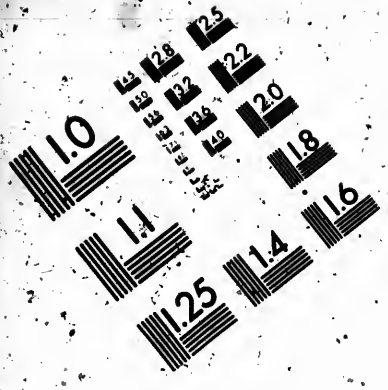

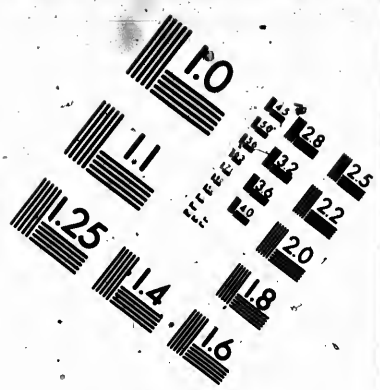

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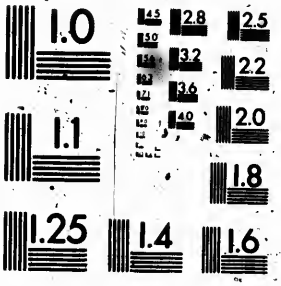

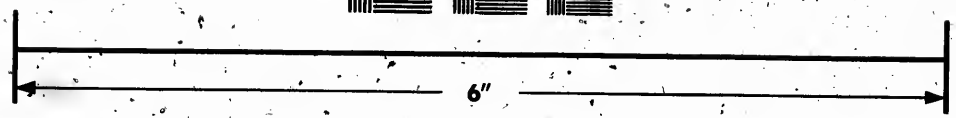

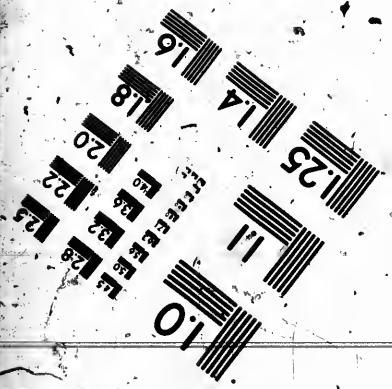

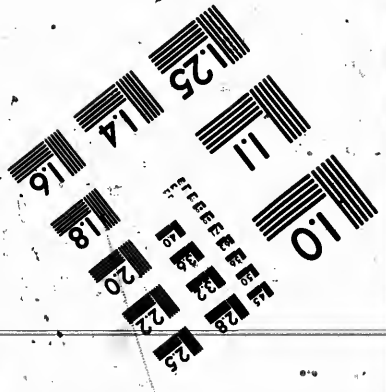

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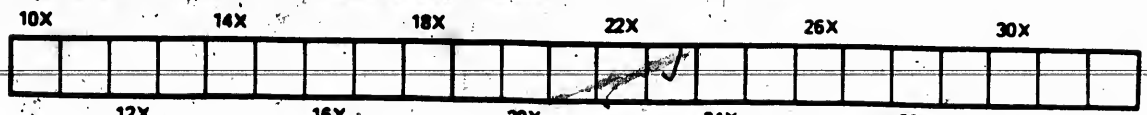

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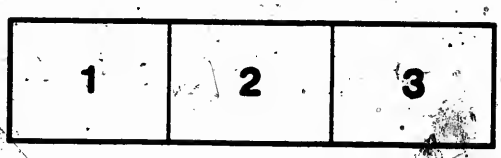

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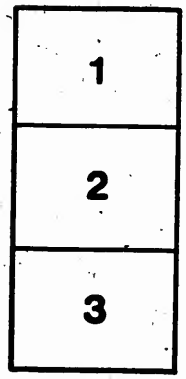

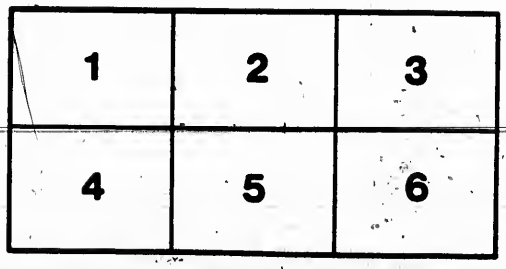

THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. XXII.

Editorial Committee:
STRACHAN BETHUNE, Q.C.; JOHN L. MORRIS; JAMES KIRBY, D.C.L., LL.D.

THE INDICES,
BY S. BETHUNE, Q.C.

Montreal:
PRINTED AND PUBLISHED BY LOVELL PRINTING AND PUBLISHING CO.
1878.

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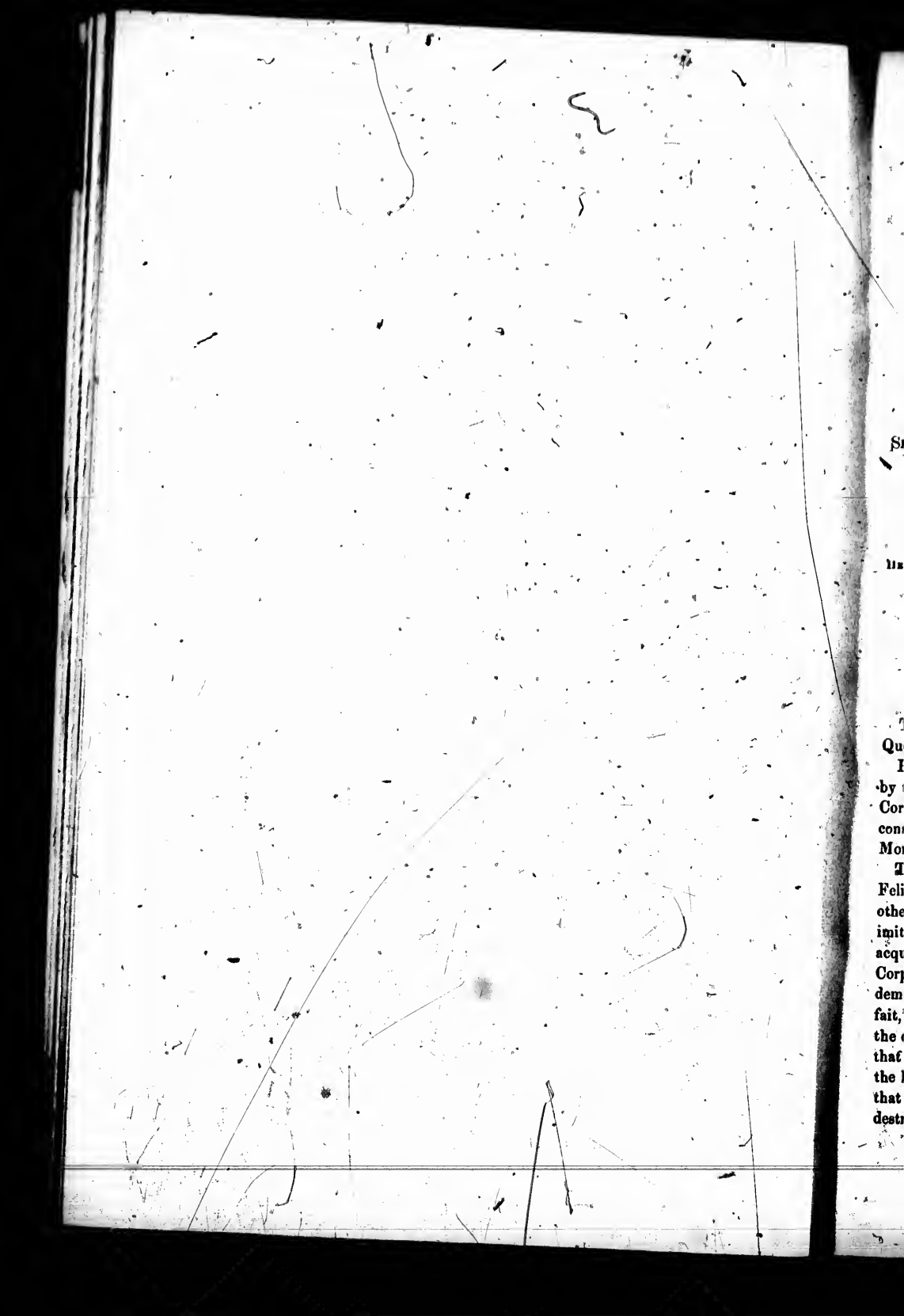

THE

LOWER CANADA JURIST.

PRIVY COUNCIL, 1876.

16TH MAY, 1876.

Present: SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER.

THE MAYOR, ET AL. OF MONTREAL, APPELLANTS;

AND

DRUMMOND, RESPONDENT.

HELD:—1. Damage to rights of house owners in a city, such as "droits d'accès" to streets, does not constitute "expropriation," and gives no right to preliminary indemnity.

2. In France the depreciation caused to a house by stopping one end of the street on which it fronts is not an interference with a servitude, nor (standing alone) such direct and immediate damage as will give a title to indemnity; and, *semble*, the law in the Province of Quebec is similar.

3. The statute 27 and 28 Vict. c. 60. s. 15, by requiring that the compensation payable to any party by reason of any act of the Council for which they are bound to make compensation, shall be ascertained in the manner prescribed by the statute, excludes by necessary implication actions of indemnity for damage in respect of such acts.

The appeal was from a judgment of the Court of Queen's Bench, Province of Quebec, reported at 18 L. C. Jurist, 225.

PER CURIAM:—The action which gives occasion to this appeal was brought by the Honorable Lewis Drummond (the respondent) against the Municipal Corporation of the City of Montreal (the appellants), for damage sustained in consequence of the Corporation having closed one end of St. Felix street in Montreal.

The declaration alleged that the plaintiff had built eight houses fronting St. Felix street, which at one end opened into St. Bonaventure street, and at the other into St. Joseph street, and that these houses, being in immediate proximity to the Bonaventure Station of the Grand Trunk Railway Company, had acquired great value as boarding-houses and shops. It then alleged that the Corporation, "without any previous notice to the plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, 'et par voie de fait,' closed up St. Felix street, and built from the south end of his houses to the opposite side of the street a close wooden fence, about fifteen feet in height; that in consequence the street had "become a *cul de sac*, and the occupants of the houses had lost their natural means of egress and regress." It also alleged that the occupant of one of the houses had abandoned it in consequence of the destruction of his business.

The Mayor et al. and Drummond.

The pleas of the Corporation (written in French) alleged that in closing the street they had not committed "un acte de violence et illégalité ou une voie de fait;" that they had only exercised a privilege and used a power conferred upon them by their charter of incorporation, "et qu'en exerçant ce privilége ils n'ont pas empiété sur la propriété du demandeur;" that in the several Acts of Incorporation of the city the Legislature had specially designated the cases in which they were liable to indemnify individuals for the damages resulting from the exercise of their powers, that is to say:—"1, l'expropriation forcée; 2, le changement de site des marchés; 3, le changement de niveau des trottoirs;" and that whilst acting within the limits of their powers, they were not responsible for damage. The pleas then state that the street "n'a pas été obstruée en face des maisons ou de la propriété du demandeur, et ses locataires ont actuellement entrée et sortie par la dite rue."

The action then is founded on a trespass and wrong illegally committed by the Corporation, and the defence, stating it generally, rests on two grounds: (1) that the street was lawfully closed under powers conferred by the Legislature, and, therefore, no wrong had been committed for which an action in this form will lie; and (2) that the plaintiff was not by law entitled to any indemnity for the damage complained of.

The following are some of the material facts:—

St. Felix street opens, near the north end of the plaintiff's houses, into Bonaventure street, and extends northwards beyond the latter street to St. Antoine street. In its original state it ran southwards from the plaintiff's houses to St. Joseph street. This part of it was crossed on the level by the lines of the Grand Trunk Railway Company. The Bonaventure station was a short distance from the plaintiff's houses, the ordinary approaches to it being in Bonaventure street. People could, however, go on foot from the station to St. Felix street, but only by walking over some lines of railway, and contravening, in so doing, the by-laws of the Company. It appears that a large number of persons, arriving by or waiting for the trains, went in this manner to St. Felix Street, and frequented a house kept as a restaurant by one of the plaintiff's tenants, which they could no longer do by this short cut after the fence complained of was put up. In the years 1863 and 1864 the Bonaventure Railway Station was greatly enlarged, and the goods traffic transferred from another station to it. These arrangements rendered it necessary to carry additional lines of rails across St. Felix street to the south of the plaintiff's houses, making the passage there difficult and dangerous. To assist these arrangements of the railway company the Corporation undertook to close the southern part of St. Felix street and open a new street to the south of the station. The manner in which the Corporation in fact closed or shut off this southern part was by placing a wooden barrier or fence, from 10 to 15 feet high, across the street immediately to the south of the plaintiff's houses. The place where people used to enter St. Felix street from the railway station, as before described, was to the south of this barrier, and the cutting off of this communication caused so great a diminution of the customers of the restaurant that the plaintiff's tenant gave up the business.

The authority under which the Corporation closed the street is a by-law made in pursuance of an Act of the Provincial Legislature (23rd Vict. c. 72).

Section 10 of this Act authorized the Council to make by-laws for various purposes, and, among others (sub-section 6), "to regulate, clean, repair, amend, alter, widen, contract, straighten, or *discontinue* the streets, squares, alleys, highways, bridges, side and cross-walks, drains and sewers, and all natural water-courses in the said city."

A general by-law was afterwards passed, section 3 of which is as follows:—

"The Council of the said City of Montreal may, and they are hereby authorized whenever, in their opinion, the safety or convenience of the inhabitants of the city shall require it, to *discontinue* any street, lane, or alley of the said city, or to make any alteration in the same, in part or in whole."

And subsequently, on the 11th September, 1866, a special by-law relating to St. Felix street was made, which, after reciting that it was deemed expedient in the interest of the public to open a new street (describing it), "and to discontinue a portion of St. Felix street," ordains and enacts, that a new street called Albert Street be opened, and that a section of St. Felix street, describing it by a plan and measurements (being the part to the south of the plaintiff's houses) "be henceforth discontinued."

It was not disputed that under these powers the Corporation might lawfully discontinue this portion of the street, but it was contended that they were bound, as an antecedent condition, to indemnify the plaintiff for the damage he would thereby sustain, and that erecting the barrier before doing so was an unlawful act and a trespass. The whole case, indeed, of the plaintiff, so far as this action is concerned, rests on the assumption that his property has been invaded in a way to constitute "une expropriation," which, it was urged, could only be lawfully effected in conformity with Article 407 of the Civil Code of Lower Canada, "upon a just indemnity previously paid." It was argued that the Statute giving the power to make by-laws to discontinue streets should be held to have been passed subject to the general law embodied in this Article.

Article 407 runs thus: "No one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid."

A similar Article is found in the Code Napoléon (Article 545).

These Articles undoubtedly embody a fundamental principle of the old French law, which, whilst allowing private property to be taken for purposes of public utility, asserted its generally inviolable nature by requiring previous payment of a just indemnity. They are found both in the French and Canadian Codes under the title "De la Propriété," and in both follow the Articles which define property or ownership.

The original Article in the Code Napoléon was in effect the declaration of a principle which, in France, has been applied by numerous special laws. In the Canadian Code, also, Article 407 is supplemented by Article 1589, which is as follows:—"In cases in which immoveable property is required for purposes of general utility, the owner may be forced to sell it, or it may be expropriated by the authority of law, in the manner and according to the rules prescribed by special laws."

In the special laws passed both in France and Canada, the principle of pre-

The Mayor et al. and Drummond.

vious indemnity in cases of "expropriation," properly so called, appears to have been generally maintained. But exceptions have been made in works of urgency: and it is obvious that special laws, when passed by competent authority, may adopt, reject, or modify this principle.

A distinction has long been made in France, and indeed it exists in the nature of things, between "expropriation," properly so called, in respect of which previous indemnity is payable, and simple "dommage;" and a further distinction between direct damage, which gives the sufferer a right to compensation, and indirect damage, which does not.

Great research was displayed by the learned Counsel on both sides in investigating the history of French law and procedure on these subjects, the powers conferred on the Tribunals, and the conflicts between them. According to the opinion of Dalloz the first complete system of procedure is to be found in the Law, 8 Mars, 1810. A short history of this and other laws upon the subject will be found in Dalloz's "Répertoire," tit. "Expropriation," c. 1.

It is sufficient for the present purpose to note that a conflict arose under these laws between the ordinary Courts of law and the Administrative Tribunals, during which numerous decisions bearing on the present controversy took place. It was settled, at least after the Law, 8 Mars 1810, that the Courts of Law alone had jurisdiction to decide on the indemnity payable to owners of property in cases of expropriation, and that the province of the Administrative Tribunals was confined to cases of damage; but conflicts constantly arose as to whether particular cases fell within one or the other category, and the claims of owners of houses to indemnity for injury to their servitudes or quasi servitudes in public streets were a fertile source of them.

Demolombe adverts to these conflicts in his "Traité des Servitudes," and thus sums up the controversy. (Vol. 12, Art. 700.) Assuming, as he does, that the owners of houses bordering on streets are entitled to indemnity when "leurs droits d'accès ou de vues ou d'égouts" are suppressed, or injuriously affected, he asks what is the competent authority to determine their claims? His answer is, "Cette question est elle-même fort délicate. C'est le pouvoir judiciaire suivant les uns puisqu'il s'agit d'une question de propriété privée. C'est au contraire, d'après les autres, le pouvoir administratif, parceqn'il ne s'agit pas d'une véritable *expropriation*, mais seulement d'un simple *dommage*, quoique ce dommage soit permanent, et nous avons déjà dit (referring to vol. 9, Art. 567), que telle paraît être aujourd'hui, après beaucoup d'hésitation et de luttes, la doctrine généralement suivie." Delalieu, in his "Traité de l'Expropriation," arrives at the same conclusion. (See Art. 152, 6th Edit., pp. 85 to 87.)

No doubt in some of the French decisions and authorities the violation of rights of this kind has been treated as "une expropriation réelle." But in others it has been spoken of as being only analogous to it, as thus: "comme s'il subissait une expropriation réelle d'une partie de sol." (See Delalieu, p. 86; Curasson, p. 211.) Be this as it may, the result of the decisions appears to be correctly summed up by Demolombe, and it would seem that in France at the present day damage to rights such as "droits d'accès" to streets is not deemed

to constitute "expropriation." Indeed, upon a reasonable construction of the language of Art. 407 of the Code, it seems to apply to property which can be actually ceded, and for which indemnity could be fixed before it was ceded.

The compensation allowed in France for "dommage," as distinguished from "expropriation," seems to be founded on an equitable principle which the special laws have adopted subject to the regulations prescribed in them. But claims for damage, other than that arising from the cession of property, being for the loss caused by the execution of the works and as a consequence of them, it would be unreasonable to require previous indemnity; indeed, in many cases, the extent of damage cannot be previously ascertained. The distinction between the damage which grows from an expropriation, and that which arises from the execution of the works ("l'exécution ultérieure des travaux"), is plainly put and illustrated by Delalieu. The latter, he says, is, "non la suite de l'expropriation, mais la suite de l'exécution des travaux," and he shows how in the nature of things the indemnity for it cannot be assessed beforehand, but should be the subject of a subsequent inquiry, even in the case where an actual expropriation has taken place. (See Delalieu, Art. 301 to 305.)

Assuming, then, that the plaintiff had rights in St. Felix street which have sustained damage, their Lordships think he has failed to establish an expropriation, or an injury which would give him a right to preliminary indemnity, so as to make the Corporation wrong-doers, and their act in closing the street a trespass, and "une voie de fait," because such indemnity had not been paid. It seems to them that if he has any claim, it is one to be prosecuted under the provisions of the Act relating to expropriations by this Corporation (27 and 28 Vict., c. 60) which will be hereafter considered. (See on this point Jones and Stanstead Ry. Co., L. R. 4 P. C. 98.)

Their Lordships observe that one of the grounds on which Mr. Justice Taschereau has sustained the action, instead of sending the plaintiff to the Special Tribunal constituted by the Act referred to, is that the parties had submitted to the jurisdiction of the Court, but they are unable to find sufficient evidence of submission or consent in the record to justify this conclusion.

Whilst upon the considerations just referred to, it seems to their Lordships that the present action is misconceived, they are reluctant to determine the case, without considering the other points (more nearly touching the merits of the claim) which were argued at the Bar. These were: that the plaintiff had suffered no injury which, by the French law, would give a right to indemnity; and that, if this were not so, the legislation authorising the act which caused the damage, had taken away the right of action, without providing compensation.

It cannot be denied that the law of France allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. Demolombe enumerates as undoubted the rights "d'accès ou de sortie, des vues, et d'égouts," (vol. 12, sec. 699) and the same rights are spoken of by Proudhon (vol. 1, Art. 369). The right of access to a house is of course essential to its enjoyment, and if by reason of alterations in the street the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the law of France he is entitled to recover, in some form,

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indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences. The occupiers of the plaintiff's houses can go from them into St. Felix street, and pass from it into other streets, and through them into all parts of the City. The only effect of making the street a *cul de sac* so far as the rights of access and passage are concerned (apart from the loss of customers, to be presently noticed) is that the plaintiff's tenants have to go by other streets and further to reach the southern part of the city.

The Counsel for the plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house in it as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view; but the weight of authority appears to be the other way. With all their industry the learned Counsel were unable to find, in the mass of French decisions on this subject, a single case in which it has been held that closing one end only of a street was an interference with the rights of access and passage which gave a claim to compensation. On the other hand, several authorities and decisions were cited to the contrary. Demolombe, in discussing the rights of access and other rights in streets (which he acknowledges are servitudes that cannot be interfered with by the Administration without making compensation), considers the passage a man enjoys over that portion of a street, which is not necessary for immediate access to his house, to be, not a right, but only an advantage of which he may be deprived without compensation. And among the instances of interference with mere advantages, as distinguished from rights, he gives the following:—"Comme si par exemple l'Administration diminuait la largeur de la place ou de la rue, ou même si elle fermait la rue par l'un de ses bouts, de manière à en faire une impasse." (Vol. 12, sec. 699.)

In Dalloz, "Répertoire," tit. "Travaux Publics," sec. 816, it is said, that to give a claim to indemnity, according to the constant jurisprudence of the Conseil d'Etat, the damage must be material, and the direct and immediate consequence of the works executed by the Administration, and that for indirect damage no indemnity is due. And in Section 818 he gives as an instance of indirect damage, "La dépréciation causée à une maison située dans une rue, qui par suite de travaux publics a été fermée à une de ses extrémités, alors qu'elle reste, du côté opposé, une communication avec autres rues."

In Dalloz, "Récueil," 1856, part 3, p. 61, an important Arrêt of the Conseil d'Etat is set out, given in a case in which the owner of a house in a street at Toulouse, one end of which had been closed, claimed an indemnity of 40,000 fr. One of the considérants of this Arrêt, which affirmed the judgment of the Conseil de Préfecture rejecting the claim, is as follows:—

"Considérant que si la Rue de l'Orme-sec a été fermée aux voitures à celle de ses extrémités qui aboutissait à la dite place, elle est restée ouverte du côté opposé, et se trouve encore en communication avec la nouvelle Rue de l'Orme-sec, qu'ainsi la dite maison n'ayant pas été privée de son accès à la voie publique, la dépréciation qu'elle aurait pu éprouver ne constituerait point un dommage direct et matériel qui pût donner droit à une indemnité, &c."

It certainly then appears that in France the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not

regarded as an interference with a servitude, nor (standing alone) such direct and immediate damage as will give a title to indemnity; and if this be so, there seems to be no reason or authority for declaring the law to be otherwise in Canada.

The authorities referred to leave untouched the question whether, if a street were stopped at both its ends, indemnity would be payable. It is enough to say that should such a case arise, it might possibly be contended with effect that a virtual destruction of the undoubted rights of access to the houses in the street so closed had been occasioned which would give to their owners a title to indemnity.

It was further contended for the plaintiff that beyond the mere passage through the street of which the occupiers of his houses were deprived, he had sustained special damage by reason of the loss of customers, who formerly came from the railway station into the street and were now prevented from doing so, and that thus the value of his houses for the purpose of the particular trades carried on in them was depreciated.

But it is to be observed that there was no authorized road from the railway station to this street, and the people who came into it from the station did so in an irregular manner, and by passing over the lines and works of the railway, in contravention of the bye-laws of the Company. This source of profit was obviously of a precarious kind, and cannot be regarded as permanent. The street does not appear to have been much used, being inconvenient, if not dangerous, from the frequent passing of railway trains, and, apart from the custom of the railway passengers, no special advantage seems to have been derived from its being a thoroughfare. French cases were cited to the effect that the loss of customers (unless, indeed, the right of access as before interpreted is infringed) would not be such a direct and immediate damage as would give a claim to indemnity. (See Dufour, "Droit Administratif appliqué," 275, 277, 323.) A similar decision was given by the House of Lords in Ricket *v.* Metropolitan Railway Company, L.R. 2 H.L. 175.

Whether, if the closing of the street had cut off the plaintiff's houses from a place the occupiers had long used in connection with them, as from a wharf upon a public river, or had rendered the immediate approach to the houses difficult or inconvenient, he would have been entitled by French law to indemnity upon the principle on which two English decisions, turning upon facts of the kind just supposed, were determined, it is unnecessary to consider. But the present case differs from the supposed ones. The immediate access to the houses is not obstructed, and the occupiers of them had no special object beyond that of their neighbours in going to the part of the city which lies south of the barrier. Indeed, there is no evidence that any inconvenience was felt on this score, and probably none could have been given, for there appears to be another street, easily accessible to the occupiers of the plaintiff's houses, by which this part of the city can be reached, and which, whilst only a little further, is probably more commodious, being less liable to obstruction from the operations of the railway. The gravamen of the damage, as proved, was the loss of the custom of the railway passengers already adverted to. No doubt the distinctions in the

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cases on this subject are fine. The English decisions (which are only referred to by way of illustration) as well as the French have been conflicting, and the boundary lines between them are in consequence somewhat indistinct. (See Metropolitan Board of Works v. McCarthy, L.R. 7 H.L. 213. Beckett v. Midland Railway Company, L.R., 3 C. P. 97.)

One ground of damage complained of is due not to the discontinuance of the street, but to the manner of closing it. It is said the barrier which has been erected darkens the plaintiff's houses.

It may be that the plaintiff has some ground of complaint on this head, but he has not alleged in his declaration that the windows of his houses have been deprived of light, but only that the street has been darkened; nor does the evidence distinctly show a deprivation of light to an actionable degree, nor is such a deprivation found as a fact by the experts or the Judges. The great contest in the cause has been as to the damage arising from the suppression of the street, and not that due to the form of the barrier. Throughout Mr. Justice Taschereau's judgment, in which that learned Judge ably supports his own view, there is no allusion to loss of light as a substantive grievance. If, however, this or other damage has been occasioned by the proximity of the barrier, it would be recoverable, if at all, under the Corporation statutes. The amount of damage assessed in the action is, in the main, given in respect of loss of custom and the consequent depreciation in the value of the houses.

The other questions argued turned upon the special Statutes relating to the Corporation. It was contended that these Acts excluded an action for indemnity, and gave no compensation in cases like the present. For the plaintiff it was denied that the action was thus excluded, but it was said that, if taken away, compensation was given.

Upon the English legislation on these subjects, it is clearly established that a Statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the Statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are "injuriously affected"—words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable, if the work causing it had been executed without statutable authority.

In the Canadian Act (23 Vict. c. 72), authorizing the by-law in question, no compensation is expressly provided for the damage which may be caused by any of the acts it authorizes to be done. But in a previous Act (14 and 15 Vict. c. 128), provision for compensation is expressly made in two instances. Thus, the power to make bye-laws for altering the footpaths or side-walks of any street is conferred subject to the provision "that the Council shall make compensation out of the funds of the city to any persons whose property shall be injuriously affected by any such alteration of the level of the footpath in front thereof." And the power to make bye-laws for changing the sites of markets and appro-

priating the sites, saves to any party aggrieved "any remedy he may by law have against the corporation for any damage he might thereby sustain."

The Counsel for the corporation referred to two or three other instances of express provisions in former acts relating to this corporation, and also to sets of acts authorizing roads, bridges, and other public works, which provided compensation in express terms, and contended that it might be inferred from this course of legislation that the intention was to exclude compensation, whenever it was not expressly given.

On the other hand, the Counsel for the plaintiff relied on the fact that no compensation was provided by the Act authorizing the bye-law in question, although the power it conferred would, it was said, justify an interference with property, and with undoubted servitudes, and also upon the difference between English and French law, arising from the existence of the Article of the Code, and the dissimilar systems of procedure in the two countries. Their contention, in substance, was that the special Acts should be read with and subject to Article 407 of the Code in the cases to which it was applicable, and also to the general law which gave, in certain cases at least, a right to indemnity for damage.

Whatever may have been the effect of the special Acts relating to this corporation before the passing of the 27 and 28 Vict. c. 60, they must now be read and considered with it. That Act is indeed a Statute upon expropriations. After reciting in the preamble that much difficulty was often experienced in carrying out the law in force relating to expropriations for purposes of public utility, it establishes a tribunal consisting of commissioners for determining the value of property expropriated, and a system of procedure for such cases. Then the 18th section enacts that these provisions shall be extended to all cases in which it becomes necessary to ascertain the compensation to be paid for any damage sustained by reason of any alteration in the level of footways made by the Council, or by reason of the removal of any establishment subject to be removed under any bye-law of the Council, "or to any party by reason of any other act of the Council, *for which they are bound to make compensation*."

It was contended for the corporation that this general clause referred only to such compensation as was expressly mentioned in their Statutes, though they could only point to two instances of such compensation which could satisfy the words, and these were contained in a Road Act (36 Geo. III. c. 9), the powers of which were transferred to the corporation. Whilst, for the plaintiff, it was said that if it be held that actions for indemnity are taken away, this sweeping clause ought to be construed so as to comprehend all cases of damage for which, by the general law, indemnity would be due, and as being, in effect, equivalent to the common clause in the English Statutes containing the words "otherwise injuriously affected."

Reading the clause in the latter sense, compensation would be expressly given by it to all who may suffer—to use the English phrase—actionable damage. A provision to this effect, if it be made, would no doubt be equitable and reasonable; whereas, if it be not made, the scheme of compensation provided by these acts would seem to be defective. Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised;—since, in whatever

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manner it may be determined, and whatever may have been the case before the 18th section of the 27th and 28th Vict. c. 60, was passed, they think that this enactment, by requiring that the compensation payable to any party "by reason of any act of the Council for which they are bound to make compensation," shall be ascertained in the manner prescribed by the Statute, excludes, by necessary implication, actions of indemnity for damage in respect of such acts. It is enough, therefore, to say that, in their view, the corporation, having acted within their powers, the plaintiff's claim (if sustainable at all) is of a kind which would fall to be determined by the Commissioners under the special Act.

It may be observed that the question of procedure in cases of this kind is not merely a technical one. This was pointed out in the judgment of this Committee in Jones *v.* The Stanstead Railway Company. It is there said: "The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had."

On the whole case, their Lordships find themselves unable to concur in the judgment pronounced by the majority of the Judges of the Court of Queen's Bench, and they will humbly advise Her Majesty to reverse both the judgments below, and to direct that the action be dismissed with costs. The respondent must pay the costs of this appeal.

Rouer Roy, Q. C., for the Appellant.

E. Barnard for the Respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND JUNE, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 165.

CROSS, APPELLANT;

AND

THE BRITISH AMERICA INSURANCE COMPANY et al., RESPONDENTS.

HELD:—That if a vessel be portworthy at the time a marine insurance is effected, her becoming unportworthy shortly afterwards by the act of those in charge of the vessel will not render the insurance void.

MONK, J., *dissentiens.* This is a case of some importance, and I regret that I cannot concur in the judgment about to be rendered by the Court.

This suit is brought against three incorporated insurance companies and a number of individual underwriters, for recovery of the sum of $1,682.12, as being the value of 335 barrels of oil cake, shipped on board the steamship St. Patrick, and forming part of 1,000 barrels alleged to be insured by respondents,

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as the property of appellant, on the 11th May, 1872. The St. Patrick, after taking part of her cargo on board, sank at her wharf in the Port of Montreal, on the evening of Saturday, the 11th May, 1872, being the same day on which the insurance was effected.

Lymans, Clare & Co. had previously shipped on board of the said steamship 335 barrels of the whole specified quantity aforesaid of oil cake, intended, as stated, to be shipped for delivery at Glasgow to the purchaser there, Cross & Son, and indorsed the said certificate to the purchaser, transmitting it forthwith to him as the owner of the goods, for whom Lymans, Clare & Co. had acted in the premises in like manner as on previous occasions, to the knowledge of the Insurance Union, and the purchasers, on information of the loss, returned the certificate to Lymans, Clare & Co. for the purpose, as was thereby expressly stipulated, of collecting for their principal, the owner, upon its production to the Union, the loss incurred upon the partial shipment on board of the steamship.

The accident or misfortune occurred early in the night of Saturday, the 11th of May, by the capsizing of the steamship and her sinking with her cargo on board under water at her wharf in the harbor here, where she remained for about a fortnight, when she was raised, and her partial shipment was removed on shore, where the contents—which were perishable—being found, from their long submersion, to have become unfit for use as oil cake, and useless for shipment, Lymans, Clare & Co. thereupon, as the agents of the plaintiff, abandoned the shipment to the Insurance Union, and it was subsequently sold at public auction at Montreal, by the orders of the shipowners, for the benefit of the insurers and of all concerned.

The circumstances of the accident were as follows:—The steamship arrived safely at her destined port here, and was moored in the harbor here at the Allans' wharf, on the 8th of May. On the following morning she began to discharge her inward cargo and, as usual, to stiffen the ship, took on board outward cargo to replace what was discharged of the other. In passing through the Gulf on her voyage to Montreal, her upper rudder-band was broken by the pressure of the ice, which, however, did not affect the ship on her voyage to port, and was unknown to all on board. The injury was not discovered until accidentally, on the morning of the 11th, in painting the stern. The broken rudder-band, being above water, was easily replaced by another, and completed early in the afternoon of the same day. After the repair of the broken band was ordered it was thought advisable to ascertain the state of the next lower band, and no other means being at hand, the ship was ordered to be tipped by pressing down her bow and raising her stern. The operation was begun about noon of the 11th, and by the temporary removal forward of part of her cargo stowed between decks aft, with other cargo shipped from the grain elevator alongside, and a quantity of pig-iron taken on board from the wharf, and all placed on the spar deck forward, the ship was sufficiently raised at the stern to show that the suspected rudder-band was uninjured, and the tipping was stopped.

The Insurance Union having refused to pay to the plaintiff the partial loss incurred, this action was instituted by him against the defendants, jointly and

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severally, as constituting the Union by whom the insurance contract was made, and the declaration sets out the causes of action above referred to, with the enumerated perils in marine policies.

The conclusion prays for a joint and several condemnation against the defendants for the sum of $1,682.12, with interest and costs.

The defendants plead several pleas to the plaintiff's action.

By their first plea they allege that they never were in any manner jointly concerned as insurers, and further, that at the time of the alleged insurance, and at the time of the alleged shipment, and at the time of the alleged loss, the said S.S. St. Patrick was unseaworthy and unfit to proceed on her proposed voyage, by means whereof an insurance such as pretended in and by plaintiff's declaration could not attach to the goods or oil cake therein mentioned.

By their second plea the defendants set up that they never were in any manner jointly concerned as insurers, and at the time of the alleged shipment, and of the alleged insurance, and at the time of the alleged loss, the said S.S. St. Patrick was unportworthy, and in a condition unfit to take in cargo, by means whereof no insurance, such as pretended, could attach to the oil cake in question.

By their third plea, defendants aver that the oil cake was not lost, damaged or injured by any peril of the sea, marine disaster, or any peril that could be the subject of an insurance.

By their fourth plea, defendants allege that if the oil cake was at all damaged, which defendants deny, it was so damaged by the gross carelessness, negligence, culpable and improper management, and gross ignorance and recklessness of the owners of the said steamship St. Patrick, and of their servants and agents, for which the defendants are not responsible.

By their fifth plea, defendants say they were never in any respect joint and several contractors, or in any other manner contractors in favor of plaintiff or otherwise, or for, or in respect of insurance on oil cake, as alleged in plaintiff's declaration.

And the sixth plea was the general issue. The parties then proceeded to proof after the plaintiff filing special answers.

Before proceeding to consider the more important points in this case, I shall advert briefly to two minor questions: first, as to the joint and several liability of the defendants. As I view this case, that is unimportant, being of opinion, as I am, that the judgment of Mr. Justice Torrance in the Court below should be confirmed, and the present appeal overruled. That judgment is in the following words:—

"Considering, that at the time of the insurance effected by the plaintiff, as declared upon in his declaration, the steamship "St. Patrick," on board of which the goods in question were shipped, was not seaworthy or portworthy;

"Considering, that the loss for which the plaintiff seeks indemnity by the present action was caused by the negligence of the owners of the steamship, and in this respect the said owners were the agents of the plaintiff;

"Considering, that under the circumstances of the present case, the defendants are not liable, doth dismiss the action and *demande* with costs."

The judgment about to be rendered by the Court will determine whether or

m this joint and several liability has been sufficiently established by the evidence.

The second of these two minor points is as to the abandonment; the action is for absolute total loss and no abandonment is alleged. Now, as a matter of fact, the loss was not total, and the damaged oil cake was sold at public auction, and the proceeds, amounting to between $300 and $400, were handed over to the slip owners, and were never received by the insurers. There was no regular abandonment, either verbal or in writing, as I view the evidence. There was no precise offer to abandon, nor any direct or constructive acceptance of anything of the kind; in this case I think this proceeding was necessary, as the loss was not absolute, but a constructive total loss, as clearly results from the testimony of record. But as before remarked in regard to the first question, in my view of the case, this is unimportant, as I think the action was rightly dismissed on the grounds set forth in the judgment. Coming now to the important points, viz.: the seaworthiness or portworthiness of the steamer, and the gross negligence of the shipowners, I consider it beyond controversy, that Cross, the appellant, when he insured the oil cake, by law came under a warranty to the insurer that the steamer was seaworthy or, as in this case, portworthy; and in regard to this, and generally in the management of the ship, the shipowners were his agents.

The following, among many other authorities, establish these points:—

"The warranty of seaworthiness will be implied whether the insurance be effected by the owners of the vessel or the owner of the goods carried by her."—Tudor's Mer. Cases, p. 127.

"As between the assured on goods and the underwriters, the shipowner must be considered the agent of the assured, and he undertakes that the ship shall be tight, staunch and strong, and every way fitted for the voyage. If this undertaking is broken, the merchant has no remedy against the underwriter, but he obtains a full indemnity by suing the shipowner, and, between the shipowner and underwriter, he is secure."—Per Lord Campbell in Gibson *vs.* Small, 24 English Law and Eq. Rep. p. 50.

"It is well and firmly established that in every marine policy the assured comes under an implied warranty of seaworthiness to his assurer. If we were to hold that he has not the benefit of a similar implication in the contract which he makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss which it is the object and purpose to give him by the two contracts taken together. Holding as we now do, the result is that the merchant by his contract with the shipowner, having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is by his contract of assurance protected against the damage arising from such perils acting upon a seaworthy ship."—Per Field, J., in Kopitoff *vs.* Wilson, Law Journal Rep., part 6, vol. 45, p. 439 (June, 1876).

"Seaworthiness is a word the import of which varies with the place, the voyage, the class of the ship, or even the nature of the cargo. The ship may be fit for port or river risks, and that suffices while there, or seaworthy for one

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voyage and not for another or for one class of cargo and not for another, or as fit for the voyage contemplated as such a vessel is capable of being made. *She must not be overloaded, and her cargo must not be badly stowed.* The term 'seaworthy,' said Erle, J., in the House of Lords, when used in reference to marine insurance, expresses a relation between the state of the ship and the perils it has to meet in the situation it is in."—Arnould, vol. 2, p. 590.

Overloading and improper stowage, causing an unfitness to meet the ordinary risks she has to encounter, are as applicable to a vessel in port as at sea. If, therefore, the loss arises from these causes, wherever the vessel may be, whether at sea or in port, it is clear that the underwriter is not responsible.

In the present case, the St. Patrick was not in a seaworthy state until the repairs to her rudder were made. This is fully admitted by Capt. Barclay in answer to the following question:—

"Q.—Do you consider the St. Patrick was fit to proceed to sea without her rudder band being repaired?

"A.—No."

In order to make her seaworthy she was "tipped," or, in other words, she was "overloaded" with bags of grain and pig iron, and the cargo was "badly stowed" by being placed forward on the dock, instead of being distributed equally through the vessel and stowed in the hold.

That this was the cause of the accident (notwithstanding the attempt made to show that a squall or puff of wind upset her) is amply proved even by the evidence of the Appellant's own witnesses.

Capt. Stephen (appellant's witness) says: "The ship was made tender by putting too much upper weight on her. I mean by tender, crank, or getting the centre of gravity too high up; but, before the squall, the ship, so far as I am informed, gave no signs of such tenderness." (This is in contradiction with the protest signed by Capt. Stephen, No. 7 of record). "This (the tenderness) was caused by putting too much pig iron on the deck forward on the day of the accident."

"I am prepared to admit," says Capt. Stephen afterwards, "that if we had not attempted to tip the ship, she would not have upset."

R. Gethings (respondent's witness) says: "I noticed how the cargo was placed; there was a large quantity of grain in bags piled on the deck forward of the foremast to the height of about eight or nine feet; there was also a large quantity of pig iron, probably 70 or 75 tons, or perhaps more, piled upon the deck alongside the bags of grain. This mode of placing the bags and pig iron had the effect of raising her stern very much out of the water and pulling down her bow very low."

"Q.—In your opinion, would the St. Patrick have tipped over if she had been properly loaded?"

"A.—No, sir. My reason for saying so is that the weight, instead of being in the hold forward and aft, was placed on the spar deck forward. My opinion is that this weight caused her to touch ground forward, and that the weight piled on her deck overbalanced her. Perhaps if she had had more depth of water she would not have turned over. In my opinion such a

mode of loading a vessel was contrary to every rule of right reason. I consider that it was highly improper and dangerous. In all my experience I never saw a vessel treated like that before."

Again :—

"Seaworthiness of the ship depends upon the uses and purposes to which it is to be applied. When this use is to load and stow the cargo for the voyage, and the vessel is in such a state of repair that it is necessary to re-land the cargo for the purpose of making repairs, the ship is not fit for the use to which it is applied. There is therefore a non-compliance with this warranty simultaneously with the loading of the cargo." Phill. on Ins., sec. 723.

In the present instance, if the cargo was not re-landed, it certainly ought to have been. It was not competent for the Messrs. Allan to throw an extraordinary and exceptional risk on the underwriters in order to save themselves the expense of re-landing the cargo.

"What that degree of seaworthiness is which is requisite to make a policy 'at and from,' attach upon a ship while in port, has nowhere been very accurately laid down. Generally speaking, it may be said, that under such a policy a ship will be sufficiently seaworthy to give inception to the risk, if she be in such a state while at the port as to be capable of being moved from one part of the harbor to another for the purpose of repair, and of being moored alongside its wharves or quays there in order to take in her cargo." Arnould, vol. 2, p. 604.

Applying this test to the St. Patrick, it is certain that on Saturday afternoon, while she was undergoing the process of being tipped, she was not fit to be moved from one part of the harbor to another.

One of respondents' witnesses (Gethings) states that, in his judgment, "she was not in a fit condition to be moved at all," and Capt. Barclay, in effect, admits the same thing when he says: "I thought she could have been moved about the harbor, but subsequent events have proved that it might have been unsafe." (1st. Dep.) "I am not now—I was then—of opinion that a vessel in the position she was in, tipped, could have moved about the harbor or across the basin, but I am now of opinion that that operation would have been unsafe." (Capt. Barclay's dep. for respondents.)

The fact is, as the result proved, that the St. Patrick was not only unfit to be moved across the harbor, but was not even fit to lie alongside of her wharf and take cargo on board.

His Honor then adverted to the evidence as to the time when the tipping took place. He said it certainly commenced before one o'clock in the afternoon. When was the insurance effected? It resulted from the evidence that it was effected while the tipping was going on. His Honor enlarged somewhat upon this point, holding that there was negligence on the part of the shipowners. He considered that the judgment of the Court below, which dismissed the action, ought to be confirmed.

RAMSAY, J., rendering the judgment of the Court: The facts in this case are not numerous. On the 11th of May, about eight o'clock in the morning—certainly after seven—the steamship St. Patrick capsized at her wharf and went

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down. There was a quantity of insured oil cake on board, the property of the appellant, which went into the water and was absolutely destroyed. Now the appellant brings his action against the Insurance Company to recover as for a total loss. The respondents meet this by several pleas. But the principal question urged before this Court, and the only one of serious importance, is that the vessel was not seaworthy or portworthy at the time the insurance was effected, and therefore the insurance never attached. The principal point of unseaworthiness insisted upon here is that the rudder band was broken. This, however, was a damage that could be repaired in an hour. And it is further to be remarked that the upper rudder band, which alone was broken, was not discovered to be broken until the vessel came into port and was painted. So that the vessel had stood the test of seaworthiness. There is another thing. The upper rudder band was mended long before the accident; but when they found one band broken, they took it into their heads that the other might also be broken, and they tipped the vessel to see. The lower rudder band was not broken, and the object of tipping may be discarded from consideration. The question is whether the vessel was seaworthy when the insurance was effected. If, when the insurance was effected, the vessel was tipped to such an extent that she might go over, the insurance might be null. But the fact is that prior to the tipping having arrived at any dangerous degree, the insurance had been effected, and therefore attached. There is unquestionable evidence that at half-past six the vessel was perfectly steady. The insurance, it is proved, was effected in the afternoon, when the tipping had not been carried to a dangerous extent. In my view the turning over did not happen from the tipping. It is clear from the evidence that the vessel turned over because she took the ground; there was not water enough. It would not have been a dangerous operation had there been three or four more feet of water there. The insurers ought not to be discharged in this case. The policy of the law is not to lighten their responsibility; they calculated the balance of chances, and took the risk. The insurance existed and was not void in any way.

There are two other points to be noticed. First, as to abandonment; and, secondly, the joint and several liability. As to the first point, it has not been pleaded; it is not in issue between the parties at all. There has been no question of abandonment, and in good faith there was no need of any abandonment; the oil cake was proved to be totally worthless, and it would have been a mere quibble to have raised that point. On the second point, the defendants are jointly and severally liable as having made one contract together. It was a commercial contract, and the joint and several liability did not require to be set forth. The judgment must be reversed, and the respondents must be jointly and severally condemned to pay to the appellant the amount of the insurance.

SANBORN, J., remarked that there was an insurance against barratry, and *a fortiori*, the insurance covered any imprudence on the part of the officers of the vessel. His Honor considered the insurance existed at the time of the accident, and the insured had a right to recover.

The following was the written judgment of the Court:—

"The Court * * * Considering that it is established by the evidence

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that on the 11th day of May, 1872, the appellant for lawful consideration duly paid, insured with the Canadian Insurance Union, composed of the several Insurance Companies, respondents in this cause, one thousand barrels of linseed cake, for the sum of $4,800, which insurance was to take effect from the loading of the said one thousand barrels of linseed cake on board the Steamship St. Patrick at Montreal, and to continue until the goods should be safely landed at Glasgow in Scotland;

"And considering that on the said 11th day of May, after 335 barrels of the said oil cake of the value of $1682. 12 were loaded on board the said Steamship St. Patrick at the port of Montreal, the said Steamship capsized, and became filled with water, whereby the said 335 barrels of oil cake were destroyed and lost to the appellant;

And considering that at the time the said insurance was effected, the said 335 barrels of oil cake were on board the said Steamship, and considering that the risk attached as regards the said 335 barrels of oil cake from the instant the insurance was effected, and that the said Steamship St. Patrick was then portworthy;

"And considering that the said 335 barrels of oil cake were destroyed after said risk had attached and by one of the perils insured against, and that the said respondents are therefore responsible for the loss of the said 335 barrels of oil cake;

"And considering that there was error in the judgment rendered by the Superior Court at Montreal on the 22nd day of December, 1875;

"This Court doth reverse the said judgment of the 22nd day of December, 1875, and proceeding to render the judgment which the said Superior Court should have rendered; doth condemn the said respondents jointly and severally to pay to the appellant the said sum of $1682. 12, with interest on the said sum from the 19th day of April, 1873, date of the service of the summons in this cause, and also the costs incurred as well in the Court below as on the present appeal. (The Honorable Mr. Justice Monk dissenting.)"

Dunlop & Lyman for appellant. Judgment of S. C. reversed.
S. Bethune, Q. C., Counsel.
Cross, Lunn & Davidson for respondents.
(S. B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 15TH JUNE, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

OSTELL, APPELLANT;

AND

BLAKE, ATTORNEY-GENERAL, *pro Regina*, RESPONDENT.

HELD:—That proceedings on behalf of the Crown are exempt from paying stamps.

DORION, CH. J. The respondent has filed a petition *en reprise d'instance*, and the clerk of the Court has called our attention to the fact that the petition is

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unstamped. The question arises whether the Crown is liable to pay law stamps. The general rule was that the Crown cannot be condemned to costs. There is nothing in the Statutes since Confederation which has changed the old rule. The order of the Court is, therefore, that stamps are not required.

TESSIER, J., while concurring in the judgment, did not see the propriety of the rule exempting the Crown from paying costs.

RAMSAY, J., did not consider that the judgment now rendered would bind the Court in a case where the Clerk of the Court had a beneficial interest in the fee. That point had been clearly settled before Confederation.

(S.B.) Petition granted without being stamped.

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 15TH JUNE, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 22.

POULIN ET AL., APPELLANTS;

AND

WILLIAMS ET AL., RESPONDENTS.

HELD:—That a party who takes delivery of goods ordered by another person in his name and shipped to his address, on the understanding that the sellers should draw on such party for the amount of invoice, cannot retain the goods and refuse to accept the draft or pay the amount thereof.

TESSIER, J. In the course of January, 1875, the plaintiffs, Williams & Co. of St. Louis, in the State of Missouri, sent by the railway lines, from St. Louis to Montreal, a lot of goods, feathers and other things, valued at $342.35, to the defendants, Joseph Poulin & Co., appellants in this cause.

The bill of lading accompanied these goods as from S. Williams & Co. to J. Poulin & Co., with an invoice as follows:—

INVOICE.

ST. LOUIS, MO., Jan. 30th, 1875.

M. J. Poulin & Co., (bought by P. Poulin) Montreal, Can.

Bought of S. WILLIAMS & Co.,

General Commission Merchants,

210 North Third street.

To Mdse as per Bl. L. attached.....$342.35.

These goods were delivered to the appellants, Joseph Poulin & Co., at Montreal, and accepted by them; but upon the presentation of a draft drawn by Peter Poulin, a brother of the appellants, then at St. Louis, on Joseph Poulin & Co., requesting them to pay the price of these goods, $342.35, to Williams & Co., the appellants refused to pay it. It is for the recovery of this amount that the present suit was brought.

The appellants by their pleas alleged: That the goods were purchased by Pierre Poulin from respondents on his own account, and that although the same goods afterwards came into the possession of the appellants, it was because they

were sent by Pierre Poulin to whom they paid the amount, and the appellants are not responsible to the respondents whom they never knew in the matter.

The evidence in the case consists of the invoice and bill of lading attached. In the invoice the goods are stated to have been sold by the respondents to the appellants represented by P. Poulin; and the bill of lading shews that the goods were consigned by the respondents direct to the appellants. The receipt of the appellants to the railway company, at the time of the delivery of the goods, is not produced, but Joseph Poulin, one of the appellants and the head of the firm, admits all the facts in his deposition. P. Poulin gives an order to Williams & Co. on Joseph Poulin & Co. to pay the amount to Williams & Co. This disposes of the pretention that Peter Poulin had bought these goods in his own name. He gives notice by this order to the appellants that they must pay Williams & Co., if they accept the delivery of these goods. They have accepted such delivery, and they are bound to pay. Such has been the judgment of the Superior Court, and this Court confirms it with costs.

MONK, J., stated simply that he *dissented* from the judgment just rendered.

Judgment of S. C. confirmed.

Archambault & David, for appellants.

E. Barnard, for respondents.

(S.B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND JUNE, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 131.

MONTRAIT, APPELLANT;

AND

WILLIAMS, RESPONDENT.

HELD:—That where a motion to amend the declaration in the case is of such a nature as materially to alter the allegations and conclusions, an opportunity to answer the declaration as amended should be afforded to the defendant, and therefore a judgment granting such motion and pronouncing finally on the merits of the case at the same time will be reversed.

DORION, CH. J., merely read the judgment of the Court as sufficiently explanatory of the question determined by the Court, which was in the following words:—

"La Cour * * * considérant que l'amendement que l'intimée a demandé à faire à sa déclaration en cette cause par sa motion du 18 février 1876, constituait un changement important non-seulement dans le libelle mais encore dans les conclusions de sa demande;

"Et considérant qu'en accordant à l'intimée la permission d'amender sa déclaration tel que demandé la Cour Inférieure aurait dû donner à l'appelant la faculté de répondre aux nouvelles allégations et aux conclusions nouvelles prises par l'intimé;

"Et considérant que la demande faite par l'intimée d'amender la déclara-

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tion ne lui a été accordée que par le jugement final qui a définitivement décidé du mérite des contestations entre les parties, et que par conséquent l'appelant n'a eu aucune occasion de répondre à ces nouvelles allégations et conclusions nouvelles de l'intimée ;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal le 29 février, 1876 ;

"Cette Cour casse et annulle le dit jugement du 29 février 1876, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure accorde la motion du 18 février 1876, et permet à l'intimée d'amender la déclaration conformément à la dite motion sans frais, et permet à l'appelant de répondre à la déclaration ainsi amendée dans les huit jours à compter de la signification de copie d'icelle pour être ensuite procédé ainsi que de droit. Cette cour ordonnant de plus que la pension alimentaire accordée à l'intimée par le jugement interlocutoire du 30 novembre 1874, continuera de lui être payée par le dit appelant en vertu du dit jugement tant pour le passé que pour l'avenir jusqu'à ce qu'il en soit autrement ordonné, et de plus cette cour ordonne, que chaque partie paiera ses frais sur le présent appel."

Judah & Co., for appellant.
Macmaster & Co., for respondent.
(S.B.)

Judgment of S. C. reversed.

SUPERIOR COURT, 1878.

MONTREAL, 20TH MARCH, 1878.

Coram TORRANCE, J.

No. 2476.

Simms vs. *The Quebec, Montreal, Ottawa & Occidental Railway Co.*, and Hon. *A. R. Angers*, Attorney General pro. Reg., Opposant.

HELD :—That the Court will take notice of the removal of the Attorney General pro Regina as published in the Quebec *Official Gazette*.

F. Keller, for the plaintiff, moved that all proceedings be stayed on the opposition of the Attorney General pro Regina, inasmuch as the Hon. A. R. Angers had ceased to be Attorney General pro Regina, until Hon. David Ross, the now Attorney General pro Regina, should have taken up the instance.

De Bellefeuille, for Attorney General, opposed the motion, on the ground that there was nothing before the Court to show that the Hon. A. R. Angers had ceased to be Attorney General.

The Court granted the motion, holding that it would take notice of what was published in the Quebec *Official Gazette*.

F. Keller, for plaintiff.
De Bellefeuille, for opposant.
(J. K.)

Motion granted.

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 15TH JUNE, 1877.

Coram DORION, Ch. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

THE SOUTH EASTERN RAILWAY COMPANY,

APPELLANT;

AND

LAMBKIN,

RESPONDENT.

HELD :—That an appeal does not lie to the Privy Council from a judgment of the Queen's Bench ordering a new trial.

DORION, C. J. This motion is for an appeal to the Privy Council from a judgment by this Court, ordering a new trial, reversing the judgment of the Superior Court, by which appellants were condemned to pay the respondent a sum of $7,000 for damages. The rule uniformly followed by this Court is that there can be but one appeal to the Privy Council, and that from the final judgment rendered by this Court,—Wardle and Bethune; Miller and Coleman, 22nd June, 1875. But it is said that by the judgment of this Court the respondent has been deprived of the benefit of the final judgment which he had attained in the Court below, and that, therefore, his appeal ought to be allowed as from a final judgment. The appeal to the Privy Council is not from the Court below, but from the judgment by this Court, and the judgment rendered by this Court is a judgment ordering a new trial, and is merely interlocutory. The case of Simard and Townsend, 6 L. C. Rep. 147, is precisely in point. In that case the Court below had dismissed the action on a demurrer. This was a final judgment. In the appeal the judgment was reversed, and the parties ordered to go to evidence. The respondent, who had obtained the dismissal of the action by the Court below, and had therefore obtained a final judgment in his favor, moved for leave to apply to the Privy Council from the judgment in appeal. This motion was rejected by the Court on the ground that an appeal did not lie from such a judgment. (Ch. J. Lafontaine, Aylwin, Duval and Caron, JJ.) The Court is, therefore, for rejecting this motion of the respondent, and refusing the permission to appeal to the Privy Council prayed for.*

Motion to be allowed to appeal to the P. C. rejected.

E. Carter, Q.C., for appellant.

J. Doutre, Q.C., for respondent.

(S. B.)

* Vide 21 Jurist, p. 325.

SUPERIOR COURT, 1878.

MONTREAL, 29TH MARCH, 1878.

Coram TORRANCE, J.

No. 1079.

Mackay vs. *Routh* et al., and *The Bank of Montreal* et al., Garnishees, and the Defendants, Contestants.

CONCURRENT GARNISHMENTS.

HELD:—That the existence of a previous *saisie-arrêt* in the hands of R. & Co. as garnishees at the suit of a creditor of plaintiff does not prevent the plaintiff from seizing moneys due to R. & Co. in the hands of other parties.

The plaintiff having, on the 26th November, 1877, obtained judgment against the defendants for $4,168.09, on the 16th January, 1878, sued out an attachment after judgment in the hands of divers garnishees. The defendants, on the 21st February, 1878, contested this attachment, alleging that, before it issued, namely, on the 14th December, 1877, they were summoned as garnishees to appear before this Court on the 2nd January, 1878, and declare what they owed or should owe to the now plaintiff in a cause number 1377, wherein Duncan Macdonald was plaintiff and the now plaintiff was defendant; that said action was to recover the sum of $4,500, a larger sum than the amount of the judgment in the present cause; that the now defendants made a declaration in the said cause No. 1377 that they owed to the now plaintiff the sum of $4,819.35; that by the writ issued in said cause No. 1377 they were ordered not to dispossess themselves of said moneys; that said attachment was still pending, and the attachment in the present cause was therefore null; and the defendants therefore prayed that the attachment in the present cause might be annulled. The plaintiff demurred to the contestation, on the ground that the contestants did not allege that they had been ordered to pay the said sum to said Duncan Macdonald, or that they had deposited said sum in the hands of the treasurer of the Province under 35 Vict. cap. 5, and 36 Vict. cap. 14 (both of Quebec), and did not show an interest in said contestation.

Wotherspoon, for plaintiff, cited *Duvernay & Dessaulles*, 4 L. C. Rep. 142.

L. O. Loranger, *è contra*.

PER CURIAM:—The existence of a prior *saisie-arrêt* at the suit of another plaintiff is no bar to the attachment in the present case, and the contestation being an insufficient answer to the *saisie-arrêt* by the plaintiff, the answer in law of the plaintiff is maintained, and the contestation dismissed.

Contestation dismissed.

I. Wotherspoon, for plaintiff.
L. O. Loranger, for defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND JUNE, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

LEMOINE, APPELLANT;

AND

LIONAIS, RESPONDENT.

HELD:—That where a deposit of £500 has been made as security under Art. 1179 C. C. P. on an appeal to the Privy Council, and the judgment appealed from is confirmed in the Privy Council, but without costs in the Privy Council, the deposit will nevertheless avail to liquidate the costs in the Courts below, and cannot, therefore, be withdrawn by the appellant.

DORION, C. J. A question of costs comes up here. An action having been brought, judgment was rendered, and the judgment of the Court below was confirmed by this Court, with costs. Lemoine then appealed to the Privy Council, and deposited £500 as security. The judgment was confirmed in England, but without costs in the Privy Council, leaving the condemnation as to costs in the Court below and in appeal. The £500 being still in the hands of the Clerk of the Court, the party who deposited the money for Lemoine now moves for an order to have the £500 paid to him. The question is whether the £500 was security for the costs in the Privy Council only, or also of the Courts below. The Court is of opinion that the money was security, not only for the costs of the Privy Council, but also of the previous Courts. The article of the Code is very clear. Therefore the amount of costs must be taxed, and the surplus, if any, will be paid over to the party.

The following was the written judgment of the Court:—

"La Cour après avoir entendu l'appelant et l'intimé par leurs avocats, et mûrement délibéré sur la requête de l'appelant, demandant à cette Cour de déclarer que le dit appelant a droit de retirer le dépôt de la somme de $2000 fait par lui entre les mains du greffier de cette Cour pour tenir lieu du cautionnement requis par la loi sur l'appel, par lui interjeté à Sa Majesté, en son Conseil Privé, et d'enjoindre au Greffier de cette Cour de lui accorder un certificat à cet effet de manière à ce que sur la transmission d'icelui à l'Honorable Trésorier de la Province, le montant du dit dépôt lui soit remis;

"Considérant que le décret de sa Majesté tout en condamnant chaque partie à payer ses frais sur l'appel au Conseil Privé a confirmé le jugement rendu par cette Cour le 10ème jour de décembre 1870;

"Considérant que le jugement de cette Cour ainsi confirmé par le décret de Sa Majesté condamnait l'appelant à payer à l'intimé les frais par ce dernier encourus tant en Cour d'appel qu'en Cour de première instance;

"Considérant que cette condamnation aux dépens constituait une condamnation dans le sens de l'article 1179 du Code de Procédure Civile, pour laquelle condamnation l'intimé avait droit d'obtenir un cautionnement avant que l'appelant eût le droit d'en appeler à Sa Majesté en son Conseil Privé;

"Et considérant que c'est pour assurer le paiement de cette condamnation, tout aussi bien que de toutes les condamnations ultérieures qui pouvaient être prononcées, que cette somme de $2000 a été déposée, et que par la confirmation

Lemoine and Lionais.

de cette condamnation l'Intimé a acquis le droit d'être payé de ses frais tant en Cour de première instance qu'en cette Cour sur et à même la dite somme de $2000, et que l'appelant ne peut retirer sur le montant de son dépôt que la balance qui en restera après déduction des frais dûment taxés, rejette la dite motion avec dépens."

Motion to withdraw deposit rejected.

A. & W. Robertson, for appellant.
Lacoste, Q.C., for respondent.
(S.B.)

SUPERIOR COURT, 1869.

MONTREAL, 30TH NOVEMBER, 1869.

Coram BERTHELOT, J.

No. 1655.

Fletcher vs. *Forbes* et al.

HELD:—Where persons are sued as partners, and a cause of action is only established against one individually, the action will be dismissed *in toto*.

The demand was based upon a promissory note, signed with the signature "Forbes & Drescher," the firm name of the defendants, who were partners.

Only the defendant Drescher pleaded. By his plea he alleged that the note had been signed and delivered by the other defendant Forbes for one of his private debts, and without his, Drescher's, authority, and that the plaintiff knew that Forbes had no authority to give the note in question.

At the argument the plaintiff urged that in any case he was entitled to judgment against the defendant Forbes, who had been duly foreclosed from pleading.

PER CURIAM: The Court having heard the plaintiff and the defendant Henry Drescher by their counsel on the merits of the action and contestation raised by said defendant Drescher, the other defendant Archibald H. Forbes having been foreclosed from pleading to said demand, having examined the record and evidence;

Considering that the said defendant Henry Drescher hath proved by sufficient evidence the allegations of his said plea, and that the note recited in said declaration, and for which the defendants are sued, has not been drawn and consented for any business, or the profit of said defendants as a firm or as partners, but that, on the contrary, the said note has been made and signed by the defendant Archibald H. Forbes as security for his own private and individual debt, without the knowledge and consent of said Henry Drescher, when the said plaintiff well knew that the amount of said note was not for any debt of the said defendants as a firm or as partners, doth dismiss the said action with costs, reserving to the said plaintiff his recourse against the said Archibald H. Forbes.

Action dismissed.

Lafrenaye & Armstrong, for plaintiff.
J. & C. Abbott, for defendant Drescher.
(I. W.)

SUPERIOR COURT, 1878.

MONTREAL, 21st FEBRUARY, 1878.

Coram DUNKIN, J.

No. 586.

The County of Drummond vs. *The South Eastern Railway Company;* and *The South Eastern Railway Company*, opposants; and *The County of Drummond*, contesting.

HELD:—That the railway of an incorporated company cannot be seized in execution of a judgment, or sold at Sheriff's sale.

DUNKIN, J. The County of Drummond, holding fifty $1,000 mortgage bonds of the Richelieu, Drummond and Arthabaska Counties Railway Company, since merged (under the Act, Que. 36 Vic., c. 51) in the South Eastern Railway Company, has recovered judgment against this latter Company for $14,490, made up mainly of unpaid interest thereon; and under a writ *de terris* has taken in execution part of said railway, as having originally appertained to the former Company.

The Company, defendant, meets the seizure by an opposition *afin d'annuller* in two parts, the first resting on grounds that rather savor of form; the second, boldly raising the question of the liability of any railway, or part of a railway, held by an incorporated company, to seizure at all. Under the former head the grounds assigned are:—

1. That the immoveable seized, traversing as it does the three several districts of Richelieu, Arthabaska and St. Hyacinthe, cannot be seized (as here it purports to be) by the sheriff of the District of Arthabaska.

2. That the sheriff made no demand on the Company, defendant, either of money or for specification of its real property, and did not discuss its moveables, "of which there were a certain quantity at the town of Sorel in said District of Richelieu."

3. That both in his *procès-verbal* and in his advertisement he fails to mention the concessions, ranges or localities wherein the immoveable seized is situate, or its boundaries, or the lands conterminous with it, or its extent, situation or location, or its metes and bounds, and also fails to give any detail of the rolling stock said to be seized with it.

4. That in his *procès-verbal* he fails to mention that a duplicate thereof has been delivered to the Company, defendant. Under the second head the reasons, briefly stated, are:—

1. That the railway of an incorporated railway company is in the nature of a public trust, inseparable from its corporate franchise, incapable of becoming an ordinary private property, and not seizable under legal process.

2. That, even if seizable at all, it must at any rate be dealt with in its entirety; whereas here, the seizure is of a part only of the Company's railway, and leaves unseized a large remainder in the districts of St. Hyacinthe and Bedford, each part being of comparatively small value without the other.

The County, plaintiff, contests this opposition by a general traverse in fact and

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law, and by an averment "that the debt, for to satisfy which the property taken in execution in this cause was seized, is a debt for which said property was specifically by law and statute of the Province made liable" "by first hypothec, and so declared by the judgment in this cause; and that by virtue of the premises, and of the facts of this case, and by law, plaintiffs had a right to seize and take in execution the said property as they have done."

The material facts, as they thus come before the Court, are these:—

The bonds in question were issued by the Richelieu, Drummond and Arthabaska Counties Railway Company, in terms of their act of incorporation (Que. 32 Vic., c. 56), which, by section 17, provided that "such bonds shall be and be considered to be privileged claims upon the property of the said Company, and shall bear hypothec upon the said railway without registration, anything in Article 2084 of the Civil Code to the contrary notwithstanding," and "shall and may be in the form contained in the Schedule B annexed to this Act, or in any other form similar thereto;" form B running, that the Company "do hereby mortgage and hypothecate the real estate and appurtenances hereinafter described, that is to say: The whole of the railroad from —— unto ——, including all the lands at the termini of the said road, and all lands of the Company within these limits, and all buildings thereon erected, and all and every the appurtenances thereto belonging."

By a later Act (Que. 36 Vic., c. 51) the Company in question, and the South Eastern Counties Junction Railway Company, incorporated under Act of the late Province of Canada, (29-30 Vic., c. 100), were amalgamated as the South Eastern Railway Company; section 2 providing that "all existing bondholders having mortgage on any real estate of either Company shall continue to have unimpaired, and be maintained in, their several rights and privileges, as though this Act had never been passed;" and sections 6, 7 and 8 providing that "the portion of the said united railway lying to the north of the Grand Trunk Railway shall be called the Northern section, and the portion thereof lying to the south of the Grand Trunk Railway shall be called the Southern section thereof;"—that bonds might be issued, hypothecating either section or both, and that with that view, and for other like purposes, separate accounts were to be kept for the two sections respectively.

The judgment, in terms of a special prayer to that effect by the County, plaintiff, declares "the railroad and property" "in and by the said debentures" "described as follows, to wit, 'The whole of the railroad from Sorel unto the Grand Trunk Railway at Acton Vale and from Drummondville unto L'Avenir, including all the lands at the termini of the said road, and all lands of the Company within these limits, and all buildings thereon erected, and all and every the rolling stock and other appurtenances thereto belonging,' to be affected by first privilege and hypothec to and in favor of the aforesaid debentures and interest and unpaid coupons and interest."

Under this, the County, plaintiff, sued out a writ *de bonis*; the return to which, by a bailiff of this district, after stating his search, concludes: "I could not find any goods, chattels or moveable effects whatever belonging to the said

defendants in the city of Montreal, I therefore make this my return of *nulla bona*."

On this, the writ *de terris*, the execution of which is here in question, issued to the Sheriff of the district of Arthabaska. His *procès-verbal* of seizure, after setting forth that he could not demand payment, "the said defendants having their principal place of business in the city and district of Montreal," proceeds: "I have seized and taken in execution as belonging to the said defendants the following immoveable, to wit: the immoveable heretofore known as 'The Richelieu, Drummond and Arthabaska Railroad,' and now known as and being 'The Northern Division of the South Eastern Railway,' consisting of the whole of the said railroad from the town of Sorel, in the district of Richelieu, to the Grand Trunk Railway at Acton Vale, in the district of St. Hyacinthe, and from Drummondville to L'Avenir, in the district of Arthabaska, including all the land at the termini of the said railroad now seized, and all the lands of the said Company, defendants, within these limits, and all the buildings thereon erected, and all and every the rolling stock and other appurtenances thereto belonging; said railroad now seized being about 54 miles long from Sorel to Acton Vale aforesaid, and about 66 feet wide; 24 miles, more or less, thereof running through Sorel, St. Robert, Yamaska, St. David, and the township of Upton, in the district of Richelieu; 23 miles, more or less, running through the townships of Grantham and Wickham, in the district of Arthabaska; and 7 miles, more or less, running through the township of Acton, in the district of St. Hyacinthe; and the L'Avenir branch of said railroad, to wit, the said portion from Drummondville to L'Avenir, being about 12 miles long and about 66 feet wide, and running through the Townships of Grantham, Wickham and Durham, in the district of Arthabaska aforesaid. Thus done and executed in quintuplicate, at the village of Drummondville, on the line of said railroad now seized, in the district of Arthabaska." To all of which he adds a later certificate of service of one quintuplicate at the Company's Montreal office, of a second at the Acton station, of a third at the Drummondville station, and of a fourth in the town of Acton. The description in the advertisement, of course, exactly follows that of the *procès-verbal*.

Such being the facts, the County, plaintiff, meets the Company's objections of the first class, in great part, by the argument, that whatever might be their force (and some of them must certainly be admitted to be by no means without force) as against seizure of an ordinary immoveable, they are at any rate insufficient as against seizure of an immoveable of the peculiar character here in question. So that, even with a view to this first head of the controversy, considerations relative to the second come necessarily under view. In fact, no conclusion can be arrived at without discussing these. And a decision as to these, if adverse to the seizure, will leave practically no further question open. The Court has, therefore, no hesitation in dealing with them first.

A Sheriff's sale of part of a railway was carried through in Lower Canada some 21 years ago. The then Montreal and Bytown Railway Company, incorporated in 1853, under the Act 16 Vict. c. 103, after contracting for construction of its whole road, had fallen into extreme embarrassment. The contractors

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had built, or nearly built, a small section of it, that between Carillon and Grenville; and were themselves notoriously insolvent. The whole undertaking was in a hopeless state, and a number of judgments were obtained against the Company. On one of these, (No. 2,071, Abbott *vs.* The Montreal and Bytown Railway Company,) being for $6,000 of ordinary debt, this nearly finished section was taken in execution. The sale was suspended by two oppositions *à fin d'annuller* put in by third parties, and several oppositions *à fin de distraire* by landholders, who alleged the roadway not to have passed into the ownership of the Company. These, however, were all withdrawn, and a *venditioni exponas* followed. On this, again, action was suspended under a Judge's order, by reason of an opposition *a fin d'annuller* put in by the Company. Later, this opposition was rejected by the Court, as coming too late; and the sale then took effect, and the moneys levied were distributed. This done, the parties interested obtained from the Legislature, in 1859, an Act (22 Vic., c. 96) incorporating the "Carillon and Grenville Railway Company." Its preamble sets forth that the parties named, "interested in the purchase at Sheriff's sale of that part of the Montreal and Bytown Railway lying between Carillon and Grenville, on the Ottawa river, or desiring to promote the enterprise of completing and working that part of the said railway, have by their petition prayed for an Act of incorporation, and it is desirable that the prayer of the said petition should be granted." By the 20th section provision was made for purchase by the new Company of the interest of the buyers at the Sheriff's sale; and the 21st and 22nd sections add:—

"21. Nothing in this Act shall be construed to grant to the party or parties interested in the Sheriff's sale any further or better title than they now have to the property sold by the same, and the rights of any party interested as a creditor of the Montreal and Bytown Railway Company, or as a shareholder in the said company, who may have commenced, or may within two years commence, proceedings to set aside the said sale, or to enforce any claim, right or title to or on the property so sold, are hereby specially reserved.

"22. If at any time within three years after the passing of this Act the enterprise of the Montreal and Bytown Railway Company, or any bondholder or creditor thereof, or any other enterprise to be hereafter incorporated by the Legislature, having in view the uniting of the cities of Montreal and Ottawa by railway communication, be resumed, then such Montreal and Bytown Railway, or such bondholder or creditor thereof, or such other enterprise, shall have power to take and acquire the whole of the railway, rolling stock, land, buildings and appurtenances of the said company incorporated under the present Act, on repayment to the said company of their outlay in, about and respecting, the acquisition of the same and in and about the completion and improvement thereof, together with legal interest thereon, from the time of such outlay, and also together with 12½ per centum upon such outlay, deduction being first made of the net profits, and in case of dispute as to the amount of such outlay, it shall be determined by an arbitration to be conducted as hereinbefore provided."

The question of the sufficiency of this sale was thus not adjudicated on, and,

clearly, neither the parties interested, nor yet the Legislature, looked upon it as having passed a valid title.

A little later, in 1861, occurred the case of Morrison vs. The Grand Trunk Railway Company. That Company was then in serious difficulties. Heavy judgments had been obtained against it; and in some quarters apprehension existed as to what might result from attempt at enforcing them. The plaintiff in that case, as a holder of preferential mortgage bonds, sued for overdue interest, asking, further, that he be declared entitled to a first hypothec; that the railway and its appurtenances be declared unseizable; and that a *séquestre* or receiver be named, to hold and work the railway, under order of the Court in respect of application of profits, accounting, and so forth. The judgment of this Court then taken, went for the plaintiff, so far only as his claim of debt was in question. As to declaration of preferential hypothec, it was held that he had not proved his ownership of preferential bonds, as contra-distinguished from the *coupons* upon which alone he sued. And the appointment of a *séquestre* or receiver, the Court also regarded as impossible, under our system of law. With reference to the liability of the road to seizure, it was simply held, "that under the issue joined in this cause, it is not competent in law for this Court to adjudge and declare that the whole or any part or portion of the said railway and property of the said defendants cannot legally be sold at Sheriff's sale." But the reported language of the learned Judge (Monk) who rendered that judgment, and who evidently did so after most careful and thorough study, shows that this conclusion resulted in no wise from doubt as to the proposition itself. He said, (5 L. C. J., pp. 318,9,) "There would probably be no great temerity on the part of any individual or of any tribunal in asserting that the disposal of the Grand Trunk Railway by Sheriff's sale, either in whole or part, must be held in the present state of our law a practical impossibility." "I do not consider it within the attributes of this Court to render a judgment condemning the defendants to pay to the plaintiff a certain sum of money, as in a personal action, and at the same time to declare that the judgment of the Court cannot by law be enforced in the usual way." "According to the mode of procedure adopted before this Court, an adjudication such as that prayed for here could only be rendered upon an opposition *afin d'annuller*, upon a petition *en nullité de décrêt*, or upon some proceeding equivalent or analogous to these, and not *a priori* as prayed for by the petitioner. This part of his conclusions is, therefore, overruled."

Passing, then, to the present case, where the point is at last fairly put in issue,— it is obvious to remark that the question is not that of the seizure of a railway in the abstract, but that of the seizure of one held by an incorporated company under authority and in terms of its legislative charter. No doubt, an individual or an unincorporated association might acquire, as ordinary property, a strip of land crossing property after property of other parties, might construct thereon a railway, and might work it much as a railway is commonly worked. But the question of what might be done by creditors of such railway owners is not the question here presented. The Company here has done all it has done,

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holds all it holds, is all it is, by virtue of legislation specially directed to that end. Its land, whether given to it, or bought by consent of parties, or taken by expropriation, has come to it only for railway use; indeed, under pressure always of the power to expropriate, conferred on it by statute, in exercise of the sovereign right of eminent domain inherent in the supreme authority of the land. That statute, indeed, (Que. 32 Vic., c. 51, s. 9, sub-s. 18) even goes the length of requiring the arbitrators in such case to deduct from what otherwise they would set as the value of the land taken, the increase of value to be given by the railway to the land left. Of course, land so taken can have passed only for the use for which it was taken. So, too, as regards lands given, the same act (s. 7, sub-s. 1) provides that "the same shall be held and used for the purpose of such grants or donations only." For lands bought, it purports to give power (s. 7, sub-s. 2) "to alienate, sell or dispose of the same;" but such power can obviously only cover the case of their being parted with in detail, or, in other words, of their not having come to form part of the railway. Public law, indeed, as it obtains in England, in most of the States, and presumably in our sister provinces, goes the length of holding, (1 Redfield, p. 250,) as to all acquisitions having reference to the right of eminent domain, that "no more of the title is divested from the former owner than is necessary for the public use,"—as to railways in particular, that for them no more presumably passes than "an easement,"—and even where statute provides for a taking of the fee, (p. 252,) that "upon the discontinuance of the public use, the land reverts to the former owner." Our rule, modified by the civil law, may not precisely say all this. But its principle is the same. However acquired, bit by bit, the railway is a statutory whole, held for ends and under servitudes constitutive of an imperative public trust,—of a trust from which nothing short of authority by or under statute can free it, or any really material part of it. The franchise of the company—using that term as covering the whole of that trust, the entire of what are sometimes called the various franchises of the company—subsists in order to the railway, the railway by virtue of the franchise. In idea, the two are not the same, but for all practical dealing with either of them, the two are inseparable.

In France,—where, no doubt, legislation has been more careful than with us to treat railways from the strictly public point of view,—it is the admitted doctrine of the text-writers and of the Courts, that all railways, even though granted, and no matter in what terms granted, to companies, fall within the purview of article 538 of the Code Napoleon, which regards "comme des dépendances du domaine public," not only "les chemins et routes à la charge de l'état," but also "toutes les portions du territoire Français qui ne tombent pas dans le domaine privé." As such, their control forms part of the *grande voirie*. And it is held, not merely that they are in their nature inalienable and "*insaisissables*,"—but even (with reference more particularly to certain nice questions of liability to taxation) that the proprietary rights of any companies holding them by grant are rather in the nature of moveable than of immoveable property. (1 Demolombe, Dist. des Biens, p. 326; 2 Marcadé, p. 389; 17 Dalloz Alph., vo. Domaine Public,

Nos. 23, 25 and 47; 44 Dalloz Alph., vo. Voirie, Nos. 179–188; Dalloz Per., 1851, 3rd part, p. 49, and 5th part, col. 78, No. 8; Dalloz, Table 1841–1856, vo. Chemin de Fer, Nos. 209, 210; Dalloz Per. 1861, 1st part, pp. 225–6.)

This last distinction is one that has no interest here. And indeed it is immaterial here to ask whether or not Article 400 of our Civil Code, the counterpart of Article 538 of the Code Napoleon, and very likely drafted—as beyond doubt that article was—with no specially meant reference to railways, does, strictly speaking, constitute our railways into what the English version of our Code renders as "dependencies of the Crown domain." What is material and clear is, that (inseparable as the railway and the franchise are and must be) the resultant whole is no mere "private property;" "ne tombe pas dans le domaine privé;" can be held only by the fictive person whom legislation has created to hold it; can pass to no other hand; cannot be seized in order to its being made so to pass. For a sheriff's sale of anything, there must be possibility of a competition of intending purchasers; and here there can be none. Suppose, even, all done that legal ingenuity can devise in the way of defining the servitudes (so to speak) which together may be said to constitute the railway as a special property, and of causing the sale to be made subject to them as defined, yet, at the least, the adjudication would have to be to a party wanting of capacity in an essential respect. For no form of judicial decree could vest in such party the corporate attribute of perpetual succession; and without that, all else would be the veriest mockery of the true franchise of the public railway. How guard even against adjudication to a man of straw? Speculators scheming for unfair advantage would be more likely so to work than not; and, be the first buyer or buyers never so sufficient, how guard against after-transfer, insolvency, death, or any other of the numberless risks of non-corporate ownership? Not to add that what is here in question is not even a sale of this peculiar character, but the sale, *de plano*, in common course of law, of the mere railway, as though it were a substantive immovable, capable of passing freely from owner to owner with or without charge or servitude, as parties please.

But it is earnestly contended that however conclusive this reasoning may be for the case of the railway of a company not specially authorized to mortgage its road, it fails to cover the case of a railway which by statute may be, and in fact has been, mortgaged. The Legislature, it is urged, must have regarded such railway as a property that could change owners; must have contemplated enforcement of the rights—at least, of the mortgage creditor—by its sale, if requisite, in course of law.

There is more confusion of thought here than a little.

For, first, what is it that the mortgage (so styling it, as this argument naturally does) in this case assumes to cover? Section 17 of the Company's charter declares these bonds privileged claims upon its "property," and gives them hypothec upon its "railway." Form B fastens them upon the "real estate and appurtenances" described, being "the railway from ——— unto ———," and including all "lands" at the termini and within the limits, and all "buildings thereon," and all "appurtenances thereto belonging." The bonds themselves, and after them this seizure, insert "all rolling stock" as an item before

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other appurtenances. Whatever one may fancy to have been the intention of the Legislature as to recourse by holders of such bonds, for their enforcement, against what the bonds do cover, there can have been none as to such recourse against what they do not. The franchise of the Company is in this latter case. The Legislature cannot be thought to have meant to provide for its destruction, when it has used no word ever so faintly shadowing forth such meaning.

And again, as to the word mortgage, on the equivocal use of which the argument may almost be said to rest. What may or may not have been the precise thought of whoever was first the author of the provision for the mortgaging or hypothecating of a railway in this Province, it is hardly worth while to ask. There may have been confusion of idea, as there is of phrase; a something of reference to the underlying notion of the mortgage of English law, along with—possibly, even, in preference to—that of the hypothec proper, which alone is known to our system of law, But however this may or may not have been, and whatever of variance from our idea of the hypothec any attempt to give effect to English mortgage notions might or might not involve, we have here to deal merely with the wording of a Quebec statute, and with its application to the machinery of our Quebec Courts of law. In section 17 we read "privileged claims" and "hypothec;" in form B, "do hereby mortgage and hypothecate," rendered in French as "engage, mortgage and hypothèque." The one word that has not for us a clear meaning of its own, is the word "mortgage." Was it used to convey the notion of a *rente à réméré*, the nearest approach we have to a fair equivalent for the English mortgage? Had it been, it could not have been put with the word hypothec, as it is. The two things are no match. What is sold *à réméré* is not hypothecated; and what is hypothecated is not sold *à réméré*. The French form could not have read "vend à réméré et hypothèque." Or, can the word be read as importing into our law the intricacies of the English law of mortgage, and into our practice that working of English equity without which the mortgage proper cannot be? And even if it could be, again we should be met by the fact that in such sense, too, the word could not any better run with the word hypothec. For again the two things differ too widely for their co-existence to be possible. The transaction thought of, whatever it may be, cannot at once be both. In a word, for all ends of judicial interpretation, we have no choice but to hold that the Legislature meant the word as a mere equivalent for the word hypothec, and must confine ourselves, in our application of it, to that meaning.

