de l'art. 1133 *C. civ., l'obligation de verser une somme d'argent comme prix d'une distinction honorifique (dans l'espèce la croix de commandeur d'un ordre étranger).*

Le Tribunal,

Reçoit Webb opposant en la forme au jugement par défaut contre lui rendu le 15 février 1887, et statuant sur le mérite de l'opposition;

Attendu que, sans qu'il y ait lieu d'examiner les moyens de fond opposés par le colonel G. Webb, il ressort des documents versés au procès et notamment de l'engagement souscrit par ce dernier, lequel document sera enregistré avec le présent jugement, que le défendeur a contracté l'obligation de payer à Norbert Estibal la somme de 3,500 fr., contre la remise du brevet d'Isabelle la Catholique au grade de commandeur;

Attendu qu'une pareille convention doit être considérée comme contraire à la morale publique; que, dès lors, la cause de l'engagement souscrit par Webb est illicite, dans les termes de l'art. 1133 du C. civ., et qu'aucun Tribunal ne saurait donner de sanction à un contrat de cette nature;

Par ces motifs,

Annule le jugement du dit jour 15 février 1887, auquel est opposition;

Et statuant par disposition nouvelle:

D'office déclare Norbert Estibal non recevable en sa demande, l'en déboute;

Et le condamne en tous les dépens.

Note.—Il a été jugé dans le même ordre d'idées, et par application de l'art. 1133, qu'il faut considérer comme nulle l'obligation contractée pour prix des sollicitations et du crédit employé par une personne auprès d'une administration à l'effet de faire obtenir une place du gouvernement. V. Colmar 25 juin 1834; Trib. civ. Lille 10 janvier 1834 (Dalloz, Vo. Obligations, No. 643); qu'il en est de même de la convention par laquelle une personne s'engage envers un industriel à user de l'influence d'un tiers auprès d'une administration publique pour lui procurer des commandes de la part de cette administration: Paris 19 avril 1858 (D. 58.2.160).

D'après Merlin (Questions de droit, Vo. Cause, § 2), il ne faudrait pas mettre au rang des obligations fondées sur cause immorale les traités que des particuliers feraient entre eux pour que l'un sollicite au profit de l'autre une grâce du gouvernement. Il nous paraît difficile de souscrire à cette opinion.

Comp. Cass. 1er mai 1855 et le très remarquable rapport de M. le conseiller Laborie (S.55.1.337); Paris 3 février 1859 (S.59.2.295); Paris 8 février 1862 (S.62.2.377); Nimes 22 juin 1868 (S.68.2.270); Larombière, Obligations, t. I, No. 11, p. 326.—*Gaz. Pal.*

APPEAL REGISTER—MONTREAL.

Thursday, December 22, 1887.

Webster et al. & Taylor & Noyes et al.—Petition to take up *instance* granted.

Dompierre & Baril.—Motion for dismissal of appeal. Granted for costs by consent.

Gilman & Exchange Bank of Canada.—Judgment reversed without costs. Tessier, J., dissenting as to the adjudication of costs, being of opinion that the judgment in first instance and the judgment in Review should be set aside with costs as well in Review and in appeal.

Lowrey & Routh.—Judgment reversed with costs, Baby and Doherty, JJ., dissenting.

Brosseau & Forgues.—Judgment reversed with costs.

Beckett & Merchants Bank of Canada.—Judgment reversed with costs.

Guevremont & Guevremont.—Judgment confirmed.

Galarneau & Guilbault.—Judgment confirmed.

Senécal & Rouillard.—Judgment reformed with costs in favor of the appellant.

Gilman & Gilbert.—Judgment reversed, Baby and Church, JJ., dissenting.

Smith & Wheeler.—Judgment confirmed. Motion for leave to appeal to the Privy Council. Rule *nisi* for next term.

Dubeau & Robillard.—Motion for dismissal of appeal. Rejected without costs.

The Court adjourned to Jan. 16, 1888.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 17.

