

bond was executed. She has since died intestate, leaving ten children, of whom one is a minor. The plaintiff, as a creditor of the minor, convened a family council to name a tutor for him, and his father John Bell was appointed. A copy of his nomination was served upon him, but he has not taken the oath of office.

The suit is against John Bell and Peter Francis Bell, jointly and severally, for one year and a half of accrued interest, with interest at the same rate on such arrears from the dates at which they became payable, and is also against John Bell as tutor for the minor's share of the debt and for the costs of the appointment.

The latter argues that not having taken the oath of office as tutor, nor having accepted the tutorship, he cannot be impleaded for the minor; and then both the defendants plead that interest can only run on arrears of interest under an agreement entered into subsequently and not previously to the date on which the arrears accrued.

I will first consider the contention of John Bell. The duties of a tutor either precede his administration, or concern it, or follow it. His first duty, as we see in *Prevôt de la Jannés*, Nos. 598 and 599, consists in taking the oath of office, and precedes any act of administration. Pothier, *Coutume d'Orléans*, titre 9, No. 13, says: "Celui qui est élu tuteur doit aussitôt, s'il est présent, prêter le serment de fidèlement gérer la tutelle. S'il est absent, celui sur la poursuite de qui s'est faite l'élection, l'assigne pour être condamné à accepter la tutelle et à prêter le serment." Then our Civil Code, in article 291, provides that: "A tutor, as soon as his appointment is known to him, and before acting under it, must make oath to well and truly administer the tutorship." To represent a minor in a suit, either as plaintiff or as defendant, is to act under the appointment as tutor, and to perform an act of administration; and, therefore, a person who has been named tutor cannot legally do so before taking the oath of office. Until he has legally accepted the office and taken the oath to administer faithfully, he cannot act as tutor. The action against John Bell as tutor is consequently dismissed.

I now take up the other point. The old law of France forbade interest on arrears of interest, and the new law, as contained in article 1154 of the Civil Code, only allows it under certain conditions. This article provides that: "Les intérêts échus des capitaux peuvent produire des intérêts, ou par une demande judiciaire, ou par une convention spéciale"; and under this wording it has been contended that the special agreement cannot precede, but must come after, the accruing of the arrears. The defendants' counsel cites in support of this pretension 2 *Mourlon*, No. 1159, 16 *Laurent*, No. 344, and 4 *Marcadé*, No. 534; but the last mentioned author admits, nevertheless, that the jurisprudence of his country seemed to adopt a contrary view. And on referring to the decisions given by *Sirey*, under article 1154, Nos. 18 and 20, I find the weight of the rulings of the courts to be in favor of the validity of a previous agreement. *Aubry and Rau*, vol. 4, sect. 308, say: "La convention destinée à faire produire des intérêts aux intérêts d'un capital peut être valablement conclue avant l'échéance de ces derniers;" and *Delvincourt*, *Toullier*, *Duranton* and *Larombière* all express the same opinion.

But it is not necessary to weigh these conflicting opinions, to decide the question submitted to me in this cause, as the wording of article 1078 of our Civil Code, which corresponds with article 1154 of the French Civil Code, removes all ambiguity. As the French version is the clearest, I will refer to it: "Les intérêts échus des capitaux produisent aussi des intérêts, lorsqu'il existe une convention spéciale à cet effet." That is to say, that when a special agreement to that effect exists at the time the interest accrues and becomes payable, interest runs on the arrears from the date on which they accrue, by virtue of such pre-existing agreement. I am against the defendants on this point, and judgment must go against them for the arrears of interest due, with interest at the same rate on such arrears from the dates on which they accrued.

Judgment against the two defendants personally.

*Asa Gordon*, for plaintiff.

*Thomas P. Foran*, for defendants.