It is, of course, true that, even taking this sense, the terms privileged claim and hypothec can be here applied only as covering property capable of changing owners; and, further, that the fullest and largest application of the terms can attach only to property that may readily change owners, and with reference to the contingency of such change, as more or less contemplated. But the measure of the facility or difficulty of such change is not here the material thing. Nor is it this fullest and largest application of the terms that we have here to deal with. On the one hand, no one pretends that a public railway can be sold by private sale. And on the other, though it be not saleable under ord-

nary execution, no one doubts but that it may be made to pass (franchise and all) into other hands, either by direct action of, or under sufficient authorization from, the legislative power. There is thus, in any case, a sense, and a sufficient sense, which we can give to these terms—that, namely, of conveying to the Company a legislative delegation of the power to create a special claim upon their property, such as no after change of ownership by either of these processes shall avail either to cut off or to postpone in anywise, and this with pledge of the public faith that no prejudice to it ever shall be wrought by means of any such change.

Nor is it to be forgotten in this connection, that the holder of a privileged claim or hypothec has, by our law, no peculiar right or facility accorded him, for the mere causing of the property affected in his favor to change hands. He can follow it in other hands; and has certain advantages in respect of the realizing of his claim from out of its proceeds. But, whenever he may merely want to get it sold, he must do as any one else would. There can, therefore, be no inference, from the fact of our Legislature authorizing creation of such claims, that it further meant—always without saying so—to create thereby a special right of sale in order to enforce them.

Indeed, fairly viewing the whole matter, it is not too much to say that the right here contended for by the County, plaintiff, is one which (if granted) would do infinitely more harm than good to our railway mortgage bondholders. Imagine such bonds held under peril of procedure at any moment, on default of prompt payment of all *coupons*, for an enforced sale, at suit of any bondholder,—not of franchise and road together, to the best possible advantage, and with all possible precaution in behalf of all interests,—but of the road alone, as an immoveable that any Sheriff can sell and deed over as a thing of course, irrespectively of the franchise. Bonds, so held, of any railway ever so little liable to get into financial trouble could not, for any legitimate purpose of investment, be worth the holding. And yet, in what view, save that of the inherent liability—so to speak—of every railway to get into financial trouble, has the railway mortgage bond its very *raison d'être?*

Nor is even this all. For, as the Company, opposant, urges, it is not here their whole road that is attacked, but a mere part of it. They have and can have the franchise but of one company; and though, for certain specified ends, their road has to be dealt with as subsisting in two sections, they yet have and can have but one road. A section may be—has been—hypothecated separately. But it is legally not the less inseparable as to ownership from the other section of their one road,—created indefeasibly by their Amalgamation Act, and for the keeping of which together as an unbroken road the legislative faith stands thereby pledged alike to the Company, to their mortgage bondholders, whether secured on either section or on both, and indeed, to everybody else concerned.

It may be objected,—in effect it was so at the argument—that under the view here taken the active means of recourse of mortgage bondholders are less than they may probably have been led to fancy them, perhaps than they had some ground for thinking them, perhaps even than they ought to be. But with

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this a Court of law has no concern. Possibly enough, the law might have been put into better form, or yet may be. A Court can deal with it only as it is. At present anything in the nature of what was done in the Carillon and Grenville Railway matter can be done here, (even though by consent of parties,) only subject to revision, as each case presents itself, by the legislative power. It may well be a far less evil to leave things even in that state, than to subject railways, to such end, to any judicial process not thoroughly hedged round with all needed safeguards,—and this, not merely with a view to protection of the various overt interests more immediately involved, but also to the requisite continuance (after sale, as before) of a corporate body duly organized to hold, and bound to work, each as a public institution. And whenever attempt so to legislate shall here be made, it is obvious to remark, that the fact of our railway system falling partly under Dominion and partly under Provincial control, is one suggestive of only so much the more of caution in this behalf.

It remains only to add, that, irrespectively of its objections of form, the opposition of the Company, defendant, is accordingly maintained with costs.

E. Carter, Q. C., for opposants.

N. W. Trenholme, for plaintiffs contesting.

(J. K.)

COUR SUPERIEURE, 1877.

MONTREAL, 19 DECEMBRE, 1877.

Coram PAPINEAU, J.

No 1424.

Hotte vs. *Currie*, et *McDonald* et al., Tiers-saisis; et *Gordon* et al., Intervenants; et *Hotte*, Contestant.

JUGE:—1. Que dans le cas où l'affidavit pour *capias*, constate que le défendeur recèle ou est sur le point de recéler ses biens avec l'intention de frauder le demandeur, ce dernier n'est pas tenu en vertu de l'art. 798 du Code de Procédure, de donner le nom de la personne qui l'a informé de ces faits, non plus que les raisons spéciales qui lui font croire à la vérité des faits par lui énoncés dans son affidavit.

2. Que l'affidavit sur lequel a émané le *capias*, étant disparu du dossier, et le demandeur n'ayant pas pris les moyens de le remplacer, tel *capias* ne sera cependant pas maintenu, quoique la preuve faite sur la contestation d'icelui, soit suffisante pour faire rejeter cette contestation comme mal fondée.

3. Que les allégations d'irrégularités dans l'affidavit pour saisie-arrêt avant jugement, étant vagues, générales et n'en spécifiant aucune en particulier, la Cour ne peut déclarer irrégulier, un tel affidavit.

4. Que par l'acte du 26 janvier 1875, produit en cette cause par les intervenants, ces derniers n'ont pas eu l'intention de devenir immédiatement propriétaires des objets y mentionnés, mais seulement de les prendre comme sûreté de leur créance ou comme gage jusqu'au 1er août suivant, et qu'ils n'en étaient pas en possession actuelle au temps de la saisie.

PER CURIAM:—Le 31 août 1875, action avec *capias* et saisie-arrêt avant jugement pour $298, pour marchandises et effets de commerce, vendus et livrés par le demandeur au défendeur, à Ste. Rose, dans les mois de mai, juin, juillet et août de la même année.

D'après la déclaration, la cause de la demande du *capias*, est le recel frauduleux que le défendeur a fait de ses biens.

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Ce dernier a donné caution entre les mains du Shérif et a produit trois défenses.

Par la première, il conteste le *capias* et la saisie-arrêt, en même temps que la demande pécuniaire et nie toutes les allégations de la déclaration ainsi que la vérité des faits énoncés dans l'affidavit. Et il nie spécialement avoir recélé et avoir été sur le point de receler ses biens avec intention frauduleuse.

Par sa deuxième exception, le défendeur soutient que les allégations de recel frauduleux, ne sont que dans la déclaration et non dans l'affidavit et qu'il n'y a pas d'affidavit au soutien du *capias*.

Le troisième plaidoyer est une défense au fond en fait.

Le défendeur a ensuite présenté une requête pour faire casser et annuller le *capias*, et une autre, à l'encontre de la saisie-arrêt.

Les raisons invoquées dans ces requêtes sont: insuffisance et fausseté des allégations de l'affidavit et absence totale d'affidavit à l'appui du capias; c'est-à-dire que le *capias* et la saisie-arrêt n'auraient été obtenus que sur l'affidavit produit pour l'émanation de la saisie-arrêt.

Quant aux prétendues irrégularités de l'affidavit, aucune n'est signalée spécialement, si ce n'est que le demandeur ne nomme pas la personne qui l'a informé des faits énoncés dans son affidavit et ne fait pas connaître les raisons qui lui font croire à la vérité de ces faits; mais comme dans le cas actuel, le défendeur est accusé de recel frauduleux, au préjudice du demandeur, semblables mentions n'étaient pas nécessaires.

Il se présente cependant une autre difficulté: c'est la disparition de l'affidavit sur lequel le *capias* a émané. Le *fiat* demandant l'émanation de ce *capias*, ainsi que le bref lui-même et le certificat du protonotaire au dos de ce bref, constatent la production du dit affidavit; mais d'un autre côté, il a disparu du dossier et sans que cet affidavit soit devant moi, et le demandeur n'ayant pas pris les moyens de le remplacer, il m'est impossible de déclarer le *capias* tenant; bien que d'un autre côté, je doive renvoyer, comme mal fondée, la contestation du défendeur sur ce même *capias*.

Quant à l'affidavit pour saisie-arrêt, il est suffisant; et ce n'est pas sur une allégation vague et générale d'irregularités, sans en indiquer ni déterminer aucune en particulier, que la Cour déclarera cet affidavit irrégulier.

La créance du demandeur est prouvée, même en ne prenant que les réponses du défendeur sur *faits et articles* et le livret qu'il a produit. Ses réponses contredisent ses défenses. Je considère que les allégations de recel frauduleux sont prouvées aussi et la saisie-arrêt avant jugement doit être maintenue.

On a voulu discréditer le témoin Carrières; mais outre que son témoignage est corroboré sur presque tous les points principaux, ceux des témoins qui ont essayé d'établir des raisons de reproche contre lui, ont eux-mêmes démontré qu'il ne faut pas toujours les croire; ils ont juré de plusieurs faits qu'ils ont ensuite avoué n'être pas à leur connaissance personnelle, et ils sont tombés dans des contradictions propres à nous mettre sur nos gardes, quant au poids de leur témoignage.

La contestation de la saisie-arrêt et celle du *capias*, sont donc renvoyées avec

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dépens, et l'action du demandeur ainsi que la saisie-arrêt, maintenues pour la somme de $298 et les frais.

Une intervention a été produite par les nommés Gordon par laquelle ils allèguent que lors de la saisie en cette cause, ils étaient propriétaires et en possession de quatre chevaux et deux harnais doubles, saisis comme appartenant au défendeur.

Ils fondent leur droit de propriété sur un acte du 26 janvier 1875 et prétendent que cet acte comporte une vente, en vertu de laquelle ils ont eu, jusqu'au moment de la saisie, non seulement la propriété mais aussi la possession des chevaux et harnais sus-mentionnés.

Cet acte établit que le défendeur devait aux intervenants le 26 janvier 1875, la somme de $497.58 et qu'il leur avait cédé ces objets, pour assurer le paiement de cette dette, avec convention expresse que si elle n'était pas payée le 1er août 1875, Clark Gordon, qui faisait la transaction au nom des intervenants, rétiendrait pour eux les dits objets, comme leur appartenant à titre de propriétaires en vertu du dit acte.

Dans la période entre la date de l'acte et le 1er août 1875, les intervenants pouvaient jouir des chevaux et harnais en question, mais sans néanmoins encourir aucun risque.

Voilà dans l'acte même deux raisons qui font voir que les intervenants n'ont pas entendu devenir immédiatement propriétaires des chevaux et harnais ci-dessus mentionnés. Ils ne les ont pris que comme sûreté de leur créance et sans encourir aucun risque: c'était là prendre un gage et non acheter.

Si la dette n'était pas payée dans le délai fixé, il y a convention que les intervenants les garderaient comme propriétaires. Les ont-ils gardés après le 1er août, tel que stipulé au dit acte? Pas du tout. Les intervenants n'ont jamais eu la possession du gage *de facto*, ni avant ni après le 1er août, et les objets sont restés depuis le mois d'août jusqu'à la saisie, entre les mains du défendeur et de ses employés. Il a fait travailler les chevaux et a reçu le louage de leur ouvrage, à la connaissance de témoins qui en ont attesté le fait.

Les témoins des intervenants ne se fondent que sur les dires de ces derniers pour établir la propriété des chevaux. En effet les commis et contre-maîtres du défendeur rapportent que les chevaux en question, ont été amenés à l'ouvrage et mis au nom des intervenants par ces derniers, et qu'ils ont marqué le temps qu'on les a employés; mais pas un d'eux n'a été jusqu'à dire que le prix de l'ouvrage fait par ces chevaux a été payé aux intervenants. Ils n'auraient pas manqué de le dire si tel eût été le cas.

Le demandeur a prouvé les principales allégations de sa contestation de l'intervention, et les intervenants n'ont pas prouvé celles de leur intervention, qui est en conséquence déboutée avec dépens.

Ouimet & Associés, pour le demandeur.

Trenholme & Maclaren, pour le défendeur.

Stephens, pour les intervenants.

(J. G. D.)

COURT OF REVIEW, 1877.

MONTREAL, 30TH APRIL, 1877.

Coram JOHNSON, J., DORION, J., PAPINEAU, J.

No. 111.

In the matter of *Belivcau*, Insolvent, and *Duchesneau*, Party Collocated, and *Plassis*, Contestant.

HELD :—That a mortgage given by a minor is not radically null, but is merely subject to be annulled in case of *lesion*.

JOHNSON, J. The insolvent in this case had given two obligations when he was a minor, one to Duchesneau and the other to Planté. Both these creditors were collocated; but Plassis, a subsequent creditor, contested both, and his contestation was maintained, and both claims were dismissed by the same judgment, and both the claimants inscribed for review. We unanimously reverse this judgment. It proceeded on the ground that the obligations of the minor were absolutely null in themselves; but we hold, on the contrary, that they are null, not on account of minority, but on account of lesion (*non tam minor quam lœsus*); and, therefore, this must be invoked by the party injured. Art. 987 C. C. settles this. It is very true that there are certain nullities in the contracts of minors which may be invoked without lesion; but still they must be invoked by the minor or on his behalf (Art. 1009 C. C.). In the case of Venner vs. Lortie, decided in Quebec a year ago in Review, and in which our present colleague, Mr. Justice Dorion, sat with Stuart and Casault, J J., this subject was fully treated. That case was against a surety, and had been dismissed on the ground of the nullity of the principal obligation for which they became security; but the principle applied was identical with that which must govern here. We, therefore, reverse the judgment, and dismiss the contestation of Plassis, with costs in the Court below, and also with costs here in favor of each of the claimants—as they have inscribed separately.

The following was the written judgment of the Court :—

"La Cour * * * considérant que l'hypothèque consentie par le failli pendant sa minorité, en faveur du créancier colloqué l'a été pour bonne et valable considération, et que les deniers obtenus par le dit failli au moyen de la dite hypothèque ont été employés pour le bénéfice et avantage du dit failli;

Considérant que la dite hypothèque n'était pas nulle radicalement, mais seulement annulable à la demande du mineur devenu majeur, et que ce dernier reconnait l'avoir approuvée et ratifiée après sa majorité et avant sa faillite;

Considérant que lorsque le contestant a pris hypothèque sur les biens du dit failli il devait connaitre l'hypothèque du créancier colloqué et ne peut se plaindre d'avoir été induit en erreur.

Considérant qu'il y a erreur * * * infirme, etc., etc."

Judgment of S. C. reversed.

Mathieu & Co., for party collocated.
A. Germain, for contestants.

(S.B.)

SUPERIOR COURT, 1878.

MONTREAL, 25TH JANUARY, 1878.

Coram DORION, J.

No. 1736.

The Globe Mutual Life Insurance Company vs. *The Sun Mutual Life Insurance Company.*

NON-RESIDENT—SECURITY FOR COSTS.

HELD:—That plaintiffs, having an office and place of business in Montreal, and doing business there, could not be considered absentees, and therefore were not bound to give security for costs.

The plaintiffs described themselves as "The Globe Mutual Life Insurance Company, a body corporate and politic, duly incorporated according to law, and having its head office and principal place of business in New York, in the State of New York, one of the United States of America, and having an office and doing business in the City and District of Montreal."

The defendants made a motion for security for costs on the part of the plaintiffs as non-residents.

The judgment was as follows:

"The Court, &c., considering that the plaintiffs have alleged in their writ "and declaration that they have an office and place of business in the City and "District of Montreal, in this Province, where they carry on business, and that "they cannot be considered as absentees for the purposes of the said motion, "doth dismiss said motion with costs."

Motion dismissed.

Greenshields, for plaintiffs.
S. Bethune, Q.C., for defendants.
(S.B.)

SUPERIOR COURT, 1878.

MONTREAL, 15TH MARCH, 1878.

Coram TORRANCE, J.

No. 1736.

THE SAME PARTIES.

NON-RESIDENT—POWER OF ATTORNEY.

HELD:—That the plaintiffs, being a foreign corporation, are non-resident, notwithstanding that they are licensed to transact the business of Life Insurance in the Dominion of Canada, and, therefore, as non-resident they are bound to produce a power of attorney, though they transact business and have an agency in Montreal.

PER CURIAM. This case is before the Court on the merits of an *exception dilatoire*, praying for a stay of proceedings until the plaintiffs shall have produced a power of attorney under C. C. P. 120, ss. 7, as non-residents. It appears from the evidence that the plaintiffs are a foreign corporation, and their policies of insurance are executed and issued in the City of New York.

Globe Mutual Life Ins. Co. vs. Sun Mutual Life Ins. Co.

It has already been decided by Mr. Justice DORION that the plaintiffs, doing business in Montreal, and having made a deposit of $100,000 with the Minister of Finance at Ottawa, under 31 Vic. c. 48 (A.D. 1868) do not come under the rule of C. C. 29 (see p. 38). That decision is contrary to one rendered by the Court as now constituted in the N. D. M. F. Insurance Company v. Macfarlane et al., 21 L. C. Jur. 224. It is therefore my duty to look to the reason of the rule and the exceptions to it. It has always existed and among the majority of nations. By the French law foreigners were obliged to give security for costs when they instituted an action. L'Ancien Denisart *vo.* Cautio judicatum solvi, says: "Le motif pour lequel on exige ces cautions, est, à l'égard des étrangers, qu'ils "n'ont ordinairement point de biens en France, et qu'ils pourraient par consé- "quent aisément se soustraire aux condamnations que leurs demandes peuvent "occasionner."

The chief exception was where the foreigner had immoveable property in France; vide Pothier, Personnes, Tit. II. p. 577. The rule of our Civil Code 29 requires security from non-residents in Lower Canada, and that rule is taken from the Provincial Statute 41 Geo. III., c. 7, s. 2. The reason of the rule is the same in the modern French law.

2 Carré & Chauveau, p. 155-172; C. C. Nap. 16; C. C. P. Nap. 166, 167. We read in 1 Demolombe, p. 308, n. 253: "Toutefois il existe un danger dans les relations des Français avec les étrangers en France; c'est que ceux-ci peuvent disparaître et retourner dans leur pays, en laissant ainsi le Français dans l'impossibilité de recouvrer contre eux ce qu'ils lui doivent. De là, deux garanties en faveur du Français: 1o. la faculté de demander la caution appelée judicatum solvi; 2o. la faculté d'exercer la contrainte par corps.

254. D'abord, il pourrait être à craindre qu'un étranger ne suscitât un procès mal fondé à un Français, et ne l'entraînât dans des frais que la disparition de l'étranger ne lui permettrait pas de recouvrer contre lui. L'article 16 a pour but de protéger le Français contre ce danger: "En toutes matières, autres que "celles de commerce, l'étranger qui sera demandeur sera tenu de donner caution "pour le paiement des frais et dommages-intérêts résultant du procès, à moins "qu'il ne possède en France des immeubles suffisants pour assurer ce paiement." The author goes on to explain the exceptions, namely: 1o. Consignation of the amount for which security has been ordered; 2o. Justification that the immoveables of the foreigner in France are a sufficient security. There are two other exceptions not bearing upon this case. If we now turn to the English law, Fisher's Digest vo. COSTS, pp. 2028-2030, gives a number of English cases from which I refer to *The Kilkenny and Great Southern and Western Railway Company vs. Feilden et al.*, 6 Exchequer Cases 81: (Welsby, Hurlstone & Gordon,) in which it was held that "a foreign railway company is bound to "give security for costs, notwithstanding it has personal property in England, "and some of its shareholders reside in England, who are responsible to the "extent of their unpaid capital."

The remarks of the Judges are interesting, and they indicate that personal property of the non-resident in the locality of a suit is not such a security as should satisfy a defendant. POLLOCK, C. B., said: "We are all of opinion that

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"the rule ought to be absolute. It is desirable, as far as possible, that the rules "of practice should be simple and uniform, although, from the various ques- "tions which arise out of the fluctuating transactions of life and the continual "changes in the law by Parliament, it becomes difficult to preserve the simpli- "city and certainty desirable. On the present occasion, however, there is one "clear rule, namely, that persons out of the jurisdiction, whether individuals "or a corporation, suing in the Courts here, must give security for costs, unless "they have real property in this country, or at least property of a permanent "nature, for personal property is insufficient. Then, is this Company a foreign "corporation? I think it is."

PARKE, B.: "I am of the same opinion. * * * * * The cases establish that, in "order to prevent the operation of the general rule, it is not enough to show "that, *at* the time of the application, the plaintiff has *personal* property in this "country sufficient to satisfy the costs, because such property is of a fluctuating "nature, and might not be available when judgment was obtained. That is the "ground upon which my brother Patteson decided the case of the Edinburgh "Railway Co. v. Dawson, when he held that the fact of a foreign com- "pany having money and exchequer bills in England was no answer to an appli- "cation like the present, although 1 & 2 Vic. cap. 110 gives a remedy against "that description of property. The only exceptions to the rule are, where one "of several plaintiffs resides in this country, or where there is real estate here."

ALDERSON, B.: "I am of the same opinion. Matters like these, which, in "truth, arise out of the discretion of the Court, must be acted on and dealt "with in the exercise of a reasonable discretion. A plaintiff is compelled to "give security for costs because he cannot be fined by the direct process of the "Court."

PLATT, B.: "This discussion has satisfied me that I was wrong in refusing "to make the order in Chambers. The Lord Chief Baron has put the matter "on the true ground, namely, that the rule of practice should be clear and "uniform. Here a foreign company is suing, and if it could be made plain that, "in the event of judgment against them, the defendants would get their costs, "there would be no pretence for this application."

The foreign plaintiffs here argue that, having a business agency in Montreal and having made the usual deposit of money with the Government at Ottawa, they are not bound to give security for costs. I remark on this that they are non-resident, notwithstanding that they have an agency in Montreal, and they have nothing but personal property, if any, more or less in Montreal. In fact it is not proved that they have personal property in Montreal. Further, as to the deposit at Ottawa, it is a security for the policy-holders, and this is not an action by a policy-holder, or against one; but an action for libel, and even if the deposit were a security available to all, it is not a security in Lower Canada. The plaintiffs in my opinion are non-resident in the terms of the Code 29, and it is therefore my duty to maintain the *exception dilatoire* made by the defendants.

Greenshields, for plaintiffs.

S. Bethune, Q. C., for defendants.

Exception maintained.

(S. B.)

SUPERIOR COURT, 1878.

MONTREAL, 28TH FEBRUARY, 1878.

Coram MACKAY, J.

No. 1128.

Booth vs. *Bastien* et al., and *Bastien* et al., Opposants.

HELD:—That the issue and service of a writ of appeal cannot stay execution unless security be also given, and an opposition based on the mere issue and service of such writ, without security, will be rejected on motion.

PER CURIAM:—This is a motion to reject an opposition fyled by the defendant to the execution issued on plaintiff's judgment. The opposition is based on the fact that a writ of appeal has been issued and served. No security, however, has as yet been put in under this writ. The plaintiff now moves to reject the opposition, on the ground that the mere issue and service of a writ of appeal, without actual putting in security, cannot operate a stay of execution. It would be dreadful to hold otherwise, and I, therefore, grant the motion with costs.

Motion granted.

Bethune & Bethune, for plaintiff.
Trudel & Co., for opposants.
(S.B.)

COURT OF REVIEW, 1877.

MONTREAL, 31ST MARCH, 1877.

Coram MACKAY, J., TORRANCE, J., DORION, J.

No. 1886.

Luke vs. *Wickliffe*.

HELD:—That where a lease has been continued by tacit reconduction, it can only be terminated by either party giving to the other party three months' notice.

MACKAY, J.:—This was an appeal from a judgment rendered by the Superior Court for the District of Bedford on the 17th of June, 1876, maintaining the pretensions of the plaintiff. The defendant was a tenant of plaintiff, under a lease that had been continued by tacit reconduction, and the plaintiff notified him on the 1st of April, 1876, that the lease would expire on the 1st of May following, and that he would require possession of the leased premises at that time. The defendant pleaded, that as he had not had notice before the 1st of February, 1876, the lease was continued for another year, and was, therefore, still in force when plaintiff brought his action. We are with the defendant on this point, and must, therefore, reverse the judgment complained of, and it is reversed accordingly.

Judgment of S. C. reversed.

Abbott & Co., for plaintiff.
Jas. O'Halloran, Q.C., for defendant.
(S.B.)

SUPERIOR COURT, 1878.

MONTREAL, 11TH MARCH, 1878.

Coram TORRANCE, J.

No. 1213.

Bourgoin et al. vs. *La Compagnie du Chemin de Fer de Montréal, Ottawa et Occidental, et Hon. A. R. Angers*, Pro Regina, Intervenant.

INSCRIPTION FOR ENQUETE AND HEARING—CONFLICT OF OPTIONS—C. C. P. 243.

HELD:—That a party inscribing for *enquête* and hearing at the same time will be upheld in his option under C. C. P. 243 although the other side has the same day inscribed for *enquête* in the ordinary way.

On the 12th February last, the plaintiffs inscribed for *enquête* and hearing at the same time for the first March. They served a copy of the inscription on the defendants, unaccompanied by any notice, and the inscription was rejected by the Court on the 28th February on the motion of the defendants. The defendants on the same 28th February fyled an inscription for *enquête*, and gave notice of it the same day between 12 noon and 1 p.m.

The plaintiffs the same day renewed their inscription on the role for *enquête* and hearing, and gave notice of it the same day between 4 and 5 p. m. The plaintiffs then made a motion in Court to discharge the inscription by the defendant, on the ground that the plaintiffs had made option under C. C. P. 243.

PER CURIAM:—Perhaps the inscription of date the 12th February, which was struck for irregularities, was a sufficient notice by the plaintiff of the option which he had a right to make under C. C. P. 243. But I do not think it necessary to decide this point. Both plaintiffs and defendants have inscribed the same day in different divisions for the first April. There is nothing to shew by whom the inscription was first made—by plaintiffs or by defendants. There is, therefore, nothing to show that the inscription by the plaintiffs is irregular, or that the option which they had made should not have effect. In law there are no fractions of days, and the Code does not say that whichever party first makes option shall choose his court, but that the party making option of *enquête* and merits at the same time has a right to do so. I therefore grant the motion of plaintiffs to reject the inscription for ordinary *enquête* made by the defendants, and thereby decide that the option of plaintiffs should stand.

J. Doutre, Q. C., for plaintiffs.
E. Lef. DeBellefeuille, for defendants.
(J.K.)

Motion granted.

COUR DU BANC DE LA REINE, 1877.

MONTREAL, 21 DECEMBRE, 1877.

Coram SIR A. A. DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

No. 63.

DAME CELINA VOISARD,

(*Défenderesse en Cour Inférieure,*)

APPELANTE;

ET

LOUIS SAUNDERS,

(*Demandeur en Cour Inférieure,*)

INTIMÉ.

JUGE :—Que les actions en résiliation de baux doivent être portées devant la Cour Supérieure ou devant la Cour de Circuit, selon que le montant demandé par l'action, pour loyers, ou pour usage et occupation, ou pour dommages, est de la juridiction de la Cour Supérieure ou de la Cour de Circuit, et non d'après le loyer annuel ou la valeur annuelle de l'usage et occupation.

TESSIER, J. *dissentiens* :—L'Intimé Saunders a porté à la *Cour Supérieure* une action en résiliation d'un bail annuel de $228, en y joignant une demande de $60, de loyer échu. Cette poursuite a été prise comme une procédure *sommaire* en vertu de l'acte des *locateurs et locataires*, article 887, du Code de Procédure *Civile*.

L'appelant Voisard a produit une exception déclinant la juridiction de la Cour Supérieure, prétendant que cette action eût dû être portée à la Cour de Circuit exclusivement.

La Cour Supérieure a débouté cette exception, c'est de cela qu'il y a appel. L'article 887 dit : " Les actions en résiliation de bail...&c., sont intentées soit " devant la Cour Supérieure, ou devant la Cour de Circuit suivant la valeur ou " le montant du loyer *réclamé*," le texte anglais dit "*rent alleged.*"

L'article 1105 donne juridiction à la Cour de Circuit dans les cas " où le " loyer, *la valeur annuelle*, ou le montant des dommages réclamés n'excède pas " $200."

La juridiction de la Cour de Circuit a été plus tard réduite à $100, à Montréal et à Québec.

Ces textes de notre Code ne sont pas très clairs ni précis, il semble que si le Législateur eut voulu ôter la juridiction à la Cour Supérieure, lorsque le loyer annuel excède $100 ou $200, il était facile de l'exprimer clairement. En matière de juridiction spéciale ou exceptionnelle, il faut une disposition positive et absolue. Cette disposition ne s'y trouve pas, il faut donc recourir aux règles générales de la juridiction.

L'appelante prétend que l'on ne doit pas avoir égard à la valeur annuelle du bail de $228 dont on demande la résiliation, mais que c'est le montant du loyer réclamé qui n'est que de $60, qui fixe la juridiction, et ceux qui veulent refuser à la Cour Supérieure juridiction dans ce cas-ci admettent que s'il n'y eût pas eu de loyer réclamé la simple demande de résiliation eût été bien portée devant la Cour Supérieure, mais parce qu'on a demandé $60 de plus, la Cour

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Supérieure a perdu juridiction en ce cas-ci. C'est une règle très dangereuse, parceque sous l'empire de cette règle un locateur, ou un locataire, pourra intenter devant la Cour de Circuit une action en résiliation d'un bail annuel de $1000 ou plus en y ajoutant seulement un chef de demande de $25 de loyer de dommages réclamés. Les conséquences d'une pareille interprétation n'avaient pas échappé à plusieurs juges de la Cour Supérieure. Ainsi la jurisprudence paraissait fixée sur ce point depuis 1870 par une décision donnée par l'Honorable Juge Berthelot, confirmée par la Cour de Révision, 14 L. C. Jurist p. 224, McGinnis & Horseman, unanimement, Held: That the Circuit Court has no "jurisdiction to grant the resiliation of a lease, where the rent or annual value "exceeds $200, though the amount of dommages claimed be under $200."

Cette décision dans laquelle quatre juges avaient concouru parait avoir été suivie jusqu'à présent, et le jugement dans la cause actuelle, qui nous est soumis, est conforme à cette jurisprudence.

Si une semblable action était portée dans la *procédure ordinaire* en résiliation d'un bail annuel de $228 de loyer avec en outre $60 de loyer réclamé, certainement la Cour de Circuit n'aurait pas de juridiction. Pour quelle raison y aurait-il une autre règle de juridiction en *procédure sommaire*? Cette procédure sommaire a eu pour but d'abréger les délais; c'est là son avantage. En abrégeant les délais, on réduit les frais et ces frais peuvent aussi être alloués à la discrétion du tribunal ou du juge, suivant les circonstances.

Je ne me crois donc pas justifiable de concourir dans la cassation du jugement et je suis d'avis de le confirmer, d'accord avec la cause McGinnis & Horseman suscitée.

Le point de savoir, si d'après les termes de l'article 887, la Cour de Circuit et la Cour Supérieure auraient une juridiction concurrente dans une cause semblable à celle-ci n'a pas été discutée; cette interprétation n'aurait pas l'effet au moins de créer aucune injustice, parce que le demandeur aurait l'option, et le défendeur au moyen de l'évocation pourrait peut-être faire envoyer la cause à la Cour Supérieure. Toutefois même sous l'empire de cette dernière règle la présente demande serait bien portée devant la Cour Supérieure.

MONK, J., also dissenting, agreed generally with the views expressed by Mr. Justice Tessier, and considered that this interpretation of the law was preferable to that adopted by the majority of the Court.

DORION, C. J. En 1854 la législature passa un acte pour régler la procédure dans les causes entre locateurs et locataires. 18 Vict. cap. 108, Statuts Refondus B. C., cap. 40. Elle établit une procédure sommaire pour faire résilier les baux et permit de joindre à une demande en résiliation une demande de loyers ou de dommages. Toute action en vertu de cet acte devait être intentée devant la Cour Supérieure ou de Circuit, et la valeur annuelle ou le loyer de la propriété louée devait régler la juridiction de la Cour, quelque fut le montant des dommages ou de loyers réclamés par l'action. 18 Vict. c. 108, sect. 5; S. R. B. C., cap. 40, sect. 4. Cette section fut amendée par la 25 Vict. cap. 12, sect. 1, de manière à se lire comme suit:

"Les actions en vertu du présent acte seront intentées dans la Cour Su-

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" périeure ou de Circuit, pour le montant du loyer ou des dommages réclamés, " et les frais seront alloués et taxés suivant le montant du jugement."

Cette clause pourvoit deux choses, 1o. que les actions en résiliation de baux seront portées devant la Cour Supérieure ou de Circuit d'après le montant demandé.

2o. Que les frais seront alloués suivant le montant adjugé.

Cela est clair, toute demande d'une somme au-dessus de $200 devra être portée à la Cour Supérieure, mais si le montant adjugé est au-dessous de $200 les frais ne seront que ceux d'une action à la Cour de Circuit et seront taxés sur le montant du jugement.

L'article 887 du Code de Procédure, qui d'après le rapport des Codificateurs p. 26, "*contient les dispositions statutaires sans aucune suggestion d'amende-*" *ment*," est dans les termes suivants :

" Les actions en résiliation ou rescision de bail, ou pour recouvrement de " dommages provenant de l'infraction à quelques-unes de conventions du bail, " ou pour l'inexécution des conventions qui en découlent d'après la loi, ou " résultant des rapports entre locateur et locataire, sont intentées soit devant la " Cour Supérieure, ou devant la Cour de Circuit suivant *la valeur ou le* " *montant du loyer réclamé, ou le montant des dommages allégués.*"

D'après l'article 1105, " La Cour de Circuit a juridiction sur les différends " entre locateurs et locataires, dans tous les cas où *le loyer, la valeur annuelle,* " *ou le montant des dommages réclamés* n'excède pas deux cents piastres."

Ainsi d'après la 18 Vict. c. 108 et les Statuts Refondus c. 40, c'était la valeur annuelle ou le loyer annuel qui déterminait devant quelle Cour l'action en résiliation devait être portée. Cela a été changé par le 25 Vict. c. 12, et depuis ce statut c'est le montant du loyer réclamé ou le montant de la valeur annuelle réclamée, lorsque la poursuite pour l'usage et l'occupation, ou le montant des dommages, lorsque la poursuite est pour dommages, qui détermine la juridiction de la Cour. Les articles 887 et 1105 ne paraissent laisser aucun doute à cet égard.

L'objection que l'on fait que ni l'acte 25 Vict. ni les articles 887 et 1105 du Code n'ont indiqué où l'action devra être portée lorsque la demande en résiliation ne sera accompagnée ni d'une demande de loyer, ni d'une demande de dommages, était également applicable à la section 4 du ch. 40 des Statuts Refondus, qui ne prévoyait pas ce cas. Mais il est facile d'y répondre, c'est que ce cas, n'étant pas prévu par une disposition spéciale, reste sous l'empire du droit commun, et que l'action devra dans ce cas être portée devant la Cour Supérieure ou de Circuit, d'après la valeur du bail, non pas d'après la valeur annuelle. Ainsi une demande en résiliation d'un bail à raison de $100 par année qui a cinq ans à courrir devra être porté à la Cour Supérieure parce que la valeur de l'objet en litige est de $500, quoique le loyer annuel ne soit que de $100. Mais la loi ayant par une disposition spéciale réglé que lorsqu'une demande de loyers ou de dommages était jointe à l'action en résiliation, c'était le montant du loyer ou des dommages réclamés qui déterminait la juridiction, il n'est pas possible d'ignorer cette règle parce que dans un cas non prévu, il faudrait d'après les règles ordinaires de procédure en suivre une différente.

Volsard et Saunders.

L'action n'étant que pour $60, c. a. d. $27 de cotisations et $33 de loyers, devait être portée à la Cour de Circuit, et le jugement de la Cour Supérieure qui a renvoyé l'exception déclinatoire de l'appelante doit être infirmé ainsi que le jugement final, et l'action de l'Intimé déboutée avec dépens.

Le jugement est comme suit:

"Considérant qu'en vertu des Art. 887 et 1105 du C. P. C. toute action pour résilier un bail doit être portée à la Cour Supérieure ou à la Cour de Circuit, selon que le montant du loyer et des dommages réclamés est de la juridiction de la Cour Supérieure ou de la Cour de Circuit;

"Et considérant que l'intimé n'a reclamé par son action que la somme de $60, dont $27 pour cotisations et $33 pour arrérages de loyers, et que par conséquent son action aurait dû être portée devant la Cour de Circuit;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 31 jour de Mars 1876, qui a renvoyé l'exception déclinatoire opposée par l'appelante, ainsi que dans le jugement final rendu par la Cour Supérieure siégeant à Montréal le 26 jour d'Avril 1876;

Cette Cour casse et annulle les dits deux jugements des 31 Mars et 26 Avril, 1876; et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, cette Cour déclare la dite exception déclinatoire de l'appelante bien fondée et renvoie l'action de l'intimé avec dépens &c.

(*Dissentientibus* les Hon. Juges Monk et Tessier.)

Forget & Roy, pour l'appelante.
Loranger, Loranger & Pelletier, pour l'intimé.
(J. K.)

Jugement infirmé.

COUR SUPERIEURE, 1877.

MONTREAL, 20 NOVEMBRE, 1877.

Coram TORRANCE, J.

No. 682.

Delbar vs. *Landa*.

JUGE:—1o. Qu'il n'est pas nécessaire que les timbres requis par la loi, pour la validité du billet promissoire, y soient apposés par le souscripteur lui-même.

2o. Que le fait matériel de l'apposition des timbres, est en lui-même peu important, et qu'ils peuvent, avec le même effet, être apposés par toute autre personne que le souscripteur, pourvu que ce soit à l'époque fixée par la loi, c'est-à-dire, le jour même de la date du billet, et pourvu aussi qu'ils soient d'un montant suffisant et soient oblitérés et annulés au désire de la loi. *

Cette action était fondée sur un billet promissoire.

Le défendeur y répondit *par l'exception* suivante, soutenue de sa déposition sous serment:

"Que le billet sur lequel est basée l'action de la demanderesse, est nul, n'a aucune valeur et ne peut conférer aucun droit d'action.

"Que le dit billet lors de sa confection, n'a pas été, par le faiseur, revêtu

* Statute du Canada, 31 Vic. ch. 9, sec. 4, 3e al. & 37 Vic. ch. 47, sec. 2.

des timbres requis par la loi, et que le jour où il a été signé par le défendeur, il n'a pas été par lui estampillé et ne l'a pas non plus été en sa présence par la demanderesse à qui ce billet a été remis.

" Que le billet n'ayant pas été estampillé lors de sa confection, ne se trouve pas maintenant revêtu des timbres requis par la loi." Et pour ces raisons, il concluait au renvoi de l'action.

A l'encontre de cette *exception*, la demanderesse produisit une *réponse spéciale*, contenant, entre autres allégations, les suivantes :

" Qu'il n'est pas vrai de dire que lors de l'institution de la dite action, le billet allégué en icelle n'était pas revêtu des timbres requis par la loi ; qu'au contraire, lors de la confection même du dit billet, icelui fut revêtu d'un timbre suffisant, qui fut effacé au désir de la loi, ce qui appert à la face du dit billet.

" Que si le dit timbre n'a pas été apposé par le défendeur lui-même, il l'a été avec le même effet, par la demanderesse, à qui la loi ne défendait pas de l'apposer pour le défendeur et en son lieu et place ; et que le trésor au profit de qui le droit a été ainsi payé, n'en a souffert aucun préjudice ; et que le but de la loi a été atteint avec la même efficacité que si le dit timbre eût été apposé au dit billet par le défendeur lui-même.

" Que si par [illegible] intention d'estampiller lui-même le dit billet, ainsi qu'il l'admet par sa défense, le défendeur voulait frauder le fisc, il ne peut pas avec justice, se plaindre, de ce que la fraude, qu'il avait en vue, ait été réparée par la demanderesse, et ne peut pas non plus invoquer son propre fait et sa faute, pour éviter le paiement d'une dette légitime."

La contestation fut liée de plein droit, par le défaut du défendeur de répliquer à cette réponse et la cause fut inscrite à l'enquête.

La demanderesse n'avait aucune preuve à faire : le billet par elle invoqué, portant à sa face même, le cachet de la plus parfaite légalité.

De son côté, le défendeur examina la demanderesse sur *faits et articles* et comme témoin, touchant la manière dont le timbre avait été apposé au billet en question ; et ses réponses ne firent que confirmer davantage, les allégations de sa *réponse spéciale*.

L'enquête du défendeur fut close et la cause inscrite au mérite.

A l'audition, la demanderesse n'invoqua aucune autre raison que celles énoncées dans sa *réponse spéciale*, et la Cour donna sur le champ ordre de dresser le jugement qui fut rendu suivant les prétentions de la demanderesse.

Action maintenue.

J. G. D'Amour, procureur de la demanderesse.
Prévost & Préfontaine, procureurs du défendeur.
(J. G. D.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH DECEMBER, 1877.

Coram TASCHEREAU, J.

No. 897.

Tate vs. *Torrance et al.*

HELD:—That the transfer, by a deed of dissolution of co-partnership, of the partnership estate and debts to two of the former co-partners, who continue the business, does not require to be signified before action brought against third parties indebted to the former co-partnership.

PER CURIAM:—The plaintiff in this case as well in his own rights and as representing the late Charles Tate, declares in *assumpsit* against the defendants. He avers that the sum he now claims was originally due to the firm of Tate & Company, composed of himself and Charles Tate and Benjamin Grant; that on the 6th of April, 1874, a deed of dissolution of the said firm and partnership was passed, whereby the said partners declared that the business of the said firm was to be thereafter assumed and carried on by the present plaintiff and the said Charles Tate; Benjamin Grant thereby then and there assigning and transferring over to the said plaintiff, and the said Charles Tate accepting thereof, all his rights, titles and interest in the said co-partnership, whereby the plaintiff alleges that the amount now sued for was vested in himself and the said late Charles Tate, whom he now represents as his executor. The defendants demur to this declaration, "because it is not alleged, nor does it appear by said declaration that the deed therein referred to by which the late Benjamin Grant transferred to the plaintiff and the late Charles Tate his rights in the amount sued for by the plaintiff was ever notified or signified to the defendants." The defendants rely on Art. 1571 C. C., and on the decision of the Court of Queen's Bench in Charlebois v. Forsyth.

That the buyer of debts and rights of action has no action against third parties until signification of the act of sale has been made, is clear, and has always been the law. It hardly now can be understood how, for a long time, a contrary jurisprudence prevailed in this country. However, the matter is now settled, and the Code and Legislature has declared that signification previous to the action is necessary, and had always been necessary. The question raised in this case, upon the defendants' demurrer, is whether the transfer made by Grant to the plaintiff and Charles Tate by the deed of dissolution of the co-partnership between them, as alleged by plaintiff, falls in the category of transfers or sales of debts or rights of action which must so be signified before action brought against third parties. I hold that it does not, and that the plaintiff was not obliged, before bringing his action, to signify to the defendants this deed of dissolution and transfer. I assimilate this deed to a partition of the property of the partnership between Charles Tate, Benjamin Grant and the plaintiff. Article 1898 of the Civil Code enacts that "before the dissolution of the partnership, each partner, or his legal representative, may demand of his co-partners an account and partition

of the property of the partnership, such partition to be made according to the rules relating to the partition of successions, in so far as they can be made to apply." Now, if I refer to the title of partitions of successions, Art. 746 (C. C.) says: "Each co-partitioner is deemed to have inherited, alone and directly, all the things comprised in his share, or which he has obtained by licitation, and to have never had the ownership of the other property of the succession." And Art. 747: "Every act having for its object to put an end to indivision amongst co-heirs and legatees is deemed to be a partition, although it should purport to be a sale, an exchange, a transaction, or have received any other name." These are principles applying to partnerships as well as to successions. And Dalloz, Société Civile, No. 413, says: "Les principes que consacre l'art. 883 (746 of our code) s'appliquent à toute propriété, quelque soit le titre de la possession commune, et par exemple, à la société proprement dite." Delvincourt, tome 2, note 13, p. 203, says: "Enfin le partage est déclaratif et non translatif de propriété, c'est-à-dire que chaque associé est censé avoir été propriétaire des objets tombés dans son lot, du moment qu'ils ont été acquis à la société." The authorities cited under these articles of the code are all clear on this point. I refer also to Demolombe, 5, des Successions, Nos. 254, 264, 279, 282, and 3 des Success. No. 549; Troplong, Vente, No. 11, and Société, No. 1063; Pandectes Françaises, under Arts. 883 and 1872 of the French Code. In Renaud vs. Proulx, 16 L. C. R. 476, the Superior Court gave a decision on this very point which is altogether in favor of the defendants' position here, but it will be remarked that the Court of Appeal, though on other grounds affirming the judgment of the Superior Court, studiously avoided maintaining the ruling of the Superior Court on this part of the case. Another ground of demurrer urged by the defendants is that "it is not alleged, nor does it appear what portion, if any, of said amount now sued for is claimed by the plaintiff, in his own right, irrespective of said transfer from the said late Benjamin Grant."

This, it seems to me, is not a ground of demurrer. The plaintiff's declaration shows at least a right of action for his share and Charles Tate's share in the amount due by defendants to the firm of Tate & Co. If the statement of what these shares represent is not clear—if the particulars are not sufficient,—it is not by demurrer that the defendants could avail themselves of these *laches* in the plaintiff's declaration. There the plaintiff claims all that was due to Tate & Co. He certainly shows a right of action for Grant's share and Charles Tate's share as well as his own. It cannot be because he does not say that each of the partners had a one-third interest in the partnership that he does not show a right of action. The law says it for him, 1848 C. C.

Demurrer dismissed with costs.

Abbott, Tait, Wotherspoon & Abbott, for plaintiff.

G. B. Cramp, for defendants.

(J.K.)

SUPERIOR COURT, 1878.

MONTREAL, 18TH JANUARY, 1878.

Coram DORION, J.

No. 1212.

Voligny vs. *Corbeille*, and *Corbeille*, Petitioner.

HELD:—That an affidavit to a petition for a *requête civile* cannot be amended, but that the petition itself may be amended, as no affidavit thereto is necessary.

PER CURIAM:—This is a motion to amend an affidavit to a *requête civile*, and a further motion to amend the petition itself. The first motion cannot be granted, as it is impossible to amend an affidavit once it has been sworn to and completed. The other motion is granted, as the *requête civile* does not require any affidavit to support it, on the petitioner paying $10 costs.

Judgment on motions.

Archambault & Co, for plaintiff.
Delorimier & Co., for petitioner.
(S.B.)

COURT OF REVIEW, 1877.

MONTREAL, 31ST MARCH, 1877.

Coram JOHNSON, J., DORION, J., PAPINEAU, J.

No. 9.

Staniforth vs. *McNeely*, & *McNeely*, Intervening Party.

HELD:—That, in the case of the sale of a moveable to two different persons, the purchaser who has obtained actual possession and is in good faith shall be preferred, as respects the ownership of the moveable, although his title be posterior to that of the other purchaser.

DORION, J.:—This is an appeal from a judgment of the C. C. of the county of Argenteuil, which maintained the plaintiff's action. The action was brought to revendicate a horse, which the intervening party by his intervention claimed to belong to him. It appears that the horse had been sold twice by the same person, namely to the plaintiff on the 10th of July, 1871, and to the intervening party on the 25th of the same month.

The plaintiff, however, never was put in possession of the horse, whereas the intervening party obtained possession of the horse at the time of his purchase, and was still in possession of it at the time of the seizure. As the intervening party has proved that his possession was in good faith, it is quite clear, under art. 1027 of the C. C., that he must be preferred as regards the ownership of the horse, and the judgment complained of must, therefore, be reversed, and the intervening party declared to be the party entitled to the possession and ownership of the horse.

Judgment of C. C. reversed.

Johnson & Burroughs, for plaintiff.
J. H. Filion, counsel.
R. P. DeLaRonde, for intervening party.
(S. B.)

COUR DE REVISION, 1877.

MONTREAL, 30 NOVEMBRE, 1877.

Coram JOHNSON, MACKAY, RAINVILLE, JJ.

No. 656.

Gauthier vs. *Bergevin*.

JUGE :— 1o. Que la section 284 chap. 7, 38e Vict. (Acte Electoral de Québec), n'oblige pas le candidat de remettre à l'officier rapporteur un état des dépenses de l'élection, si le candidat n'a fait aucune telle dépense.

2o. Que la pénalité imposée par la section 286 du même acte ne peut être encourue que si des dépenses ont été effectivement faites.

3o. Que cette pénalité ne sera encourue, à tout événement, que s'il est allégué et prouvé que des dépenses ont été effectivement faites et payées par le candidat. (1)

Le défendeur en cette cause, candidat à l'élection générale de 1875, dans le comté de Beauharnois, ne remit point à l'officier-rapporteur un état des dépenses encourues par lui pendant son élection. Le demandeur le poursuivit pour lui réclamer la pénalité de $200. Mais, à la preuve, il n'a pu établir que le défendeur avait effectivement fait des dépenses d'election. Or, pour le soumettre à la pénalité mentionnée en la section 284 il fallait, d'après les prétentions de la défense, le concours de trois choses:

1o. Qu'il soit allégué dans la déclaration que des dépenses ont été réellement faites et payées par le candidat.

2o. Qu'il soit prouvé que ces dépenses ont été faites;

3o. Que ces dépenses ont été payés par le candidat.

Le demandeur élevait une prétention contraire. Ce n'est, disait-il, ni l'esprit, ni la lettre du statut qui exigent cela. Il n'y a nulle nécessité de prouver le fait invoqué pour les raisons suivantes:

1o. Parceque l'acte reproché au défendeur est d'avoir manqué d'observer une formalité que la loi exige spécialement, savoir la production d'un état des dépenses faites, ou qu'il a pu faire pour le candidat; Sec. 284.

2o. Parce qu'en l'absence de tel rapport ou état certifiant que *telle dépense a été faite ou qu'aucune dépense n'a été faite*, le but de la loi est frustré et la section 288 qui permet à tout électeur de consulter le dit rapport ou état, ne peut plus recevoir son application. Il faut donc qu'il y ait production du compte tel que requis par la loi, que ce compte comporte ou non que des dépenses ont été faites.

3o. Parceque sans la production du dit état à l'officier-rapporteur, lequel est chargé de le publier dans la *Gazette Officielle*, la publicité de l'élection relativement aux dépenses des candidats disparaît, et le but de la loi est frustré.

4o. Parceque sans le production de cet état l'officier-rapporteur ne peut en publier un extrait dans la dite *Gazette Officielle* suivant le désir de la section 285.

(1) La même règle doit être observée quant aux agents du candidat. Ainsi jugé dans la cause de Primeau vs. Roy, No. 657, des dossiers de la cour de Beauharnois. Le jugement de la Cour Inférieure a été confirmé le 30 Novembre 1877 par la Cour de Révision. Les faits de cette cause sont les mêmes *mutatis mutandis*, que ceux rapportés dans la cause de Gauthier vs. Bergevin. NOTE DU RAPP.

Gauthier vs. Bergevin.

5o. Parceque par la section 287 l'agent qui aurait fourni un état inexact serait passible d'une amende de $500, que partant il y a nécessité de produire l'état requis par la section 284, lors même qu'aucune dépense n'aurait été faite afin d'être en mesure de contester l'exactitude du dit état.

6o. Parceque d'après les allégations requises dans la déclaration (section 393) il appert qu'il n'est pas nécessaire de prouver que des dépenses ont été faites pour nécessiter la production de l'état, mais qu'il suffit d'alléguer que l'acte n'a pas été suivi, partant de prouver que l'état n'a pas été produit ; toute autre preuve est surérogatoire.

7o. Parceque d'après la teneur du statut il appert que la loi a voulu faciliter la poursuite afin d'arriver plus sûrement au but que la loi se propose ; que partant ce serait une entrave à la poursuite que d'exiger une telle preuve.

Le 30 mai dernier Son Honneur le juge Bélanger, adoptant les prétentions de la défense, rendit le jugement suivant :

" Considérant que la défendeur, comme candidat à l'élection dont il est question dans la déclaration du demandeur, n'était pas tenu en vertu de la section 284, de l'acte électoral de Québec (38 Vict. ch. 7,) de produire et remettre à l'officier-rapporteur de l'élection l'état détaillé y mentionné, qu'en autant qu'il aurait payé lui-même quelques unes des dépenses par lui encourues pendant l'élection ou pour icelle ;

" Considérant que la pénalité imposée par la section 286 du dit acte et réclamée en la présente cause, ne peut être recouvrée du défendeur pour refus ou négligence de fournir tel état à l'officier-rapporteur dans le temps voulu, qu'en autant que le dit défendeur, comme tel candidat à la dite élection, aurait effectivement payé lui même quelques dépenses à et pour la dite élection.

" Considérant qu'il n'est pas allégué ni prouvé que le défendeur comme tel candidat ait payé aucune telle dépense."

La Cour de Révision a maintenu le jugement de la Cour Inférieure et renvoyé l'appel pour les mêmes motifs.

" Déboute etc."

JOHNSON, J., (dans la cause de Primeau vs. Roy) s'exprima comme suit :

This is an action to recover from the defendant a penalty of $200, under the Quebec Election Act of 1875. It is alleged in the declaration that he was one of the election agents of the candidate, and that he has not within two months after the election made out, signed and delivered to the returning officer the detailed statement of expenses required by the Act. The defendant pleaded that he never had been appointed nor acted as agent, and had never expended anything, nor ever been furnished with any account of expenses by others. There is certainly no proof of agency, and of course that alone would have justified the Court below in dismissing the action ; but, apart from this, the plaintiff has neither stated nor proved any infraction of the statute. Under Section 286, nothing is required but a detailed statement of expenses that have actually been made, and therefore, if none have really been made, no penalty accrues under that section. If the plaintiff's pretension was that payments had actually been made (in which case the omission to furnish a statement would have subjected the agent to the penalty), he should have averred the fact, and

proved it. The law seems to have provided for every case, for if an agent or a candidate incur expenses, both are bound to furnish statements under sec. 264, and the penalty of omission is provided by the 286th section, and the penalty for making an inaccurate statement is provided by section 287—in the former case the penalty is $200, in the latter, $500; but there is no penalty enacted for omitting to do what would be useless, viz., to deliver a statement when no expenses have been incurred, and there is no obligation imposed by the Act to do so. There is another case against the candidate, but the same judgment must be rendered in that also; for the case is founded on the same misapprehension of the law. Judgment confirmed in both cases.

Jugement confirmé.

Lareau & Lebœuf, procureurs du demandeur.
L. A. Jetté, conseil.
Duranceau & Seers, procureurs du défendeur.
(E. L.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 16TH MARCH, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 26.

LAPOINTE, APPELLANT;

AND

FAULKNER, RESPONDENT.

HELD:—That the Court of Queen's Bench cannot entertain a petition to have the security declared insufficient, on the ground that the respondent has discovered since the completion of the bond that the securities were really insufficient at the time the bond was signed.

DORION, CH. J.:—This is an appeal from the Circuit Court. Notice was given that security would be put in on a certain day, and the respondent appeared and required the sureties to justify. The sureties justified as required, and no objection was offered. Now a motion is made, supported by a number of affidavits, alleging that at the time these sureties justified, the party respondent thought they were both holders of real estate, and that he has since discovered that they are not holders of real estate; that they are insolvent, and he desires to force the appellant to give new security. The Court is of opinion that the respondent is too late with his objection. He alleges no new fact. He does not say that they have become insolvent since, but simply that he has been mistaken. If such an application were allowed it would lead to endless litigation. The Court would have to order an *enquête* as to whether these facts were true. The motion is therefore rejected.

Motion rejected.

M. J. A. Champagne, for appellant.
Médéric Lanctôt, for respondent.
(S.B.)

CIRCUIT COURT, 1878.

SHERBROOKE, 12TH JANUARY, 1878.

Coram DOHERTY, J.

Clement vs. *Heath*, and *Bacon*, Petitioner.

HELD:—That the Insolvent Court alone has jurisdiction to set aside a writ of attachment in insolvency.

The action was commenced by *arrêt simple*, and judgment in plaintiff's favor for $60 was rendered, and the attachment declared good and valid. A *venditioni exponas* having issued, proceedings thereunder were stopped by an *ex parte* order of the Judge upon petition of C. J. S. Bacon, official assignee, alleging that, previous to the issuing of the *venditioni exponas*, a writ of attachment in compulsory liquidation under the Insolvent Act of 1875 had been placed in his hands against the estate of the defendant, and claiming, by virtue of said writ, to be vested with the moveable property seized.

The plaintiff, treating the petition, affidavit, and order as an opposition to his execution, contested the same, on the ground that the defendant was not a trader and could not be subject to the Insolvent Act, or placed in insolvency under said Act.

At the trial, there was evidence showing that the defendant had never been a trader in any sense of the term, in fact no proof whatever was made of his ever having done anything by which he could be called a trader, his occupation being that of a farmer.

Mr. *Brown* for the assignee, contended that the Circuit Court had no jurisdiction. The writ of attachment in insolvency vested the assignee with all the property of the defendant, and the proceedings in insolvency could only be set aside by the Insolvent Court, and that even the doors of the Insolvent Court were shut against the creditors, the insolvent being the only one who had any legal interest in setting aside the proceedings; that the Insolvent Act aimed at an equal distribution among the creditors of the property of an insolvent. It was further urged that the assignee was merely an officer of the Insolvent Court, and could not be subjected to any costs on account of the orders of the Court which he was obeying.

Mr. *Hurd* and Mr. *White* for plaintiff, contended that the scope of the Insolvent Act was limited; that only a certain class, viz., traders, were entitled to the benefit of the Act, and that the Insolvent Court had absolutely no jurisdiction whatever over a non-trader. It having been clearly established that the defendant in this cause was not a trader, the Insolvent Court had no jurisdiction over him, and would therefore have no jurisdiction to decide the legality of its proceedings to place the defendant in insolvency, and plaintiff was not bound and in fact could not go before a Court destitute of jurisdiction. The provisions of the Insolvent Act only applied to traders and could not be urged on behalf of non-traders.

The plaintiff was proceeding under the orders and judgment of the Circuit Court to sell certain goods and effects, and is met by what, to all intents and

purposes, is an opposition *afin de distraire* on behalf of the assignee claiming to be vested with said property.

Plaintiff had a right to say, and the Circuit Court has a right to decide, that the assignee never became legally vested with the property, the defendant not being a trader and the Insolvent Court never having had any jurisdiction over him, or any power or authority to vest the assignee with his estate.

That as regards subjecting the assignee to costs, he, the assignee, was something more than an officer of the Court; the law vested him with the estate of an insolvent trader, and he had his recourse against the creditor at whose instance and upon whose affidavit the proceedings in insolvency had been taken, whom he could call in as his *garant* to take up the *fait et cause*.

PER CURIAM:—This case is not without its difficulties. According to the evidence, which was quite strong on this point, it would seem that the defendant was not a trader and manifestly not entitled to the benefit of the Insolvent Act.

But what Court had the legal right to decide this question? Could the Circuit Court decide it, or was the plaintiff bound to go before the Insolvent Court, and petition to set aside the proceedings which had been taken?

After careful deliberation I have come to the conclusion that the Insolvent Court alone has the power to decide the question. The writ of attachment divested the defendant of all his property, and vested the assignee with the same, and the Circuit Court had no power to set aside this writ issuing out of the Superior Court. The plaintiff has a right to intervene and contest in the Insolvent Court defendant's right to the benefit of the Act, but he has no right to go on and sell property which no longer belongs to the defendant. His contestation must therefore be dismissed.

Brooks, Camirand & Hurd, for plaintiff.

W. White, counsel for plaintiff.

Ives, Brown & Merry, for assignee.

(J. K.)

SUPERIOR COURT, 1878.

MONTREAL, 18TH JANUARY, 1878.

Coram DORION, J.

No. 1723.

Sproul vs. *Corriveau.*

HELD:—That a motion for security for costs cannot be made after the four days from the return of the writ of summons, although the notice of such motion be given within the four days.

PER CURIAM:—This is a motion for security for costs, made after the four days from the return of the writ of summons have expired. The notice of this motion was given within the four days, and it was contended that that was sufficient. When such an application could only be made in term, the Court allowed it to be made on the nearest day in term after the expiration of the delay, if notice was given within the four days and there was no term during that period. This

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was done *ex necessitate rei*. But, since applications of the kind have been allowed to be made in Chambers, and even before the Prothonotary, this overruling necessity no longer exists, and the law requiring that the application must be made within the four days must be strictly followed. I understand that Mr. Justice Papineau so ruled on the 20th December last, in the case No. 1134, *Robson* vs. *Garceau*, and as I quite concur in that ruling, I reject the motion as coming too late.

Motion rejected.

Bethune & Bethune, for plaintiff.
Lavergne & Co., for defendant.
(S. B.)

SUPERIOR COURT, 1878.

MONTREAL, 28TH FEBRUARY, 1878.

IN REVIEW.

Coram TORRANCE, J., DUNKIN, J., RAINVILLE, J.

No. 108.

In re *Dusault* et al., Insolvents, and *Deslère*, Claimant, and *Prevost* et al. es qualité, Contestants.

TRADER—MARRIAGE CONTRACT—REGISTRATION.

HELD:—That the non-registration of the marriage contract of a trader within thirty days from the execution thereof, is a bar to the claim of his wife against his estate.

TORRANCE, J. The claimant was the wife of one of the insolvents, and claimed from the estate of her husband $1,120 under their marriage contract dated the 15th February, 1868, and registered on the 23rd June, 1868. The proprietors of the estate contested the claim, on the ground that the husband was a trader, and that the contract of marriage was not registered until long after the day fixed by law. The contestation had been maintained by the Court at Sherbrooke, under the Insolvent Act of 1864, (sec. 12, par. 2,) which requires the contract of every trader to be registered in the registration division in which he has his place of business within thirty days from the execution thereof. The Court here agrees with the Court below, and judgment is confirmed.

The section provides for three cases: 1. Every trader who marries. 2. Traders already married. 3. Every person not a trader, but hereafter becoming a trader and having a marriage contract.

The contestants contend that the first of these provisions applies to the claimant's husband. The claimant contends that the third applies to him.

The Court below held that the provision of the law had not been complied with as to registration. The claimant's husband was styled a trader in that contract. No error has been shown in that designation, and upon our review we see no error in the judgment.

Judgment confirmed.

Hall, White & Panneton, for claimant.
Davidson & Cushing, for contestants.
(J. K.)

COUR DE CIRCUIT, 1878.

MONTREAL, 4 MARS, 1878.

Coram MACKAY, J.

No. 476.

Patenaude vs. *Guertin*, et *Guertin*, opposant, et *Patenaude*, contestant.

JUGÉ:—Que si un défendeur est saisi pour plus qu'il ne doit, en vertu d'un jugement, et cela, parce que le demandeur ne lui tient pas compte sur la saisie, des sommes payées à lui-même, ou à son acquit, depuis la date de ce jugement, tel défendeur est bien fondé à faire opposition et à demander que la saisie soit réduite à la juste somme revenant au demandeur.

2o. Qu'il n'est pas tenu d'offrir, par son opposition, la balance due au demandeur, ni de la déposer en Cour avec son opposition.

3o. Que cette opposition ayant été occasionnée par la faute du demandeur, et par lui contestée, il doit, dans tous les cas, en supporter les frais.

Une exécution a émanée en cette cause pour la somme de $101.76 capital et frais.

L'opposant prétend cette saisie excessive et par son opposition, demande qu'elle soit réduite à la somme de $38.97.

De son côté, le demandeur soutient qu'il est bien justifiable de contester cette opposition qui, selon lui, est mal fondée et doit être déboutée, parce que le défendeur n'a pas offert et déposé en Cour avec son opposition, la balance qu'il reconnaît lui devoir.

PER CURIAM. Les prétentions de l'opposant sont bien fondées tant en fait qu'en droit. Il est prouvé que lors de l'émanation de la saisie, le défendeur avait payé à l'acquit du demandeur, en vertu d'une saisie-arrêt après jugement au nommé Pierre Provost, une somme de $39.54, et au demandeur lui-même, une autre somme de $23.25, et qu'il ne lui revenait plus sur sa demande de $101.76, qu'une balance de $38.97. La contestation du demandeur est mal fondée et doit être rejetée. Le défendeur saisi pour plus qu'il ne devait, avait un droit incontestable de s'opposer à la saisie et d'en demander réduction. Il n'était pas tenu de déposer en cour, la balance due au demandeur, et son opposition occasionnée par la propre faute du demandeur doit, dans tous les cas, être maintenue avec dépens.

A l'appui de son jugement, l'Honorable juge cita la cause de *Fournier* vs. *Russell*, jugée en appel et rapportée au 10 L. C. R. 367.*

Opposition maintenue.

J. G. D'Amour, procureur de l'opposant.

Mousseau & associés, procureurs du contestant.

(J. G. D.)

* *Vide* 3 L. C. J. 73; 14 Ibid, 28; 3 L. C. R. 478; 7 Ibid, 130; 1 R. L. 45; C. P. C. art. 555, 2 al. & art. 581, No. 3. (J. G. D.)

PRIVY COUNCIL, 1875.

MONTREAL, 2ND MARCH, 1875.

Present:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

HENRY JOHN STYRING KING,

(Plaintiff in the Court below,)

APPELLANT;

AND

ALFRED PINSONEAULT,

(Defendant in the Court below,)

RESPONDENT.

HELD:—Where, after defendant had been foreclosed from pleading, a "transaction" was made between him and the plaintiff's counsel and attorney, to the effect that the cause was stayed on certain terms of payment, which "transaction" the defendant revoked, and then pleaded to the action, and the plaintiff subsequently brought another action to enforce the compromise, that the pendency of the first action was not a bar to the institution of the second: nor was the discontinuance of the first a condition precedent to bringing the second. The proper mode of enforcing the "transaction" was by a separate action.

2. In the absence of special authority, the plaintiff's counsel and attorney had not, by reason of his being "*avocat*" and *avoue*, any power to bind his client by a compromise. An *avoué* can, however, bind his client *(until disavow)* by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition.

The appeal was from a judgment of the Court of Queen's Bench for the Province of Quebec, 17th September, 1873, confirming the judgment of the Superior Court, 31st October, 1871.

The judgment of their Lordships was delivered by SIR ROBERT P. COLLIER:—

In order to make this case intelligible a short narrative is necessary. General Napier Christie Burton, who possessed property in England and in Lower Canada, made his will on the 20th December, 1834, the provisions of which material to the cause are as follows:—He gave and bequeathed the lease of the house in England, in which he then resided, and all his household furniture, plate, etc., and all his other effects, together with all cash in the house at the time of his decease, together with all moneys due to him, in his own right, as well as representative and heir-at-law of his late father, General Gabriel Christie Burton, to three trustees (George Burton Hamilton and William Henry King, gentlemen residing in England, and Edmé Henry, described as of Laprairie near Montreal, Lower Canada) in trust for investing the moneys collected and the proceeds of the sale of the furniture, etc., in Government stocks, and accumulating such stocks and dividends, "until," in the words of the will, "Christiana Harmer, the only child of my natural daughter, Mary Harmer, shall attain the age of 21 years, or day of marriage, whichever shall first happen, and then I do direct my said trustees, or the survivors or the survivor of them, or the executors of the survivor, to assign and transfer the whole of such accumulated principal fund or stock, and all dividends thereon, unto the said Christiana Harmer for her absolute use and benefit . . . but in case the said Christiana Harmer should die before attaining the age of 21 years, or being married, or the trans-

fer of the accumulated stock being made to her, then I do give and bequeath the same unto Henry John Styring King, the eldest son of the said William Henry King, his executors, administrators, and assigns, absolutely for his or their use and benefit," and he directed his trustees to assign the same accordingly.

In a subsequent part of the will he bequeathed the residue of his estate and effects to Christiana Harmer absolutely on her attaining the age of 21 years, but in the event of her dying under age to Henry John Styring King.

By a codicil dated the 23rd of December, 1834, he directed Edmé Henry to sell his dwelling-house and land adjoining in Lower Canada, to deduct out of the purchase money all that may be due to Henry for the expenses of the sale, and his trouble in collecting the rents of the house and of the real estates and seigniories of the testator in Canada, and then to pay over to the other trustees "the balance of such purchase money, and of all other moneys and rents due to me which have or may come into the hands of the said Edmé Henry or his heirs in manner aforesaid, in order that the balance may be invested in Government stock in England, upon and for the same trusts and persons to whom I have in the said will bequeathed the rest and residue of my estate and effects."

The testator died in January, 1835.

Christiana Harmer died in April, 1847, at the age of 22 years, unmarried.

On the 31st December, 1839, Edmé Henry, the Canadian executor, with the consent of his English co-executors, sold, by deed of that date, to Pinsoneault, the defendant, a relative of his, the uncollected rents of the seigniories of the testator in Canada for a sum of £1,999.

On the 18th of December, 1869, nearly 30 years after the above-mentioned transaction, Henry John Styring King filed a declaration in an action against Pinsoneault and George Burton Hamilton, the last surviving executor and trustee of the testator, in which he set out the will without the codicil, averred that Christiana Harmer had died under age and unmarried, and before any transfer to her; that Edmé Henry had fraudulently concealed from his co-executors the amount of the uncollected rents due to the testator, which amounted to 50,000*l.*; that by false representations of Henry and Pinsoneault the other executors were induced to agree to the sale to Pinsoneault; he prayed that the deed of December 31, 1839, should be cancelled, that Pinsoneault should account for all the arrears with interest and profits, or in default should pay to him 480,000 dollars. On the filing of the declaration a burial certificate was filed with it, wherein it is stated that, at the time of her death, Miss Harmer was aged 22.

This action was brought when the defendant and his family were in Europe, intending to take a lengthened tour. The statement that Miss Harmer died under age is admitted by Mr. Laflamme, the Advocate and Attorney of the plaintiff, to have been false to his knowledge, and inserted in the declaration by him to prevent its being demurrable. If the plaintiff's right to sue, as it is now contended for, had been stated, viz., that, notwithstanding Miss Harmer attained her majority, nevertheless the gift over to the plaintiff took effect because no transfer had actually been made to her, the declaration might have been met by

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a demurrer, upon the argument of which the plaintiff's right to sue could have been decided without an *enquête* being necessary if the decision had been against him, and the defendant's presence in Canada might not have been required. It has been suggested that the object of this false statement was to compel the plaintiff's return to Canada, to work on his fears by the prospect of an inquiry into transactions thirty years old, and to drive him to a compromise. Be this as it may, Mr. Pinsoneault when he heard of the action hastened to Canada, and arrived at Montreal on the 25th of May, 1870. Communications took place between his legal advisers and those of the plaintiff, in the course of which a proposition for settling the action for 30,000 dollars was discussed. Mr. Pinsoneault, however, states that on Saturday the 4th of June he had determined to plead to the action, and had given instructions for that purpose. On that same 4th of June Mr. Laflamme obtained a foreclosure of the pleadings in the suit. The defendant, probably more alarmed than he need have been at this procedure, went to Mr. Laflamme (who had been a personal friend of his) on the Sunday morning without consulting his Attorney or Counsel, and in the course of the day the following document was drawn up by Mr. Laflamme:—

"Henry J. S. King, Plaintiff, and Alfred Pinsoneault, Defendant.

"*Memorandum.*

"It is agreed that this case is to be settled upon the following terms, viz:—

"1. The defendant is to pay to the plaintiff thirty thousand dollars in full settlement of the action, which is to be at once desisted from, the defendant paying costs to the amount of fifty dollars.

"2. Of the above sum of thirty thousand dollars, fifteen thousand dollars shall be paid immediately, and the remaining fifteen thousand dollars shall be invested in hypotheques, or other approved securities, in the joint names of H. Cotté and Thomas W. Ritchie, Esquires, in trust to pay the interest upon such investment during the period extending from this date to the thirty-first December, one thousand eight hundred and seventy-seven, to the plaintiff, at the rate of five per cent. per annum, payable semi-annually, and to transfer the capital to him (the plaintiff) or his representatives at the expiration of that time, provided no action shall have been brought by the representatives of the late Christiana Harmer against Mr. Pinsoneault or his representatives for or in respect of any of the rents, monies, or matters or things mentioned in the Declaration of this cause, or under and in virtue of the will of the late General Christie; and provided any such action has been brought, that it shall have been finally dismissed or disposed of; and if any such action is instituted, then Mr. Pinsoneault shall pay the interest of five per cent. to the said trustees, who shall deposit the same under the above trust to await the final decision of this action.

"3. If at the expiration of the said time (on the thirty-first December, one thousand eight hundred and seventy-seven) such an action shall be pending, the capital shall only be paid upon the same being finally dismissed.

"4. If such action shall be brought within the said period of seven years, and shall be finally decided against Mr. Pinsoneault, the investment of the said sum

of fifteen thousand dollars shall be transferred to Mr. Pinsoneault together with the interest added thereto.

"5. If Mr. Pinsoneault prefers it, the sum of fifteen thousand dollars may be deposited in any chartered bank of this city selected by him, in the names of Mr. Cotté and Mr. Ritchie, subject to the foregoing trust.

"*Montreal*, June 4, 1870.

"(Signed,) ALFRED PINSONEAULT.
R. LAFLAMME,
"*Attorney for the said J. S. King.*"

The agreement, which, in the language of the Canadian law, is termed a "transaction," though made on the 5th of June, is dated on the 4th. Mr. Laflamme, after the signing of the agreement, gave the defendant a letter addressed to Mr. Cassidy, his counsel and attorney, to the effect that the cause was stayed and the forclosure removed "jusqu'à nouvel avis."

Mr. Laflamme deposes that he had authority from the plaintiff to enter into this agreement, and that he so informed the defendant; and it is manifest that the defendant at the time supposed that he had such authority.

On the next day the defendant's legal advisers satisfied him that the agreement he had made was an improvident one, and intimated their opinion that the plaintiff had no cause of action.

On the 10th of June the defendant executed a notarial instrument revoking the agreement, on the ground (among others) that it had not been accepted by the plaintiff, which instrument was served on that day on Mr. Laflamme.

On the 11th of June plaintiff wrote and sent a letter to the defendant, notifying that he was prepared to carry out the agreement and to desist from the action on the payment of the 30,000 dollars as therein provided.

From this time the plaintiff attempted to enforce the compromise, and the defendant to resist its enforcement, by all means in their power.

The defendant sought to put in pleas to the action, and succeeded in spite of the plaintiff's opposition on the ground of the settlement.

The plaintiff prayed for judgment in the action, in the terms of the compromise, but this was refused on the ground that the defendant had been admitted to plead.

In January, 1871, the plaintiff commenced a fresh action on the agreement or "transaction" of the 5th of June, 1870, averring his own readiness to perform it, and offering to perform it, and praying that the defendant might be compelled to perform it. This action is the subject-matter of the present appeal.

The main grounds of defence raised by the pleas to the action were in substance—

1. That the action was not maintainable during the pendency of the original action, because they were for substantially the same cause; or, if that were not so, that the discontinuance of the first action was a condition precedent, under the "transaction," to the bringing of the second.

2. That the proceedings by which the defendant had been admitted to plead in the original action, and the motion of the plaintiff for judgment in terms of the

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compromise had been rejected, were, in effect, a judgment adverse to the plaintiff's right to enforce the "transaction."

3. That the "transaction" was not intended to be final, but to be conditional on its ratification by the Court.

4. That Mr. Laflamme had not authority to make it.

5. That the defendant was entitled to be relieved from it on the ground of mistake or surprise or fraud.

The three last, with some other grounds, were taken by the same (the third) plea.

These questions, after a multiplicity of pleadings and interlocutory proceedings which it is needless to particularize further, came before the Superior Court, when Judgment was pronounced by Mr. Justice Beaudry.

That Judgment is to the effect that the pendency of the first suit is not a bar to the maintenance of the second, and that the defence in the nature of *res judicata* raised by the second plea also failed, but that the suit should be dismissed on the ground that Mr. Laflamme had not sufficient general authority, as Attorney and Counsel in the case, to bind his client by the agreement in question, and that no special authority had been proved, and that the ratification by the plaintiff of the 11th of June after the defendant's repudiation of the 10th, was too late.

On appeal to the Court of Queen's Bench that Court held—

1. That the second action was not maintainable as long as the first was pending.

2. That, although the plaintiff might have enforced the "transaction" in the first action, he had not done so by the proper pleading.

The reasons of this Judgment are thus stated by Chief Justice Duval:—

"I express no opinion on the validity of the settlement pleaded, but I hold that no separate action can be brought on it, *pending* the first action instituted. King ought to have discontinued his first action brought, before instituting the present, or to have pleaded this as an *incident* to the first."

The Court thereupon confirmed the Judgment of the Court below, but not for the reasons therein alleged, "reserving liberty to the defendant to resort to any means he may be advised for the purpose of putting in force the transaction."

In giving this Judgment the Court was far from being unanimous.

Judges Taschereau and Monk dissent from it, holding that the action was maintainable, and that the Plaintiffs were entitled to succeed upon the merits. The Judgment is that of Chief Justice Duval, Judges Polette and Badgley, the latter of whom, though subscribing to the judgment, and holding that the action was not maintainable pending the former action, doubts whether "the transaction" was not properly pleaded in the first action, and, expressing a regret in which their lordships sympathize, that the Court having all the evidence before them for deciding the merits should feel themselves unable to do so, gives his own opinion in favor of the defendant.

Their lordships concur with the Superior Court and with Judges Taschereau and Monk that the pendency of the first action was not a bar to the institution of the second.

The actions were not for the same cause. The first action was brought against Pinsoneault and Hamilton, for the purpose of setting aside a deed of 1839, and obtaining an account of the full amount of the sums received by Pinsoneault with payment thereof; or, in default of such account and payment, for damages. The second action was brought against Pinsoneault alone to enforce an agreement of 1870, and not only to obtain payment of a sum of money, but to enforce the settlement of another sum upon trusts wholly outside of and collateral to the first action. Nor was the discontinuance of the first action a condition precedent under the agreement to enforcing that agreement by action. The performance by the parties of their parts of the agreement respectively, were, in their lordships' opinion, concurrent conditions, and, this being so, it was sufficient for the plaintiff to aver in his declaration that he had been and was ready and willing, and that he offered to perform his part, viz., discontinuance of the first action on the defendant performing his part of the agreement. Their lordships are further of opinion that he has taken no step inconsistent with this averment, and they find that it is proved in fact.

Although the forms of procedure differ in England and Canada, some observations of the vice-chancellor Turner in Askew *v.* Wellington (9 Hare, 65) are applicable in principle and in reason to the present suit. The vice-chancellor observed that some cases which he referred to "appear to establish that, at least in cases where the compromise goes beyond the ordinary range of the court in the existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings, and I think that *à fortiori*, this must be the case where the agreement itself is disputed." It may be collected that the putting an end to the original suit in that case was not deemed a condition precedent to instituing the second.

It becomes, therefore, unnecessary to decide whether or not the plaintiff could have enforced the "transaction" in the first action, or whether, if he could, he has taken the proper steps for doing so.

For these reasons their lordships are of opinion that the court of Queen's Bench were wrong in declining to give judgment on the validity of "the transaction;" it becomes, therefore, their lordships' duty to determine this question, and to give the judgment which ought to have been given by the court of Queen's Bench.

The objection that the "transaction" was not intended to be final, but was subject to some act of confirmation by the Court, is not noticed by Mr. Justice Beaudry, who seems to have thought his finding on the want of authority sufficient to establish the third plea and to dispose of the suit. Their Lordships have no doubt that it was intended to be final.

The next important question that arises is whether or not Mr. Laflamme had authority to bind his client by it.

This question again divides itself into two:—1. Had Mr. Laflamme such authority by reason of his being counsel and attorney (avocat and avoué) in the case?

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2. ...ot, had he express authority from the plaintiff?

Their Lordships do not consider it necessary or desirable for the determination of the first of these questions, to inquire into the extent of the authority to settle causes of counsel, attorneys or proctors, in this country, founded as it is upon laws and customs in a great degree peculiar to ourselves. The law on the subject must be looked for in the Canadian Code, interpreted, if its provisions are obscure, by the aid of what light can be thrown upon them by the French law.

Mr. Justice Badgley, in his learned judgment, intimates an opinion (as their Lordships understand him) that the "transaction" was invalid, because it was not given effect to by a "jugement d'expédient," and in support of this view he quotes the following passage from Pigeau (1 Procédure Civile, liv. 2, tit. 3, and 339):—

"On peut transiger en justice en passant un jugement de compromis, ou en donnant les parties sont convenues; cela se fait très fréquemment au Châtelet de Paris, et c'est ce qu'on appelle cette voie expédient. On dresse le dispositif du jugement sur papier ordinaire, les procureurs le signent et le font signer à leurs cliens, *lorsqu'ils n'ont pas de pouvoir spécial*, et ne veulent pas prendre sur eux de signer sans pouvoir, à cause de l'importance de l'affaire."

The "transaction" with "jugement d'expédient" with its formalities, which was only one form of "transaction" according to the French law, has not been adopted or recognized in the Canadian Code, which does not require that a "transaction" shall be in any particular form, even if it consists in assenting to a judgment. The passage from Pigeau, however, is not unimportant as bearing on the general authority of procureurs—for, if they have not authority to consent to a judgment, it may be argued that they cannot have the power to settle a cause, and to abandon or compromise the rights of their clients without one.

Mr. Laflamme was both "avocat" and "avoué." It does not appear, however, that the law gives him any greater authority in his former than he had in his latter capacity. If he had any power analogous to that of a counsel in England, to settle a cause "in Court," it is enough to say that it was not this power which he exercised; his power was merely that of an "avoué."

No French authority has been cited which goes the length of asserting that an "avoué" has a general power to bind his client by a "transaction," such as the present, and some French authorities have been cited which it is contended establish the negative of this proposition.

Much reliance has been placed by the Counsel for the defendant on a passage from Dalloz's "Répertoire de Jurisprudence" (Transaction, Art. 4, s. 57), which runs thus:—

"Un mandataire a-t-il le droit de transiger au nom de son mandant? La négative résulte clairement de l'Article 1988, Code Nap., à moins que la procuration ne confère expressément ce pouvoir au mandataire. Le mandataire chargé pour une seule affaire ne peut transiger sans un pouvoir exprès."

Article 1988 of the "Code Napoléon" is almost identical with Article 1703 of the Canadian Code, which is in these terms:—

"The mandate may be either special for a particular business or general for all the affairs of the mandator. When general it includes only acts of administration. For the purpose of alienation or hypothecation, and for all acts of ownership other than acts of administration, the mandate must be express."

It has been argued that if the inability declared by the French Code to alienate and hypothecate without express powers carried with it the inability to "transact," the same words in the Canadian Code must have the same effect.

The plaintiff seeks to explain this passage as referring only to the powers of ordinary mandatories, and having no reference to "avoués," who are mandatories with extraordinary and exceptional powers. If, however, a class of mandatories so well known do possess this exceptional power, the omission of all notice of it in the place where notice of it would have been appropriate, or, indeed, in any part of the exhaustive treatise of Dalloz concerning "transactions," is not a little remarkable.

The same doctrine is laid down in other books of authority.

In Guyot's "Répertoire de Jurisprudence" (Vol. 17, transaction, p. 235) this is said:—

"Un procureur ou mandataire peut-il transiger au nom de son commettant? Il le peut sans difficulté, si la procuration lui eût donné expressément le pouvoir; mais dans le cas contraire toute espèce de transaction lui est interdite."

The same doctrine is laid down by Troplong ("Droit Civil Expliqué," sec. 295), and by other writers on French law, without the supposed exception being ever noticed.

Undoubtedly "avoués" possess some powers beyond those of ordinary mandatories of binding their principals, unless their acts are expressly disavowed.

This subject is treated of at some length in Dalloz's Répertoire de Jurisprudence "(Désaveu, Section 3, Article 25), where many instances of such powers are given, not, however, including the power "to transact." It is also treated more succinctly in Dalloz's "Dictionnaire de Jurisprudence," tit. Désaveu. It is there said that in general every act of a mandatory is void which exceeds the bounds of his mandate, but that it is otherwise with mandatories *ad litem*, who are in some sense officers of justice representing citizens before the tribunals in the exercise of their profession. He thus sums up the law: "en effet, jusqu'à désaveu tout acte de ministère de l'avoué, mandataire *ad litem*, quelles que soient les conséquences qu'il entraîne, est réputé fait en vertu du pouvoir de sa partie."