Judicial Abandonments.

Elmire Létourneau (S. St. Michel, fils), Montreal, Dec. 13.

Curators appointed.

Re Aldéric Maillé.—C. Desmarteau, Montreal, curator, Dec. 9.

Re J. B. Scott.—C. A. Sylvestre, Nicolet, curator, Dec. 10.

Dividends.

Re Zoël Bessette.—Dividend, J. L. Dozois, Granby, curator.

Re Thos. Dufresne & Co., Yamachiche.—Final dividend, payable Jan. 10, 1888, at office of F. X. O. Lacoursière, Louiseville.

Re M. Fournier, Scotstown.—Dividend, payable Jan. 10, 1888, Kent & Turcotte, Montreal, curator.

Re William Skinner Thompson.—First and final dividend, payable Jan. 4, 1888, J. M. M. Duff, Montreal, curator.

Separation as to Property.

Elizabeth Ann Garraty vs. Thomas Webster, tailor, Montreal, June 16.

Zéphirine St. Pierre vs. François Xavier Wilson, farmer and trader, St. Raphaël de l'Isle Bizard, Oct. 5, 1885.

Mathilde Vien vs. Joseph Couture, hotel-keeper, Stanbridge, Nov. 26.

APPOINTMENTS.

Messrs. Sévère L. de Lottinville and Alfred Désilets, appointed joint Prothonotary Superior Court, Clerk of the Circuit Court, and Clerk of the Crown, for the District of Three Rivers.

Alfred Morin, l'Anse aux Griffons, appointed joint Coroner, *vice* J. A. Lebel, resigned.

Court Terms Altered.

District of Chicoutimi:—Court of Queen's Bench, criminal term to begin Feb. 6. Superior Court, from 31st Jan. to 4th Feb. Circuit Court, 7th to 9th Feb. County Chicoutimi, at Hebertville, 27th and 28th January.

District of Saguenay:—Superior Court, 13th to 20th Feb. Circuit Court, 21st to 23rd Feb. County of Charlevoix, at Baie St. Paul, 27th Feb.

Notarial Minutes Transferred.

Minutes of Joseph H. Lefebvre and Thomas Brassard, Waterloo, transferred to Louis Tremblay, N.P., Waterloo.

Minutes of Louis Rainville, Arthabaskaville, transferred to Louis Lavergne, N. P., Arthabaskaville.

GENERAL NOTES.

A man had a right of pasturage on Liston common, and put on two cows to graze. Another man had a like right, and he put on two calves. The calves sucked the cows to such an extent that they yielded only a pint instead of seven or eight quarts. The cow man sued and recovered damages.

A MANX TRIAL.—In a lately published tale, "Green Hills by the Sea," the scene of which is laid in the Isle of Man, a strange Manx custom is described. It appears that up to 1845, and perhaps still, in a capital trial the bishop and archdeacon were required to appear upon the bench. The question put to the jury was, not as in England, "Guilty or not guilty," but "May the man of the chancel continue to sit?" The answer was plain "yes" or "no." In the latter case the departure of the clergy was followed by a sentence of death.—*Criminal Law Magazine.*

THE relations between the Lord Chief Justice of England and the Court of Appeal may fairly be said to be strained. The former is very sore at what he conceives to be the interference of the latter with his discretion on two points: (1) referring causes: (2) depriving of costs. His Lordship believes the Court of Appeal have officiously and improperly interfered in cases "about which they know nothing." He has determined never again to refer a case. This is a distinct gain, but the public expression of irritation with a superior court is much to be deprecated. The public don't understand it.—*Law Times.*

La Cour d'assises de Bône a condamné Isaac Guily, employé de l'enregistrement, à cinq ans de travaux forcés, pour faux en écritures publiques.

Cet individu a réussi, durant l'espace de quatre ans, à détourner la somme de 207,839 francs en établissant de fausses taxes pour frais judiciaires.

