ruption of prescription by the defendant's absence; and, therefore, taking whatever view you please of this *défense en droit*, the Court below was in error in dismissing the whole action upon it. The judgment of this Court has been drawn so as to reconcile the slight difference of opinion on the point referred to.

BADGLEY, J. The declaration sets out defendant's promissory note dated in 1857, in Michigan, and payable at four months from date, and was met by a *défense en droit*, demurrer, which was sustained by the Superior Court, and the action in consequence dismissed; the judgment resting on the ground that the *demande* on the face of the declaration was by law obnoxious to our Statutory Limitation for promissory notes. That may or may not be the case, but the limitation cannot be put in issue by a demurrer. The essential constituent of limitation, as of our prescription, is time, and without it both words are mere legal abstractions. This time ingredient is a fact which may be legally avoided by other facts in contradiction or waiver of it, and therefore necessitates a special plea of the limitation relied upon, in order to form a bar to the action; for the obvious reason, to enable plaintiff to show in his replication any fact sufficient to avoid the bar. Our own prescriptions require to be pleaded, and may not be supplied by the Court; and so in England, the limitation, in like manner, must be pleaded, as shown in the following case: in which "the declaration alleged a promise made at a certain time, for money lent, and after verdict it was moved in arrest of judgment, that the cause of action did not accrue within six years before action brought. But the plaintiff had judgment; for though the cause of action appeared to be twenty years before action brought, yet the plaintiff shall recover, if the defendant do not plead the Statute, which was made for the use of those who would take advantage of it, but the Court shall not give the defendant the advantage of it if he will not plead it." These facts cannot form an issue in law, and the judgment therefore sustaining the *défense en droit* cannot be maintained.

AYLWIN, J. In one word, the ground of the demurrer is the Statute of Limitations, but the Statute of Limitations could only be pleaded by an exception: therefore, the demurrer is worse than the original declaration.

MONDELET, J., concurred in the judgment.

The judgment was *motivé* as follows: Considering that the declaration contains allegations of fact, entirely irrespective of those upon which the *défense en droit* is founded, allegations which could not be disposed of in adjudicating upon said *défense en droit*; considering that the said *défense en droit* is irregular and insufficient; considering therefore that in the judgment appealed from, there is error, &c. Judgment reversed, and record ordered to be remitted to Court below.

J. Popham, for the Appellant.

D. Girouard, for the Respondent.

CIRCUIT COURT.

Quebec, Nov. 24, 1866.

BROWN *v.* THE QUEBEC BANK.

Payment—Deficiency in packages of silver.

Held, that banking institutions are not liable for any deficit in packages of silver paid out by them, unless the silver be counted and the deficit made known before the packages are taken from the bank.

This was an action brought to recover $20, which was claimed as so much money which the Bank had short paid on a cheque. It appears that a cheque for $830 was drawn; and on presentation of it, eight packages, said to contain $100 each, and three packages containing ten dollars each, were paid to the clerk presenting the cheque. The money was taken from the banking-house without being counted; but within ten minutes, the packages were counted over at a broker's office; and one of the $100 packages was found to contain but $80. The clerk returned to the Bank with the package, and demanded the $20. The Bank refused to entertain the claim.

At the enquête the fact of the deficiency was clearly proved, and in arguing the case the counsel for the plaintiff urged, that the only question to be decided in this case was whether the plaintiff did or did not receive from the bank the amount specified in his cheque. It was clearly proved that he did not, and that there was still $20 due on the cheque. It was clear, therefore, that the plaintiff ought to have that sum, and that the Quebec Bank