It appears to their Lordships that full effect may be given to the meaning of these expressions by treating the "avoué" as able to bind his client (until "désaveu") by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition. The plaintiff is assumed to have authorized every thing made on his behalf in the declaration, the defendant every plea pleaded for him; for example, a plea of the statute of limitations, or a plea justifying a libel—though he may have prohibited their being pleaded. An illustration of this doctrine is afforded in the present case, where the plaintiff must be taken to have authorised his claim being based on a false statement of the age at which Miss Harmer died, although he may possibly have disapproved of it. Such would appear to be the view taken of this subject by the framers of the Canadian Code of Procedure, Article 194 of which is in these terms:—

"A disavowal can only be made by the party himself or his attorney, under a

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special power, and the party himself must declare that he did not authorize the *act of procedure* which he repudiates."

Their Lordships are of opinion that to enter upon an agreement such as "the transaction" in question, which was in a great measure collateral to the cause and was capable of being made the subject-matter of a separate suit, cannot be properly termed an act of procedure in the cause.

Their Lordships have not discovered in the Canadian codes any provision conferring upon "avoués" the power of entering into transactions if they did not before possess it. The subject of "mandate" is treated of under the 8th title in five chapters.

Article 1703, which has been above referred to, applied to all mandatories, general and special.

Article 1704 is in these terms:—

"The mandatory can do nothing beyond the authority given or implied by the mandate. He may do all acts which are incidental to such authority and necessary for the execution of the mandate."

And the application of this rule to professional men of various classes, including "avoués," is provided for by Article 1705—

"Powers granted to persons of a certain profession or calling to do anything in the ordinary course of the business which they follow need not be specified, they are inferred from the nature of such profession or calling."

The only mention of "avoués" in the chapter is contained in Article 1732:—

"Advocates, attorneys, and notaries are subject to the general rules contained in this title ("mandat") in so far as they can be made to apply. The profession of advocate and attorney is regulated by the provisions contained in an Act intituled 'An Act respecting the Bar of Lower Canada.'"

It has been admitted that the power contended for is not to be found in this Act.

There are nine articles in the Code under the head "transaction," none of which appear to have any material bearing on the subject now under discussion.

It does not appear to have been the intention of the framers of the Code to invest "avocats" or "avoués" with any new or exceptional powers, but rather to apply to them the general law with respect to mandatories as far as it was applicable.

In their Lordships' opinion Mr. Laflamme had not authority, by reason of his being "avocat" and "avoué," to bind his client by this "transaction."

If this be so, the next question is whether any special authority to make this "transaction" has been proved? It has been admitted that such special authority need not have been in writing.

The evidence relied upon by the plaintiff on this subject is to be found in an affidavit made by Mr. Laflamme in the original suit, which may be referred to inasmuch as it has been put in evidence by the plaintiff, in which Mr. Laflamme states:—"The defendant then and there signed the same (the transaction), together with this deponent, on behalf of plaintiff, *by whom he was fully authorized*." And in his deposition as a witness for the defendant, "Je lui dis alors ce que mon client consentirait à accepter, que j'étais autorisé à régler sur ces bases."

No questions were put to Mr. Laflamme by the plaintiff.

In their Lordships' opinion these allegations are consistent with a belief which Mr. Laflamme may have *bonâ fide* entertained, that his character of "avoué" gave him authority to conclude the "transaction." Mr. Laflamme must have been aware of the importance to his client of proving a special authorization, and if such had been given, he might and probably would have been called by the plaintiff to prove it. Called by the defendant, he might still have proved it by putting in the written authority, if the authority were in writing, or, if it were given by a verbal communication, by stating the effect of that communication, and where and when it was made. But Mr. Laflamme makes no mention of any special authority, and in absence of such mention their Lordships cannot assume it.

King and Tinsoneault.

There being no evidence of special authority, it becomes unnecessary to deal with the argument on the part of the defendant, that, although the special authority need not have been in writing, still that the proof of it, or, at all events, the commencement of proof, must have been in writing, and that no such commencement has here been shown.

It has been contended further, on the part of the plaintiff, that even assuming Mr. Laflamme not to have been authorized, still the defendant, having treated him as authorized, could not resile from his agreement, until a reasonable time had elapsed for the ratification of Mr. Laflamme's act by his principal; and, in support of this proposition, a passage from Toullier has been quoted. It is enough to say that, assuming this to be Canadian law, of which their Lordships are by no means satisfied, in their opinion more than a reasonable time for ratification of the "transaction" by the plaintiff had elapsed, before it was repudiated by the defendant.

The decision which their Lordships have come to on the question of authority disposes of the case. It therefore becomes unnecessary to determine the further question which would have arisen had their decision on this point been otherwise, whether the defendant is entitled to relief from the agreement on the ground of mistake, surprise, or fraud, and their Lordships are spared a somewhat painful investigation into many circumstances which it has been unnecessary to notice.

Their Lordships will humbly advise Her Majesty to reverse the Judgment of the Court of Queen's Bench, except so far as it affirms that of the Superior Court and condemns the appellant in the costs of the Appeal; and to direct that that Appeal do stand dismissed and the Judgment of the Superior Court affirmed in all respects with the costs of this Appeal.

Mr. *Fry*, Q.C., and Mr. *H. A. Giffard*, Q.C., for appellant.
Mr. *Bompas* and Mr. *Kemelm Digby*, for respondent.

(J. K.)

COUR SUPERIEURE, 1878.

EN REVISION.

MONTREAL, 30 AVRIL, 1878.

Coram [redacted] DORION, J., RAINVILLE, J.

No. 2319.

Grenier vs. *Leroux*.

JUGE :—Que la stipulation faite au profit d'un tiers dans un acte de donation, peut être révoquée, par le stipulant, même sans le consentement du donataire, s'il n'a pas d'intérêt à l'accomplissement de la stipulation, tant que celui au profit duquel la libéralité est faite n'a pas manifesté l'intention de l'accepter.

2. Que la convention entre deux personnes que l'une d'elles encherira sur une propriété devant être vendue par le shérif jusqu'à un certain montant et cèdera la revendera à l'autre, est parfaitement licite et ne peut invalider le décret.

DORION, J. Olivier Grenier, père, a fait une donation entre-vifs à Olivier Grenier, son fils mineur, d'une terre située au Côteau du Lac, à la charge de payer 1,000 livres, ancien cours, à chacun de ses frères et sœurs à leur âge de majorité. Cette donation a été acceptée par l'aïeul du donataire. Quelques mois plus tard, le donateur résilia et révoqua cette donation avec le concours de celui qui l'avait acceptée pour le mineur. L'acceptation par l'aïeul d'une donation onéreuse comme celle-ci n'était pas irrévocable à l'égard du mineur qui pouvait la répudier à son âge de majorité, mais elle l'était à l'égard du donateur, et je ne vois pas que le grand-père du donataire eut aucune qualité pour délier le donateur de son engagement. La résiliation de la donation était donc nulle quant à Olivier Grenier, fils, mais elle avait toute sa force quant aux frères et sœurs de ce dernier qui n'avaient pas accepté la libéralité stipulée en leur faveur dans l'acte de donation. Cette libéralité pouvant être révoquée par le stipulant même sans le consentement du donataire promettant en tout temps avant son acceptation, (*). A son âge de majorité Olivier Grenier, fils, a fait signifier à son père, qui était toujours resté en possession de la propriété donnée, une acceptation formelle de la donation. A cette époque la propriété était sous saisie à la poursuite des créanciers d'Olivier Grenier, père. Après avoir fait signifier son [redacted] d'acceptation, Olivier Grenier, fils, fit une opposition afin d'annuler à la saisie et revendiqua la propriété comme lui appartenant. Cette opposition eut l'effet de suspendre la vente. Dans l'intervalle des pourparlers eurent lieu entre [redacted] Grenier fils, et le présent défendeur qui était aux droits des créanciers saisissants, et le résultat de ces pourparlers fut qu'Olivier Grenier, fils, admit la créance des saisissants comme bien fondée sur la propriété saisie, consentit à ce qu'elle fut vendue comme appartenant à Olivier Grenier, père, et discontinua son opposition. [redacted] ce n'était rien moins qu'une renonciation à l'acceptation qu'il avait faite de la donation et une admission tacite de la résiliation. Or du moment qu'Olivier Grenier, fils, reconnaissait et ratifiait cette résiliation, les droits de ses frères et sœurs qui n'avaient pas accepté la

(*) *Demolombe, No.* 249.
C. C. art. 1029.
C. Nap. art. 1121.
J. du Palais, 1878, 1—123.

libéralité stipulée à leur égard, s'éteignaient complètement. Le demandeur qui est un des frères d'Olivier Grenier, fils, était dans ce cas; donc son droit de réclamer 1500 livres a. c. de ce dernier n'existe plus. Or s'il n'a pas de créance, il n'a pas d'hypothèque. Malgré cela il a porté la présente action en déclaration d'hypothèque contre le défendeur qui a acheté la propriété à la vente qui en a été faite par le shérif sur un bref de venditioni exponas. Le défendeur, qui a payé son prix d'adjudication, oppose son titre du shérif ainsi que la résiliation du dit acte de donation. La position du défendeur me parait inattaquable.

En supposant même que le demandeur eut eu une créance hypothécaire sur l'immeuble en question, elle est purgée par le décret et c'est sur le produit de la vente qu'il devait se pourvoir. Au lieu de cela, il laisse vendre la propriété, distribuer les deniers qui proviennent de cette vente, et vient ensuite troubler l'acquéreur sous prétexte qu'il y a eu collusion entre lui et Olivier Grenier, fils, pour le frauder!

Le frauder de quoi? C'est ce que je ne puis comprendre. On vient de voir que le donateur pouvait révoquer la libéralité faite à un tiers tant qu'elle n'était pas acceptée. C'est ce qui a été fait ici et lorsque le défendeur a fait des arrangements avec Olivier Grenier, fils, le demandeur était sans intérêt, le demandeur n'ayant ni créance, ni hypothèque. En supposant même que le demandeur aurait eu un droit quelconque, les conventions privées intervenues entre le défendeur et O. Grenier, fils, à raison desquelles ce dernier s'engageait à discontinuer son opposition, n'affectait aucunement le demandeur dont le droit restait intact. A moins de faire voir que la vente par le shérif, elle-même, a été irrégulière et frauduleuse; (ce qui ne paraît pas) le demandeur ne pouvait réussir dans son action.

La convention par laquelle le défendeur promettait d'enchérir sur la propriété jusqu'à un certain montant et de la revendre à O. Grenier, fils, est une convention très ordinaire et parfaitement licite. La cour de première instance (Dunkin, J.) a cru voir quelque chose de louche dans toute cette affaire et a maintenu les prétentions du demandeur.

Ce jugement suivant moi ne peut se soutenir ni en loi ni en justice.

JUGEMENT:—"La cour, etc. Considérant que la donation faite le 27 septembre 1858, par Olivier Grenier, père, à Olivier Grenier, son fils, mineur, et acceptée par son aïeul, Frs. Grenier, a été le 26 novembre 1858 subséquemment révoquée et résiliée par le dit Olivier Grenier, père, du consentement du dit Frs. Grenier, et cela avant la majorité du dit Olivier Grenier, fils, et avant l'acceptation par le demandeur de la libéralité stipulée en sa faveur dans la dite donation;

"Considérant que le dit Olivier Grenier, père, est toujours resté en possession du dit immeuble jusqu'à l'époque du décret invoqué par le défendeur;

"Considérant que le dit Olivier Grenier, fils, en discontinuant son opposition à la vente de l'immeuble désigné en la déclaration en cette cause, par le shérif, sur la saisie qui en avait été faite sur son père, a acquiescé à la révocation et résiliation de la dite donation;

"Attendu qu'aux termes de l'article 1029 du Code Civil la stipulation faite

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au profit d'un tiers est valable si elle est la condition d'une donation que l'on fait à un autre ; que d'après le même article celui qui a fait la stipulation ne peut la révoquer si le tiers a déclaré vouloir en profiter ; d'où il suit que jusqu'à telle acceptation et en conformité des règles ordinaires sur les contrats, la stipulation favorable au tiers peut être retirée, sans qu'il soit besoin du concours de la volonté du donataire principal à l'égard duquel la stipulation dont il s'agit n'est qu'une charge ;

" Considérant que l'acceptation subséquente du demandeur de la libéralité stipulée en sa faveur par la dite donation est en conséquence devenue sans effet, et que le demandeur n'a ni créance, ni hypothèque pour réclamer la somme de deniers qu'il demande par son action ;

" Considérant qu'en supposant même qu'il eut eu une telle créance et hypothèque, cette hypothèque a été purgée par la vente faite au défendeur par le shérif, sur le produit de laquelle vente le demandeur pouvait faire valoir tous ses droits hypothécaires s'il en avait, les transactions entre Olivier Grenier, fils, et le défendeur n'affectant en aucune manière le demandeur dans la présente cause ;

" Considérant que le demandeur n'a ni allégué, ni prouvé que la dite vente du shérif fut irrégulière ou frauduleuse, ni même que la propriété ait été vendue au dessus de sa valeur à raison des faits du défendeur et du dit Olivier Grenier, fils

" Considérant que dans le jugement dont est appel, il y a mal jugé, casse et annule le dit jugement, et déboute l'action du dit demandeur avec dépens."

Doutre, Doutre & Robidoux, avocats du demandeur.

Geoffrion, Rinfret & Dorion, avocats du défendeur.

(J. K.)

COUR DE REVISION, 1878.

MONTREAL, 30 MARS, 1878.

Coram MACKAY, J., DORION, J., RAINVILLE, J.

No. 2268.

Prévost vs. *Wilson*, et *Rodgers et al.*, opposants.

JUGE :—Que des ouvriers et journaliers qui travaillent dans une carrière n'ont pas de privilège sur les outils servant à l'exploitation de la carrière, ni sur la pierre qui en est extraite et taillée, surtout quand ces outils et cette carrière n'appartiennent pas à celui qui a employé les ouvriers.

DORION, J. Le demandeur tant pour lui-même que comme représentant un certain nombre de journaliers qui ont travaillé avec lui dans une carrière à Ste. Geneviève, a obtenu jugement contre le défendeur Wilson pour les gages qui leur étaient dus pour avoir ainsi été employés dans la dite carrière, tant pour extraire que pour tailler et préparer la pierre, à venir à l'époque à laquelle Wilson, qui avait engagé ces hommes à la journée, a abandonné la carrière et a laissé le pays.

L'action a été accompagnée d'une saisie-arrêt avant jugement, en vertu de laquelle le demandeur a fait saisir toute la pierre qui se trouvait alors avoir été extraite de la carrière et, qui était encore sur les lieux, ainsi que les machines et ins ments servant à l'exploitation de la carrière.

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Les opposants qui se prétendaient propriétaires de cette pierre et des autres objets saisis, ont obtenu de cette cour la possession de ces effets en donnant caution de les représenter s'il y avait lieu.

Le demandeur ayant pris exécution et sommé les opposants de produire les articles saisis, ceux-ci ont fait leur opposition en en réclamant la propriété et demandant le renvoi de la saisie.

Le demandeur contesta cette opposition pour quatre raisons :

1o. La pierre n'appartient pas aux opposants.

2o. Les opposants ayant donné caution de rapporter les objets saisis, n'ont plus le droit d'en réclamer la propriété à l'égard du demandeur.

3o. Les opposants ont pendant l'instance originaire produit une intervention réclamant les effets saisis sur laquelle ils n'ont pas procédé, et que la saisie-arrêt ayant depuis été déclarée bonne et valable, il y a chose jugée entr'eux et le demandeur.

4o. Le demandeur a un droit de rétention sur ces objets saisis pour le paiement de sa créance qui est privilégiée.

La Cour a rejeté les trois premiers moyens de contestation du demandeur, mais elle a accueilli favorablement le quatrième et renvoyé l'opposition des opposants, parceque le demandeur avait un privilège sur tout ce qui se trouvait dans la carrière.

Sur la question de propriété, il ne me paraît y avoir aucun doute. La carrière même appartenait aux opposants qui l'avaient acheté du nommé St. Denis, le 29 août, 1876. Le défendeur n'était qu'un sous contracteur qui, par écrit en date du mois de juillet précédent, s'était chargé moyennant un certain prix que lui payait les opposants d'extraire la pierre de la carrière (les opposants lui fournissant les machines nécessaires), et de la faire tailler et préparer pour l'usage pour lequel elle était destinée. Avant la saisie toute la pierre qui était prête à être enlevée a été mesurée et le défendeur a reçu le paiement de ce qui lui était dû à cet égard. Ensuite il a abandonné son contrat et les opposants ont pris possession de la carrière et des machines qui leur appartenaient, ainsi que de toute la pierre. Ce n'est que plusieurs jours après que les hommes eussent cessé de travailler à la carrière que le demandeur a pris sa saisie-arrêt avant jugement.

En vertu de quoi peut-il réclamer un privilège sur des objets qui n'appartiennent pas et n'ont jamais appartenu à son débiteur ?

Le jugement ne le dit pas, mais le demandeur dans son factum nous réfère à quatre articles du Code Civil, les articles 194, 1993, 2001 et 2006.

Le premier ne s'applique pas au privilège, mais seulement au droit de propriété, et ne peut être invoqué que dans les cas où le fait de l'accession que l'on réclame a eu lieu sans le consentement des propriétaires ; 10 Demolombe, No. 184.

L'art. 1993 ne fait que donner une règle bien connue, c'est qu'il y a des privilèges sur tous les meubles et d'autres sur certains meubles en particulier.

L'art. 2001 concerne le privilège de celui qui a fait des avances pour la conservation de la chose. Ce n'est pas le cas qui nous occupe. Celui qui n'a fait *qu'améliorer* une chose n'a pas le privilège de celui qui l'a *conservé*. Il n'a qu'un droit de rétention, et n'a plus de privilège du moment qu'elle est sortie de

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sa possession. D'ailleurs ici les ouvriers qui ont travaillé dans la carrière n'en ont jamais été en possession.

Reste donc l'art. 2006 qui donne aux domestiques et serviteurs un privilège sur tous les meubles *appartenant au débiteur* pour leurs gages, et qui ajoute que les commis, compagnons, et apprentis auront la même préférence, mais seulement sur les marchandises et effets qui se trouveront dans le magasin, échoppe ou boutique où leurs services étaient requis pour un terme d'arrérages n'excédant pas trois mois.

Cet article encore ne me paraît pas venir au secours du demandeur. Les commis, compagnons et apprentis dont il y est question, sont des gens engagés à l'année, mais ne comprend nullement les ouvriers à la journée—Rollandde Villargues, Priv. art. 4, No. 37, 1 Troplong, P. et H. No. 142.

La cause de Graham & Côté, décidée par la Cour d'Appel en 1872, et qui a été suivi depuis par plusieurs décisions analogues, était, à mon sens semblable à celle-ci. Il est vrai que le motivé du jugement ne parle pas de privilège: Il est dit seulement qu'il n'y avait pas lieu à une saisie conservatoire. Pourquoi n'y avait-il pas lieu à une saisie-conservatoire, c'est parcequ'il n'y avait pas privilège; car il est élémentaire que chaque fois qu'il y a privilège il y a saisie conservatoire si le privilège est en danger, quand même il n'y aurait pas de fraude de la part du débiteur.

Girouard, pour le demandeur. Jugement infirmé.

Abbott & Co., pour les opposants.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH JUEY, 1877.

Coram RAINVILLE, J.

No. 2186.

Boudry et al. vs. *Rolland* et al.

HELD:—That universal legatees under a will, who have not renounced, are bound to pay the debts of the testator, notwithstanding he may have appointed executors, whom he vested with all his estate.

This was an action against the defendants as the universal legatees of the late Henri Auguste Rolland. The defendants pleaded that the deceased, by his will, vested his whole estate in his executors, whom he directed to administer his estate and pay his debts, and that the executors ought consequently to have been sued and not the universal legatees. And the plaintiffs replied, that the defendants had never renounced their legacy in their favor, and that the fact of the appointment of executors did not interfere with their liability.

The following was the judgment of the Court:—

"La Cour * * * considérant que les demandeurs ont prouvé les allégations de leur demande;

"Considérant qu'aux termes de l'article 735 du Code Civil les légataires universels sont tenus d'acquitter toutes les charges et dettes de la succession;

"Considérant que le fait que le testateur a institué des exécuteurs testamentaires entre les mains desquels il s'est dessaisi de tous ses biens, n'empêche pas les légataires universels d'être responsables des dettes de la succession ;

"Déboute les défendeurs de leur exception, et condamne les deux défenderesses personellement, et le dit Armstrong ès-qualité de tuteur au dit mineur, conjointement et solidairement à payer aux demandeurs la somme de $235 19c. cours actuel, étant pour marchandises et effets de commerce vendus et livrés par les demandeurs au dit Henri Auguste Rolland, (maintenant représenté par ses dits enfants, ses légataires universels,) aux dates et pour les prix portés au compte produit ; avec intérêt sur la dite somme de $235 19c. à compter du 19 avril 1877, jour de l'assignation, et les dépens, distraits à Messrs. De Bellefeuille & Turgeon, avocats des demandeurs."

Judgment for plaintiffs.

De Bellefeuille & Turgeon, for plaintiffs.
H. W. Austin, for defendants.
(S. B.)

COUR SUPERIEURE, 1878.

EN REVISION.

MONTRÉAL, 30 AVRIL, 1878.

Coram TORRANCE, J., DORION, J., PAPINEAU, J.

No. 793.

Lefebvre vs. *Branchaud*.

VENTE—JUGEMENT—ENREGISTREMENT.

1. Que jusqu'à qu'un acquéreur d'immeubles ait enregistré son titre d'acquisition, les créanciers du vendeur peuvent subséquemment à la vente, prendre hypothèque légale ou judiciaire sur les immeubles vendus.
2. Que la vente sans enregistrement n'est d'aucun effet à l'égard des tiers.

DORION, J. Le demandeur a acheté un immeuble le 28 novembre 1876, et n'a fait enregistrer son titre d'acquisition que le 5 décembre suivant. Dans l'intervalle, c'est-à-dire, le 30 novembre, le défendeur a obtenu un jugement contre le vendeur et a pris hypothèque le 1er décembre sur l'immeuble en question comme étant encore la propriété du vendeur, vu que l'acquéreur n'avait pas enregistré son titre de possession lors de l'inscription prise par le défendeur.

Le demandeur demande la radiation de cette hypothèque comme ayant été prise sur un immeuble qui lors de la reddition du jugement n'appartenait plus au débiteur.

La cour de première instance (Bélanger, J.,) a accueilli cette demande et déclaré l'hypothèque nulle. Il n'y a pas de difficulté sur les faits. Il s'agit d'une pure question de droit.

La vente non enregistrée a-t-elle dessaisi le vendeur vis-à-vis des tiers, de manière à ce que ceux-ci ne puissent exercer leurs droits sur le bien vendu et acquérir l'hypothèque judiciaire ou légale sur icelui ?

Lefebvre vs. Blanchaud.

Je n'hésite pas à me prononcer pour la négative, et je crois que le jugement dont est appel est contraire à la lettre et à l'esprit de nos lois d'enregistrement qui ont pour objet la publicité des droits réels afin d'en assurer une protection efficace.

Pour l'affirmative l'on se fonde sur l'art. 2026 du Code Civil, qui dit que l'hypothèque judiciaire n'affecte que les immeubles qui appartiennent au débiteur et qui sont désignés dans un avis produit au bureau d'enregistrement; et que la vente étant parfaite par le seul consentement des parties d'après l'art. 1472, il s'en suit que, lorsque le jugement a été obtenu et enregistré, le débiteur n'était plus propriétaire et que le défendeur n'a pu acquérir aucun droit d'hypothèque sur l'immeuble en question en vertu de son jugement. C'est là une erreur qu'il est facile de démontrer. L'art. 1472 est subordonné aux dispositions de l'art. 1027, qui dit que dans les contrats pour l'aliénation d'immeubles la vente sera parfaite par le seul consentement des parties, même vis-à-vis des tiers, mais sujette aux dispositions relatives à l'enregistrement des droits réels sur tels immeubles.

Il faut donc recourir aux dispositions de la loi concernant l'enregistrement des droits réels pour voir quand la vente est devenue parfaite à l'égard des tiers.

Le Code n'est pas aussi explicite, que ne l'était l'Ordonnance d'Enregistrement de 1841, quoique cependant les codificateurs déclarent dans leur rapport, qu'ils n'ont pas entendu en restreindre les dispositions, mais même les étendre dans le sens de la publicité des droits réels.

Le Code au lieu de mentionner spécialement les différents actes qui pouvaient affecter les immeubles, comme ventes, donations, hypothèques conventionnelles, hypothèques légales, judiciaires et autres, comme ne devant avoir aucun effet à l'encontre de ceux qui auraient enregistré les premiers leurs droits résultant des mêmes sources, ainsi que le faisait l'ordonnance, a procédé, d'une manière un peu différente.

Il a commencé par déclarer (art. 2082) que l'enregistrement des droits réels leur donnait effet et établissait leur rang de priorité suivant les dispositions suivantes du Code. L'art. 2083 décrète que tous les droits réels sujets à l'enregistrement prennent effet du jour de l'enregistrement à l'encontre de tous créanciers qui ont enregistré subséquemment ou qui n'ont pas enregistré du tout.

Ensuite l'art. 2098 dit que tout titre translatif de propriété doit être enregistré, et que tout acte de vente ou hypothèque consenti par un acquéreur qui n'aura pas enregistré son droit de propriété, sera sans effet.

Or si l'acquéreur, non enregistré, ne peut conférer aucun droit quelconque, il faut bien dire que c'est parcequ'il n'est pas propriétaire vis-à-vis des tiers. Alors c'est le vendeur qui reste propriétaire. Il peut vendre, hypothéquer, et ses créanciers qui obtiennent des hypothèques judiciaires ou autres, et qui prennent inscription avant l'enregistrement de la vente doivent être préférés. Cette doctrine est suivie en France, où depuis 1855 le même système que nous avons ici a été établi. 24 Dèmolombe, No. 450.

"... L'article 3 de la loi de 1855 a voulu que l'on considérât comme *tiers*, "non seulement ceux qui auraient acquis des droits sur l'immeuble en contre- "tant avec le vendeur, comme un second acheteur ou un créancier à hypothèque

[Lefebvre vs. Branchaud.

" conventionnelle, mais encore ceux qui y auraient acquis des droits de son chef, " sans contracter avec lui, comme son créancier à hypothèque légale ou judi- " ciaire... "

Dans la cause de Chesner *vs.* Jamieson, et Huntor, opposant, rapportée au 19e vol. du *Lower Canada Jurist*, p. 190, la Cour d'Appel a unanimement maintenu une hypothèque conventionnelle enregistrée, à l'encontre d'un acte de vente passé six ans auparavant et qui ne l'était pas. Je ne vois aucune raison de faire une distinction entre l'hypothèque conventionnelle et l'hypothèque légale ou judiciaire. La loi n'en fait pas, et les mêmes raisons existent dans un cas comme dans l'autre.

C'est à l'acheteur à s'imputer la faute de n'avoir pas enregistré son titre en temps utile. Pourquoi les sociétés qui prêtent de l'argent ne se dessaisissent-elles de leurs deniers qu'après avoir fait enregistrer l'acte d'obligation et s'être assurées que leur hypothèque a bien pris le rang qu'elles entendaient lui donner? C'est justement pour se protéger contre des ventes ou autres transactions occultes que l'on pourrait ensuite leur opposer.

L'acquéreur n'a qu'à prendre les mêmes précautions et tous les droits seront sauvegardés, et les placements sur la propriété foncière auront cette garantie que la loi a eu en vue en soumettant les droits réels à l'enregistrement.

Pour ces raisons, je suis d'opinion (et la cour est unanime) de renverser le jugement de la cour de première instance, et débouter l'action du demandeur.

Le jugement en révision est motivé comme suit :

" La Cour considérant qu'aux termes des art. 2082 et 2083 du Code Civil du Bas-Canada, l'enregistrement des droits réels est nécessaire pour leur donner effet vis-à-vis des tiers, et établir leur rang entr'eux ;

" Considérant que lorsque L. R. Baker a obtenu jugement contre François X. Lachance le 30 novembre 1876, et l'a fait enregistrer, le demandeur n'avait pas enregistré son titre d'acquisition de l'immeuble désigné en la déclaration en cette cause ;

" Considérant que le dit L. R. Baker a pu valablement prendre hypothèque sur le dit immeuble, et que l'action du demandeur pour faire radier cette hypothèque était mal fondée ;

Considérant qu'il y a erreur dans le dit jugement, casse, annule, etc., et déboute l'action avec dépens."

Jugement infirmé.

Duhamel, pour le demandeur.
Branchaud, pour le défendeur.

(J. K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 21st DECEMBER, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

GRAFFTIS, APPELLANT;

AND

SLEEPER, RESPONDENT.

HELD:—That an appeal instituted from a judgment in review, in a proceeding in insolvency, after the expiration of eight days from the rendering of the judgment, will be rejected on motion.

DORION, C. J. A judgment rendered in the Court below was taken to Review, and the judgment there was adverse to Grafftis. After the eight days had expired he gave notice that he intended to appeal from the judgment of the Court of Review to this Court. The other party now moves that the appeal be rejected because the appeal has not been taken within the eight days. Section 128 of the Insolvent Act of 1875 requires that the appeal in all matters of insolvency be taken within eight days after the judgment is rendered. This applies to judgments in review as well as to those in first instance, and, therefore, the appeal must be dismissed.

(S. B.) Appeal rejected.

SUPERIOR COURT, 1878.

MONTREAL, 8TH APRIL, 1878.

Coram DORION, J.

No. 61.

Farmer vs. *O'Neill.*

HELD.—That an award of an arbitrator and *amiable compositeur*, which does not state that he heard the parties, is illegal, and will be rejected on motion.

PER CURIAM. This is a motion by the defendant to reject the award of the Rev. Father Dowd, as sole arbitrator and *amiable compositeur*, on the ground that it fails to state that the parties were heard, and because, in point of fact, they were not so heard. Although this is a friendly reference, namely to the *curé* of the parties, yet the parties are certainly entitled to be heard before a decision is arrived at. Here they have not only not been heard, but there is a total absence of evidence that they had even an opportunity allowed them to state their respective pretensions. The motion is, therefore, granted with costs.

Motion to reject award granted.

Doutre & Co., for plaintiff.
Bethune & Co., for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND SEPTEMBER, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J.

COTTON,

APPELLANT;

AND

THE ONTARIO BANK,

RESPONDENT.

HELD:—That a rule to show cause why a writ of appeal should issue will be rejected, where the only cause for the rule was the mere fact that the delay for appealing under the Insolvent Act had expired.

DORION, C. J. The proceeding here is somewhat novel. It is a motion on the part of the Ontario Bank that Cotton show cause why a writ of appeal should issue in his behalf. It is in the nature of an injunction to the clerk of the court not to issue the writ, but it is in the form of a rule upon the appellant to show cause why a writ should issue. It appears that a writ of compulsory liquidation issued, at the instance of the Dominion Type Foundry, against James Cotton. Some proceedings were had, and the writ was quashed on petition. Then a petition was presented by the Ontario Bank, in the nature of a tierce opposition, complaining of this judgment, and another judge set aside the judgment complained of, thereby reviving the proceeding in insolvency. The delay for appealing from the latter judgment was allowed to elapse, and subsequently Cotton filed a fiat in the office to obtain a writ of appeal. The Ontario Bank at once took a rule upon Cotton to show cause why a writ should issue after the delay had elapsed, and the rule was granted *nisi*. The opinion of the court is that such a proceeding ought not to be adopted unless a very clear case could be shown that no appeal lay, and that the party was trying to get the appeal simply to frustrate the ends of justice. In such a case the court might, no doubt, interfere and stop the issue of the writ, and even punish the party for contempt. But there is no such case here, and the rule will, therefore, be rejected, reserving to the Ontario Bank the right to urge all objections hereafter. It may be said that there was a good deal that was extraordinary in the proceedings in the court below, but the present decision goes no further than to reject the rule.

Rule discharged.

Curran & Coyle, for appellant.

Abbott & Co., for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND SEPTEMBER, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

RIDDELL, APPELLANT;

AND

McARTHUR, RESPONDENT.

HELD:—That an appellant will not be ordered to give new security, because one of his sureties admits and declares that he was really insolvent at the time he signed the bond, although he then declared he was solvent.

DORION, C. J. An appeal was taken, and two sureties were offered. Both these sureties justified, and the security was received. Subsequently one of the sureties came up and declared that he was insolvent. He had not become insolvent since, but he said that when he declared he was solvent he was really insolvent. It would require strong evidence to overrule the original declaration, and here there is nothing but the statement of the party himself. The motion for new security must be rejected.

Motion rejected.

Macmaster & Co., for appellant.
Duhamel & Co., for respondent.
(S. B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 14TH DECEMBER, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

CALDWELL, APPELLANT;

AND

MACFARLANE, RESPONDENT.

HELD:—That in an action for imprisonment under sec. 136 of the Insolvent Act of 1875, it is not necessary to bring a separate action on each separate invoice of goods, but one action will suffice, as respects all the purchases.

DORION, C. J. The action was brought by Caldwell as representing the late partnership of Caldwell & Watchorn, alleging that Macfarlane had purchased goods on credit, knowing himself to be insolvent, and concealing the fact with intent to defraud. The conclusion was that the respondent be imprisoned for such time, not exceeding two years, as the court should order. The respondent pleaded by demurrer that there were twenty-six different purchases alleged, each of which constituted a separate offence, while there was but one prayer, and that the court could not adjudge imprisonment under the circumstances. Upon that demurrer the court below dismissed the action. The court here is unanimous that there is nothing in that plea. This is a civil remedy granted to the credi-

tor, and the imprisonment was ordered, not for an absolute term, but until the debt and costs were paid. It was not necessary, therefore, to charge each offence separately. The court has no hesitation in saying that the ground on which the action has been dismissed in the court below is unfounded. It is necessary, therefore, to look into the case on its merits. Macfarlane, before his insolvency, purchased goods to the amount of $32,000, and the appellant only received dividends from his estate to the amount of about $6,000. To prove that Macfarlane was insolvent an accountant was brought up to state that there was a large deficiency in the estate. But this deficiency was only arrived at by striking out certain amounts, and there is not enough to satisfy the court that Macfarlane must have known that he was insolvent. The purchases in question extended over six months, and it appears that Macfarlane during this time actually reduced his indebtedness to the appellant, having made payments amounting to $58,000. The Court considers that this fact rebuts any presumption which might arise from the state of Macfarlane's affairs. The demand for imprisonment, therefore, cannot be granted. But the appellant is entitled to judgment for his debt, and the judgment below, which dismissed the action altogether, must be corrected to this extent. Each party, however, will have to pay his own costs in appeal. The respondent is condemned to pay the debt; demand for imprisonment rejected.

Judgment of Superior Court reformed.

Abbott & Co., for appellant.
Kerr & Carter, for respondent.
(S. B.)

COURT OF REVIEW, 1878.

MONTREAL, 5TH APRIL, 1878.

Coram TORRANCE, J., DORION, J., RAINVILLE, J.

No. 2030.

D'Aoust vs. *McDonald*, and *Norris*, Opposant, and Plaintiff, contesting.

HELD:—1. That though C. S. C. Ch. 41 was repealed 17th March, 1874, by 37-8 Vic. ch. 128, sect. 3, a bill of sale by way of mortgage of a vessel registered under the former statute, made since such repeal, in the form usual under the former statute, creates a valid mortgage.

2. That it was not necessary to the validity of a mortgage on such vessel that she should first be re-enregistered under the Imperial Merchants Shipping Act of 1854, and the form I. of said Act adhered to.

3. That the form of bill of sale by way of mortgage was in the case of such vessel sufficiently near the form I. of the Merchants Shipping Act to be valid thereunder.

4. That the privilege accorded by C. C. 2388 to the wages of the master and crew of ships for the last voyage does not apply to a balance of wages of a season's continuous navigation on the St. Lawrence and lakes in trips of a few days' duration, even when the master and crew sign articles for the season, and are paid by the month and not by the trip.

5. That a mortgagee of a vessel has no right to oppose and cannot prevent the sale under execution by a judgment creditor, but such sale will not purge his mortgage, and will only convey to the purchaser the rights of the judgment debtor in the vessel, and the mortgagee will retain his rights under his mortgage against the vessel in the hands of the purchaser.

The plaintiff, a mariner, serving on board the defendant's steamer "America," navigating between Montreal and Toronto, had been engaged by the season at monthly wages, and sued for a balance of wages, and attached the vessel, alleging the insolvency of defendant. He obtained judgment, and to the execution

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issued Norris filed an opposition *afin de distraire*, founding his claim on a mortgage dated 27th September, 1874, granted to him by defendant for $6,000, payable as therein and with a clause of power of sale in case of default. He alleged $4,500, as the balance due, and concluded that he has a right to stop plaintiff from proceeding to the sale of the vessel, and to have himself declared *first* mortgagee of the vessel, and to have her delivered up to him as proprietor.

The plaintiff contested this opposition on three grounds:

1. That the mortgage was invalid.

2. That plaintiff had a lien or privilege for his wages, which would out-rank the opposant in any case.

3. That if Norris had a right to oppose, it was *afin de conserver* only, or at the most *afin de charge* and not *afin de distraire*.

On 28th February, 1878, the opposition was maintained with costs by the Hon. Mr. Justice Mackay, whereupon the plaintiff inscribed for review.

Ramsay, for plaintiff contesting:

1. The America was registered under the old Canadian Inland Registration Act, (C. S. C. ch. 41) and the mortgage is made in the form required by sec. 13 of that Act, and under C. C. 2360 *et seq.* and usual thereunder, until that Act was, as well as the articles of the Code cited, *repealed* by 37-8 Vict. (1873, Canada) ch. 128, sect. 3. This repeal took effect 17th March, 1874. Opposant's mortgage is dated 27th September, 1874. The Colonial Act and Articles of the Code being repealed as above, the Imperial Merchants Shipping Act of 1854, (17-18 Vic. ch. 104) which is law throughout the empire, (sect. 1) became our law.

By it (sect. 66) all mortgages "*shall be*" in the form "I" given, which is not that of bill of sale by way of mortgage but a declaration of mortgage or hypothecation. Norris' mortgage is not in that form, or "as near thereto as may be," and fails in consequence.

It has been held that seeing the wording of the Act (*shall be*) the form is sacramental. Liverpool Borough Bank *vs.* Turner, 1 Johnston and Hemming, 159, decided by Sir William PageWood, V. C. 1860, and affirmed in appeal. 2 De Gex, Fisher & Jones, 502. Also see Fisher, Digest, 7906, 7917. The Lord Chancellor (Campbell) remarking in respect to the use of the form "I," that "though the Act contained no provision negativing the validity of a mortgage made otherwise than according to the terms of the Act, the whole scope of the Act was to that effect."

The Imperial Act of 1854 did not repeal the Colonial Act (8 V. ch. 5), which was of older date, (being that now consolidated as C. S. C. ch. 41) because, though the Imperial Act applied to the whole empire (sect. 17), it became *necessary* to come under it only to enable a vessel to proceed to sea (sect. 19), enjoying the privileges of a British ship (sect. 106). This is shewn by wording of C. S. C. 41, s. 27. It was, however, always *permissive* under its wide terms, to register under the Imperial Act, and quite as many inland going vessels were registered under it as under the Colonial Act.

The Colonial Act applied only to Colonial *built* ships (sect. 2), while the Imperial Act was open to foreign-built ships, if British *owned*.

Under the Colonial Act, a ship registered thereunder could be made available

ss security for a loan by bill of sale by way of mortgage in the form of Norris' deed under C. S. C. ch. 41, sects. 13, 23, 24, & C. C. 2360, 2371.

But what happened on the repeal by 36 V. ch. 128, sect. 3, of C. S. C. 41, and the C. C. articles? Her registration remained good in terms of sect. 14 of the repealing act, unless she wished to go to sea, for if she did not register under the Imperial Act she could be stopped under sect. 19.

But in what way could she be made security for a loan, when the lender intended to leave her in possession of her owner? The Colonial Act being repealed, there was no law applicable to her under which she could be so made a security. She is a moveable, and a moveable cannot be hypothecated.

Norris contends that sect. 14 of 36 V, ch. 128, saves him. Plaintiff submits that the effect of that clause is that registration need not be re-made when she is not going to sea, *if* the owner does not need to mortgage her.

If he does he must bring her under an Act which permits her being made a security. The only Act that does so is the Imperial Act of 1854.

By sect. 66 a ship registered under that Act "*may* be made a security for a "loan, etc., and the instrument creating such security and mortgage *shall* be in "the form I." Therefore to be able to mortgage her validly he must register her under that Act, and then use form "I."

If he *sells* her he does not need to do so, though it would be advisable, because, being a moveable, a sale followed by delivery *bonâ fide*, and evidenced in any way, would be valid, but she would navigate as a maritime outlaw without British rights or protection.

2. By Code 2383 the wages of crew for "the last voyage" have privilege. Plaintiff submits that the last voyage of this vessel was the continuous voyage of the whole season, because the crew was hired for the season and signed articles for the season's voyaging, while a sea-going crew sign for a voyage from one place to another. Frechette vs. Gosselin (S. C. Quebec, Bowen, C. J., Duval, Meredith, J J.) 1 L. C. R. 145—*held*, that master has privilege for amount of a balance of the *season's* wages over a mortgagee. The work of the crew is necessary that the ship may earn freight, which is necessary that the owner may pay his interest to mortgagee, and accordingly by C. C. 2383, the crew's wages have precedence over all hypothecations of the ship in the order of distribution.

3. Norris, if his mortgage is good, is not entitled to prevent sale on execution, but to be paid out of proceeds, to secure which his proceeding should be an opposition *afin de conserver*, or at most to have her sold subject to his mortgage, so that only defendant's interest in her over his mortgage title under C. S. C. 41, sects. 13 and 23, if they apply, would be sold, and then it should be by opposition *afin de charge*.

Norris cited *Kelly & Hamilton*, 16 L. C. J. 320, but all that the court there held was that the bailiff's sale did not extinguish the mortgage, and that it only ordered the vessel to be delivered to the mortgagee, *that it might be sold to satisfy his mortgage*, and in default of delivery condemned the defendant to pay not the value of the ship, but the amount of mortgage. It will be noted that the execution creditor in *Kelly & Hamilton* held only a common debt judgment against the owner of the barge, while in this case, plaintiff holds one of privilege on the ship, and one preferred to opposant himself.

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To admit plaintiff's pretension that the vessel cannot be sold, nor even defendant's interest in her sold, permit an owner of a ship worth $20,000, upon borrowing $100 *bonâ fide*, to give a mortgage therefor, and then to defeat attempts of his creditors to make the surplus $19,900 of value available for his debts.

The Court cannot grant the conclusions *afin-de charge* or *conservatoire* when those *de distraire* are asked.

The plaintiff submits that the judgment should be revised and the opposition dismissed with costs.

Trenholme, for opposant:

Under the Merchants Shipping Act of 1854 a bill of sale by way of mortgage, as in this case, is perfectly valid as a mortgage. Sec. 66 prescribes no cast iron form of mortgage, but only requires that the instruments shall be in the form I, or as near the prescribed form as circumstances may admit.

The Imperial Act 18 and 19 Vict. cap. 91, sec. 11, clearly contemplates other forms of mortgages as valid. Opposant contends that forms such as this have been usual, and he refers to Maclachlan, Shipping, 2nd Ed., p. 41.

Opposant submits that the Act 36 Vict. cap. 128, does not repeal cap. 41 C. S. C. for the purposes of the present mortgage. Sect. 14 of that repealing Act expressly declares that it shall not be necessary to re-register vessels already registered under cap. 41 C. S. C. "for any purpose whatever, *except to proceed "to sea as a British ship.*" Now a mortgage in the form prescribed by the Imperial Act could not be granted upon any vessel not registered in accordance with that Act, for the simple reason that the data, measurements, etc., which are essential to be [illegible] the form of mortgage of the Imperial Act cannot and do not exist [illegible] vessel is first registered under the Imperial Act.

But the [illegible] referred to states that a vessel need not be re-registered for any purpose except to proceed to sea as a British vessel. As a consequence vessels registered under the Canadian Act continue to be susceptible of being mortgaged in the same form as before the said repealing Act was passed.

The only escape from these conclusions is by the extreme and extraordinary interpretation that the Legislature intended to strike with incompetency to be mortgaged or assigned, all Canadian shipping registered under C. S. C. ch. 41, unless such shipping is first re-registered in accordance with the Imperial Act, and this in face of a clause stating that registration is only required for one purpose.

2. Opposant submits that he is (C. C. 2371) owner of the vessel for all the purposes of his mortgage, and may revendicate her by his opposition *afin de distraire* on the principle established in Hamilton *vs.* Kelly, 16 L. C. Jurist, p. 320.

3. That plaintiff has no prior claim under our law which interferes with this right of opposant is also established, Jasmin *vs.* Lafantasie, (S. C. Montreal, 1862, Smith, J.) 7 L. C. J. p. 119; 13 L. C. R. 226, Delisle *vs.* Lecuyer, (Review, 1871) Berthelot, Mackay and Torrance, J J., 15 L. C. J., 262.

The pretension that a season's trips constitute one voyage under C. C. 2383 has been lately overruled by Johnson, J. Owens *vs.* The Union Bank, Legal News, vol. 1, p. 87.

Were there any doubt on the subject the equities would be in favor of up-

holding opposant's mortgage and not allowing it to be defeated by what would be a technicality *strictissimi juris*. Opposant's mortgage was duly registered, and plaintiff is presumed to have known it during the term that he was allowing his arrears of wages to accrue.

D. Ao vs McDo

On 6th April, 1878, the judgment was reversed by the Court of Review, Torrance, J., dissenting.

Doutox, J. In August, 1874, Norris an[illegible] McDonald an inland registered vessel called the "*America*" [illegible] have been paid cash, and this sale was duly registered. T[illegible] registered previous to the repeal of the chap. 41 of the Co[illegible] Canada.

In September, 1874, McDonald mortgaged to [illegible] Norris for $6,000, payable in three yearly instalments of $2,000 [illegible] is in the form prescribed by the Statute above referred to.

The plaintiff, who is a judgment creditor of McDonald, has caused the "*America*" to be seized in satisfaction of his judgment, and Norris has filed an opposition *afin de distraire* claiming the vessel as his own under his mortgage.

The plaintiff has contested this opposition under three grounds :—

1. That the mortgage is worthless, not being in the form given by the Merchants Shipping Act of 1854, which was the only law in force at the time of the making of said mortgage, the ch. 41 of the Consolidated Statutes having been repealed, 37–8 V., ch. 128, sec. 3.

2nd. That plaintiff's claim was a privileged one which had precedence over that of the opposant.

3rd. That the opposant could not prevent the sale of the vessel, and could only come in either by opposition *afin de charge* or *afin de conserver*.

Upon the first two grounds I am against the plaintiff. The sec. 14 of the above Act, repealing ch. 41 of Consolidated Statutes, expressly declares that vessels already registered need not be re-registered except in one particular case. And the sec. 66 of the Act of 1854 says that the mortgages shall be made in form given, *or* as near to it as circumstances will permit. The vessel having been registered under ch. 41 of the Consolidated Statutes, the mortgage could only be made according to the description contained in the original registration; and as to the rest of the document the forms in both Statutes are materially similar, so that the mortgage is in my opinion perfectly good.

As to the question of privilege, it is impossible to apply Art. 2383 C. C. to this case. This article applies only to the *last* voyage. That does not mean a master of a vessel hired by the season to navigate within the limits of our rivers or lakes, and who makes trips, *not voyages*, every day or two days, and sometimes many trips in one day. This has been decided in many cases.

But I do not consider that the question of privilege or no privilege can affect this case.

The question is whether the defendant has any interest in this vessel, and if he has, can that interest be seized and sold by sheriff, notwithstanding the mortgages that may affect her? The only case in point decided in Lower Canada is that of Kelly & Hamilton, 16 L. C. J., p. 320. In that case the vessel had been sold by sheriff's sale, without opposition from the mortgagee. The mort-

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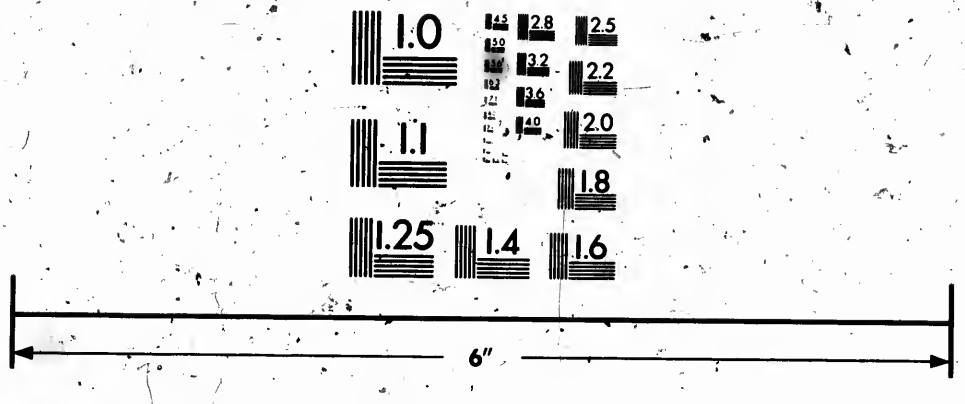

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gagee took a *saisie-revendication*, alleging that his mortgage was then due and payable, and claiming that the vessel be delivered to him in order that it might be sold for the payment of his mortgage, and demanding an order of the court that such sale should take place. This *saisie revendication* was dismissed by the Superior Court, which maintained that the sheriff's sale had purged the mortgage. The Court of Review reversed this judgment, and gave for reasons, not that the sheriff's sale was invalid, but that it could not have transferred to the purchaser more rights than the mortgagor himself had in the vessel, and that the sale did not interfere with the mortgage. The Court of Appeals, three judges against two, maintained this view of the case. But nowhere in that case is it contended that the sheriff's sale was a nullity.

Here we are asked to say that a registered vessel can never be sold by sheriff or otherwise because there is a mortgage upon her! The first question that suggests itself to one's mind is, who is the proprietor? Is it the mortgagor or mortgagee? This is answered by art. 2371 of our Code: "And the person to whom such transfer is made (mortgagee) is not deemed to be the owner of such vessel or share, except in so far only as may be necessary for rendering the same available by sale or otherwise for the payment of the money so secured."

This article shows that the real ownership remains in the mortgagor with all its accessories, as right of possession, etc. The ownership of the mortgagee is limited to his right of having the vessel sold for the payment of his mortgage when exigible. Then if the defendant is still owner, the opposant has no right to oppose the sale. Of course that sale will not affect his mortgage, which will follow the vessel into whatever hands it may go. The purchaser will buy her subject to the mortgage, and will take the place of the mortgagor, as was done in Kelly and Hamilton. I am, therefore, of opinion that the opposition was unfounded, and that the judgment should be reversed. Kitchen & Irving, 1 Jurist (new series), Vol. 5, p. 1, p. 118.

The judgment was recorded as follows:

"Considérant que lorsque la saisie a été faite en cette cause sur le défendeur du bâtiment "America," le dit défendeur en était le seul propriétaire dûment enregistré, et que le transport fait à l'opposant n'était que comme sûreté pour le paiement d'une somme d'argent;

Considérant que le créancier hypothécaire sur un bâtiment n'est réputé propriétaire de tel bâtiment qu'en autant qu'il est besoin pour en tirer parti par vente ou autrement et obtenir le paiement des deniers ainsi assurés;

Considérant que la saisie et vente par exécution d'un bâtiment hypothéqué ne peut pas avoir pour effet de détruire les droits du créancier hypothécaire, mais seulement de transporter les droits du propriétaire en icelui, et que partant l'opposant est sans intérêt à s'opposer à la vente du bâtiment saisi en cette cause;

Infirme et annule le dit jugement, &c., &c., et déboute et renvoie la dite opposition, avec dépens.

Le juge Torrance dissident.

Judgment reversed.

R. A. Ramsay, for plaintiff.

Trenholme & Maclaren, for opposant.

(S. B.)

COURT OF QUEEN'S BENCH, 1877.

CRIMINAL SIDE.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram DORION, C. J., and CROSS, J.

Ex parte John Cutler, petitioner for a writ of *Habeas Corpus*.

HELD :—That a person imprisoned under a process in a civil matter, where no excess of jurisdiction is shown, is not entitled to be discharged on *habeas corpus* on petition to the Court of Queen's Bench.

DORION, C. J. The petition is in very general terms. It merely states that the petitioner is detained in the common gaol of this district under a commitment which is totally insufficient and irregular, a copy of which is produced. The application is not supported, as is usual in such cases, by any affidavit. The commitment shows that the petitioner is detained under a writ of *contrainte par corps*, issued from the Circuit Court on a judgment rendered on the 4th of September, 1877, by which he was condemned to be imprisoned until he should have paid the debt, interest and costs therein mentioned, for having failed to produce, at the time fixed for the sale, the articles placed in his custody as guardian, on a seizure made in a cause, No. 1174, of McCall against Broders.

At the argument it was contended that the Court should, by its judgment, have given to the petitioner the option to produce the goods placed in his custody, or to pay their value, as provided by Art. 597 of the Code of Civil Procedure, and also that it was not stated to whom the costs were to be paid.

This being an application to bring before this Court, with a view to his liberation, a party arrested on a process issued from a court of civil jurisdiction, requires special notice. By Article 1052 of the Code of Procedure, similar to sec. 25 of ch. 95 of the L. C. C. S., it is expressly declared that the provisions in the Code relating to *habeas corpus* cannot be extended to the discharge of any person imprisoned for debt, or under any action or process in civil matters. The same rule applies in England, yet it was there held in the case of Carus Wilson, 9 Jurist 393, *in re* Crawford, 13 Jurist 955, and Ex parte Dukins, 1 Jurist 378, that the Court of Queen's Bench had the right to inquire, by the issue of a writ of *habeas corpus*, into the authority under which the civil courts of Jersey and of the Isle of Man had directed the arrest of the petitioners, although, on a proper return being made in each case, the Court refused to liberate the prisoners for mere irregularities in the proceedings where no excess of jurisdiction was shown.

This question was fully examined here in the case of Donaghue, 9 L. C. R. p. 285, wherein it was held that, even if the writ for the arrest was irregular, the prisoner could not be liberated on a writ of *habeas corpus*, if it did not appear to be out of the scope of the jurisdiction of the court from which it issued.

I entirely concur in the rulings in that case. The Art. 1052 does not prohibit the issue of a writ of *habeas corpus* to inquire into the cause of detention of a party making out a *prima facie* case of being illegally confined in gaol, but the moment it is shewn by the return to such a writ, that the arrest was made under the order of a civil court in a matter over which it had jurisdiction,

In re John Cutler.

the authority of this court ceases. We cannot here on a writ of *habeas corpus* revise the judgments of a civil court, however improperly or unjustly that court may have exercised its jurisdiction.

Several cases have been cited to show that parties imprisoned on civil process have been liberated. Some of these cases went perhaps further than this Court would be disposed to do, yet, in most of them, if not in all, the decisions were rendered on the assumption that the court issuing the process had exceeded its jurisdiction. (1)

In this case there is nothing of the kind. The Circuit Court had full authority to order the imprisonment of the petitioner for not representing the goods placed in his custody. The objection that the option to produce the goods seized should have been given would at most constitute a *mal jugé*, with which this Court could not interfere, but this has already been held not to be an error. Brooks *vs.* Whitney, 10 L. C. Rep. 244. As to the irregularities in the commitment, they seem to be mere verbal inaccuracies, which the Court would not be disposed to entertain even if they were of much greater importance than they really are. The application is therefore rejected.

Foran, for the petitioner.

St. Pierre, for the Crown.

(J. K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 13TH OCTOBER, 1877.

Coram DORION, C. J., AND CROSS, J.

Ex parte John Cutler, Petitioner for a writ of *Habeas Corpus*.

HELD:—As in previous case, but the petitioner may show that there is no judgment ordering his imprisonment, and in such case he is entitled to his discharge.

This was a second application on behalf of the petitioner for a writ of *habeas corpus*.

The grounds specially alleged were irregularities in the commitment, and also the absence of any judgment ordering the arrest and imprisonment of the petitioner.

In support of his application the petitioner produced the affidavit of the deputy prothonotary, establishing that it was on the rule and judgment of which copies were filed that the writ for *contrainte par corps* issued.

The gaoler, in his return to the writ of *habeas corpus*, stated that he detained the petitioner on a commitment from the deputy sheriff, based on a writ of *contrainte par corps* issued from the Circuit Court, a copy of which was annexed

(1) Exparte Grebassa, 15 L. C. J. 331, Drummond, J.
" Prince, " " 332, Aylwin, J.
" Fourquin et al., 16 " 103.
Leboeuf & Viau & Viau Fils, 18 " 214, Bélanger, J.

to his return. The writ purported to have been issued on a judgment rendered on the 4th September, 1877, ordering the petitioner to be imprisoned until he should have paid the debt, interest and costs in a cause of McCall against Broders for having failed to produce, at the time of sale, the articles placed in his custody as guardian.

DORION, C. J., after stating the facts, said: If the return to the writ was conclusive as to the facts therein stated, the Court could not give any other decision but the one already given on a former application.

It is now, however, generally conceded that there are cases in which the return to a writ of *habeas corpus* may be controverted, (Paley on Summary Convictions, p. 394; Hurd on *Habeas Corpus*,) and there is a special provision to that effect in Art. 1045 of the Code of Procedure as to cases coming within the articles of the Code.

If it be true that there is no judgment ordering the imprisonment of the petitioner he ought to have an opportunity of showing it. From the affidavit and the documents filed with the petition, and they are in no way contradicted by the counsel on the other side, it appears that on the 3rd of July last, the plaintiff, McCall, obtained in the Circuit Court a rule ordering that, "the said "guardian (John Cutler) do appear before this Court on the sixth day of July "instant, to show cause why he should not be condemned to pay the debt, inter- "est and costs in full in this cause; and in default of his appearing to answer "this rule he will be condemned to pay the said debt, interest and costs under "pain of imprisonment *contrainte par corps* in default of payment, the whole "with costs."

On the 4th of September last, the rule was declared absolute and "the "guardian was condemned (in the terms of the rule) to pay the debt, interest "and costs in this cause under pain of imprisonment, *contrainte par corps*, in "default of payment, the whole with costs."

There is nothing in this judgment condemning the guardian to be imprisoned. He is condemned to pay the debt, interest and costs, under pain of imprisonment in default of payment, that is subject to imprisonment if he does not pay. This is nothing more than what the law says. A guardian is liable to be imprisoned, if he does not represent the goods seized or pay the debt of the seizing creditor, but he cannot be imprisoned on a mere condemnation to pay the debt. An express adjudication on the conclusions taken by the plaintiff is required (Art. 781 Code of Procedure,) and here there were no proper conclusions to that effect. The writ of *contrainte par corps* was therefore issued without any proper adjudication, and the petitioner is now detained in gaol, not under the order of a court having jurisdiction in the matter, but by the mere authority of a ministerial officer, who, by mistake, has issued a writ of *contrainte* not justified by the order of the Court.

It has been urged that the petitioner had another remedy under Art. 792 of the Code of Civil Procedure,—this, however, is a cumulative remedy which cannot supersede the more effective one secured by the writ of *habeas corpus* in all cases in which this last remedy is applicable.

Exparte John Cutler

The commitment must be quashed on the ground that the writ of *contrainte par corps* was not justified by the terms of the judgment.

B. Devlin, for the petitioner.

St. Pierre, for the Crown.

(J.K.)

COUR DU BANC DE LA REINE, 1877.

MONTREAL, 20TH OCTOBER, 1877.

Coram DORION, C. J.

Ex parte Ann Martin, Réquerante pour *Habeas Corpus*.

HELD:—That a judgment ordering the imprisonment of a defendant until payment of debt, interest and costs, and also the costs of rule, will not justify a commitment which includes also sheriff's costs, and the defendant under such circumstances is entitled to be discharged on *habeas corpus*.

La pétitionnaire, défenderesse dans une cause de Beaudry contre Martin, a été condamnée par un jugement de la Cour de Circuit à être emprisonnée, pour rébellion à justice, jusqu'à ce qu'elle eut payé au demandeur la dette, intérêts et frais au montant de $86.95, avec de plus les frais de la règle taxés depuis à $6.35, ce qui faisait en tout $92.60. Un bref de contrainte par corps a été émané sur ce jugement. Ce bref ordonne au député-shérif d'arrêter la pétitionnaire, et de la garder en prison jusqu'à ce qu'elle ait payé cette somme de $92.60, et de plus $1 pour coût du bref, et de plus ses propres émoluments. Le député-shérif a donné son ordre ou warrant, enjoignant au geôlier de retenir la pétitionnaire en prison jusqu'à ce qu'elle ait payé les sommes ci-dessus, et de plus $4.00 pour son warrant, et $5.00 pour les frais du bailli.

DORION, J. C. Le jugement n'ordonnait l'emprisonnement que pour la dette, intérêts et frais, y compris les frais de la règle, en tout $92.60. Le Committimus est pour $10 de plus. Le bref de contrainte par corps qui a autorisé cette surcharge n'est pas conforme au jugement. Il a été émané sans autorité, quant aux $10 qui ne sont pas mentionnées dans le jugement ordonnant la contrainte par corps. Comme le Committimus ne peut être divisé, il faut qu'il soit annulé, et la pétitionnaire libérée. Paley on Convictions, pp. 328, 333 and 338.

La Cour, en annulant le Committimus, n'intervient pas avec le jugement rendu par la Cour de Circuit. Elle ne fait que déclarer que ce jugement ne justifiait pas l'ordre d'arrestation, tel qu'émané, et laisse le jugement intacte.

Duhamel & Pagnuelo, pour la pétitionnaire.

St. Pierre, pour la couronne.

(J.K.)

COURT OF QUEEN'S BENCH, 1877.

In Chambers.

MONTREAL, 19TH NOVEMBER, 1877.

Coram CROSS, J.

Ex parte John Thomson, Petitioner for a writ of *Habeas Corpus*.

HELD:—1. Persons imprisoned for debt, or under any action or process in civil matters, are not entitled to be discharged on *Habeas Corpus* on petition to a judge in Chambers.

2. Where the Court from which the process issued is a superior court, having jurisdiction over the subject matter, there is a presumption that its jurisdiction has been rightfully exercised, and it is not necessary that the cause of imprisonment be specified in the warrant of commitment so as to show that the Court had jurisdiction.

3. A judgment concluding in the words "the whole with costs" includes the necessary future costs of executing the judgment.

CROSS, J. The petition in this case represents that the applicant is confined in the common gaol for the District of Montreal, under a sheriff's warrant, dated 18th April, 1877, based on a judgment of the Superior Court at Montreal, of the same date, declaring absolute a rule for coercive imprisonment obtained by Henry J. Evans, plaintiff, against the now petitioner, John Thomson, as defendant, ordering him to be imprisoned until he shall have paid $200.64 of a debt, with interest from the 9th January, and costs of the rule, with $41.10 taxed costs in the cause. The warrant sets forth these proceedings and directs the apprehension and detention of Thomson until he shall have paid the said sums, together with $13.15, costs of the rule, and $2, costs of the writ, as also the sheriff's costs; $4, costs of warrant, and $5, costs of arrest. These facts are all disclosed in the petition, which concludes with a prayer for the quashing of the commitment and the discharge of the prisoner.

The petitioner produced a copy of the judgment decreeing the imprisonment. It recites an original judgment in the same cause, of date the 14th March, 1877, whereby Thomson was condemned to pay the debt with costs, and, in default, to be imprisoned; also that an execution against goods and lands had issued 31st March, 1877, on which costs had been incurred; that a return had been made thereon of no goods and no lands, and the judgment remained unsatisfied; wherefore the rule which had been then taken against Thomson to have him declared in contempt of the court, and to be imprisoned, was declared absolute, and his imprisonment consequently ordered.

The warrant includes the costs of the writ, warrant and arrest.

The reasons in support of the application are:

1st. The commitment is vague and indefinite.

2nd. It states no offence.

3rd. Its terms are in excess of those of the judgment.

4th. The same ground as the last, specifying as excess the costs of the rule, $13.15, costs of writ, $2, and costs of warrant, $4, also costs of arrest, $5.

The writ itself has not been produced.

The strict rules applicable to convictions by magistrates and tribunals of inferior or limited jurisdiction cannot be allowed to govern the present case.

Exparte John Thomson.

The applicant is charged in debt, which he has been condemned to pay, and is detained for it by process in a civil suit.

By the English as well as the Canadian *Habeas Corpus* Acts, and by our own Code of Civil Procedure, persons imprisoned for debt or under any action or process in civil matters are not to be discharged on *Habeas Corpus*. See art. 1052.

The detention of the applicant is for debt, and the process is in a suit for a civil matter.

It is contended that the specific cause of detention should have been set forth in the sheriff's warrant, and that it should have appeared to be one for which the law authorised imprisonment.

It is fairly answered that the court which rendered the judgment, and from which the process issued, is a superior court, having jurisdiction over the subject matter, in favor of which there is a presumption that its jurisdiction has been rightfully exercised.

It is not, as in the case of inferior tribunals, bound to show its jurisdiction on the face of the proceedings.

The warrant and judgment authorise the prisoner's detention for a cause over which the Superior Court had jurisdiction.

Whether their judgment was erroneous, or their authority irregularly exercised, cannot at present, in my opinion, be made the subject of valid complaint before a judge of this Court in Chambers.

If, as in the case of Cutler, determined in the last term of the Queen's Bench, criminal side, there was no judgment ordering the imprisonment, then I would liberate, in the absence of a legal cause of detention. But here it is otherwise. There is a judgment ordering the imprisonment, and the court had authority over the matter.

Referring to the petitioner's reasons *seriatim*:

1st. Alleged vagueness. I can only take into account the fact that imprisonment has been ordered in a case where the court had jurisdiction over the subject matter; and that a writ has issued to execute that judgment, which I find duly certified in the sheriff's warrant, nor do I find the warrant vague or indefinite.

2nd. Not stating the offence. This has already been commented upon. I do not think that a superior court is bound in its judgment to specify the cause of imprisonment in a manner to show that it had jurisdiction. If the the whole record were here, or even the judgment condemning Thomson to pay the debt, it would appear that it was one for which the law authorised imprisonment.

As to the 3rd and 4th reasons, that the warrant or commitment is in excess of the judgment: I do not find this to be so in fact. The costs of the writ for *contrainte*, the sheriff's warrant, and bailiff's fees being included are a necessary incident, a sequence of, and comprised within the terms, of the judgment of the 18th of April, which specifies all costs made up to that date, and passing a condemnation specific for everything incurred up to that date,

concludes in the words "the whole with costs." These terms apply to and include the necessary future costs of executing the judgment. The extent of these costs cannot at the time be foreseen nor specified, yet they are a necessary incident to carrying into effect the judgment, which would in all like cases have to be borne by the plaintiff unless they could in this manner be collected from the defendant. The practice of the Civil Courts does not require these costs to be assessed beforehand, nor could they well be so assessed. Ex parte John Thomson.

The present case differs from that of Ann Martin, determined by His Honor the Chief Justice in the last criminal term at Montreal, in which the judgment seemed to limit the costs to be exacted to those of having the rule for *contrainte* declared absolute. There was no general condemnation for costs in the judgment on the rule so as to apply to future costs in the suit or of the execution, no condemnation so as to apply to future costs generally in the suit.

The object of the *habeas corpus* cannot be to evade the law or to help suitors to escape from their legal obligations. It is to give summary relief to persons illegally detained. I cannot think that this great remedy is applicable to testing whether officers of the court, authorised or unauthorised, have added to a legal cause of detention the exaction of some items of costs which, on scrutiny, might be found not warranted as taxable against the party detained. These matters pertain peculiarly to the domestic forum seized of the cause, and, if in any case, an abuse in this direction could justify interference by *habeas corpus*, it would be when this remained the sole cause of detention, and not when it formed but an inconsiderable accessory to an existing legal cause of detention. Besides, to remedy this abuse of costs, the domestic forum seems to me to be the proper resort. I quote, I think, appropriately, from Hind's Work on *Habeas Corpus*, p. 336. Where it is discovered that it will interfere unnecessarily with another competent and acting jurisdiction it will be denied as an inappropriate remedy, for it was never designed to be used to frustrate or interrupt the due course of justice nor to intermeddle with other judicial proceedings, while a ready redress might be had by application to the same tribunal whose action may be the subject of complaint.

I am of opinion that the 3rd and 4th grounds are not warranted by the facts of this case, and are, moreover, unfounded in law.

It will be seen by these remarks that I am not prepared to go the length of agreeing with the ruling in the case of Elmire Prince, cited at the argument from a note to Crebassa's case, reported in 15 L. C. Jurist, p. 332, or the case cited in note 3, L. C. R., vol. 4, p. 45, but I do not say that my present impression might not give way should I find that sufficient reason to combat it were given when a like case to either of these two comes up, should that occur. I do not consider the present a parallel case, and, for the reasons given, I believe it my duty to refuse the present application, which is accordingly done.

Petition rejected.

Macmaster, Hall & Geenshields, for the petitioner.
St. Pierre, for the Crown.

(J.K.)

PRIVY COUNCIL, 1878.

25TH JANUARY, 1878

Present:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

KERSHAW, APPELLANT;

AND

KIRKPATRICK ET AL., RESPONDENTS.

The defendant Kershaw, a broker, bought two cargoes of wheat for and on behalf of S., the second cargo being purchased from Kirkpatrick & Co., the plaintiffs. S. received separate invoices for the cargoes. The broker having sent his clerk to request payment, S. paid him $8,000, which was acknowledged by the clerk on the invoice of the second cargo. The defendant subsequently tried to get the payment imputed to the first cargo, but S. refused to alter the memorandum.

HELD:—That the debtor had a right to appropriate the payment, and a receipt having been given effectuating his intention, the appropriation could not be changed by the person receiving the money, and moreover such alleged change should have been specially pleaded.

The facts of the case are fully set out in the judgment of their Lordships.

PER CURIAM:—This was an action for money had and received, to which the general issue was pleaded. The question in the cause may be shortly stated to have been the appropriation of a payment, on which the lower Court, and the Court of Queen's Bench, have found in favour of the plaintiff. The material facts of the case are as follows: Mr. Kershaw, the defendant, a broker, bought a cargo of wheat as a broker from the plaintiffs, Kirkpatrick & Co., for and on behalf of a firm named Stevenson. The quantity of wheat bought was on the whole some 13,000 bushels. There was, however, a separate invoice with respect to 8,127 bushels, the price of which amounted to 10,000 and some dollars. Mr. Kershaw had also acted as broker in another transaction whereby Stevenson became the purchaser of the cargo of another vessel called the "Europe," of which the price was some 17,000 dollars. In this cargo Kershaw appears to have had some interest himself, but it had been pledged to the Bank of Montreal, who were the ostensible vendors. On these two accounts a sum of about 37,000 dollars was due from Stevenson to Kershaw on the 18th of July, 1874. On that day Kershaw sent his clerk, a Mr. Benac, to Stevenson's office to get what money he could on account. Mr. Stevenson, the plaintiff's principal witness, gives the following account of what then took place. He says, "Mr. Benac, "Mr. Kershaw's clerk, who is in the habit of acting for him sometimes, came into "the office and asked me how much I could give him, and I told him I did not "know. I would give him as much as I could. There was some mention of 20,000 "or 30,000 dollars. I said I could not give him much that day. He went "away, and in a few minutes came back again, when I told him I had been "disappointed in getting money. I drew a check for 8,000 dollars and handed "it to Mr. Benac. That account paper "B" being with a lot of other accounts, "I handed the account to Mr. Benac with a cheque, and he marked the words "July 18th, cash on account, P. Benac, 8,000 dollars." In page 15 of the case that document is set out. It is an invoice of wheat sold by Kirkpatrick

& Co. to Stevenson, of the 15th of July, and runs in this way: "8,127 $\frac{30}{60}$ "bushels Amber Michigan Wheat ex barge 'Swan' into 'Elisabeth Alice,' at "1.25= - - $10,159.37

Brokerage 40.63

$10,200.00"

Below the $10,200.00 is the entry "July 18, cash on account with the bank $8,000," which is what this witness referred to as having been written by Mr. Benac at that time on this invoice. It may be here observed that it was not written on the back of the invoice, but on the face of it and under the figures which have been referred to. There are in this exhibit also the words "Balance, $2,200." But it does not appear distinctly when and where those words, which are in pencil, were written. Mr. Stevenson goes on to say, "The invoice, after the money was paid and the receipt written, was in the "same state as it is now, with the exception of some figures in pencil. I fancy "the cheque I gave was paid. It was on the Union Bank." He identifies the cheque. Cross-examined, he says, "The wheat was from the barge 'Swan.' "I employed Mr. Kershaw to buy the wheat. He was my broker. Mr. Benac, "when he came for the money, said, as near as I can recollect, 'Is that all you "can give me,' and I gave him the cheque for the 8,000 dollars. The first "time he came was the 18th July, about 12 o'clock. He asked me how much "I could give him, and I said I could not tell. He then said, 'How much do "you expect?' and I said '20,000 or 30,000 dollars.' That is all that trans-"pired at that interview. He came back again about half-past 12. He said, "'How much can you give me?' I said, 'So far I have only been able to get "8,000 or 9,000,' and I handed him the account and a cheque. He made "some remark about not taking it on that account." (It should be observed that Mr. Benac, when called, does not in any way corroborate this latter state-ment.) "His precise words when he came in were, 'How much can you give "me?' and I said, 'Take that in the meantime, and I will see if I can do any "more.'" He says, further on, Benac returned in about 10 minutes, "and "said, that Mr. Kershaw would not receive that upon account of the 'Swan's' "cargo, that is plaintiff's debt; and to change the receipt. I said to Benac, "'I am going away, we can leave that until Monday.' He said the 8,000 "dollars was not to be on account of Kirkpatrick & Cookson, but on account of "the 'Europe,' which was an older debt of some days before. I said I was just "going away, and I would see and straighten it upon Monday. I was going "away early, at half-past one. I was going to the country to St. Hilaire by the "2 o'clock train. That is all that transpired on the Saturday between me and "Benac." Then he goes on to speak of what subsequently took place. "I "received a visit from Kirkpatrick that afternoon about 10 minutes after Benac "was gone. Mr. Kirkpatrick came to my office, and asked for some money on "that debt of the 'Swan.' I said I could not give him the whole. He said, "'Give me some.' I said, 'I have given Mr. Kershaw all I had, and I suppose "he will give you some.' That was all that transpired at that interview. Mr.

Kershaw, and Kirkpatrick, et al.

"Kirkpatrick then went away, but came back in 5 or 10 minutes. I fancy, from "the direction which I saw him coming from, that he went to Mr. Kershaw's. "He said that Mr. Kershaw had said that he had no money for him. I said I "supposed he had applied it to some other account. He then asked me if I "could not give him some, and I then gave him a cheque, I think, for 4,000 "dollars. I did not take a receipt for that payment, to the best of my recollec- "tion. The cheque was made payable to the firm's order. I do not recollect "whether it was that Saturday or the Monday following that he told me that he "would look to me for the account. He said I was not to pay any more money "to Mr. Kershaw, but that he looked to me for the entire amount of the wheat "purchased. I paid Mr. Kirkpatrick afterwards 5,000 dollars, either on the "Monday or the Tuesday following." Then the question is put, "Is "it not a fact that Mr. Kirkpatrick, time after time, and after payment by you "of 4,000 or 5,000 dollars, dunned you for the payment of the balance "of the cargo of the 'Swan?' Answer:—Yes, on several occasions he asked "me for the balance. I saw Mr. Kershaw on the Monday. He told "me that he had sent Benac over to say that he would not accept that "payment on account of Kirkpatrick & Cookson, and to cancel that "receipt and put it to the account of the 'Europe,' which was due long "before that to which he had paid it. I said it was no use doing anything "about the matter, it could easily be explained. He said the money was for "the 'Europe's cargo, which was due before that, and that he had sent Benac "over to say so. I refused to cancel it. I did not think it was worth while to can- "cel it. I said to Mr. Kershaw it was much better to leave it as it was and "explain the circumstances. I got the 'Europe's' wheat from Mr. Kershaw, "who had given a 'Bailee' receipt to the Bank of Montreal." Then he says, "When Mr. Kirkpatrick came to my office I told him that the 88,000 I had "paid I expected Mr. Kershaw would give him some of it. I did say in my depo- "sition before the police magistrate that I said to Mr. Kirkpatrick that I ex- "pected the 88,000 dollars I had given to Benac was for him (Kirkpatrick). I "had previously promised Kirkpatrick to pay him his account on that day." Then there is a little explanation on his re-cross-examination, the question being, "You have stated in answer to Mr. Kerr, that you have sworn in your "deposition at the Police Court that you had told Mr. Kirkpatrick on the 18th "of July that you were under the impression that you had paid Mr. Benac 8,- "000 dollars which you expected was for him, did you not also state, to complete "the same sentence which did not end there, the following words, 'but as there "'were other accounts running between Mr. Kershaw and me that it had been "applied to something else?' Answer: I did."

There is also the evidence of Benac, which does not throw much more light upon the main question in the cause, how and under what circumstances the invoice was given to him, and he wrote the receipt. He gives a short account of what took place at the interview, but without stating the circumstances under which he received the invoice or wrote upon it. He only refers to it incidentally by saying, "I brought back the cheque to the office and handed it to Mr. "Kershaw. Mr. Kershaw asked me if it was intended for any particular

"account. I said to Mr. Kershaw, 'No; Mr. Stevenson did not tell me any-"thing about it, but I think I gave a receipt for the money on Mr. Kirkpatrick's "invoice.'" Then he further says: "I was in a great hurry, and I took the "first invoice in order to acknowledge the sum which I received from Stevenson. "It was merely accidental; if it had been another account it would have been "the same thing. There were a lot of accounts together. Generally we do the same "thing in all the houses where we are doing business." This does not appear to their Lordships a very probable statement, considering the importance attached by the Canadian law, somewhat greater than that attached by our law, to instruments of this description.

The judgments of the two Courts are very short. The first is the judgment of Mr. Justice Mackay, who, as their Lordships understand, had the witnesses before him. It consists, as far as the decision on the point in the cause is concerned, in these words: "Considering that the defendant on the 18th day of "July last received 8,000 dollars, money for plaintiffs, as alleged, from J. B. "Stevenson & Co., purchasers of plaintiffs' wheat, that at the time of payment "of it J. B. Stevenson & Co. meant it for plaintiffs." Their Lordships, therefore, observe that Mr. Justice Mackay finds as a fact that the money was meant, that is, meant by Stevenson, for the plaintiffs. He goes on to say, "And defendant so expressed it by the account rendered and receipt given to "the said J. B. Stevenson & Co., on the said 18th day of July last, against "which defendant cannot go, certainly not under his plea pleaded (mere gene-"ral issue)."

Their Lordships do not read this judgment as ruling that the receipt *per se* would be conclusive, and that the plaintiff could not go against it; but that the receipt having been given, effectuating the intention of the parties, or at all events the intention of the debtor, who had a right to appropriate the payment, it cannot be impugned at all events under these pleadings.

The judgment of the Court of Queen's Bench recites what seem to the Court the most material facts thus: "On the 15th of July, 1874, the said Thomas "Kershaw, acting as agent of the respondents, rendered to the said J. B. Ste-"venson & Co. an account for 8,127½ bushels of amber Michigan wheat, so sold "and delivered to the said J. B. Stevenson & Co. by the respondents, together "with his account for brokerage, making in all the sum of 10,200 dollars. On "the 18th July, 1874, the said Thomas Kershaw sent his clerk to the said J. B. "Stevenson & Co. to get some money; the clerk received 8,000 dollars, and "gave a receipt on account of the respondent's wheat. When he returned the "said Thomas Kershaw asked him if the 8,000 dollars was on any particular "account. The clerk replied that he thought he had given a receipt on account "of the respondent's cargo of wheat, upon which the said Thomas Kershaw "replied, 'Go back and tell Stevenson.'" After reciting the judgment of the Court below, the Court of Queen's Bench proceed to say, "The Court here see "no reason to alter the judgment of the Court below. The imputation was "made by the parties at the time the receipt was given, and to this date this "receipt remains in evidence that Stevenson paid the $8,000 to appellant on "account of amount due to respondents."

Kershaw and Kirkpatrick et al.

The law of Canada with respect to the appropriation of payments appears not to differ materially from the law of this country. It is contained in the section 1,158 and the following sections of their Civil Code. Sections 1,158 is in these terms: "A debtor of several debts has the right of declaring, when he pays, "what debt he means to discharge." This is very much a repetition of a similar provision in the Code Napoleon, the commentators on which paraphrase the expression "when he pays" by the expression "at the instant or the moment of payment." Section 1,160 runs thus: "When a debtor of several debts has "accepted a receipt by which the creditor has imputed what he has received in "discharge specifically of one of the debts, the debtor cannot afterwards require "the imputation to be made upon a different debt, except upon grounds for which "contracts may be avoided," which are to be found in Article 991, which declares that contracts may be avoided on the ground of fraud and error, and other grounds very similar to those on which they are avoidable in this country. Then section 1,161 says: "When the receipt makes no special imputation, "the payment must be imputed in discharge of the debt actually payable which "the debtor has at the time the greater interest in paying," and so on. The only observation their Lordships think it necessary to make upon these provisions in the Code is, that they seem to attach somewhat more importance, as indeed the Code Napoleon does, to the written evidence of an appropriation than is attached to it in this country, the object being, no doubt, as far as possible to avoid contradictions of parol evidence.

Such being the facts of this case, and the law applicable to them, their Lordships have to determine, not what decision they might have come to if they had heard the case as a Court of First Instance, but whether it has been established that the Courts below were wrong in their findings, which their Lordships regard as in a great measure findings of fact.

Undoubtedly the evidence of Stevenson and of Benac was far from satisfactory, and it is open to argument upon that evidence that the choice of the particular invoice on which the receipt was written was merely a matter of chance, without the intention of appropriating the payment to any particular debt. But there having been a finding of fact in both Courts that it was the intention of Stevenson to appropriate the payment to the debt of the plaintiff, their Lordships are unable to say that the evidence did not warrant such a finding. Assuming this intention, they agree with the Courts that upon the giving of the cheque by Stevenson, and the receipt by Benac, who was sent by Mr. Kershaw for the purpose of receiving the money, and would therefore be acting within the scope of his authority in giving the receipt, there was an appropriation of the payment to the debt of the plaintiffs.

That being so, Mr. Kershaw himself could not change the appropriation, although he appears to have desired to do so.

But it has been contended that there was a change of the appropriation by the consent of Stevenson and Kirkpatrick.

Their Lordships do not think it necessary to determine whether, considering that Kershaw received this payment on behalf of a third person, an agreement

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by Kershaw and Stevenson could have had the effect of changing the appropriation of the payment as against Kirkpatrick, because they concur in what they understand to be the finding of the Court of Queen's Bench, that Stevenson did not agree to any change of the appropriation of the payment. He appears to have given an evasive answer upon the Saturday, and to have spoken again evasively upon the Monday. But the fact remains that he refused to alter the receipt, and their Lordships do not think the Court wrong in attaching great weight to the fact that the receipt remained in the terms in which it was originally written.

It has been further contended, that what took place between Kirkpatrick, Stevenson, and Kershaw on the Monday amounted to an agreement of all the parties to a change in the appropriation of the payment. It is true that Mr. Kirkpatrick appears to have tried to get as much as he possibly could, and to have got somewhat too much, which possibly he will have to account for to Stevenson's estate. But be that as it may, it does not appear to be made out that there was any rescision of the appropriation of payment by the consent of all parties. Their Lordships are further disposed to think that if such a defence had been set up it ought to have been specially pleaded, as the rescision of a contract is required to be by the Code of Civil Procedure, the appropriation of a payment being put upon the footing of a contract by the Canadian law.

Their Lordships think it right to say that no imputation can properly be made against Mr. Kershaw for his conduct. Considering that Mr. Kirkpatrick received the sums which he did from Mr. Stevenson, and having regard to all the circumstances, Mr. Kershaw may very well have thought that this was a case in which he was justified in taking the opinion of the Courts.

For these reasons their Lordships will humbly advise Her Majesty that the decision of the Queen's Bench in Canada be affirmed, and this appeal be dismissed, with costs.

Abbott, Tait, Wotherspoon & Abbott, for appellant.

Kerr & Carter, for respondents.

(J.K.)

COUR DE CIRCUIT, 1878.

MONTREAL, 22 MAI, 1878.

Coram DORION, J.

No. 11,241.

Lepage vs. *Watzo*, et *Watzo*, Opposant, et *Lepage*, Contestant.

JUGE :—1o. Qu'en vertu de "l'Acte des Sauvages de 1876" (39 Vic., ch. 18), les biens meubles et effets mobiliers des sauvages, sont exempts de saisie.

2o. Que le mot PROPRIETE, employé seul, dans une disposition de la loi, comprend les meubles et les immeubles indistinctement.

