witness. It suffices to observe on this point that Maurice Cuvillier is not a party to this suit, that he is only in the suit to authorize his wife, and does not come within this provision. The case is anomalous, however. The wife herself, *séparée de biens* and a *marchande publique*, might be examined, and of course would know nothing, because it is her name alone that is used in the trade, which her husband carries on for her as her agent and attorney, and yet he cannot legally be examined as she might be. But this is the law, and, therefore, we think the evidence of Maurice Cuvillier should have been rejected and dismissed from the record. That being rejected there remains no other evidence in support of the plaintiff's contestation, except that given by Ross, an accountant, who was permitted to examine the books of Cuvillier & Co. This is wholly insufficient to sustain the plaintiff's pretensions, and therefore the judgment must be confirmed.

The following is the substance of the recorded judgment:

The Court.... considering that the said Maurice Cuvillier, the husband of the respondent, is not a party to this cause; considering that the said Maurice Cuvillier has been adduced and given evidence in this cause on behalf of the appellant against his wife, upon the contestation raised by the appellant, notwithstanding the objection by the respondent made *in limine* to the examination of the said Maurice Cuvillier as such witness; considering that by the law in force in Lower Canada, the husband cannot give evidence in civil matters for or against his wife; considering that the objection so made to the examination of the said Maurice Cuvillier should have been maintained by the Superior Court, and that there was error in the allowance of such testimony, this Court doth sustain the said objection, and doth reject from the record of this cause, the deposition made and filed therein by the said Maurice Cuvillier as such witness; and considering that save as aforesaid there is no error in the judgment rendered in this cause by the Superior Court, doth confirm the said judgment with costs.

AYLWIN, DRUMMOND, and MONDELET, JJ., concurred.

Torrance & Morris, for the Appellant.

Cartier, Pominville & Bétournay, for the Respondents.

O'CONNOR (defendant in the Court below), Appellant; and RAPHAEL (plaintiff in the Court below), Respondent.

Cause of Action—Draft—Action for money overpaid—C. S. L. C. cap. 82, sec. 26.

The plaintiff, residing in Montreal, Lower Canada, received a consignment of flour from the defendant residing in Paris, Upper Canada, against which consignment the defendant drew upon him for $6000. The plaintiff accepted the draft, and paid the money, but the proceeds of the flour were afterwards found to fall short of the $6000. The plaintiff having brought an action at Montreal, in Lower Canada, to recover the deficiency:

Held, that the cause of action arose out of the transactions at Montreal, to wit, the acceptance there of the consignment by the plaintiff, the sale of the consignment, the acceptance of the draft, and the overpayment, and that the action was, therefore, rightly brought at Montreal.

This was an appeal from an interlocutory judgment rendered in the Superior Court at Montreal, by *Monk*, J., on the 18th June, 1864, dismissing an *exception déclinatoire* filed by the defendant.

The action was brought under these circumstances: The plaintiff is a produce factor at Montreal, and as such received from the defendant, a miller and trader, residing in Paris, Upper Canada, a consignment of 2000 barrels of flour to be sold on his account. The plaintiff sold the flour at Montreal, but before he had received the proceeds of the sale, the defendant, in anticipation of the money being received by the plaintiff, drew upon him (against the consignment) for $6000. This amount was paid by the plaintiff at Montreal, but the proceeds of the flour falling short of the sum so paid, the plaintiff brought an action for the recovery of the amount overpaid.

By the declaration the plaintiff alleged specially that when he accepted and paid the draft, he was not indebted to the defendant in any sum of money, but the same was drawn against the consignment, and for the sole accommodation of the defendant. By a second count the plaintiff repeated the above statement, omitting the consignor, and stating that