

neither wife nor widow. If the testator's will had run "equally among the surviving spinster daughters of my sister-in-law," it could not have been suggested that widowed daughters were included. The past participle of the English language must, however, if used like an adjective, always lead to obscurity, and to use it with a negative prefix intended to have the effect of "not," simply is to be guilty of a solecism as well.—*Law Journal* (London).

SUPERIOR COURT.

SHERBROOKE, May 5, 1885.

Before BROOKS, J.

LA BANQUE NATIONALE V. THE EASTERN TOWNSHIPS BANK.

Cancellation of Mortgage on Insolvent's Property.

PER CURIAM. This is an action to compel radiation of a pretended hypothec created by the registration of defendant's judgment against one W. W. Beckett for \$29,202.72, interest and costs, alleging that said W. W. Beckett is indebted to plaintiffs in the sum of \$33,000 for a note given them, and was so indebted in November last. That on the 19th November last (1884), being insolvent, he made a transfer of his property to one Darling for the benefit of his creditors; that they, plaintiffs, had then sued him, their action being returned on the 6th of December; that on the 11th of December defendants also sued him for their debt (\$29,200) and on the 12th of December obtained judgment upon their confession, and registered this judgment against the property mentioned in the return; that this was done to obtain an undue preference, and they seek its radiation on the ground that it gave no preferential hypothecary claim to defendants.

The defendants have not pleaded, but content themselves with stating at the argument that, under Art. 2023, C. C., if Beckett were insolvent no hypothec was acquired by the registration of their judgment, but that they, defendants, had a right to enregister; the plaintiffs cannot now ask its radiation; they are premature; they should have waited; and if defendants sought to obtain an advantage, then they must contest, and

defendants were not bound to radiate on a notarial demand.

Articles 2148 and 2149, C. C., do not apply. What is registration? It is a claim of hypothec. Articles 2026, C. C., *et seq.*, declare that legal hypothecs only affect properties mentioned in notice. (Notice in Consolidated Statutes, p. 388.) This notice must be given by defendants. That is, they ask that the property described may become bound and affected by the general hypothec under their judgment.

The facts are undisputed. Beckett was insolvent; he was sued by the plaintiffs for a large amount, some \$33,000. He made an assignment on November 19th, declaring himself insolvent. The defendants sued him on the 11th, and on the 12th, on his own confession, judgment was rendered and registered by defendant asking preference by judicial hypothec. The plaintiffs complain of this, and ask that the pretended hypothec should be radiated.

The codifiers have not changed the law from what it was under chapter 27 of the Consolidated Statutes. They say (page 62, vol. 3) that they have added a few articles and suggested a few amendments; that it was on this article only they deemed it necessary to offer any special remarks. They do not refer to this case, but to the Articles 2148-49 and section 42 of chapter 37 Consolidated Statutes of Lower Canada, and Article 2159 Code Napoléon.

By chapter 37, C. S. L. C., section 42, the right of action seems to be limited to the debtor, but our code says it may be urged by any party interested.

The defendants claim a mortgage. The plaintiffs say: "You have none, but your claim is prejudicial to us; cancel it." The defendants say they had a right to enregister. What does this mean? That they had a right to a mortgage on the realty. Is this true? It is not. Their claim is that of a mortgage created by them by registering a judicial hypothec which does not exist. They had no right to it. But they say: "You cannot now claim radiation." (See 31 Laurent, p. 149, sec. 174, pp. 154-5, sec. 179, pp. 157 and 182; *La Banque Jacques Cartier v. Ogilvie*, 19 L. C. J., p. 100, Court of Queen's Bench, 1874.)