security for land taken for railway purposes, a judge of the Superior Court in Chambers after formal answer and hearing of the parties granted the order, 42 Vict., c. 9, sec. 9, s-s. 31. The railway company appealed against this order to the Court of Queen's Bench for Lower Canada (Appeal side), and that court affirmed the decision of the judge of the Superior Court. On appeal to the Supreme Court of Canada it was

Held, that as the proceedings had not originated in the Superior Court of the Province of Quebec, the case was not appealable. R.S.C., c. 135, s. 28.

2. That the judge of the Superior Court when he made the order in question acted as a *persona designata.*

Appeal quashed with costs.

H. Abbott, Q.C., and *Ferguson* for appellants.

Pagnuelo, Q.C., for respondents.

THE EXCHANGE BANK OF CANADA *v.* GILMAN.

Art. 451 C.C.P.—Retraxit—Subsequent action—Document not proved at trial—Inadmissible on appeal—Lis pendens and res judicata—Pleas of.

The Exchange Bank of Canada in an action they instituted against G., filed a withdrawal of a part of their demand in open court, reserving their right to institute a subsequent action for the amount so withdrawn. The court acted on this retraxit, and gave judgment for the balance. This judgment was not appealed against. In a subsequent action for the amount so reserved, it was

Held, reversing the judgment of the Court below, that the provisions of art. 451 C.C.P. are applicable to a withdrawal made outside and without the interference of the court, and cannot affect the validity of a withdrawal made in open court and with its permission.

2nd. That it was too late in the second action to question the validity of the retraxit upon which the court had in the first action acted on and rendered a final judgment.

3rd. That a document relied on in the Court of Queen's Bench not proved at the trial, as setting aside the final judgment rendered in the first action, cannot be relied on or made part of the case in appeal.

Montreal L. & M. Co. v. *Fauteux*, 3 Can. S.C. 433, and *Lyonnais* v. *Molson's Bank*, 10 Can. S.C.R. 527 followed.

4th. That under the circumstances the defendant's pleas of *lis pendens* and of *res judicata* could not be maintained.

Appeal allowed with costs.

Macmaster, Q.C., for appellant.

Gilman for respondent.

DUFRESNE *et al. v.* DAME MARIA DIXON.

Action en nullite de decret—Registration of deed—Art. 2089 C.C.—Preference between purchasers who derive their respective titles from the same person.

D. *et al.*, judgment creditors of one W.A.C., seized and sold a lot of land situate in the City of Montreal, as belonging to his estate. This lot had originally belonged to Dame M.D., who sold it to W.A.C. *et al.*, and subsequently W.A. C., who became the registered owner of the lot, re-assigned it to Dame M.D. The property was occupied by Dame M. D. through her tenant at the time of the seizure.

The sheriff's sale took place on the 3rd of October, 1884. Dame M. D. registered her deed of re-assignment on the 28th of November, 1884, and on the 4th of May, 1885, the purchasers registered their deed of purchase.

The respondent by petition to the Superior Court prayed for the setting aside of the sheriff's decree.

Held, affirming the judgments of the courts below, that respondent having been for a long time in open, peaceable, and public possession of her property, and notably so at the time of the seizure, the sheriff's seizure and sale thereof at the instance of the appellant, was null, as having been made *super non domino.*

2nd. That notwithstanding the adjudication by the sheriff on the 3rd of October, 1884, the title not having been granted until the 4th of May, 1885, respondent, who had registered her deed of retrocession on the 28th of November, 1884, was entitled to the conclusions of her petition.

Appeal dismissed with costs.

Pagnuelo, Q.C., and *Geoffrion*, Q.C., for appellant.

Lacoste, Q.C., and *Grenier* for respondent.