

ing that in any event he was entitled to set off damages caused by the first arrest, which had been abandoned; and

3rd. That the second arrest was illegal, as the defendant could not be twice arrested for the same debt.

Mr. Merry, for plaintiffs, urged :

That the account sued upon had been fully proved by the evidence of witnesses, and the admissions of defendant, and that the alleged damages, not being *clairs et liquides*, could not be pleaded as a set-off to plaintiffs' claim for goods, wares and merchandise sold; that secretion of property by defendant had been fully established by plaintiffs.

Mr. Brown for defendant, urged :

That the account had not been established to the extent of \$40, consequently the action had been improperly brought in the Superior Court; and further, that in any event defendant had proved disbursements, to the extent of \$18.25, made by him in getting released on bail under the first *capias*, and that he was entitled to set off damages easily proved against plaintiffs' account, and that the action must be dismissed. Also, that defendant could not be arrested a second time.

Brooks, J. Owing to the account sued upon being so small, I have examined very carefully the proof, as the reduction of a small sum would cause the *capias* to be set aside, but I find the account proved. The defendant himself was, on more than one occasion, furnished with a detailed statement, and made no objection until arrested. He, on several occasions, stated that he only owed plaintiffs a little over \$40, and that they should not have arrested him for so small a sum. He has, moreover, pleaded in bad faith, denying articles which are proved, and alleging payment of others by one Moulton, which he does not attempt to establish, though Moulton was examined

As to the second ground, the right to off-set unliquidated damages caused by former arrest, I do not think this can be legally done. C. C. 1188 says that compensation takes place between debts which are equally liquidated and demandable. Does this apply to the present case, even if damages were proved?

The case of *Hall v. Beaudet*, 6 L. C. R., p. 75, (1856) has been cited, as sustaining defendant's views, but a reference to the report will show

that while a majority of the Court held that an account for goods sold and delivered might be opposed to a debt due under a notarial obligation, Ch. J. Sir L. H. Lafontaine dissented, and the majority of the Court applied the principle as limited to cases *sounding in money*. That under the old French law limiting the advantage to opposite debts, *claires et liquides*, owing to the development of trade, an evil grew up requiring a remedy, and which, Mr. Justice Badgley says, "was supplied by the jurisprudence of the French Courts, and the opinions of acknowledged and eminent French jurists, by which the principle of compensation was enlarged and extended to a class of debts susceptible of liquidation by a *ready proof at hand*, but refusing the application to such as were conditional, uncertain, dependent upon the settlement of litigated accounts, *comptes de successions, de tutelles*, with all their intricacies and delays of adjustment, or debts not yet due, or when the object set off was not easily appreciable in money, and such like; to all these the rigor of the rule was strictly applied in the same manner as in England, where mutual debts may be set off, *not in actions for unliquidated damages*, nor for costs, as upon the case, trespass, replevin, or *detenue*, but for debts in actions of *assumpsit*, debt and covenant for the non-payment of money, and for which an action of *indebitatus assumpsit* might be maintained, and such like, and where the debts were due at the commencement of the action, and in the same right." "On appelle une dette, claire et liquide, laquelle est due présentement et dont le défendeur peut faire sa demande, étant due par écrit ou autrement, ou que les parties en conviennent."

Is the claim set up by defendant for damages alleged to be sustained by him by reason of former arrest, of such a nature as to entitle him to have it compensate the account sued for goods, wares and merchandize?

To establish his claim defendant is not only bound to prove the amount of damage, but to prove that the plaintiffs are liable to pay these damages.

Lacombe says: "*Extenditur etiam ad ea que facile et intra breve tempus, liquidari possunt.*"

Can it be said that a claim for unliquidated damages is of such a nature? The claim, if arising *ex contractu*, would be differently viewed, but arising *ex delicto*, I cannot declare it such a