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## *PRESCRIPTION OF BILLS AND NOTES.*

We have been asked to insert a short report of a judgment rendered by the Circuit Court, Montmagny. We comply with the request, but we cannot do so without appending to the report a few remarks, because the suggestion of our correspondent is that the judgment is wrong. It may be a case of hardship for the plaintiff, but the law as laid down by the Court is in accord with previous decisions. The report is as follows:

CIRCUIT COURT.

Montmagny, Nov. 15, 1878.

Bossé, J.

FISET v. FOURNIER.

*Held*, that a debt originally due under a promissory note, and which has been prescribed by the lapse of five years from the making of such note, cannot be recovered at law, although the defendant may have acknowledged in the presence of a witness, after prescription accrued, that he was still indebted to plaintiff in the amount of the note, and have promised to pay, thus renouncing the benefit of the prescription accrued.

The plaintiff sued the defendant for $46.96, amount of a promissory note made by the defendant on the 17th May 1869, and plaintiff alleged specially that after the note was prescribed, to wit: in the month of June or July last, the defendant acknowledged in the presence of a witness that he owed the amount of the debt, and promised to pay when his means would permit him to do so. This fact was proved by the plaintiff's clerk. The Court dismissed the plaintiff's action with costs.

*C. Pacaud* for plaintiff.

*A. J. Bender* for defendant.

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This is but following the doctrine laid down by the Court of Appeal in *Bowker* and *Fenn*, in which the Court held "that the prescription of five years, under the Promissory Note Act, c. 64, C. S. L. C., is so absolute, that no acknowledgement of indebtedness or partial payment will take the case out of the statute; and if no suit or action be brought on a note within five years after its maturity, it will be held to be absolutely paid and discharged." 10 L. C. Jurist, p. 120. That was a celebrated case, and attracted much attention from the bar. The question was whether a written promise to pay and payments on account had the effect of interrupting the prescription. The debtor, Bowker, had, in a series of letters to the plaintiff, formally and repeatedly acknowledged his indebtedness, but the judgment of the Court held the statute to be an absolute bar to the action. Judge Mondelet remarked that the statute was as stringent as the ordinance of 1510 with reference to actions brought for five years' arrears of *rentes constituées*. Such actions were to be dismissed if brought. Chief Justice Meredith, then a Judge of the Queen's Bench, said: "I am quite aware that a strict interpretation of the terms of our statute may, in certain cases, bear hard upon individuals; but the remedy is with the Legislature, and the result of the attempt made by the English Courts to exclude certain cases from the operation of their statute of limitations affords additional proof, if any were wanting, of the danger of attempting to modify a statute by judicial interpretation."

Then, under the Code, Art. 2267 says: "In all the cases mentioned in Articles 2250, 2260, 2261 and 2262, the debt is absolutely extinguished, and no action can be maintained after the delay for prescription has expired." And among the matters mentioned in Art. 2260, as prescribed by five years, are actions upon inland or foreign bills of exchange, promissory notes, &c.

It is true that Chief Justice Meredith remarked, in the case of *Bowker* and *Fenn*, that the law had been materially changed by the Code, which had just come into force. The case reported above falls under the Code, but we are not aware of any text of law or ruling of the Courts which would affect the correctness of Mr. Justice Bossé's decision. On the contrary, in the case of *Court* and *Thompson*, at Montreal, 8th July, 1876, Rainville, J., held, even where a short prescription was not pleaded, that the Court was bound to take notice of the fact that prescription had accrued, and the intervention of Court, Assignee, after the lapse of a year (C. C. 1040) was rejected. Art. 2267 C. C. mentions the cases in which prescription need not be pleaded, and the action of an Assignee is not included in the exceptions. The judgment in *Court* and *Thompson* was affirmed in appeal, and it seems to hold that the defendant cannot waive the benefit of prescription by any acknowledgement that he may make, and that the