Le demandeur ayant obtenu jugement contre le défendeur, pour la somme de $92, fit émaner contre lui, un bref de *fieri facias de bonis*, en vertu duquel

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ses biens meubles et effets furent saisis, et à l'encontre de cette saisie, le défendeur produisit l'opposition suivante :

Samuel Watso, chasseur et commerçant, de la tribu des Abénakis de St. François de Sales, dans le district de Richelieu, faisant, aux fins des présentes, élection de domicile, au bureau de son procureur soussigné, rue St. Vincent, en la cité de Montréal, par sa présente opposition et moyens d'opposition afin d'annuler, à la saisie pratiquée contre lui en cette cause, dit et allègue :

Qu'il est sauvage, aux termes et conditions des lois et statuts concernant les sauvages, et comme tel, qu'il fait partie de la tribu des Abénakis de St. François de Sales; laquelle est régie par les lois générales et les statuts de la Puissance du Canada, concernant les sauvages.

Que tous les biens saisis en cette cause étaient, lors de la dite saisie et sont encore actuellement, dans les limites des terres spécialement réservées à la dite tribu, et en la possession du dit opposant, sauvage, comme susdit.

Que tant par les termes généraux que par les dispositions spéciales de l'Acte des Sauvages de 1876, les meubles et effets saisis en cette cause, sont exempts de saisie, et que le demandeur ne peut, en aucune façon, les rechercher en justice, comme il le fait par sa dite saisie; laquelle est illégale, nulle et comme non avenue.

Pourquoi le dit opposant conclut à ce que la dite saisie soit déclarée illégale et nulle à toutes fins que de droit; et à ce que main levée lui en soit accordée avec dépens.

A l'encontre de cette opposition le demandeur produisit la contestation suivante :

Et le dit contestant pour moyens à l'appui de sa présente contestation, dit :

Que le fait que l'opposant est un sauvage, n'est pas suffisant dans l'esprit de la loi, pour empêcher la saisie et la vente de ses meubles.

Qu'en vertu de la loi, les immeubles seuls sont réservés.

Que d'ailleurs, l'opposant est un commerçant, faisant des transactions journalières avec les blancs; et que s'il y avait par la loi, une exception quant à la saisie des meubles des indiens, cette exception ne saurait s'appliquer à l'opposant.

Et il concluait au renvoi de l'opposition.

A cette contestation, l'opposant répondit en droit, comme suit :

Que toutes et chacune des allégations de la dite contestation, sont mal fondées en droit et insuffisantes pour lui en faire obtenir les conclusions, pour entre autres raisons, les suivantes :

Parce que le dit contestant ne démontre pas et ne fait pas voir par sa dite contestation, que les biens meubles et effets mobiliers de l'opposant qui est un sauvage, et comme tel, protégé par la loi, soient saisissables.

Parce qu'il ne démontre pas et ne fait pas voir par sa dite contestation, en quoi, comment et pourquoi, le titre de commerçant de l'opposant et ses transactions journalières avec les blancs, peuvent en loi, rendre ses meubles et effets saisissables.

Parce qu'en vertu des sections 66 et 69 de l'Acte des Sauvages de 1876 (39 Vic., ch, 18), tous et chacun des meubles et effets du dit opposant, saisis en cette cause, étaient et sont exempts de saisie; et que partant la saisie d'iceux effectuée comme susdit, est entièrement illégale, nulle et comme non avenue. Et l'opposant concluait, pour ces raisons, au renvoi de la dite contestation.

Duhamel, lors de l'audition, prétendit, de la part du contestant, que cette opposition était pour le moins futile et devait être déboutée sur le champ.

Il soutenait que l'opposant n'avait fait aucune preuve de la nationalité par lui invoquée; il le pensait cependant *sauvage sans traités*; mais comme il faisait journellement des transactions avec les blancs, il n'avait aucun titre à la protection de l'Acte des Sauvages de 1876; il prétendit en outre, comme il avait déjà prétendu par sa contestation, que les immeubles seulement et non les biens mobiliers des sauvages, leur étaient réservés par la loi. Il termina son argumentation, en offrant de prouver que l'opposant était commerçant; mais la Cour le dispensa de ce soin et prit la cause en *délibéré*.

D'Amour, de la part de l'opposant, produisit, de consentement, entre les mains du juge, le *factum* suivant;

Par son opposition, l'opposant se déclare sauvage Abénakis du village de St. François de Sales, district de Richelieu, et réclame, comme tel, la protection de l'Acte des Sauvages de 1876, et par sa *réponse en droit*, il invoque spécialement les sections 66 et 69 de cet acte.

Le contestant ne lui nie pas sa nationalité de sauvage; au contraire, il l'admet formellement, par sa contestation, mais prétend que d'après l'esprit de la loi, il n'y a que ses immeubles d'exempts de saisie. Il admet donc implicitement, que s'il s'agissait d'immeubles, l'opposition serait bien fondée; mais soutient en même temps, que les meubles de l'opposant ne tombent pas sous l'effet de la loi.

En second lieu, le contestant prétend que parce que l'opposant est commerçant, il n'a pas droit à la protection de la loi.

Cette dernière proposition tombe d'elle-même, la loi ne faisant pas une telle exception.

L'opposant n'avait pas à prouver sa nationalité, ce point étant admis en toute lettre au dossier.

La seule question sur laquelle cette Honorable Cour est appelée à prononcer, est celle de savoir si les meubles comme les immeubles de l'opposant, sont exempts de saisie.

La sec. 69 de l'acte sus-cité dit: "Les présents faits aux *sauvages* ou sauvages sans traités, ni aucune *propriété*, etc., ne pourront être pris, *saisis* ou vendus *pour aucune dette*, etc."

Toute la difficulté roule donc sur l'interprétation que la Cour doit donner au mot *propriété* qui se trouve dans la section précitée; car le contestant prétend que, *dans l'esprit de la loi*, ce terme ne s'applique qu'aux immeubles seulement et non aux biens mobiliers des sauvages.

Sur l'interprétation que l'on doit donner à ce mot *propriété*, l'opposant citera: Pothier, Droit de domaine et de propriété, vol. 9, p. 102, No. 3. (Ed. de 1845, M. Bugnet.)

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Jacob's Law Dictionary, Vo. Property, col. 2, 6e et 8e, al.

Petersdorf's Abridgment, vol. 14, Vo. Property, note au bas de p. 84, où l'on trouve la définition suivante du mot *propriété*: " Property may be defined any- " thing pos essing exchangeable value, and is either *real* or *personal*.....Estate " in ordinary discourse, is applied only to land ; but in law, obtains the same " signification as *property*, and may be either *real* or *personal*."

Toutes ces autorités s'accordent à dire que le mot *propriété* s'applique indistinctement aux meubles comme aux immeubles.

Reste maintenant à savoir si l'Acte des sauvages de 1876, s'applique à l'opposant et s'il a droit de l'invoquer.

L'opposant n'hésite pas à répondre affirmativement, puisque cette loi a été promulguée expressément pour la protection de tous les sauvages de la Puissance du Canada : ce qui est exprimé en toute lettre, dans la section première du dit acte.

Cette cause fut plaidée le 17 mai 1878, et le 22 du même mois, la cour rendit son jugement, par lequel elle déclara bien fondée l'opposition du dit Samuel Watzo et lui en accorda les conclusions avec dépens.

Opposition maintenue.

J. G. D'Amour, pour l'opposant.
Duhamel et *Associés*, pour le contestant.
(J.G.D.)

COUR SUPERIEURE, 1878.

MONTREAL, 12 JUIN, 1878.

Coram PAPINEAU, J.

Ex parte L'Hon. H. G. MALHIOT *et al.*, Requérants, et C. S. BURROUGHS, Exproprié.

JUGE :— Que la taxation d'un mémoire de frais faite par le juge en C[illegible] sous l'autorité de l'*Acte des Chemins de Fer de Québec*, 1869, s. 9, ss. 19, n'est pas sujette à révision par un autre juge siégeant *in banco*.

Un arbitrage avait eu lieu entre les requérants et l'exproprié sous l'autorité de l'acte des chemins de fer de Québec, 1869, pour établir la compensation à laquelle avait droit l'exproprié pour un terrain pris pour la construction du chemin de fer de Montréal, Ottawa et Occidental. MM. Joseph & Burroughs, avocats, comparurent pour l'exproprié et défendirent sa cause devant les arbitres. Ceux-ci rendirent une sentence accordant à l'exproprié un montant plus élevé que celui offert par l'avis d'expropriation. Quelque temps après, MM. Joseph & Burroughs soumirent leur mémoire de frais à l'Honorable Juge Torrance en chambre pour être taxé. Ce mémoire s'élevait à $716.50, et le 17 avril 1878 il fut taxé à la somme de $338.

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Le sept juin suivant les requérants présentèrent une requête, cour tenante, se plaignant que cette taxation était excessive et demandant à la cour de la réviser et de réduire le mémoire à $150.

PER CURIAM. Les requérants font requête pour réviser le mémoire de frais taxé en chambre par l'Honorable Juge Torrance, sous l'opération de l'acte des chemins de fer de Québec de 1869.

Cet acte donne pouvoir à un juge de taxer le mémoire de frais sans donner à la cour pouvoir de le réviser. Le droit commun ne donne pas pouvoir de réviser les jugements d'un autre juge, excepté dans les cas prévus par le Code de Procédure Civile. Celui-ci n'en est pas.

La cour peut bien réviser son propre jugement interlocutoire réglant l'instruction dans une cause. C'était un cas prévu par l'Ordonnance de 1667.

En supposant que la cour aurait juridiction, la requête ne se plaint d'aucun item en particulier.

Requête renvoyée avec dépens.

De Bellefeuille & Turgeon, pour les Requérants.
Joseph & Burroughs, pour l'Exproprié.
(E. LEF. DE B.)

SUPERIOR COURT, 1877.

MONTREAL, 28TH JUNE, 1877.

Coram DORION, J.

No. 2107.

Mallette et al. vs. *Hudon.*

HELD:—1. That a delegation of payment contained in a registered deed of sale of real property, unaccepted by the creditor, is no bar to an action by the creditor who has created such delegation against his debtor.

2. That where a debt is payable at the debtor's domicile, he cannot, when sued for the debt, simply ask the dismissal of the action, on the ground that no previous demand of payment was made at his domicile.

PER CURIAM.—The plaintiffs sued defendant for $1,120, arrears of interest on a deed of sale. The defendant pleaded, first, that by the deed invoked by the plaintiffs the latter delegated the money in question to the Seminary of Montreal; that the deed being enregistered at length had become perfect, the same as if it had been accepted by the party to whom it had been delegated, and consequently plaintiffs had no action against him; second, that plaintiffs' claim was payable at defendant's domicile, and demand of payment had never been made before the institution of the action either personally or at his domicile. Cases have been referred to which do not appear to the Court to sustain the defendant's pretension. The third party here never manifested any intention to accept the delegation, and without such acceptance there was no *lien de droit* between defendant and him. As to the necessity of a previous demand, the defendant in taking this ground should have testified his readiness to pay by bringing the money into Court. Judgment in favor of the plaintiffs.

Mallette & al. vs. Hudon.

The following were the reasons assigned in the written judgment :—

"La Cour * * * considérant que l'indication de paiement contenue dans l'acte de vente du 10 septembre 1874, relaté en la déclaration en cette cause, non acceptée par la personne indiquée, n'a pas eu l'effet de priver les demandeurs de leur droit d'action contre le défendeur pour le recouvrement des intérêts reclamés en la dite cause ;

"Considérant que le défendeur n'a pas fait voir qu'il eut payé les dits intérêts au créancier indiqué ;

"Considérant que demande de paiement des dits intérêts n'a pas été faite au défendeur à son domicile, avant l'institution de cette action, mais que pour invoquer efficacement ce moyen le défendeur aurait dû offrir le paiement par son plaidoyer et consigner les deniers en cour, ce qu'il n'a pas fait ; condamne le défendeur à payer au demandeur la somme de * * *."

Judgment for plaintiffs.

Jetté & Co., for plaintiffs.
Judah & Co., for defendant.
(S.B.)

COUR DE REVISION, 1877.

MONTREAL, 1 DECEMBRE, 1877.

Coram JOHNSON, DORION, BELANGER, J J.

No. 128.

Dalton vs. *Doran*, et *Doran*, opposant.

JUGE :—Que dans une opposition, les ratures et les renvois doivent être constatés et approuvés, à peine de nullité.

L'opposant produisit à l'encontre de l'exécution émanée en cette cause, une opposition *afin de distraire*, qui contenait grand nombre de mots rayés et de renvois non constatés ni approuvés.

Le demandeur ne contesta pas cette opposition au mérite, et se contenta, pour les raisons susdites, d'en demander le renvoi par simple motion.

A l'appui de ses prétentions, il cita les autorités suivantes : C. P. C. art. 295 ; 5 L. C. R. 36 & seq ; 8 Toullier, 173 & seq.

Au No. 115, p. 173, cet auteur s'exprime comme suit : "Quant aux ratures non constatées ni approuvées, nous avons vu que suivant le réglement de 1685, *elles entrainaient la nullité des actes*," &c.

Voici le jugement rendu par la Cour Supérieure sur cette motion le 8 novembre 1877. (H. E. TASCHEREAU.)

"La cour, après avoir entendu les parties par leurs avocats respectivement, sur la motion du demandeur, produite le sept novembre courant, demandant pour les causes et raisons y enoncées, que l'opposition, *afin de distraire*, faite par le défendeur en cette cause, soit déclarée illégale et renvoyée ; avoir examiné la procédure et délibéré ;

"Vu que la dite opposition est remplie de ratures et renvois non-approuvés en la manière voulue par la loi ;

"Accorde la dite motion et rejette la dite opposition avec dépens, distraits à M. F. L. Sarrasin, avocat du demandeur."

Ce jugement fut porté en révision, et, le premier décembre 1877, confirmé à l'unanimité par les Honorables Juges Johnson, Dorion et Bélanger.

Opposition renvoyée.

Archibald & McCormick, pour l'opposant.
F. L. Sarrasin, faisant motion.
(J. G. D.)

COUR SUPERIEURE, 1878.

MONTREAL, 12 FEVRIER, 1878.

Coram MACKAY, J.

No. 128.

Dalton vs. *Doran*, et *Doran*, opposant.

JUGE :—Que si une opposition à la vente de meubles saisis en vertu d'un bref de *Fieri Facias*, a été déboutée avec dépens, il ne sera pas permis à l'opposant, de faire une nouvelle opposition, dans le but d'arrêter une seconde fois la vente des dits meubles sur *Venditioni Exponas*, à moins qu'il n'ait payé au préalable, les frais encourus par la partie adverse sur la première opposition.

Que la seconde opposition produite en cette cause, sera déboutée avec dépens, à moins que les frais adjugés au demandeur sur la première, ne soient payés sous trois jours.

Une première opposition de la part du dit opposant, fut renvoyée avec dépens en cette cause, et avant d'en payer les frais, il produisit une seconde opposition, pour arrêter de nouveau la vente des meubles saisis, et qui devaient être vendus en vertu d'un bref de *Venditioni Exponas*.

F. L. Sarrasin, de la part du demandeur, présenta à la cour la motion suivante, à l'encontre de cette seconde opposition :

Motion du demandeur, qu'en autant qu'une seconde opposition a été produite en cette cause de la part du défendeur, pour retarder injustement la vente de ses meubles, et effets sur *Venditioni Exponas*, cette opposition soit rejetée, pour, entre autres raisons, la suivante :

Parce que les frais adjugés sur la première opposition, n'ont jamais été payés.

Pourquoi le demandeur conclut à ce que la dite opposition soit déboutée avec dépens ; et subsidiairement, à ce que tous procédés sur icelle, soient arrêtés jusqu'au paiement des frais dus au demandeur sur le renvoi de la première opposition ; à ce que le dit paiement soit effectué sous tel délai qu'il plaira à cette Honorable cour fixer ; et à ce qu'à défaut par le dit opposant, de se conformer au jugement à intervenir, son opposition soit renvoyée avec dépens.

Au soutien de cette motion, le demandeur cita l'art. 453 C. P. C., & 1 R. L., 747.

Les parties ayant été entendues sur cette motion, la Cour, par interlocutoire du 12 février 1878, ordonna à l'opposant de payer au demandeur, sous trois

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jours de cet ordre, les frais à lui adjugés sur la première opposition ; et qu'à défaut de ce faire dans le dit délai, et icelui passé, son opposition serait déboutée avec dépens.

L'opposant se conforma à cet ordre, et, en conséquence, la motion du demandeur ne fut accordée que quant aux frais.

Motion accordée quant aux frais.

Archibald & McCormick, pour l'opposant.
F. L. Sarrasin, faisant motion.
(J. G. D.)

COURT OF REVIEW, 1877.

MONTREAL, 31ST OCTOBER, 1877.

Coram MACKAY, J., TORRANCE, J., RAINVILLE, J.

No. 148.

Boyer vs. *McIver*, & *Craig*, Intervening Party.

HELD :—That a lessor is not debarred from seizing by writ of *saisie gagerie*, in a direct action against his tenant, the effects found in the leased premises, notwithstanding that such effects are under seizure under a writ of attachment in insolvency issued against a sub-tenant of the lessee to whose estate the effects seized belong, and notwithstanding that the lessor may have previously received payment of portions of his rent from such sub-tenant.

MACKAY, J. This was an inscription in Review of a judgment rendered by the Superior Court at Montreal (Dorion, J.) on the 20th of April, 1877, dismissing the intervention of the intervening party.

It would appear that the plaintiff, in a direct action against his own tenant, seized by process of *saisie gagerie* all the effects found in the leased premises.

It turned out that these effects belonged to the insolvent estate of Schultz, Reinhardt & Co., of which Mr. Craig was the assignee, and that these parties were really sub-tenants of McIver, the plaintiff's tenant.

Mr. Craig, being in possession of the effects as such assignee at the time of the seizure, intervened, and asked to have the seizure set aside, on the ground that under the Insolvent Act the plaintiff was bound to claim on the estate, instead of so seizing. It was also urged that because the plaintiff had from time to time received payment of his rent from Schultze, Reinhardt & Co., he had in reality accepted them as his tenants.

The judge *à quo* rendered the following judgment on this intervention :—"Considering that the firm of Schultz, Reinhardt & Co., whom the intervening party represents, have never been acknowledged or accepted as the tenants of the plaintiff so as to discharge the defendant from his liability under the original lease mentioned in the declaration in this cause, and that the plaintiff had the

right of suing the defendant for his rent and exercising his remedy by *saisie gagerie* upon the moveables and effects garnishing the premises, doth dismiss the said intervention with costs." And we do not see any valid reason for disturbing this judgment, and it is, therefore, confirmed.

Boyer vs. McIver.

Judgment of Superior Court confirmed.

Doutre & Co., for plaintiffs.

Edward Carter, Q.C., for intervening party.

(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram PAPINEAU, J.

No. 1000.

Archambault et ux. vs. *Galarneau.*

HELD:—That a creditor who takes out a policy of insurance for his own protection, and at his own expense, on his debtor's property, is not bound to account to the debtor for any portion of the amount paid to him under such policy.

This was an action, *inter alia*, to recover from the defendant a sum of money which the plaintiffs claimed to be due to them under the following circumstances:—

The plaintiffs had given a notarial obligation and mortgage to the defendant, who, for his own protection and at his own expense, caused the property mortgaged to be insured in his, the defendant's, own name. A fire occurred, and the insurance money was duly paid to the defendant. And the plaintiffs contended, that they had a right to obtain the benefit of this payment by the Insurance Company, in extinction of the debt due under the mortgage, and the action sought to recover the surplus of this insurance money, after payment of the obligation.

The Court thought no such right of action existed and dismissed the action, assigning the following reasons:—

"La Cour *** considérant que les demandeurs n'ont jamais été parties directement ni indirectement au contrat d'assurance, effectué par le défendeur, dont ils réclament le bénéfice par leur action;

Considérant qu'il est prouvé que le défendeur n'a jamais eu l'intention d'effectuer le dit contrat d'assurance dans l'intérêt des demandeurs, mais qu'au contraire il l'a effectué pour son intérêt particulier, et que ce n'est pas tant la propriété des demandeurs, comme corps, qu'il a fait assurer, que son intérêt à la conservation de la propriété qu'il a fait assurer;

Considérant qu'il est prouvé que les demandeurs n'ont jamais payé les primes du dit contrat d'assurance ni aucune partie d'icelles, et qu'ils n'ont jamais offert au défendeur de lui rembourser les dites primes, ni aucune partie d'icelles pour devenir participants au dit contrat d'assurance effectué par le défendeur;

Considérant que le dit contrat d'assurance n'était valable que jusqu'à concurrence de l'intérêt du défendeur et pourrait être annulé pour le surplus, à la demande de la Compagnie d'Assurance;

Archambault et ux. vs. Galarneau.

Considérant que le dit contrat d'assurance n'a donné naissance à aucun droit d'action aux demandeurs contre le défendeur pour réclamer l'excédant de ce qu'il avait le droit de faire assurer;

La Cour déboute l'action des demandeurs."

Plaintiffs' action dismissed.

Doutre & Co., for plaintiffs.
Lacoste & Co., for defendant.
(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 889.

Phaneuf vs. *Cochrane* et al.

HELD:—That proof by parol evidence of an alleged *compromis* between the parties cannot be made for the purpose of defeating an application for *péremption d'instance*.

PER CURIAM:—This is a motion for *péremption d'instance*, and is attempted to be answered and defeated by the affidavits of the plaintiff and his counsel, tending to establish a species of *compromis* between the parties. It is quite impossible to admit of proof of a *compromis* by parol evidence. The motion for *péremption* is therefore granted.

Motion granted.

Jetté & Co., for plaintiff.
L. N. Benjamin, for defendant.
(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 1530.

Robert vs. *Fortin*, and *La Société Permanente de Construction de Jacques Cartier*, opposant.

HELD:—That in the case of a seizure of immovables which have been previously sold by defendant, and deed of sale duly registered, the plaintiff will be condemned to pay the costs of opposition to the seizure and sale filed by the purchaser.

PER CURIAM:—This case comes up on an opposition *afin de distraire*, based on a duly registered title deed to the immoveable property seized by the plaintiff. The opposition is not contested, but the plaintiff contends he is not liable for costs. I cannot see how he can escape paying the costs which are specially claimed against him by the opposant. The opposant's title deed was duly registered prior to the issue of the writ of execution, and it was the business

of the plaintiff, before seizing, to have enquired at the Registry Office. Had he done so in the present instance he would have seen that the opposant was the duly registered owner of the property which has been seized. Under the circumstances he must clearly pay the opposant the costs which have been rendered necessary by his negligent act. The opposition is, therefore, maintained with costs.

Robert vs. Fortin.

A. Dalbec, for plaintiff. Opposition maintained.
Loranger & Co., for opposant.
(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 226.

Sinclair vs. *McLean* et al.

HELD:—That in cases of *péremption d'instance* the action will always be declared *perimée* with costs, unless very special circumstances be adduced to prevent the condemnation in costs.

PER CURIAM:—This is an application for *péremption d'instance*. At the argument it was urged for the plaintiff that both parties were equally negligent, and that, following the Quebec Practice, no other costs should be allowed than those on the motion. The practice here has always been to allow the full costs of the action to the applicant, and I shall adhere to that practice unless very special circumstances in extenuation are urged. The motion is, therefore, allowed, and the action declared *périmée* with costs.

Bethune & Bethune, for plaintiff.
L. N. Benjamin, for defendant.
(S.B.)

COUR DE CIRCUIT, 1878.

DRUMMONDVILLE, 7 FEVRIER, 1878.

Coram PLAMONDON, J.

No. 4158.

Martel vs. *Senécal*.

JUGE:—Qu'une action dont le bref d'assignation contient le *domicile* du défendeur au lieu de sa *résidence actuelle*, sera déboutée sur exception à la forme.

Au mois d'août 1877, le demandeur a poursuivi le défendeur, et dans le bref il le désigne comme étant de St. Thomas de Pierreville, dans le district de Richelieu. Le défendeur a plaidé par exception à la forme que son *domicile* était bien à St. Thomas de Pierreville, mais que sa *résidence*, depuis le printemps 1877, et encore actuellement, au moment de l'action et signification, était à Lévis, dans le district de Québec, et que l'article 49 du Code de Procédure décrétant que le bref doit contenir la *résidence actuelle* du défendeur, l'exploit était irrégulier et nul et l'action devait être déboutée.

La preuve ayant révélé, que de fait, le domicile du défendeur est à St. Thomas de Pierreville où est sa famille, mais que sa résidence est à Lévis, où il tient maison et où il construit et exploite un chemin de fer, la Cour a maintenu l'exception à la forme et débouté l'action avec dépens.

Martel vs. Senécal

Autorités du défendeur: Article 49, du Code de Procédure du B. C.

Marcadé, vol. 1, p. 253, No. 312, sur art. 102. *Quant au domicile ordinaire* il est, d'après notre article, au lieu où l'on a son principal établissement. Il ne faut donc pas le confondre avec la *résidence*, qui consiste dans le seul fait de l'habitation. Ainsi un commerçant qui a le siége de ses affaires à Rouen, laisse dans cette ville un commis à la tête de sa maison et va passer une année ou davantage, avec sa famille, chez un parent ou un ami à Marseille. Pendant ce temps, il sera *résidant* à Marseille, mais il n'en continuera pas moins d'être *domicilié* à Rouen.

Jousse, com. sur ord. 1667, vol. 1, p. 21. Des ajournements, tit. II. Il ne faut pas confondre le *domicile* avec la *résidence*. On peut être résident dans un lieu sans y avoir son domicile. Le *domicile* est le lieu où l'on habite, et où l'on a établi sa demeure ordinaire et permanente. *Domicilium est locus in quo quis sedem posuit laremque et summam rerum suarum, L. 7, Cod. de Incolis.* Au lieu que la *résidence* s'entend d'un lieu où l'on fait une demeure passagère.

Dictionnaire du Notariat, p. 252, *verbo* Résidence. La *résidence* peut être distincte du *domicile*, et p. 809, *verbo* Domicile, Nos. 8 et 9.

8. Le législateur a considéré qu'un individu pouvait bien ne pas avoir de domicile dans le sens qu'on attache à ce mot, ou, comme le dit Duranton, t. 1, No. 360, de domicile *connu*. Aussi la loi a-t-elle statuée que le défendeur serait, en pareil cas, cité devant le juge de sa *résidence*. (C. proc. 59 et 69, 8o).

9. Par résidence, on entend *seulement une habitation* momentanée. Carré, *loc-cit.*

Berriat-Saint-Prix, p. 199, note 21, 1o. Une demeure n'est pas la même chose que le domicile. On peut en avoir plusieurs, et en changer, quand on veut, dans un seul instant, et sans formalité; on a au contraire qu'un seul domicile, et le changement en est assujetti à des formes et résulte de divers circonstances parfois très compliquées; 2o. Il est des actes tels que les offres réelles, (Code Civil, 1258, §6), qu'il faut notifier au domicile de la justice, et dont le défendeur serait frustré, ou qu'il serait exposé à faire irrégulièrement si le demandeur n'indiquait que sa demeure.....; 3o. Le Code se servant du mot *demeure* pour le défendeur, et du mot *domicile* pour le demandeur, annonce évidemment qu'il n'attache pas le même sens à ces deux mots; 4o. enfin, c'est ce qui a été jugé par plusieurs arrêts, et consacré par la doctrine des auteurs (voir la citation de M. Berriat.)—N.B. Le Code Français dit *domicile* du demandeur et du défendeur comme devant être indiqués dans l'exploit, notre Code dit *domicile* du demandeur et *résidence actuelle* du défendeur, ce qui est encore plus clair. Aussi Carré & Chauveau, tome 1, p. 339, No. 300 sur l'ajournement, qui prétendent que domicile et demeure dans le sens de l'art. du Code Français sont synonymes, enseignent-ils que la résidence diffère du domicile quand ils écrivent.

"No. 300 bis. L'indication de demeure équivaut-elle à l'indication du domicile? Un arrêt du [illegible] Cour de Gênes, a jugé la négative, par le motif que d'après l'art. [illegible] C. le domicile diffère de la demeure. Nous estimons que si l'on peut faire une application aussi rigoureuse de l'art. 102, ce ne devrait être du moins qu'autant qu'il serait prouvé que le demandeur n'aurait pas son

domicile dans l'endroit où la demeure serait indiquée. Le mot demeure exprime, suivant nous, une habitation permanente qui doit faire supposer le domicile, et qui diffère en cela de la *résidence*, qui n'est qu'une habitation momentanée.—Dalloz, tome 7, p. 731, No. 6, enseigne que la *demeure* diffère du *domicile*, à fortiori la *résidence* en diffère-t-elle. Voir encore Carré & Chauveau, la suite du No. 300 et No. 308, p. 352 t. 1er.

Martel vs. Sénécal.

J. U. Richard, pour le demandeur.

Charles Gill, pour le défendeur.

(C. C.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 21st FEBRUARY, 1876.

[IN CHAMBERS].

Coram DORION, C. J.

On the application of *Charles Worms*, for a writ of Habeas Corpus.

HELD:—1. The expressions "forgery" and "utterance of forged paper" in the Extradition Treaty include every crime falling under that description, whether it amounts to a felony or is only a simple misdemeanor.

2. An error in the warrant of arrest in an extradition case does not affect the warrant of commitment, if the latter be in accordance with the charge and the evidence adduced.

3. It is not necessary that the depositions be taken before the magistrate who issued the original warrant.

4. The Imperial Extradition Act of 1870 applies to Canada, and is not inconsistent with sect. 132 of the B. N. A. Act.

5. The Extradition Act merely requires that the fugitive be charged with having committed, within the foreign jurisdiction, one of the crimes enumerated in the treaty, and that the evidence of criminality be such as, according to the laws of this country, would justify his apprehension and trial, if the crime had been committed here; and when the authorities in the country where the offence was committed have declared, by the issue of a warrant for the apprehension of an offender, that the acts complained of constitute an extradition offence according to their law, it only remains for the authorities here to examine whether the same acts, if committed here, would, under our law, justify the arrest and trial of the accused for the same offence.

DORION, C. J. The petitioner, Charles Worms, has been brought before me on a writ of habeas corpus. The officer in charge of the Montreal jail, to whom the writ was addressed, states in his return that the said Charles Worms was committed to his custody under a warrant issued by Mr. Justice Ramsay, on the 12th day of February, 1876, on a complaint made by William L. Newman, of Chicago, of having, on the 20th day of November 1875, at the city of Philadelphia, in the State of Pennsylvania, one of the United States of America, and within the jurisdiction of the said United States of America, unlawfully forged the signature of the Honorable Zachariah Chandler to a certain contract, in unity with William L. Newman and John Keller, with intent to defraud, and of having unlawfully offered, uttered, disposed and put off the said forged contract with intent to defraud, well knowing the same to be forged, until he should be surrendered according to the Extradition Treaty between Her Majesty and the United States of America or discharged according to law.

Several objections were urged on behalf of the petitioner, some applying to the warrant of commitment and others to the proceedings on which it was founded. The points principally relied upon at the argument were: 1st, that the complaint on which the warrant of arrest was issued does not, in express terms charge

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the petitioner with the commission of one of the crimes mentioned in the Treaty; that the only crimes contemplated by the Treaty are felonies, and that the complaint does not charge him with having *feloniously* forged a contract or issued a forged paper or document. Among the crimes provided for by the Treaty are those of "*forgery*" and the "*utterance of forged paper*," without any further description or distinction as to the quality of the offence. Every crime coming within the description of "*forgery*" and of "*utterance of forged paper*" must therefore be held to be included in the terms used, whether it amounts to a felony or a simple misdemeanor. Then the complaint, after a detailed statement of the acts complained of, which, if proved, would amount to the crimes of *forgery* and of *uttering forged paper*, specifically charges the prisoner with the commission of those crimes in the terms of the Treaty. This sufficiently discloses the nature and particulars of the offences charged, although they may not be described with all the technicalities of an indictment, this not being required in a complaint.

Another objection is that the warrant of arrest was issued for a felony and the warrant of commitment is for a mere misdemeanor, and also that, while the warrant of arrest was issued for a felony committed against the laws of Pensylvania, the evidence adduced shows that in Pennsylvania the offence charged is only a misdemeanor. The warrant of arrest is for the purpose of bringing the accused before the magistrate who can afterwarda commit him for a higher or minor offence according to the nature of the evidence adduced before him. Any error or discrepancy in the warrant of arrest cannot affect the warrant of commitment, if the latter be in accordance with the charge and evidence adduced, and for the purpose of extradition such a warrant will be sufficient if it describes the offences in the terms used in the Treaty. (*See Commitments in the Case of Besset*, 1 *New Session Cases* 341, *and In Re Bouvier L. J. R., Q. B.* 1872–3, *pp.* 19 *and* 20.

A more serious objection, and one raising questions of considerable difficulty, is that the depositions sworn to before Weaver, a justice of the peace at Washington, were illegally received in evidence, as they were not taken before Dougherty, the magistrate who issued the original warrant in the State of Pennsylvania. The word deposition is generally used to denote any affidavit on oath. The Extradition Act of 1870 (Imperial) sect. 14, uses it in that broad sense when it refers to *depositions* or "*statements on oath*" as synonymous terms. There is nothing in the Extradition Act of 1869, (31 Vict. c. 94) to restrict its meaning, or to require that the depositions received in evidence must be taken before the magistrate who issued the original warrant; it simply requires that they be authenticated by him as being the depositions on which the warrant has issued. The depositions taken before Mr. Weaver are of the same character as those taken before Mr. Dougherty, who certified them as true copies, and the only question is whether they are properly authenticated or not. It would therefore seem that the depositions objected to might properly be received in evidence under the provisions of the Act of 1869. But all doubts are removed if the Extradition Act of 1870 is in force here, for, by sect. 14, it expressly makes any "*deposition or statement on oath*," when properly certified, admissible in evidence. The provisions of this Act are to apply to all or any part of Her Majesty's

Dominions, as may be declared by any order in council passed to that effect [sect. 2] and section 18 provides that Her Majesty by an order in council, applying the Act to any British possession, may direct that any law passed by the legislature of such British possession for the surrender of fugitive criminals shall have effect in such British possession, with or without modification, as if it were part of the Act of 1870. It was, therefore, competent for Her Majesty to direct by an order in council that the Act of 1870 would apply to cases of fugitive criminals, in Canada, under the arrangement made with the United States, and that the laws already passed in Canada on that subject should have the same effect as if they formed part of that Act. What could have been done by an order in council is effectually done as regards Canada at least, by section 27 of that Act. This section first repeals the previous Imperial legislation therein mentioned, relating to the extradition of fugitive criminals; then it provides that the Act of 1870, except when inconsistent with existing treaties referred to in the repealed statutes, shall apply in the whole of Her Majesty's Dominions as if an order in council to that effect had been passed, and also as if such order in council had directed that every law in force in any British possession, with respect to such treaties, should have effect as part of that Act. As the Treaty with the United States as regards the extradition of fugitive criminals existed when the Act of 1870 was passed, sect. 27 makes the Act applicable to that treaty, except when inconsistent with it, throughout the whole of Her Majesty's dominions and, as Canada had previous legislation on the subject, it makes that legislation part of the Act of 1870, in the same manner as if an order in council had so directed it, under section 18, as regards the Extradition Treaty with the United States. (Re Bouvier L. J. R., Q. B. 1872-3, pp. 19 and 20. If this be a correct interpretation of sect. 27, then section 2 of the Act of 1869 must be read with section 14 of the Act of 1870, as containing the words "*depositions or statements on oath*," and the depositions taken before Mr. Weaver are receivable in evidence as "statements on oath," even if they were not so as depositions. (Re Dubois alias Coppin, 12 Jurist N. S., 867, and in Re Counhaye, 8 Law Rep., Q. B. 416.)

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It was also urged that the Act of 1870 could not apply to Canada, because by the British North American Act, sect. 132, the power to carry out any obligation resulting from extradition treaties had been absolutely given to Canada, and that, if the Act was in force then, the formalities required were not observed, as no warrant from the Governor General had preceded the issuing of the warrant to arrest the accused. The answer to this objection is very simple. In the first place the Act of 1870 is not inconsistent with sect. 132 of the British North America Act of 1867, and, if it were, the last Act should prevail. As to the second branch of the objection it is unfounded, inasmuch as the Act of 1870 merely authorizes the Secretary of State in England and the Governor of a British possession to issue an order requiring a police magistrate to issue his warrant for the apprehension of a fugitive criminal, but does not require it in every case; this is made evident by section 8 of that Act. This order is also expressly dispensed with by our Extradition Act of 1869, which, as already stated, must be taken as part of the Act of 1870.

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Another objection is that there is no evidence the crime amounted to forgery according to the law where the crime was committed, and, finally, that there was no sufficient evidence to establish the crime of forgery according to our laws. The first part of this objection was urged on the assumption that the crime for which the fugitive is claimed for extradition must in every particular be the same in both countries; and the observations of Cockburn, C. J., in Re Windsor (11 Jurist 807 and 8) "that the Treaty must be held to apply to offences "which, in the legislation of both countries, must have some common element," were cited in support of this pretension. But neither the ruling in that case nor the observations quoted go to the extent of establishing that the foreign law must, as regards the offence charged, be identical with our own law. The Extradition Act merely requires that the fugitive be charged with having committed, within the jurisdiction of the United States, one of the crimes enumerated in the Treaty, and that the evidence of criminality be such, according to the laws of this country, as would justify his apprehension and trial, if the crime had been committed here. The offence must, no doubt, be such as will, under the laws of both countries, come within the general description of one of the crimes mentioned in the treaty, but when, as in this case, the proper authorities in the country where the offence was committed have declared by the issue of a warrant for the apprehension of the offender that the acts complained of constituted the crimes of forgery and of uttering forged paper according to their laws, it only remains for the authorities here to examine whether the same acts, if committed here and proved according to our own laws, would justify the arrest and trial of the accused for crimes coming within the same general description of forgery and of uttering forged paper. The common element mentioned by Chief Justice Cockburn exists whenever the duly constituted authorities of both countries, respectively adjudge that, according to their own laws, the facts complained of constitute one of the crimes mentioned in the Treaty. In such a case no other proof of the foreign law is required. In the case of Wideman, mentioned by Clarke on Extradition, p. 138, it seems to have been held, although not on precisely the same grounds, that it was not necessary to prove the foreign law.

The second part of the objection raises the important question, whether in matters of extradition the court or a judge can, on a writ of habeas corpus, enquire into the sufficiency of the evidence on which the accused was committed. It is not necessary for me to express an opinion on that delicate point, for I am satisfied that in this instance a *prima facie* case has been made out, quite sufficient to justify the committal of the accused for trial.

The order is, therefore, that the prisoner be remanded until he be delivered under the Treaty, or otherwise discharged according to law.

Carter, Q.C. & Archambault, for the prisoner.

Kerr, Q.C., for the prosecution.

(J. K.)

SUPERIOR COURT, 1878.

MONTREAL, 28TH JUNE, 1878.

Coram JOHNSON, J.

No. 2349.

Rhodes vs. *Starnes et al.*

HELD :—1. That reports made and accounts rendered by directors in the course of their duty, though made and issued to the shareholders only, as to the state of the affairs of the company, are considered the representations of the company, not only to the shareholders, but to the public, if they are published and circulated by the authority of the directors or a general meeting.

2. Directors of a company are personally liable for injury caused to third parties by false representations contained in a report of the directors to the shareholders, but the injury must be the immediate, and not the remote consequence of the representation, and it must appear that the false representation was made with the intent that it should be acted upon by such third persons.

3. A shareholder cannot claim damages against directors for having been induced to purchase shares by misrepresentation, if he has continued to hold them without objection long after he had knowledge, or full means of knowledge, of the untruth of the representations on which he bought them.

JOHNSON, J. This case might have been disposed of before, if the record had been before me; but it was not; and in view of the great amount of supervening business, I thought it best to discharge it, so that the parties might submit it afresh. It has come up again by consent, and I now proceed to give judgment. It has some importance—not only on account of the amount of money lost in this concern, but also perhaps in point of the difficulty to some extent in applying accurately principles of law which unhappily in our day have had to be applied, under an infinite variety of circumstances, to facts more or less like those in the present case. First, I must see precisely what it is that the plaintiff alleges—then what he deduces from what he alleges; then whether these deductions are warranted by the facts as they appear, or even as they are alleged. I wish to avoid verbal reference to the technical language of the declaration; because what I have to say will be long enough without that; and, perhaps, more intelligible also; but I will omit nothing that is essential; and where absolute precision is requisite, I will take the words of the declaration, and of the law.

The action is brought to recover from the defendants damages stated at $10,000, being the nominal value of one hundred shares of stock in the Metropolitan Bank, which the plaintiff purchased in July, 1872; and it rests upon alleged false representations, and fraudulent artifices and conduct of the defendants as directors and president and managing directors of that bank, by which the plaintiff was induced, as he avers, first to purchase the stock in question, and subsequently to retain it until the entire collapse of the bank in the autumn of 1875, at which time the shares became unsaleable, and ultimately proved to be worth not more than forty per cent. of their nominal value. This is a succinct and general way of putting what the plaintiff sets up as the grounds of his case; and as a general proposition, and under certain circumstances, it may be at once admitted that an action against directors might lie for an injury done to an individual by inducing him by false representations to purchase stock. There are numerous and well-known decisions to that effect; though for the

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most part they seem to have been founded on false prospectuses, and not on reports to the shareholders— a distinction which has given rise to some discussion ; and which I need not further notice at this moment. Then we have our own Banking Act, and our Civil Code establishing a general principle of liability, of which I will not stop now to discuss the limitations, because I gathered from what the defendants' counsel said that he conceded the general principle, or rather *a* general principle, though he by no means conceded any violation of it in the present instance. The first thing therefore will be to see exactly what are the precise misrepresentations and frauds charged. The misrepresentations charged against the defendants are those said to be contained in the annual statement of the 30th of June, 1872, in reliance on which the plaintiff says he purchased his shares. This statement was submitted to the shareholders at the annual general meeting, on the 2nd of July of the same year. The plaintiff purchased on the 24th of July, at a premium of 5½ per cent., which, he says, the stock would have been well worth if the statements of the directors had been true. The plaintiff then goes on to specify the precise things that were said in this statement of the directors, and in what respects they were untrue and likely to deceive him. He says, first of all, it asserted that the capital stock paid up was $636,200 ; and he insists that in this particular it was false, inasmuch as a considerable portion of the capital said to be paid up was only colorably paid up by collusion among the defendants, and not intended to be paid up at all. The report was as follows: "The directors of the Metropolitan Bank submit to the shareholders their first report embodying the balance sheet, and statement of profit and losses, for the year ending 30th June, 1872. The bank commenced business nominally in July last: but it was only towards the end of August that it was able to do so actively. The various calls have been punctually met, and many shares have been paid in full. The average capital during the year has, notwithstanding, been only $420,000, so that the result will, it is hoped, be satisfactory, and justifies the expectation that with the larger paid up capital of $636,200, still greater profits will be realized. It is not the intention of the directors to make any new calls at present, though the option will be given to the shareholders, as heretofore, to pay up in full. It was deemed expedient a few weeks ago to commence the issue of notes, and the circulation has now reached $79,848. After dividing eight per cent. on the paid up capital, the sum of $15,000 has been carried to a rest, leaving a balance at the credit of profit and loss of $4,652.69. The probable further advance in the value of real estate, and difficulty likely to arise in procuring suitable sites for banking purposes, have induced your directors to purchase the premises now occupied by the bank at a price upon which an advance can already be got."

The declaration then goes on to say that Mr. Starnes, the president, further stated that the paid-up capital was $636,200, and the average capital from the July previous up to the time of the report was $420,000, and the profits for the year ending June, 1872, were $55,277.39. The next allegation is one that might have had very great importance, if it could be referred to any particular point of time; it is this: "The plaintiff further alleges that, notwithstanding the provisions of the Act respecting banks and banking, the said directors have

collusively and fraudulently loaned to each other for speculative purposes large sums of money belonging to the said bank upon collusive and fictitious security, and to more than double the amount which, by virtue of the said statute, the said directors could lawfully borrow from the said bank, and a large portion of the indebtedness so incurred is still unpaid by the defendants." I say this allegation would be of importance if it referred to any precise time. If it charged, for instance, that *before* the plaintiff became a stockholder at all, the defendants had unlawfully used vast sums of the funds of the bank, and that the plaintiff, misled by their concealing the fact, had bought, and suffered in consequence, the relation between the concealment of the fact and the plaintiff's purchase and loss might have directly borne on the question of their responsibility; and more than that, there might have been a direct relation between that fact and the mode of payment of the calls; but if, on the contrary, this allegation is intended to refer to their mis-application of the funds *after* the plaintiff's purchase of shares, not only could there, on that score, have been no concealment of it possible at the time of the purchase, but the difference would also be very important in another respect, for the relation of the directors to the plaintiff would then have been a very different relation; from being a stranger and an outsider, he would have become a shareholder and member of the corporation, and their responsibility to him *qua* shareholder might essentially differ from their responsibility to an individual not a member of the corporation. Therefore I say, the absence of all particularity as to the time of the alleged delinquency on their part must prevent its having any effect whatever as a concealment of facts in the report which, if known to the plaintiff, would have prevented him from buying his stock. The rest of this declaration refers only to what occurred after July, 1872—the buying of the stock, the price paid for it, and the subsequent annual meetings up to 1874 inclusive, what was done at those meetings, and the untruth of the statements and representations they contained. The plaintiff's case, then, as he puts it, is made to rest on the fraud and misrepresentation of the defendants as affecting every part of it; and he brings it under two separate heads: 1st, he says: your misrepresentation of certain facts induced me to buy, and what you represented being false, you are responsible to me for the loss I have suffered through it; and 2nd, he says: after I bought, you continued your frauds and concealment and false reports, and therefore you are further answerable to me personally for the loss I sustained from what you did after I was a shareholder in the bank. The defendants, Starnes, O'Brien and Cuvillier, have pleaded a general denial. The two other defendants, Judah and Hogan, specially deny any fraud or misrepresentation, and any acquiescence in fraud or misrepresentation by them; alleging, on the contrary, that they acted in good faith, and to the best of their judgment; but admitting that they were elected directors, and that the reports were made in the terms alleged. Subsequently, owing to an amendment in the declaration, the two last named defendants pleaded further that the plaintiff had no right of action for what occurred after he became a shareholder. The reports are produced and proved. It further appears by the evidence that during the year 1871 fifty per cent. of the capital was called up by five calls of ten per cent. each, all of which had become due in

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February, 1872. In April of that year the defendant Cuvillier owed $28,565, for calls and interest. For this sum he gave his own promissory note, payable on demand. The amount of this note was placed to his credit in the bank's books, and he then gave a check for it, in payment of the calls. On the defendant Hogan's shares, he only paid two calls in cash not got from the bank; the remaining three calls he arranged for by money advanced to him by the bank on his letter or undertaking, and the amount being placed to his credit, he drew a cheque for what was in arrear, viz.: $17,700. Starnes did the same thing as Hogan, the amount in his case being $14,320. These sums amount to $60,584. The plaintiff deduces from these facts that this report was absolutely false in several particulars: First, he says that the capital was not paid up, because these payments were merely colourable and collusive, and in reality there was no intention that they ever should be paid at all; and the capital must therefore *pro tanto* be held to have been reduced; 2nd, he contends that these payments, whatever they may have been, whether colourable or not, were overdue before they were made; 3rd, the plaintiff deduces from this state of facts that Starnes' statement that there were no bad or doubtful debts was untrue; and fourthly, he deduces that the $55,000 odd of profits was also a delusion, because in the calculations showing that amount of profit, these demand notes and letters were included as assets. I am bound to say that from the evidence of record I have no doubt whatever of the mere facts themselves from which these conclusions are deduced by the plaintiff; I have no doubt that the calls were paid by the proceeds of loans or discounts; but as to all the inferences of fraud or collusion and intent never to pay them at all, I think they must be considered with reference to all the evidence in the case to see if they are just. I am now on the first branch of the case, *i. e.* the plaintiff's complaint that these were false representations by which he was induced to buy, and by which he has suffered loss. The first thing to look at will be: what is a false representation? how made and to whom? and a second point, one would think, would be: if false statements are made by directors of banks, and adopted by the latter, on whom is the responsibility to fall? on the directors personally, who are agents of the Bank? or on their principals, the bank itself that adopted and profited by these reports? or, is it to fall on both? Yet none of these points have been noticed at all; though they certainly, up to a very recent date, were most seriously discussed in England. A collection of case-law on this and cognate subjects is to be found in Shelford's law of joint-stock companies, and other books referring to the highest sources of authority in cases of this description in England, both on the question of a report of directors being in any sense a representation to an outsider who buys on the faith of it, and also on the point whether it is to be considered a report of directors, or, (after its adoption by the bank) a report by the latter, as having approved of it and profited by it. I will read now from Mr. Shelford's work, cap. iii., par. 15, p. 56: "Reports made and accounts rendered by directors in the course of their duty, though made and issued to the shareholders only, as to the state and affairs of the company, are considered the representations *of the company*, not only to the shareholders, but to the public, if they are published and circulated by the authority of the

directors, or a general meeting. But such reports and accounts made and issued to the shareholders are not the representations of the company to a person who obtains knowledge of their contents only from private sources. The various judgments with respect to this part of the law are very conflicting, both on account of the view formerly taken by the courts as to the difference between companies and other persons as to their liability for the frauds of their agents, and from its having been considered that reports made to shareholders could not be considered reports made by them. The real question, however, seems to be, whether the person deceived has obtained knowledge through persons he has a right to consider authorized by the company to afford such information. * *

"Moreover, it is conceived that many of such matters, such as reports made to the general meetings of railway companies, are of so public a nature that they must be considered as issued to the world at large."

Vice-Chancellor Kindersley said he had decided *Brockwell's* case on the principle that the report of a joint stock company was in effect a public document. Brockwell's case had been overruled by *Mixer's* case; but the reasons of Vice-Chancellor Kindersley were not questioned, and have since been expressly approved in the House of Lords in the case of the *Western Bank of Scotland* v. *Addie*. This proposition is that which the courts of equity now adopt. In the case of the *National Exchange Bank of Glasgow* v. *Drew*, 2 Macq. 103, Lord Cranworth said: "What is the consequence of the company receiving a report and publishing it to the world? I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken, as between the company and third persons, to be a representation by the company. The company, as an abstract thing, can represent or do nothing; it can only act by its managers; when therefore the directors, in the discharge of their duty, fraudulently, for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it, in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company; otherwise companies of this sort would be in this extraordinary predicament, that they may employ, nay must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false and ever so fraudulent, and yet that the company might benefit by those representations."

And again in the same case, Lord St. Leonards said: "I have certainly come to this conclusion, that if representations are made by a company fraudulently for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, these representations so made by them for that purpose do bind the company. I consider representations by the directors of the company as representations by the company; although it may be a representation to the company, it is their own representation." These remarks are sanctioned by Lord Chelmsford in a more recent case, that of *The Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. Ap. 156. Again, Lord Westbury said: "If reports were made to the shareholders of a company by their directors, and adopted by the shareholders at a regular meeting, and those reports were afterwards industrious-

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ly circulated, undoubtedly representations contained in those reports must be taken, after their adoption, to be representations and statements made with the authority of the company, and, therefore, binding the company; and if those reports, having been industriously circulated, should be clearly shown to be the proximate and immediate cause of shares having been bought from the company by any individuals, undoubtedly it would be impossible consistently with the principles of equity to permit the company to retain the benefit of that contract and to keep the purchase money." *New Brunswick R. & Land Co.* v. *Conybear*, 31 L. J. 302.

A great number of cases more or less distinguishable from each other, and from this one, in some of their details, are collected in this volume, and in a much later work by Mr. Buckley—the second edition of which was published in 1875—and without now going into them, I will only say, that whether the corporation itself be liable for representations made in this report; or whether the directors alone—or whether both alike are liable—if they should turn out to be false and to have caused injury, there is abundant authority and reason for holding that such representation, by whomsoever made and on whomsoever binding, is a representation made to the outside public, and which the plaintiff might properly treat as a representation made to him. I will only add on this point the words of V. C. Kindersley in the *National Patent Steam Fuel Co.* v. *Worth*, 4 Drew, 529, "It has been the opinion of the most eminent judges of the present day that if in a body like this, consisting of a great number of shareholders, the directors whose duty it is to present a balance sheet or report to the body at large containing a representation of the state of the affairs of the company, if that body exercising that duty or that function make a report that is entirely false, and if that is made to a public and general meeting, although there be no order to publish it either by the directors or the body at large, from the very nature of the case, it must be made public."

Whether the corporation itself, having adopted the acts of their directors, and profited by them—having gone on, as the record shows, for some three years after this report of 1872, could itself be made liable for the consequences of it to the plaintiff, is a point not raised at all in the case; and indeed, if it were, it would be quite immaterial if the law also made the directors personally liable. Now, upon the point of personal liability on the part of the directors in certain cases, there can be no manner of doubt whatever. Whether this is one of those cases is another question; but the law of Lower Canada on the subject is, I think, quite clear. The 62nd section of our Banking Act of 1871 says, that "the making of any wilfully false or deceptive statement in any account, statement, return, report, or other document, respecting the affairs of the bank shall, unless it amounts to a higher offence, be a misdemeanor; and any and every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier, or other officer of the bank, preparing, signing, approving or concurring in such statement, return, report or document, or using the same with intent to deceive or mislead any party, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by such party in consequence thereof." Here we have both criminal and civil re-

possibility—the latter expressly extended to bank directors, in terms perhaps different from those of the common law, that finds expression in Art. 1053 of the Civil Code: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." Therefore I think we must see whether this was a false representation within the meaning of the law, and which was the immediate or proximate cause of damage to the plaintiff. I have stated already what is the proof as to the mode of payment of the calls, and also how the plaintiff arrives at the conclusion that there was a diminution of the capital because the payments were collusive and colourable only—that is to say sham or simulated, and indeed expressly charged, in the words of the declaration, to have been made in that manner because of the intent that they should never be paid at all. I must say at once that in my opinion the plaintiff has entirely failed in proving anything of that kind. To avoid the risk of any inaccuracy on this point, and to see exactly what it is that the plaintiff does assert, in contradistinction to what he does not assert, perhaps I had better refer verbatim to this part of the declaration: "And the plaintiff saith that the said reports, both written and verbal, so made as aforesaid by the said defendant, the said Honorable Henry Starnes, as the mouth-piece and organ of the directors of the said bank, were and each of them was false and fraudulent, and more especially false in this respect: that it was asserted by the said reports and by the said president, that there was an amount equal to $636,200 of the capital stock paid up, whereas in truth and in fact a large portion of the capital which was pretended by him and by the said directors had been subscribed in the said bank, was so subscribed merely colourably, without any *bona fide* intention on the part of the defendants of paying for the same. * * * That the said directors knew, when they made the said report, that the said sum of $636,200 was not in fact paid up on account of the bank; but on the contrary was represented on the books of the bank by promissory notes of the said directors *colourably, collusively* and *fraudulently introduced into the books and pretended to be discounted therein, which were never intended to be paid.*" This is what he says, and what, therefore, he must be held to mean; he does not say, and cannot mean, that if this arrangement had been made in good faith, with the intention and the ability at the time to carry it out, the calls would not in effect have been paid, or the capital have been diminished. He probably could not have said with any show of reason that the capital was not paid in the way that the bank consented to take payment; and there is no allegation whatever that the directors, as agents of the bank, went *ultra vires* in taking payment in that way, if they acted in good faith. He could only mean that there was in fact no such consent given, because the whole thing was a fraud and a pretence to avoid payment; and this is, I take it, precisely what he does say. It is certain, therefore, as far as language can make it certain, that the plaintiff rests this part of his case on the arrangement for the payment of calls having been a simulated one; and not on there having been valid arrangements between the parties to them which if faithfully contracted and carried out would have diminished the capital. I say that in my judgment he has proved nothing of the kind. He has proved some-

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thing of a very different kind. He has proved that at the time of the report, these calls were paid in a manner that I do not say is a right manner of paying calls; (for if I did I should be saying that the capital of the bank might consist entirely of the credit of its shareholders) but that is not at all the case of the plaintiff, as he puts it himself. He does not say that this bank could not in good faith debit a shareholder with a loan, and credit him with a payment; he says they did not do that, but only pretended to do it; that the thing was a sham, and there was never any intention of paying at all. That position is not supported by the evidence, which shows not only that some of these loans have been since paid and discharged; but that the credit of Cuvillier, the principal borrower, was at that time very high. Can I say then, without a particle of proof as to any motive such as might have been furnished by evidence of the abuse of the funds at that time, that there is proof that this arrangement was a sham; and that the directors made a wilfully false report with intent to mislead? If I could say that, I should then have to be satisfied that such false statement on their part was the cause of the damage complained of; but I cannot see that; and therefore in making that report, the directors, though they may have fallen short of their duty to the Corporation in trusting anybody for stock—a question between them and the bank whose agents they were—they may have done so without being in fairness chargeable with a mis-statement to others with intent to deceive. They may have erred in judgment also perhaps; but if they in good faith took that mode of payment as satisfactory in their judgment at that time, they would not have told the truth if they had said that the calls had not been paid. It is certainly true that they did not say in their report in what way the calls had been paid; possibly, if they had been asked, the truth would have come out, but who is to blame for that? There is a case of recent date—the case of *Peek* v. *Gurney* to which I called counsel's attention. It is a leading case (vol. 6 English and Irish Appeals), and it turned principally upon whether a misrepresentation in a prospectus could be a misrepresentation to a purchaser in open market after all the shares had been allotted, and the office of the prospectus ended. But a variety of other points arose in that case—among them one very like this; and Lord Cairns said: "Mere non disclosures of material facts, however morally censurable, however they might be a ground in a proper proceeding, at a proper time, for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation."

Referring further on to what was insisted on in that case as a misrepresentation, Lord Cairns observed: "Strange as it may appear to us now, when looked at by the light of subsequent events, I am not satisfied that this statement was not perfectly consistent with the opinion the directors really had." In the present case I cannot doubt that the directors considered it was a good payment, and, therefore, in the absence of evidence of motive, ought to be absolved not only from intent to mislead, but from the charge as it is brought of having misrepresented a fact. Of course I am aware of the distinction between criminal and civil responsibility. I am not prepared, however, to say that that distinction does not in reality disappear under our Statute of 1871, passed after the

Code, and defining perhaps the liabilities of directors differently from those of other persons as settled by the article of the Code. That point, however, is not raised, and I shall only observe that in my opinion it is immaterial whether, in the present case, such a distinction is made or not, for I am quite certain in my own mind, after a pretty carefully cultivated acquaintance with this record, that plaintiff has suffered no injury or loss from the representation thus made. The rule to be acted on was laid down by Lord Hatherly, when he was Vice Chancellor, in *Barry* v. *Croskey*. That case was referred to by Lord Cairns in giving judgment in *Peek* v. *Gurney*, and the principles reduced to three: "First, that every man must be held responsible for the consequences of a false representation made by him to another upon which that other acts, and so acting is injured or damnified; secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the loss or injury; and thirdly," he continues: "but to bring it within the principle, the injury must be *the immediate and not the remote consequence of the representation made.*" Now what do we find to be the case here? The plaintiff buys stock in July, 1872. He remains a shareholder from that time up to June, 1876, when he brought his action, and for aught I know is so still. During all that time that he held his stock with the presumable knowledge, or what is the same thing, the means of knowledge of what the directors were about; with the same means at his disposal, at all events, as all the other stockholders, and the power of questioning them at every meeting, and either getting all the information he desired, or being refused it, and acting accordingly; he continues during all that time to hold the power which he can exercise whenever he finds it profitable, of selling the stock in question, but decides not to do so; and after three years, when the crash has come, he turns round and says to these directors: you told me in your report in 1872 that the capital stock was so much—which was false, because the payments of the calls were made with the proceeds of a sham loan which was never intended to be paid; and by that statement you have caused me $10,000 damages. This is his first complaint. Then, he goes on and shows, as I think, conclusively, that he cannot be right in saying that his loss can be attributable to the stock not having been paid; for he says, further, you have squandered all the capital. It is true, he gives no time as to this squandering of capital, and, therefore, it cannot serve as a motive for concealment in the report; but we must take it as true as against him, for he says it himself. Now, it must have been either before or after the report, and in either case, according to the plaintiff, the statement in the report would have been immaterial, since, if the capital had all been paid in gold, it was equally squandered. Of course, if it was a misrepresentation, the additional wrong of squandering the Bank's funds could not excuse it; but it remains true, also, that the false statement was not the cause of the injury; for, to use Lord Cairns' words, "the injury must be the immediate, and not the remote, consequence of the representation." I need not dwell upon the other conclusions

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deduced by the plaintiff, from the fact or assumption that there was misrepresentation as to the payment of the calls. They all depend upon whether that was a statement that was wilfully and absolutely false, or whether it was a statement that was true in the sense that these payments were *bona fide* considered by the directors as available assets of the bank. I have already given my judgment upon that point, and it therefore appears to me that the first part of the plaintiff's case must fail. Confining myself to the first part of this case, and to that alone, I find that all authority is against subjecting directors to personal responsibility, however imprudent their conduct may seem, unless it is shown that it has been prompted by fraudulent and improper motives. There is nothing of this kind brought to bear upon the time of the first report; and, therefore, if the grossest misconduct were proved afterwards, I should have no concern with it in the present case.

I decide the case upon the grounds that I see no wilful mis-statement leading immediately or proximately to the injury complained of; and because it appears to me, upon the whole, that the plaintiff who here asks damages for having been induced to purchase his shares by misrepresentation, cannot complain, if he has continued to hold them without objection after knowledge, or with the full means of knowledge, of the truth or untruth of the representations on which he bought them. The case seems to me analogous in principle to that of *Peek* v. *Gurney*—in one part of that case, where Lord Chelmsford said: "The Master of the Rolls proceeded upon the principle established by many decided cases, that an allottee or purchaser of shares in a company seeking to divest himself of them upon the ground of having been induced to purchase by misrepresentation, cannot be relieved, if he has continued to hold them without objection after knowledge of the falsehood by which he has been drawn in to acquire them. These cases proceeded upon the ground of acquiescence, and on the application of a more general principle that an agreement produced by fraud is not absolutely void; but that it is entirely in the option of the person defrauded whether he will be bound by it or not. The suit in the present case is not for the rescision of the contract; but is founded on the loss the appellant has sustained, and is similar to an action for deceit."

Upon the second part of the case, the responsibility of the defendants to the plaintiff for what occurred after he became a shareholder, it is not expected probably that I shall say much. I am quite satisfied upon principle and upon express authority cited, that all that is alleged to have taken place after the meeting of July, 1872, constitutes an injury to the corporation to whom alone an action would on that account belong; and I have no doubt that portion of the Declaration might have been demurred to. As I am not able to give judgment against any of the defendants, I am not called upon to discriminate between them. After all that has been said, however, as to malfeasance, it is only proper to observe that as regards the defendant, O'Brien, he was not a director at all until some time after the report of 1872; and, as respects Mr. Judah, the plaintiff's counsel admits that his name was used without authority by Mr. Starnes in a loan account opened by the latter; and indeed it appears from his own testimony that he sold his stock in March, 1872, and only attended to

watch the interests of the City and District Savings Bank, of which he was president. That there were speculations in stocks with the funds of this Bank is not only true, but was assigned by Mr. Judah as the reason for selling his stock. On a thing of that sort probably all sober people have the same opinion and I need not give mine now, but it was a matter between the shareholders as a body—that is, the corporation and those persons who so used the funds—and has nothing whatever to do with the representation made in the report upon which the plaintiff expressly puts his case, and which, he says, had it been a true report, would have made his stock worth all that he paid for it; and I gathered from what was said at the hearing, that the corporation had practically renounced its claim against them. Before concluding I will mention one other consideration which appears to me to have weight in this case. The case of *Peek* v. *Gurney* has been referred to already; but there is one part of Lord Cairns' admirable judgment in that case that seems to bear directly on the position of the parties here. That was a case of misrepresentation also—the only difference being that there it was in a prospectus, and here in a directors' report. The office of the prospectus was over—all the shares having been allotted;—in other respects the principle of liability and the duration of it were the same as in the present case. Lord Cairns' language was this: "Now, my lords, I ask the question, how can the directors of a company be liable after the full original allotment of shares for all the subsequent dealings that may take place with regard to those shares upon the *Stock Exchange?* If the argument of the appellant is right, they must be liable *ad infinitum*, for I know no means of pointing out any time at which the liability would, in point of fact, cease. Not only so, but, if the argument be right, they must be liable, no matter what the premium may be at which the shares may be sold. That premium may rise from time to time from circumstances altogether unconnected with the prospectus"—and so I would observe it might rise or fall here from circumstances altogether unconnected with the report—"and yet, the appellant would be entitled to call upon the directors to indemnify him up to the highest point at which the shares may be sold for all that may be expended in buying the shares. My lords, I ask, is there any authority for this? I am aware of none." It must be allowed, of course, that Lord Cairns asked and answered this question in a case where liability had ceased, because the office of the prospectus in which the statement had been made was over, and the plaintiff had bought afterwards in open market. As far as responsibility for misrepresentation is concerned, there was that difference between that case and this one, and there was no other difference: it was a difference as to the existence of responsibility; not as to the duration of responsibility, if it existed. Therefore as to the duration of existing responsibility, that case and this one are on the same footing; and it was as to the injustice of the duration of this responsibility, if it existed, at all, that Lord Cairns was speaking.

The plaintiff's action must be dismissed; but as to costs, it is entirely owing to the fault of the defendants that the plaintiff has taken these steps; and though they made no intentional mis-statement; and therefore no action can be main-

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tained against them for it, they will get no costs from the plaintiff; and the action is, under the circumstances, dismissed without costs.

Abbott & Co., for plaintiff.

Kerr & Carter, for defendant O'Brien.

Judah, Wurtele & Branchaud, for other defendants.

SUPERIOR COURT, 1878.

MONTREAL, 28TH JUNE, 1878.

Coram JOHNSON, J.

No. 970.

Massé vs. *The Hochelaga Mutual Insurance Company.*

HELD:—Where a condition in a policy of a mutual fire insurance company provided that in case any promissory note for the first payment on any deposit note should remain unpaid for 30 days after it was due, the policy should be void as to claims occurring before payment, that the company, accepting a note for such first payment, but acknowledging receipt by the policy as for cash paid, waived the condition.

JOHNSON, J. This is an action to recover the amount of a loss by fire on the 15th August, 1877, under a policy of insurance for three years from the 10th March, upon an engine lathe in a building described in the policy. The plaintiff alleges the execution of the policy, the giving of his deposit note for $79.24, and the payment of the first assessment on it, amounting to $11.89. Then he alleges the fire, and destruction of the thing insured, and notice of loss. The defendants plead, besides the general issue, two pleas. By the first, they set up the 19th condition of the policy, which provides that in case any promissory note for the first payment on any deposit note shall remain unpaid for thirty days after it is due, the policy shall be void as affects all claims for loss occurring during the time of such non-payment, subject, however, to revival after payment; that the plaintiff gave his deposit note for $79.24, as alleged, on which a first payment of $12.05 ought to have been made when the policy issued; but instead of paying that sum in money, the plaintiff gave his note at thirty days, which became due on 12th of April, and remained due at the time of the fire, which was on the 15th of August. Second, the defendants set up the 12th condition of the policy, by which notice of fire and proof of loss are to be made within 30 days after a fire; and they also set up the Provincial Statute of Quebec, 40 Vic. c. 72, sec. 28, which provides for such notice and proofs of claim, and obliges the company within 30 days afterwards to ascertain and determine the amount of loss, and notify the claimant of their determination by a prepaid and registered letter, and makes the amount of loss payable in three months after the receipt of the proofs; and they say the plaintiff violated both conditions, and also the Statute. The plaintiff makes two special answers: first, that these conditions are no part of the policy, not being in the body of it, but only printed on the back; and that the receipt for the deposit note of $79, and for the first assessment $11.89, are conclusive, and a waiver of the condition.

By his second special answer he says that the note for $12.05 was in fact paid on the 15th September, and the risk thereby revived. I am clear that these conditions are part of the contract. The application for insurance makes them so. There is warning given by an express reference to them on the printed endorsement, and the plaintiff, as a member of a mutual company, and both insured and insurer, uses these conditions towards other members, and must be held to them himself.

As to the non-payment of the note given for the 1st assessment, can the plaintiff prove the note at all in the face of the policy by which this corporation under its seal acknowledges that the plaintiff "has deposited in the hands of the direc- "tors of the Company his note on demand for $79.24, of which the sum of "$11.89 has been paid to the directors," and further, in the face of their interim receipt "that the plaintiff has given a deposit note for $79.24, and made a cash "payment thereon of $11.89."

The evidence was taken under reserve of objection made at the time, and on looking at the case now, I feel no hesitation in ruling out the evidence on that subject. The point is not now, under this first special answer, as to the effect of this 19th condition if it could be legally proved that a promissory note had been given, and was overdue and unpaid at the time of the fire; but whether, when the defendants themselves acknowledge in writing that the payment was in cash, they can be allowed to prove the reverse of what they have admitted in the contract. The effect of a payment by note is one thing: It may be an absolute payment in certain cases, or it may be defeated by the happening of the condition, *i. e.*, non-payment at maturity. That question is very nicely treated in Benjamin on Sales, c. 2, Book IV, on payment and tender; but what I am concerned with now is whether this corporation, confessing under its seal that it has received payment, can be allowed to prove that it has not; and it would be against all principle to allow that it can. On this point I would merely refer to the collection of authority in Sansum's Digest, page 900 et seq., where it will be seen that the point has been over and over again decided in accordance with the plaintiff's first special answer. Therefore the question raised by the second special answer of the plaintiff made without waiver of the first, that this note had been paid on the 15th of September, whereby the risk revived, is not reached. There is no violation of the condition No. 19, because the defendants have waived it by express admission in the contract, which prevents the proof of it.

There remains therefore the question of notice and proof of loss under the twelfth condition. Upon this point I am against the plaintiff. The notice and proofs required by that condition have not, in my opinion, been given as the parties agreed that they should be given. Notice of loss was to have been given "forthwith" in writing. The only thing in the nature of notice in this case was what is contained in the two papers produced by the defendants as Exhibits 1 and 2. They are notices by a Mr. Babcock acting, as he says, in his own interest, and in that of the plaintiff. They were not delivered forthwith—nor even within thirty days. As to proofs of loss, the insured was required to make them within the 30 days—so that the Company could exercise its right within the time, and in the manner stated in the 28th section of the Act. The assured

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seems to have sworn to his loss by attorney. That is to say he never swore to it at all, for his attorney could surely not make oath to facts known only to the principal. Then a Mr. Annett swears to the value, but not the destruction of the thing insured. The object of such a condition, which is evidently to put the insurer in a position, within a reasonable time, to judge of the facts, is obviously frustrated, if this can be held to be a compliance with it. There must be fair play on both sides.

Action dismissed.

Lambe, for the plaintiff.
Lunn & Co., for the defendants.
(J. K.)

SUPERIOR COURT, 1878.

MONTREAL, 28th JUNE, 1878.

Coram JOHNSON, J.

No. 2390.

Brown et al. vs. *Archibald et al.*

HELD:—Where several persons, trustees of an insolvent estate under a deed of composition, which gave them no power to draw or accept bills, signed promissory notes with the words "Trustees to Estate C. D. Edwards" after their signatures, that they were personally liable.

JOHNSON, J. The action of the plaintiffs here is against the makers of five promissory notes, signed by the defendants in favor of Charles D. Edwards, and endorsed by him to the present holders. The pleas were that Edwards had become insolvent, and had made an assignment to Perkins, and afterwards made a deed of composition with his creditors under which the defendants were made trustees of the estate, while he himself carried on the business; but, being unable to meet the terms of his composition, the official assignee re-took the estate; and that the defendants were called upon by Edwards to sign these notes to enable him to get coal that he had bought from the plaintiff, and signed them as trustees, and so limited their liability. The plaintiff answers that the notes were signed with the express understanding of a personal liability of the defendants, and without which the coal would not have been delivered. There are two points: 1. As to the personal liability of the defendants, under the general rule—they having put the words "Trustees Estate C. D. Edwards" after their signatures; and, 2. Was there any express understanding? Both points depend on the proof, as, no doubt, there may be circumstances that would exempt them from personal liability, and there might also be an express understanding. The question is not new, and, according to the current of authority, turns upon distinctions that are sometimes extremely faint. The general principle is that there is personal liability, unless distinctly excluded. In a case of *Rocher* v. *Leprohon*, in September 1876—in Review, it was held by the majority of the court that there was personal liability, even where the debtor gave a tolerably distinct notice that he intended there should be none. It was the case of a registrar suing a returning officer for the price of work in furnishing election lists, and the returning

officer had written to him to get the list, and said: "I require in my capacity of returning officer, &c." I thought there, there was a plain notice of the capacity in which he acted, and in which the other consented to treat with him; and I differed from the Court. A more recent case is that of *Brown* v. *Kerr*, where the defendant signed "R. Kerr, as president of the Montreal Omnibus Company." In that case Mr. Justice Rainville held there was no personal undertaking. That judgment was, however, reversed in Review—and is now before the Queen's Bench. That was an undertaking by which Kerr had agreed to settle an account, in order to prevent the property of the company (of which he was president) from being seized, and the plaintiff had abstained from legal proceedings, and the property had been sold through the instrumentality of the defendant, and on that ground the case was decided against him in review. The cases are very numerous in this country and in England on this subject: the latter are all to be found abbreviated at p. 102, Shelford's digest of case law of joint stock companies, under the head of liability of agents signing negotiable instruments.

Courtald v. *Sanders*, 15 W. R. 906, is cited as giving the test, which is, that "*the agent is bound personally, unless on the face of the instrument* which evidences the contract the signature appears to be on behalf of the company." It is there said that the cases on this subject are somewhat conflicting, and no doubt they are, and will continue to be, under the great variety of circumstances constantly arising in the course of business, and under the different aspect of facts presented to different minds; for, after all, this is mainly a question of fact; and no doubt Mr. Shelford is quite right in saying that in many instances persons have been held liable contrary to their intentions; and, probably to obviate this, a provision was inserted in the Companies' Act in England with respect to notes and bills of exchange—in language which, however, has been held to do nothing more than express what the law was before. In the present case, what was meant as between all the parties to the notes may be considered with reference to the deed under which the defendants were acting. It was a deed to which Edwards was party of the first part, his creditors parties of the second part, the defendants made trustees of the third part, and Perkins, assignee, binding himself to give up the estate to them, of the fourth part. Edwards gave notes running over thirty-six months to his creditors, who were to discharge him if the notes were paid; and the defendants were to superintend merely, and the debtor, until the last note was paid, was to carry on the business under the supervision and control of these gentlemen, who were to re-assign to him what they had received from Perkins as soon as the notes should be paid. The cases of *Redpath* v. *Wigg*, 1 L. R. Ex. 335, and *Easterbrook et al.* v. *Barker et al.*, 6 L. R. C. P., do not directly apply. In the first, the signature was "for so and so" (the debtor), and in the second there was no undertaking at all by the trustees, and the question was only whether the debtor could pledge their credit. The plaintiff is proved to have asked Edwards to get the notes signed by his trustees. He probably knew, therefore, of this arrangement, and that Edwards had divested himself of his estate, and that the defendants had it for the benefit of the creditors. I do not see how he could be supposed to ask them to bind

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Edwards' estate, already belonging to the creditors, and held by the defendants in trust for them. They had no power given to them by the deed to draw or accept bills. The mere mention of the fact that they were trustees could not of course by itself make their contract in that capacity. As creditors of Edwards they had a personal interest in the success of his business, and I think they must be held to have contracted personally. The plea is, therefore, dismissed, and plaintiff has judgment.

Abbott & Co., for plaintiff.
Kerr & Co., for defendants.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 30TH APRIL, 1877.

Coram JOHNSON, J.

No. 562.

Green et vir vs. *The City of Montreal.*

A clause in the City Charter makes goods and chattels found in the possession of those indebted to the city for taxes and assessments liable to seizure.

HELD:—Where goods belonging to plaintiff, *séparée de biens*, were seized in the conjugal domicile for taxes due by her husband, that the goods were not in the possession of the husband within the meaning of the Statute. Cohabitation does not destroy the *possession séparée* which pertains to the wife *séparée de biens*.

PER CURIAM. This is a proceeding for an injunction taken by the plaintiff, who is the wife *séparée* of Dr. Utley, to stop an execution for taxes due by her husband to the Corporation. The power given to the city under the 88th sec. of the Statute (37 Vic., c. 51) is to levy by warrant from the Recorder's Court in 15 days after demand, "from the goods and chattels of the person bound to pay the same, or of any goods and chattels in his possession wherever the same can be found within the city, and no claim of property or privilege thereon or thereto shall be available to prevent the sale thereof for the payment of the assessments, taxes or duties and costs out of the proceeds thereof."

The plaintiff's *requête* sets up that some furniture belonging to her has been seized by warrant of distress issued from the Recorder's Court in a case where the Corporation is plaintiff and Dr. Utley defendant; that the debt was incurred by Utley as tenant of an office in St. James street, for which she is not responsible, and her property ought not to be sold to pay it. The defendant pleads that the warrant has been legally issued, and legally executed by seizing moveables in Utley's possession, in a house rented by him, and having his name on the door, and that the effects seized are not the plaintiff's property, but were bought with her husband's money.

The facts of the case are established by written admissions. They are that the debt for which the seizure was made, and also another debt for a larger sum, are due by Utley for taxes and assessments, which he became liable to pay to the city while he kept an office at 194 St. James street for the practice of his profession as a physician, and while the residence of the plaintiff, her husband,

and family was in McGill College avenue, from which she removed to her present residence, where the seizure was made. That the articles seized had never been in the office of Utley. That, when the seizure was made (7th August last) Utley had ceased to keep an office in St. James street, and kept it at his wife's residence, and his name was on a plate on the door. That before the seizure the officers got notice that the furniture had never been in St. James street, and that the articles seized are the same as those mentioned in exhibit A, which is a certified copy of *procès verbal* of sale to the plaintiff by the Sheriff in a case in which she was plaintiff and her husband defendant.

Under the statute I have cited, it is clear that the right of the Corporation to bring to sale the effects seized is limited to two cases: 1st, where they are the property of the debtor; 2nd, where they are in his possession. As to their being the property of the debtor, the admission settles that; they were the property of his wife beyond doubt. The only question is as to the debtor's possession, because, if that is clear, it excludes the privilege of the proprietor. The seizure was made at the husband's domicile, and the wife must prove her possession in her separate right; but it is not because by law and by nature a husband's domicile is with his wife, unless he has a *séparation de corps*, that his possession is to be presumed of his wife's separate property. Some strong language was used as to the nature of the right claimed by the corporation, and the character of this particular provision of their charter. I always prefer strong reasons to strong language; and I see nothing in this law that is not dictated by the necessities of the case, for, if the payment of city taxes is to depend in all cases upon the chicanery of the tax-payers, city government will be impossible, and the law has, therefore, plainly said that, if the property of others be left in the possession of the city's debtors, it will be liable to be sold for the debts of those debtors to the city. It is optional with those who dwell in separate abodes to leave or refuse to leave their property in the possession of the city's debtors; but how is a wife who has merely *séparation de biens*, and not *séparation de corps*, to prevent the modified or joint possession by her husband of the household furniture? And yet, is she to lose her property because she obeys the law and lives with her husband? A case of Walker vs. The Corporation of Sorel, in appeal, was cited by the defendant at the hearing. There is no authoritative report of that case; but, from the newspaper extract laid before me, I see that it was a revendication by a wife of property that had been seized for taxes in the conjugal domicile. There were some features in that case clearly distinguishing it from this one; but the action was dismissed by a majority of the Court, who held that the husband there had possession to bring him within the statute. The Chief Justice and Mr. Justice Taschereau, however, dissented, and all the Judges, without exception, appear to have agreed that, if the goods had belonged to the wife, and had been seized in her possession, they could not have been sold to pay the debt of another. *Aliter*, no doubt, if they were seized in the possession of the husband, as the majority of the Court in that case held they were. In France the civil code has much the same provision regarding the privileges of the *trésor public* on the property of *comptables*; and the subject is treated very fully in several modern French books. (See *Pont, privilèges et hypothèques*,

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vol. 1, Nos. 41 et seq.; and Persil, Régime hypothécaire, vol. 1, p. 19, et seq. Comm. on art. 2098 C.C.) In the present case there is no evidence beyond the admission; but the admission says these are the same things that the plaintiff acquired at a Sheriff's sale of her husband's effects, and that they never were in his office. A *femme séparée* certainly has a legal *possession séparée*. The authority cited from Persil to the effect that the wife must show these things were bought with her own money, and that they will be presumed to have been so with her husband's, has no application. Persil is treating of No. 2, of Art. 2098, C.C. which gave a privilege to the *trésor public sur tous les biens meubles trouvés* dans les maisons d'habitation des comptables (which the Statute before me does not do; but only on those in the debtor's possession) and the reason in France is stated by Persil, vol. 1, p. 22, to be that they may be supposed to have been purchased with the public money—particularly if bought since the comptable's appointment to office. That authority does not reach the present case. Under our régime the possession of the *femme séparée* is a *possession séparée*, and her *possession séparée* is not the possession of the husband, and cannot be so in the very nature of things, while it is hers. The very idea involves a contradiction and an absurdity. Suppose, for instance, that these taxes had been a separate debt of the wife, could it be contended that the property she had bought was not in her possession so that it could be seized and sold for her separate debt, notwithstanding her husband's co-habitation? Assuredly not. Since, then, their rights of property are distinct, it follows that her possession cannot also be his possession in the sense of the law; or else a *femme séparée* can have no separate property, for in moveables possession is title, and if he has possession he has also presumable title; and they cannot both have a separate title to the same things. It follows, therefore, that the husband in this case had no possession except the inevitable appearance of it arising from co-habitation. I am not in a position to state from the report of Walker's case what was the proof of the husband's possession there; nor do I take upon myself with such insufficient information to say whether or not my view would agree with that of the majority in that case; but certainly, however necessary this law may be, it is a very severe one, and must not be stretched to violate the laws of property, or to make out of mere co-habitation and the apparent and unavoidable co-possession arising from it, a possession by the husband alone that would have the effect, under the statute, of taking the property of a *femme séparée* to pay his individual liabilities. Judgment for plaintiff against the city with costs, and against the other defendants, who have not contested, without costs.

Doutre & Co., for plaintiff.

R. Roy, Q. C., for defendant.

(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 30TH MAY, 1877.

Coram JOHNSON, J.

No. 1375.

Delaney vs. *Lazarus*.

HELD:—That a pawnbroker is not liable for articles pledged with him which have been stolen from his premises without any negligence on his part.

PER CURIAM. This is a very hard case. A lady sues a pawnbroker for the value of some articles pledged; and he pleads that they were burglariously stolen, without any negligence on his part, and that therefore he is not liable. The fact is circumstantially proved, and even admitted. The larceny was committed under circumstances that no ordinary prudence could have foreseen. The keys of the safe appear to have been taken from the defendant's pocket, and a wax impression of them made, and then returned. The night watchman went on duty at a quarter to eight at night, and went off next morning at five. The capture and subsequent conviction of one of the thieves leave no doubt of the redoubtable skill of the operators. The question is one of law. Is there liability? As I have said, the circumstances admit of no doubt; and I do not think the law does either. The pawnbroker is not liable without negligence. Story, 338, says: "The true principle that seems to be established by the authorities is that theft *per se* establishes neither responsibility nor irresponsibility. If the theft is occasioned by any negligence, the bailee is responsible; if without any negligence he is discharged. Ordinary diligence is not disproved, even presumptively, by mere theft; but the proper conclusion must be drawn by weighing all the circumstances. This is the just doctrine to which the learned mind of Mr. Chancellor Kent has arrived, after a large survey of the authorities, and it seems at once rational and convenient." At No. 339: "Another duty of the pawnee is to return the pledge and its increments, if any, after the debt has been discharged. Of course this debt or duty is by law extinguished when the pledge is lost by casualty or other unavoidable accident." This is the rule of the Roman law and the French law also, and the pawnee has an action *pignoratitia contraria* to recover the money advanced where the thing pledged has been lost by theft without negligence on his part. (Pothier, Nantissement, No. 60.)

