

*Held* (by JETTE, J., and TORRANCE, J.,) that such executor having renounced as such legatee, but being a defendant individually, and liable solidairement as having endorsed the note sued upon, is still incompetent as a witness for the estate, although he has pleaded separately.

The Bank instituted an action against Robert Mitchell and two others in their quality of executors of the last will and testament of the late Dame Eliza L. Ross, in her lifetime the wife separated as to property of the said Robert Mitchell; and also against Robert Mitchell personally, to recover the amount of a promissory note signed by the late Mrs. Mitchell, and endorsed by said Robert Mitchell. The defendants pleaded separately.

The executors pleaded in effect (1) that Mrs. Mitchell made the note to the knowledge of the Bank for the securing of her husband's debts, and to obligate herself therefor, in violation of Art. 1301 C.C., and (2) that the note was given without consideration.

Robert Mitchell pleaded in effect (1) that no consideration was ever given him or his wife for the note, and (2) that long before the institution of the action he had satisfied all claims against him by the Bank, and that in fact the Bank was indebted to him.

At *enquête* the defendant's counsel produced Mr. Robert Mitchell as a witness on behalf of the defendants *es qualité*.

Mr. Mitchell being examined on the *voir dire*, admitted that he was a usufructuary legatee under his wife's will, a copy of which was filed, and that he was a defendant individually as endorser of the note sued on.

Tail, Q.C., for the Bank, objected to the examination of the witness upon the grounds (1) that the witness was a party to the suit, and personally interested as such legatee and as such endorser, and (2) that although Mrs. Mitchell was dead, yet the rule of law which would have rendered the witness incompetent as a witness for his wife had she been living, also rendered him incompetent as a witness on behalf of her estate concerning matters which occurred before her death. He cited *Fair & Cassils*, 2 Q. B. R. 3, and cases there mentioned.

*Trenholme*, for defendants *es qualité*, contended that after death of wife a husband could be examined respecting his wife's estate in such

cases as the present, and that a person is a perfectly good witness for himself *es qualité*, and that Mitchell was not excluded on the ground of interest.

The Honorable Judge Rainville, who presided at *Enquête* sittings, maintained the objection upon the ground that, as legatee under his wife's will, Mr. Mitchell was a party to the suit as a defendant on the issue between plaintiffs and the executors, and that he was incompetent as a witness for the estate.

Mr. Mitchell thereupon renounced as legatee, and was brought up again as a witness. His examination was again objected to upon the ground that he must still be considered a party to the suit, being sued individually as endorser.

The plaintiff's counsel contended that the effect of Mitchell's evidence might be to destroy plaintiff's action against the defendants *es qualités*, and he would have the benefit of the judgment dismissing plaintiff's action against them, as it would be *chose jugée* in his favor.

The defendant's counsel argued that under our law a defendant could be a witness for his co-defendant if he pleaded separately, as in this case, and that Mr. Mitchell having now renounced as legatee, was a competent witness in the issue between plaintiffs and defendants *es qualités*, and that a judgment might be rendered dismissing the action against defendants *es qualités*, but condemning the witness, as for instance if witness should establish that the note was given by his wife for his debt, he would still be liable as endorser, though the action against other defendants would fail.

The Court (Jetté, J.) took the objection under advisement, and subsequently, on the 11th March, 1882, maintained it. The honorable Judge referred in his remarks to the case of *McLeod & The Eastern Townships Bank*. (Q. B.) 2 L. N. 239.

The following are the motives of the judgment:—

“Considérant en principe que toute personne qui pourrait invoquer le jugement rendu dans une cause comme chose jugée en sa faveur, doit y être considérée comme partie;

“Considérant en outre que dans l'espèce le témoin est nominalement partie dans la cause, et qu'une partie ne peut être examinée que par sa partie adverse et non par son co-défendeur.”