

[Quebec.]

[May 1.]

MACDONALD & FERDAIS.

Action confessoire—Real servitude—Apparent registration—44 & 45 Vict., c. 16, ss. 5 & 6 (P.Q.)—Art. 1508 C.C.—Procedure—Matters of, in appeal.

By deed of sale dated 2nd April, 1860, the vendor of cadastral lot No. 369 in the parish of Ste. Marguerite de Blairfindie, District of Iberville, reserved for himself, as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent, as assignee of the owner of lot 370, continued to enjoy the use of said carriage road, which was sufficiently indicated by an open road, until 1887, when he was prevented by appellant Cully from using the said road. C. had purchased the lot 369 from one McD. without any mention of any servitude, and the original title deed created by the servitude was not registered within the delay prescribed by 44 & 45 Vict. (P.Q.), c. 16, ss. 5 & 6.

In an action brought by F. against C. the latter filed a dilatory exception to enable him to call McD. in warranty, and, McD. having intervened, pleaded to the action. C. never pleaded to the merits of the action. The judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the court below, that the deed created a real apparent servitude which need not be registered, there being sufficient evidence of an open road having been used by F. and his predecessors in title as owners of lot No. 370.

Held, also, that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait et cause* for C. with his knowledge, and both courts had held them jointly liable, this court would not interfere in such a matter of practice and procedure.

Appeal dismissed with costs.

Paradis and Belcourt for the appellants.

Geoffrion, Q.C., for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Practice.

[Common Pleas Court.]

[June 24]

FERGUSON v. PROVINCIAL PROVIDENT INSTITUTION.

Discovery—Production of documents—Life insurance application—Untrue statements—Materiality—55 Vict., c. 39, s. 33 (O.).

It is provided by s-s. 2 of s. 33 of the Insurance Corporations' Act, 55 Vict., c. 39 (O.), that no untrue statement in an application for insurance shall vitiate the contract unless material thereto; and by s-s. 3 that the question of materiality is for the jury, or, if there is no jury, for the court.