Son frère David Guily, et sa maitresse, Marie Crochet, ont été condamnés, le premier à cinq ans de réclusion, la seconde à trois ans de prison, comme complices et recéleurs.

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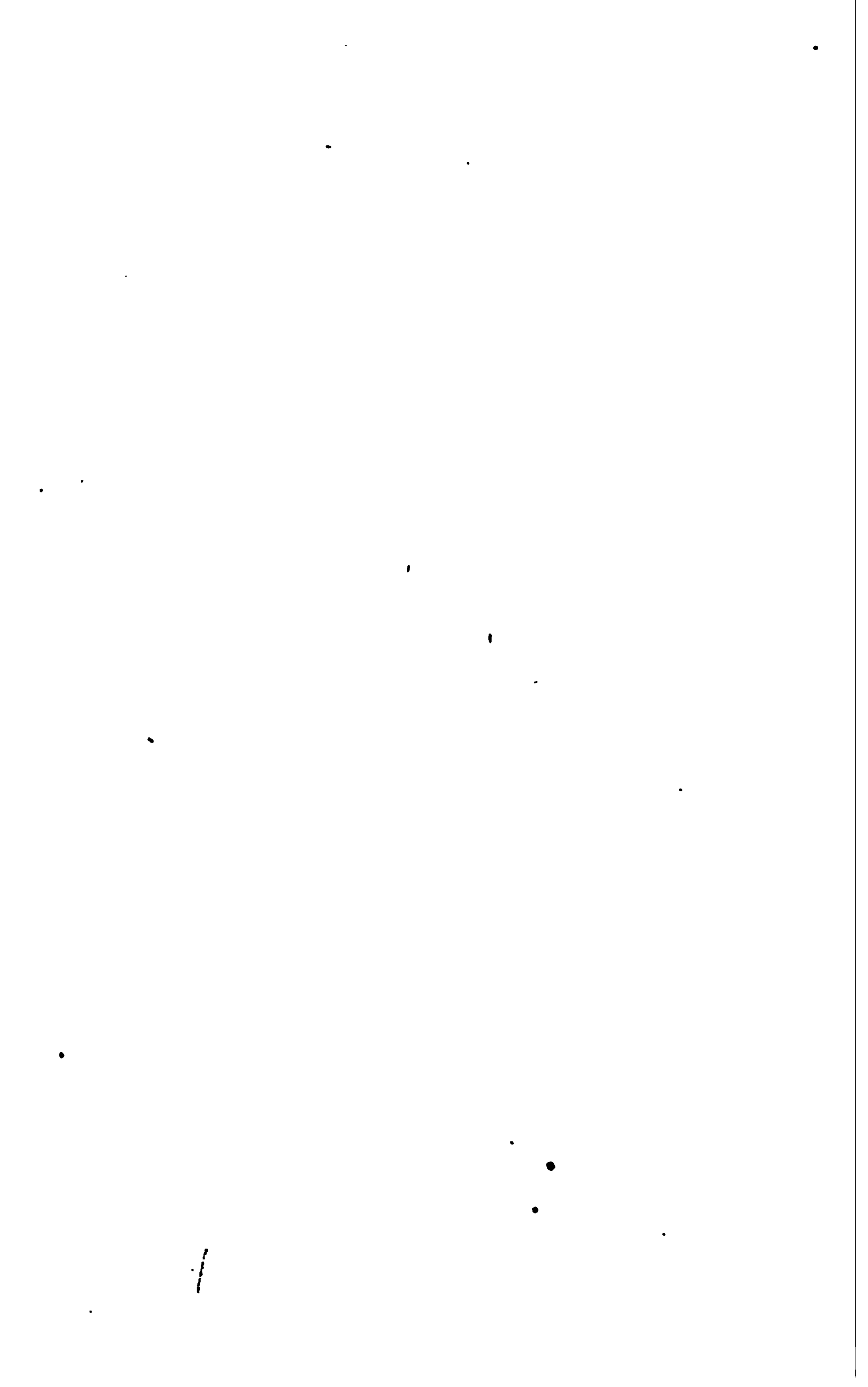

