

plaidée. C'est en appel seulement que cette question est soulevée.

"L'Art. 2267 dit que la prescription est interrompue par la reconnaissance que le débiteur fait du droit de celui contre lequel il prescrivait. Quelle reconnaissance plus positive que celle de celui qui prétend avoir payé?"

The judgment was unanimously affirmed in appeal, Dorion, Ch. J., Monk, Taschereau, Ramsay, Sanborn, J.J., and in Mr. Justice Ramsay's factums we find the following carefully written opinion, which indicates that the question of prescription was fully considered by the Court, this being apparently the only question upon which there was any hesitation in confirming the judgment.

"RAMSAY, J. :—

"Under the Code is it necessary to plead a limitation, and if not pleaded, may it be supplied by the Court?"

"The general rule is, that the defence of prescription cannot be supplied by the Court, but Art. 2188 adds, 'except in cases where the right of action is denied.' It is pretended that under this Article it can and must be supplied by the Court.

"This exception is given as old law, on the authority, it is presumed, of the case of *Pigeon & The Mayor, etc., of Montreal*, 3 L.C.J., p. 294. But that case was decided in appeal on the special enactment which permits the Corporation to raise the question of the limitation of six months under the general issue in all actions for anything done under the Water Works Acts. 7 Vic. cap. 44, sect. 26, extended by the 16 Vic. cap. 127; 19 Vic. cap. 70, and 24 Vict. cap. 67. It is not the law in England. Chitty on Bills, 596; Stephen on Pleading, 154; Chitty on Pleading, 479. Nor was there any such idea under the old French law: 'Les fins de non recevoir doivent être opposées par le débiteur; le Juge ne les supplée pas,' says Pothier, Obl. 676. We have therefore a doctrine laid down in the Code as old law, not only unsupported, but at variance with all authority, and besides it is not in accordance with the general principles of the Articles preceding. Art. 2183 defines the different prescriptions, and indicates the distinction between those prescriptions which are a 'bar to' or 'preclude' any

action. Art. 2184, however, goes on to say that the prescription generally may be renounced, and 2185 says it may be so tacitly or expressly. If, however, we take the interpretation sought to be given to Art. 2188, and which its terms to some extent justify, we must conclude that the short prescriptions cannot be renounced. We must therefore reconcile these articles, and this becomes the easier from the form of Art. 2188. It will be observed that the article does not say absolutely that the Court could supply the defence resulting from prescription where the action is denied; it is only inferentially that we can decide that it was the intention of the legislature to confer this exceptional power on the Court. Pointed as the inference is, I don't think we are obliged so to interpret the Statute under the circumstances.

"Again, the action is not denied in the short prescriptions. Art. 2267 says, 'no action can be maintained.' Those words have never been held to preclude the action. And so an action for any matter provided for by Art. 1235 will not be dismissed on demurrer if the writing signed by the party to be bound be set up.

"This, however, is not the first time since the Code that this point has come up. In the case of *Wilson & Demers, Aylwin and Badgley, J.J.*, declared that the Statute of Limitations could not be put in issue by demurrer, but must be pleaded by an exception. 2 L.C.L.J., page 251."

From the foregoing it would appear that in 1884 the doctrine held by the Court of Appeal was that these prescriptions must be pleaded, and that in 1886, when Mr. Justice Ramsay was compiling his Index, he was under the impression that this doctrine had not been disturbed. In fact, however, it had been disturbed by the decision of the Supreme Court in *Carter & Breakey*; and in another issue we propose to refer more particularly to what was held in this case.

#### SUPERIOR COURT—MONTREAL.\*

*Jurisdiction disciplinaire de la Cour sur les huissiers—Livre de ventes—Achat pour l'huissier par personnes interposées d'effets*

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