Coming to our own law, and the positive texts of the Code, we find the case disposed of by reference to Articles 1072, 1150, and 1200. Art. 1072 says there is no liability where the inexecution of the obligation is caused by a fortuitous event, or by irresistible force, without fault. Article 1150 makes the debtor responsible even for deterioration in the thing deposited, only in case of negligence on his part. Art. 1200 says that when the performance of the obligation becomes impossible either by reason of the perishing of the thing, or any other cause without his fault, the debtor is not responsible unless he has expressly bound himself for fortuitous events. All the modern authors class theft as a *cas fortuit*. I have said this is a hard case, and so it is in the sense

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that the plaintiff must lose her property without her fault; but how much harder would it be for the defendant if his debtors could hold him liable for all the property which in their own possession would have been equally liable to be stolen, and probably much more so, merely because he had lent them money on it, and without any fault on his part?

Judgment for defendant.

A. Gélinas, for plaintiff.
Kerr & Co., for defendant.
(J.K.)

COUR SUPERIEURE, 1878.

MONTRÉAL, 9 JUILLET, 1878.

Coram PAPINEAU, J.

No. 2196.

Turcotte vs. *Regnier, fils.*

JUGE :—Qu'une action de $67 originée à la Cour Supérieure par *capias ad respondendum* dument exécuté, mais dont désistement est subséquemment fait par le demandeur le jour du rapport de telle action, ne peut être continuée devant ce tribunal qui n'a alors aucune juridiction, et doit être renvoyée sauf au demandeur à se pourvoir devant le tribunal compétent.

Le 18 mai 1878, le demandeur poursuivait pour $67 mais instituait son action à la Cour Supérieure par *capias*, sur le fait que le défendeur quittait la Province de Québec pour aller résider à Manitoba.

Le 6 juin, jour même du rapport de l'action, le défendeur comparut par son avocat qui alors reçut signification d'un désistement du *capias* seulement, le demandeur continuant son recours sur l'action telle qu'intentée.

Le défendeur par exception déclinatoire plaida que, par tel désistement du *capias*, qui n'était que l'accessoire et seul donnait juridiction à l'action, la Cour Supérieure n'avait plus telle juridiction et le défendeur ne pouvait être dès lors appelé ou contraint à s'y défendre.

Le jugement de la cour a été comme suit :

La Cour etc. : considérant que le *capias ad respondendum* accompagnant l'action, seul pouvait donner droit au demandeur d'intenter son action devant cette Cour Supérieure pour la somme demandée qui n'est que de $67.00, et qu'il n'est pas prouvé que le demandeur eut rapporté son action en cour avant de se désister du dit *capias ad respondendum*, maintient la dite exception déclinatoire et met en conséquence le défendeur hors de cour avec dépens contre le demandeur, la cour réservant au demandeur le droit de se pourvoir devant le tribunal compétent.

Action déboutée.

Thibault & Messier, pour le demandeur.
A. W. Grenier, pour le défendeur.
(A. W. G.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 16TH SEPTEMBER, 1876.

Coram DORION, C. J., MONK, J., SANBORN, J., TESSIER, J., and BELANGER, J., *ad hoc*.

JOHN R. DOUGALL, ET AL.,

PLAINTIFFS IN ERROR;

AND

THE QUEEN,

DEFENDANT IN ERROR.

HELD:—That on a writ of error the Court cannot look beyond the record for what took place at the trial, and affidavits purporting to contradict the record are inadmissible.

2. The notes taken by the judge presiding at the trial do not form part of the record.

SANBORN, J. This is a writ of error, and the plaintiffs in error have assigned nine reasons why they should obtain relief from the judgment rendered on the 28th day of September, 1874, condemning the said plaintiffs in error, John Redpath Dougall and James Dougall, to pay severally, to wit, John Redpath Dougall sixty dollars, and the said James Dougall forty dollars, to Her Majesty, upon a verdict rendered against them for libel. The first reason assigned is because their motion for a new trial was rejected. Without deciding whether, under the existing law and the constitution of the Queen's Bench, Crown side, the Court could under any circumstances entertain such motion, it is sufficient to say that all the grounds urged in support of the motion, except one, are alleged illegal rulings of the presiding judge upon matters of evidence. Section 80 of our Criminal Procedure Act expressly declares that no writ of error shall be allowed in any criminal case, unless it be founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve. It is not stated in the motion for a new trial that the Judge refused to reserve any of these questions, and we cannot take cognizance of them. Further, the notes of evidence are not before us, and we have no means of judging upon the rulings. As to the other ground of motion, that the verdict was not one of "guilty" but "not guilty," it is not proved by the record before us. The 2nd, 3rd, 4th, 5th, 6th and 7th reasons assigned have reference to alleged illegal rulings of the presiding Judge on questions of evidence. In fact, they are a repetition of the reasons given for the motion for a new trial. It is simply impossible for this Court to give any opinion upon these rulings as we are not in possession of the notes of evidence taken at the trial, and there is nothing in the record to show that such rulings were made. The eighth reason assigned is that the verdict was not that of "guilty" but "not guilty." The record shows nothing but a verdict of "guilty." We cannot look at the affidavits of persons as to what took place at the trial. The record is the only authentic account of it and the only thing by which we can be guided. The ninth ground is that the honorable Judge presiding refused to reserve any of these questions raised as to evidence, although requested in writing to do so. This is a matter that might be considered under a writ of error, as is implied by the 80th section of the Criminal Procedure Act, to which reference has been made. This Court, how-

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ever, can only ascertain that such request was made, by reference to the record sent up, and can only determine upon the reasonableness of the refusal, by proof of tender of such evidence as was alleged to have been ruled out. The record, as sent up to us, does not establish these facts. It is plain, then, as the Court upon writ of error can only consider what appears upon the face of the record, it has nothing to act upon. The allegations contained in the several reasons assigned for reversal of the judgment, so far as the record proves them, are unfounded. It is first to be observed that this Court, in adjudicating upon a writ of error, has no appellate jurisdiction, and it is a well-settled doctrine that in error the Court only takes cognizance of what appears on the face of the record. Rex vs. Faderman, 4 New Sess. R. 161; Archbold, p. 186. Mellith vs. Richardson, 2 M. & Scott, 191. Babinas vs. Reginam, 14 L. C. R. 71. Wheelan vs. Reginam, 28 U. C. Q. B. 139. As to what should constitute a record, there is great uncertainty. Bishop says (1 Procedure 1,153): "There is no subject relating to the law of criminal procedure upon which it is so difficult to set down anything as positive law as the subject of the record." Chitty sums up the contents of a record in a case of felony as follows: "It states the session of Oyer and Terminer, the communion of the judges, the presentment of the oath of the grand jurymen by name, the indictment, the award of capias or process to bring the offender, the delivery of the indictment into Court, the arraignment, the plea, the issue, the award of jury process, the verdict, the asking of the prisoner why sentence should not be passed upon him, and the judgment." 1 Chitty, Criminal Law, 720. This subject was fully discussed in the case of Babinas vs. The Queen, decided by this Court in 1863, and four out of the five judges appear to have been of the opinion that the notes of evidence of the presiding Judge form no part of the record. This dictum is in accordance with Chitty. Speaking of judge's notes, he says:—"In order to enable the presiding judge to sum up the evidence with accuracy to the jury, he ought to take notes of the proofs adduced in every part of the proceedings. And this is the more necessary, as these minutes frequently become important documents in a remoter stage of the prosecution, as where the cause is removed by *certiorari* before sentence, where a special case is carried up to the Court above, or where an application is made for a pardon. In these and many other cases these notes are examined to show the circumstances of the prisoner's guilt and how far the aggravations or excuses of the case ought to operate in dispensation of justice or extension of mercy." 1 Chitty, Crim. Law, 633. The judge's notes remain with him. The procedure that forms part of the record is what is entered by the clerk. According to Bishop, it is greatly in the power of the presiding judge to control the record, and it would seem by the terms of the 80th section of the Crim. Pro. Act, if any question is sought to be reserved and the judge declines to reserve it, that it may be put on record and form part of the record to be taken cognizance of under writ of error. It was held in Rex vs. Carlisle, Q. B. and Ad. 362, that matter of record must be proved by the record itself, not by anything *aliunde*. It is not necessary or pertinent for the Court to pronounce any opinion upon the questions presented by the reasons assigned by the plaintiffs

in error. It would be adjudicating upon abstract questions so far as the record gives us any information, for the Court can only determine this demand in error upon what appears upon the face of the record. The record as certified by the Clerk shows no defect in substance or irregularity of procedure in the trial and judgments to warrant a reversal of the judgment complained of, and the reasons assigned generally appear not to be founded upon facts of record, consequently the judgment must be affirmed.

Doutre & Co., for the plaintiff in error.

Carter, Q. C., and *Kerr, Q. C.*, for the Crown.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 28TH DECEMBER, 1877.

Coram DORION, J.

No. 1275.

Homier vs. *Brosseau* et al.

HELD:—That under the clause of *garantir, fournir et faire valoir* in a deed of transfer of a debt, the assignee cannot sue the assignor, without previously discussing the debtor and establishing his insolvency.

This was an action by the assignee of a debt under a deed of transfer against the assignor and the debtor jointly and severally.

The plaintiff in his declaration simply invoked the clause of *garantir, fournir et faire valoir* contained in the deed, without alleging in any way that he had previously discussed the debtor, or that he was insolvent.

The assignor (Morin) contested the action and denied all present liability.

The Court dismissed the action, assigning the following reasons:—

"Considérant que le vendeur d'une créance avec promesse de garantir, fournir et faire valoir, est garant de la solvabilité du débiteur seulement, et non obligé direct au paiement de la somme transportée;

"Considérant que le cessionnaire ne peut exercer son recours en garantie qu'après discussion des biens du débiteur, et après avoir établi son insolvabilité;

"Considérant que le demandeur en la présente cause n'a ni allégué ni prouvé l'insolvabilité du défendeur Morin, a débouté et déboute l'action du dit demandeur, quant au dit défendeur Morin, avec dépens."

Action dismissed.

Archambault & David, for plaintiff.

Lacoste & Globensky, for defendant Morin.

(S. B.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 22ND MARCH, 1878.

Coram DORION, C. J., MONK, RAMSAY, TESSIER JJ. and TASCHEREAU J., *ad hoc.*

No. 168.

THE CITY OF MONTREAL, APPELLANT;

AND

DEVLIN, RESPONDENT.

HELD:—That leave to appeal to the Privy Council from a judgment of the Court of Queen's Bench, Quebec, will be granted, although the opposite party has already obtained leave to appeal from the same judgment to the Supreme Court of Canada.

DORION, C. J., in rendering the judgment of the Court, made the following observations:

Upon an action instituted by Mr. Devlin, the Superior Court has condemned the City of Montreal to pay to the plaintiff a sum of $11,000. Both parties being dissatisfied with this judgment, each of them brought a separate appeal. This Court on the 13th instant reduced the amount of the judgment rendered by the Superior Court, and dismissed the appeal of Mr. Devlin, who was condemned to the costs of both appeals.

On the same day, the City obtained a rule for leave to appeal to the Privy Council. This rule was returned on the 16th instant. In the meantime Mr. Devlin presented in Chambers two petitions to be allowed to appeal to the Supreme Court from the two judgments rendered on the 13th, and the appeals were allowed.

Yesterday Mr. Devlin showed cause upon the rule obtained by the City for leave to appeal to the Privy Council, and has objected to its being granted, because an appeal having been allowed to the Supreme Court, no appeal can be taken to the Privy Council, at least pending the appeal to the Supreme Court.

The law with reference to such a case as this is most unsatisfactory.

By section 17 of the Supreme Court Act, an appeal lies to the Supreme Court from every judgment rendered by this Court, in every case wherein the sum or value of the matter in dispute amounts to $2000 or more. This appeal must be allowed by the Court or a judge within 30 days from the pronouncing of the judgment. The Act contains a provision that the judgment of the Supreme Court shall be final, and that no appeal shall be brought from such judgment to her Majesty in Council, except by virtue of the exercise of Her Royal Prerogative. The Act contains no such provision as regards appeals from the judgments of this Court to Her Majesty in Her Privy Council, and article 1178 of the Civil Code, giving such right of appeal, has not been revoked, but has been considered as still in force, both by this Court and by the Privy Council, in several cases which have been taken to appeal and adjudicated upon since the establishment of the Supreme Court.

We have therefore two laws, the one granting an appeal from judgments of this Court to the Supreme Court, and the other granting an appeal to the Privy Council, and both applicable to this case.

It is evident that the judge in Chambers, to whom the application was made to allow an appeal to the Supreme Court, had no right to deny to the party making the application an appeal which the law gave him. The judge in such case exercises a ministerial duty, and has no discretion to refuse an appeal in those cases where the law allows one, or to grant it in cases where it is denied.

Art. 1178 of the Civil Code is as imperative as the Supreme Court Act, and says:—"An appeal lies to Her Majesty in Her Privy Council, from final judgments rendered in appeal or error by the Court of Queen's Bench.....3rdly, in all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling."

The present case, involving several thousand dollars, is one in which an appeal clearly lies to the Privy Council, and the question arises whether this Court has any authority either to deny altogether or to suspend the exercise of a right of appeal to which the parties are entitled by law.

To suspend the adjudication upon the rule for leave to appeal until the case is determined by the Supreme Court, would be equivalent to a denial of the appeal, for the judgment of the Supreme Court would be final, and, were it not final, it could not be in the power of this Court to grant an appeal to the Privy Council from a judgment of the Supreme Court superseding the judgment rendered by this Court.

Whatever may be the inconveniences resulting from the allowing in the same case a double appeal, one to the Supreme Court and the other to the Privy Council, and we admit they cannot be inconsiderable, yet it seems that under the present state of the law it is impossible for this Court either to refuse the application of either party, and thereby select the tribunal to which the parties shall be bound to carry their appeal, or even to suspend the application of one of them, which in reality would have the same effect. We cannot say that the City of Montreal shall be deprived of its appeal to the highest Court established for revising judgments of this Court. And, if one of the parties must be deprived of his appeal to one of the Courts, it seems it should not be the party who made the first application and sought to appeal to the Court of last resort. We have not to reform the law, but to apply it.

On the other hand, we have no authority to say that Mr. Devlin cannot appeal to the Supreme Court merely because his adverse party wishes to appeal to the Privy Council.

Under these circumstances, the majority of the Court considers that it cannot do otherwise than allow both appeals.

In the exercise of that extended jurisdiction which is conferred on the Supreme Court and on the Privy Council, they will, no doubt, be able to adopt such a course as may reconcile these discordant dispositions of the law by such order as may meet the justice of the case and be consistent with the rights of the parties. And if this be impossible, it will be for the Legislature to adopt such measures as may prevent for the future the serious inconvenience resulting from

City of Montreal and Devlin.

the antagonistic right of appeal given to two separate tribunals, whose decisions are by law held supreme and final.

As regards this Court, it is bound by a precise text of law to grant this appeal to the Privy Council, as the Judge in Chambers to whom Mr. Devlin applied, was bound to allow his appeal to the Supreme Court.

The appeal is therefore granted.

MONK and TESSIER, JJ., dissented.

R. Roy, Q. C., for the City of Montreal.

E. Carter, Q.C., for the respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1878.

[IN CHAMBERS.]

MONTREAL, FEBRUARY, 1878.

Coram MONK, J.

Ex parte Healey, Petitioner for Writ of Habeas Corpus.

HELD:—That a writ of Habeas Corpus will not be granted to liberate a prisoner charged with process in a civil suit, even though the writ of execution in virtue of which he was arrested appear to be irregular, if it is within the scope of the jurisdiction of the Court from which it issued.

RAMSAY, J. The case was argued before Mr. Justice Monk, who, being indisposed, has requested me to say that he is of opinion that the writ should be refused, and his order to that effect is endorsed on the application. As I was present at the argument, and as he conferred with me on the matter, he has requested me to state his reasons for refusing the writ, and in which I concur. I have also consulted the other Judges of this Court, save Mr. Justice Tessier, with whom I have not been able to confer, on account of his being at Quebec. Those present here agree with me in the opinion expressed in the present case.

This is an application to a Judge in Chambers for a writ of Habeas Corpus. The cause of commitment was alleged to be a warrant of the Sheriff setting up a writ of *contrainte par corps* addressed to the said Sheriff, wherein it was declared and set forth that "by judgment rendered in the said Superior Court of Montreal, on the 1st day of June, 1876, on a rule for *contrainte par corps*, obtained by the plaintiffs against the defendant in a certain cause No. 2,581, wherein the Delaware, Lackawanna & Western Railway Company, a body politic and corporate, duly incorporated according to the laws of the State of New York, one of the United States of America, is plaintiff, and Christopher Healey, of the City and District of Montreal, trader, defendant, the said Christopher Healey was condemned to pay and satisfy to plaintiff the sum of $352, currency, with interest thereon from the sixteenth day of November, 1875, day of service of process in this cause, until actual payment and costs of suit, and it was further declared and adjudged that the said defendant was guilty of fraud, by reason of his purchase from plaintiff and non-payment thereof after the delivery of the goods to him; it was ordered under the said judgment that the said Christopher

Healey be imprisoned in the common gaol of this district for the term and period of three months, unless such debt and costs be sooner paid." The warrant then relates that this judgment was confirmed in appeal, that the said defendant had failed to pay the debt and interest as ordered by the said judgment, and that the Sheriff is commanded to take the body of the said defendant, "and to detain him in the common gaol of the district for the term and period of three months, unless he pay to said plaintiff the said sum of $352, with interest as aforesaid, and also the sum of one dollar for the writ of *contrainte*." The warrant, therefore, commands the bailiffs and gaoler to whom it is addressed to take the body of the said Christopher Healey, if he be found in the district, "and to detain him in the common gaol of the said district for the term of three months, unless he pay the said plaintiffs the said sum of $352, with interest as aforesaid, also the sum of one dollar for the writ of *contrainte par corps*."

Two grounds are urged by the petitioner in support of his application: first, that the imprisonment is commanded on grounds of alleged fraud, without in any way showing that the petitioner had been guilty of said offence; second, that it is not alleged where the debt referred to in the commitment was contracted, and that there is no ground or reason set forth to warrant the imprisonment.

The rest of the reasons are merely formal.

The judgment was also produced, and it sets forth the purchase by defendant of goods to the value of $352 on credit on a certain day; that on that day defendant knew that he was unable to meet his engagements; that he concealed the fact from the plaintiffs with intent to defraud them, and that he had not paid them. The Court, therefore, condemned the said defendant to pay and satisfy to plaintiffs the said sum of $352 currency, with interest thereon until payment of costs of suit; and further declared defendant to be guilty of a fraud by reason of his said purchase and non-payment after delivery of said goods to him, and ordered that defendant be imprisoned in the common gaol of this district for the term and period of three months, unless the said debt and costs be sooner paid.

At the argument it was contended—1st, that the warrant was not in conformity with the judgment, for that it ordered the payment of $1 for subsequent costs; 2nd, that the *contrainte* could not go for interest and costs, but only for the debt; 3rd, that the warrant should have set forth the amount of costs; and 4th, that the commitment being for fraud, it was for a criminal or supposed criminal offence, and consequently that the application was not made under the authority of sections 20 to 25, cap. 95, C. S. L. C.

The scope of this argument is somewhat wider than is suggested by the reasons of the petition; but taking the argument as it was offered, it may be as well to dispose of the last point. This is beyond all question an application for a *habeas* under the sections somewhat incorrectly classed as being those relating to *habeas corpus ad subjiciendum* in civil matters. In other words, it is not an application in a case of detention for any criminal or supposed criminal offence. We have, therefore, to meet the prohibition of section 25, cap. 95, C. S. L. C. "Nothing in the five next preceding sections contained (that is, all those relating to so-called civil matters) shall extend to discharge out of prison any person charged in debt

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or other action, *or with process in any civil suit.*" This is clearly a process in a civil suit. The prisoner is held on the warrant of the Sheriff acting under a writ in execution of the judgment. The fraud justifies this sort of execution; but the imprisonment is not a punishment for the fraud; it is only an execution. As C. J. Jervis said in a similar case, "the object was to get the money by coercing the person of the debtor." Dakins' case, 16 C. B. 92. Whether, then, the process be good or bad we cannot touch it. This was decided in *Barber v. O'Hara*, 8 L. C. R., p. 216. There was also the case of *Donaghue*, which was brought before Chief Justice Duval on application for a writ of *habeas corpus*, and the application was renewed before Chief Justice Meredith. Both applications were refused, Chief Justice Duval holding that a writ of *habeas corpus* cannot be granted to liberate a prisoner charged with process in a civil suit, even though the writ of execution in virtue of which he was arrested is irregular, and Chief Justice Meredith said that, even if the arrest were irregular, yet if it does not appear to be out of the scope of the jurisdiction of the Court from which it issued, it cannot be declared void, and the prisoner consequently cannot be liberated by *habeas corpus*.

Two cases of *Exp. Cutler** and *Exp. Martin*† decided in the Court of Queen's Bench, Crown side, last September, were cited. In the first place it is to be observed that they were decided by the Court and not by a judge in Chambers, and this might perhaps alter the question; but it does not appear that they laid down any principle at variance with the view now taken. It was there held that there was no judgment to warrant the detention, and therefore that it was not really a process in a civil suit, but at most the semblance of one. Several English cases were cited, and particularly *Bracey's* case, 1 Salkeld, 348, and Sancher's case, 1 Ld. Raymond, 323. These cases both turned on the excess of jurisdiction under a special authority. The former was the authority of commissioners of bankruptcy, the second that of an ecclesiastical court. The authority of the Superior Court—the great court of original civil jurisdiction in civil matters, which has a superintending and reforming power, order and control over all courts and magistrates, and all other persons and bodies politic and corporate in the Province, saving only this Court, is not a special but a general power. These cases, therefore, do not apply in any way. The case which has gone furthest in England is that of Dakins, already mentioned, but that was a case of privilege. The petitioner had a right to be discharged, owing to a personal privilege, and the Court, therefore, gave relief by way of *habeas*, because he was plainly detained without right, not on a judgment, but by an execution beyond the authority of an inferior tribunal.

Writ refused.

Carter, Q.C., and *Devlin*, for petitioner.
St. Pierre, for the Crown.
(J. K.)

* *Ante*, p. 85. † *Ante*, p. 86.

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 19TH MARCH, 1877.

Coram DORION, C. J., MONK, RAMSAY, SANBORN, and TESSIER, J J.

The Queen vs. *Cotté.*

HELD:—In an indictment of a cashier under sec. 62 of the Banking Act of 1871, for having unlawfully and willfully made a willfully false and deceptive statement in a return respecting the affairs of the bank, it is not necessary to allege that the return referred to was one required by law to be made by the accused, or that any use was made by him of such return, or to specify in what particulars the return was false.

2. The enumeration in the indictment of several alleged false statements constitutes but one count, and a general verdict is sufficient if the statement be shown to be false in any one of the particulars alleged.

3. It is not necessary to allege in the indictment that the false statement was made with intent to deceive or mislead.

DORION, C. J. This is a reserved case on an indictment under the Act of 1871 relating to Banks and Banking, section 62. The indictment is as follows:—

"The jurors for Our Lady the Queen upon their oath present that before and at the time of the committing of the offence hereinafter mentioned, Honoré Cotté was a cashier of a certain bank called 'La Banque Jacques Cartier,' and that he, the said Honoré Cotté, so being such cashier as aforesaid, on the tenth day of April, in the year of our [illegible] 1875, did unlawfully and willfully make a certain willfully false and d[illegible]tatement in a certain written return respecting the affairs of the said ba[illegible], which said statement was willfully false and deceptive in certain material particulars, that is to say, in this, to wit, that it was therein falsely stated that certain liabilities of the said bank, to wit: Dominion Government deposits payable on demand amounted on the thirty-first day of March of the year last aforesaid to $11,544.70." The indictment contains a number of averments as to several other particulars in which statements in said return were false, and concluding by "that he, the said Honoré Cotté, then well knowing the said statement to be false in the several particulars aforesaid."

The questions reserved are:

First.—Whether the indictment is defective and ought to be quashed and set aside, as it does not allege or show that the statement or return therein referred to was a statement or return which by the requirements of the law the said Honoré Cotté was bound to make?

Secondly.—Whether said indictment is also defective, inasmuch as it omits to allege or show that any use was made by the defendant of the statement or return referred to?

Thirdly.—Whether the indictment is also defective, as it contains no negative averment with reference to either of the items mentioned to show in what respect they were false?

Fourthly—Whether the indictment is also defective and null and void, and should have been quashed, for the reason assigned by defendant's counsel at the time of the trial and before the jury were sworn, namely, that it does not charge any offence in the terms of the statute, by omitting the words "with intent to deceive or mislead," which intent is an essential ingredient of the

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offence, and being so described by the statute should have been averred in the indictment?

Fifthly—Whether the application of the defendant's counsel after the jury were sworn, that the Crown Prosecutor do elect which of the numerous counts or enumeration of alleged false statements set forth in the indictment he intended to rely on, is well founded in law, and should have been granted?

Sixthly—Whether a general verdict has been given upon the whole indictment without such election having been made, and without any special finding of the jury having been rendered as to any particular statement set forth in the indictment or referred to in the evidence?

The first, second and third objections urged may briefly be disposed of by saying that nothing in the Act under which the indictment was brought requires that the false statement with which the defendant was charged should be contained in a return he was by the requirements of the law bound to make, or that any use had been made of such statement, or that the indictment should contain any negative averments to show in what particulars the items therein mentioned were false, and the form given as applicable to section 84 of the Larceny Act (Imperial) having reference to a somewhat similar offence as the one here charged shows that none of the above averments are required in an indictment under that section, which is more exacting in the description of the offence than section 62 of our Banking Act.

The fifth and sixth objections may also be disposed of by saying that the indictment does not charge the defendant with several offences, or with one offence, in different counts, but contains only one count, charging the defendant with only one offence, that is, of having unlawfully and willfully made a certain willfully false and deceptive statement in a return respecting the affairs of the bank, which statement it is averred was false in several particulars, the whole forming but one offence, as the several particulars in which the statement was false and deceptive were included in the same return, and formed but one and the same transaction. There was therefore no ground to compel the Crown Prosecutor to elect, nor any occasion for the jury to find, a special verdict, a general verdict being justified if said statement was false in any one of the particulars alleged in the indictment.

There remains the fourth ground of objection, founded on the omission in the indictment—"intent to deceive or mislead." The first part of section 62 of the Banking Act of 1871, under which this charge was made, is as follows:—

"The making of any willfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank, shall, unless it amounts to a higher offence, be misdemeanor." The offence here declared to be a misdemeanor is the making of any willfully false or deceptive statement, in any account, statement, return, report or other document respecting the affairs of the bank, all which is found to have been alleged in the indictment before us.

In this first part of section 62 there is no mention of any intent to deceive or mislead, and this being a statutory offence, it is quite sufficient to charge it in the indictment in the precise words of the statute. The gist of the offence is the making of a willfully false statement respecting the affairs of the bank.

This section creates an offence different from the one mentioned in section 85 of the Larceny Act, and the first part of it above cited describes what constitutes the offence almost in the same terms as section 4 of the Imperial Act 3 and 4 Vict., c. 97, whereby the willfully making of any false return by railway companies to the Lords of the Committee of the Privy Council is made a misdemeanor, no intention to mislead or deceive being required by this Act to constitute the offence.

The 43rd section of the Act relating to forgery enacts that "whoever knowingly and willfully inserts, or causes or permits to be inserted, in any copy of any register directed or required by law to be transmitted to any registrar or other officer, *any false entry of any matter relating to any baptism, &c., is guilty of a felony*," without requiring any intent to defraud or deceive, and the form of indictment under this section as given by Archbold, p. 587, lays no such intent. But it is said that the latter part of section 62 of the Banking Act of 1871 makes "the intent to deceive or mislead" an essential ingredient of the offence. Now, this section, after stating that the making of a willfully false statement in reference to the affairs of the bank shall be a misdemeanor, proceeds thus: "And any and every president, vice-president, director, principal, partner in commandite, auditor, manager, cashier, or other officer of the bank preparing, signing, approving or concurring in such statement, return, report or document, or using the same with intent to deceive or mislead any party, shall be held to have willfully made such false statement." On the part of the Crown it has been argued that the words "with intent to deceive or mislead" merely applied to the case of a party using a bank statement knowing the same to be false, in which case it was necessary to show that he had used it with intent to deceive or mislead, inasmuch as the willfully signing, preparing or concurring in a false statement was of itself a criminal act, while the using of it would not necessarily be so, unless coupled with some evil intent, such as to deceive or mislead; and great stress was laid on the difference between the English and the French versions of the Act. Under the French version the argument seems irresistible. It is, however, impossible to rest the decision of a criminal case upon such a difference. The defendant in such a case should as a general rule have the advantage of the version most favorable to him. Supposing, therefore, this intent to apply equally to the preparing, signing, approving and concurring in such a false statement, this would not alter the case, as this second part of the section merely declares that certain acts done by certain officers made under certain circumstances, different from the making a willfully false and deceptive statement, shall amount to the making of such willfully false statement. The first part of the section declares the making of a willfully false or deceptive statement respecting the affairs of the bank to be a misdemeanor, and the second part declares that certain officers of the bank by doing other things, such as approving such false statement or concurring in it, or using it, with intent to deceive or mislead, shall be held to have made such false statement, and shall be guilty of the misdemeanor created by the first portion of the Act. This section is, perhaps, not as clearly worded as it might have been, but the Court, after the most careful consideration, has come to the conclusion that the

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indictment was sufficient without the words "with intent to deceive or mislead;" and the conclusion arrived at is in accord with the decision of the learned Judge who presided at the trial. The verdict is, therefore, maintained.

Mr. *Carter*, asked the Court if it was unanimous in its decision, as, if there was any difference of opinion, he would take the matter to the Supreme Court.

DORION, C. J., said that on some of the points he had referred to, he would like to have seen the case taken to the Supreme Court.

Mr. *Carter* said there was a clause in the Act regulating appeals to the Supreme Court which prevented the taking of the case before that Court unless some one Judge on the bench dissented from the ruling of the Court.

MONK, J., said if there were any reasonable doubt he would certainly express it, but the decision was in his opinion beyond doubt.

Ritchie, Q.C., for the Crown.

Carter, Q.C., for the defendant.

(J.K.)

COURT OF REVIEW, 1878.

MONTREAL, 30TH APRIL, 1878.

Coram JOHNSON, DORION, RAINVILLE, J J.

No. 596.

The Windsor Hotel Co. vs. *Laframboise.*

HELD:—In an action against a shareholder for unpaid calls, where the defendant denied that he had subscribed for stock in the company plaintiff (Windsor Hotel Co.), and in the subscription book produced, the name "Windsor" had been substituted for "Royal," that the action could not be maintained in the absence of evidence that the change of name had been made before the defendant subscribed.

The company plaintiff brought action for $1000, amount of five calls of $10 each on twenty shares of stock, subscribed by the defendant. Plea, that defendant never subscribed for any stock in the Windsor Hotel Company, but in another company called the "Royal Hotel Company." He admitted his signature in a book produced at the trial, in which the name "Windsor" had been substituted for "Royal," and the capital had been changed from $600,000 to $500,000. The Superior Court (MACKAY, J., 28th December, 1877) held that, in default of proof by the plaintiffs that the alterations were made before the defendant signed the book, the action could not be maintained.

The *motifs* were as follows:

"The Court * * * "Considering that the company plaintiff has not proved its allegations material; that the *primâ facie* appearance of the plaintiff's case the defendant has destroyed and shown to be weak;

"Considering in the dearth of proofs by plaintiff that it cannot get judgment against defendant;

"Considering that reliable proof is not that the defendant subscribed to plaintiff's company as charged;

"Considering that plaintiff's present action fails by reason of the premises, doth dismiss, etc."

This judgment was unanimously confirmed in review.

Abbott & Co., for plaintiff.

Loranger & Co., for defendant.

(J. K.)

COURT OF REVIEW, 1878.

MONTREAL, 31st JANUARY, 1878.

Coram MACKAY, DUNKIN, RAINVILLE, J J.

No. 34.

Alcock et al. vs. *Howie.*

HELD:—In a suit on a judgment obtained in Ontario, where it was admitted that the summons in the original suit had been served personally on defendant in Quebec, he was not entitled to raise any objection which he might have urged to the original suit.

The appeal was from a judgment of the Circuit Court, Iberville. (CHAGNON, J.)

The defendant in support of the judgment, argued as follows:

"Les demandeurs qui pour toute enquête, ont produit une admission du défendeur, que l'assignation de comparaître devant la Cour de comté du comté de York, Province d'Ontario, lui avait été signifiée personnellement, auraient dû produire le billet en question, et faire voir que la Cour de comté avait juridiction et compétence pour adjuger sur icelui, et que les marchandises dont ils réclamaient le prix, avaient été vendues et livrées au défendeur dans un endroit qui rendait ce dernier justiciable de cette cour. Ayant manqué de le faire, et n'ayant nullement fait voir en vertu de quoi la Cour de comté du comté de York avait rendu un jugement contre un justiciable de la Province de Québec, nous croyons que la Cour a, à bon droit, renvoyé l'action."

MACKAY, J. The action was brought on a judgment obtained in Ontario against the defendant, a trader of St. Johns, P.Q., on whom personal service at his domicile had been made in the original suit. Plea, that the judgment is a nullity, because the defendant never was summoned in Ontario. But what of that, seeing C. S. L. C. cap. 90, sec. 2? The defendant was personally served in his domicile, and ought to have contested as he pleased in Ontario. The judgment dismissing the action ought to be reversed. As to place of contract, or place at which debt was contracted, there is not certainty; the exemplification does not state places as well as it might have done. But under sec. 2, ch. 90, C. S. L. C., the defendant ought to have pleaded preliminarily, or as he pleased, in Ontario.

The judgment was as follows:

"The Court * * * considering the judgment *a quo* erroneous in holding that, because defendant had not been served with process in Ontario, and because of defendant's domicile being in Quebec, he, defendant, was not *justiciable des tribunaux d'Ontario*;

"Considering that the judgment *a quo* ought to have held that defendant, having been personally served with process in Quebec province, was bound to appear in Ontario and contest plaintiff's demand there, if he saw fit;

"Considering that the plaintiffs proved all their allegations material of declaration, and were and are entitled to judgment, &c."

Judgment reversed.

J. J. Maclaren, for plaintiffs.

Charland & Co., and *Lacoste & Globensky*, for defendant.

(J.K.)

SUPERIOR COURT, 1878.

MONTREAL, 28TH JUNE, 1878.

Coram JOHNSON, J.

No. 533.

Fisher et al. vs. *McKnight et al.*

HELD:—That a plea which invokes want of jurisdiction *ratione loci* must be pleaded by declinatory exception. A plea to the merits accepts the jurisdiction.

2. In an action on a promissory note the Court may, on motion of the plaintiff, strike out subsequent endorsements not recited in the declaration.

JOHNSON, J. The plaintiff sues McKnight and Hoggard on a note made by Alger to McKnight's order, and endorsed by McKnight to Hoggard, and by Hoggard to the plaintiff. This is the recital of the declaration. The plea is that Hoggard never received the note by endorsement from McKnight, but is an employee in the plaintiff's office in Montreal, and only put his name on it here to give the Court an improper jurisdiction over McKnight, who lives in Quebec. This is strictly a question of jurisdiction, and should have been pleaded as such, jurisdiction *ratione loci* merely, and which I cannot take notice of now that the party has accepted jurisdiction by pleading to the merits.

The plaintiff moves to strike out the endorsers' names appearing after Hoggard's, the late Judge Dorion having declined to give judgment for the plaintiff while these endorsements remained. I hold that I must grant the plaintiff's motion and give judgment for the plaintiff against both endorsers, who are sued. Art. 2289 recognizes the plaintiff's right to do this. It refers to Roscoe and to Story, on bills, and to Kent's commentaries. I regard this article as declaratory of the English commercial law in this respect, and the motion has the effect of changing the demand or the form in which it is made *pro tanto*. In England this is done every day at the trial; and in this particular case there could be no need of a motion to amend the declaration so as to accord with the proof, because it claimed through McKnight's and Hoggard's endorsements only, and not through the subsequent ones.

On the point of jurisdiction I may add, that in June, 1874, in a case, or rather series of cases, of *Ford et al.* v. *Auger et al.*, all of which were put before me at one hearing, I went very fully into the point of the effect of collusive service to give jurisdiction. There, however, there was a declinatory exception, and though it was dismissed for want of evidence to support it, the rule I followed was that where the want of jurisdiction is invoked *ratione materiæ*, the Court can take notice of it on the merits; where it rests on the *ratio loci*, or *ratio personæ*, it must be expressly pleaded by declinatory exception.

Macmaster & Co., for plaintiff.

Lunn & Co., for defendant.

(J.K.)

COURT OF REVIEW, 1878.

MONTREAL, 28TH FEBRUARY, 1878.

Coram TORRANCE, DUNKIN, RAINVILLE, J J.

No. 40.

In re Marsan et al., Insolvents; *Magnan*, Assignee, and *Brouillet et al.*, Contestants.

HELD:—That a judgment maintaining the taxation of an assignee's bill by a judge in Chambers will not be interfered with by the Court of Review except on very special grounds.

The appeal was from a judgment of the Superior Court, Joliette, maintaining the contestation by Brouillet et al., hypothecary creditors, of a dividend sheet prepared by A. Magnan, assignee to the insolvent's estate.

TORRANCE, J. The facts are as follows: On Jan. 9, 1873, the assignee gave notice of a first and final dividend sheet. By this sheet the assets of the estate in question, in re Louis Marsan & al., consisted of:

1. Stock		$20 00
2. Collections of debts		37 31½
3. Price of land	$575 00	
4. Interest on same	85	
5. Interest in bank	$35 50	$611 35
		$668 66½

Distributed as follows:

1. Remuneration to assignee as guardian	$225 00	
2. Costs	148 56	
3. Bill of assignee in the liquidation of the estate, discharge, &c.	158 74	
4. Discharge of insolvents	49 45	
		$581 75
		$86 91

This residue of $86.91 was divided between the two hypothecary creditors, as follows:

1. G. Brouillet	$48 03
2. O. Arbour	38 88
Total	$86 91

The creditors contested this collocation, alleging that it was unjust to take out of the proceeds of the sale of land hypothecated to them $225 as remuneration to the assignee for the care of property which only produced $20.

The Court below took the same view. Hence the appeal.

It appears that the assignee applied to the judge in Chambers at Joliette for taxation of this bill, after notice to the parties that he would make the appli-

In re Marsan et al.

cation on the 14th October, 1872. Whether the application was then made does not appear, but the Judge taxed the bill at this amount on the 17th October, 1872, as appears by his certificate on the bill. It was the same Judge, familiar with the circumstances of the case, who gave the judgment now complained of. No additional parole or other evidence has been placed of record. It was the opinion of the Judge that one allowance to the assignee of $158.74 was sufficient to compensate the assignee for his trouble and disbursements in an estate of which the moveables under his care only produced $20, and that he should not be allowed an additional sum of $225, the amount in contestation. The Judge has here exercised his discretion in a matter of fact. We are not disposed to interfere with that discretion, and the judgment is therefore confirmed.

Godin & Co., for assignee.

Olivier & Baby, for contestants.

(J. K.)

COURT OF REVIEW, 1878.

MONTREAL, 30TH APRIL, 1878.

Coram TORRANCE, DORION, PAPINEAU, J J.

No. 887.

The Merchants Bank of Canada vs. *McGrail*, and *Lajoie*, intervening.

A bank discounted a draft, drawn by A upon B, and accepted by the latter, and received as collateral security a bill of lading of goods as shipped by A to them, and on the arrival of the goods entrusted them to B for sale, subject to the bank's order, taking a bailee receipt in the following form:

"Received from the Merchants Bank of Canada B. L. for 1284 hams, 100 shoulders and 10 pcs bacon, and I hereby undertake to sell the property therein specified for account of the bank, and collect the proceeds of the sale or sales thereof, and deposit the same in the said bank, at Montreal, to the credit of acceptance 2414, due July 11th, hereby acknowledging myself to be bailee of the said property for the said Bank. Dated at Montreal, the 22nd May, 1877. (Signed) Henry Parker."

HELD:—That the bank did not lose control of the goods, and on B becoming insolvent had a right to revendicate them as pledged for the amount of the acceptance.

TORRANCE, J. The question submitted is as to the privilege of the Bank on goods revendicated. On the 9th of May, 1877, the plaintiffs at the agency of their bank at St. Thomas, Ontario, discounted a draft for the firm of Scott, York & Co., of Aylmer, drawn by that firm upon Henry Parker, represented in the present case by his assignee, Louis Joseph Lajoie, and at the time of such discount received as collateral security for its acceptance and payment, a bill of lading of the goods as being shipped by that firm to the plaintiffs or order at Montreal. The plaintiffs say that, by the delivery of this bill of lading, the Bank, under sections 46, 47, and 49, of the Banking Act, 34 Vict. Chapter 5 (1871), became vested with the goods mentioned in the bill of lading, and had a right to retain them until the draft so discounted should have been accepted and paid. On the arrival of the goods in Montreal, the bank being desirous of realizing them, entrusted them to Parker for sale subject to its order, and received from him a receipt in the following form: "Received from the Mer-

chants Bank of Canada B. L. for 1284 hams, 100 shoulders and 10 pcs bacon, and I hereby undertake to sell the property therein specified for account of the bank, and collect the proceeds of the sale or sales thereof, and deposit the same in the said bank, at Montreal, to the credit of acceptance 2414, due July 11th, hereby acknowledging myself to be bailee of the said property for the said Bank. Dated at Montreal, the 22nd May, 1877. (Signed) Henry Parker." The draft after being discounted by the Bank was presented to Parker for acceptance and by him accepted. Parker subsequently became insolvent, and his assignee, the intervening party, claims that the Bank by entrusting the goods to Parker, the real owner, for sale under the foregoing receipt, lost all lien upon them and all right to recover possession.

We have no difficulty in disposing of this case. The Bank got control of the goods when they discounted the draft. Their advance was to the drawers, Scott, York & Co., of Aylmer, and their position could not be changed without their consent. The agreement with Parker under the bailee receipt did not change that position. On the contrary, it carefully preserved their rights. The agreement was a law to the parties, and perfectly binding upon Parker. The Superior Court, by its judgment of 18th February, 1878, so held by maintaining the attachment of the Bank, and we confirm the judgment.

Archambault, for intervener.

Tait, for plaintiffs.

(J. K.)

PRIVY COUNCIL, 1878.

12TH JULY, 1878.

Present: SIR JAMES W. COLVILE, SIR BARNES PEACOCK and SIR ROBERT P. COLLIER.

LES SŒURS DAMES HOSPITALIERES DE ST. JOSEPH DE L'HOTEL DIEU DE MONTREAL,

APPELLANTS;

AND

JOHN R. MIDDLEMISS,

RESPONDENT.

HELD:—That under the law of Lower Canada, the acquisition by the Crown of lands held from or under a seignior as part of his fief extinguished absolutely and for ever all feudal rights in such lands, and gave the seignior a mere right to an indemnity, the amount of the indemnity, in the case of lands held by *roturiers*, being one-fifth of the price.

2. That in this case the indemnity paid by the Crown in 1860 was the indemnity payable by reason of such extinction of feudal rights, and not merely the indemnity payable by all *mains-mortes* when they acquired immoveable property.

The history of the case and the principal arguments of the parties will be found fully noticed in the judgment of their Lordships. The appellants, the *seigneuresses* of the Fief St. Augustin, claimed certain commutation money on an immoveable in the fief, which the respondent had acquired from the Provincial Government of Quebec in 1874, in exchange for other property. The appellants petitioned in the usual form for the nomination of experts, in order to

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establish the amount of indemnity or commutation due the petitioners by reason of the exchange, in consideration of their seigniorial rights on the land, and the amount to be paid for the redemption of the constituted rent representing the *cens et rentes* to which the property was alleged to be subject.

The respondents pleaded that the property had been acquired by the Crown for a purpose of public utility and the tenure had been changed; that the appellant had been indemnified for this change of tenure; that while the land was the property of the Crown seigniorial rights in the fief were abolished, and the land passed into the possession of the respondents free from all seigniorial rights, and consequently there was no occasion to commute rights which did not exist.

The Superior Court having sustained the pretensions of the plaintiffs and named experts to establish the amount of indemnity to be paid in lieu of seigniorial rights, and also the amount to be paid for redemption of the constituted rent, and having homologated the report of the experts thereon, the proprietor Middlemiss appealed.

The Court of Appeal, Monk and Tessier, J J., dissenting, reversed the judgment. Sir A. A. Dorion, C. J., for the majority of the Court, made the following observations:—

En 1839, le Dr. Robertson et C. W. Montizambert ont acheté pour les Commissaires de l'Asile des Aliénés, nommé en vertu de l'acte 3 Geo. 4, c. 25, pour la somme de £960 4 6, un terrain relevant du fief St. Augustin. Les Intimées étaient alors seigneurs du fief St. Augustin et ont continué à l'être jusqu'à l'abolition de la tenure seigneuriale.

Les fonctions des commissaires des aliénés ayant été abolies en 1841, (4 Vict. ch. 9) ce terrain retourna en la possession de la couronne qui en avait payé le coût.

Le 20 avril 1860, le gouvernement de la ci-devant province du Canada a payé aux Intimées £192 9 10 pour indemnité que celles-ci ont réclamé sur le prix d'acquisition de ce terrain.

Le 10 mai 1860, un mois après le paiement de cette indemnité, les droits seigneuriaux ont été abolis dans le fief St. Augustin (23 Vict. c. 60). Il a été décrété par cet acte, que les Intimées auraient le droit d'exiger à la première mutation qui donnerait lieu à des lods et ventes, un droit de commutation semblable à celui que le Séminaire de St. Sulpice de Montréal avait le droit d'exiger dans la paroisse de Montréal.

Le 1er juillet 1874, le gouvernement de la province de Québec a échangé cette propriété avec l'Appelant moyennant une soulte, et les Intimées prétendant que cette mutation donnait lieu en leur faveur à un droit de commutation, ont adopté des procédés pour faire détermiuer le montant de leur réclamation.

L'Appelant a contesté cette demande, et la Cour Supérieure a jugé qu'il était tenu de payer aux Intimées un droit de commutation qui a été fixé par experts à la somme de $21,199.52.

De là les deux questions suivantes:

1o. L'acquisition, par le gouvernement, de l'immeuble en question pour cause d'utilité publique, a-t-elle eu l'effet d'éteindre la mouvance qui l'assujétis-

sait au domaine du fief St. Augustin et de l'affranchir de tous droits seigneuriaux ?

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2o. Cet immeuble, en passant après l'abolition de la tenure seigneuriale, des mains de la couronne en celles de l'Appelant par l'acte d'échange du 1er juillet 1874, est-il devenu sujet au paiement de la commutation établie par l'acte 23 Vict. c. 60, qui a aboli la tenure seigneuriale dans le fief des Intimées ?

Une des maximes les plus incontestables du droit féodal, c'est que le roi ne pouvait relever de ses sujets et qu'il n'était tenu envers eux à aucun devoir féodal.

Loyseau, des Seigneuries, ch. 12, No. 87. Bacquet, Droits de justice, t. 1, p. 60. LeBret, Traité du Domaine, liv. 3, ch. 4, p. 175.

"En France, les devoirs de la vassalité sont incompatibles avec la souveraineté et l'indépendance du monarque." Guyot, Répertoire vo. Indemnité.

Cependant le roi pouvait acquérir des immeubles dans la mouvance des fiefs qui appartenaient à ses sujets. Il pouvait le faire volontairement en achetant des terres pour des objets d'utilité publique ou pour l'embellissement de ses parcs et jardins, etc., ou accidentellement et en vertu de quelque loi ou de son droit de souveraineté, comme par confiscation, déshérence, etc. Dans le premier cas, ces immeubles étaient réunis au domaine public du jour de leur acquisition. Dans le second cas, ils n'étaient réunis au domaine que lorsque le roi jugeait à propos de les réunir ou après dix ans de possession. (Ord. de Charles IX, fév. 1566.)

Les biens faisant partie du domaine public étaient inaliénables, et ceux échus par confiscation et deshérence ne le devenaient que lorsqu'ils étaient réunis au domaine. (Ancien Denisart vo. Domaine No. 30.)

Dans les premiers temps de la monarchie française, alors que les rois de France n'étaient guère que des seigneurs féodaux plus ou moins puissants, lorsqu'ils faisaient l'acquisition d'héritages qui ne relevaient pas d'eux, ils commettaient un homme chargé de porter en leur nom la foi et hommage au seigneur du fief dont relevaient ces héritages, afin qu'il ne fût pas privé de ses droits par les acquisitions du prince.

Plus tard, lorsque la puissance souveraine fût mieux établie, que les rapports entre le souverain et ses sujets furent mieux définis, le roi traitait [illegible] seigneurs d'une indemnité pour tenir lieu des droits féodaux sur les héritages qu'il acquérait dans leurs fiefs et quant aux biens échus par confiscation ou déshérence, ceux-là étant aliénables il pouvait vuider ses mains, c'est-à-dire les aliéner, dans l'année de leur acquisition, sans payer d'indemnité, ou il pouvait les garder en payant une indemnité au seigneur pour l'indemniser de la perte de sa mouvance.

L'Ordonnance de Philippe-le-Bel, du 23 mars 1302, paraît être le premier acte émané de l'autorité souveraine sur cette question. Par l'art. 8, le roi déclare "qu'il n'acquerra rien dans les fiefs, ni les arrières-fiefs des prélats et barons "sans leur consentement;" et par l'art. 9, "que s'il arrive que par quelque for-"faiture, quelques biens soient acquis au roy dans les terres des prélats et bar-"rons, Sa Majesté les mettra hors de ses mains dans l'an et les remettra à des "personnes qui pourront s'acquitter des devoirs féodaux *ou Elle en indemnisera "les seigneurs.*"

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Cette Ordonnance reconnaissait deux choses: 1o. que le Roi ne pouvait remplir des devoirs féodaux envers ses sujets: 2o. que pour ne pas causer de préjudice aux propriétaires de fiefs, il devait leur payer une indemnité ou mettre hors de ses mains dans l'année de leur acquisition, les biens échus par confiscation.

Quoique cette Ordonnance n'ait jamais été enrégistrée et n'ait par conséquent jamais eu force de loi, même en France, cependant ses dispositions ont toujours été regardées comme étant une déclaration du principe que toute acquisition faite par le roi dans la mouvance d'un seigneur anéantissait cette mouvance, et que le roi ne devait qu'une indemnité pour tenir lieu des droits et devoirs des seigneurs féodaux, dont, en sa qualité de souverain ou de seigneur suzerain de tous les fiefs de son royaume, il ne pouvait être tenu envers ses sujets.

Cette Ordonnance a été suivie de plusieurs autres s'appliquant à différentes provinces du royaume, et qui toutes reconnaissent que le roi ne devra qu'une indemnité aux seigneurs pour les biens qui lui écherront dans leurs fiefs, lorsqu'il voudra les retenir sans en vuider ses mains dans l'année.

Louis XIV ayant, pour l'embellissement de ses parcs et jardins, augmenté le nombre et l'étendue de ses acquisitions, promulga l'édit du mois d'avril 1667, pour satisfaire les justes réclamations des seigneurs en fixant le taux de l'indemnité à laquelle ils auraient droit—et cet édit déclare "*qu'au moyen de cette in-*"*demnité les dits héritages seront déchargés de tous droits et devoirs seigneuriaux*"*de quelque nature et qualité qu'ils puissent être.*"

Le savant avocat des Intimées a prétendu que cet édit, postérieur à l'établissement du Conseil Supérieur à Québec,—n'y ayant pas été enrégistré, n'avait jamais été loi au pays. Cela serait exact si cet édit avait créé un droit nouveau. Mais il n'y a de nouveau dans cet édit que le taux de l'indemnité, tout le reste n'est que déclaratoire de ce qui était déjà loi avant l'établissement du Conseil Supérieur.

Voici ce que disent les auteurs sur ce sujet:

"Cette édit (celui de 1667), ne contient pas un droit nouveau. Ce que les "auteurs avaient décidé avant que cette loi parut, les arrêts le jugeaient de même, "et leur uniformité constante *avant* et depuis cet édit réunit à son autorité celle "de la jurisprudence la plus uniforme:" *Series rerum perpetuo judicaturum* (*Guyot, Répertoire vo. Indemnité, p.* 165.)

"Lorsque le roi acquiert des immeubles à quelque titre que ce puisse être, "les mouvances particulières sont éteintes." (*Ibidem, loc. cit. p.* 148.)

"Lorsque le roi acquiert de ses sujets, cette mouvance s'anéantit, cela ne "peut pas faire la moindre difficulté." (*Ibidem, loc. cit. p.* 163.)

Cette décision est fondée sur la majesté du souverain qui perdrait de son éclat si le roi pouvait être vassal, et sur le principe aussi que le monarque, en acquerrant des terres dans ses Etats, ne fait que les réunir à son domaine dont elles furent originairement séparées et rejoindre le domaine utile au domaine direct qu'il n'a jamais pu céder à personne.

"Aussitôt que le fief estant retourné au roy, il a repris sa première nature "et liberté naturelle, sans qu'il soit sujet à aucun droit ou devoir, ainsi qu'il a "été jugé par arrêt entre le Seigneur de la Trémouille, Demandeur, et Monsieur "le Procureur du Roy, et la Dame de la Fosseline, Défendeurs, le 25 février "1558." (*Bacquet, Traité des droits de justice, tome* 1*er, p.* 60.)

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Par arrêt du 7 juin, 1661, cité au Répertoire de Guyot, vo. Indemnité, p. 165, le Procureur-Général a été condamné à payer l'indemnité due sur une acquisition faite par le roi. Or cette condamnation n'aurait pas pu avoir lieu, si l'héritage acquis par le roi eût continué à être entre ses mains sujet aux droits seigneuriaux. Ces deux arrêts sont antérieurs à l'édit de création du Conseil Supérieur.

Nul doute que l'acquisition faite par la Couronne de l'immeuble, dont il est question en cette cause, et le paiement qui a été fait aux Intimées d'une indemnité seigneuriale n'ont eu l'effet d'éteindre la mouvance et d'affranchir cet immeuble de tous droits seigneuriaux, du moins pour tout le temps qu'il appartiendrait à la Couronne.

Voyons maintenant si l'aliénation que la Couronne en a faite le 1er juillet 1874, après l'abolition de la tenure seigneuriale, a pu l'assujétir au paiement de la commutation établie pour le rachat des droits seigneuriaux.

Nous avons établi que cette propriété, qui était entre les mains de la Couronne lors de l'abolition de la tenure seigneuriale, n'était pas alors sujette aux droits seigneuriaux. Comment et à quel titre aurait-elle pu, dans ce cas, être chargée d'un droit de commutation envers les seigneurs ?

Mais la doctrine et la jurisprudence sont d'accord sur ce point, qu'une fois la réunion au domaine effectuée, l'immeuble était pour toujours affranchi de tous devoirs seigneuriaux, nonobstant toute aliénation subséquente.

Ainsi par arrêt de 1679, la terre de Bohin, possédée par Henri IV, lors de son avènement au trône de France et par lui aliénée en 1594, a été déclarée avoir été réunie au domaine dès 1589 et avoir été dès lors affranchie de tous devoirs, même entre les mains des successeurs du premier acquéreur. Cet arrêt, tout en rejetant la demande du Seigneur pour ses droits seigneuriaux, lui a réservé son recours pour son droit d'indemnité, qui ne paraissait pas avoir été payé. (*Guyot, Rép. vo. Indemnité.*)

Il y a de plus l'arrêt de 1708, rapporté par Augeard, tome 2, p. 71, qui a jugé, après les plus amples recherches, que la terre de Beaurin, réunie au domaine en 1368, et ensuite aliéné par le roi, avait cessé d'être sujette aux droits et devoirs féodaux dès l'époque de sa réunion au domaine, et que le propriétaire du fief dont elle relevait originairement n'avait droit qu'à une indemnité pour l'extinction de sa mouvance, et son recours pour cette indemnité lui fut réservé par l'arrêt.

Les Intimées, qui ont cité de longs extraits de cet arrêt, sont obligées d'admettre qu'il leur est défavorable, et elles se sont efforcées d'en atténuer la portée en critiquant les motifs et en alléguant qu'il n'avait été rendu qu'après l'édit de 1667. Il est vrai que cet arrêt et le précédent n'ont été rendus qu'après l'édit de 1667, mais ils ont jugé des contestations commencées longtemps avant et les ont décidées conformément au droit existant lors des transactions qui y ont donné lieu. Ces transactions remontaient dans un cas à 1368 et dans l'autre à 1589. Ces arrêts ont donc établi que l'édit de 1667 n'a pas créé un droit nouveau et qu'il n'a fait que régler le mode de déterminer la qualité d'un droit d'indemnité dû en vertu de la loi et de la jurisprudence antérieure.

Il y a plus, c'est que le roi pouvait toujours, en érigeant une terre en comté,

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marquisat, duché ou pairie, ordonner la distraction de la mouvance et forcer le seigneur à se contenter d'une simple indemnité. Les auteurs du Répertoire déjà cité disent à cet égard :—

P. 166, " Ajoutons que les principes de cette matière sont soutenus par un usage " *si ancien, si public, qu'il n'est pas possible de s'en défendre ;* rien n'est, " en effet, plus commun dans l'usage que de voir le roi disposer de la mouvance " des seigneurs du royaume en leur procurant une indemnité, soit qu'il leur " enlève entièrement cette mouvance, soit qu'il se contente de la dégrader ou de " l'affaiblir."

Ce que le Souverain pouvait faire pour ses comtes et barrons il devait sans doute pouvoir le faire pour lui-même, surtout lorsque pour cause d'utilité, il était obligé de faire des acquisitions dans les fiefs de ses sujets.

Les Intimées ont prétendu que le Conseil Spécial avait reconnu, par une Ordonnance passée en la deuxième année du règne de Sa Majesté, sous le ch. 21, que les terres acquises par la Couronne continuaient à être possédées par elle au même titre et sujettes à la même tenure que celle qui les régissait au temps de leur acquisition.

Une première observation à faire sur cette loi, c'est qu'elle ne s'applique qu'aux terres acquises par les principaux officiers de l'Ordonnance et nullement au terrain dont il est question en cette cause, qui a été acquis pour y ériger un asile d'aliénés. La seconde c'est que si, comme le prétendent les Intimées, la mouvance n'avait pas été affectée par les acquisitions faites par la Couronne, il était inutile de déclarer, par une loi spéciale, ce qui était de droit commun.

Enfin, c'est que l'objet de cette déclaration est parfaitement expliqué dans le préambule où il est dit : " And whereas it may be expedient that such part " of the said messuages, lands, &c.... as may not be wanted for the service of " the said department should from time to time be sold and disposed of....." Ainsi la Couronne voulant se réserver le droit de vendre toute partie de ses terres dont elle n'aurait pas besoin pour le service public, a déclaré qu'elles seraient tenues au même titre qu'elles avaient été acquises. Ce n'est pas là une déclaration que ces terres seront sujettes aux droits seigneuriaux pendant que la Couronne en aura la possession, et ce n'est rien autre chose qu'une simple déclaration que voulant en vendre une partie elle n'entendait pas les réunir au domaine public, afin de pouvoir les aliéner sous la même tenure que celle à laquelle elles étaient assujetties lors de leur acquisition. Il aurait fallu une déclaration beaucoup plus explicite que celle-là, pour soumettre la Couronne à des devoirs féodaux envers ses sujets, dont elle était exonérée par le droit commun.

L'argument tiré de ce que par l'acte 22 Vict. ch. 48, il aurait été déclaré que la somme de $140,000 et les autres paiements que le gouvernement ferait au Séminaire de Montréal, pour sa contribution à l'abolition de la tenure seigneuriale dans les seigneuries du Séminaire, couvrirait la commutation des terres alors possédées par la Couronne dans ces seigneuries, était une reconnaissance que ces terres étaient sujettes à la mouvance et au paiement des droits seigneuriaux, est également mal fondé. Tout ce que l'on peut induire de cette déclaration, c'est que le gouvernement, en venant en aide aux censitaires, vou-

lât ne pas être troublé par le Séminaire pour les indemnités qu'il aurait pu devoir sur les biens considérables qu'il avait acquis pour cause d'utilité publique, ou par la déshérence des ci-devant ordres des Jésuites et des Récollets.

Enfin il a été dit que le terrain dont il est question avait été acheté sujet aux droits seigneuriaux dont il pouvait être tenu envers les seigneurs, et que l'indemnité payée par la Couronne n'était pas celle fixée par l'édit de 1667, mais celle que les gens de main-morte sont tenus de payer, et que cette indemnité n'était que pour tenir lieu des lods et ventes pendant le temps que la Couronne posséderait l'immeuble pour lequel cette indemnité avait été payée.

Quant à la clause contenue dans l'acte de vente, elle est de pure forme et se rencontre dans tous les actes de vente. L'objet que l'on avait en l'insérant dans l'acte de vente était de décharger le vendeur du paiement des droits seigneuriaux à l'avenir, l'acquéreur s'obligeant de les acquitter à sa décharge. Or la Couronne acquitte les droits seigneuriaux en payant aux seigneurs de fiefs une indemnité pour en tenir lieu. Quant à la seconde partie de l'objection, il suffit de dire que la Couronne n'a jamais été une main-morte ni considérée comme telle, et qu'il n'y a aucune loi ou usage qui l'ait obligée à payer l'indemnité due par les mains-mortes; qu'il était loisible aux intéressés de fixer à l'amiable une indemnité autre que celle réglée par l'édit de 1667, et que dans tous les cas ce n'est pas aux Intimées à se plaindre, puisque l'indemnité qu'elles ont reçue excède de beaucoup le taux fixé par l'édit.

Pour ces motifs, je suis d'opinion que l'immeuble en question, qui appartenait à la Couronne lors de l'abolition de la tenure seigneuriale et pour lequel la Couronne avait payé aux Intimées un droit d'indemnité, n'était plus dans leur mouvance, et qu'il n'y est pas retourné par l'aliénation que la Couronne en a faite en faveur de l'Appelant en 1874, alors que la tenure seigneuriale était définitivement abolie, et que les Intimées ne peuvent réclamer de l'Appelant aucune commutation en vertu de l'acte 23 Vict. ch. 60.

Le jugement de la Cour Supérieure doit donc être infirmé, et telle est l'opinion de la majorité de la Cour.

The judgment in appeal was as follows:—

"Considérant que le Dr. Wm. Robertson et Charles N. Montizambert ont acquis pour les commissaires de l'asile des aliénés sous l'autorité de la 3 Geo. 4, c. 25, par l'acte du 8 Oct. 1839, reçu devant Joseph Guy et son collègue, Notaires, l'immeuble y désigné qui relevait du fief St. Augustin dont les Intimées étaient les seigneurs et propriétaires, et que cette acquisition a été faite pour un objet d'utilité publique et avec les deniers de la Couronne;

"Et considérant que par cette acquisition ce terrain a été réuni au domaine de la Couronne, et affranchi pour toujours de tous droits et devoirs seigneuriaux envers les dites Intimées et tous autres propriétaires du fief St. Augustin dont la mouvance a été éteinte, sauf leur droit à une indemnité pour la perte de leur mouvance;

Et considérant que le 20 avril 1860 la Couronne a payé aux Intimées la somme de £192.0.10 pour droit d'indemnité réclamé par les Intimées à raison de la dite acquisition;

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"Et considérant que la tenure seigneuriale a été abolie dans le fief St. Augustin par la 23 Vict. c. 60, sanctionné le 19 mai, 1860, et que depuis cette époque les Intimées n'ont eu d'autre droit que celui de réclamer un droit de commutation sur les aliénations qui, avant le dit acte 23 Vict. c. 60, auraient donné lieu à un droit de lods et ventes, et considérant que l'échange, que le gouvernement de la Province de Québec a fait du dit immeuble avec l'appelant en cette cause le 1 juillet 1874, n'a pas fait revivre les droits seigneuriaux sur le dit immeuble qui avaient été abolis par sa réunion au domaine de la Couronne, et que cet acte, lors même qu'il aurait été passé avant l'abolition de la tenure seigneuriale, n'aurait pas donné lieu à des lods et ventes, en sorte que les Intimées sont mal fondées à réclamer un droit de commutation à raison de l'échange du dit immeuble;

"Et considérant qu'il y a erreur dans le jugement rendu sur la requête des Intimées par l'hon. M. le Juge Torrance, l'un des juges de la Cour Supérieure le 31 mai 1876, nommant des experts pour déterminer la valeur du terrain en question, et pour établir le montant de l'indemnité ou droit de commutation dû aux Intimées au lieu des droits seigneuriaux dûs sur le dit immeuble, et aussi dans le jugement rendu par la Cour Supérieure à Montréal le 2 sept. 1876, homologuant le rapport des experts établissant la valeur du dit immeuble et le montant à être payé par l'appelant pour le rachat de la rente constituée dont cet immeuble était originairement chargée;

"Cette cour casse, etc.

"(M. le Juge Monk et M. le Juge Tessier différants.)"

The above judgment was confirmed by the Judicial Committee of the Privy Council. The following observations were made by their Lordships:—

PER CURIAM. This case has been argued with great learning and ability on both sides. The question, however, between the parties is reducible within narrow limits; and that question having been very fully argued, and their Lordships having had an opportunity of considering the authorities cited, they do not think it necessary to reserve their judgment.

The appellants are a religious community known as Les Religieuses Sœurs Hospitalières de St. Joseph de l'Hôtel Dieu de Montréal, and are the seigniors of a fief in Montreal known as the Fief St. Augustin. The respondent is the present proprietor of a piece of land within the ambit of that fief, and, at one time, unquestionably held of it subject to the feudal rights then incident to such a tenure. The proceedings out of which this appeal has arisen were taken by the appellants in order to recover from the respondent, as owner of this land, the commutation fine to which, as they allege, they were upon the transfer thereof entitled under the 74th and following sections of chapter XLI. of the Consolidated Statutes of Lower Canada, intituled "An Act respecting the "general abolition of feudal rights and duties." The 74th section is as follows: "In the Fief St. Augustin * * *lods et ventes*, and other "casual dues, including *droit de banalité* and all seigniorial dues whatever, were "abolished on the 19th day of May, 1860, and instead thereof the *cens et rentes* "have since that day been and shall be represented by a *rente constituée* of the

"same amount (in money or kind, as the case may be) secured by the same "privileges, and payable at the same periods, until the capital thereof becomes "payable as hereinafter provided; and a commutation fine equal to that which "the Seminary of St. Sulpice, of Montreal, is entitled, in the city and parish of "Montreal, and to be calculated and ascertained in the manner prescribed by "chapter 42 of these Consolidated Statutes respecting the said seminary, and "by the 69th section of this Act, subject to the provisions hereinafter made in "section 84 of this Act, as to the rate of commutation according to the situa-"tion of the property, shall be payable to the seigniors of the said fief, or any "portion of it, on the first mutation which would have created *lods et ventes* of "the ownership of any property happening in the * * * Fief St. Au-"gustin * * * during the 20 years next after the said day." Upon the transfer to the respondent of this piece of land in 1874, the appellants conceived that the period prescribed by the Statute as that at which they would be entitled to the commutation fine had arrived, and accordingly, in conformity with the procedure prescribed by the Statutes for ascertaining the amount thereof, they called upon the respondent to appoint an arbitrator. He refused to do so. They then took the next step prescribed by the Statutes, and petitioned the Court to appoint an arbitrator on his behalf. A defence was raised to that claim, which will be afterwards considered. The result was that the Superior Court upheld the claim and appointed an arbitrator. The amount of the commutation fine was afterwards ascertained in due course, and a decree made accordingly. Against those two decrees of the Superior Court there was an appeal to the Court of Queen's Bench, the Judges of which were divided in opinion, but the majority held that the proceedings had been irregular from the beginning; that no arbitrator ought to have been appointed, and that the application of the appellants ought to have been dismissed. This appeal is against their decree.

Before considering the merits of the case, it may be well shortly to recapitulate the history of the devolution of this property. In 1805 it seems to have been vested in one William Hallowell. In his hands it was subject, not only to the seigniorial dues, but to certain reserved rents and other charges, conventions and servitudes which were expressed in a deed of accord of the 9th October, 1805. On Hallowell's death his interest in the property became divisible amongst his wife and children, and, by two notarial deeds of the 8th October, 1839, respectively, one-tenth of that interest was duly conveyed to and became vested in one William Robertson, the remaining nine-tenths being in like manner conveyed to and vested in one Charles Montizambert, each of whom accepted as purchaser in trust for the commissioners appointed for the purpose of erecting a lunatic asylum in the said district of Montreal, and their successors, and with an obligation on his behalf to reconvey in a due manner unto the said commissioners and their successors, so soon as they should be duly authorised to accept a deed to that effect, the undivided part conveyed to him of the said property. It appears that, under a colonial statute, public money had been appropriated to certain persons as commissioners generally for charitable purposes connected with lunatics, and that there was then an intention at least of making those persons

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a corporation capable of holding land. The purchases were unquestionably made with the public moneys so appropriated to the commissioners. Nothing, however, was afterwards done to constitute them a body corporate, or to authorize them to hold lands: and it appears—though it is not very distinctly shown when—that some time between 1841 and 1844 they had ceased to exist, and that the Government of Canada was then in possession of the land. The next transaction in order of date in that of the 20th of April, 1860, and as will afterwards be shown, it is upon the true effect and nature of that transaction that the determination of this appeal now almost admittedly depends. Before and about that time various statutes had been passed with the object of abolishing all feudal rights of the seigniors, and of giving to the tenants a free allodial tenure. The Statute, however, which related to this particular fief was not passed until the 19th May, 1860, and was one of several that were embodied in the Consolidated Statutes, Chapter 41. On the 14th January, 1863, after the statute had come into effect, a notarial act was passed between Montezambert, who held nine-tenths of the property under the trusts already mentioned, and Her Majesty the Queen represented by the Honourable John Rose, described as a Commissioner of Public Works, by which the nine-tenths of the property vested in Montezambert was formally conveyed to the Crown. That deed contains a recital in the words: "And whereas the property hereinafter described "was never conveyed to the commissioners for the erection of a lunatic asylum "in the district of Montreal, that such commissioners have ceased to exist, and "that by the laws in force in this province the said property, having been paid "for out of the provincial funds, should be vested in Her Majesty, her heirs "and successors, and be under the management and control of the Commissioner "of Public Works for the time being." There is no trace in the record of any transfer of what English lawyers would call the outstanding legal estate of the remaining one-tenth from Robertson to the Crown; but there is no doubt that the Crown had long been in possession as well of that, as of the other nine-tenths, and, in fact, continued to be in possession of the whole property up to the 1st July, 1874. At that date it passed from the Crown to the respondent by means of an exchange *à titre de soulte et retour*, and it is admitted that if that transaction had taken place between subjects it would have been such a mutation of property as would have created *lods et ventes* within the meaning of the 74th section of chapter 41 of the Consolidated Statutes.

That being so, what was the defence made by the respondent to the appellants' claim? His first answer to their petition is at page 21 of the Record. The appellants put in their reply, whereupon the defendant obtained leave to file an amended answer, and the reply was ultimately taken to be a reply to that amended answer. Mr. Digby has to-day drawn their Lordships' attention to some supposed distinctions between the two answers, but their Lordships do not see that there is any difference between them which materially affects the question now to be decided. They will, therefore, confine their observations to the last answer. That is to the effect that the property in question was acquired by the Crown by the notarial acts of the 8th October, 1839; that by those acts it was established that the property in question was acquired in the name of a

trustee ("*en fidei-commis*") by the commissioners for the erection of a lunatic asylum in the district of Montreal, with the money of the Crown appropriated to that object; that the commission of these commissioners having expired about the year 1844 without their ever having effected the erection of the asylum, and the commissioners having consequently ceased to exist, the trust was extinguished, the Crown united the property to its domain, and then began to possess and afterwards continued to possess it as proprietor up to the time of the alienation in favour of the respondent Middlemiss; and further that the appellants had since that time treated the Crown as proprietor of the property, and had claimed the indemnity which was due to them as seigneuresses upon the said property, "*ainsi passé en main-morte.*" Their Lordships here pause to consider an argument which has been founded upon the words "*ainsi passé en main-morte.*" They think that the words "thus passed *en main-morte*" cannot fairly be taken to import more than that the property had passed *extra commercium* under the circumstances above stated; and that if those circumstances do not support the conclusion that it had passed into hands which were in the strict sense of the term those of *gens de main-morte*, the respondent ought not to be held to have made an admission to that effect because his pleader has used in a loose way the term *main-morte* instead of that which Hervé, writing with precision, in his definition of "Indemnité," advisedly substituted for it, viz., *une main qui n'aliène point.* In the following passage he thus explains the use of those words: "Je dis en général aussi, une main qui n'aliène point and non "pas simplement une main-morte, parceque le Roi qui n'est pas mis dans la "classe des main-mortes, doit néanmoins une indemnité aux seigneurs dans la "mouvance des quels il acquiert," and then he proceeds to deal with the indemnity payable in the one case by *gens de main-morte*, properly so termed, and in the other by the Crown. The answer goes on to say that, on or about the 20th April, 1860, the Crown had paid to the petitioners an indemnity agreed between them by reason of the said property having ceased to be subject to seigniorial rights; and that by reason of the acquisition by the Crown of the said property, and the payment of the said indemnity, that property was united to the Sovereign's domain and ceased to be subject to any *mouvance particulière.* The reply of the appellants admits to a certain extent the facts pleaded by the respondent. It admits that the land had been acquired by virtue of the two notarial deeds in trust for the commissioners, to which commissioners the government of the province of Canada had afterwards succeeded; it also admits the payment of the sum alleged to have been paid by way of indemnity, being one-fifth of the sum less a tenth, but says that that indemnity was not fixed and agreed upon by the parties, because the petitioners did not acknowledge the propriety of the deduction of the tenth, and further claimed *lods et ventes* on the purchase of 1839, which had been released by the Crown. It then states what is in fact the real issue between the parties, viz., that the indemnity paid represented only that indemnity which was payable by all *mains-mortes* when they acquired immoveable property; that the effect of the payment was not *resoudre la mouvance, i.e.* to put an end to the tenure, but merely to suspend the rights of the seigniors so long as the property remained in the hands of the Government, and that it had

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been acquired by Robertson and Montizambert subject to all seigniorial rights, and so continued to be, except so far as related to the indemnity *pour amortissement*. The appellants with their reply filed the account at page 24 of the Record, which is really the only evidence in the cause of the transaction in question. Their Lordships have felt, during the greater part of the argument, that the crucial question in the case was, which of the constructions put by the parties respectively upon that transaction was correct; or in other words, *quo animo* did one party pay and the other receive the indemnity mentioned in the account. To that question they will now address themselves.

The case of the respondent involves two questions, one a question of law, and the other a question of fact. The question of law is whether by the law of Lower Canada the acquisition by the Crown of lands held from or under a seignior as part of his fief, did extinguish all feudal rights in those lands, and give to the seignior a mere right to an indemnity. The question of fact is, whether the transaction evidenced by the document at page 24 took place upon that footing. Those questions more or less run into each other, because it must be presumed that the parties dealt with each other with reference to the subsisting law, and the construction of the document, in so far as it is ambiguous, will therefore be facilitated by a consideration of what that law was.

Their Lordships do not think it necessary to go in great detail through the many authorities which have been cited in the factum of the parties, in the reasons of the Judges, or at the bar, as to what the law of France, and, consequently, the law of Canada, was upon that point. They have come to the conclusion that those authorities do establish that (whatever may have been the case in earlier times when the kings of France seem occasionally to have submitted to do homage by attorney or otherwise, for acquisitions in the fiefs of subject seigniors,) for a considerable time, probably very soon after the Edict of Moulins, passed in the reign of Charles IX., there was an end of that state of things, and that the Crown thenceforward acquired such properties with an extinction of all feudal rights therein, subject only to a right on the part of the seignior to receive an indemnity,—a right more or less strictly enforceable, but certainly recognized by custom. They also think it is established that up to the time of the Ordinance of Louis XIV., in 1667, the amount of that indemnity, when not determinable by legal custom or written law, was in the case of lands held by roturiers one-fifth of the price. This is very clearly stated by Hervé in a paragraph which applies, not only to the indemnity payable by *gens de main-morte*, but also to the indemnity payable by the Crown. He says, "Lors qu'il "n'y a aucune règle écrite ou lors qu'il y a du doute, il faut suivre la juris- "prudence qui a fixé l'indemnité à la valeur du tiers des biens nobles et du "cinquième de ceux qui sont roturiers, car cette jurisprudence fait le droit "commun dans les provinces où il n'y a ni loi ni usage contraire." This view of the jurisprudence of France does not depend simply upon text writers, such as Guyot and others. It is confirmed by the various decisions or arrêts that have been cited by the learned Judges, and in particular by the arrêt in the case of *la terre de Bohin;* for although the decision in that case was subsequent in date to the Ordinance of Louis XIV., it is impossible to impute to

the Judges who passed it, that they were not applying the law as it existed at the time when the feudal rights were alleged to have been extinguished.

What then is the effect of the Ordinance of Louis XIV., of which so much has been said? It assumed the existing law, and modified that law in so far as the amount of the indemnity was concerned. It prescribed a mode of calculating the indemnity less favourable to the subject, and also extremely complicated in form, in so far as it related to property held *en roture*. The second article of it, which relates to seigniories or fiefs purchased by the Crown, seems to preserve the old custom of calculating the indemnity at one-fifth of the value or price. Their Lordships here observe that it is by no means necessary to hold that this ordinance, which was passed four years after the establishment of the Superior Council in Canada, and therefore was not introduced *proprio vigore* into Canada, and was never afterwards registered in Canada, ever became part of the law of Canada.

It will subsequently be shown that the parties acted and dealt with each other upon the footing of the law as it existed before the passing of the Ordinance.

The next question is, was this law so defining the rights of the Crown ever introduced into Canada? Their Lordships can see no objection in principle to treating it as so introduced. It was merely part of the law of feudal tenure, which was unquestionably introduced into French Canada as the law of real property or part of the law of real property in that colony; and which after the conquest of Canada, when the province had passed under British dominion, continued to be law by virtue of the Imperial Statute, known as the Quebec Act. If the law relating to the rights of the Crown, which was part of the general law of tenure, was not introduced or continued in Canada, it should be shown affirmatively to have been excepted. What has been principally relied upon as establishing this, is the fifth sub-section of the 66th section of the Consolidated Statute, chapter 41. That portion of the Consolidated Statute does not, however, relate to the seigniory in question, or to seigniories of that class, but is confined to seigniories belonging to the Seminary of St. Sulpice. The enactment relied upon is, moreover, extremely general in its terms. It says, "The said payments by the province shall include "the commutation of the tenure of all property now held by the province or "the Crown, or by the War Department, as representing the late Ordnance "Department in any seigniory belonging to the said Seminary, and such com- "mutation shall be held to have been perfected on the 4th day of May, 1859." It speaks of the tenure of all property held by the province or the Crown, or by the War Department. It does not positively assert that the Crown was treated as an ordinary *censitaire* in all seigniories in Canada in which it might hold lands, or in the particular seigniory which is in question here.

Reliance was also placed upon two statutes which relate to the officers of Her Majesty's Ordnance, and to lands purchased by them for the protection of the province with Imperial funds. It is possible that lands so purchased and held may have been subject to feudal rights, but their Lordships cannot infer from these particular statutes that the French law was altered upon its introduction

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into Canada so as to affect the general rights of the Crown in Canada in the manner supposed, or that it has since been so altered.

It may be convenient to [illegible] there is no doubt as to the law which is invoked on the [illegible] ant, namely, that upon an alienation by virtue of which pr[illegible] feudal rights passed into the hands of *gens de main-morte*, in the proper sense of the word, an indemnity estimated also at one-fifth of the price became payable by the *gens de main-morte* as a compensation for the probable loss of *lods et ventes*. There was, however, this distinction between the indemnity payable by *gens de main-morte* and the indemnity payable by the Crown, viz., that upon the [illegible] property out of the hands of the *gens de main-morte* the right to *lods et ventes* again revived, the feudal rights, so far as they were covered by the indemnity, being merely suspended; whereas in the case of the Crown, according to the authorities to which their Lordships have already referred, they were absolutely and for ever extinguished. The real question, then, between the parties in this case is, whether the feudal rights in question were so extinguished, or only so suspended by the transaction of the 20th of April, 1860.

Their Lordships will now examine the document set out at page 24, and consider which of the contentions of the opposite parties it favours. It is in the form of a bill, presented by the seigniors and followed by a statement of what has been paid by the Government. It may here be remarked that the Provincial Government, as such, was not capable of holding lands, and that all lands acquired by Government for public purposes were required by law to be taken in the name of the Crown. The Bill is headed "Le Gouvernement Provincial." Those words clearly import that the bill was presented to the Provincial Government as representing the Crown. It proceeds thus "Pour "lods et ventes sur son acquisition,"—that is, the acquisition by the Government, the representative of the Crown, from the heirs and representatives of William Hallowell,—"by two contracts of the 8th October, 1839, which passed "to Robertson and Montizambert, purchasers for the advantage of the Commis- "sioners of the lunatic asylum." It claims first the *lods et ventes*, alleged to have been payable on that particular transaction, and then contains this item: "Pour droit d'indemnité sur le susdit prix de vente £192 0s. 10d." being one fifth of the price. Then follows a claim from the Government of the *rente foncière*, which was reserved by the original deed to Hallowell in favor of the seigniors over and above their seigniorial dues for fifteen years, a claim which implies that at least during that period Government representing the Crown had been the proprietors of the land. How then did the Government, as appears by the second part of this document, deal with these claims? It rejected that for the *lods et ventes* upon the transaction of 1839, and it may well be presumed that the claim was so rejected because it had been established by judicial decisions in Canada that *lods et ventes* were not payable on a purchase for a purpose of public utility. It paid to the appellants the sum of £217 11s. 9d., which was composed of the following items; viz., 1st, the indemnity claimed £192 0s. 10d., less one-tenth, which was deducted on the ground that these particular seigniors were not entitled to the profits of *la haute justice*, and therefore that

one-tenth was retainable to cover the claims of those that were so entitled; and, secondly, the sums claimed for the arrears of the *rente-foncière*.

An argument was founded by the learned Counsel for the appellants upon the words "droit d'indemnité," and upon the fact that the payment was made of the "indemnité reclamée." It was contended that the words "droit d'indemnité" have received a statutory interpretation, and must be taken to import the indemnity payable to a corporation or other *main-morte*. Their Lordships are of opinion that the words mean only a right of indemnity, and are to be construed *secundum subjectam materiam*. Here it appears on the face of the bill, as already shown, that the claim was against the Government as representing the Crown; that its title was referred to the transactions of 1839; and that it was treated as having been in possession of the property, and liable for the rent reserved for at least fifteen years before the date of the transaction. All this appears to their Lordships to afford the strongest inference that the indemnity claimed was that payable by the Crown.

It was suggested, however, in an early part of the argument that the sum was not that which would have been the amount of the indemnity payable to the Crown under the Ordinance of Louis XIV., but, as their Lordships have already observed, that only shows that that ordinance was not treated as regulating in Canada the amount of the indemnity, but that the claim was made according to the law as it existed in France before that ordinance. On the other hand the view which the appellants take of the transaction is not altogether consistent with the document. There is on the face of the account no allegation that the sum claimed was the indemnity payable by *gens de main-morte* in the proper sense of the term. To treat the Crown as falling within that category would clearly have been an error in law, and the facts stated in the bill which give a partial history of the former transactions, fail to show that at any time the property was held by any corporation or body of persons who were capable of being treated in the proper sense of the term as *gens de main-morte*. Therefore it appears to their Lordships that upon the true construction of this document it must be held that the indemnity was claimed and paid as an indemnity payable by the Crown, with the legal incidents of a purchase by the Crown, and the payment of an indemnity thereon, namely, that the feudal rights were thereby extinguished and became incapable of being revived.

The chief argument, not already dealt with, which has been used against this construction was founded upon the expression in the deed of 1861, which conveyed the legal estate to the Crown. Their Lordships are not prepared to say that a plausible argument cannot be raised upon that point. That deed, however, cannot be used in the way of admission or estoppel as regards this question, because the appellants were no parties to it; and it seems to their Lordships that a sufficient explanation of the difficulty is that given by the learned Chief Justice of the Court of Queen's Bench, which is to the effect that the clause was put in for the protection in the ordinary way of the conveying party, and to relieve him from any claim which might possibly be made against him in respect of seigniorial rights. Their Lordships cannot set any inference which arises from those clauses against what upon a full view of the law and the facts

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they think was the effect of the transaction of April, 1860. It seems to them that their view of that transaction really disposes of the case, and that it is unnecessary to deal with any other questions that might be raised upon the construction of the Statute and the effect of the conveyance to the Crown of 1861, or any of the other points which have been more or less raised in the course of the argument before them. It will be their duty on the whole case humbly to advise Her Majesty to affirm the judgment of the Court of Queen's Bench for Lower Canada, and to dismiss this Appeal with costs.

