SUPERIOR COURT.

Before JOHNSON, J.

THE ONTARIO BANK v. FOSTER.

Insolvency — Benefit of Term — When action on note may be instituted.

1. *A firm which has ceased to meet its ordinary payments as they become due, will be deemed insolvent within the meaning of* 1092 *C.C., and the insolvency of the firm entails that of the partners individually.*
2. *An action on a promissory note against the maker, instituted on the afternoon of the third day of grace, is not premature.*

PER CURIAM. The action is to recover the amount of a promissory note, signed by the defendant and endorsed by his firm, A. M. Foster & Co., for $15,000, dated 21st day of November, 1882, and payable three months after date at the Ontario Bank in Montreal. The suit was accompanied by an attachment before judgment which has been dismissed upon the ground that fraudulent secretion was not established. A consent has been filed in the record, that the evidence and exhibits which were filed upon the issues raised upon the petition to quash the attachment shall avail upon the present issue.

There are really only two points for consideration:—

1st. Whether the action was prematurely brought.

2nd. The amount (if any) for which judgment is to be rendered.

The last day of grace expired on the 24th of February last, and the action was instituted on the afternoon of that day, after banking hours. The declaration alleged that at the date of the action, and for some time past, the defendant had been insolvent, *en état de déconfiture*.

The right of action therefore depended on two points:—1st, the insolvency as depriving the debtor of the term; 2nd, the existence *de plano* of the right to sue on the afternoon of the third day of grace.

The plaintiffs contend that the defendant had become bankrupt before the 24th February, and that the amount of the note was exigible before and on that date. They also contend that, under the circumstances proved in the case, even if the defendant had not been bankrupt, the action was not prematurely instituted.

On the question of bankruptcy the plaintiffs cite 1092 C. C. The English version reads as follows:—

"The debtor cannot claim the benefit of "the term when he has become *bankrupt* or *in-*"*solvent*, or has by his own act diminished the "security given to the creditor by the contract."

The French version reads as follows:—

"Le débiteur ne peut plus réclamer le bénéfice "du terme, lorsqu'il est devenu *insolvable* ou "*en faillite*, ou lorsque par son fait il a diminué "les sûretés qu'il avait données par le contrat "à son créancier."

Article 17 C. C., sub-section 23, reads as follows:—

"By 'bankruptcy' is meant the condition of "a trader who has discontinued his payments."

The French version is as follows:—

"La faillite est l'état d'un commerçant qui "a cessé ses paiments."

It cannot be disputed that the defendant, before and on the 24th February last, was a bankrupt, "*insolvable*," within the meaning of these articles.

It is proved by the evidence of Mr. Taylor, partner in the firm of A. M. Foster & Co., the endorsers of the note, and of which firm defendant was a member, that on the 18th of January, 1883, a letter was written at Mr. Foster's dictation, to all the English creditors of the firm, notifying them that they would not be able to meet the drafts falling due on the 4th of March following. This letter was to all intents and purposes a suspension of the firm of A. M. Foster & Co., and it did not after the said date meet any of its engagements as they became due. It is indeed admitted on all hands that the firm then suspended payment.

Mr. Stephenson proves that on the 24th February last there were 32 notes lying at the Ontario Bank overdue bearing the firm's name; in addition to this there was about $20,000 overdue to English creditors, and $2,000 to Canadian creditors.

The learned Judge who rendered judgment dismissing the attachment before judgment, by one of the *considérants* of his judgment, held as follows:—

"Considérant qu'il n'est pas prouvé que le "défendeur, *quoiqu'insolvable* au commencement "des procédures adoptées par la dite deman-"deresse, soit en état de déconfiture."