

Nous avons déjà jugé dans la cause de *Fulton & McNamee*, conformément à l'article 1243 C.C., que l'aveu, soit judiciaire ou extra-judiciaire, ne peut être divisé contre celui qui le fait, et ce jugement a été confirmé par la Cour Suprême (2 Supreme Court Rep. 470).

D'après cette décision et la jurisprudence invariable en matière d'aveux, le jugement de la Cour inférieure doit être confirmé.

Il y a quelques cas spéciaux où les tribunaux sont justifiables de diviser l'aveu d'une partie, mais celui-ci n'en est pas un.

TESSIER, J., who was absent at the rendering of the judgment, concurred in writing.

Judgment confirmed.

Doutre & Doutre, for Appellants.

St. Pierre & Scallon, for Respondents.

COURT OF REVIEW.

MONTREAL, February 28, 1880.

JOHNSON, TORRANCE, RAINVILLE, J.J.

ROSS v. SMITH, and CANTIN, opposant.

[From S. C., Montreal.

Vessel—Creditor cannot seize and sell mortgaged ship without consent of registered mortgagee.

This case came before the Court of Review on the inscription of the plaintiff from the judgment of the Superior Court, Jetté, J., noted at 2 Legal News, p. 362.

JOHNSON, J. This is a very important case no doubt, but I do not intend to say much about it, because another of the Judges is kind enough to express all that need be said. The judgment under review is one of very great clearness and ability, and I think is perfectly conclusive. If I say now anything in this case, it is because there have been discordant decisions, and the parties will probably remember that when this very case was first heard, it came up before me, and I was disposed to adopt the decision in *Daoust v. McDonald*; but I never looked closely at the grounds of that decision, because the parties withdrew the case from before me, and it was heard before Mr. Justice Jetté whose judgment is now before us. Looking into the case now, it is plain that the decision in *Daoust v. McDonald*, (from which by the Judge Torrance dissented,) proceeded on the assumption that the art. of the C. C. 2371 was still in force, whereas it is certain that

it was repealed by the 3rd section of the Dominion Shipping Act, 36 Vic., c. 128. Our law now, therefore, is the same as the English law; and that was settled by Lord Campbell in the case of *Dickenson v. Kitchen*, to the effect that a creditor cannot seize and sell a mortgaged ship as against the mortgagee. I am, therefore, for confirming Judge Jetté's judgment.

TORRANCE, J. The question submitted to the Court is as to the right of a judgment creditor to take in execution a vessel, for the payment of his judgment, against the will and in opposition to an opposing mortgage creditor, holding a mortgage duly registered under the Shipping Acts in force in Her Majesty's dominions. The point has been discussed and decided by a majority of the Court of Review, in favor of the plaintiff in *Daoust v. McDonald, & Norris*, opposant, 1 Legal News, 218; and against the plaintiff in *Kempt v. Smith, & Cantin* (Sicotte, J.), 2 Legal News, 190; and in the present case (Jetté, J.), 2 Legal News, 362. The majority of the Court here think that there is no error in the judgment now under review, and confirm it. In order to save time, reference is made to the observations of Mr. Justice Sicotte and Mr. Justice Jetté, in the second volume of the Legal News.

Judgment confirmed, Rainville J., dissenting.

D. R. McCord for opposant.

T. P. Bulter for plaintiff contesting.

JOHNSON, RAINVILLE, JETTÉ, J. J.

TRESTLER v. DAWSON et al.

[From S. C., Montreal.

Damages caused by fall of snow from roof—Proof of force majeure.

This case came up in review of the judgment of the Superior Court, Torrance, J., noted at 2 Legal News, p. 344.

JOHNSON, J. A mass of snow fell from the roof of a church into the public street; a gentleman named Robertson was passing at the time, being driven in his sleigh, and the horse took fright, and the result was that the plaintiff was hurt, having had a rib broken, and having been laid up for several weeks. The defendants are sued as Trustees of the church; their responsibility on that score not being questioned, the contest being merely on the merits, and the plea being a plea of not guilty. The judgment dismissed