Pagnuelo & Major, for appellants.

Geoffrion, Rinfret & Archambault, for respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND SEPTEMBER, 1877.

Coram DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

No. 98.

ROLLAND ET AL., APPELLANTS;

AND

TIFFIN ET AL., RESPONDENTS.

A tenant became insolvent, and the leased premises, which were vacant, subsequently becoming uninhabitable, the landlord proceeded to execute certain repairs.

HELD:—That in default of a demand by the lessee, or his representative the assignee, to rescind the lease, it continued to subsist, and the lessor was entitled to rent, less the time occupied in making the repairs.

RAMSAY, J., *dissentiens*. The lessee of a house became insolvent, and there was no one actually in occupation of the building. The house was in great disrepair, and the proprietor was notified by the building inspector that it was in a dangerous condition. He took possession of the premises, pulled down the front wall and rebuilt, and then claimed all his rent except for two or three months during which the repairs were being made. The Court below allowed him only the rent up to the time of the rebuilding. The lessor appealed from this judgment. His Honor thought it should be confirmed. The lessor had no right to take possession of the premises of his own accord, and his doing so amounted to a resiliation of the lease; but even if it did not, he had no right to claim rent for the whole term.

MONK, J., also dissenting, thought that the article of the Code which allows the landlord to make repairs was not applicable to the present case. Certain repairs became necessary. The landlord, without any notice to the lessee, took possession of the premises and demolished the front, and kept the house under repair for several months without any communication with the parties to the lease. This was a kind of violent taking possession. It was not a question of damages; it was a question of resiliation of the lease. The landlord, by his forcible taking possession, had resiliated the lease.

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Cross, J. This appeal arises out of the contestation of a dividend sheet in the matter of Turgeon, insolvent, in which Rolland, the landlord, besides arrears, was collocated for a year's rent of the premises which the respondent had occupied, said year extending from 1st May, 1876, to 1st May, 1877. The respondents, inspectors to this estate, contested the collocation, on the ground that the landlord had taken possession of the premises to make repairs, during the continuance of which the premises had become uninhabitable, and he had given no notice to the assignee of the time when the repairs were commenced, nor when they were finished, consequently it was argued the premises remained in the hands of the proprietor, and he was not entitled to rent after the 20th August, the time when the repairs commenced. The Court below maintained the contestation, and struck out the collocation as regards the rent accruing after the 20th August. From this the landlord appeals. It appears that the building became dangerous, and the Building Inspector for the city required repairs to be made, which the proprietor commenced 20th August and did not finish until the 26th October. He gave no notice to the assignee when the repairs were commenced nor when they were finished. The keys remained all the time with the assignee, who never protested nor asked for the termination or resiliation of the lease, nor to be relieved from the payment of the rent.

I am of opinion that the proprietor was in the exercise of his right when he entered to make these repairs, that in doing so he is not presumed to have ousted the tenant from his right of occupation of the premises, which remained, and is presumed to have been desired by him or his representative, the assignee, inasmuch as neither of them claimed to have their liability interrupted or dissolved. Tenancy after 1st May incurred liability for rent for the current year. The tenant had a continuing estate or right in the premises for the whole year, and if he wished to avail himself of a ground for terminating that liability he should have made the demand for it in due time, otherwise it is to be presumed he wished to retain his right in the premises which, of course, would be subject to the payment of the rent. Under article 1634 of the C. C. such an interruption might have given rise to a well-founded demand to dissolve or terminate the lease, but without that demand at the diligence of the tenant the premises remained at his risk. He is presumed to have had the occupation, save in so far as interrupted by the repairs, during which time he is entitled to have his rent deducted. The time was more than two months and less than three. I do not think the Court should be exact to the day in making computation of the amount to be deducted, as the inconvenience might exceed the duration of the repairs. The assignee should be allowed for three months' rent and taxes, or a deduction of one-fourth of the amount in dispute. The judgment should therefore be reversed, awarding to Rolland $440.25 in addition to the arrears of $345.81, not contested. It is obvious that Rolland showed no purpose to abandon his rent; the liability rested on the assignee by his occupation beyond the 1st May. He did nothing to relieve himself, and has really suffered no damage, as he would not have occupied the premises. He was not in actual occupation when the repairs commenced.

The judgment is as follows:—

"The Court, etc.

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"Considering that the moveables and effects of the insolvent Turgeon, on the premises which he occupied as tenant of the appellants, were liable to said appellants for rent and taxes, and that said premises continued to be occupied by the estate of the said insolvent, represented by his assignee in insolvency, during the space of about three months of the current year, commencing on the 1st day of May, 1876, and the said assignee had the right and liberty of occupying the same, up to 1st May, 1876, and that said estate was liable for the rent and taxes of said premises for the whole of the then current year, but became entitled to a proportionate deduction of said rent and taxes for a certain time the premises were under repairs and uninhabitable, to wit, in the months of August, September and October, 1876, and that in the judgment rendered in this matter in the Court below, on the 12th February, 1877, there is error; "Doth reverse," &c., &c.

Archambault & David, for appellants.

Geoffrion, Rinfret & Archambault, for respondents.

(J. K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND MARCH, 1877.

Coram DORION, C.J., MONK, RAMSAY, SANBORN, TESSIER, JJ.

No. 195.

JAMES WILLIAMSON, APPELLANT;

AND

WILLIAM RHIND, RESPONDENT.

HELD:—1. That a warehouse receipt given by a warehouseman when the goods in question are not in his possession is null and void.

2. That after a case has been submitted to the Court on the merits, the plaintiff is not entitled to discontinue the action on payment of costs.

The appeal was from a judgment of the Superior Court in Insolvency, 23rd June, 1876.

SANBORN, J. The appellant is a warehouseman. He alleges that between the 12th of February and the 1st of September, 1875, he delivered certain warehouse receipts to William M. Molson, then President of the Moisic Iron Company, for different quantities of iron, in all, worth $15,000, and trusting to the assurances of said Molson that said iron was at his disposal, it was left on the grounds of the Moisic Iron Company. Some time afterwards the Moisic Iron Company went into insolvency and respondent was appointed assignee. He refused to deliver up the iron mentioned in these receipts. Appellant petitions a Judge of the Superior Court under the Insolvent Act of 1875 to have the iron put into his possession to answer the exigency of these receipts. The receipts were all given to William M. Molson in his individual name. Parties joined issue and proof was had. There is no evidence that the notes for which

the iron was pledged went to the use of the Moisic Iron Company. After the case was submitted for judgment appellant applied to have it withdrawn from *délibéré* to make proof that the notes were discounted for the benefit of the Moisic Iron Company. This was refused. He then, when the Judge was proceeding to render judgment, filed a discontinuance on payment of costs. The Judge disregarded the discontinuance and rendered judgment, dismissing the petition.

The Court is of opinion that this judgment was right. Had appellant been allowed to prove that the advances made upon the iron were for the benefit of the Moisic Company it does not appear to the Court that the result could have been different. The receipts cannot be treated as other than what they purport to be. They are in terms receipts to William M. Molson individually. And appellant never had the physical possession of the iron. The receipts were improperly given, and this is a very mild term to use respecting them. Such warehouse receipts are given by the law great privileges, and it is of the very essence of their worth that they should state accurately the truth. The appellant certifies by these receipts that the iron is in his yard on the Lachine Canal, while it was all the time on the grounds of the Moisic Iron Company. It is plain from 64 Section of 34 Vic., c. 5, what the Legislature intended by these receipts, from the fact that it is made a misdemeanor for a warehouseman to deliver such receipts to mislead anyone before the goods named in such receipts have been actually received by him. Without such delivery to, and actual possession by the warehouseman, of goods to be in his storehouse, or place of storage, to answer the exigencies of such receipts, before the granting thereof, the receipts are illegal and illusory.

The present appeal is urged mainly against the judgment because rendered after discontinuance. The Court is of opinion that after the case has been submitted to the Judge, the right of discontinuance does not exist. Each party, then, has a right to the decision of the Court. It is plain that article 450 of the Code of Procedure did not contemplate the right to take the case out of advisement by the plaintiff or petitioner. Article 451 indicates that it can be done by [illegible] discontinuance with the prothonotary and serving notice. If this applied to a case already in the hands of the Court, it would permit of taking proceedings in the cause after it has been submitted, which is against all practice. After a case has been once regularly submitted, the Court is seized of it, and it can only be afterwards dealt with by permission obtained from the Court or Judge. The judgment is confirmed.

Abbott, Tait, Wotherspoon & Abbott, for appellant.

Kerr & Carter, for respondent.

(J. K.)

COURT OF REVIEW, 1877.

MONTREAL, 30TH APRIL, 1877.

Coram JOHNSON, J., DORION J., PAPINEAU, J.

No. 111.

In the matter of *Belivеau*, Insolvent, and *Duchesneau*, Party Collocated, and *Plassis*, Contestant.

HELD:—That a mortgage given by a minor is not radically null, but is merely subject to be annulled in case of *lésion*.

JOHNSON, J. The insolvent in this case had given two obligations when he was a minor, one to Duchesneau and the other to Plante. Both these creditors were collocated; but Plassis, a subsequent creditor, contested both, and his contestation was maintained, and both claims were dismissed by the same judgment, and both the claimants inscribed for review. We unanimously reverse this judgment. It proceeded on the ground that the obligations of the minor were absolutely null in themselves; but we hold, on the contrary, that they are null, not on account of minority, but on account of lesion (*non tam minor quam læsus*); and, therefore, this must be invoked by the party injured. Art. 987 C. C. settles this. It is very true that there are certain nullities in the contracts of minors which may be invoked without lesion; but still they must be invoked by the minor or on his behalf (Art. 1009 C. C.) In the case of Venner vs. Lortie, decided in Québec a year ago in Review, and in which our present colleague, Mr. Justice Dorion, sat with Stuart and Casault, JJ., this subject was fully treated. That case was against a surety, and had been dismissed on the ground of the nullity of the principal obligation for which they became security; but the principle applied was identical with that which must govern here. We, therefore, reverse the judgment, and dismiss the contestation of Plassis with costs in the Court below, and also with costs here in favor of each of the claimants—as they have inscribed separately.

The following was the written judgment of the Court:—

"La Cour * * * considérant que l'hypothèque consentie par le failli pendant sa minorité, en faveur du créancier colloqué l'a été pour bonne et valable considération, et que les deniers obtenus par le dit failli au moyen de la dite hypothèque ont été employés pour le bénéfice et avantage du dit failli;

Considérant que la dite hypothèque n'était pas nulle radicalement, mais seulement annulable à la demande du mineur devenu majeur, et que ce dernier reconnait l'avoir approuvée et ratifiée après sa majorité et avant sa faillite;

Considérant que lorsque le contestant a pris hypothèque sur les biens du dit failli il devait connaître l'hypothèque du créancier colloqué, et ne peut se plaindre d'avoir été induit en erreur.

Considérant qu'il y a erreur * * * infirme, etc., etc."

Judgment of S. C. reversed.

Mathieu & Co., for party collocated.
A. Germain, for contestants.
(S.B.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 29TH JANUARY, 1878.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

No. 98.

THOMAS ROBERTSON ET AL.,

(Defendants in the Court below,)

APPELLANTS;

AND

LOUIS JOSEPH LAJOIE,

(Plaintiff par reprise in the Court below,)

RESPONDENT.

HELD:—1. That a document in the form following was a warehouse receipt, and not a mere delivery order:

"Received from Ritchie, Gregg, Gillespie & Co., on storage, in yard Grey Nun Street, the following merchandize, viz.

"(300) Three hundred tons No. 1 Clyde pig iron, storage free till opening of navigation.

"Deliverable only on the surrender of this receipt properly endorsed.

"Montreal, 5th March, 1873. Thomas Robertson & Co."

2. That the parties signing the above warehouse receipt, unpaid vendors of the iron, could not pretend that it was not a warehouse receipt inasmuch as they were not warehousemen, as against a holder of such receipt in good faith.

3. That such warehouse receipt may be transferred by endorsement as collateral security for a debt contracted at the time, in good faith, the pledgee having no notice that the pledgor is not authorized to pledge, the proof of such knowledge being on the party signing the receipt.

4. That an obligation contracted at the time may be made to cover future advances, but not past indebtedness.

Abbott, Tait, Wotherspoon & Abbott, for respondent:—The action in the Court below was based upon five warehouse receipts in the following form:

"Received from Ritchie, Gregg, Gillespie & Co., on storage in yard Grey Nun "Street, the following merchandize, viz:—

"(300) *Three hundred Tons No. 1 Clyde Pig Iron. Storage free till open-* "*ing of navigation.*

"Deliverable only on the surrender of this receipt properly endorsed.

"Montreal, 5th March, 1873."

(Signed,) "THOMAS ROBERTSON & CO."

The other four were for about 350 tons additional, of pig iron, and were in the same form as the above, only differing in the specification of the amount and of the place where the iron was stored; the total amount of the iron being 647 tons, 15 cwt., 2 qrs., amounting in value to $21,856.72. The original plaintiff in the Court below, Mr. Nelson Davis, was the holder of these warehouse receipts, under endorsement and delivery to him by Ritchie, Gregg, Gillespie & Co. On the 4th October, 1873, demand was made on behalf of Mr. Davis, by Phillips, notary, upon the appellants, for the delivery of the iron, the warehouse receipts being at the same time tendered back duly endorsed. But several demands had been previously verbally made to the same effect, and refused by appellants; one of which refusals is by letter, dated 27th August, 1873, and filed as No. 38 of the *dossier*.

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Thereupon an action was brought by Mr. Davis against the appellants, praying that they be ordered to deliver over the iron to him, and in default thereof to pay the said sum of $21,856.72 with interest from service of process till paid.

The Court, after contestation and the taking of evidence, rendered judgment in accordance with Mr. Davis' conclusions, against appellants, ordering them to deliver the said iron to the respondent (Davis having become insolvent in the interval); or in default thereof to pay the above mentioned amount. And it is from that judgment that the present appeal has been instituted by the appellants.

The declaration in the cause alleged that early in the year 1873, the appellants purchased a large quantity of pig iron, on a joint adventure with one John McDougall, and that in March of that year, they sold a portion of the iron so purchased, amounting to 647 tons, 15 cwts., 2 qrs., to the firm of Ritchie, Gregg, Gillespie & Co., and delivered it to them. That upon such delivery and as recognition thereof, and of the acquisition by Ritchie & Co. of the iron, the appellants made the warehouse receipts already referred to, and delivered them to Ritchie & Co.

That Ritchie & Co. afterwards pledged the said iron to the plaintiff Davis, as security for the payment of the amount then due to him by them, and for advances then and subsequently made, and as evidence of such pledge, endorsed and delivered the warehouse receipts representing the iron, to Davis: by means whereof, and by law, and the custom of trade and of merchants, Davis became the possessor of the iron, and the appellants became bailees for him. And he became entitled to demand delivery of the iron, in accordance with the terms of the warehouse receipts.

To this action the appellants pleaded four pleas:—

1. That as the plaintiff Davis did not allege that the appellants were paid for the iron by Ritchie & Co., it did not follow that they were bound to deliver the iron to Ritchie & Co. And further, that as it was not alleged that the appellants were warehousemen by calling, the warehouse receipts had no legal value. And that they were not capable of being transferred by endorsement.

By a second plea they alleged that the appellants were not paid for the iron, and that without payment the sale was not complete. Moreover, that the appellants were not warehousemen by calling, and therefore could not pledge their own goods by means of the several receipts mentioned in the plaintiff's declaration. That the receipts were, therefore, null in the hands of Ritchie & Co., and the endorsement of them conveyed no title.

By a third plea they alleged that the plaintiff Davis was aware, at the time of the alleged sale by appellants to Ritchie & Co., that the appellants had received no payment for the iron: and knew that Ritchie & Co. were unable to pay for it, they being then, to Davis' knowledge, in a hopeless state of insolvency.

That, in fact, the alleged sales were planned and contrived with a fraudulent intent between the plaintiff Davis and Ritchie & Co., viz., to deliver the iron to the plaintiff Davis for overdue advances and liabilities incurred in his favor by Ritchie & Co.; and that the warehouse receipts having been so obtained with fraudulent intent, could not be availed of by the plaintiff Davis.

By the fourth plea the appellants denied all the allegations of the declaration.

In the answers filed by the plaintiff Davis, he asserted that he was a *bonâ fide* pledgee of the iron for value, and had a right to hold it under the endorsement and transfer to him of the warehouse receipts in question, notwithstanding the alleged non-payment of the price, of which he declared his ignorance. And that the appellants could not avail themselves of any claim they might have upon the iron, inasmuch as they had themselves made the warehouse receipts to Ritchie & Co., or their order; and had thereby debarred themselves from making any objection to their transfer.

By a motion made before Mr. Justice Mackay, after issue was joined, the appellants obtained leave to amend their pleadings, and thereupon they repeated their former pleadings, and added the following clause, namely:—"That the "warehouse receipts had no legal value, not having been signed or endorsed to "guarantee the payment of any bill of exchange, note or debt, negotiated or "contracted at the same time of the endorsement of said warehouse receipts. "And that if they were, the effect of the warehouse receipts was lost, as the "plaintiff Davis had held the iron for more than six months after the date of "the warehouse receipts."

A general answer being filed to the new plea, the parties proceeded to evidence, when, although a great mass of testimony was introduced into the record, most of it entirely irrelevant to the issues, the main facts of the case were established as they are related in the declaration, with this addition, that at the time of the purchase of the iron in question, it was settled for by Ritchie & Co. by their negotiable paper, at six months from date, none of which had matured at the time that the plaintiff Davis demanded the iron.

Much testimony of a vague description was adduced for the purpose of endeavoring to shew that Ritchie & Co. were hopelessly and notoriously insolvent at the time of the sale; but if this pretension were not sufficiently negatived by the fact that the appellants were content to accept their paper at six months from date, in payment of so large a sum of money, it will be seen that the attempt to establish any insolvency, or even suspicion of insolvency, at that time, wholly failed. The plaintiff Davis proved that he received the iron in question in pledge, as security for the re-payment of advances, considerably exceeding $300,000, made by him to Ritchie & Co., of which, at the time the action was brought, about $200,000 remained unpaid. The sale by appellants to Ritchie & Co., and the settlement for the iron by bills at six months, was proved, as has already been mentioned.

The letter of the appellants, refusing to deliver the iron, dated 27th of August, was produced, as also a copy of the notarial demand of the 4th October. In fact no evidence was wanting that could be required to establish the plaintiff's case. It is impossible to doubt that it was completely made out, so far as evidence is concerned, in all respects.

It remains to enquire what weight the legal propositions enunciated by the appellants in their pleas can be allowed to have in the decision of the matter at issue.

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Their first proposition is, that inasmuch as the plaintiff Davis did not allege that Ritchie & Co. paid for the iron, he had made out no case for the delivery of the iron to himself.

The answer to this is very simple. By signing and issuing a negotiable instrument, declaring that the iron belonged to Ritchie & Co., the appellants rendered any enquiry into the accounts of Ritchie & Co. with them entirely unnecessary. They were satisfied by the settlement made with them, and declared their satisfaction in the most effectual manner by giving Ritchie & Co. their warehouse receipts for the iron in question, as his iron. It was therefore unnecessary for the public to enquire what the precise nature of the bargain was by which Ritchie & Co. acquired it. In fact if any such questions had been asked of the appellants at the time, it is probable the enquirers would have met with no very satisfactory reply. The answer to the appellants' first proposition is, therefore, that they are restrained by their own act from denying the right of property of Messrs. Ritchie & Co.

The appellants argued in the Court below on this point, that if there was any obligation contracted for by them, it consisted in delivery, when paid. And they cite Article 1533 of the Code in support of this proposition. A reference to the Article shews, that the authority is not applicable in favor of the appellants; but, on the contrary, is directly against them. That Article provides, "that if the time and place of payment be *not* fixed *by agreement*, the "buyer must pay at the time and place of the delivery of the thing."

Now, in this instance the time and place of payment were fixed at the date of the sale, by the bills of exchange which the appellants accepted in settlement for the iron. The sale was a sale on credit, for negotiable paper, which appellants used, and the delivery was made at the time of the sale by means of the warehouse receipt which the appellants gave to Ritchie & Co.; they thereby converted their possession from a possession as owners into a possession as bailees or depositaries of Ritchie & Co.

There is nothing new in the doctrine that delivery may be made by a change in the nature of the possession. Our own Code, Article 1797, is express upon the point. Delivery is essential to the formation of a contract of deposit. The delivery is sufficient when the depositary is in possession, under any other title, of the thing which is deposited. And this doctrine is peculiarly applicable to commercial cases; and necessary to commercial credit, since a large portion of the financial arrangements of merchants depend upon the validity of documents of title, such as warehouse receipts, bills of lading, and the like, the transfer of which has come universally to be recognized as a transfer of the goods represented by them.

The proposition of the appellants, therefore, in the Court below—that Davis could not ask for delivery without payment of the price—does not apply, because in fact delivery was made at the time of the sale; and the possession of the appellants, as owners jointly with Macdougall of the iron, had been converted into the possession of the appellants as depositaries for Davis. For the fact that the iron was the property of the appellants and Macdougall jointly as joint adventurers, and that the warehouse receipt was granted by the appel-

lants alone, must not be lost sight of. It appears clear that, while the appellants, as managers of the joint adventure between themselves and Macdougall, and acting partly for themselves and partly for Macdougall in the purchase and sale of the iron, were the parties who made the sale to Ritchie & Co.; it was they alone who granted the warehouse receipts, and accepted the position of depositaries for Ritchie & Co.

The second proposition of law raised by the appellants is that, not being warehousemen by calling, they could not pledge *their own goods*.

To this the answer is equally simple. It is proved that the goods were not theirs, but that they belonged to Ritchie & Co., by virtue of the sale made by themselves for the joint adventure, which sale vested the right of property in Ritchie & Co.; and there is no question of pledge as between the appellants and Ritchie & Co. It is not pretended that the appellants pledged the iron to Ritchie & Co., but that they held it as depositaries for Ritchie & Co., who were the owners of it.

This simple reply disposes of a vast amount of specious arguments, to which the appellants had recourse in the Court below, accompanied by the citation of a large number of authorities from Upper Canada decisions. These arguments and authorities were based on the provisions of the Banking Act, intituled "An Act respecting Banks and Banking," in which it was virtually enacted that a person not being a warehouseman could not give a warehouse receipt for goods which were his own property, so as validly to pledge them for a debt.

This enactment was in accordance with the existing law of Lower Canada, since the principle there is, that a pledge cannot ordinarily co-exist with the possession of the owner; and it is introduced in the Banking Act as an exception to the general rule, that banks may lend money upon warehouse receipts, and that such warehouse receipts shall create a lien upon the goods mentioned in them.

It was attempted in the Court below to distort this provision into meaning that no one but a warehouseman could give a warehouse receipt; but in fact the statute contemplates a rule exactly the reverse of that sought to be attributed to it by the appellants. For if it did not contemplate the possibility of any person who was the depositary of goods giving a warehouse receipt for them which could be transferred by endorsement, and which would create a valid lien on those goods, it would have been unnecessary to make the special provision, that only a warehouseman by calling could create a lien on his own goods in that way. The whole argument, however, falls to the ground, and is entirely inapplicable to this case, for the simple reason that there is no pretension that the appellants pledged the goods to Ritchie & Co., and that no question of pledge arises out of the issues in the cause.

The third point raised in the Court below was that, as a matter of fact, the appellants had not possession of the iron at the time of the sale.

This pretension also seems to require little discussion. The appellants acknowledged to have had possession of the iron, and undertook, in express terms, to deliver it; and on being asked for delivery, it is not in their power to say that they have not possession. Moreover, there is really nothing to contradict

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the assertion they make in their receipts, that they had received the iron, and held it subject to Ritchie & Co.'s order. The iron appears to have been deposited in various yards called Macdougall's Yard, Vanalstyne's Yard, &c.; but there is nothing in that fact inconsistent with the iron being in the possession of the appellants. On this point, however, the respondent contends, that the declaration by the appellants themselves, that they were in possession, relieves him from any obligation to prove it; and, moreover, is an acknowledgment of such a nature, that it is not legally in the power of the appellants to attempt to controvert it.

It was urged in the Court below that Ritchie & Co. never had any control of the iron, because they had not acquired it by means of the warehouse receipts; and because the possession of things that can be weighed or measured cannot be acquired otherwise than by physical possession, and Ritchie & Co. never had physical possession. This proposition of law is unfounded, since it is agreed by juris consults that virtual tradition of merchandise, or other corporeal things, may be effected without a delivery of physical possession. And as that was the basis of the argument, it seems scarcely necessary to say more. But in fact the delivery of the possession by change of title is not confined to warehousemen, but is applicable to all persons who can effect a sale.

But the appellants proceeded to insist that the documents produced, not having been signed by warehousemen, were not warehouse receipts.

In some countries warehousemen are *quasi* public officers, and are organized under rules, and licensed by Government. No such law, however, prevails in Lower Canada; and there is nothing in our law which prevents any person who has a warehouse or a yard from acting as a warehouseman and issuing receipts, which are transferable by endorsement. This species of receipt has been known and used as long as commercial affairs have been transacted, and it has never previously been questioned that any person has the right to constitute himself a depositary of goods by signing a receipt for them, and that he may make a receipt transferable by endorsement, and thereby constitute it a negotiable instrument of title. Long before the Banking Act referred to by the appellants was passed, it was found necessary to provide by criminal penalties against the abuse of the trust created by such documents; and also to render valid, transactions which agents or factors (not owners) might enter into, creating liens, and making sales and deliveries by means of the transfer of such documents by endorsement.

The Code reproduces, in the 5th chapter of the 8th title of the third book, some of these statutory provisions, extending the doctrine which nobody disputed with regard to principals, to transactions by agents; and in doing so, had occasion to define what are documents of title transferable by endorsement.

This chapter of the Code mainly treats of the use of these documents of title by agents, assuming, as has been already stated, that such documents of title may be validly dealt with by principals.

Article 1745 says: "Bills of lading, warehouse keepers or wharfingers "receipts, or orders for delivery of goods, bills of inspection of potash or "pearlash, *and all other documents used in the ordinary course of business, as*

"*proof of the possession or control of goods; or purporting to authorize, either* "*by endorsement or delivery, the possessor of any such document to transfer or* "*receive goods thereby represented,* are deemed documents of title within the "provisions of this chapter."

The same term, "document of title," is defined in the same words by the statute 32 and 33 Vic., Chap. 21, Sec. 1. And by section 90 of the same Act, any miller, warehouseman, factor, agent, *or other person,* who, after having given, or after any clerk or person in his employ has to his knowledge given, as having been received by him in any mill, warehouse, vessel, cove or *other place,* any receipt, certificate, or acknowledgment, for any of the purposes mentioned in the Act passed in the 31st year of Her Majesty's reign, and intituled "An Act respecting banks," afterwards, and without consent of the holder or *endorsee in writing,* wilfully alienates or parts with, or does not *deliver to* such holder *or endorsee* of any such receipt, certificate or acknowledgment, the grain, timber, goods, or property therein mentioned, is guilty of a misdemeanor, and shall be liable to be imprisoned, &c.

Can it be pretended that if a person other than a warehouseman should grant a receipt for goods, and does not deliver the same to the endorsee of such receipt, he can be guilty of a misdemeanor, and yet that the endorsee of such receipt can have no right to claim the goods mentioned in it? That is the position which the appellants hold in this cause. They have granted a receipt for goods, in a place other than a warehouse, to Ritchie or his endorsee, and they refuse to deliver the goods to that endorsee. Under the law they became thereby guilty of a misdemeanor, and he could have indicted them for it, and can still. Yet the appellants contend that Davis had no right to demand possession of those goods, though the neglect to give him possession is a misdemeanor.

The fact is, that there is no specific enactment that a man has a right to receive by endorsement a warehouse receipt in negotiable form, for the same reason that there is no specific enactment in the Code respecting the enjoyment of a vast number of rights which are the privilege of every sane man in a free state. The use of such privileges has become so universal, that it is no longer necessary to make a legislative declaration, that a person *sui juris* is entitled to them. And there can be no better proof of the universal admission of their existence than the fact that a profusion of legislative enactments are found creating additional remedies and punishments based upon the assumption of their existence.

Numerous other statutes and other provisions of the Code plainly recognize documents purporting to authorize, either by endorsement or delivery, "the control or delivery of goods," as being valid documents of title, transferable by endorsement or delivery. In giving such force to such documents, our Code and Statutes have only followed the example of the whole commercial world. The recognition of the doctrine, that nothing more than such endorsement is required to entitle the holder of a document of title to obtain the goods it represents, has been hesitatingly conceded in England, only by reason of that respect for precedents which characterizes English jurisprudence. The [illegible] and most able English writer on sales points out that the sense of all com[illegible]al men in Eng-

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land; of all parliamentary enactments, in fact, the whole public opinion in England, and the whole practice of merchants, recognize the validity and perfection of the transfer of goods by the endorsement of the document of title, without any notice to the bailee. But the Courts imagine themselves to be bound by ancient precedents, and seem reluctant to give effect to the express will of the nation and of the Legislature. And cases are therefore to be found, wherein it was held that there was no direct action against the bailee, unless he had been notified previously of the transfer of his receipt, and had accepted the custody of the goods from their new owner. But this is felt to be so repugnant both to principle and practice, that the writer alluded to points to the probable necessity of a statute to compel the uniform adoption by the Courts of a rule, which is universally recognized in practice, and has been repeatedly sanctioned by Parliament. In this country there are no precedents pointing to such a doctrine as seems still to linger in the Courts in England; and if there were, there are no such trammels upon the administration of justice as would obstruct a correct application of sound principles, because of their having been previously misapplied.

The next point raised by the appellants in the Court below was, that as the warehouse receipts were transferred by Ritchie & Co. to Davis, as security for an existing debt, the transfer was invalid.

On this point, the evidence shows that the transfer by Ritchie to Davis was made under the terms of an agreement dated the 8th November, 1871, which was in force at the time of such transfer. This was an agreement providing for a line of advances by Davis, to enable Ritchie & Co. to carry on their business. And it gave Davis a general lien on goods which might come into his possession or under his control belonging to them. But as to the proposition of law, that such a pledge could not be made to an individual, the appellants and respondent are at issue.

It is quite true that in the Banking Acts it has been the policy of the Legislature to prevent banks from receiving security by means of warehouse receipts, bills of lading, and the like, as additional security for previous advances. The policy of restraining powerful financial corporations from demanding such additional securities is obvious enough. With the power they possess over commercial men, dependent upon them for their capital, they could insist on appropriating all the assets of a commercial house by way of additional security as soon as their intimate knowledge of what is going on in business gave them reason to suspect that a disaster was impending. Therefore, the Legislature, in granting powers to banks to make advances upon documents of title, has always wisely restricted the power of receiving such security to the period at which the advance is actually made. It is well understood, of course, that Corporations are creatures of the Acts which create them, and possess only the powers which are expressly or impliedly given them. And as the power of receiving documents of title, after an advance has been made, has been denied to banks by Statute, they of course do not possess it.

But with regard to private individuals, who have the liberty of doing everything that is lawful unless expressly prohibited, no restriction exists of the kind

contended for. An individual may lend money to whom he pleases, and take what security may be agreed upon either then or afterwards. And he is not restrained from so doing by any law of which the respondent is aware, except in the case of impending bankruptcy, in which he is prohibited by Statute from obtaining a fraudulent preference over his fellow-creditors. The citation, therefore, of numerous judgments in Ontario, holding that banks could not validly receive documents of title by endorsement, as security for [illegible] debts, while no doubt perfectly sound in themselves, have no [illegible] to the case of an individual receiving such security. [illegible] have failed to cite any authority in which such a doctrine was [illegible] regard to banks.

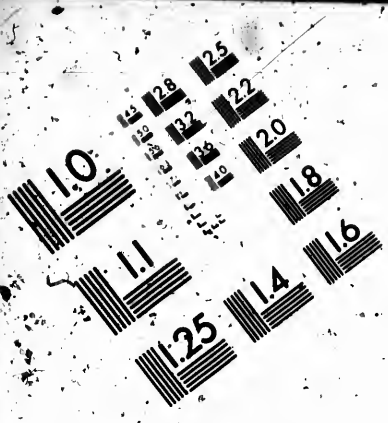
But there is no foundation in fact for the objection. The [illegible] were such that even if a bank had made the advance, it would have [illegible] failed to hold the security. The statute says that the transfer of a receipt shall not be made to a bank, unless the debt be negotiated or contracted at the time of the acquisition thereof by the bank, or upon the understanding that such receipt would be transferred to the bank. A reference to the evidence of Thomas Ritchie, and to the agreement between him and Davis, made previous to the transaction in question, will shew that the understanding between them comprised both a special and a general lien upon the merchandise transferred to Davis.

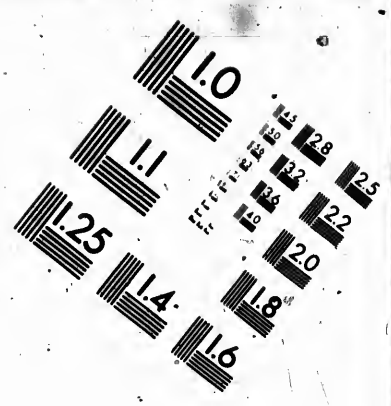
Upon Ritchie delivering goods to Davis, it was understood that Davis should make advances on such goods, and should also hold them as a joint security for any unpaid balance. But the advance which Davis did make upon the special lien thus created upon the iron in question greatly exceeded the value of the iron; for it will be seen that the receipts dated the 5th March were delivered to Davis on the 6th for the purpose of securing an advance to be made. And on the following day an advance was made upon them to the amount of £5,000 sterling, equal to about $25,000.

In consideration of the endorsement of the subsequent warehouse receipts to Davis, he made advances during the month of March to an amount greatly exceeding their value and the value of the other securities received by him at the time, all of which are detailed in Ritchie's deposition. As has been said, these advances were made under a contract for them, and upon the strength of the warehouse receipts in question; which would render valid their transfer, though it had been made to a bank under the Banking Act.

The appellants took their fifth objection to the demand of the respondent also from the Banking Act. They say it is provided by that Act that no action is maintainable upon a pledged warehouse receipt more than six months after its date.

This pretension is an illustration of the extent to which the appellants are prepared to go in attempting to discover a defence to this action. It is quite true that the Banking Act provides that a bank holding documents of title shall not retain them more than six months without the consent of the owner. But if this doctrine could be applied to the appellants' case the value of documents of title would be considerably diminished, as the following facts will shew:—





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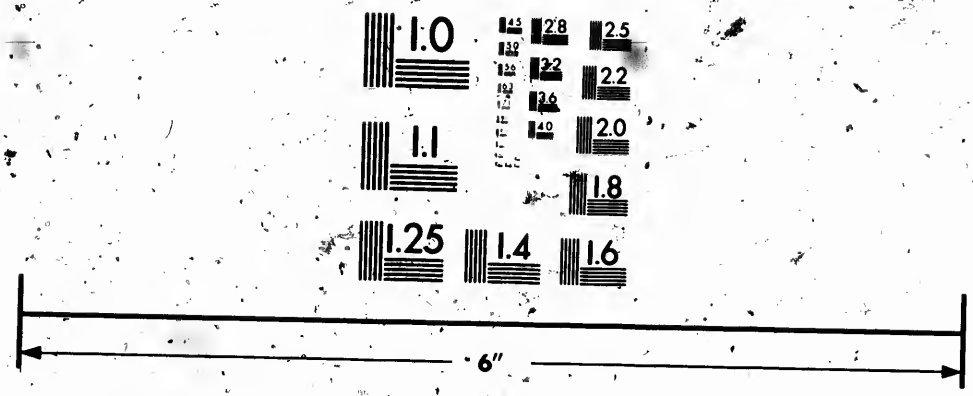

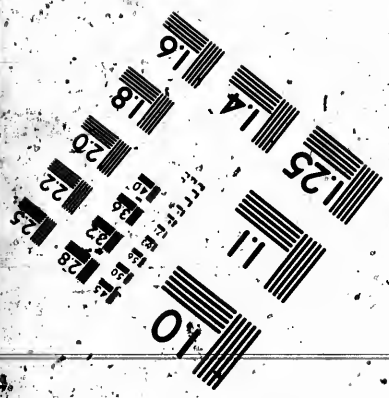

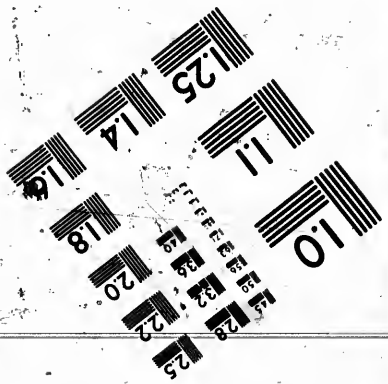

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The receipts were dated from the 5th to the 10th of March, 1873. On the 27th August, long before the expiry of the six months, in answer to repeated demands for possession of the iron, the appellants wrote a letter to Davis, as already stated, which is produced and filed as No. 38 of the *dossier*, in which they refuse to deliver the iron to him. So that in accordance with the pretension of the appellants, a bailee or depositary having the custody of goods, has only to refuse the delivery of them according to the document he signs, and to hold them by force or otherwise till six months from the date of that document has expired, and may then plead the statute and retain them. Even if no diligence had been used by Davis to obtain the iron until after the expiry of the six months, it might perhaps be asked what right the appellants have to set up any such provision of any statute, as a justification of their breach of their obligation as depositaries to hand over the iron to its proprietor, or his representative. But any such enquiry is rendered unnecessary by the fact that Davis was prevented from obtaining the iron within the six months by the illegal refusal of the appellants to deliver it to him.

The last of the appellants' objections in the Court below is the alleged complicity of Davis in the fraud which they say was attempted to be practiced upon the appellants.

The fraud here imputed to Davis is having conspired with Ritchie & Co. to obtain the goods from the appellants without paying for them, and to hand them over to Davis as security for a hopeless pre-existing debt. This is a question of evidence, and the Court will see how far that which is of record in the cause supports the appellants' assertion.

The respondent contends that there is not a shadow of proof in support of it. The evidence and the circumstances alike go to shew that at the time of the sale by the appellants to Ritchie & Co. there was no question of their credit, and no suspicion that they were in any difficulty. Thomas Ritchie, the head of the firm, is examined as a witness, and states the circumstances of the sale. At page 3 of the respondent's evidence his account of the transaction will be found.

He says, with reference to the purchase of the first lot of 300 tons acquired from the appellants: "We purchased the iron and got a warehouse receipt for "it. * * * * * * * * * With regard to the other, a more detailed "negotiation took place. We purchased the second lot in a similar way through "Porteous, a broker. Mr. Robertson's clerk called a day or two after with a "bill for the iron, and wished to get notes in payment of the iron without "giving any warehouse receipt, on the plea that he had already trusted us with a "considerable sum of money. I then told him that I could not do that. That "in that instance we would be trusting Thomas Robertson & Co. instead of them "trusting us. And as I had every confidence in the solvency of our firm at the "time, I declined to do that, and told him if he had any hesitation about trusting us with the iron, he could cancel the sale; but that I would not give the "paper without the warehouse receipt for the iron. The clerk called the same "or the following day, and stated that Mr. Robertson was willing to complete "the sale in the usual way, and give us a warehouse receipt, and get the paper. "This applies to all the other receipts."

The interval during which the appellants were considering the question of handing the warehouse receipts to Ritchie & Co. was, according to Mr. Robertson's own testimony, occupied in making enquiries as to their standing. There is no pretension that Ritchie & Co. used any arts or improper means to induce them to sell. The sale appears to have been made through Porteous, who Mr. Robertson declares was his own broker in the matter. When the appellants hesitated about handing over the warehouse receipts for the iron to Ritchie & Co., which, notwithstanding their present pretensions, they then evidently regarded as giving him entire control, he told them plainly either to give him warehouse receipts or cancel the sale. They made such enquiries as they thought proper about the firm of Ritchie & Co., including, amongst others, enquiries at the Bank of Montreal, and satisfied themselves as to the solvency of the firm. And then they again sent their clerk to Ritchie & Co. to complete the transaction, and hand over the warehouse receipts in exchange for Ritchie & Co.'s bills on England. Ritchie himself proves that at this time he had accounts in several banks, in some of them to the extent of $100,000. His business seems to have been enormous, as Davis, who acted as his warehouseman, and assisted him in carrying (as it is called) his stock of goods pending their sale, was under obligations for him to the extent of about $600,000.

It is true, that later on in the year Ritchie & Co. failed; but the appellants have not succeeded in shewing that at the time of the transaction in question there was the least indication of their being in any financial difficulty. And Davis himself continued advancing large sums to them long after the transaction in question. In fact, as has been already stated, he advanced to them upon the strength of the warehouse receipts in question sums of money considerably exceeding the value of the iron represented by those receipts. As for instance, according to Ritchie's statement, £5,000, equal to nearly $25,000, on the 7th March. On the 11th March, $90,000; and on the 1st April, £10,000 sterling, equal to about $50,000. Between the 6th March and the 12th May, Ritchie & Co. received advances from Davis to the extent of $420,000. On the 26th June, Ritchie & Co. suspended payment, and assigned in the month of July; and their failure brought down Davis, who was unable to meet the large liabilities which were thus suddenly thrown upon him. If the facts showed that at the time Davis received the warehouse receipts in question from Ritchie & Co. he had so received them solely as security for previous advances, there would be ground for suspicion, though there is really no proof that he was endeavoring to save himself in the way charged by the appellants. But it is obvious, that if Ritchie is not speaking truly in his deposition, when he swears that at the time of these transactions he had no reason to believe that he would be compelled to stop payment, Davis was as much deceived as the appellants; as the amounts he advanced to Ritchie & Co. at the time, and after receiving the warehouse receipts, appear to have been greater than at any corresponding period of his dealings with Ritchie & Co. The whole of his liabilities for them appear to have amounted to about $600,000, of which $420,000 of advances were made after receipt of the warehouse receipts in question.

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Of course after a firm has failed for large sums of money, and an interval of a year or more has elapsed before a witness is called on to testify as to his recollections on the subject, there will be some vagueness as to the date at which suspicion was first excited. But as Ritchie & Co. are proved to have had good credit at no less than three or four banks at the time of the purchase, in addition to Davis and the appellants, it is plain that at that time there could have been no feeling of distrust as to their position.

The respondent has now disposed of the numerous grounds which the appellants have collected as reasons for not performing their obligations under the warehouse receipts in question; and it appears to him that none of the objections of the appellants possess any legal force. It is true that it is a misfortune for them that, after deliberating as they did whether or no they would abandon all control over the iron in question, by giving negotiable warehouse receipts for it to Ritchie & Co., they should have decided upon doing so. But having done so, they must abide by the legal consequences of that act. If it be hard for them to lose their share of the amount of the purchase money of the iron in question, it is also a hardship for the creditors of Davis to be deprived of the security which they hold, as they contend, in due form of law, for the payment of so much of the debts due to his estate. It is neither they nor Davis who should suffer the consequences of the act of the appellants in selling the iron to Ritchie & Co. on credit, and constituting themselves depositaries of it subject to his order. No doubt the appellants were innocent of the intention of doing Davis or his creditors any injury. And they have failed to prove that Davis was other than innocent of the intention to injure them. For, as has been demonstrated, he advanced in good faith on the warehouse receipts in question; and it is not proved that he was aware of the nature of the transaction between Ritchie & Co. and them. But it is the appellants who were the occasion of Ritchie's obtaining the advances from Davis upon the security of the iron; and it is a well known rule of law that where one of two innocent persons must suffer, he who gave the opportunity for the injurious act must bear its consequences.

The respondent also considers he has a right to urge upon this Honorable Court the consideration, that a severe blow would be dealt to the interests of trade and commerce if any doubt were cast by the judgment in this case upon the negotiability of documents of title. It is proved, and if it were not proved it is notorious, that the greater part of the business of the country, and especially its enormous produce business, is carried on both internally and with foreign countries upon the basis of the security supposed to be afforded by negotiable documents of title. If it were shewn that Ritchie & Co. contemplated any fraud upon Robertson, and that Davis was a party to such fraud, a judgment in favor of the appellants would be in the interests of morality and justice. And as to this branch of the case the respondent relies upon the evidence. But a judgment against him involving a denial of the negotiability of documents of title would not only be a severe injury to the creditors he represents, but it would be a public calamity.

The respondent, therefore, respectfully submits that the judgment of the Court below should be confirmed.

H. L. Snowdon for appellants (defendants):

1st. There was no legal and complete sale from the appellants to Ritchie, Gregg, Gillespie & Co.

The plaintiff, in beginning his action, was convinced of the imperative necessity of establishing a sale of the iron in question to Ritchie, Gregg, Gillespie & Co.; he knew that, without showing this, his action must fail; so, in his declaration, he specially sets forth a sale by the appellants to Ritchie & Co. at a particular time, for a specified price, and a due delivery of the iron. If this firm had endeavored to exercise a revendicatory process to obtain possession of the iron, it could not be maintained, as there was no writing signed by the parties, referring to the sale, nor did the buyer receive any of the iron nor pay any earnest money.

The provisions of art. 1235 C. C. are here plainly applicable. It is impossible to make out of a receipt, such as those set forth, a contract of sale, for it is a totally different thing, and does not in any way imply a sale. In the next place, it is not even alleged that the price of the iron was actually *paid* to the appellants; but, on the contrary, the evidence shows that the iron was not paid for and that, long before the transfer of the receipts to Nelson Davis came to the knowledge of the appellants, the firm of Ritchie & Co. became hopelessly insolvent.

If anything were wanting to show that the sale was not perfect it is the fact that the iron in question was never indicated to Ritchie & Co. in any way. In a large yard kept for warehousing iron, where there were several lots stored, it would have been impossible for the buyers to point out what particular lot they had purchased. Moreover, the pretended sale was by weight, and art. 1474 C.C. requires in such cases that the moveables should be weighed to make the sale perfect. If there was any contract entered into on the part of the appellants, it was to deliver the iron on being paid, *vide* C. C., art. 1533. In whatever aspect we view the transaction between the appellants and Ritchie & Co., it is clear that the latter had neither any right of property in nor possession of the iron in question.

2nd.—Without a complete sale, the receipts signed by the appellants could not, of themselves, have given the firm of Ritchie & Co. the right to claim the iron from the appellants. There can be no question that if they, or the assignee appointed to their estate, had brought an action for the recovery of the iron, it could not have been maintained under the circumstances. But even if such a sale were complete, the bills of exchange which were given for the iron having been dishonored, and the firm of Ritchie & Co. having become insolvent long before any notice was given to the appellants of the transfer to Davis, the appellants had a right to stop delivery of the iron, and retain the same till the price was paid.

3rd.—The appellants not being warehousemen by calling, could not issue warehouse receipts for their own goods, which would be negotiable by endorsement.

The plaintiff, aware that there was no law which made such instruments negotiable, declared that they were so in conformity with the usages of trade. If

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that contention had been made good, it would raise a very important question, namely: whether usages of trade can destroy and render nugatory positive enactments of law. Usages of trade can be invoked only when the law is silent or ambiguous, (C. C., art. 1016); but it is preposterous to pretend that usage can supersede the law. Here we have a most direct and positive statutory disposition, introduced with the evident intention to give legal value to instruments which had none without such law.

Under the enactment of the C. S. C. c. 54, sec. 8, no one could give a valid warehouse receipt for goods in his own possession. As long as this legislation prevailed the warehouseman's receipt stood in an unfavorable position, as it entailed the necessity of an inquiry, as to a fact which was almost self-evident in cases of receipts issued by other people. With the receipts of the latter class it was easily ascertained to whom the goods belonged, and that they did not belong to the party signing the receipt.

With the receipts of warehousemen, previous to the amendment of the law, such receipts came from men having their stores full of goods, belonging to a number of different parties. There might be confusion. A warehouseman could in bad faith issue receipts for goods, apparently in his hands, but belonging to other parties than the pledgor, or to himself, and, as the law did not cover this case, his bad faith could constitute him a defendant in a civil suit, but not subject him to the penalties enacted against the violators of warehouse receipts; in other words, warehouse receipts, being of artificial creation by statute, the maker of such receipts was declared the bailee of another man's property, and treated as a criminal, if he disposed of the pledged article in breach of his receipt. If it turned out that he had given a receipt for his own goods, criminal visitations not being susceptible of extension by constructive analogies, there would be nothing but a civil remedy, and, as parties guilty of such breach of trust and confidence have no responsibility as regards solvency, there would, in fact, be no remedy at all. These being evidently the motives of the amendment, it brings out in an unmistakable light the absolute worthlessness of a receipt, delivered by a person not a warehouseman for goods which were in his possession at the date of the receipt, as his property.

What has been said of the artificial character of those receipts, as regards the penalties enacted against the maker, in breach of his trust, is also applicable to the civil peculiarities of such operations; in the first place, any law derogatory to the common law cannot be extended by implied construction or analogy to other cases than those mentioned in the exceptional law.

By common law, possession of things that can be weighed or measured cannot be acquired otherwise than by physical possession.

The object of the warehouse receipt is to create an artificial possession. The bearer of the receipt, either original or through endorsement, becomes the possessor of the goods receipted, even without seeing them, and, without knowing where the warehouse containing them is situated. To acquire and preserve that extraordinary character, the instrument must be delivered within the conditions prescribed by the exceptional law, or it is of no value whatever.

Moreover, the common law recognizes only one form of transferring incorporeal

things as regards third persons: (C. C., arts. 1570,1571) it is by authentic deed and its signification on the debtor. The only exceptions to that rule are contained in art. 1573, and they are as follows: Bills of exchange or promissory notes, bank cheques or bank notes, payable to order or bearer, shares in incorporated companies, and notes for the delivery of grain, or other things which are transferable, either by endorsement or otherwise, according to the particular case, but not necessarily by what is known as a transfer, although a transfer at common law would still be good for such instruments. In including in that exception notes for the delivery of *grain or other things*, the Code did not mean warehouse receipts. Art. 1979 reserved the law as it stood as regards such receipts in the following terms:

"Special provision is made in chap. 54 C. S. C., for the transfer by endorsement of bills of lading, specifications of timber, and receipts given by "*warehousemen*, millers, wharfingers, masters of vessels or carriers, to incorporated "or chartered banks, or to *private persons* as collateral security, and for the sale "of merchandise and effects represented by such instruments."

If the acknowledgment of the appellants, that they held iron, deliverable to Ritchie & Co., or their order, is not a warehouse receipt proper, and is invalid as such, and if it be contended that it is good for something at common law, it could not be transferred by endorsement, as it does not belong to the class of exceptional instruments mentioned in the Code. As stated already, the plaintiff alleged and attempted to prove that, in accordance with the usage of trade, these papers were, to all intents and purposes, warehouse receipts. One witness only has been produced to prove a pretended usage, which would, if it existed, supersede and destroy a positive statute. It is Mr. D. A. P. Watt, who, in support of his opinion, cited several cases which, according to his statement, would seem quite applicable. In the face of the positive averments of the plea, which denied the legal character imputed by the plaintiff to the instruments, and which also traversed the assertion that usages of trade made them what is known as warehouse receipts, transferable by endorsement; in the face of the plaintiff's own evidence, that the goods mentioned in those instruments had been the property and in the possession of the appellants up to the signing of these receipts; in view, moreover, of the facts proved by the plaintiff's witnesses, that appellants had never been warehousemen, a very different evidence would have been made had it been possible. The appellants have shown why the plaintiff did not bring other witnesses to establish the extraordinary usage of trade invoked in the declaration. They have examined, on this alleged usage, the most competent authorities; bankers, money-lenders on warehouse receipts, brokers, warehousemen, and one and all disproved the pretended usage, and made it clear that the actual usage and the law were in harmony in this respect, and did not leave a vestige of impression from the cases mentioned by the said witness of the plaintiff, Mr. Watt. Each case was taken up separately, and the result was, that in every case cited by the witness, the parties who had delivered receipts for goods formerly belonging to them, all belonged to one or the other class in the category contained in the statutes—that is, they were either millers or warehousemen

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Although no case similar to the one in question in this cause has been proved, tending to show the existence of the alleged usage, it is obvious that irregularities take place every day in all kinds of transactions. Because a man would pay a note not dated or signed, knowing that he owes the debt, such payment could not be adduced as evidence that a note not dated or not signed constitutes a usage making such a paper valid. Other irregularities of a minor character may long prevail among men who have no ground of equity to take advantage of such *laches*. As Mr. Barsalou (one of appellants' witnesses) expressed it humorously; when asked if warehouse receipts, such as those in this cause, would be considered negotiable: "Greenhorns," said he, "will take anything." If such usage, as is contended, ever existed, it must have been among that class of rustic traders who pay so dearly for their experience.

Let us see how Courts of Justice have dealt with the matter, when brought before them.

No case seems to have arisen in Lower Canada, and it is a proof that this mode of transaction was better understood by our bankers and traders than the plaintiff contends. In Upper Canada, where the same law obtains, we find several decisions, and not one of them could be invoked by the plaintiff.

29 U. C. Q. B. Rep., p. 266, *Royal Canadian Bank* vs. *Miller* et al. The plaintiff claimed title to goods under C. S. C., c. 54, s. 8, by virtue of a warehouse receipt signed by defendants, acknowledging to have received *from the plaintiffs*, 6,000 lbs. of wool, deposited in defendants' warehouse, subject to the plaintiffs' order. *Held*, affirming the decision, but dissenting from the opinions expressed in the Q. B, that such receipt, given directly to the plaintiffs, was not within the Statute, which authorizes only a transfer by endorsement, and that the plaintiffs, therefore, could not recover.

19 U. C. C. P. R., p. 258, *Ontario Bank* vs. *Newton*, "Where two partners not carrying on the business of warehousemen, have their partnership stock in their own cellar, a receipt given by one to the other for that stock, though in the form of a warehouse receipt, is not a warehouse receipt within the meaning of the Statute C. S. C, ch. 54."

19 U. C. C. P. R., p. 182, *Bank of B. N. A.* vs. *Clarkson*. M. & Co. being indebted to the plaintiffs on certain overdue notes, it was agreed that plaintiffs should discount a further note for them, with the proceeds of which, it was understood, the overdue paper should be retired; that M. & Co. should hand over to plaintiffs certain warehouse receipts for wool stored in their warehouse as collateral security. This note was accordingly, on 23rd January, 1868, discounted by plaintiffs, and the old notes duly retired, an agreement being signed by M. & Co. at the time of the discount, reciting that they had endorsed over the receipts as collateral security for the note, etc., etc. The receipts, nearly all in the same form, were as follows:—

"Warehouse Receipt.—Received in store at our warehouse, at * * * from sundry parties, 17,000 pounds batting, to be delivered pursuant to the order of the Bank of British North America to be endorsed hereon. The said batting is separate from, etc., etc.

Neither M. & Co. nor the Bank endorsed the receipts.

"*Held*, that they were not warehouse receipts under the Statutes referred to, and that the Bank could not, therefore, claim the property covered by them.

"Per Hagerty, C. J., that the transaction of the 23rd January was not in substance, though in form, a present advance to M. & Co., but merely a mode adopted to pay off an already existing debt.

We will now see a warehouse receipt issued by a warehouseman maintained —18 U. C. C. P. R., p. 192—*Todd* vs. *The Liverpool and London and Globe Insurance Company*—"*Held*, that a warehouse receipt for wheat, and the property of A, *a warehouseman*, signed by a clerk of A, in his own name, was sufficient under Statute 24 Vic., c. 23, s. 1, to pass the property in the wheat, so as to confer an insurable interest in B."

3rd.—Want of actual possession on the part of the signers of the receipts.

From the evidence, and from the terms of the receipts themselves, it appears as a fact known to all concerned, that the iron was not in the possession or under the control of the appellants, but in the yards of persons who were warehousemen, and who had no notice of, nor became a party to such sale or transfer.

The declaration anticipated the objection made here by stating that the yards where the iron was deposited were under the control of the defendants. No evidence was adduced in support of this averment; the defendants, however, volunteered the evidence that the assertion was unfounded, and, in fact, it is proved that, at the date of these receipts, the defendants were not in actual possession of the iron.

4th.—The receipts were not transferred for liabilities, presently incurred, but for existing debt, or to cover future advances.

The declaration left the defendants nothing to do on this point.

It says, that on the date of the receipts, 10th of March, 1873, the said Ritchie & Co. pledged the said iron to the said plaintiffs as security for the payment of all the sums of money which were then due, or which might hereafter become due to him, as a general and continuing security, etc., and it further states, that at the same date the said firm were indebted to the plaintiff in the sum of $300,0[illegible] which sum was never paid to the plaintiff.

5th.—Even if the receipts in question were viewed as delivery orders, which they more resemble than anything else, so long as no notice of their transfer to Davis was given to the several warehousemen holding the iron, the appellants had a right to stop delivery for non-payment.

No notice of transfer was given to the keepers of the several yards where the iron was stored. If such notice had been given, and an undertaking on their part entered into to hold the iron for Davis, it might have given the pretensions of the plaintiff a more favorable aspect. As it is, Davis had no right or claim against the actual holders of the iron to compel them to deliver it according to the receipts. Appellants were to keep the iron or rather the iron was to be kept at their expense, till 1st May, and afterwards to be held in the yards, at the expense of Ritchie & Co. There is no evidence to show that this firm ever paid, or offered to pay, the charges on the iron after the 1st May. In order to be able more fully to appreciate the pretensions of the appellants, it is necessary to give the dates when the different events occurred. On or about the 10th

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March, 1873, the pretended sale took place. At the same time the receipts were signed by the appellants. On the same day they were transferred to Nelson Davis, as security for an overdue indebtedness of $300,000. On the 26th June, Ritchie & Co. suspended. On the 28th June, the first bill of exchange, given by this firm, was protested for non-payment. In July an attachment in insolvency was issued against them. On the 26th August, an assignee was appointed to their estate, and on the 4th of October following, Nelson Davis served a notarial demand on the appellants, claiming the iron in question. This is the first intimation which is proved to have been given to the appellants of Nelson Davis holding the receipts. The principles which regulate such cases are well established. The following is nearly a parallel case:—

Dixon vs. *Yates*, 5 B. & A., p. 313.

A sold to B, rum lying in the warehouse of C, at Liverpool, and delivered to B an invoice with marks and numbers. B accepted the draft for the price, and sold to D. The usage at Liverpool was, for the vendor to deliver to the vendee delivery orders on the warehouseman, who accepted such orders; no delivery orders were given by A to B, except for a small portion of the goods which B received. By the permission of B, but without the knowledge of A, D gauged and coopered the casks in the warehouse, and marked them with his initials. Upon B's acceptance being dishonored, *Held*, that A had a lien upon the rum for the price.

Littledale, J. said: "There are two general principles of law which must "decide this case; the one is, that so long as goods sold and unpaid for re- "main in the immediate possession of the vendor, he may refuse to deliver "them; and if they remain in the possession of his agent, *i. e.* a warehouseman "or carrier, he may stop them. The other is that a second vendee of a chattel "cannot stand in a better situation than his vendor."

The following cases support the same principles, viz.:—

Hanson vs. *Meyer*, 6 East R. K. B., p. 614; *Shepley* vs. *Davis*, 5 Taunton, p. 616; *Whitehouse* vs. *Townsend*, 12 East R., p. 614.

5th. No action after six months. As already seen, the receipts were transferred to Davis on the 11th March, and he first claimed the iron on the 4th October following. The words of section 9, of the C. S. C., c. 54, are:—

"But no such cereal, grains, goods, wares or merchandise, shall be held by "such bank, or private person, for any period exceeding six months."

6th. Complicity of Nelson Davis in the fraud attempted to be practised against the appellants.

We have suggested this as the last in the order of our objections, so that the Court, if satisfied, as we hope it is, might save itself the trouble of reading a voluminous evidence, and thereby abstain from pronouncing on the question of fraud.

The appellants submitted the following authorities:—

Consolidated Statutes of Canada, Chap. 54, Sect. 8; Banking Act; 24th Vict. Chap. 23, Sect. 1 and 2; 34th Vict. Chap. 5, Sect. 46—Banks may advance on warehouse receipts, &c., and all right and title of last previous holder or owner vests in Bank.

Sec. 47—Restricted to *debt contracted at time of acquisition* of receipt by Bank.

Sec. 48—When person issuing a receipt, a warehouseman by calling, and owner of the thing, the receipt issued by him is valid.

Civil Code, Art. 1745—Bills of lading, warehouse-keepers' receipts, &c., are deemed documents of title.

Benjamin on Sales, pp. 132,133—"When the goods at the time of sale "in the possession of a third person, an actual receipt takes place, when the "vendor, the purchaser and the third person agree together that the latter "shall hold them for the purchaser."

P. 684—"The endorsement and transfer of a dock warrant, warehouse "certificate, or other like document of title by a vendor to a vendee is not such "a *delivery of possession as divests the vendor's lien.*"

P. 632—"That the endorsement to a third person of a delivery order for "the goods given by the vendor to the buyer, *does not confer on such third "person any greater rights than the buyer had.*"

"McEwan vs. Smith, 2 H. of Lords, 309."

P. 640—"The vendor's remedy will not be impaired by his giving a "delivery order for the goods, if countermanded before the bailee attorns to "the buyer."

P. 641—"The rights of the unpaid vendor are the same against a sub-"vendee as against the original buyer."

P. 627—"Thus, in the whole class of cases where the delivery has been "effected by the consent of the vendor to assume the changed character of "bailee for the buyer, it will be seen that the unpaid vendor is still deemed to "be in actual possession of the goods for the purpose of exercising his remedies "on them to obtain payment of the price; and this, even in a case where the "vendor gave a written paper acknowledging that he held the goods for the "buyer and subject to his order."

P. 631—Where bills given for goods are dishonored, vendor may retain goods.

Farmilo vs. Bain, 45 Law Journal Reports, C. P., p. 264—Defendants sold goods to Bain & Co., same time handed two documents, each as follows: "We hereby undertake to deliver to your order, endorsed hereon, 25 "tons merchantable zinc, off your contract of this date." Before delivery, Bain & Co. became insolvent, whereupon defendants retained the goods by virtue of their lien as unpaid vendors of insolvent purchasers. Bain & Co. sold the goods to the plaintiffs and endorsed and handed them the two documents above referred to.

In an action by plaintiffs against the defendants,

Held,—That, inasmuch as the defendants were entitled to set up their lien as against Bain & Co., and inasmuch as the two documents were only undertakings to do something, and not representations of any fact, the defendants were not estopped by them from setting up their lien as against the plaintiffs, and were, therefore, entitled to retain the goods.

Gunn vs. Bolclow, Vaughan & Co., 44 Law Journal, Chancery, p. 732

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—Held,—That delivery of acceptances did not constitute valid payment. Custom of trade could not give certificates effect of warrants.

New vs. Swain, 1 Dawson & Lloyd's Reports, p. 193 (1828)—The buyer of goods agrees to leave them in the warehouse of the seller, paying rent for the room.

Held,—That upon the dishonor of the bill given, according to agreement, in payment, the seller, who still had the goods in his warehouse, had a right to retain them until payment of the price.

Lord Tenterden, C.J.—We are all of opinion that, on non-payment of the bill, the defendant had a right to retain the goods. The general rule is well known, and we do not think that the right in this case was taken away by the agreement for rent.

Bayley, J.—Where the owner of goods sells on credit, the buyer has a right to immediate possession; but if he suffers the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them. There is no difference in principle whether the seller charges the buyer with a rent or not—they are still in his possession.

Daniels on Negotiable Instruments, p. 610—"Dock warrants and ware-"housekeeper's receipts for goods, independent of statute law, are of modern "invention, and do not rest, like bills of lading, upon ancient mercantile "custom, imparting to them a quasi negotiability. 'These documents,' "says Blackburn, J., 'are generally written contracts, by which the holder of "the endorsed document is rendered the person to whom the holder of the "goods is to deliver them, and in so far they greatly resemble bills of lading; "but they differ from them in this respect: that where goods are at sea, the pur-"chaser who takes the bill of lading has done all that is possible in order to "take possession of the goods, as there is a physical obstacle to his seeking out "the master of the ship, and requiring them to attorn to his rights; but when "the goods are on land there is no reason why the person who receives a "delivery order or dock warrant should not at once lodge it with the bailee, "and so take actual or constructive possession of the goods.' There is, there-"fore, a very sufficient reason why the custom of merchants should make the "transfer of the bill of lading equivalent to an actual delivery of possession, "and yet not give such an effect to the transfer of documents of title to goods "on shore."

P. 270, *Ibid*—If the goods are permitted to remain in the vendor's hands until the bill or note given for them by the buyer falls due, and it is then dishonored, the vendor's lien will be revived.

C. C., Arts. 2286 & 2287 enact that bills of exchange are transferable by endorsement, and a perfect title conveyed.

C. C., Art. 2421—Bills of lading, transferable by endorsement, and "the "ownership of the goods and all the rights and liabilities in respect thereof, "are held to pass thereby to the endorsee."

Neither Art. 1745 nor any other Art. in the Code gives the same character or attribute to a warehouse receipt.

14 American Reports, 289—Bernard vs. Campbell.

The judgment of the Superior Court, (Beaudry, J.) 17th December, 1875, which was confirmed in appeal, was as follows: Robertson et al. and Lajoie.

"The Court, etc.

"Considering that it is in evidence that, on or about the 5th of March, 1873, the defendants sold to the firm of Ritchie, Gregg, Gillespie & Co., then doing business at Montreal, the quantity of 647 tons 15 cwt. 2 qrs. of iron, for which they received notes and bills of exchange from the said firm of Ritchie, Gregg, Gillespie & Co.; and that on the said 5th of March, 1873, the said defendants gave to the said firm of Ritchie, Gregg, Gillespie & Co., a warehouse receipt for 300 tons No. 1 Clyde pig iron, of the value of $33.50, lying in a certain yard in Grey Nun Street, deliverable to the said firm or order; and that on or about the 10th of March, 1873, the said defendants gave to the said Ritchie, four other warehouse receipts, amounting to 347 tons, 15 cwt. 2 qrs. also deliverable to the said Ritchie, Gregg, Gillespie & Co., which five receipts were properly endorsed and delivered to the said plaintiff; considering that under said sale by defendants, and said warehouse receipts, which were legally transferable by endorsement, the said defendants were bound to deliver over to plaintiff the said quantity of iron in said warehouse receipts mentioned; considering that the defendants have failed to prove the averments of their pleas, and specially that they have failed to prove fraud or collusion between the said plaintiff and said firm of Ritchie, Gregg, Gillespie & Co.; and considering that it is in evidence that the said Nelson Davis was *bona fide* holder and proprietor of said warehouse receipts, seeing Articles 1472, 1492, 1573 of the Civil Code of Lower Canada:

'Doth condemn the said defendants to deliver to the said plaintiff *par reprise d'instance*, the said quantity, etc., being the quantities of iron mentioned in said five receipts given by the defendants, within fifteen days from this present judgment, and in default thereof, to pay and satisfy to said plaintiff *par reprise d'instance* the sum of $21,856.72, with interest thereon from the date of service of process in this cause, to wit, the 15th of October, 1873, the whole with costs, etc."

CROSS, *J., dissentiens*:—This suit was originally brought by Nelson Davis, who claimed from Thos. Robertson & Co. $21,856 as the value of a quantity of pig iron which he alleged R. & Co. were bound to deliver to him, but had refused to do so. Davis having become insolvent, the suit is now continued by Lajoie, his assignee.

The declaration avers that in October, 1872, Robertson & Co. entered into a joint venture with one John McDougall for selling pig iron, and for that purpose purchased a large quantity, whereof they sold to Messrs. Ritchie, Gregg, Gillespie & Co. 647 tons 15 cwt. 2 qrs., which they delivered, and then and there, in recognition of such delivery, gave R., G., G. & Co. warehouse receipts for the same; that afterwards on the said 10th March, 1873, they (R., G., G. & Co.) pledged the said iron to Davis for payment of all the sums of money which were then due or which might thereafter become due to him (Davis) as a general and continuing security, and as evidence of such pledge the said R., G., G. & Co. then endorsed and delivered the said warehouse receipts for value to Davis,

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whereupon, by the custom of trade, Davis became possessor of the iron through Robertson & Co. as bailees thereof; that the amount of the indebtedness of R., G., G. & Co. to Davis exceeded $300,000, of which $200,000 remained due after some other securities had been realized. R., G., G. & Co. had become insolvent, Robertson & Co. refused to deliver the iron, whereof the value was now demanded.

The appellants, Robertson & Co., demurred on the grounds: 1st. It was not alleged that they, as vendors, had been paid; 2nd. It was not alleged that they were warehousemen. This demurrer was overruled, we think, correctly. It was sufficient for the plaintiff to allege that the documents he relied on were warehouse receipts, and that they had taken them in pledge by endorsement, leaving the makers to set up affirmatively such grounds as might tend to impeach their validity. The appellants' pleas to the merits were: 1st. They were unpaid vendors and held the iron for the price; 2nd. It had never been delivered; 3rd. They were not warehousemen; 4th. They could not pledge their own iron in their own possession; 5th. The receipts were invalid and could not pass by endorsement; 6th. Davis was aware appellants had not been paid and that the receipts were valueless, and it was a scheme concocted between him and R., G., G. & Co. to defraud Robertson & Co. of the iron and to cover overdue liabilities by R., G., G. & Co. to Davis, they being hopelessly insolvent; lastly, a *défense en fait*.

The documentary evidence consisted of the warehouse receipts alleged, five in number, representing the quantity of iron in question. An undertaking, dated 8th November, 1871, in the form of a letter from Thomas Ritchie to Davis, by which, in consideration of advances made and to be made by discount, cash and otherwise, Davis should have a lien on all goods of Ritchie's then in possession or which should thereafter come into his possession, which he, Davis, was authorized to sell in case of default made in payment. The amount of advances then already made was stated at $10,000, and the document was declared to be a continuing guarantee. Ritchie afterwards admitted partners into his business, and the agreement was assumed by the different firms, including R., G., G. & Co. Demands appear to have been made by Davis on Robertson & Co. for the delivery of the iron, and by letter of date the 27th of August, 1873, they refused to give it. See No. 38 of the record. The most of the oral testimony produced was on the one side to affirm and on the other to deny the custom of trade alleged by Davis as to the negotiability of documents such as the receipts in question. This we deem of no great importance in the decision of the case. The attempt to prove any fraud on the part of Davis I think was altogether unsuccessful. It is proved that a large balance remained due to Davis far beyond the value of the iron after realization of all his other securities, which balance he cannot get paid from R., G., G. & Co. in consequence of their failure. It is further proved that at or about the time Davis got the warehouse receipts in question he advanced to R., G., G. & Co. more than the value of the goods represented by them. The questions on which it seems to me the case must turn are;—

1st. Whether the documents relied on as transferring the iron to Davis are negotiable warehouse receipts.

2nd. Whether the endorsement thereof by R., G., G. & Co. was effective to transfer the iron to Davis.

3rd. Whether Davis had a right to hold the iron for any, and if any, what advances made by him to R., G., G. & Co.

4th. Whether Davis's title was defeated or impaired by lapse of time or other cause.

Of the five receipts produced, dated in March, 1873, purporting to include the iron, three of them were for portions stored at McDougall's yard, one for iron at Van Alstyne's and one for a portion at a yard in Grey Nun street. These documents ran to the effect that Robertson & Co. had received from R., G., G. & Co. on storage at McDougall's yard (or the place indicated in each receipt) the following merchandise, viz. (mentioning the quantity and brand of the iron), deliverable only on the surrender of the receipt, properly endorsed, signed T. Robertson & Co., and endorsed: deliver to Nelson Davis or order of R., G., G. & Co. These documents were in the possession of Davis pursuant to their endorsement, and held by him for his advances. The appellants have contended that no sufficient sale of the iron had taken place to divest them of it; that if vendors, as alleged by the respondents themselves, they still had possession, and held it by virtue of their privilege until the price was paid, but if these documents are valid as warehouse receipts, their tenor and effect are quite inconsistent with this pretension of Robertson & Co. They thereby declare that they hold the iron as having been delivered to them by R., G., G. & Co., thereby constituting themselves bailees of that firm, completely inverting their former title as sellers, and relinquishing their privilege as vendors. They thus admitted that they held for R., G., G. & Co., with power to that firm to transfer to whom they pleased in conformity to the Statute governing warehouse receipts.

We have thus to deal with the iron not as the property of Robertson & Co., but as the property of Ritchie, Gregg, Gillespie & Co.

This answers appellants' first and second objections.

It was further contended that the action should have been brought within the six months allowed by the 9th sec. of the Cap. 54 of the Con. Stat. of Canada, as the time pledgees may hold such securities. This is perhaps sufficiently answered by proof which has been made, that delivery of the iron had been demanded by Davis, and the liability of R. & Co. fixed by their refusal to deliver the iron, as shown by their letter of the 27th August, 1873.

Much pains was taken to adduce evidence of the negotiability of such receipts by the custom of trade, and it has been suggested that the Art. 1745 and some others in the Cap. of the C. C., relating to brokers, factors and other commercial agents, might be invoked to support the respondent's title. The articles in question are taken from the Canadian Factors' Act, Consolidated Statutes of Canada, C. 59, passed chiefly to enable factors and agents to pledge and dispose of the goods of their principals. Art. 1745 of the Civil Code does not change the nature of the documents therein mentioned. Bills of lading were always negotiable, and remained so. Delivery orders were probably negotiable, but in order to divest the owner's title, the warehouseman or depositary had to accept

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the order by acknowledging that he held for the transferee. Documents were not thereby made negotiable to an extent beyond what they had been before. An agent was given power to transfer the goods of his principal, but a delivery order, or any title that before the passing of that Act had not the effect of divesting the assignor, had no greater effect after that Act came into force; this is made manifest by Art. 1979 of the C. C., which specially invokes C. 54 of the C. S. C. as governing the transfer by endorsement of warehouse receipts, &c. I do not think that any custom of merchants exists to affect the case. The appellants have strenuously urged the objection that they were not warehousemen, and consequently had not the legal qualification to grant negotiable warehouse receipts. It is very questionable whether this can be an objection in the mouth of the signers of the receipts. There is no preliminary requisite in law to becoming a warehouseman; the intention alone constitutes the quality, and in that sense one receipt would be as valid as 100. It seems reasonable to hold that a party who grants a receipt in that quality cannot be allowed to repudiate it on the plea that he has given himself a false designation, otherwise there could be no security in dealing with such documents coming from a distance. Again, it is urged that it was necessary the endorsee should notify the holder of the iron and have the latter undertake to hold on his account, in the language of the law, attorn to him, but in this respect the appellants fail to make the distinction between the effect of these documents as bailee warehouse receipts and ordinary delivery orders, which cannot have effect until accepted. In the former the holder or depositary of the goods declares that he holds them in that capacity for whosoever brings him his receipt properly endorsed. In the latter he holds them for owner until he accepts an order agreeing to a change in the proprietorship, he being up to that time agent for the former proprietor and continuing so until by the acceptance of his order he agrees to become agent for his vendee. In such case, there being no interversion of title, a vendor's privilege would hold good against a delivery order until defeated by the complete delivery, which would be effected by the acceptance of such order by the warehouseman. In case of a bailee warehouse receipt, that delivery is already acknowledged in favor of the holder of the document. It is his goods that have to be dealt with. It may be said that in this case Davis has gone far to waive the advantages of the title in R., G., G. & Co., by alleging that they were purchasers from Robertson & Co., which Davis had no occasion to do, as it could have no effect unless to weaken his title. The last objection I have to notice is that the receipts were not transferred to secure the payment of any bill, note or debt negotiated or contracted at the same time with the endorsement. By reference to Thos. Ritchie's evidence at p. 5 of the Appendix to respondent's factum, it will be found that at or about the time these receipts were endorsed over to Davis he advanced to R., G., G. & Co. a much larger amount than the value of the iron assigned to him, viz., a B | E for £500 sterling, and four promissory notes of $10,000 each, but difficulty arises in applying this evidence, because I do not find, on reference to respondent's declaration, that he has claimed that these securities were held by him (Davis) for any other than past advances. His statement is in effect that his agreement with R., G., G. & Co. was that they

were to cover past and future advances, in fact a continuing agreement, but that R., G., G. & Co.'s indebtedness at the time was $300,000, to secure which the warehouse receipts were endorsed over to him, and that this sum had been only partially paid by the realization of other securities, leaving a balance of $200,000 which had never been paid; but no present or future advances are alleged or claimed, and, therefore, the application of the proof without an averment in the plaintiff's declaration would be going beyond the case made by the plaintiff himself. Now, sec. 9 of cap. 54 of the C. S. C. is clear enough in its provision that "No transfer of any such bill of lading, specification of timber, or receipt, shall be made under the Act to secure the payment of any bill, note or debt, unless such bill, note or debt be negotiated or contracted at the same time with the endorsement of such bill of lading, specification or receipt." In the present case, the plaintiff has not claimed for any such bill, note or debt negotiated or contracted at the same time with the endorsement of the receipts in question. I hold that these receipts are made negotiable by the statutes comprised in chap. 54, C. S. C., but only by compliance with their terms, and one of the essential conditions of such negotiability thereby imposed is that the debt should be contracted at the same time with the endorsement. This being no part of the respondent's pretensions, although we may have the impression that some part of the evidence he has adduced might possibly have been applicable to sustain a demand for present advances, I am forced to the conclusion that such evidence does not apply to the case he has put before the Court, nor can we be certain that if he had claimed for advances made at or posterior to the taking of the securities, the appellants might not have been ready with a plea and proof constituting a sufficient answer to such demand. Seeing that some proof was made to raise a doubt, I would have preferred sending the case back to the Court below with permission to re-plead, but on full consideration of the point I have concluded that it is not the duty of this Court to do so, but in reversing the judgment of the Court below I would dismiss the plaintiff's action, saving his recourse in case he is of opinion that he could maintain an action for advances made at the time of the transfer of the receipts, and sees fit to bring it. I think that there is no indication that the respondent intended in this action to rely upon present advances to sustain his demand, and we cannot presume that he so intended. A judgment in his favor on this point may be a surprise to both parties, and certain it seems to me the appellant has had no opportunity of pleading to or otherwise answering such. A judgment in favor of the respondent, I think necessarily affirms the principle that such documents can be given in pledge for past advances, which, in the face of the language of the statute, I am not prepared to admit. The opinion now given is, however, not that of the majority of the Court, and the judgment of the Court below will be confirmed.

DORION, C. J., *dissentiens*:—The question in this cause is as to the effect and value, in the hands of a *bonâ fide* holder, of warehouse receipts, as against an unpaid vendor who signed the receipts and retained possession of the goods sold.

The appellants sold to Ritchie, Gregg, Gillespie & Co. a large quantity of iron. They did not deliver the iron, but gave to the purchasers several receipts in the form of ordinary warehouse receipts. These several receipts covered the

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whole quantity of iron sold. Under a subsisting agreement of the 8th Nov., 1871, entered into between Ritchie and Nelson Davis, and subsequently ratified by Ritchie, Gregg, Gillespie & Co., the latter endorsed the receipts to Davis as collateral security for all sums they then owed or might thereafter owe to him.

Ritchie, Gregg, Gillespie & Co. failed a short time after without having paid for the iron. Davis claimed from the appellants by this action delivery of the iron mentioned in the said receipts, and, having also failed, the respondent, as assignee for his estate, continues the suit.

The declaration, after setting forth the agreement between Ritchie, Gregg Gillespie & Co. and Davis, contains the averment that, when the warehouse receipts were transferred to Davis, Ritchie, Gregg, Gillespie & Co. were indebted to him in a sum of $300,000, but contains no allegation that any advances were made at the time the receipts were transferred, or subsequently to the transfer. The appellants by their pleas alleged in substance that the sale of the iron was not perfected, as they were not paid and no delivery had taken place; that they were not warehousemen, and the receipts had no value; that Davis was aware that appellants were not paid; that Ritchie, Gregg, Gillespie & Co. were in a hopeless state of insolvency, and that they and Davis had fraudulently contrived to place these receipts in the hands of Davis to cover him for advances and liabilities then overdue; and, finally, that these warehouse receipts were not endorsed to guarantee any note, bill of exchange or debt negotiated or contracted at the same time that they were endorsed.

The respondent has proved that large advances were made by Davis to Ritchie, Gregg, Gillespie & Co. subsequently to the transfer of the warehouse receipts. This proof cannot, however, be of any avail for want of proper allegations in the declaration to justify it.

The question is, therefore, has the respondent acquired under these warehouse receipts, as against the appellants, who are the unpaid vendors still in possession of the iron, any title to it or any lien for the advances made before the receipts were endorsed to Davis? It cannot for a moment be doubted that if Ritchie, Gregg, Gillespie & Co. were still the holders of these warehouse receipts, they could not claim the iron from the appellants without first paying for it.—Civil Code, L. C., Arts. 1496 and 1497.

Under the ordinary rules of law they could not transfer to other parties more rights than they themselves had, and they could not, therefore, by an ordinary transfer convey to Davis the right to claim the iron free from the right of appellant to retain it until paid.

The respondent, however, contends that those rules of law are not applicable to the case of warehouse receipts transferred by endorsement, and that when such receipts are so transferred they are in the hands of a *bonâ fide* holder, like bills of lading, subject to none of the equities which might attach to them in the hands of the original holder. This privilege is claimed under the Consolidated Statutes of Canada, ch. 54, s. 8, which provides that such receipts given by a warehouseman may be transferred by endorsement to any incorporated bank or to any private person as collateral security for the payment of any bill or note discounted by such bank in the regular course of its banking business,

or of any debt due to such private person. This security is restricted by sect. 9, by which is enacted, that no transfer of such receipt shall be made under the Act to secure the payment of any debt *unless such debt was contracted at the same time with the endorsement of such receipts.*

The Superior Court, by ordering the appellants to deliver the iron, has adjudged that the respondent was entitled to hold this iron as collateral security for the debt mentioned in the declaration; that is, a debt due at the time the receipts were transferred to Davis; since this there is no indebtedness alleged in the declaration. Being of opinion that such a transfer is not authorized by the Statute, and that if valid in law as a transfer of the iron mentioned in the receipts it cannot convey to the holder thereof any more rights to it than Ritchie, Gregg, Gillespie & Co. could have conveyed by an ordinary transfer, that is, such rights only as they themselves had, without entering into the other questions raised, I have come to the conclusion that the appellants had a right to retain the iron until they were paid, and that the action of respondent should be dismissed *sauf à se pouvoir.*

RAMSAY, J., for the majority of the Court:—The respondent is the assignee of the estate of Nelson Davis, plaintiff in the court below. The action was brought against appellants to cause them to deliver up a quantity of iron mentioned in certain warehouse receipts delivered by appellants to the firm of Ritchie, Gregg, Gillespie & Co., and by that firm endorsed over to Davis.

The appellants met the action, first, by a demurrer which raised two grounds: 1stly. That the declaration did not set forth that appellants had been paid for the iron; 2ndly. That the declaration did not allege that the appellants exercised the calling of warehousemen. The appellants also set up eight peremptory exceptions, by the first of which they again set up the grounds of the demurrer affirmatively, denying that they had been paid, and also denying their calling as warehousemen.

By the 2nd peremptory exception they went still further, and said that the fact that appellants had not been paid was known to respondent when he took the transfer by endorsement; that Ritchie, Gregg, Gillespie & Co. were hopelessly insolvent; and that the transfer was fraudulently planned between them and respondent to give him an advantage for overdue advances.

By the 3rd peremptory exception it was set forth that the transfer was not to guarantee any note, bill or debt negotiated at the time.

Appellants also pleaded a *défense en fait.*

Three questions are brought up by these pleadings: 1st. Whether the five receipts alleged as between the signer and an indorser, holder of warehouse receipts, are transferable by endorsement; 2nd. Whether the consideration given by Nelson Davis was of a character under the act to enable him to deal with the goods in question by a fictitious transfer; and 3rd. Whether Nelson Davis was an insolvent holder. It would seem that appellants also raise the question as to whether the unpaid vendor can stop the delivery after the transfer of the warehouse receipts until he is paid the price of sale.

It may be as well at once to disembarrass the case of all consideration of the last question, which appears to me to offer no difficulty. I presume the appellants mean that by analogy, with the right of stoppage *in transitu*, they may stop

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before actual delivery. This is probably true, but the right of stoppage *in transitu*, if not determined, is seriously interfered with by pledging the goods. In short, the right to stop *in transitu* only continues to exist on payment of the pledgee's interest, and he, of course, being without notice of the fact that the vendor was unpaid when the goods were pledged. In the absence, therefore, of notice, fraud or collusion, the holder of the receipts has a right to the goods if the receipts be warehouse receipts and be transferable by endorsement like a bill of lading. If the receipts have not these qualities, then it is needless to allude to stoppage *in transitu*.