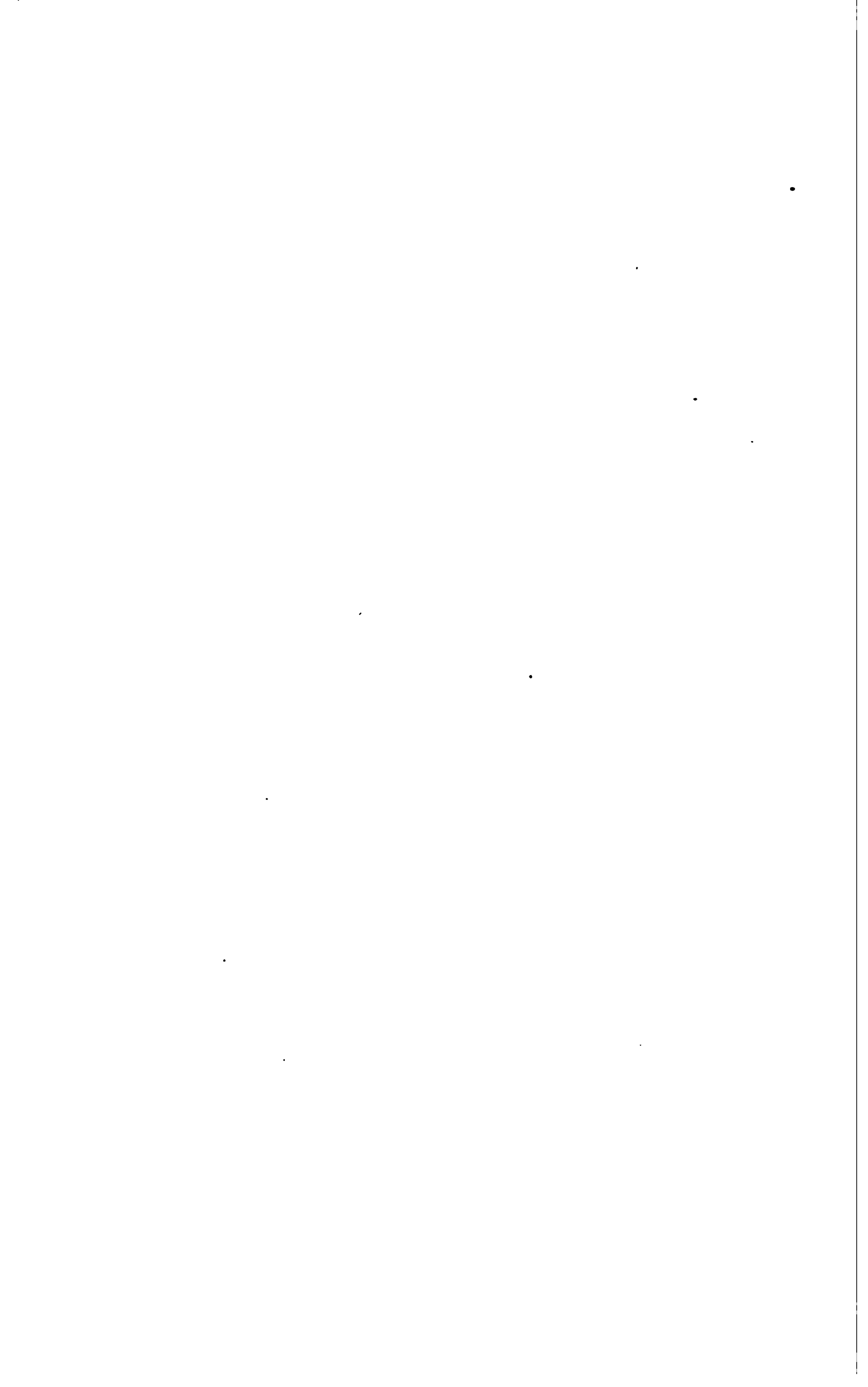

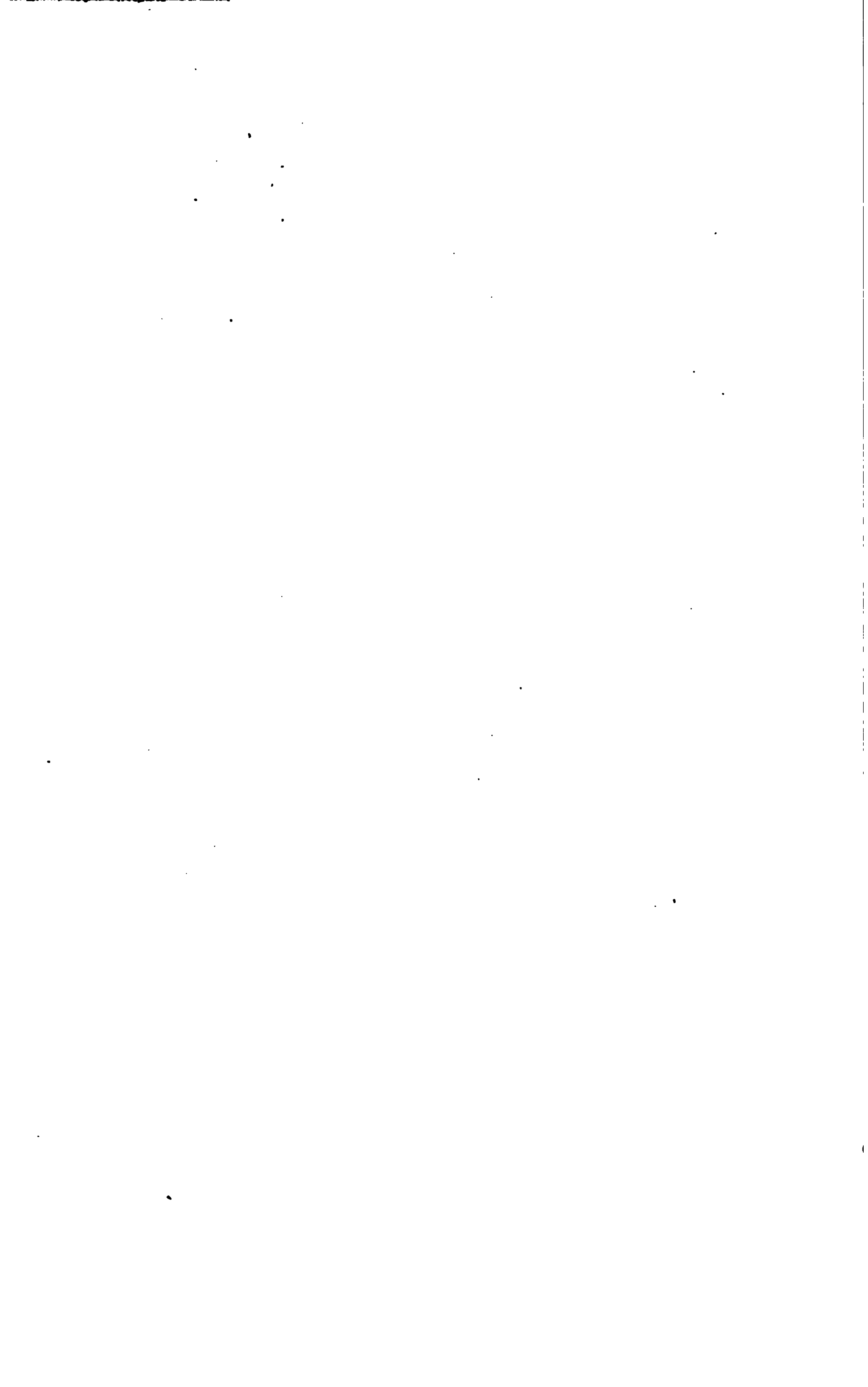

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