

Statute of Limitations—Demurrer.

In an action on a promissory note, made more than five years previous to the institution of the action, the plaintiff alleged in his declaration, that by the law of New York State, where the note was made, and of Wisconsin, where the note was payable, the fact of the defendant's absence from his domicile suspended the Statute of Limitations. To this the defendant demurred, on the ground that it was the *lex fori*, the law of Lower Canada, which applied.

Held, (reversing the judgment of the Superior Court), that the plaintiff's action could not be dismissed on this demurrer, as there were allegations of fact in the declaration irrespective of those upon which the demurrer was founded.

(Per AYLWIN, and BADGLEY, JJ. *Held*, that the Statute of Limitations must be pleaded by an exception, and cannot be put in issue by a demurrer.)

This was an appeal from a judgment rendered in the Superior Court by *Berthelot, J.*, on the 9th of July, 1866, maintaining a *défense en droit*, filed by the defendant.

The action was brought on a promissory note. The declaration set out that the defendant, (who was then carrying on business in partnership with his brother, Hector Demers, in Fond du Lac, Wisconsin, under the name of Demers, Bros.,) on the 12th of September, 1857, at the city of New York, gave to the firm of L. O. Wilson & Co., of that city, a promissory note, signed by Demers Bros., for \$1120.47, payable four months after date, at Fond du Lac. L. O. Wilson & Co. transferred this note to the plaintiff at maturity; it was protested for non-payment, and about the date of protest, the defendant and his brother left their domicile in Fond du Lac. Since then up to the 19th of April, 1866, the plaintiff had failed to discover their whereabouts,—but he at length ascertained that they were in Lower Canada. That by the laws of New York and Wisconsin, the absence of the defendant suspended the Statute of Limitations, and gave the plaintiff a right to sue for the amount of the note.

To this declaration the defendant demurred, on the ground that the note in question was not subject to foreign law, *lex loci contractus*, but to the law of Lower Canada, and was pre-

scribed. This demurrer being maintained, and the action dismissed, the plaintiff appealed.

Popham, for the Appellant. 1st. The question is one to be decided by Private International Law, and, according to the opinion of the majority of writers on this department, the *lex loci contractus*, or the law of the place where the note was made payable, should be applied to the case. 2nd. Even if the *lex fori* be applied, the allegations in the declaration raise questions of fact, which exempt them from a demurrer. 3rd. Admitting the declaration to be demurrable, the demurrer should not have been based on the Statute of Limitations as in this case.

Girouard, for the respondent. The decision of the Court below is fully justified by the dispositions of our Statutory law, and also by the international jurisprudence of all countries where the English enactments respecting prescription have been adopted. It may be said that this question could not be raised by a demurrer. But the plaintiff himself provoked the demurrer by setting out in his declaration that the note, not being prescribed by the law of the country where it was made, or where it was payable, was not prescribed here. The defendant merely answered, that supposing the facts alleged in the declaration to be true, he had nothing to do with the *lex loci contractus*, but only with the law of this country.

DRUMMOND, J. [After stating the facts set out in the declaration]. The plaintiff, apparently foreseeing the exception that might be set up, has stated his case in such a way as to meet that exception. The *défense en droit* filed by the defendant is very irregular, being partly an exception and partly a demurrer. The plaintiff alleges that the law of the place where the note was made or where it was payable, should govern; and then the defendant says, your action is ill founded, because it is not the law of the place where the note was made or where it was payable, but the law of Lower Canada, that applies. I am inclined to think, however, that this demurrer, so far as it goes, is good. There is a difference of opinion on this point; but we are all of opinion that the demurrer does not meet the whole case. It does not meet the allegation of inter-