With regard to the 1st question I can see no reason to distinguish them from warehouse receipts, if the distinction be now important, which may be a question. They have no resemblance to mere delivery orders. They differ in this, that they are recognitions of title, and promises to deliver the goods therein mentioned "on the surrender of this receipt properly endorsed." It is not a question here of sale and delivery under the articles of the Code, setting forth the common law and the restriction drawn from the Statute of Frauds, but whether orders such as these have any negotiable character. This proposition necessitates rather a minute enquiry into the Acts both in England and Canada which led to the passing of chapter 54 C. S. C. and to the Articles 1740 to 1751 C. C., and to the subsequent legislation as to the same matter.

In England before the "Factors Act," 6th Geo. IV. c. 94, somewhat similar receipts had a certain amount of negotiability, that is, they could be transferred by endorsement from hand to hand, but the property only vested in the holder after notice to the warehouseman and his attornment to the holder. They were, therefore, transfers of the property, sales simulated or real, which took their effect from a fictitious delivery. In the case of Zwinger & Samuda (7 Taunton 265) Park, J., appears to have held that India warrants, then (1817) of recent use, were, by the custom of trade, transferable by endorsement simply, but on motion for a new trial the majority of the court, (Park, J., dissenting) refusing the application for a new trial, "guarded itself against any inference that, according to a practice which has obtained since the erection of the West India docks, an indorsement on these delivery notes or dock warrants, was of itself and without making the wharfingers parties to the order, capable of transferring any property in the goods therein described." By the 4 Geo IV. cap. 83, a considerable change was introduced. By the 1st section it was enacted that any person entrusted with goods for the purpose of sale, AND by whom such goods shall be shipped in his own name, *or* in whose name any goods shall be shipped by any other person, "shall be deemed" and taken to be the true owner thereof, so far as to entitle the consignee to a lien thereon for any money, etc., advanced to the person in whose name such goods were shipped, in like manner as if such person was the true owner, provided the consignee had no notice, by the bill or otherwise, at or before the time of any such advance, that the person in whose name goods were shipped was not the actual owner hereof.

The 2nd section then went to say that any person or body politic and corporate might take the goods, etc., or the bill of lading for the delivery

thereof, in deposit or pledge from any consignee, but such person or body politic acquired no further or other right, title or interest in the said goods or bill of lading than the consignee at the time of such deposit and pledge.

Section 3rd allowed the real owner to get back the goods or bill of lading by disinteresting the assignee of the factor or agent.

The scope of this Act appears to be limited to goods supplied where there is a bill of lading, but two years later this Act was altered and amended by "The Factors' Act" (6 Geo. IV. cap. 94), which gave still greater facilities for dealing not with consignees only but with factors or agents intrusted with the possession of goods.

The 1st section provides that factors or agents having goods in possession should be deemed to be owners thereof so as to give validity to contracts with persons in good faith.

Section 2nd then provides that any person intrusted with a "bill of lading, *India* warrant, dock warrant, warehouse receipt, certificate, wharfinger's certificate, warrant or order, for the delivery of the goods," shall be deemed and taken to be the owner of the goods so as to give validity to any *bonâ fide* contract for the sale or for the deposit or pledge thereof.

There is a proviso to each section to the effect that any one dealing with the person intrusted should not have notice that the latter was not the true owner.

Section 3rd then provides a limit as to deposit or pledge. If made for an antecedent debt, the person to whom deposit or pledge was made only acquired the same right, title, or interest as the depositor had and no more.

Section 4 provides that persons may contract with a known agent in the ordinary course of business, or within the scope of his authority, notwithstanding notice that he is an agent, provided there be no notice that such agent had not power to sell or to receive payment.

Section 5 provides that if any one deals with an agent knowing him to be such (having notice), he only acquires the right, interest and title of the agent or factor.

Section 6 allows the true owner in case of bankruptcy of agent or factor to follow his goods and recover them on disinteresting the pledgee.

The rest of the Act relates to the remedies, civil and criminal. Under this Act a great variety of difficulties arose. It was held that "*India* warrants" were not negotiable. Taylor & Kyneer, 3 B. & Ad. 320. Taylor & Trueman, 1 M. & M. 437. It was questioned what was a "disposition." Ib. What was an advance, and whether one deposit could be exchanged for another.

The 5 and 6 Vic. cap. 93 was passed to alter, amend and extend the 6 Geo. IV.

Sect. 1 abolished all question of notice; the known agent intrusted with goods or document of title could contract in good faith. It also covered continuing advances. By section 2 *bonâ fide* deposits in exchange were protected "as if the consideration for the same had been a *bonâ fide* present advance of money."

Section 3 excludes from the protection of the Act contracts "for or in respect of any antecedent debt."

Section 4 defines what shall be considered "documents of title." They include

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bills of lading, India warrants, dock warrants, warehouse keepers' certificates, warrants or *orders* for the delivery of goods, or any other document used in the ordinary course of business, *as proof of the possession or control of goods*, or authorizing, or purporting to authorize, *either by indorsement or delivery*, the possessor of such document to transfer or receive goods thereby represented." The same section then goes on to give full effect to the transfer of such documents of title, whether the same be in the agent's active custody, or shall be held by any other person subject to his control, or for him on his behalf.

If any doubt could have existed as to the effect of these Acts being to confer a negotiable character on these contracts, it is dissipated by the decision in the House of Lords in the case of Dickens & Hertz (L. R., 2 H. L. 113, Sc. App.). In that case it appears that the original vendor acknowledged to hold the iron subject to the order of Hertz, who advanced on it, but this fact had no effect on the judgment. The opinions of the Lord Chancellor Hatherley, Lords Chelmsford and Colonsay all held that the document of title transferred by indorsement even where its negotiable character did not appear on the face of the document. It may not be uninteresting to us to remark that Lord Colonsay would have affirmed the judgment, on the ground stated in the Scotch Court, without the help of the Factors Acts. He said: "The Scotch law had gravitated in that direction for a considerable time previously to these statutes; Mr. Bell laying it down expressly that a factor has the power to pledge his principal's property." This is coming very near to the view taken by Park, J., in the case of Zwinger & Samuda.

This being the law of England we have now to enquire whether it is the law here.

So far back as 1847 the whole provisions of the Factors Acts were introduced as law in Canada. (10 & 11 Vic. cap. 10.) This Act appears as cap. 59 C. S. C. Later, in 1849, an Act was passed "for the punishment of warehousemen and others giving false receipts for merchandise, and of persons receiving advances upon goods, and afterwards fraudulently disposing of the same." (12 Vic. cap. 12.)

In 1859 an Act was passed "granting additional facilities in commercial matters." By this Act it was enacted that any bill of lading, any specification of timber, or any receipt given by a warehouseman, miller, wharfinger, master of a vessel, or carrier, for cereal grains, goods, wares, or merchandise "stored or shipped," may, by indorsement thereon "by the owner thereof or person entitled to receive the same," "be transferred to any incorporated or chartered bank, or to any private person," as collateral security for any bill or note discounted. This enactment was subsequently incorporated in chap. 54 C. S. C. sect. 8.

In 1866 the C. C. of Lower Canada came into force, and we find that the Articles 1740 to 1751 reproduce the whole dispositions of cap. 59 C. S. C., and by Article 1979 "the special provisions made in chap. 54 C. S. C. for the transfer by indorsement of bills of lading, specifications of timber and receipts given by warehousemen, millers, wharfingers, masters of vessels or carriers to incorporated banks or to private persons as collateral security, and for the sale of the merchandise and effects represented by such instruments."

It therefore appears that under the Factors Acts in England such receipts as those in question are transferable by indorsement, and that here they are much more so under chapter 54 C. S. C., recognized by Art. 1979 C. C.

The second question requires a reference to the same legislation, and here a new difficulty arises. By chapter 54 C. S. C., where it expressly declares that the goods may be pledged by indorsement of the document of title, it is provided (sect. 9) that no transfer of any such document of title shall be made unless such bill, note or debt shall be negotiable or contracted *at the same time* with the indorsement of such document of title. But chapter 59, re-enacting the English Factors Acts, only provides that the *lien* or pledge shall not be created for any antecedent debt. I think the seeming discrepancy may be reconciled, because in section 9 of chapter 54 the debt is covered if it be *negotiated at the time.* It seems to me, therefore, that the pledge of the goods for future advances is protected by both statutes.

But another verbal difficulty has been suggested. Section 8 C. S. C. cap. 54, authorizing banks and private persons to take by indorsement such documents of title, adds: "And being so indorsed shall vest in such bank or private person from the date of such indorsement all the right and title of the indorser to or in such cereal grains, goods, &c."

If we are to hold that the transfer by indorsement of the titles only transfers the real and not the apparent rights of the indorser, then the whole object and aim of the Factors Acts are defeated, and the result would be to limit the negotiable character of bills of lading. This will hardly be contended for. The law was laid down by Sir Joseph Napier in the case of Rodger & The Comptoir d' Escompte *de Paris* as to a bill of lading (L. R., 2 P. C. p. 405,) and this statement of the law was approved of in the judgment in the case of The Chartered Bank of India &c., and Henderson, L. R., 5 P. C. 513. We must therefore, I think, interpret the clause of our Act to mean that the indorsation transfers all the *rights* that are conveyed by the actual and *authorized* possessor of a negotiable instrument. Who is to blame if Robertson & Co. *gave* to Gregg & Co. this negotiable instrument? It certainly was not Nelson Davis. These bills were given for the purpose of raising money, and their condition is simply that of indorsation, which has been complied with.

The last question is purely one of evidence, which has been somewhat unnecessarily spun out. There is no evidence to show any fraud or collusion on the part of Nelson Davis. Two witnesses only are examined on the point—Ritchie and Prinel. From the former nothing is extracted, and Prinel distinctly tells us that unless Davis were told by Ritchie, Gregg, Gillespie & Co. of the state of their business, he had really no knowledge of it, and of any such confidential communication the witness is totally ignorant. The assertion that Davis knew the state of Ritchie, Gregg, Gillespie & Co.'s affairs is in the last degree improbable. If he believed his warehouse receipts to be a good title he had no occasion to enquire further, provided he left a sufficient margin, and it is impossible to conceive his advancing money to this firm if he knew its affairs and having any doubt as to the sufficiency of his title. The statutes 34 Vic. and 31 Vic. do not affect the case. The former refers to banks only and the latter lapsed in 1872.

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I am therefore of opinion that the judgment should be confirmed on the merits. A question of procedure has been raised. On it alone, I believe, is there any essential difference among the members of the Court. The declaration is manifestly defective in this, that it does not set up any indebtedness subsequent to the transfer of the documents of title. This objection would evidently have been fatal on demurrer; but although plaintiff demurred specially to the declaration he took no notice of this objection. He then went on to put specially in issue the fact that the transfer was not for any note, bill, or debt negotiated at the time; thus as it were practically, if not according to the rules of pleading, raising the whole question. The parties then went to proof, and without any kind of objection by defendants, plaintiff proved beyond a doubt a subsequent indebtedness far beyond the value of the goods. The case was argued without any allusion to this, was decided in the Court below without any reference to it, and so it came up before this Court. We have therefore to decide whether agreeing with the plaintiff, on the matter of law, we should declare all this expensive litigation to be useless, all the time consumed by it to be thrown away, to maintain a theoretical regularity in pleading where no party has complained and where no injury has been sustained. I don't know whether under another system of procedure such a rigid observance of needless rules would be enforced, but it would be a novelty here.

An allusion has been made by one of the learned judges who dissents to the limitation of six months mentioned in chap. 54 C. S. C., but on that point the Court does not consider it is necessary to express any opinion. The exact effect of the words limiting the former to take in pledge for more than six months may perhaps be open to some question, but the point was neither pleaded nor argued in this case. It was raised in another case of Hearle & Rhind, but not in this one.

The majority of the Court is, therefore, of opinion that the judgment of the Court below should be confirmed.*

Judgment confirmed.

H. L. Snowdon, for appellants.
Doutre, Doutre & Hutchinson, counsel.
Abbott, Tait, Wotherspoon & Abbott, for respondent.
(J.K.)

* An Appeal was allowed to the Judicial Committee of the Privy Council, but the case being settled between the parties proceedings were discontinued. (Reporter's note.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 22ND MARCH, 1878.

Coram SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 17.

DUPUY, APPELLANT;

AND

CUSHING ET AL., RESPONDENTS.

HELD:—1o. That the possession of an assignee under a writ of attachment under the Insolvent Act of 1875, of moveables found by him in the possession of the insolvent, but which had been previously sold without actual tradition to the purchaser, renders the title of the assignee to such moveables superior to that of such purchaser.

2o. That in the present case the sale invoked by the purchaser was simulated, and was in reality a pledging of the moveables claimed to have been sold rather than a veritable sale of them. And was, moreover, fraudulent, and inoperative as against the creditors of the insolvent.

RAMSAY, J. (*dissentiens*):—The only question seriously argued in the *factum* is the question of *déplacement*. It is not contended that *déplacement* in a sale of moveables is now necessary to complete the sale. The article 1025 C. C. has reversed the rule of the old law, *traditionibus non nudis pactis dominia rerum transferuntur*. V. 1st Report, p. 50, Art. 44, (40). But it is said that article 1027 C. C. limits the effects of the innovation of art. 1025 C. C. (1st Report, pp. 14 and 50, art. 46 (42). This is very true, but the limitation does not reach the present case. The proviso of art. 1027 C. C. as regards moveables is as follows: "But if a party oblige himself successively to two persons, to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred, and remains owner of the thing although his title be posterior in date; provided, however, that his possession be in good faith."

It is quite plain that this proviso contemplates a sale to one person, and then another sale to another purchaser in good faith while the thing is still in the possession of the vendor, followed by tradition to the second purchaser. In that case the title of the second purchaser prevails. Now appellant seeks to extend this rule arising out of a contract, to the seizing creditor, to whom it is attempted to give the same privilege as the second purchaser with tradition. It seems to me that the two positions are not at all similar. Such an interpretation would have the effect of destroying the rule of 1025 by stretching the terms of the exception 1027.

The other reasons fall to the ground for want of proof. The only presumption of fraud is the bailment to the vendor, but as we said in the case of Bell & Rickaby (since reversed by the Supreme Court), the vendor remaining in possession of the goods, under a lease or otherwise, is not, as the law now stands, conclusive proof of fraud. To hold that it is proof of fraud is to sweep away the amendment of art. 1025 C. C. and the exception of art. 1027 C. C., which I am not prepared to do, although I consider article 1025 is a serious disimprovement

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to the law. The rule of the Code law was perfectly clear. As against third parties secret sales were of no avail. If by jurisprudence we can come back to this doctrine, I shall be very glad, but it certainly is not the law of the Code.

MONK, J., also dissented, and stated that he feared the judgment about to be rendered would overrule Bell & Rickaby, recently decided by this Court.

SIR A. A. DORION, C.J. :—Le 14 mars 1877, McLeod, McNaughton & Léveillé, fabriquants de bière, ont vendu à l'Intimé qui est Notaire, tout le matériel dont ils se servaient pour leur brasserie. Tous les effets vendus sont désignés dans l'acte de vente. Quelques-uns sont évalués et forment une somme totale de $4890. Les autres en assez grand nombre sont seulement décrits, sans être évalués.

Cette vente a été faite pour une piastre et pour autre valeur reçue, de plus à la condition que l'Intimé endosserait les billets des vendeurs jusqu'à concurrence de $2,000, y compris ceux qu'il avait déjà endossés et pour lesquels il n'avait aucune garantie.

Le même jour, l'Intimé a loué ces mêmes effets aux vendeurs, pour trois ans, à raison de $100 par année. Il n'y a eu aucun déplacement. Les vendeurs sont demeurés en possession des articles vendus et ils ont continué à s'en servir, comme ils le faisaient avant la vente jusqu'au 19 juillet suivant, lorsque l'Appelant les a saisis en leur possession en vertu d'un bref de saisie compulsoire émané contre eux, sous l'acte des faillites de 1875.

L'Intimé a, par une requête présentée à l'un des juges de la Cour Supérieure, réclamé ces effets en vertu de la vente qui lui en avait été faite par les faillis.

Cette requête a été contestée par l'appelant, syndic à la faillite.

1o. Parceque l'acte du 14 mars 1877, était moins une vente qu'une garantie donnée pour des avances faites et à faire.

2o. Qu'il n'y avait eu aucune tradition des effets vendus.

3o. Que lors de la vente, McLeod, McNaughton & Léveillé étaient insolvables, ce que connaissait l'Intimé, et que la vente lui avait été faite en fraude des droits des créanciers.

L'appelant s'est contenté de prouver que les effets vendus étaient demeurés en la possession des vendeurs, et l'Intimé a fait entendre McNaughton, l'un d'eux, pour établir qu'ils n'étaient pas insolvables à l'époque où la vente avait eu lieu.

La Cour Inférieure a renvoyé la contestation de l'appelant et adjugé que les effets réclamés appartenaient à l'Intimé, qui les avaient achetés pour bonne et valable cause, et qu'en vertu des articles 1025, 1027 et 1472 du Code Civil, une telle vente était parfaite même à l'égard des tiers, sans déplacement ni tradition réelle.

Il n'y a aucun doute qu'avant le Code, le consentement des parties ne suffisait pas pour transférer la propriété. Il fallait de plus la tradition. Cette règle dérivée du droit Romain était universellement admise, du moins quant à la transmission des meubles corporels. *Traditionibus dominia rerum non nudis pactis transferuntur: L. 29 Cod. de Pact.*

C'est ce qui faisait dire à Bourjon, Droit Com. 1, Tit. 1, ch. 6, Sect. 3 No. 11, "La "vente des meubles faite sans déplacement est nulle à l'égard des créanciers du "vendeur."

Le même auteur au Tome 2, Tit. 8, ch. 3, Sect. 1, No. 1. Ferrière sur l'art. 170 de la Coutume de Paris, Nos. 14 et 15. Merlin Vo. Tradition §3, et tous les auteurs modernes reconnaissent que telle était la règle sous l'ancien droit. Dupuy and Cushing et al.

C'est aussi ce qui a été jugé ici dans les causes de Mallory & Hart, 2 Rap. Jud. B.C. 345, Bonneina & Seed, 5 Rap. Jud. B.C. 446, Cummings et al. et Smith et al. 10 Rap. Jud. B.C. 122 et 5 L.C. Jurist, 1, Nesbitt et La Banque de Montréal, 9 Rap. Jud. B.C. 193, Boyer & Prieur, 7 L.C. Jurist 5, Charrand & Joly, 1 L.C. L.J. 27, et dans White & La Banque de Montréal, 12 L.C. Jurist 188.

Sous cette jurisprudence antérieure au Code, la vente du 14 mars, non suivie de tradition réelle, n'aurait pas empêché l'Intimé le droit de revendiquer les effets qu'il avait achetés et qui auraient été saisis à la poursuite des créanciers de ses vendeurs.

Mais le Code a fait des changements notables au droit préexistant, en substituant à l'ancienne règle qui exigeait la tradition, le principe déjà consacré dans le Code Napoléon et dans le Code de la Louisiane, que le consentement seul des parties, sans tradition, suffit pour transmettre la propriété.

Les articles qui touchent plus spécialement à cette matière sont les articles 1025, 1027 et 1472 du Code Civil. Ils correspondent aux articles 1138, 1140, 1141 et 1583 du Code Français. En mettant en regard le texte même de ces différents articles, il sera plus facile d'apprécier la portée de ces changements et les commentaires auxquels ils ont donné lieu.

Art. 1025 C.C.

"Le contrat d'aliénation d'une chose certaine et déterminée rend l'acquéreur "propriétaire de la chose par le seul consentement des parties, quoique la tradi-"tion actuelle n'en ait pas lieu."

Art. 1138 C.N.

"L'obligation de livrer la chose est parfaite par le seul consentement des parties "contractantes.

"Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant qu'elle a dû être livrée, encore que la tradition n'en ait point été faite, &c."

Le principe général, que l'acquéreur devient propriétaire de la chose vendue par le seul consentement des parties et sans le secours de la tradition, est posé dans l'un et l'autre de ces articles quoiqu'en termes un peu différents.

Art. 1472 C.C.

"Elle (la vente) est parfaite par le seul consentement des parties, quoi-"que la chose ne soit pas encore livrée; sujette néanmoins aux dispositions "contenues en l'article 1027, etc."

Art. 1583 C.N.

"Elle (la vente) est parfaite entre les parties, et la propriété est acquise de "droit à l'acheteur à *l'égard du vendeur*, dès qu'on est convenu de la chose et du "prix, quoique la chose n'ait pas encore été livrée, ni le prix payé."

Les mots *entre les parties*, dans l'article 1583 semblent être une modification de la règle posée dans l'article 1138 et indiquer que la vente sans tradition n'a d'effet qu'entre les parties et non à l'égard des tiers. Ces expressions, entre les parties, ne se trouvent pas dans l'article 1472 du Code Civil, mais la référence

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qui y est faite à l'article 1027 devait, sans doute, dans la pensée des commissaires, avoir le même effet, puisqu'ils disent à ce sujet dans leur 4me rapport p. 7. "L'article amendé est en substance emprunté des articles 1582 et 1583 du Code "Napoléon dont la rédaction inexacte n'a pas été suivie; et sur la suggestion des "commentateurs une définition plus stricte a été adoptée."

Les commissaires semblent n'avoir pas voulu changer la règle contenue dans l'article 1583, mais seulement la préciser en référant à l'article 1027, que voici tel que soumis avec leur rapport à la Législature.

Art. 46, projet de l'art. 1027 C.C.

"Les règles contenues dans les deux articles qui précèdent (44 et 45 du projet. "1025 et 1026 du Code) s'appliquent aussi bien aux tiers qu'aux parties con- "tractantes dans les contrats pour le transport d'immeubles, sauf les dispositions "particulières contenues dans ce Code quant à l'enrégistrement des droits réels.

"Mais si une partie s'oblige successivement envers deux personnes à livrer à "chacune d'elle une chose purement mobilière, celle des deux qui en aura été "mise en possession actuelle a la préférence et en demeure propriétaire, quoique "son titre soit postérieur, pourvu toujours que sa possession soit de bonne foi."

Art. 1140 C.N.

"Les effets de l'obligation de donner ou de livrer un immeuble sont réglés au "titre *de la vente*, et au titre des priviléges et hypothèques.

Art. 1141 C.N.

"Si la chose qu'on s'est obligé de donner ou de livrer à deux personnes succes- "sivement, est pure mobilière, celle des deux qui en a été mise en possession "réelle est préférée et en demeure propriétaire, encore que son titre soit poste- "rieur en date, pourvu toutefois que la possession soit de bonne foi."

Jusque là point de différence notable entre l'article suggéré par les commissaires et, comme nous le verrons dans un instant, celui adopté par la législature et le Code Napoléon. L'article 1583 restreint il est vrai aux seules parties contractantes l'effet de l'article 1138 qui dispose de la tradition, mais l'article 1140 refère au titre des priviléges et hypothèques pour ce qui regarde la vente des immeubles, et l'article 1141 règle la préférence entre deux acquéreurs des mêmes meubles en faveur de celui qui a eu la tradition quelque soit la date de son titre.

L'article 1472 du C.C. ne restreint pas aux seules parties contractantes l'effet de la vente faite sans tradition, mais il refère à l'article 1027, et cet article, tel qu'originairement préparé et soumis par les commissaires, n'applique aux tiers l'article 1025 que dans les ventes d'immeubles qui sont assujéties aux lois d'enrégistrement, et adopte, quant aux meubles, la même règle que le Code Napoléon.

Aussi, les commissaires disaient-ils dans leur 1er rapport p. 15.

"L'article 46 (42) limite l'opération de la règle dans certains cas, dans "l'intérêt des tiers, et correspond en substance aux dispositions du Code "Français."

L'intention des commissaires était donc évidente de se conformer aux dispositions du Code Français, le changement dans l'expression n'étant que pour plus de clarté et de précision. Dans ce but le 1er paragraphe du projet de l'article 1027 exprimait clairement que la vente d'immeubles était seule parfaite à

l'égard des tiers sans tradition,—quant aux ventes de meubles, elles demeuraient soumises à la règle posée dans le second paragraphe de l'article 1027 semblable à l'article 1141 du Code Napoléon.

Malheureusement ce dernier article a donné lieu aux plus graves dissidences parmi les auteurs. Les uns ont prétendu qu'en vertu de cet article, la vente de meubles sans tradition ne pouvait être invoquée à l'encontre des tiers de bonne foi, et que conformément à ce qui existait avant le Code les créanciers pouvaient faire saisir valablement les meubles que leur debiteur avait vendus, mais qu'il n'avait pas encore livrés. Favard de Langlade, Vo. Vente, sect. 1, § 1, No. 7. Dalloz, Vo. Vente, ch. 1, sect. 1, article 2, No. 17. Troplong, Vente, No. 42. Toullier, T. 4, No. 61. Idem, T. 6, No. 205. Idem, T. 7, Nos. 35 et 36. Rolland de Villargues, Vo. Vente, No., Duvergier, T. 1, No. 37, ont tous écrit dans ce sens.

Marcadé, T. 4, article 1141 No. 1, est le premier auteur qui ait osé s'attaquer à une opinion si généralement reçue. Il l'a fait avec tant de talent qu'il a entraîné à sa suite non seulement tous les écrivains qui ont écrit depuis, comme Larombière, T. 1 article 1141, No. 18, Demolombe, T. 24 p. 468 et 469, Colmet de Santerre, T. 5 No. 57, *bis*, mais qu'il est même parvenu à faire adopter ses vues par une série d'arrêts qui semblent avoir fixé la jurisprudence. Beaubois Sirey, 1841 2, 624, Catros Sirey, 1846, 1, 551, Humbert Sirey, 1848, 2, 742, Lanthier Sirey, 1864, 2, 183.

Dans ce conflit d'autorités, si nous avions à exprimer notre opinion, nous serions disposé à dire que M. Marcadé et ceux qui ont adopté son opinion se sont plus attachés à la lettre qu'à l'esprit du Code.

Ils ont étendu la règle posée dans l'article 1138 aux tiers aussi bien qu'aux parties contractantes, ce qui est exact, mais ils ont limité l'exception contenue en l'article 1141 au cas précis de deux acquéreurs successifs, sans appliquer ce mot acquéreur, dans son sens le plus large, de manière a embrasse tous ceux qui ont acquis un droit sur la chose, et par conséquent le créancier saisissant qui a acquis par la saisie un gage sur le bien de son débiteur, ce qui me paraît avoir été l'intention des auteurs du Code.

Quelque soit la force des raisons données par Marcadé, elles ne sont pas applicables à notre Code, ainsi que nous l'allons démontrer.

D'après les termes déjà cités de l'article 46 du projet de Code, la règle contenue dans l'article 1025 ne s'appliquerait *aussi bien aux tiers qu'aux parties contractantes que dans les contrats pour le transport des immeubles.* Donc la vente des meubles sans tradition n'affecterait que les parties contractantes, et les tiers seraient protégés tant par le fait que l'acquéreur n'aurait acquis aucun droit de propriété avant la tradition, que par le second paragraphe du même article.

Les commissaires, comme ils le déclarent eux-mêmes, n'ont pas adopté la rédaction des articles 1138, 1140, 1141 et 1583 pour éviter les difficultés suggérées par la discussion à laquelle ces articles avaient donné lieu. Ils ont fait ces changements en pleine connaissance de cause, puisqu'ils avaient devant eux les opinions divergentes de Troplong, de Toullier et de Marcadé, dont ils citent les ouvrages à la marge même de leur rapport, tandis qu'au bas de l'article

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40. Ils ne citent, comme source de l'article, que la loi *Quoties*. Pothier, Oblig. 151, 152. Idem, Vente 318, 319. Le Code de la Louisiane, articles 1914, 1916, et le Code Napoléon art. 1141, sans citer Marcadé, ni aucun des autres auteurs qui ont adopté l'interprétation qu'il a donné à l'article 1141.

L'article 1916 du C.L. cité par les commissaires est dans ces termes ; 1916. "A l'égard des effets mobiliers, quoique d'après la règle, qui est contenue dans "les deux articles qui précèdent, la propriété de la chose soit transmise à la "personne de l'acquéreur par le seul consentement de lui transférer, néanmoins "l'effet de cette règle *n'a strictement lieu qu'entre les parties contractantes*, "jusqu'à la délivrance réelle de la chose. Si le vendeur qui en est en possession "en transfère la propriété par un second contrat à une autre personne qui en "obtienne la possession avant le premier acquéreur, le second acquéreur sera "considéré comme en étant propriétaire, pourvu que le contrat ait été fait de "bonne foi de sa part, et sans avoir eu connaissance du premier contrat."

En comparant cet article avec celui suggéré par les commissaires, l'on trouve dans les deux, précisément la même règle :—L'article 1916 veut *qu'à l'égard des effets mobiliers, la règle, que la propriété de la chose est transmise par le seul consentement, n'a strictement lieu qu'entre les parties contractantes*, et l'article 46 des commissaires, que cette règle s'applique *aussi bien aux tiers qu'aux parties contractantes dans les contrats pour le transport des immeubles* et non quant aux meubles, précisément comme dans l'article 1916.

De cette règle découle cette autre, enseignée par Bourjon, Pothier, Troplong et Toullier, (*loc. cit.*) et que l'on trouve dans le Code de la Louisiane :

Art. 1917. "De la même manière, si une chose mobilière a été aliénée par "contrat, mais n'a pas été délivrée, elle sera sujette à être saisie-exécutée, ou "arrêtée entre les mains du vendeur par ses créanciers."

C'est donc cette règle que les commissaires ont voulu adopter et qu'ils ont entendu suivre.

Mais ici se présente une autre difficulté. L'art. 46 suggéré par les Commissaires, a été adopté sans amendement par la législature. (*Voir* 29 *Vict.*, *ch.* 41, *Cédule*, *Résolution* 5e.) Cependant par la transposition du mot "sauf" dans le texte officiel du Code, l'on a donné au premier paragraphe de l'art. 1027, un sens différent de celui qu'il avait dans le projet des Commissaires sanctionné par acte du parlement.

Ce 1er paragraphe de l'art. 1027, se lit maintenant comme suit :

1027.—"Les règles contenues dans les deux articles qui précèdent s'appli-"quent aussi bien aux tiers qu'aux parties contractantes, sauf dans le contrat "pour le transport des immeubles, les dispositions particulières contenues dans "ce Code quant à l'enrégistrement des droits réels."

Dans le projet le consentement ne transférait la propriété à l'acquéreur sans tradition à l'égard des tiers que dans les aliénations d'immeubles. Maintenant cette propriété est transférée même à l'égard des tiers soit qu'il s'agisse de l'aliénation de meubles ou d'immeubles.

Nous ne pouvons supposer qu'un changement qui à première vue paraît si important soit dû à une erreur cléricale, d'autant plus que nous trouvons la même transposition du mot "subject" dans la version anglaise, et nous n'avons

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pas le droit de le faire. Nous croyons au contraire qu'il a été fait par les Commissaires en co-ordonnant les différentes dispositions touchant le sujet auquel il refère, et qu'il a été fait après mûre délibération. Et comme les Commissaires ne pouvaient faire dans les amendements adoptés par la législature que des changements de forme ou d'expression sans en altérer l'effet ou la substance, (29 Vict., c. 41, sect. 2), nous croyons que les Commissaires n'ont fait que corriger un vice de rédaction sans aucunement altérer le sens ni la portée du principe que la législature avait consacré.

La rédaction du projet des commissaires était défectueuse en ce qu'elle établissait une distinction à l'égard des tiers, entre l'effet de la vente d'un meuble et celle d'un immeuble, lorsque ni l'une ni l'autre n'était suivie de tradition. Ce n'est pas là ce qu'ils entendaient faire. Ils voulaient au contraire adopter le principe que la vente est parfaite et transfert le domaine de propriété par le seul consentement des parties, sans le secours de la tradition, mais en même temps ils voulaient dans l'intérêt des tiers restreindre cette règle dans certains cas, ainsi qu'ils le déclarent dans leur rapport, p. 14.

L'article tel que soumis à la législature n'atteignait pas ce double but. Il protégeait bien l'intérêt des tiers soit qu'ils fussent acquéreurs subséquents ou seulement créanciers saisissants, puisqu'à l'égard des tiers la vente de meubles sans tradition ne transférait pas la propriété. Mais à raison de cela même il excluait de la règle générale une foule de cas non compris dans le second paragraphe de l'article et rendait ce second paragraphe tout à fait inutile. Si en effet la première vente faite sans tradition n'avait conféré aucun droit de propriété à l'acquéreur à l'égard des tiers, il était inutile et même contradictoire de dire dans le second paragraphe que le second acquéreur mis en possession, en demeurerait propriétaire *s'il était de bonne foi*. Pourquoi exiger cette *bonne foi* si le premier acquéreur n'avait acquis aucun droit de propriété? Il ne pouvait revendiquer la chose contre ce second acquéreur, ni contre tout autre possesseur, puisque d'après la première partie de l'article la vente sans tradition ne l'avait pas rendu propriétaire à l'égard des tiers.

C'est pour faire disparaître cette contradiction entre la première et la seconde partie de l'article et rétablir tant à l'égard des meubles que des immeubles, la règle qu'ils avaient posée dans leur rapport d'une manière générale, que la vente sans le secours de la tradition transférait le domaine de propriété même à l'égard des tiers, mais toujours sous les modifications apportées par l'enrégistrement des droits réels quant aux immeubles, et quant aux meubles à la préférence accordée à ceux qui de bonne foi en auraient obtenu la possession.

En transposant le mot "sauf" les Commissaires n'ont pas entendu restreindre les droits des tiers de bonne foi, qui pouvaient se prévaloir de leur possession pour repousser la demande en revendication de l'acquéreur qui n'avait pas eu de tradition, l'on a seulement voulu donner à cet acquéreur le droit de revendication contre ceux que le second paragraphe de l'article ne protégeait pas, tel qu'un acquéreur de mauvaise foi, un possesseur sans titre, etc. En un mot l'on a voulu donner à l'acquéreur qui n'avait pas eu de tradition, un droit d'action en revendication contre tous ceux qui n'avaient pas obtenu par une possession de bonne foi, un meilleur titre que le sien.

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Le second paragraphe de l'art. 1027 n'exige pas que la personne mise la première en possession de la chose l'ait été à titre de vente ou autre titre translatif de propriété, pour exercer la préférence qu'il lui accorde. Il suffit qu'elle ait obtenu la possession de bonne foi à quelque titre qui lui confère des droits réels sur la chose. Ainsi le créancier-gagiste selon Demolombe, T. 24, No. 485. Larombière, sur l'art. 1141, No. 7 Troplong, Prescription, No. 1060. Idem. Nantissement, No. 72 et suiv. Zachariæ, T. 3, p. 169, et Durantón, T. 18, No. 533, peut opposer sa possession de bonne foi à la demande faite par l'acquéreur dont le titre est antérieur, mais qui n'aurait pas eu de tradition.

Larombière, (*loc. cit.*) dit que le preneur, le commodataire, l'emprunteur même, auront le même droit. C'est qu'en effet le principe est général. C'est la possession de bonne foi à quelque titre que ce puisse être qui donne droit à la préférence que l'article confère à la personne mise en possession.

Si McLeod, McNaughton et Léveillé, après avoir vendu leurs meubles à l'Intimé, les avaient cédé à titre de gage à un ou à plusieurs de leurs créanciers, ces créanciers qui en auraient été mis en possession à titre de gagistes, n'auraient-ils pas pu en se fondant sur les autorités citées, repousser la demande en revendication de l'Intimé? Maintenant si au lieu de faire cette cession aux créanciers eux-mêmes, ils l'avaient faite à l'appelant en sa qualité de syndic officiel agissant pour et au nom des créanciers, cette cession suivie de possession, qui aurait constitué les effets cédés le gage des créanciers, n'aurait-elle pas pu être opposée à l'Intimé, de la même manière que si elle avait été faite aux créanciers directement? Il nous est impossible de comprendre pourquoi il y aurait une différence entre l'effet que pourrait avoir l'une ou l'autre de ces cessions.

Mais l'on dira peut-être, ici il n'y a pas eu de cession. L'appelant a pris possession des effets qui avaient été vendus à l'Intimé, en vertu d'un bref compulsoire. Cela est vrai, mais il les a saisi en la possession des vendeurs et avant qu'ils les eussent livrés à l'Intimé, et cette saisie compulsoire a tous les effets aux yeux de la loi d'une cession volontaire. C'est la justice qui a mis l'appelant en possession des effets saisis, et cette dépossession forcée ne peut avoir moins de valeur que la possession que les faillis auraient pu donner volontairement à l'appelant. Il faut donc dire que l'appelant a eu le droit de prendre possession comme il l'a fait des meubles qui avaient été vendus à l'Intimé, mais dont il n'avait pas eu de tradition réelle.

Le principe que nous consacrons dans cette cause est de la plus haute importance. De tout temps il a été regardé comme la seule protection efficace contre les fraudes de toutes sortes qui se pratiquent journellement à l'encontre des créanciers au moyen de transactions secrètes, qui, à défaut de tradition réelle demeurent ignorées de ceux qui ont intérêt à les connaître.

Cette décision est non-seulement dans l'esprit de la législation moderne dont la tendance est de donner la plus grande publicité à toutes les transactions qui touchent à la transmission des propriétés, mais elle est de plus conforme à l'intention formellement exprimée et des Commissaires qui ont préparé le Code et de la législature qui a adopté leur suggestion.

Il reste une autre question à examiner.

L'acte du 14 mars contient-il une véritable vente, ou n'est-ce pas plutôt une vente simulée? N'a-t-il pas été fait pour donner à l'Intimé une garantie ou sûreté pour les billets qui s'obligeait d'endosser pour les vendeurs jusqu'à concurrence de $2,000. Nous trouvons ici des manufacturiers qui vendent des machines et ustensiles dont ils ont besoin pour continuer leur commerce à un Notaire qui n'en a aucun besoin, et qui de suite les loue pour trois ans à ceux qui les lui ont vendu. Ces meubles qui sont d'une grande valeur puisque les parties en ont estimé dans l'acte même une partie à $4,890, sont vendus moyennant l'obligation que contracte l'acquéreur d'endosser des billets au montant de $2,000 (de les endosser seulement et non pas de les payer,) et pour d'autres considérations dont il n'y a d'autres traces dans la procédure, que la déclaration vague qui en est faite dans l'acte même.

Ces meubles que sont sujets à une grande détérioration par l'usage et dont la valeur est de $5,000 à $6,000 et peut-être $10,000, sont loués pour $100 par année pour trois années. Ils ne rapporteront donc à leur prétendu propriétaire que de 1½ à 2½ pour cent, pour être rendus à l'expiration du bail diminués de moitié de leur valeur.

Cette transaction réunit tous les indices qui aident à découvrir la simulation. Bédarride, de la Fraude, T. 4, Nos. 1446 à 1457.

Ce n'est pas une vente réelle que les parties ont entendu faire. C'est un gage ou une sûreté mobilière que les prétendus vendeurs ont voulu donner à l'Intimé, et ce gage manque d'une condition essentielle pour lui donner quelque valeur, l'Intimé n'ayant jamais été mis en possession des effets qui devaient lui servir de garantie.

Code Civil, art. 1970.

La majorité de la Cour croit que la saisie faite par l'appelant en sa qualité de syndic est valable, et que la requête de l'Intimé aurait dû être renvoyée par la Cour Inférieure dont le jugement doit être infirmé avec dépens.

The following was the written judgment as recorded in the Registers of the Court:—

"The Court * * * considering that, notwithstanding the notarial *acte* in part recited in the petition in this matter by the respondent, presented to the Superior Court sitting in matters of insolvency at Montreal on the thirty-first day of August, one thousand eight hundred and seventy-seven, and therein designated as a deed of sale executed before J. S. Hunter, Notary, on the fourteenth day of March, one thousand eight hundred and seventy, purporting to transfer from Samuel McLeod, John McNaughton and Napoleon Leveillé, therein named, to the respondent the several articles of plant, material, furniture and effects therein enumerated, lying and being in and about the premises of the said McLeod, McNaughton and Leveillé, to a number of which articles values are severally affixed in said *acte*, amounting in the aggregate to four thousand eight hundred and ninety dollars, but to the remainder, constituting a considerable portion thereof, no values are affixed; and although by another notarial *acte*, executed on the same day, the respondent purports to have leased all the said property to the said McLeod, McNaughton and Leveillé, yet considering that the same remained in the actual possession of the said McLeod, McNaughton and

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Leveillé up to the nineteenth day of July, one thousand eight hundred and seventy-seven, when a writ of attachment in insolvency, under the provisions of the Insolvent Act of 1875, issued against the said McLeod, McNaughton and Leveillé, under and whereby the appellant, as assignee to their insolvency, took possession of and the said property vested in him as such assignee, and he was afterwards duly appointed assignee to their insolvent estates, and thenceforth continued to hold the said property until claimed by the respondent by his said petition, whereby priority of title and possession passed to and became vested in the appellant by preference over that pretended by the respondent in his said petition; and considering that in said *acte*, so purporting to be a deed of sale, no specific price is mentioned, and that the consideration therein mentioned is stated to be the nominal one of one dollar, and for other good and valuable consideration, without its appearing in what it consisted, and in further consideration that the said respondent should endorse the paper of the said McLeod, McNaughton and Leveillé for a sum not to exceed two thousand dollars, thereby giving to the said *acte* the complexion of a conveyance in security for endorsements, and no proof having been made of the giving of said endorsements; and considering that, notwithstanding the articles 1472, 1025 and 1027 of the Civil Code for Lower Canada, the said notarial *acte*, so executed on the fourteenth day of March, one thousand eight hundred and seventy-seven, must be held to be fraudulent and inoperative as against the creditors of the said McLeod, McNaughton and Leveillé, so represented by the appellant, and that a correct construction of said articles of the Civil Code cannot defeat the rights of the appellant to retain said property, and that in the judgment rendered on the said petition by the Superior Court at Montreal, on the fifth day of October, one thousand eight hundred and seventy-seven, from which the present appeal has been taken, there is error, the Court of Our Lady the Queen now here doth cancel, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the petition of the said respondent with costs as well in the Court below as on the present appeal."

The Honorable Justices Monk and Ramsay dissenting.

Trudel & Co., for appellant.

Davidson & Cushing, for respondents.

Judgment of S. C. reversed.

(S. B.)

COUR DE CIRCUIT, 1878.

MONTREAL, 13 SEPTEMBRE 1878.

Coram PAPINEAU, J.

Perrault vs. *Etienne, ès-qualité.*

JUGE:—Qu'une réclamation, quoique de sa nature dette de la communauté, peut être également exercée contre les héritiers personnels de la femme, nonobstant la renonciation par ces derniers à la communauté de biens.

Le demandeur, médecin, alléguait et établissait que l'épouse en secondes noces de Roch Thibault lui devait $70.75 pour services professionnels fournis à sa requisition, et qu'elle avait promis les payer; qu'elle était décédée, et

que par son testament elle avait léguée ses biens à son enfant mineur issu de son premier mariage ; que Joseph Etienne, élu tuteur à ce mineur, avait accepté pour lui les biens personnels de l'épouse décédée ; et le demandeur concluait à la condamnation du tuteur *ès-qualité*. Ce dernier répondit à l'action que l'épouse décédée était en communauté de biens avec Roch Thibault, que la dette réclamée était une charge de la communauté et une des charges du mariage ; que le défendeur *ès-qualité* ayant renoncé à la communauté par acte produit, le dit Roch Thibault était seul responsable de cette dette et le demandeur n'avait aucun recours contre la succession de l'épouse décédée.

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L'honorable juge en rendant le jugement, dit : Il n'y a pas de doute que cette dette est une charge de la communauté, mais aussi telle qu'établie elle est une dette naturelle à l'enfant, car à part le fait que la mère aurait requis les services du demandeur, il y a obligation naturelle des héritiers de cette dernière de payer cette réclamation. D'un côté je pourrais débouter l'action sauf recours afin de permettre au demandeur d'exercer les droits contre le mari, chef de la communauté, mais à quoi servirait cette action ? L'inventaire et la renonciation qui sont produites établissent que cette communauté ne valait rien ; je considère donc l'action bien intentée contre l'héritier de la femme et le demandeur doit avoir jugement.

Le demandeur a cité C. C. art. 1994 et 2003.
2 Bourjon p. 688. Louet & Brodeau.
Bacquet. Vol. 1, page 294.

A. W. Grenier, pour le demandeur.
Duhamel, Pagnuelo & Rainville, pour le défendeur.
(A. W. G.)

COUR DE CIRCUIT, 1874.

MONTRÉAL, 9 OCTOBRE 1874.

Coram TORRANCE, J.

Morin vs. *Lord et al.*

JUGE :—1o. Qu'un tierçon (*tierce*) d'huile est le tiers d'une pipe et contient de 42 à 63 gallons Winchester ou mesure de vin.

2o. Que l'inspecteur de poisson et des huiles de poisson a droit à un honoraire de 20 centins par chaque tierçon d'huile qu'il inspecte.

3o. Que la clause du Statut du Canada 36 Vict., chap. 47, sect. 4, statuant que le gallon impérial sera désormais l'unique étalon de mesure de capacité pour les liquides, ne s'applique pas au mesurage des tierçons.

La question soulevée dans cette cause ne manque pas d'importance pour les personnes engagées dans le commerce, et la décision qui a été rendue met fin à une difficulté qui aurait pu se renouveler tous les jours et qui a, paraît-il, causé beaucoup de trouble aux inspecteurs. Il s'agissait de décider quelle est la capacité d'un tierçon d'huile.

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Le demandeur, qui est inspecteur de poisson et des huiles de poisson pour Montréal, a droit, de par la loi, 37 Viet., chap. 45, sect. 68, à un honoraire de 20 centins par chaque tierçon et de 15 centins seulement par chaque quart ou baril d'huile qu'il inspecte. Dans un compte qu'il présenta aux défendeurs pour leur avoir inspecté une certaine quantité d'huile il faisait la différence entre les barils et les tierçons, chargeant 15 centins pour les premiers et 20 centins pour les derniers. Ceux-ci ne voulurent point reconnaître cette classification en barils et tierçons, mais prétendirent au contraire que c'étaient tous des barils et qu'ils ne devaient que 15 centins pour chaque item inspecté.

Le demandeur croyant sa prétention bien fondée, institua la présente action contre les défendeurs. Ces derniers plaidèrent que tous les items dénommés tierçons dans le compte produit, et pour lesquels on leur réclamait 20 centins, n'étaient pas des tierçons suivant l'usage et la coutume du commerce à Montréal, que les tierçons étaient chose inconnue et que, par conséquent, ils ne devaient que 15 centins pour chaque article inspecté.

Lors de la preuve et audition le demandeur établit que le tierçon était une mesure de capacité de 42 à 63 gallons Winchester ou mesure de vin, le tiers d'une pipe. Que la différence entre les barils et les tierçons, quoique n'ayant pas été généralement faite dans le commerce avant la passation de la loi d'inspection, n'en existait cependant pas moins, et était bien connue des personnes habituées à mesurer les liquides, que de plus elle était clairement établie dans tous les livres où ce sujet est traité.

Les défendeurs citèrent, à l'encontre de cette preuve, une loi passée en 1873 par la législature fédérale statuant que désormais le gallon impérial sera l'unique étalon de mesure de capacité pour les liquides. Or la mesure impériale est plus grande que la mesure Winchester, car il faut 6 gallons Winchester ou mesure de vin pour faire 5 gallons impériaux. Ainsi par l'interprétation qu'ils donnaient au Statut de 1873, les défendeurs voulaient établir que la capacité d'un tierçon est de 42 gallons impériaux et non de 42 gallons Winchester, que partant tous les items classés comme tierçons dans le compte du demandeur n'étaient que des barils parcequ'ils ne contenaient point 42 gallons impériaux.

La cour, après avoir délibéré, rendit jugement en faveur du demandeur. Elle fit remarquer qu'il avait été clairement prouvé par des témoins compétents que le tierçon est une mesure de capacité connue dans le commerce et contenant de 42 à 63 gallons Winchester. Que les dictionnaires et les arithmétiques nous enseignent la même chose. Que le Statut de 1873, (36 Viet., chap. 47, sect. 4) cité par les défendeurs ne s'applique pas à la présente cause, parceque le tierçon ancienne mesure française est le tiers d'une pipe qui est une autre vieille mesure française. Or la pipe qui contient 126 gallons Winchester est égale à 105 gallons impériaux. Le tiers de 105 gallons n'est que 35 gallons. Le tierçon ne serait donc plus le tiers d'une pipe s'il devait contenir 42 gallons impériaux. Pour ces raisons le demandeur doit avoir jugement.

N. Durand, pour le demandeur.

Kerr, Lambe & Carter, pour les défendeurs.

(N. D.)

COURT OF QUEEN'S BENCH, 1877.

MONTRÉAL, 22ND DECEMBER, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J.

No. 37.

DAME EMMA L. GUY ET AL.,

APPELLANTS;

AND

MICHEL P. GUY ET AL.,

RESPONDENTS.

HELD:—That land purchased by the *grevé de substitution* with monies arising out of the redemption of a constituted rent which belongs to the substitution, takes the place in all respects of the constituted rent, so much so, that the *appelés* to the substitution have a right to the land or its value, and not merely to the value of the constituted rent.

This was an appeal from a judgment rendered by the Superior Court at Montreal (RAINVILLE, J.), on the 30th of September, 1876, as follows:—

"La cour, après avoir entendu les parties contradictoirement, tant sur la défense en droit qu'au mérite, par leurs conseils respectifs, avoir examiné la procédure, les pièces produites et avoir délibéré, déclare la dite défense en droit mal fondée et en déboute les défendeurs. Attendu que feu Etienne Guy, père, par son testament du 12 décembre 1820, a institué son épouse, Dame Catherine Vallée, sa légataire universelle en usufruit et substitua le dit usufruit à ses trois enfants, Etienne, Hélène et Michel Patrice, avec la condition qu'à la mort de l'un d'eux sans enfants, sa part d'usufruit appartiendrait aux survivants; attendu que la dite Catherine Vallée est décédée, ainsi que le dit Etienne Guy, fils, ce dernier, sans descendant; attendu que lors du décès du dit Etienne Guy, père, il existait parmi les biens de sa succession, des rentes constituées, savoir, une rente constituée de $72 par an, au capital de $1200 courant, due par un nommé Alexander Hardie et créée sur l'immeuble suivant; "Un terrain divisé en trois emplacements, situé au faubourg St. Antoine, dans la cité de Montréal, de la contenance de 160 pieds de front sur 205 pieds de profondeur, tous contigus les uns aux autres, tenant par devant à la continuation de la rue St. Antoine, par derrière aux terrains d'Etienne Guimond, d'un côté au nord-est à Charles Lusignan, et d'autre côté à la rue Guy, sans bâtiments dessus construits,"—et une autre rente constituée de $24 courant, au capital de $400 courant, due par un nommé Charles Porteous et créée par l'acte du 6 février 1815, Delisle, notaire, sur l'immeuble suivant: "Un terrain situé en la cité de Montréal, dans le faubourg St. Antoine, de la contenance de 80 pieds de front sur 160 pieds de profondeur, plus ou moins, tenant par devant à la rue Guy, par derrière à David Ross, écuier, joignant d'un côté au nord-ouest à Peter Harkness, sans bâtiments dessus construits;" attendu que par l'inventaire des biens de la succession de feu Etienne Guy, père, il est constaté que le dit Charles Porteous était débiteur de £5 7s. 4d. pour arrérages de la dite rente lors du décès du dit Guy, père; attendu que par le jugement obtenu par la dite Catherine Vallée contre la succession du dit Charles Porteous, il est constaté que le montant accordé par le dit jugement comprenait la dite somme de £5 7s. 4d.: attendu que les dits

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immeubles ont été vendus en exécution des jugements que la dite Dame Catherine Vallée avait obtenus contre les dits Porteous et Hardie, et qu'elle s'en est rendue adjudicataire, en sa qualité de légataire universelle en usufruit et grevée de substitution, des dites rentes constituées; attendu que les dits immeubles ont été acquis en grande partie avec les deniers appartenants à la dite substitution; attendu que la dite Dame Catherine Vallée a toujours regardé les dits immeubles comme faisant partie des biens sujets à son usufruit et grevés de substitution en faveur de ses enfants et petits enfants; attendu que par l'acte de partage du 26 octobre 1831 fait entre Etienne Guy, fils, Michel Patrice et Hélène Guy, les dits deux immeubles ont été considérés comme faisant parties des biens grevés de substitution et sujets à l'usufruit des dits co-partageants, et ont de fait été soumis au partage comme tels; attendu que les dits deux immeubles sont échus par le dit partage au dit feu Etienne Guy, fils;

"Déclare les dits deux immeubles grevés de substitution et sujets à l'usufruit les demandeurs, comme enfants du dit Etienne Guy, père, et condamne les défendeurs ès-qualités à rendre, remettre et livrer la possession et jouissance des dits deux immeubles, sous quinze jours de la signification du présent jugement, sinon à en payer la valeur, et déboute les défendeurs de leurs exceptions, sauf celle réclamant les impenses et améliorations alléguées avoir été faites sur les dits immeubles, la valeur des dits immeubles à être établie par experts nommés suivant la loi, lesquels experts devront constater la plus grande valeur donnée aux dits immeubles par les dites impenses et améliorations."

In pronouncing judgment, the learned judge referred to the following authority, as the best exponent of the doctrine embodied in the judgment:—

Pothier, Substitutions, page 530:

"Les choses qui tiennent lieu au grevé de celles qui étaient comprises en la substitution, et qui ont cessé de l'être, sont comprises à leur place en la substitution; tels sont: 1o. les héritages et rentes qui ont été acquis pour emploi, tant des deniers comptants trouvés en la succession de l'auteur de la substitution, que de ceux reçus des débiteurs de la dite succession, ou provenus de la vente des effets mobiliers; ces héritages et rentes sont compris en la substitution, en la place des dits deniers comptants et effets mobiliers qui cessent d'y être compris au moyen de leur conversion dans les dits héritages ou rentes dans lesquels l'emploi a été fait; mais le grevé ne serait pas recevable à vouloir retenir les dits héritages ou rentes en offrant les sommes dont ils sont l'emploi; car, au moyen de l'emploi, ce ne sont plus les sommes qui sont comprises en la substitution, ce sont les dits héritages ou rentes.

"2o. Telles sont les sommes que l'héritier grevé a reçu pour le prix de l'aliénation comprise en la substitution, comme pour le prix d'une licitation ou de vente d'un héritage qu'on a été forcé de faire par des ordres supérieurs, pour quelque cause d'utilité publique, ou pour le prix du rachat d'une rente rachetable, ou pour le remboursement du prix d'un office qui a été supprimé, ou qu'on a été obligé de vendre. En tous ces cas, les rentes cessant d'être comprises en la substitution par leur rachat et extinction, les offices par leur suppression ou aliénation, les héritages par l'aliénation nécessaire qui en a été faite; les sommes reçues pour le prix des dites rentes, offices ou héritages, y sont comprises en leur place, mais elles n'y sont comprises que jusqu'à ce qu'il en ait été fait

emploi en héritages ou rentes, auquel cas ce sont ces héritages ou rentes dans lesquels l'emploi a été fait qui y sont compris en leur place." Guy et al. and Guy et al.

The Court of Appeal unanimously concurred in the legal propositions enunciated in the judgment appealed from, but was of opinion that one of the lots referred to in the judgment was not proved to have been purchased with the monies of the substitution, and therefore reformed the judgment as respects that lot.

Doutre & Co. for appellants. Judgment of S. C. reformed.
Strachan Bethune, Q.C., counsel.
Loranger & Co., for respondents.
L. A. Jetté, counsel.
(S. B.)

PRIVY COUNCIL, 1875.

9TH MARCH, 1875.

Coram SIR JAMES W. COLVILE, Lord Justice JAMES, Lord Justice MELLISH and SIR MONTAGUE E. SMITH.

JOHN WHYTE, APPELLANT;

AND

THE WESTERN ASSURANCE COMPANY, RESPONDENT.

HELD:—1. That where a policy of fire insurance has been transferred in trust, and a condition of the policy requires that the assignor shall in such case make and furnish the necessary proofs in support of the claim for loss before the same shall be recognized and payable, the making and furnishing of such proofs by the assignor and not by the assignee is a condition precedent to the right by the assignee to recover the amount of the loss.

2. That where a condition of a fire policy requires the making and furnishing of proofs of loss within a specified time, and declares that, until they are furnished, the loss shall not be payable, the delay is a material part of the condition, and, consequently, (in the absence of waiver) the assured cannot recover unless he sends in the proper proofs within the prescribed delay.

3. The mere silence of the company, with regard to proofs sent in after the delay prescribed by the condition of the policy, does not amount to a waiver of the condition by the company, nor does the declaration by the company at that time that it did not consider itself liable amount to a waiver by the company of the benefit of the condition.

PER CURIAM:—This is an Appeal from a judgment of the Court of Queen's Bench in Canada, affirming a judgment of the Superior Court. The action was on a policy of insurance against fire, brought in the name of Whyte, who was an official assignee of the effects of Davies, who was an insolvent, and who claimed as the assignee of the policy from one Clarke. There were pleas raising several defences, and, according to the practice of the Court in Canada, the Court settled a number of questions on points of fact which were put to the jury at the trial, and their answers are before their Lordships.

After the trial a motion was made both by the plaintiff and by the defendants to have judgment entered for them respectively upon the findings. There was also an application made on the part of the plaintiff for a new trial on the ground of mis-direction of the judge on certain points which arose during the trial. The Court ordered judgment to be entered for the defendants on several grounds, and refused a new trial, and that judgment was affirmed by

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the Court of Queen's Bench, though there was a difference of opinion among the judges.

Now the question that we have heard argued has been the question whether there ought to be a new trial on the ground of the misdirection of the judge during the trial, because it is admitted on the part of the plaintiff that there is one defence which on the findings is properly found for the defendants; and that depended upon a condition in the policy as to the proofs which were to be made after the fire, before the action could be brought, and that was the ninth condition in the policy, which was in these words,—"All persons assured by this "Company, and sustaining loss or damage by fire, are to give immediate notice "thereof to the secretary or manager of the Company, or to the agent of the "Company, should there be one acting for it in the neighborhood of the "place where such fire took place, and shall within 30 days after such loss or "damage deliver to the secretary or manager or to the agent of the Company as "aforesaid, a full and detailed account of such loss or damage, signed with their "own hands, and verified by their oath or affirmation; they shall also declare on "oath or affirmation whether any or what other assurance has been made on "the same property, what was the whole actual cash value of the subject assured, "and what their interest therein; in what general manner (as to trade, manu- "factory, merchandise, or otherwise,) the building assured, or the building con- "taining the subject assured and the several parts thereof, were occupied at the "time of the loss, and who were the occupants of such building; and when "and how the fire originated, so far as they know or believe; and, in case of "buildings, machinery, or other fixed property, they shall further accompany the "said statement by the affidavit of two builders, machinists, or other competent "persons acquainted with the premises preceding their destruction or damage, as "to the cash value of the same at the time of the fire, to the best of their "knowledge and belief; and also shall produce such other evidence as to any "loss or damage by fire as this Company or its agents may reasonably require. "They shall also produce a certificate within the said 30 days, under the hand "and seal of a magistrate or notary public most contiguous to the place of the "fire, and not concerned in the loss, stating that he has examined the circum- "stances attending the fire, loss or damage alleged, and that he is well acquaint- "ed with the character and circumstances of the claimant, and verily believes "that he, she, or they have, by misfortune, and without fraud or evil practice, "sustained loss and damage on the subject assured to the amount which the "magistrate or notary public shall certify; and, whenever required in writing, "the assured or person claiming shall produce and exhibit his books of account, "invoices, or certified duplicates thereof where the originals are lost, and other "vouchers to the assurers or their agents, in support of his claim, and permit "extracts and copies thereof to be made; and until such proofs, declarations, "and certificates are produced, the loss shall not be payable; and if there appears "any fraud or false swearing in the proofs, declarations, or certificates, the "assured shall forfeit all claim under this policy." Then further on it says: "—"And in case this policy should be assigned in trust or as collateral security, "when loss or damage arises it shall be the duty of the assignor to make and

"furnish the necessary proofs in support of the claim before the same shall be "be recognized and payable."

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Now, after the fire had taken place, and within a short time afterwards, namely, on the 30th of June, 1870, Mr. Whyte sent in a claim,—therefore, he so far complied with the conditions; and afterwards he sent in a certificate of a notary public, and no defence is raised on account of any defect in that. But nothing more was sent in within the 30 days. After the 30 days were over—somewhere between the 1st and the 5th of August—he sent in a valuation, which was signed by two builders and two blacksmiths, and a manager, but it was not on oath or affirmation. He probably sent in some additional voucher, though what precisely it was does not appear on the evidence; and then he wrote this letter, addressed to the agents of the defendants,—"Dear Sirs, I have not received from you any request for additional vouchers in support of my claim made upon the 'Western' Insurance Company, in the matter of the loss by fire at the Dominion Glass Works on the night of the 9th and 10th June last, but as I am furnishing the other companies with an additional voucher, I do also in this case. I hope the proofs and vouchers will be considered satisfactory, and will be glad to hear from you to that effect." That was signed "John Whyte, Assignee." To that letter the Company sent no answer at all.

Then, on the 24th of August, 1870, Whyte writes them another letter,—"Would you allow me to remind you that 60 days have elapsed since my proof was furnished you of loss, under Policy No. 65,971, transferred to me by H. J. Clarke, Esq., and to request a settlement. You can understand that, as assignee, I am expected to be diligent, and that creditors will look for an early distribution. I would, therefore, feel obliged by a speedy liquidation of the claim.—Yours very respectfully, John Whyte, Assignee." To that an answer was sent on the 31st of August,—"Dear Sir, In answer to your note of 24th inst., requesting a settlement of your claim as assignee of the estate [of] Davies, under Policy No. 65,971, transferred to you by H. J. Clarke, Esq., we have to inform you that the Company consider that they are not liable for any loss referred to in the claim you have made under said policy, and decline paying it."

There are two misdirections which, it is alleged, the judge made at the trial; first, that he told the jury that Clarke was the person who ought to have sent in an affidavit as to his interest under the policy, and how the loss occurred; and, secondly, that, though he left it to the jury to say whether there had been any waiver of strict compliance with the conditions, yet that he told the jury that the Court could not see any evidence of such waiver; and it is said that there was misdirection in those respects.

To the first it was answered that the direction is quite right; that Clarke was the proper person to make the affidavit, and, even if that were wrong, still it was wholly immaterial, because it was plain that even if Whyte were the person to make the claim and send in the affidavit, he had not sent in the proper proofs within the proper time.

Now with reference to the question whether Clarke was the proper person to

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make the claim and make the affidavit, it is necessary to consider what the position of Clarke was with reference to Davies. Davies was a man apparently of no means, but he had entered into a contract for the purchase of this property, for the purpose of establishing some glass works. A few days after he had purchased it, he executed a deed, which unquestionably on the face of it was an absolute conveyance, in which, in consideration of the sum of $10,000, he purported to convey the property absolutely to Clarke. On the same day, there was what on the face of it was a mortgage from Davies to Clarke's wife, which appears to have been executed with Clarke's consent. Then afterwards, in the month of October, there was an absolute assignment of the plant and machinery on the premises, by Davies to Clarke, in consideration of another sum, with an agreement that it would be re-sold on paying the sum of $10,000. After Davies's failure, Clarke appears to have executed an assignment, with the consent of the Company, of the policy to Whyte, by which he purported to assign it to Whyte; and, previous to that assignment, or contemporaneous with it (for it does not very clearly appear which), he wrote a letter of the 19th April, 1870, to Whyte, in which he says,—"Sir, As you are aware, I hold policies of insurance on the building, "plant, tools, &c., of the Dominion Glass Works, covering, to a certain extent, "my mortgage on the buildings, &c., and also on the plant, tools, &c., mine by "bill of sale. Now that the concern has broken down, I think it right that "the policies in question should be transferred to you, as assignee to the estate; "for this reason I desire that, in case of accident, all the unsecured creditors "should share alike, and indeed it is my intention, no matter what may be the "result of Davies's efforts to obtain a settlement with his creditors, to cast aside "all advantages in my favour, as far as securities are concerned, and to take my "chance as an ordinary creditor, as I am well aware that many of the creditors "were encouraged to trust Davies because of their being told that I had a large "amount invested in it. I want them and you to understand that I can better "afford to be looked upon as a fool in business matters, than to be viewed by "my fellow-sufferers as a selfish speculator, who, secured himself, induced or "encouraged them to risk their money or goods without security. I will, "therefore, as soon as you are ready to accept the same, transfer to you all the "insurance which I hold, for the benefit of the unsecured creditors of the "estate, not including claims for Davies's debts outside of his glass business. "*It must be perfectly understood that the insurance in question is transferred "for the benefit of the unsecured creditors, and more especially for the benefit "of the Messrs. Shaw, W. P. Bartley and Co., Mathieu De Beaufort, Mc-"Mann, McCready, Abjon, Devany and Co., Johnston, Robinson, Brogan, "Harvey, Hill, Hynes, Hall, Watkins, Guy and Co., Jordan and Benard, "Smith and McLynn and myself.* I wish it to be distinctly understood that I "do not intend, nor will I consent, that any part or portion of the insurance "thus to be transferred shall be taken as covering or in any way whatever "securing *Molson's claim*, or certain pretended mortgages and other *claims of "Mulholland and Baker*, nor those of certain workmen claiming wages, because "Mulholland and Baker received all the glass that was ever manufactured by "Davies up to the Saturday when they refused to pay the workmen's wages,

"which they were bound to do, and to my own knowledge, with the exception "of the amount due [to] them by that last pay list, the whole of the men were "far overpaid for all the time they worked for Davies. *The above express con-"ditions and stipulations understood and agreed to, I will transfer the insur-"ance in question to you, as official assignee in the matter of Richard Davies "(Clarke and Co.) for the benefit of the creditors above mentioned*, whenever "you are ready to accept such transfer, and *I shall consider your acceptance "of the transfer as being an acceptance of the conditions and stipulations "above set forth, without exception.*" It is quite plain that if that letter is the letter which states the terms on which Clarke assigned the policy to Whyte, it was not assigned to him for the equal benefit of all the creditors of Davies, but was assigned to him for the benefit of Clarke himself and certain particular creditors.

It is true that a question was asked the jury—"Was the assignment of the "said policy from Henry J. Clarke to the plaintiff executed as alleged in "plaintiff's declaration, and acceded to and approved by the defendants as "therein also averred, or was the said transfer made to the plaintiff for the "benefit only of the parties mentioned in defendant's first plea, and in a letter "bearing date the 19th day of April, 1870, and was said letter written by the "said Henry J. Clarke to the plaintiff and received by the latter?" The answer is,—"Policy was assigned as alleged, and approved by the defendants, "and was for the benefit of the creditors generally, Clarke's letter as to dis-"tribution having no binding effect on assignee." It is to be observed the jury do not find that the letter was not written and sent, but all they find is that Clarke's letter as to distribution had no binding effect on the assignee.

It appears to their Lordships that this is merely an answer as to what is really a question of law. Whatever answer the jury gave on questions of fact which are put to them, the Court would be bound by, subject, of course, to this: that if the answer was not satisfactory the Court might order a new trial. But it appears to their Lordships that if the jury in answering a question really only give an answer which is an answer to a question of law, and not an answer to a question of fact at all, the Court in giving their judgment, and entering the verdict according to the findings of the jury, are to decide the question according to the correct decision in point of law, and not according to any erroneous statement or findings of the jury in that respect.

Therefore, it appears to their Lordships, notwithstanding that finding, this really was an assignment by Clarke to Whyte, on trust for the benefit of Clarke himself and the other particular creditors mentioned in that letter.

There is a considerable question, whether Clarke is to be treated as mortgagee or as the actual owner under the bill of sale which he took. It appears to their Lordships unnecessary to decide that question, because, whether he was owner or whether he was mortgagee, he was unquestionably the absolute owner of the policy of insurance. It is not contended that the policy of insurance was made on account of Davies, or that Davies had any interest in it. Neither was there any consideration given by Whyte for the assignment of the policy by Clarke to Whyte, and it therefore follows that this being in the nature merely of

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a gift, Clarke was perfectly entitled to say for what purposes and on trust for whom Whyte should hold the policy. Therefore their Lordships are of opinion that Whyte held the policy on trust for the persons mentioned in the letter by Clarke.

That being so, it necessarily follows that the case comes within the condition of the policy.—"In case this policy should be assigned in trust or as collateral "security, when loss or damage arises it shall be the duty of the assignor to "make and furnish the necessary proofs in support of the claim before the same "shall be recognized and payable." Therefore the judge, in their Lordships' opinion, was perfectly correct in saying that Clarke was the person to send in the proof.

The only other question is, assuming that the condition was not at all complied with, was there a waiver of the condition? The alleged waiver must arise either from the Company having sent no answer to the letter of the 5th of August, 1870, or else from the letter written by the Company of the 31st of August, 1870. With respect to not answering the letter of the 5th of August, 1870, that letter was not sent, nor were the proofs even by Whyte sent in until after the 30 days had elapsed; and their Lordships are clearly of opinion that the 30 days are a material part of the condition; so that unless there is a waiver, the assured cannot recover unless he sends in the proper proofs within 30 days. It was said, that although it was a condition precedent that the proofs should be sent in, yet the period of 30 days was not material; but if that were so, then there would be no time appointed at all within which the proofs were to be sent in, and the assured might wait one, two, or three, or four years before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the condition. And indeed the cases which have been referred to which have been decided in England,—the case of *Meeson* v. *Hardy*, and another case in 1 Ellis and Ellis,—are decisions by the Courts here that the time mentioned is an essential part of a condition of this kind, and that is affirmed by the clause which has been cited from the Code of Canada, by which, if by some impossibility the assured is prevented from sending in his proofs within the proper time, further time may be given to him. Therefore their Lordships think that it was essential that the proofs should be sent in within 30 days, unless that was waived.

That being so, their Lordships are also of opinion that the not answering a letter sending in proofs after the 30 days—the mere fact of not answering that letter—cannot possibly be a waiver of the not sending the proper proofs in, and not sending them in within proper time. Whether, if the proofs, or what appear to be and professed to be proofs, had been sent in within the 30 days, asking, as this letter does, whether those proofs were satisfactory,—whether in that case the not answering it, when if they had answered it possibly the assured might have sent in proper proofs in time, would be a waiver, it is not necessary to consider; but it appears to their Lordships that after the 30 days are over, and when the assured had a defence to the action, their not answering a letter cannot be sufficient to amount to a waiver. Their Lordships do not mean to say that there may not be a waiver after the 30 days are over. It is possible

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that if they did anything which misled the assured, or put him to expense, there might be a waiver after the time was over; but they are clearly of opinion that not answering this letter sent after the 30 days cannot of itself be sufficient.

Then with respect to the letter of the 31st of August, that was in answer to a letter of the 24th of August, in which Mr. Whyte says not only the 30 days have elapsed, but "would you allow me to remind you that 60 days have elapsed since proof was furnished." Therefore that was when more than 90 days had elapsed, and when the assured was alleging that he had performed all the conditions, and was entitled to recover, and when the time had long gone by. Then in answer to that the assurers say:—"We have to inform you that the "Company consider that they are not liable for any loss referred to in the claim "you have made under said policy, and decline paying it." If that letter also had been sent within the 30 days before the time had elapsed, or had been sent after the 30 days had been waived, and had been sent at a time when it was still possible for the assured to have sent in proper proofs, then it might well be said that the Company, by saying they are not liable for the loss, are not relying on the non-compliance with the sending in the proper proofs, but are relying on some defence on the merits respecting the fire itself. But when the time for the sending in the proofs has elapsed, merely writing to say they are not liable for the loss cannot in their Lordship's opinion amount to any waiver, because it is perfectly consistent with that that the Company are going to say that they are not liable for the loss referred to because the proper time for sending in the proofs has elapsed and the proofs have not been sent in.

Therefore their Lordships are of opinion that the direction of the judge was perfectly right on that part of the case, and that the verdict of the jury was right, and that the decision of the Court was correct; and therefore they will humbly advise Her Majesty that the Appeal be dismissed with costs.

(S.B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND DECEMBER, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

NOS. 110 & 111.

McDONELL,

APPELLANT;

AND

GOUNDRY,

RESPONDENT.

HELD:—That, notwithstanding a clause in a deed of sale of land, that the purchaser might at any time keep the whole or any part of the purchase money in his hands until the vendor should furnish him with a Registrar's certificate showing the property to be free and clear of all mortgages and incumbrances whatsoever, the purchaser, in an action for the recovery of a portion of the purchase money, will be condemned to pay, in the absence of such a certificate, when it is shown that he has in his hands a sufficient balance of the purchase money to meet any possible disturbance or trouble in his possession of the land sold.

The facts and circumstances which gave rise to the present appeal are sufficiently disclosed in the remarks of the Honorable Judges, in rendering the

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judgment which confirmed the judgment of the Court below—the Superior Court for the District of Beauharnois.

DORION, Ch. J., *dissentiens*:—On the 19th of October, 1867, the respondent sold to appellant a mill at Dewittville for $7,000, of which $2,800 was made payable by yearly instalments of $400 each.

These two actions are for the fifth and sixth instalments.

The appellant has pleaded that the deed of sale contained the following stipulation: "The purchaser shall have the right at any time to keep the "whole or any part of the balance payable to the said vendor until such time "as the said vendor has furnished to the said purchaser a certificate of the "Registry Office shewing that the property and buildings hereby sold are free "and clear of all mortgages and incumbrances whatsoever," and that part of the property sold belonged to James McArthur, who also had a right of way through the property sold to a portion of it which he had reserved.

The Court below admitted by its judgment that McArthur had a right of way through the property sold but gave judgment in favor of respondent, on the ground that appellant had still in his hands enough to protect himself from the trouble he might be exposed to.

The Judge *a quo* seems to have treated this as a case coming under the provisions of article 1535 of the Civil Code. The appellant did not, however, claim to retain the money demanded, by virtue of this article of the Code, but by virtue of the stipulation in the deed, which the Court has no power or discretion to modify. The appellant stipulated that, to protect himself, he should retain the whole of the purchase money, and not merely one instalment, until the respondent had furnished a registry certificate that there are no incumbrances, which it is admitted by the Court below he has not yet been able to procure.

The authorities seem to me to be clear on this point: Bunker and Carter, 5 L. C. Rep. 291; Lalonde & Lynch, Judgment S. C. 1873; 12 Dalloz, vo. Vente, p. 894; Sirey, 1812, 2, 391; 16 Duranton, No. 554; Sirey 1827, 2, 191; Rolland de Villargues, vo. Vente, No. 209.

I would reverse the Judgment, and would condemn the appellant to pay the interest only, with costs of the Circuit Court. The appellant is entitled to retain the principal, but not the interest, which represents the rents and issues which he enjoys. Sirey, 1812, 2, 281; Dallos R. P. 1832, 2, 160; 16 Duranton, No. 553; 2 Troplong, Vente. No. 611. *Contra* Dorion v. Hyde et vir, 10 L.C.J., 337.

MONK, J., also dissented. and stated that he entirely concurred in the remarks of the Chief Justice.

CROSS, J. Each of these actions is for an instalment of purchase money under a deed of sale from Goundry to McDonell of a mill property on the Chateauguay River. Previous instalments had been paid, and at the time of the institution of the suits there still remained instalments to fall due.

McDonell for his defence relies upon a clause in his deed which provides that he will have the right to keep the whole or any part of the balance until the vendor shall furnish him with a registrar's certificate shewing that the property is free and clear of all mortgages, dowers or other encumbrances.

He pleads that such certificate had not been furnished as promised, that part of the property, viz., a portion of an island included in the purchase, belonged to one McArthur, who had a right of way over the remainder to gain access to the portion belonging to him; therefore, he concluded for the dismissal of the action.

That he, McDonell, had been troubled in his possession by McArthur, who, was owner of part of the island and right of way over the remainder of it which were of great value to McDonell for a tail race and works, and without which he would not have made the purchase. So, reserving to himself the right to rescind the deed and get back his purchase money, he prayed that it might be declared he had been troubled and had reason to fear trouble, and that plaintiff's action be dismissed.

Goundry produced a registrar's certificate shewing that there were no charges against himself or his predecessor from 2nd May, 1863, downwards, thereby making out a *primâ facie* case of the property being free from incumbrances according to the terms of the deed.

McDonell produced a copy of McArthur's deed to Walker, of date 2nd May 1857, with registrar's certificate thereon.

McArthur was examined, who said he intended to institute an action for his rights to part of the island and right of way, but it did not appear that he had protested or made any formal demand in the matter up to that time.

The date of McArthur's sale to Walker, as already stated, was 2nd May, 1853; that of Walker to Goundry 6th May, 1857; Goundry to McDonell, 19th October 1867. McArthur's deed to Walker clearly excluded a small part of the island and reserved a right of way over the remainder.

The Court below dismissed McDonell's pleas, admitting that McDonell had cause to fear trouble in regard to the part of the island and right of way claimed by McArthur; but, considering that McDonell's right was to have security against this trouble, which security he had not demanded, and for which he had ample in his hands in the additional instalments remaining unpaid, they rejected his conclusions, and awarded the plaintiff Goundry judgment for the instalments he claimed.

It is from this judgment the present appeal has been taken.

It will not be denied that a convention for the retention of purchase money to the extent of incumbrances should have effect, but here the deficiency in quantity was not an incumbrance, it was a diminution of the thing sold which, if of sufficient importance, would have given the purchaser the option of rescinding the sale, and in any case gave him a right to a diminution of price, and, according to circumstances, compensation in damages, a recourse he has not sought by his pleas to these actions, and from which he is not precluded; in fact, he retains an ample guarantee in the future payments to indemnify him for this deficiency, which would appear to be of small value. His recourse seems clear to obtain such indemnity when he sees fit to make a claim for it.

The right of way admits of greater doubt as to whether it is an incumbrance, but it is evident that this servitude, if an incumbrance, is of inconsiderable

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value, it cannot be controlled by the vendor Goundry, and should, like the deficiency to which it is an accessory, be compensated by damages. It is not, in the opinion of the Court, a sufficient justification for the retention of the purchase money. The Judgment of the Superior Court will therefore be confirmed.

Archibald & McCormick, for appellant. Judgment of S. C. confirmed.
A. & W. *Robertson*, for respondent.
(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 28TH DECEMBER, 1877.

Coram MACKAY, J.

No. 2362.

The South Eastern R. W. Co. vs. *Lambkin* et al.

HELD:—That the penalty in a security bond, on an appeal to the Supreme Court, which stipulates that the penalty should become due and payable in case the appellant failed to prosecute his appeal and the judgment appealed, from be affirmed, cannot be recovered, when the appellant, after giving security, discontinues his appeal.

This was an action to recover the penalty stipulated to be paid by a bond given as security, on an appeal from the Court of Queen's Bench to the Supreme Court.

The bond stipulated, that the penalty should become due and payable if the appellant failed to prosecute his appeal, and if the judgment in appeal should be affirmed.

Shortly after the appeal was instituted, it was discontinued, and the present suit was brought, in consequence, to recover the penalty mentioned in the bond.

The defendants pleaded that the penalty was not incurred, and offered to pay $18.10 for costs incurred.

After hearing the parties the Court rendered the following judgment:

"Considering that section 39 of 38 Vic. cap. xi. controls this case, no affirmance having been of the judgment appealed from by said Philo Lambkin to the Supreme Court, but his appeal having been discontinued;

"Considering that defendants at the time of the institution of this action were not indebted to plaintiffs as claimed, but only as the defendants have admitted, and that, under the circumstances, this suit might have been brought in the Circuit Court; doth adjudge and condemn the said defendants jointly and severally to pay and satisfy to said plaintiffs the sums of $14 and $4.10 offered, making together the sum of $18.10 currency, with interest thereon from the 4th of October, 1877, day of service of process, until paid, with costs of the Circuit Court up to and including plea pleaded *distraits* to Messrs. Bethune & Bethune, attorneys for plaintiffs, and costs of this Court since plea pleaded against plaintiffs in favour of defendants, *distraits* to Messrs. Doutre, Doutre, Robidoux, Hutchinson & Walker, their attorneys."

Bethune & Bethune, for plaintiffs. Judgment for defendants.
Doutre & Co., for defendants.
(S. B.)

SUPERIOR COURT, 1878.

MONTREAL, 9TH SEPTEMBER, 1878.

Coram RAINVILLE, J.

No. 820.

Knox vs. *Lafleur et al.*

HELD:—1. That a party has not the right to examine his adversary *sur faits et articles* before trial.

2. When a case has been *recently* inscribed for *enquête* and hearing, though the issues and articulations have been completed some months before, and a party has, two days before the day fixed for trial by the inscription, served for the said day of trial an order for *faits et articles* upon the attorney of his absent adversary, he is still in proper time.

3. That the words "without retarding either trial or judgment," in C. P. C. 221, mean "so long as the right is used without, in the opinion of the Court, evident intent to retard, etc." And therefore when the application is made as above, without in the opinion of the Court such manifest intent, the exercise of the right will be allowed, although the practical effect is to retard the trial.

4. When the attorney of an absent party, upon whom an order for *faits et articles* has been served, declares the residence of his client and his option to have him examined upon *commission rogatoire* there, such commission will be at the diligence and expense of the party submitting the interrogatories, and will be conditioned returnable within a fixed delay.

Plaintiff, described as residing at Ryde in England, sued defendants for a large sum, balance of *prix de vente*.

Plea, an alleged agreement by plaintiff in person in England with an agent of defendants (named Cureau) for an extension of term of payment. Answer, general.

After completion of articulations of facts, plaintiff obtained a *commission rogatoire* to England to prove some points necessary to his case, and called upon defendants to join in said commission if they required evidence thence. This they failed to do.

Upon the return of the commission, the plaintiff, under Art. 243 C. P. C., filed, on 16th August, 1878, option for *enquête* and hearing at the same time, and also inscribed the case for 9th September, the earliest possible date allowing the required 8 days' notice after vacation ended. On 6th Sept., defendants obtained an order *sur faits et articles* to be answered by plaintiff, returnable on the day fixed for trial, and served it on his attorney. (C. P. C. 223.)

When the case was called from the roll defendants presented their order, but had no witnesses in attendance.

Ramsay, for plaintiff, objected to any entry being made upon the order, as having been taken too late, and being for the purpose of delay only, in support of which latter ground he filed affidavits denying the alleged agreement by plaintiff, and stating that some of the defendants had admitted it to be a fabrication, and the taking of the order for *faits et articles* to be for delay. He cited C. P. C. 221: "The parties to any suit may at any time during the trial, and *without retarding either trial or judgment*, be examined upon articulated facts, etc." The defendants might have examined the plaintiff under the *commission rogatoire* issued, or caused another of their own to issue for that purpose. They knew that a *commission rogatoire* would be required to examine him if his testimony was wanted, as he is designated as of Ryde, England, and they

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should have moved for such *commission rogatoire* within four days from the option for *enquête* and hearing. C. P. C. 308. If they really believed their own plea they would surely examine Carean in England, or have him here, which they have not done.

Robidoux, for defendants:—The defendants are in proper time with their order. If they had taken it sooner, they would have been too soon, and it might have been rejected. Under C. P. C. 221, the time for examination by a party of his adversary is "at any time during the trial," and not sooner. The trial is only set to commence this day, and this is therefore the earliest day for which defendants could summon plaintiff to answer. Under the old system of lengthened *enquêtes*, for which C. P. C. 221 was doubtless drawn, the provision that the examination should be "without retarding either trial or judgment" would be just, but when applied to the new system, the fact that this is the very first day of trial must be held to control the words "without retarding, etc."

If the case had been inscribed before and continued over, the position might be different. But there is nothing in the proceedings to justify plaintiff's suspicions and charges of factious delay. The affidavits filed cannot deprive the defendants of their right to their adversary's oath. Until the plaintiff's attorney makes the declaration under C. P. C. 223, defendants cannot issue a *commission rogatoire*, for plaintiff might choose to appear in person as he has right.

PER CURIAM. After consultation with some of my colleagues I decide that the application of defendants is in time. Such an examination of an adversary can only be "during the trial," "*pendant l'instruction.*" This case comes before the Court now on its first inscription made only a few days ago, and the application being made at an early date thereafter does not bear on its face such conclusive proof of intent to delay as would justify me in relying on the affidavits filed on behalf of plaintiff, and refusing to defendants their right to have their adversary's oath on the facts of their plea.

I consider the words "without retarding," etc., in C. P. C. 221, to be controlled by the attendant circumstances and subject to the discretion of the Court. If the Court gathers from the circumstances an intention to retard, the examination can justly be refused. But when the trial has not been prolonged by defendants, or continued over, as in this case, I do not think it intended that the defendants should be deprived of a right which, if the words "without retarding" are to be strictly construed, it would be physically impossible to exercise. That the matter is thus one for the discretion of the Court is laid down in *Carré & Chauveau* on the similar article 325 of the *Code Napoléon*.

I therefore allow the order to be filed and plaintiff to be called.

Ramsay then filed, under C. P. C. 223, a declaration of plaintiff's residence, and that he elected to have him examined on commission there. This, he contended, should be made returnable within a short fixed delay, and to be at the cost and diligence of defendants, for all the costs of such interrogatories have to be borne by the party submitting them. C. P. C. 232. If plaintiff elected to come to answer, he would be entitled to his expenses, C. P. C. 233, while the cost of the commission will be less. This is conformable to *Walters & Lyman*, 17 L. C. J. 246.

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Robidoux contended that under C. P. C. 398, if the party for his own convenience does not choose to come to the Court, it is his own duty to have a commission issued for the purpose of receiving his answers and saving himself from the effects of a default.

PER CURIAM. The examination under *commission rogatoire* must be at the diligence of the defendants. The examination of their adversary under *faits et articles* is a privilege granted them for which they by law bear all the costs. I continue the cause to 10th November, and give defendants leave to examine plaintiff under commission to be issued and returned at their cost and diligence within two months from this day.

R. A. Ramsay, for plaintiff.

Doutre, Doutre & Robidoux, for defendants.

(J. J. M.)

SUPERIOR COURT, 1878.

MONTREAL, 13TH NOVEMBER, 1878.

Coram JETTÉ, J.

No. 2013.

Beausoleil vs. *Bourgouin* et al., and *Bourgouin* et al., Opposants.

HELD:—That defendants, who have become insolvents under the Insolvent Act, cannot call on the plaintiff to admit or contest an opposition filed by them to an execution of a judgment recovered against them by the plaintiff, without giving security for costs.

PER CURIAM:—Les opposants demandent la nullité de la saisie pour irrégularités dans les procédés de l'huissier.

Le demandeur requis de déclarer s'il conteste cette opposition, demande que les opposants soient tenus préalablement de lui donner caution pour frais, attendu que depuis leur opposition ils ont été mis en faillite.

Acte 1875, Sec. 39.

La règle requérant le demandeur de déclarer s'il conteste l'opposition est en date du 14 octobre 1878.

La motion du demandeur pour cautionnement avant d'être tenu de contester, est en date du 18 octobre.

Les opposants prétendent qu'étant les défendeurs dans la cause ils ne sont pas tenus de donner ce cautionnement.

De plus, que la motion du demandeur est présentée trop tard, vû qu'elle aurait dû être faite dans les quatre jours après la cession de biens faite par les opposants.

Les opposants se trouvent ici dans le cas que je supposais tout à l'heure, dans la cause que je viens de juger (*Marais* vs. *Brodeur & Brodeur*). Ce sont des *faillis* qui veulent forcer le demandeur de continuer les procédures dans une instance pendante entre eux.

Il y a donc lieu de leur appliquer la disposition de la sec. 39 de l'acte de faillite, et puisqu'ils veulent *continuer* les procédés commencés et obliger le demandeur d'agir, celui-ci est bien fondé à leur demander un cautionnement.

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Mais on dit que cette demande est tardive, et qu'elle aurait dû être faite dans les quatre jours à compter de la *cession* des faillis.

La règle de pratique que l'on invoque n'a pas été faite pour le cas de faillite, et je ne vois pas qu'elle y soit applicable.

La sec. 39 de l'acte de 1875, dit que "si un failli fait émettre quelque bref, "ou institue ou continue quelque procédure d'une nature quelconque, il donnera "à la partie adverse tel cautionnement pour les frais, qui sera prescrit par la Cour "devant laquelle cette poursuite ou procédure est pendante, *avant que cette "partie ne soit tenue de comparaître ou plaider ou d'adopter toute autre pro- "cédure ultérieure dans la cause.*"

Ainsi, par le seul fait de la faillite, la partie devient *incapable* d'intenter une action ou de continuer une procédure d'une nature quelconque, à moins de donner cautionnement pour frais C'est la loi même qui prononce cette incapacité et qui, comme conséquence, déclare que la partie contre qui agit cet incapable n'est tenue ni de *comparaître*, ni de *répondre* à une telle demande.

Le demandeur dans l'espèce, n'était donc pas obligé de demander ce cautionnement des opposants. Tout ce qu'il avait à faire c'était de dénoncer au tribunal le fait de la faillite, et la procédure se trouvait suspendue par là même.

Or, cette dénonciation, il n'était tenue de la faire qu'en autant que l'on voulait l'obliger de procéder, et il l'a faite le jour même du retour de la *Règle*, savoir le 18 octobre, produisant à l'appui le bref en liquidation forcée, signifié aux opposants. Il demande ensuite par une motion produite le même jour à ne pas être tenu de contester l'opposition des faillis tant que ceux-ci ne lui auront pas donné cautionnement pour les frais.

La procédure du demandeur est donc parfaitement régulière, elle est faite en temps utile, et la motion doit être accordée avec dépens.

Motion for security of costs granted.

Geoffrion & Co., for plaintiff.

Loranger & Co., for defendants and opposants.

(S.B.)

SUPERIOR COURT, 1878.

MONTREAL, 30TH APRIL, 1878.

IN REVIEW.

Coram TORRANCE, J., DORION, J., PAPINEAU, J.

No. 194.

Thibodeau et al. vs. *Jasmin et al.*

INSOLVENT ACT, 1875—AFFIDAVIT FOR ATTACHMENT.

HELD:—That the affidavit for compulsory liquidation is sufficient if it follow the statutory form, and that it is not necessary for the plaintiffs to state in such affidavit what guarantees they hold for the payment of their claim.

TORRANCE, J. The defendant Gendron complains of a judgment rendered against him by the Superior Court (Richelieu) for $827. The proceedings

began by the issue of a writ of compulsory liquidation. The defendant makes five several objections to the judgment. 1st. He owed nothing personally to the plaintiffs, they having accepted of his co-partner Jasmin and discharged him. We do not find this proved. 2nd. He pleads that a composition was effected of 60 cents in the dollar with Jasmin for their indebtedness. 3rd. He objects that the affidavit under which the writ issued was null, as it omitted to state what guarantee was held by plaintiffs for their debt. There are several judgments of the Superior Court in which this objection was made and sustained, *inter alia*, *Barbeau* vs. *Larochelle et al.*, 3 Quebec Law Reports 31; but the judgment in that case was reversed in Appeal, and is reported at p. 189. 4th. Because more than three months had elapsed without plaintiffs taking proceedings, and this omission was in contravention of section 8 of the Insolvent Act of 1875. We think that the plaintiffs have well answered by alleging that their proceedings were taken under section 9, to which section 8 did not apply. On the whole case, the evidence does not sustain the pleas of the defendant, and the judgment complained of should be confirmed.

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Lareau, for plaintiffs.

Barthe, for defendant Gendron.

Judgment confirmed.

(J.K.)

COUR DU BANC DE LA REINE, 1877.

(EN APPEL.)

MONTRÉAL, 21 DÉCEMBRE, 1877.

Coram SIR A. A. DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 52.

WILLIAM B. SIMPSON ET AL.,

(*Défendeurs en Cour inférieure*),

APPELANTS;

ET

WILLIAM YUILE ET AL.,

(*Demandeurs en Cour inférieure*),

INTIMÉS.

JUGE:—1o. Que la vente, par encan public, des marchandises importées dont les entrées n'ont pas été faites à la douane, est nulle et ne confère aucun droit de propriété à l'adjudicataire, si elles n'ont pas été placées et gardées pendant un mois dans l'entrepôt de la douane, (*examining warehouse*), avant d'être mises à l'enchère. S.C. 31 Vict. chap. 6, Sect. 13, sous-sect. 4.

2o. Qu'un entreposeur (*warehouseman*) chez qui les marchandises sont déposées et qui donne au déposant un reçu d'entrepôt, est ensuite obligé de ne livrer les marchandises qu'au porteur et sur remise seulement de son reçu d'entrepôt.

3o. Que dans l'espèce la saisie-revendication, prise par l'adjudicataire des marchandises contre le percepteur de la douane qui les a vendues, et contre l'entreposeur qui en a la possession, sera déboutée avec dépens : 1o. quant au percepteur, qui a fait une vente nulle et illégale, et ne peut livrer des marchandises qu'il n'a jamais eu en sa possession ; 2o. quant à l'entreposeur, qui est tenu de ne les remettre qu'au porteur et sur remise seulement de son reçu d'entrepôt.

La présente action est une saisie-revendication de 172 paniers de flacons et de

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bouteilles, instituée le 17 juin 1875, contre les appelants William B. Simpson, percepteur de la douane à Montréal, et Louis Edouard Morin, entreposeur, par les Intimés William et David Yuile, pour se faire mettre en possession des bouteilles, ou à défaut de cela, s'en faire payer la valeur, $2,000.

Voici les faits qui ont donné naissance à cette cause.

Le 25 juin 1874, le *steamer* "Québec" arrivait d'Europe dans le port de Montréal. Parmi sa cargaison se trouvaient 173 paniers de flacons et de bouteilles importés par David A. Ansell, et qui furent déchargés sur le quai. Un de ces paniers fut transporté à l'entrepôt de la douane, *examining warehouse*, et les 172 autres traînèrent plusieurs jours sur le quai, gênant la circulation et causant beaucoup d'embarras. M. Rudolf, le maître du hâvre, pour obvier à ces inconvénients, fit transporter, le 3 juillet 1874, ces 172 paniers de flacons et de bouteilles aux entrepôts privés de l'appelant Morin où ils demeurèrent jusqu'au 14 avril 1875, sous le contrôle de Rudolf. C'est la première irrégularité qui a été commise, car trois jours après leur arrivée dans le port, ces marchandises devaient être mises dans les entrepôts de la douane, et si un mois après, les entrées n'étaient pas faites conformément à la loi, le percepteur pouvait alors les faire vendre par encan public.

Toutefois Ansell, ayant payé les frais dus aux commissaires du hâvre, obtint de Rudolf le 14 avril 1875 un ordre sur Morin pour prendre possession des bouteilles. Morin livra la marchandise à Ansell qui, au lieu de l'enlever, la laissa en entrepôt chez celui-ci et se fit donner un reçu d'entrepôt, *warehouse receipt*, pour une partie, savoir, 109 paniers.

Dans l'intervalle Simpson fait annoncer la vente des bouteilles en question comme marchandises non-réclamées, et le 26 mai 1875 les 172 paniers de flacons et de bouteilles sont vendus à l'enchère et adjugés à un employé de la douane, P. A. Mercier, à raison de $2.30 le panier, formant une somme totale de $395.60. Presqu'aussitôt arrive l'un des Intimés qui achète les bouteilles de Mercier et est accepté par les autorités de la douane comme l'acquéreur et fait le dépôt requis. Le lendemain les Messrs. Yuile paient à la douane la balance du prix de vente pour lequel on leur remet un compte fait et acquitté au nom de Mercier.

Lorsque la vente des 172 paniers de flacons et de bouteilles eut lieu, ils étaient encore dans les entrepôts de Morin. Un panier de flacons et un panier de bouteilles que ce dernier avait prêtés au percepteur servirent comme échantillons pour faire la vente. Et aussitôt après ils furent remis à Morin.

Dans l'avant-midi du 5 juin 1875, l'un des Intimés avec un employé de la douane se rendirent au bureau de Morin pour obtenir la livraison des bouteilles, et lui remirent à cet effet un ordre des autorités de la douane. Morin refusa péremptoirement et ajouta qu'il détenait les bouteilles en vertu d'un reçu d'entrepôt signé à l'ordre de David A. Ansell et qu'il ne les remettrait que sur la production de son reçu d'entrepôt. Ce reçu ne fut point produit, mais Barry, l'employé de la douane, saisit les bouteilles et dit à Yuile de les enlever. Ce jour étant un samedi, Yuile remit au lundi suivant l'enlèvement des bouteilles. Dans l'après-midi du même jour, le percepteur, qui avait reçu du département à Ottawa des instructions spéciales à ce sujet, fit avertir Morin de ne pas livrer les bouteilles.

Les Intimés instituèrent leur action contre les appelants le 17 juin 1875. Le lendemain David A. Ansell fit à la douane l'entrée des bouteilles comme les ayant importées, et il les laissa chez Morin où elles étaient encore lors de la saisie en cette cause. Simpson et al. Yuile et al.

Les Intimés n'invoquent dans leur action aucun titre d'acquisition mais disent simplement qu'ils sont propriétaires et possesseurs des bouteilles en question. A cette action les appelants plaidèrent séparément, M. Simpson par une dénégation générale; M. Morin par une défense spéciale et allégua :

Qu'il avait reçu les bouteilles en question d'un officier public, M. Rudolf, le maître du hâvre, sur l'ordre duquel il les avait transportées à David A. Ansell, pour qui il les gardait, en vertu d'un reçu d'entrepôt signé à son ordre. Qu'il était responsable des bouteilles comme entreposeur et non autrement.

Que l'ordre du percepteur en date du 26 mai 1875, de livrer les marchandises aux Intimés, est nul, le percepteur n'en ayant jamais eu la possession ni le contrôle. Que du reste cet ordre fut contremandé le 5 juin 1875.

Que la vente que le percepteur aurait faite des bouteilles serait nulle et illégale. Que lui Morin avait toujours été et était encore prêt à livrer les bouteilles sur remise de son reçu d'entrepôt.

Son Honneur le Juge Tessier, après avoir exposé les faits de la cause tels que relatés, s'exprima comme suit en rendant le jugement de la Cour :

Il semble que la principale question à décider est celle-ci : "Cette vente, par "encan public le 26 mai 1875, a-t-elle conféré aux Messrs. Yuile un droit de "propriété et, comme conséquence, le droit de les saisir et revendiquer dans les "entrepôts de M. Morin, ou ont-ils simplement droit à des dommages contre le "vendeur, à défaut par lui de leur livrer les bouteilles? En d'autre termes et "pour parler un langage légal, les Intimés ont-ils un droit *in re*, ou seulement "un droit *ad rem*"?

La première irrégularité qui a été commise lors de cette vente, c'est l'adjudication des bouteilles à un employé de la Douane. Comme la question n'a pas été soulevée par les appelants, la cour s'abstiendra d'exprimer son opinion sur ce point.

La seconde irrégularité et la plus importante, c'est que le percepteur n'a pas observé les formalités nécessaires pour pouvoir vendre les bouteilles. Elles n'étaient pas lors de la vente ni avant dans les entrepôts de la douane. Cependant les autorités de la douane devaient les y mettre et les y garder pendant un mois avant d'annoncer la vente et de les mettre à l'enchère, conformément aux dispositions du Statut du Canada, 31 Vict. chap. 6, Sects. 13 et 14.

M. Simpson n'a jamais eu la possession des bouteilles, il ne pouvait pas les livrer et de fait il ne les a jamais livrées. S'il a vendu, par erreur et étant sous une fausse impression, des marchandises qui n'étaient pas en sa possession ni sous son contrôle, quelle en est la conséquence?

Cette vente est nulle et ne peut faire passer la propriété de ces bouteilles dans la personne des Intimés. Notre Code pourvoit au remède à employer en pareil cas. Les demandeurs les Messrs. Yuile peuvent avoir une action en dommages pour les pertes qu'ils ont subies. Il ressort de la preuve qui a été faite que Simpson le percepteur a agi de bonne foi, mais les Intimés ne peuvent réclamer

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et revendiquer ces bouteilles comme leur appartenant. Lorsque la vente de ces bouteilles eût lieu, Ansell n'en avait pas encore été dépossédé en vertu des lois de la douane. Il en était encore en possession réelle et légale et en était le propriétaire même lors de l'institution de la présente action.

Quant à l'appelant Morin sa défense a beaucoup de force. Il a agi comme entreposeur conformément à la loi. Aucune fraude, aucune mauvaise foi ne lui sont attribuées. Il était certainement justifiable de garder les bouteilles, premièrement sur l'ordre d'un officier public, Rudolf, le maître du hâvre, et subséquemment sur l'ordre de cet officier de les livrer à Ansell, et il était de son devoir de ne remettre les bouteilles qu'au porteur du reçu d'entrepôt et sur remise seulement de ce reçu.

Toutefois l'honorable juge présidant en Cour Supérieure a pensé autrement, et par son jugement du 28 octobre 1876, il a déclaré la saisie-revendication bonne et valable et ordonné aux défendeurs appelants, Simpson et Morin, de remettre les bouteilles aux demandeurs et intimés, ou à défaut de ce faire, de leur en payer la valeur $2,000.

Ce jugement est infirmé, et cette cour, procédant à rendre le jugement qu'aurait dû prononcer la Cour Supérieure, déboute l'action des demandeurs avec dépens, tant de cette cour que la Cour Inférieure, en réservant toutefois aux Intimés tel recours en dommages qu'ils peuvent avoir contre l'appelant W. B. Simpson.

Sir A. A. DORION, J. C. Rapport de l'arrivée des bouteilles en question dans le port de Montréal a été fait à la douane, ainsi que requis par la 31 Vict., chap. 6, sect. 10; mais l'entrée n'en a pas été faite dans les trois jours ainsi qu'ordonné par la sect. 13. A défaut de cette entrée, le devoir du percepteur était de faire transporter les bouteilles à l'entrepôt de la douane, et si, dans l'espace d'un mois, les droits et autres charges n'étaient point payés, les bouteilles pouvaient alors être vendues par encan public. Sect. 13, sous-sect. 4.

L'officier de la douane aurait pu aussi les saisir et les confisquer parceque les droits n'avaient pas été payés. Dans ce cas il lui aurait fallu adopter d'autres formalités. Mais ces formalités n'ont pas été employées, les bouteilles n'ont pas été saisies, elles n'ont jamais été dans les entrepôts de la douane. Le percepteur n'en a jamais eu la possession, les Intimés non plus.

Ceux-ci n'allèguent aucun titre dans leur déclaration. Ils n'ont prouvé ni titre ni possession.

Le fait que le percepteur a obtenu de Morin deux paniers comme échantillons pour faire la vente est peu important, car, en vertu des lois de la douane, il a droit d'aller partout où se trouvent des marchandises dont les entrées n'ont pas été faites, ou sur lesquelles les droits n'ont pas été payés. Mais le propriétaire des marchandises a droit à un mois d'avis, et dans le cas qui nous occupe, il n'a pas eu un mois d'avis.

Le jugement de la Cour Inférieure doit être renversé et l'action des demandeurs est déboutée.

RAMSAY, J. (dissident). This case gives rise simply to a question of law; namely, whether goods subject to seizure and sale by the collector of customs, and which by accident have been removed and placed by the port warden in

store, are still constructively in the possession of the collector so that he can sell them as unentered goods.

At the proper time these goods were entered in the list of goods to be sold at the customs sale, and on the 26th May, 1875, they were in effect sold, after the usual advertisements, and adjudged to one Mercier, whom the respondents represent. It seems the collector Simpson thought this a valid sale; but as Morin refused to give the goods up, as they were lying in Ansell's name and not subject to the order of the Customs Department, it seems the collector was proceeding to take forcible possession of the goods, in order to deliver them, when, owing to some occult influence, he stopped. Respondents seized the goods by way of *revendication*. In the Superior Court this action was declared to be well founded, and the appellants were condemned to deliver up the bottles. From this judgment defendants appealed. At the argument we were informed that the collector was an appellant in spite of himself, and I confess I am not surprised that he should be so. He had in perfect good faith sold at a public sale goods which were liable to sale, and had been so for months, and the sale of which was not unknown to the consignee, who evidently was acting in a fraudulent manner, and the pretension now urged before the Court is, that by law 31 Vict. chap. 6, sect. 13, sub-sect. 4, it was the duty of the collector to keep them thirty days in the customs warehouse before he sold them, and that if, instead of that, they had by error of another public officer been carried to Morin's, the sale was null. This is pushing the doctrine of special power, it seems to me, to an extreme, and reminds one of the mode of dealing with tax titles in the United States, and the extraordinary doctrines there put forward to defeat the operation of laws which are violations of strict principle. As I cannot adopt the doctrine that when a special power is given it must be followed literally in every particular, whether important or not, it appears to me that the carrying to the customs warehouse is simply directory; that the right to sell arises not from carrying the goods to one building more than to another (the customs warehouse really being any building employed for that purpose), but from the failure to enter the goods prior to the sale, and after they have remained thirty days unentered.

The appellants have no interest in the pretensions they put forward, and I think it is impossible to conceal from one's self the fact that the whole thing is a monstrous trick got up in the interest of that astute person Ansell, who was purposely evading the obligation to enter his goods. I am therefore of opinion that it was the duty of the collector to have delivered the goods sold by him, and that the appeal should be dismissed with costs.

MONK, J. (aussi dissident,) partage l'opinion émise par l'honorable juge Ramsay, et ajoute que le percepteur Simpson a tout intérêt à ce que la vente des boutcilles soit déclarée bonne et valable, et que la livraison en soit faite aux Messrs. Yuile. Quant à Morin, il n'a aucun intérêt dans la cause et peut d'ailleurs exercer son recours contre Simpson pour les dommages qu'il pourrait subir.

CROSS, J. The questions which seem to me to be involved in the case are:

Were the bottles lawfully sold and delivered? Did the collector conform to the requirements of the statute so as to enable him to pass a valid title to the purchaser? Could he sell the goods without having had them in his possession?

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The fourth paragraph of sect. 13 of the Dominion Statute 31 Vict. cap 6, contains the provision of the customs law applicable to this case. It is to the effect that in case of non-entry and non-payment of duty, the goods may be conveyed to the customs warehouse, and if not duly entered within one month thereafter, and charges paid, they are to be sold by public auction, and the surplus of their proceeds, if any, after deducting duty and charges, paid over to the owner.

The goods in question never were taken to the customs warehouse as required by the statute. Had they been so, and properly advertised for sale, it would have been competent for the proprietor at any time within the month of their removal thither, to have relieved them from liability to sale by making proper entry thereof and paying charges. He was entitled to have the goods there as a condition precedent to their sale; intending purchasers might have viewed them there, and in consequence enhanced the proceeds by higher bids in case they had to be sold, and up to a month after their removal there the owner was always in time to make entry of them and pay charges. Unless the goods were in the Custom House, the provision of the statute giving the collector power of sale, did not apply; he had not jurisdiction and could not confer title. Any individual action on his part not in conformity to law was of no avail. It was the law and not the collector that could give title, and without compliance with its terms no title was conveyed. The observance of the prescribed formalities is in the interest of all concerned, more especially of the owner, whose rights are forfeited if the statute is conformed to, but only by the law as it exists being put in operation against him. In such cases nothing can be taken for granted. The purchaser takes his title under the statute, and must justify it by the force of the statute. If its terms have not been conformed to, the property in the goods will not pass to the purchaser, and the proprietor is in time to save his rights by making his entry, otherwise it might be contended that a collector could sell an importer's goods where and as he pleased. There was besides in this case no valid delivery, nor could there be under a sale which was a nullity. Morin having become responsible for the goods to the holder of the warehouse receipt, has the same interest in contesting the demand as the owner.

I think the bottles were not lawfully sold; that the collector did not conform to the requirements of the statute so as to confer a valid title on Mercier or Yuile & Co.; that it was not competent for him to sell goods without having them in possession and conforming to the requirements of the law in that behalf; and lastly, that no actual delivery of the goods ever took place.

The present is not a case of claiming a forfeiture for any cause of the specific causes of forfeiture mentioned in the statute, nor is the proceeding one for forfeiture. The goods in question remained liable to the payment of duty and to seizure for infraction of the customs laws; the customs authorities do not lose their recourse although they fail in enforcing an inapplicable remedy, but it appears that a customs entry of the goods has been made posterior to the alleged sale, so that their position may now be altered. Had the customs authorities exercised diligence when the goods were landed, the controversy that has arisen in this case could not have occurred. Whether the respondents

have or not any other ground for complaint against them is not a subject of present enquiry. I concur in the judgment of the majority of the Court, reversing the decision of the Court below and dismissing the action of Yuile & Co.

Simpson et al. et Yuile et al.

Jugement de la Cour Supérieure renversé. Monk et Ramsay, J J., dissidents.

C. A. Geoffrion, pour l'appelant, W. B. Simpson.

N. Durand, pour l'appelant, L. E. Morin.

Doutre, Doutre, Rolidoux, Hutchinson & Walker, pour les Intimés.

(N.D.)

SUPERIOR COURT, 1878.

MONTREAL, 30TH SEPTEMBER, 1878.

Coram RAINVILLE, J.

No. 1627.

The Grand Trunk Railway Company of Canada vs. *The Citizens' Insurance Company.*

The defendants, by a guarantee bond, guaranteed an employee of the plaintiffs in the terms following:—"The said employee shall honestly, diligently and faithfully discharge and transact the duties devolving upon him...and shall fairly account for and pay over to the said Railway Company all such moneys as he, the said employee, shall receive for or from the said Company...and, in default thereof, that the said Company (defendants) shall indemnify the said Railway Company (plaintiffs) against all loss and damage, costs and expenses, which the said Railway Company shall sustain or incur by reason of any act, matter or thing whatsoever, done or committed, or omitted to be done by the said employee, in or arising out of his said employment; and for which the said employee shall be liable by law, to indemnify the said Railway Company." The employee left a large sum of money in an open bag in his room while he went to lunch. He had at his disposal a desk with lock drawer, and a strong box, neither of which he used for the safe keeping of the money. On his return from lunch, the money, as the employee alleged, had disappeared.

HELD:—(Following *Soulière* vs. *Lazarus*, 21 L. C. J. 104) That the defendants were liable under the bond. It was for them to prove that a theft had been committed; but even if a theft had been proved in the present case, they would still be liable,— the abstraction of the money, in view of the employee's negligence, not being such a fortuitous event as would relieve them under Arts. 1072 and 1200 C. C.

PER CURIAM:—La demanderesse réclame de la défenderesse la somme de $22,077.00. Par sa déclaration elle allègue que le 1er avril 1869, la défenderesse a consenti en sa faveur une police jusqu'à concurrence de $25,000, garantissant David Faulkner, qui était alors à l'emploi de la demanderesse comme paie-maître. Que le 22 juin 1877, alors que cette police d'assurance était encore en force par renouvellement, Faulkner reçut un chèque de $22,489.25 dont il toucha le montant à la Banque de Montréal, qu'il n'a pas remis cette somme à l'exception de $411.65, laissant une balance de $22,077 dont il n'a pas rendu compte; qu'en vertu de la police en question la défenderesse est responsable du remboursement de cette somme, et la demanderesse conclut en conséquence que la défenderesse soit condamnée à lui payer la dite somme.

A cette action la défenderesse a plaidé qu'en effet Faulkner avait reçu cette somme de la Banque, qu'il l'a transportée dans un appartement destiné à son usage dans les bureaux de la demanderesse; qu'il l'a mise sous son pupitre dans

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le dit appartement, cette place étant aussi sûre qu'aucune autre dans le dit bureau, et étant aussi la place où il avait l'habitude depuis longtemps de placer les sommes par lui reçues comme paie-maître, et ce à la connaissance de la demanderesse ;—Que par les usages et les règlements de la demanderesse le dit Faulkner avait droit à un certain temps au milieu du jour pour prendre son lunch, et que le dit jour après avoir ainsi placé le dit argent il a laissé son bureau pour aller prendre son lunch, après avoir fermé à clef la porte de son dit bureau : qu'à son retour après une absence assez courte il a trouvé la porte de son bureau débarrée et que sur son argent une somme de $22,077 avait été volée ; que le nommé Faulkner a agi dans les circonstances avec toute la prudence nécessaire, et que si la demanderesse a subi une perte, c'est par suite de sa faute en ne lui fournissant pas une salamandre ou une place sûre pour déposer les deniers qu'il pouvait avoir en mains.

A cette exception la demanderesse a répondu spécialement que le nommé Faulkner n'avait pas suivi les règlements de la Compagnie ; qu'il avait agi imprudemment en laissant une somme aussi considérable dans son appartement : qu'il avait à sa disposition une boîte en métal où il aurait pu déposer cette somme, qu'il avait de plus un pupitre avec des tiroirs fermant à clef où il aurait pu la mettre, et qu'enfin il y avait dans la bâtisse une voute de sûreté où il était obligé de déposer les sommes qu'il recevait.

Sur la contestation ainsi liée les parties allèrent à l'enquête après avoir fait des admissions des faits principaux jusqu'au temps du vol allégué.

La preuve de la défenderesse consiste principalement dans la déposition de Faulkner qui, comme on peut bien le prévoir, établit les faits tels qu'il les a racontés d'abord, c'est-à-dire qu'il a été la victime d'un vol.

La demanderesse de son côté a établi les faits qu'elle a allégués dans sa réponse spéciale, c'est-à-dire qu'il y avait dans l'appartement de Faulkner un pupitre fermant à clef ; qu'il avait à son usage exclusif une boite en métal assez forte, et l'existence de la voute de sûreté dans la bâtisse occupée par la demanderesse. Un des témoins constate que Faulkner avait la clef de cette boite, et qu'il ne la lui a remise qu'après avoir été déchargé. Et un autre établit qu'il aurait fallu dix à quinze minutes pour ouvrir cette boite par force, et que cela ne pouvait se faire qu'en faisant beaucoup de bruit.

Tels sont les faits de la cause.

Etablissons d'abord la position légale des parties.

A quoi la défenderesse s'est-elle obligée par sa police ? A-t-elle garanti seulement la fidélité, l'honnêteté de Faulkner ? Ou bien a-t-elle garanti en outre ses faits, ses fautes ?

Voyons les termes du contrat. Elle garantit que " the said *employé* shall honestly, diligently and faithfully discharge and transact the duties devolving upon him.....and shall faithfully account for, and pay over, to the said Railway Company all such moneys.....as he, the said employee, shall receive for or from the said Company.....And in default thereof that the said Company (defendant) shall indemnify the said Railway Company against all loss and damage, costs and expenses, which the said Railway Company shall sustain or incur by reason of *any act, matter or thing whatsoever done or committed, or omitted* to

be done by the said employee, in or arising out of his said employment, and *for which* the said employee *shall be liable* by law, *to indemnify* the said Railway Company."

La défenderesse au terme de ce contrat est donc obligée comme caution du nommé Faulkner, et elle est responsable dans tous les cas où en loi Faulkner le serait. Elle répond donc de ses faits et fautes, soit par commission ou omission aussi bien que de sa fidélité. Or quelle est la responsabilité de Faulkner? Elle est réglée par les arts. 1072 et 1200 de notre Code Civil.

Le débiteur, dit l'art. 1072, n'est pas tenu de payer les dommages et intérêts, lorsque l'inexécution de l'obligation est causée par *cas fortuit* ou force majeure, *sans aucune faute de sa part*.....

" Lorsque le corps certain et déterminé qui fait l'objet de l'obligation, dit " l'art. 1200, périt, ou que, pour quelqu'autre cause la livraison en devient " impossible *sans le fait* ou *la faute du débiteur*, l'obligation est éteinte.....Le " débiteur est tenu de *prouver le cas fortuit* qu'il allègue."

Ulpien définit le cas fortuit: *fortuitos casus quos nullum humanum providere potest*, des événements qu'aucune *prudence humaine ne peut prévoir*.

" Il est bien entendu, dit Demolombe, que le débiteur ne se trouve déchargé " de toute responsabilité à raison de la force majeure ou du cas fortuit, qu'au- " tant que l'événement n'a pas été *précédé, accompagné* ou suivi de quelque " faute qui lui soit imputable." Demolombe, Oblig. T. 1, No. 560.

Mais il y a deux sortes de cas fortuits: les uns sont par eux-mêmes exclusifs d'une faute ou d'un fait imputable au débiteur, tel que le feu du ciel, la tempête, les inondations, la guerre, etc.

Et généralement quant à ceux-là, il suffit au débiteur de fournir la preuve de l'événement lui-même, preuve généralement facile, pour être libéré de son obligation.

" Mais il est d'autres événements, continue Demolombe, qui peuvent avoir " également pour cause soit un cas fortuit, soit une faute ou un fait du débiteur. " La mort, par exemple, ou le *vol*, ou l'incendie.

" Suffit-il, quant à ceux-là, au débiteur, afin d'être libéré de son obligation, de " prouver le fait lui-même?

" Ou doit-il en outre prouver qu'il a veillé, en bon père de famille, à la con- " servation de la chose, et qu'aucune faute ni aucun fait de sa part n'a pu pro- " duire le sinistre dans lequel elle a péri?

Colmet de Santerre soutient l'opinion qu'il suffira au débiteur de prouver le fait, l'événement: et si le créancier allègue que cet événement a été causé par le fait ou la faute du débiteur c'est lui qui doit faire la preuve de cette nouvelle allégation.

" Mais (dit Demolombe,) nous croyons que cette doctrine est trop indulgente " pour le débiteur.

" Et à notre avis, continue-t-il, il faut décider en principe que c'est à lui de " prouver, en outre, que cet événement qui a les caractères apparents d'un cas " fortuit, *est arrivé sans sa faute et sans son fait.*

" C'est que, en effet, ces sortes d'événements ne sauraient être libératoires " immédiatement, par eux-mêmes et par eux seuls: précisément, parcequ'ils ne

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" sont point par eux-mêmes et par eux seuls, exclusifs de toute faute ou de tout " fait imputable au débiteur.....

".....Le vol en effet! N'est-il pas clair que le débiteur ne prouvera pas l'ex- " tinction de son obligation par la perte de la chose en se bornant à dire:

" *Elle m'a été soustraite!*

" En supposant même un vol avec violence, encore faudrait-il qu'il prouvât les " caractères de cette violence et qu'il n'a pu y résister.

" *A plus forte raison*, s'il s'agissait d'une simple *soustraction*, la preuve des " circonstances dans lesquelles elle a eu lieu, devrait-elle être fournie par lui.

" *Contra furtum*, disait Averani, *in quo nulla vis adhibetur, a diligente " patre familias præcavere potest. Raro sine culpa nostra accidit.*

" L'observation est très vraie! Et il faudra certainement que le débiteur " fournisse des explications, s'il avait *placé la chose où elle devait être, en lieu " de sûreté*, ou s'il *l'avait laissé imprudemment exposée* aux entreprises des mal- " faiteurs," etc.

Demolombe, Oblig., T. 5, No. 765 à 769.

" Il y a des faits, dit Larombière, qui par eux-mêmes n'excluent pas toute " pensée de faute. Par exemple, une chose est enlevée par des voleurs.....Si " d'un côté on peut présumer que cela est arrivé par cas fortuit et force majeure, " on peut présumer aussi qu'une faute personnelle n'y est demeurée étrangère. " Il ne suffira donc pas au débiteur de la chose d'alléguer qu'elle a été volée, " pour être libéré. Il doit prouver qu'il n'y a eu *aucune négligence* de sa part: " et *c'est alors seulement que, sur cette preuve faite, l'événement est réputé cas " fortuit et purgé de toute présomption de fraude.*"

Larombière, Oblig. T. 1, p. 537 sur l'art. 1148, No. 16.

C'est d'après cette doctrine que j'ai décidé la cause de Soulière vs. Lazarus, rapportée au L. C. J., vol. 21, p. 104.

Dans cette affaire, j'ai donné gain de cause au défendeur qui était un dépositaire comme prêteur sur gages, parce qu'il a prouvé qu'il avait gardé les objets avec tout le soin d'un bon père de famille, et que le vol avait eu lieu dans des circonstances *qu'aucune prudence humaine ne pouvait prévoir.*

C'est encore d'après les mêmes principes qu'a été décidée la cause de Martin vs. Gravel par les tribunaux du pays et même par le Conseil Privé.

D'après l'exposé de ces principes il est facile de conclure que la procédure en cette cause est parfaitement régulière, et que l'objection de la défenderesse que la demanderesse a voulu refaire son action par sa réponse spéciale en alléguant des faits de négligence de la part de Faulkner, faits qui auraient du être allégués dans la déclaration, est mal fondée. Pourquoi, en effet, la demanderesse aurait-elle répondu d'avance à une exception qu'on n'aurait peut-être pas produite?

Il incombait donc à la défenderesse de prouver que la somme en question avait été volée et que le vol avait eu lieu sans la faute de Faulkner.

Pour établir ce vol la défenderesse n'a que le témoignage de Faulkner qui n'est pas un témoin incompétent, mais qui est grandement intéressé dans la cause, puisque la défenderesse a un recours contre lui si elle est condamnée. Son intérêt n'est, d'après l'art. 252 C. P., une cause de reproche que relativement au degré de créance qu'on doit accorder à son témoignage. Je suis donc appelé à

apprécier cette preuve, et je ne puis pas trouver la preuve légale et juridique d'un vol dans le simple témoignage de Faulkner, dénué qu'il est de toute preuve de circonstances : je n'ai pas de preuve juridique bien que j'en aie la conviction morale et que je n'aie aucun doute de l'honnêteté et de la fidélité de cet infortuné Faulkner.

Mais en supposant que le vol serait prouvé j'ai la preuve, d'après la version même de Faulkner, qu'il a agi avec imprudence, et que si le vol a été commis, c'est par suite de son fait, de sa faute. Il suffit d'énoncer le fait d'un homme, ayant à sa disposition un pupitre fermant à clef, une boite en métal à son usage exclusif barrant aussi à clef, et en outre, une voute de sureté dans la bâtisse, et qui laisse dans son appartement, sur le plancher, dans un simple sac non fermé, une somme de $22,000, et laisse cet appartement pendant 30 ou 40 minutes, pour établir en même temps son imprudence, sa négligence.

A-t-il fermé à clef la porte de son appartement ? Il le jure, mais lorsqu'il est revenu la porte était ouverte sans qu'elle eut été forcée. Elle aurait donc été ouverte avec une fausse clef. Mais c'est justement ce qui fait voir l'imprudence de Faulkner. Je suis d'opinion que la défenderesse n'a pas prouvé son exception de cas fortuit, et la demanderesse doit avoir jugement.

G. Macrae, Q.C., for plaintiffs.

S. Bethune, Q.C., counsel.

Abbott, Tait, Wotherspoon & Abbott, for defendants.

(J.K.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 29TH JANUARY, 1878.

Coram DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 152.

EBENEZER HEARLE,
(*Plaintiff in the Court below,*)
APPELLANT;

AND

WILLIAM RHIND, *es qual.*,
(*Defendant in the Court below,*)
RESPONDENT.

HELD :—1. It is not necessary that a copy of the declaration in an action of revendication should be served by a bailiff at the Prothonotary's office ; it is sufficient that a copy be filed at the office.

2. Warehouse receipts granted without authority by the President and Secretary of a company not doing business as warehousemen are invalid.

Doutre & Co., for appellant :—The appellant's declaration contained the following averments :

That on the 16th August, 1873, the Moisic Iron Company, (the original defendants), acting through William Markland Molson, their President, acknowledged to have received on account of John McDougall, and to hold deliverable only on the production of the warehouse receipt then and there delivered over to the said John McDougall, endorsed by the latter, 250 tons No. 1 wrought

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scrap iron, which warehouse receipt was then and there signed by the said defendants, acting as above.

That on the 27th November, 1873, the said defendants, acting through their president as above, acknowledged, by another warehouse receipt, to have received 500 tons of No. 1 railroad wrought iron scrap, deliverable only on production of the said receipt, endorsed by the said John McDougall, which receipt was then and there signed by the said defendants and delivered over to the said John McDougall.

That on the 26th June, 1874, the said defendants acknowledged, by another warehouse receipt, to have received 150 tons Moisic blooms, deliverable only on production of the said warehouse receipt, duly endorsed by Wm. Markland Molson, who then and there endorsed the said receipt, for value received, and delivered it, duly signed by the defendants, acting through J. M. Roberts, their secretary, and endorsed by the said Wm. Markland Molson, to the said John McDougall.

That on the 15th September, 1874, the said defendants acknowledged, by another warehouse receipt, to have received 100 tons Moisic bars, deliverable only on production of the said warehouse receipt, endorsed by the said John McDougall, which was then and there signed by the defendants through the said J. M. Roberts, their secretary, and delivered over to the said John McDougall.

That on the 10th Oct., 1874, the said defendants acknowledged, by another warehouse receipt, to have received 100 tons Moisic iron bars, deliverable only on production of the warehouse receipt, endorsed by the said John McDougall, which warehouse receipt was then and there signed by the defendants through their said secretary and delivered over to the said John McDougall.

That afterwards the said warehouse receipts were, for value received, transferred to the said plaintiff, by the endorsement of the said John McDougall, and the plaintiff, in order to obtain actual possession from the said defendants, presented and produced the said warehouse receipts, duly endorsed by the said John McDougall, to the said defendants, and offered to surrender them on the delivery of the several quantities of iron therein mentioned, which the said defendants refused to do.

That the said divers quantities and descriptions of iron are of the value together of the sum of $29,500; that the plaintiff is entitled to obtain possession of the said iron under the authority of the Court, by means of a writ of *saisie revendication*. Wherefore the plaintiff prayed that the said iron be seized, *revendiqué*, and placed in the possession of the plaintiff, and that in case the plaintiff should not be put in possession of the said iron, the defendants be condemned to pay the sum of $29,500 with interest and costs.

The Moisic Iron Company pleaded an *exception à la forme*, alleging: 1. That it was not stated in the writ or declaration where the principal place of business of the said Company was; 2. That it did not appear that the declaration had been served upon the defendants.

The appellant called upon the defendants to plead to the merits, before answering the *exception à la forme*, which was in due time answered generally.

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The said Company, pleading under article 131 of the C. C. P., said that the defendants never were warehousemen, and could not by law and did not give negotiable warehouse receipts, and plaintiff never had any legal title to the instruments sued upon, which were delivered by the said John McDougall without value, and merely in order that this action might be brought in the name of the plaintiff, who is only a *prête-nom* for the said John McDougall, who never was proprietor or in possession of the said iron; that long before this action, the said John McDougall received from the defendants much more iron than the quantities mentioned in said receipts, and any account or claim which he had against them was more than paid and extinguished, and the said J. McDougall unlawfully retained possession of said receipts and refused to give them up to the defendants; that the iron seized by the plaintiff is not the iron mentioned in said receipts. Then follows a *défense en fait*. This plea was answered by a general denial.

At *Enquête*, the plaintiff filed the Prothonotary's certificate proving the deposit of a copy of the plaintiff's declaration in the office of the said Prothonotary within three days of the issuing and execution of the writ of revendication, as provided by art. 850 and 868 of the C. C. P. The plaintiff also filed the notes which he had paid as endorser of the said Company, and which constituted the consideration of the warehouse receipts sued upon.

The identity of the iron seized with the iron mentioned in the warehouse receipts being made out by the bailiff's return, until this was disproved the only fact which the plaintiff had to prove was the value of the iron. That fact was proved by one witness to be as follows: No. 1 scrap iron, $16 a ton; railroad scrap iron, $16 a ton; Moisic blooms, $35 a ton; Moisic bars, $55 a ton.

Whatever might be said on the merits of the case, there cannot be any doubt that the judgment appealed from is erroneous and must be reversed. The Court decided that there had been no service of the declaration when the certificate of the Prothonotary proved the contrary. The opinion of the Court was that there should be a bailiff's return of the deposit of the declaration in the Prothonotary's office. "As regards the declaration (says art. 850), it may either be served at the same time as the writ, *or within the three days which follow the seizure, by leaving a copy thereof either with the defendants or the Prothonotary's or clerk's office.*"

This question, the appellant is informed, has already been decided by this Court in accordance with the appellant's contention, viz., that the leaving of the copy at the office of the clerk need not be made by the bailiff or sheriff.

On the merits, the appellant was entitled to judgment in accordance with the conclusions of the declaration. With the affirmative plea of the respondents, which threw upon them the burden of evidence, the appellant had nothing to prove but the value of the iron. Its identity was completely made out by the *procès-verbal* of seizure and the return of the bailiff on the writ. The respondents offered no evidence of the averments of their plea. On the appellant's side the seizure, as usual, had been preceded by the oath of the plaintiff; the seizure is in accordance with titles (warehouse receipts) which

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proved themselves, and these titles agree with the descriptions contained in the affidavit, in the writ, in the declaration, in the *procès-verbal* of seizure and in the return of the bailiff on the writ. If these were insufficient, the *Exception à la forme* should have been dismissed, and the plaintiff called upon to complete by oral testimony, a thing which may be ordered still by the judgment of this Court.

The appellant therefore respectfully contends that the judgment appealed from ought to be reversed and judgment entered in his favor on the merits of the case.

Kerr & Carter, for respondent:—The learned Judge, in giving his judgment, restricted himself entirely to the questions raised by the *exception à la forme*, and he held that there was no proof whatsoever of service of the copy of the declaration upon the defendant; and the *considérants* of the judgment are as follows:

"Considering that neither by the return of the bailiff charged with the "service of process of revendication in this cause issued, nor by any other evi- "dence of record, does it appear that the defendant was in any manner served "with a copy of the plaintiff's declaration, as required by law, doth dismiss the "plaintiff's action with costs."

Article 830 of our Code, which regulates the service of the declaration in such case, provides:

"As regards the declaration, it may either be served at the same time with "the writ or within the three days which follow the seizure, by leaving a copy "thereof either with the defendant or at the Prothonotary's or clerk's office."

It is evident here that under this article the service is required to be made by a bailiff. A return of service must in all cases be made either by a bailiff or upon oath by the party serving. And article 74 seems to anticipate that bailiffs alone have the right of making services.

Article 48 provides—"that all writs of summons are directed to any bailiff "of the Superior Court, commanding him to summon the defendant to appear "before the Court on the day and at the place therein stated," with the exceptions thereinafter mentioned, within which the present case does not come.

The only person, therefore, who can show that the defendant has been summoned is the bailiff by his return of service.

Article 56 says: "Service is effected by leaving with the defendant a copy "of the writ of summons, and of the declaration, if there is one."

Article 850 makes use of the word "served," and also the word "leaving," which shows conclusively that, with respect to service at the Prothonotary's office, it is to be effected in the same manner as if it was made personally on the defendant, or at his domicile, consequently, in order to show that a writ is served, the return of service must be complete, and be under the oath of office of the bailiff.

In this instance it is attempted to supply the defective return by producing the Prothonotary's certificate; but the Prothonotary has no more right to prove such a fact by his certificate than any other individual. The only proof that can be made of that fact is by the return of service.

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It will be seen that Exhibits Nos. 1 and 2 are signed by William Markland Molson, as President; Nos. 3, 4, and 5 are signed by Roberts, who designates himself as secretary of the Company. All appear to have been handed over to be held as collateral security for the payment of certain promissory notes with the exception of No. 2. No evidence whatsoever was given save that of a Mr. Hersey, who deposed as to the value of iron. But there is nothing to connect the iron mentioned in the warehouse receipts with the iron seized in the case—nothing to show that it is the same iron, nothing to show that it was really McDougall's iron, deposited with the Moisic Iron Company, and nothing to show that William Markland Molson, the pretended president of that Company, and Roberts, the pretended secretary, had any authority whatsoever to grant such warehouse receipts. There is nothing, moreover, to show that the promissory notes for which this iron was given as security had not been paid by Mr. Molson, or by the Moisic Iron Company. The proceeding, also, is in direct violation of the law as contained in the C. S. C., 24 Vic. cap. 23, and 29 Vic. cap. 19, which expressly provides that such warehouse receipts shall not be held in pledge for a period longer than six months from the date on which the bill for which it was security was negotiated. Moreover, it would appear that the provisions of the statutes are directly against a person so endorsing over, or giving a warehouse receipt, merely as security to the endorser for the payment of a bill which is discounted by some person else; and there is nothing whatsoever to shew in this case that McDougall, the plaintiff's *auteur*, was the party who discounted the bill. There is nothing to show that any bill was discounted at the time of the giving of the said warehouse receipts.

DORION, C. J. This is an action *en revendication*, by which the appellant, as endorsee of five warehouse receipts given by the Moisic Iron Company to John McDougall, claims 1100 tons of iron, of the value of $29,500. Two of these receipts are signed by Wm. Markland Molson, as president of the Company, and three by T. M. Roberts, its secretary.

The Moisic Iron Company, the original defendants, pleaded, by *exception à la forme*, that its place of business was not properly described in the writ, that a copy of the declaration was not served upon them, and no return of service was made as required by law. A plea to the merits having been demanded, they pleaded that they were not warehousemen, and could not give warehouse receipts; that their president and their secretary had no authority to grant such receipts; that the receipts were not negotiable instruments; that appellant had given no value for these receipts and was a mere *prête-nom* for McDougall, who never had any right to the iron in question, which was the property and in the possession of the defendants; that the iron seized was not the iron mentioned in the receipts; and that defendants were not indebted to the plaintiff nor to McDougall.

The appellant produced a certificate from the Prothonotary, establishing that a copy of the declaration had been lodged in their office on the 29th October, 1875, that is, within three days from the service of the writ of summons and revendication. He also produced several notes of the Company which he had paid, and which he claims to be the consideration for the warehouse receipts,

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which appear, at least four of them, to have been given as collateral security. One witness was examined to establish the value of the iron mentioned in the warehouse receipts.

Upon this evidence the parties were heard, both on the *exception à la forme* and on the merits, after the respondent had taken up the instance as assignee to the insolvent estate of the Moisic Iron Company.

The Court below, holding that under articles 850 and 868 the copy of the declaration in an action in revendication must be served by a bailiff, and that it was not sufficient that it should be lodged in the office by any other party but by an officer authorised to serve the writ, dismissed the action. The plaintiff has appealed from this judgment.

Art. 850 of the Code of Civil Procedure provides that, in cases of *saisie arrêt* before judgment, the declaration may be served at the same time as the writ, or by *leaving a copy thereof at the Prothonotary's office within three days after the seizure has been made*, and art. 868 applies the provisions of art. 850 to cases of revendication. The same rule is laid down in art. 804 as to the service of the declaration in cases of capias, although in somewhat different terms. This mode of serving the declaration is not new.

The three articles above referred to are taken from the Consolidated Statutes, ch. 83, s. 57. Under this statute it was formally decided by Mr. Justice Monk in Raplnel & McDonald, 10 L. C. Jurist, p. 19, by Mr. Justice Badgley in Brahadi and Bergeron, and by the Court of Appeals in the same case, 10 L. C. Jurist, p. 18 and p. 117, that the declaration need not be served by a bailiff, but that it is sufficient if it be filed at the Prothonotary's office within the three days after the seizure or service of capias. Since the Code Mr. Justice Polette held the same rule in Gaudet & Laliberté, 1 Revue Légale, p. 747, and I am informed that both Mr. Justice Berthelot and Mr. Justice Rainville have delivered similar judgments in two other unreported cases. It is true that the case of Brassard & Turgeon, 5 Revue Légale p. 123, decided by Mr. Justice Loranger, seems to militate against the decisions in the other cases. The question adjudicated upon in this last case was not, however, the same as the one submitted in the present case, and the majority of this Court have no hesitation in holding that the filing of a copy of the declaration in the Prothonotary's office, was a sufficient service, both under the terms of the Code and the jurisprudence which has sanctioned this practice.

On the merits we are all agreed that the action must be dismissed, as there is no evidence whatsoever that the Moisic Iron Company carried on the business of warehousemen, nor that the president and the secretary of the Company were ever authorised to sign warehouse receipts to pledge the Company's property.

The judgment will, therefore, be confirmed, but not for the reasons assigned by the Court below, but for the following:

"The Court, &c., considering that the appellant in this cause has not proved that the Moisic Iron Company was engaged in the calling of warehousekeeper when the warehouse receipts mentioned in the declaration in this cause were given, nor that Wm. Murkland Molson, the president of the Company, who

signed some of the receipts, and T. M. Roberts, the secretary of the Company, who signed the others, were authorised by the said Company to sign them, notwithstanding that these facts were specially put in issue by the plea of the said Moisic Iron Company, the original defendants in this cause; Hearle and Ithind.

"And considering that there is no error in the judgment rendered by the Superior Court on the 18th day of April, 1876, and that the said judgment should be confirmed for the reasons above mentioned, and not on account of any irregularity in the service of the declaration in this cause, which has been duly filed in the office of the Prothonotary within the delay required by law.

"This Court doth confirm," &c.

Judgment confirmed.

Doutre, Doutre, Robidoux, Hutchinson & Walker, for appellant.
Kerr & Carter, for respondents.
(J.K.)

COURT OF REVIEW, 1878.

MONTREAL, 31st OCTOBER, 1878.

Coram TORRANCE, J., PAPINEAU, J., JETTÉ, J.

No. 289.

In re Hatchette, Insolvent, and *Bury*, Assignee, and *Hatchette*, Petitioner, and *Robertson* et al., contesting.

HELD:—That so soon as a deed of composition and discharge has been executed, in accordance with the provisions of sect. 52 of the Insolvent Act of 1875, the assignee is bound, under sect. 60 of the Act, to re-convey the estate to the insolvent, without waiting for the confirmation of the deed by the Court or Judge.

A deed of composition, signed by the required number of the creditors of the insolvent, was executed on the 28th of April, 1878. And, by a clause in the deed, the assignee was bound to re-transfer and re-convey the estate to the insolvent, so soon as the insolvent had deposited with him the different sums of money stipulated by the deed to be so deposited.

The inspectors being of opinion that the insolvent had sufficiently complied with the stipulations of the deed, directed the assignee, by resolution passed on the 27th of June, 1878, to re-transfer the estate to the insolvent.

On the 2nd of July, 1878, certain of the creditors obtained an order from Papineau, J., not to act on the resolution of the inspectors.

On the 6th of August, 1878, by judgment of Rainville, J., on the petition of the insolvent, the order of the 2nd of July, 1878, was vacated, and the assignee was peremptorily ordered, on due payment to him of his charges, which he was enjoined to make a bill of in one day, to re-assign and re-convey the estate to the insolvent.

The inscription in review by the creditors contesting was for the purpose of reviewing this latter judgment, and obtaining a reversal of it, if possible. And it was urged at the argument that, until the deed was confirmed by the Court

In re Hatchette and Robertson et al.

or Judge, the assignee was not bound to re-convey the estate to the insolvent, and could not be legally compelled to do so.

The Court were unanimously of opinion that the requirements of the 60th Section of the Insolvent Act were imperative, and that the assignee could not refuse to re-convey, on the ground that the deed was not yet confirmed by the Court or Judge.

The judgment complained of was consequently confirmed.

Judgment of Superior Court confirmed.*

Macmaster & Co., for contestants.
Davidson & Co., for the insolvent.
(S.B.)

SUPERIOR COURT, 1878.

MONTREAL, 4TH NOVEMBER, 1878.

Coram TORRANCE, J.

No. 1072.

Symes et vir vs. *Voligny*.

HELD:—That the costs on dilatory exceptions, calling for power of attorney from and security for costs by plaintiffs, must abide the final judgment in the case.

This was a hearing on two dilatory exceptions filed by the defendant. By one he asked for the production of a power of attorney from the plaintiffs, and by the other he asked for security for costs.

At the hearing, defendant's counsel explained that the power of attorney had been produced and security for costs given as asked by the exceptions. He then claimed that the plaintiffs should be condemned to pay the costs of these exceptions.

PER CURIAM:—The settled practice of this Court in such cases is, that the costs shall abide the final judgment in the case. The exceptions are, therefore, dismissed; the costs thereon to abide the final judgment in this cause.

Exceptions dismissed.

Bethune & Bethune, for plaintiff.
A. Desjardins, for defendant.
(S.B.)

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*A similar judgment was rendered by Rainville, J., on the 6th August, 1878, *in re* Gustave R. Fabre, insolvent.—Reporter's note.

COUR DU BANC DE LA REINE EN APPEL, 1878.

MONTREAL, 21 SEPTEMBRE 1878.

Coram : Sir A. A. DORION, J.C., MONK, RAMSAY, CROSS ET TESSIER, JJ.

No. 11.

JEAN-BAPTISTE LAFLEUR, ET AL.,

ET APPELANTS;

LA COMPAGNIE D'ASSURANCE DES CITOYENS, INTIMÉE.

JUGE : 1. Que dans le cas d'une assurance effectuée sur reçu (*short risk receipt*) et sans police, l'avis d'une seconde assurance donné après le feu seulement mais en temps utile pour que les deux assurances contribuent aux dommages, est suffisant.

2. Dans le cas de telle assurance les conditions spéciales contenues aux polices ordinairement émanées ne s'appliquent pas.

Un nommé Limoges devait une somme d'environ $3,000 aux appelants pour le prix d'un terrain que ces derniers lui avaient vendu. Limoges ayant commencé des constructions sur ce terrain assura ces constructions à la Compagnie d'Assurance Royale Canadienne et à l'Assurance des Citoyens, la présente Intimée.

Ces constructions ayant été détruites par le feu, les Appelants firent saisir par saisie-arrêt après jugement le montant que les deux compagnies d'assurance pouvaient devoir à Limoges. Les compagnies d'assurance déclarèrent ne rien devoir à Limoges et les appelants contestèrent leur déclaration.

En cour inférieure, la contestation de la déclaration de l'Assurance des Citoyens fut renvoyée sans frais.

Les Appelants appelèrent de ce jugement.

L'assurance avec la présente Intimée avait été effectuée d'une manière assez spéciale.

Le 28 août 1877, un agent de l'Intimée vint trouver Limoges et le pressa d'assurer ses bâtisses en construction pour $2,000. Limoges y consentit et les assura pour un mois. Le même jour, mais quelques heures après, il assura les mêmes constructions à la Royale Canadienne pour $1,000.

Les bâtisses assurées valaient environ $4,000.

Lorsque Limoges s'assura avec l'Intimée, l'agent lui remit un reçu connu dans les assurances sous le nom *short risk receipt*, et dont voici la copie :

THE CITIZENS INSURANCE AND INVESTMENT COMPANY.

No. 721. SHORT RISK RECEIPT.

Montreal, 28th August, 1876.

Received from Xavier Limoges, Esq., the sum of five dollars, being the premium of assurance against the Loss or Damage by Fire effected with the Company to the extent of $2,000 on a brick-encased building in course of construction on Champlain Street, Point St. Charles, near Montreal (including carpenter's risk) for one month.....

Lafleur et al. et Co. D'Ass. des Citoyens.

subject to the conditions of the Fire Insurance Policies of this Company. The said loss or damage payable to the said Xavier Limoges, Esq., or order.

HUGH ALLAN,
President.

Period one month
Premium $5 00
Stamps 15 cents.

per JNO. HUTCHISON,
Manager.

En recevant ce reçu Limoges demanda une police, mais le commis de l'assurance lui dit que pour des assurances de ce terme l'usage de la compagnie était de ne pas donner de police. Trois jours après les bâtisses assurées furent détruites par le feu. Aussitôt Limoges se transporta au bureau de l'Intimée, l'informa de l'incendie et lui dit en même temps qu'il avait une autre assurance à la Royale Canadienne pour $1,000.

Un mois après Limoges renouvela son avis par écrit et donna en même temps une estimation détaillée de la valeur des bâtisses incendiées.

L'intimée ayant sur la saisie-arrêt déclaré ne rien devoir à Limoges, les Appelants contestèrent cette déclaration et en réponse à cette contestation l'Intimée plaida deux moyens principaux:

1o. Que Limoges, contrairement aux conditions des polices d'assurance de la compagnie, avait fait assurer les mêmes bâtisses à une autre assurance sans le consentement de l'Intimée et sans avis préalable à l'Intimée.

2o. Que Limoges n'avait pas donné avis de l'incendie, ni fait l'estimation des dommages subis en la manière portée aux polices d'assurance ordinairement émanées par l'Intimée.

C'est sur le premier de ces moyens que l'Intimée a surtout insisté pour faire rejeter la demande des Appelants.

Les Appelants, à l'appui de leur contestation, prétendirent que les conditions imprimées au dos des polices d'assurance ordinairement émanées par l'Intimée ne pouvaient pas être invoquées dans le contrat intervenu entre les parties en cette cause, parce que telle police d'assurance n'avait jamais été offerte à Limoges, qu'au contraire, elle lui avait été refusée; que Limoges n'avait pas eu occasion de prendre connaissance de telles conditions; que de plus, à défaut de conditions spéciales convenues entre les parties, on ne pouvait invoquer que les règles ordinaires aux contrats et spécialement aux contrats d'assurance; qu'il n'y a rien dans la loi des assurances qui oblige l'assuré de donner avis d'une seconde assurance au premier assureur avant de pouvoir effectuer telle seconde assurance; que pourvu que l'avis de telle seconde assurance soit donné en temps utile pour que la contribution ait lieu entre les différents assureurs, cela est suffisant; qu'une seconde assurance est parfaitement permise pourvu que le montant réuni des assurances ne dépasse pas la valeur de l'objet assuré.

M. de Bellefeuille, pour les Appelants, cita la décision dans la cause de Soupras vs. The Mutual Insurance Co. of Chambly, (1 L. C. J., 197):

" Held, that where, by the by-laws of an insurance company endorsed on the " policy, notice of a second insurance must be given and endorsed upon such " policy *à peine de nullité*, that a notice of second insurance given after the " fire, and as a consequence not endorsed on the policy, is sufficient."

Cette décision s'applique parfaitement à la cause actuelle et les paroles prononcées par l'Hon. Juge, en donnant le jugement de la majorité de la Cour, concordent si bien avec les faits de la cause actuelle que l'on pourrait croire qu'elles ont été prononcées pour cette dernière.

La doctrine adoptée par cet arrêt est conforme à celle des anciens auteurs, tant en France qu'en Angleterre. Des principes différents, beaucoup plus conformes aux intérêts des compagnies d'assurances qu'à ceux du public, ont pendant quelque temps, semblé gagné du terrain aux Etats-Unis; mais le droit des Etats-Unis n'est pas le nôtre. C'est le nôtre qu'il faut rechercher, et si nous pouvons démontrer que d'après les principes du droit français, en l'absence de conventions arrêtées au contraire entre les parties, une double assurance, ou des assurances successives, ne sont pas prohibées, mais sont permises, pourvu qu'elles soient déclarés avant que le paiement de l'assurance ait lieu, nous serons autorisés à conclure que l'Intimée est tenue pour le montant de l'assurance effectuée chez elle.

Du reste, même aux Etats-Unis, les auteurs les plus nouveaux et les arrêts les plus récents ont adopté des idées moins absolues et plus favorables aux assurés.

"But the Court, dit May, on Insurance, p. 449, § 370, have become more liberal in favor of the assured in their construction of this sort of stipulation in policies of insurance. While, as we have seen, the old rule required the consent to be in writing and endorsed on the policy, it is the decided tendency of the modern cases to hold that, if the notice be duly given to the company, or its agent, of the additional insurance, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy, because their consent thereto was not indorsed, as literally required by the stipulation. An office which issues a subsequent policy will be presumed to have notice of the prior one, and, where both policies are negotiated through the same person, who is agent for both companies, his knowledge is the knowledge of each company. But the knowledge of the broker through which both insurances are effected is not the knowledge of the insurers."

Il nous semble ressortir des auteurs que nous avons consultés que:

1o. L'on peut faire assurer successivement par plusieurs assurances le même objet, pourvu que, et ceci est une condition d'équité tout-à-fait essentielle, avis en soit donné aux diverses compagnies intéressées, en temps utile pour qu'il y ait contribution entre elles dans le paiement du dommage ou accident contre lequel ces assurances ont été effectuées.

2o. Que l'équité n'exige pas qu'une seconde assurance ne puisse être effectuée sur la même propriété sans la déclaration de la première, pourvu toujours que toutes les assurances réunies ne forment pas un montant plus élevé que la véritable valeur de l'objet assuré et pourvu que cette déclaration ait lieu avant le paiement des dommages.

Une décision récente donnée par les tribunaux américains vient supporter la prétention des Appelants.

C'est le jugement rendu dans la cause de Kelly et al. *vs.* The Commonwealth Insurance Co. of Pennsylvania, Bosworth Reports, t. X, p. 82, dans laquelle il a été jugé que:

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"A mere oral contract of insurance, supported by a sufficient consideration, "which is to take effect forthwith, although it may be entered contemporaneously with an agreement by the insurers to deliver and the assured to accept "subsequently, as a substitute therefor, a written policy by the former in the "form usually adopted by them, becomes binding, and remains in force until the "delivery or tender of such policy. Until then the condition usually inserted "in such policies, requiring pre-payment of the premium to make them binding, "unless expressly adopted by the parties in such oral contract, forms no part of "the contract of insurance between them."

Les autorités suivantes peuvent aussi être citées du côté des Appelants pour établir les principes généraux du contrat d'assurance, lesquels doivent régler les relations des parties à défaut de convention particulière.

Pothier Assurance, c. I. s. II, No. 31, 33, 76, 97, 159.

Boulay Paty, Traité des assurances, t. I, sect. V. II, p. 21.

Casaregis dix. I, No. 89, Straccha, gl. 3.

Stypmannus part 4, cap. 7 No. 506, page 472. Infra, ch. 9 sect. 1 et ch. 16, sect. 5.

De Luca, de credito, dix. 106, No. 18, et dix. 166, No. 5, Infra, ch. 2 et ch. 16.

Ordonnance de la Marine, Liv. III, tit. VI, No. 22, art. 53.

Le Code de Commerce, art. 357.

Valin, Commentaire sur l'ordonnance de la Marine, sur le 1, III, tit. VI, No. 22, p. 488.

Hethier, Assurances Terrestres, page 203, des assurances successives.

Persil No 96.

The law of Fire Insurance, by C. J. Bunyon, chap. V. III, page 114.

Ellis on Fire and Life Insurance, Shaw's edition, ch. I, No. 13, p. 49.

Kent's Commentaries, Tome 3, page 280.

Angell on Fire and Life Insurance, p. 142, paragraph 88.

Code Civil, B. C. Arts. 2516 et 2517.

La majorité de la cour a adopté les prétentions des Appelants. Voici en quels termes les Hon. Juges ont exprimé leurs opinions.

SIR A. A. DORION, Juge en chef, (*dissentiens*):—On the 28th day of August, 1876, the respondents insured for a period of one month, and to the amount of $2000, a building belonging to one Xavier Limoges, and gave him what is termed a short risk receipt in the following terms:

"Received from Xavier Limoges," etc., etc.

The building was destroyed by fire on the night of the 31st August and 1st September.

The appellants, creditors of Limoges, have served a writ of attachment upon the respondents who have declared they owed nothing to Limoges. This declaration has been contested by the appellants, who allege that the respondents are indebted to Limoges in the sum of $2,000, being the amount of his loss covered by the insurance effected by them on the 28th of August, 1876.

The respondents have answered this contestation by alleging that it was stipulated in the receipt in question that the insurance was subject to the

conditions of the fire insurance policies of their Company; that the following condition was among those printed on the fire insurance policies then in use by the Company:

"That the assured must give notice to this Company (to wit, to the respondents) of any other insurance effected on the same property, and have the same endorsed on his policy, or otherwise acknowledged by the Company in writing. A failure to give such notice will void such policy;"—that on the day on which Limoges obtained the above receipt he had applied to the Royal Canadian Insurance Company for a further insurance on the same property with the Royal Insurance Company of the sum of $1,000; that Limoges never gave notice to the respondents of this last insurance, and never had the same acknowledged by the respondents in any way whatever, whereby the insurance effected with the Company (respondents) was null and void, and neither Limoges nor the appellants had any right to obtain from the respondents the amount of the alleged insurance or any part thereof.

It is not necessary to refer to the other answers of the respondents, as they have all been abandoned.

The fact that Limoges had on the same day, 28th August, 1876, effected another insurance with the Royal Canadian Insurance Company on the same property for $1,000, and that no notice was given to the respondents of such insurance until after the fire had occurred was proved. A blank policy containing the printed condition set out in the answers of the respondents was also proved to be the form used by them at the date of the receipt.

The appellants proved that, when Limoges effected the insurance with the respondents, he applied for a policy and was told that it was not the practice to issue policies for short risks. Upon these pleadings and evidence the Superior Court dismissed the appellants' contestation.

The appeal is from this judgment and raises the two following questions:

1st. Was Limoges, under the terms of the short risk insurance receipt of the 28th August, bound to comply with the ordinary conditions contained in the fire policies then used by the Company (respondents), and among others to give notice of any other insurance effected by him on the same building?

2nd. Was he relieved from the obligation of giving such notice by the fact that the respondents did not give him a policy of insurance containing these conditions?

I am of opinion that the first question must be answered in the affirmative. The receipt given by the respondents on the 28th of August was accepted by Limoges as evidence of the contract entered into by him with the respondents for the insurance of his building. This receipt refers to the conditions contained in the fire policies of the Company, (the respondents), and in express terms subjects the insurance to these conditions. The acceptance by Limoges of this receipt must be considered as an admission on his part that he was aware of the nature of the conditions which he agreed should be applicable to the insurance of his property. He became, therefore, as much bound by these conditions as if they had been incorporated or endorsed on the receipt itself. The cases of Goodwin and The Lancashire Insurance Co., 16 L. C. Jurist 298, and of Jacobs *vs.* The

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Equitable Insurance Co., 17 [illegible] C., 35, 19 Q. B. U. C., 250 and 257, support this view of the case.

On the second question I consider that, when Limoges asked for a policy, he might have insisted upon getting one, or he might have refused to insure with the respondents on the ground that he was entitled to such a policy; but when he accepted the receipt he acquiesced in what was represented to him as being the usual course of the Company of not issuing policies for short risks—and became satisfied to hold this receipt in lieu of a policy. The receipt he so accepted is the evidence of his contract with the respondents, and, by this contract, he agreed to abide by the condition of the policies then used by the Company. He cannot now plead ignorance of these conditions which he should have ascertained at the time he effected the insurance.

The demand which Limoges made of a policy does not seem to have been for the purpose of ascertaining the conditions, but to secure a title which he thought necessary to the validity of a claim in case of loss. If he had applied for a blank form of a policy to see what the conditions were, it is not likely it would have been refused to him.

I would confirm the judgment of the Superior Court. The judgment will, however, be reversed, as Mr. Justice Monk and myself are dissenting from the view the majority of this Court take of this case.

MONK, J., also dissenting, entirely concurred with the Chief Justice.

CROSS, J.:—I have found no precedent which will apply precisely to the point raised in this suit. I must try to arrive at the extent of the obligations incurred by each of the parties to the contract of insurance which is admitted to have intervened between Limoges, the defendant, and the Citizens' Insurance Company, garnishees in this cause.

Limoges being engaged in the construction of a building at Point St. Charles, near Montreal, desired to be protected by insurance on his enterprise, for which purpose he first applied to the Citizens' Insurance Company, who agreed to take the risk for one month. He paid the premium, and obtained from the Company a receipt, declaring that the Company had received from him, Limoges, the sum of five dollars, being the premium of assurance against the loss or damage by fire effected with the Company to the extent of $2,000 on a brick building in course of construction, on Champlain street, Point St. Charles, near Montreal, including carpenters' risk, for one month, subject to the conditions of the fire insurance policies of this Company.

Limoges asked for a policy, but was answered by the company's agent or manager in the office who gave him the receipt, that it was not usual to give policies for short risks such as the one in question. It must, consequently, I think, be assumed that the contract was to insure on the usual conditions of the Company in so far as these were applicable in the case of an undelivered policy. On reference to the schedule of conditions on the form of the ordinary policies of the Company, as produced by them, it is found that the one pleaded and relied on by the Company, is in the following words: "The assured must give "notice to this Company of any other insurance effected on the same property,

"and have the same endorsed on this policy or otherwise acknowledged by the "Company in writing, and failure to give such notice shall void this policy." These terms indicate an existing policy, one in fact made out and delivered to the assured, so as to enable him to exercise his diligence in regard to the requirements of the condition in question.

Limoges, on the same day he got the receipt in question, applied to the Royal Insurance Company for other insurance on the same property to the extent of $1000, and obtained a similar receipt from the last named Company, but no Policy was issued for this latter insurance. If this last was another insurance within the condition of the Citizens Company's policy, Limoges was at least entitled to such reasonable time as would be necessary to enable him to comply with the condition. As the fire which consumed the premises insured took place on the 31st August, and almost immediately afterwards notice of the other insurance was given, it may be said that, within a reasonable time, Limoges had, as far as possible on his part, complied with the condition in question, but evidently the compliance indicated by the policy was such as would lead to an endorsement thereof by the Company on the policy, or have it otherwise by them acknowledged in writing. Now if no policy was issued in either case, Limoges could not satisfactorily communicate to the Citizens Insurance Company the particulars of his contract with the Royal, nor have such notice endorsed on the policy of the Citizens' Company. If it was reasonable for the Citizens' Insurance Company to refuse their policy for a short risk, it was equally reasonable for the Royal to refuse their policy,—without it no satisfactory particulars could have been communicated to the Citizens', and without the policy of the Citizens' there could have been no endorsement on it of the insurance effected with the Royal.

It seems to me that the refusal by the Citizens' Insurance Company to deliver a policy to Limoges for the risk they assumed, was equivalent to an acknowledgement on their part that the condition in question could not attach, and, if it could attach, the refusal to deliver the policy operated a waiver of the condition, and that the Company are now estopped from availing themselves of a condition they themselves stood in the way of being fulfilled. No fraud or misconduct is imputable to the assured; the defence set up by the Company against his claim rests on a technical ground. I think neither the law nor the facts should be, in such case, in aid of such a defence. I consider the assured entitled to a liberal construction of the contract, with allowance made for the circumstances which rendered the condition inapplicable. I am, therefore, of opinion to reverse the judgment of the Court below; declare the seizure made upon the Citizens' Insurance Company valid, and order them to pay the plaintiff in the Court below the sum of $2000, which was so by them insured in favor of Limoges.

RAMSAY, J.:—This case arises on a short risk insurance receipt, by which the assured agreed to be bound by the conditions of the fire insurance policies of the Company. One of these conditions is that "the assured must give notice to the Company of any other insurance effected on the same property, and have the same endorsed on the policy, or otherwise acknowledged by the Company in writing, a failure to give such notice will void such policy." This is a reasonable condition, and its object is clear. It cannot, therefore, be doubted that

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it is such a stipulation as an insurer may validly make for his own protection, and that it will be binding on the insured. The only question then is whether a general reference to a policy withheld will be considered as sufficient to modify the contract. The learned Judge in the Court below held that the insured was presumed to know the condition. This is perfectly true as a general rule, if the thing referred to is not too vague, and if it is a thing the knowledge of which is within the reach of the party to be bound by it. But the case here is somewhat different. What is a policy of the company? This short risk receipt is a policy, and it seems the only one given for short periods. It is also in proof the respondents refused appellant any other, and there is no evidence to show that appellant's attention was drawn to this condition.

I concur in thinking the judgment should be reversed.

The judgment is as follows:—

"The Court of Our Lady the Queen, etc.

"Considering that in and by the receipt and undertaking made and delivered by the respondents, the said Citizens Insurance Company, to François Xavier Limoges, on the twenty-eighth day of August, one thousand eight hundred and seventy-six, it was therein in effect declared that they, the Citizens Insurance Company, had received from the said Limoges the sum of five dollars, being the premium of assurance against loss or damage by fire effected with the Company to the extent of two thousand dollars, on a brick-encased building in course of construction on Champlain street, Point St. Charles, near Montreal (including carpenter's risk), for one month, subject to the conditions of the Fire Insurance policies of the said Company;

"And considering that it has been proved the said brick-encased building was destroyed by fire on the night of the thirty-first day of August and morning of the first day of September, one thousand eight hundred and seventy-six, and that the said François Xavier Limoges thereby suffered damages to an extent exceeding the amount of the insurance effected thereon, and although it has been pleaded and established in proof on behalf of the said Citizens Insurance Company that one of the conditions of their fire policies is to the effect and in the words following: 'The assured must give notice to this Company of any other insurance effected on the same property, and have the same endorsed on this policy, or otherwise acknowledged by the Company in writing, and failure to give such notice shall avoid this policy;' and that after the delivery to said Limoges of said receipt and undertaking, on the said twenty-eighth day of August, one thousand eight hundred and seventy-six, he applied for and obtained from the Royal Insurance Company a like receipt and undertaking, insuring the same property to the extent of a further sum of one thousand dollars, whereby notice was not given, nor allowance thereof made in writing before the said fire on any policy of the said Citizens Insurance Company; yet it has been established and proved that upon the delivery to him, the said Limoges, by the said Citizens Insurance Company, of the aforesaid receipt and undertaking, he asked for and was refused a policy by the said last named Company;

"And considering that if the said François Xavier Limoges was under any

obligation in respect of such notice and allowance, it was thereby suspended and waived until such policy should be delivered to him, which was not done;

"And considering that upon delivery to him of a policy containing said condition he was entitled to a reasonable delay to give to the said Citizens Insurance Company said notice, and get their said allowance in writing;

"And considering that in the said judgment rendered by the Superior Court at Montreal, on the twenty-eighth day of June, one thousand eight hundred and seventy-seven, dismissing the contestation made by the said appellants to the declaration of the said Citizens Insurance Company, as garnishees in this cause, there is error;

"This Court doth reverse, annul and set aside the said judgment, and, proceeding to render the judgment which the said Superior Court should have rendered, doth maintain the said contestation of the said appellants, doth set aside the said declaration of the said Citizens Insurance Company as garnishees in this cause, and doth condemn the Citizens Insurance Company to pay and satisfy to the said appellants the sum of two thousand dollars, with interest thereon from the nineteenth day of December, one thousand eight hundred and seventy-six, with costs, as well in this Court as in the Court below.

"The Honorable Sir Antoine Aimé Dorion, Knight, Chief Justice, and Mr. Justice Monk dissenting."

DeBellefeuille & Turgeon, avocats des appelants. Jugement renversé.
Abbott, Tait & Wotherspoon, avocats de l'intimé.
(E.L. DE B.)

SUPERIOR COURT, 1878.

MONTREAL, 13TH NOVEMBER, 1878.

Coram JETTÉ, J.

No. 94.

Murais vs. *Brodeur*, and *Brodeur*, Intervening Party.

HELD:—That an Intervening Party who resides beyond the limits of this Province, and who is also an insolvent under the Insolvent Act, who intervenes simply as the *garant* of the defendant and for the mere purpose of taking up the *fait et cause* of the defendant and defending the action brought against him, is not bound to give security for costs.

PER CURIAM. La demanderesse poursuit le défendeur comme endosseur d'un billet signé par l'intervenant, mais elle n'a pas mis ce dernier en cause.

L'intervenant qui demeure maintenant aux États-Unis, demande à être admis dans la cause, pour prendre le fait et cause du défendeur et contester la demande, prétendant que le billet sur lequel est basée l'action a été donné sans considération; que par conséquent il est intéressé à faire renvoyer cette demande contre sa caution et à obtenir ainsi sa propre libération de la dette réclamée.

La demanderesse fait motion que l'intervenant soit tenu de donner cautionnement pour frais, pour deux raisons:

1o. Parce qu'il n'a pas de domicile en Bas-Canada.

2o. Parce qu'au moment de son départ du pays le dit intervenant avait fait cession de biens, en vertu de la loi de faillite, et qu'il n'a jamais eu sa décharge.

Marois vs. Beaudoin.

Le premier motif est fondé sur l'art. 29 du Code Civil qui déclare que tout individu, non résidant dans le Bas-Canada, qui y *porte, intente* ou *poursuit* une *action, instance* ou *procès*, est tenu de fournir à la partie adverse cautionnement pour les frais.

Malgré la généralité des termes dont le législateur s'est servi, je ne crois pas qu'il soit possible d'interpréter cet article de manière à obliger un débiteur non résidant de donner cautionnement pour se défendre. Ici l'intervenant pourrait être mis en cause par action en garantie simple de la part du défendeur et forcé de venir se défendre, et si telle procédure était adoptée, personne ne prétendrait qu'il peut être obligé de donner cautionnement pour plaider à cette action en garantie. Au lieu d'attendre cette poursuite il intervient et demande à se constituer défendeur pour faire repousser l'action. Il ne forme donc pas une demande nouvelle, il ne se constitue pas demandeur d'une condamnation quelconque, sa position est exactement la même que s'il avait été poursuivi en premier lieu par la demanderesse, tout comme s'il avait été appelé en garantie simple par le défendeur.

La demanderesse ne peut donc réussir sur ce premier motif.

Le second motif de la demande de cautionnement repose sur la section 39 de l'acte de faillite de 1875 qui déclare que "*Si après qu'une cession a été faite, "ou qu'un bref de saisie-arrêt a été émané, en vertu du présent acte,* et avant "qu'il n'ait obtenu sa décharge en vertu du présent acte, *le failli fait "émettre quelque bref*, ou *institue* ou *continue* quelque *procédure d'une nature "quelconque*, il donnera à la partie adverse tel cautionnement pour les frais qui "sera prescrit par la cour devant laquelle cette poursuite ou procédure est pen-"dante, avant que cette partie ne soit tenue de comparaître ou plaider ou "d'adopter toute autre procédure ultérieure dans la cause."

Les expressions dont le législateur s'est servi dans ce statut sont encore plus larges et semblent avoir une plus grande portée que le langage du Code. Mais sera-t-il possible d'interpréter même cette section du statut de façon à priver un failli du droit de se défendre lorsqu'il est poursuivi, à moins qu'il ne donne caution pour les frais de sa partie adverse? Je ne puis adopter cette manière de voir, et il me semble que même en donnant à cette disposition de la loi la portée la plus étendue qu'il soit possible, il y a une distinction à faire entre le cas d'un défendeur que *est forcé par le demandeur* de procéder et le cas d'un défendeur qui, *malgré sa faillite*, veut lui-même *forcer le demandeur* de continuer les procédures dans l'instance où ils sont concernés.

Si le défendeur se contente d'agir sous la pression du demandeur, je ne crois pas qu'il puisse être tenu de donner caution.

Si, au contraire, c'est lui défendeur qui veut forcer le demandeur de continuer les procédures commencées, je l'obligerais de donner le cautionnement.

Dans l'espèce le défendeur entre dans la cause pour se défendre, pour répondre à la demande de la poursuivante, mais jusqu'à présent, je ne vois pas qu'il soit encore dans le cas où la loi indique qu'il doit être tenu de donner un cautionnement. Ce cas pourra peut être se présenter plus tard, car le failli se trouve ici en cause, avec un désavantage évident puisqu'il peut être forcé de procéder sans pouvoir exercer la même pression sur sa partie adverse. Mais en

attendant que le failli soit dans cette position, je ne puis l'obliger de donner le cautionnement demandé.

Marais vs. Beudoin.

Motion renvoyée avec dépens.

Bertrand, for plaintiff.
Ouimet & Co., for defendant and for intervening party.
(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram PAPINEAU, J.

No. 1109.

Louis Kellert et al. vs. *The Grand Trunk Railway Company of Canada.*

JUGE:—Que dans l'espèce la responsabilité des voituriers à l'égard de la garde et la conservation de bagage de voyageurs à eux confié cesse au moment où le propriétaire arrive à sa destination, et que sans un nouveau contrat intervenu après, entre le voyageur et la Compagnie de voitures, pour prolonger la responsabilité de cette dernière, la Compagnie n'est pas tenue de la perte du bagage, cette perte devant alors être attribuée à la négligence seule du voyageur.

PER CURIAM. Le 28 Août 1873, les demandeurs ont mis à bord des voitures de la Compagnie défenderesse, à Napanee, pour la transporter à Montréal, une valise contenant les marchandises détaillées dans la liste A, annexée à la déclaration et valant $255.87, pour être transportée à Montréal, moyennant considération, et que la défenderesse ne la leur a jamais livrée; Dommage, $255.87. Action datée le 28 Octobre; rapportable 5 Décembre 1873.

La défenderesse plaide 1er. Exception en droit: Les demandeurs ont fait étiqueter la valise en question comme bagage ordinaire de voyageur pendant qu'elle contenait des marchandises.

Que la valise arrivée à Montréal n'a été réclamée que 3 jours après, par la faute et négligence des demandeurs et, dans l'intervalle, elle a été volée, retrouvée plus tard par la police dans une maison de prostitution, avec une partie des effets valant $150.

Les effets ont été gardés par les autorités judiciaires pendant quelque temps pour le procès de l'accusé, maintenant que la Compagnie a obtenu les effets elle est prête à les remettre comme elle l'a déjà offert, et sous ces circonstances la défenderesse n'est pas responsable et demande le débouté de l'action (sans offrir par ses conclusions de remettre ce qui reste des effets).

2o. Elle produit une dénegation générale.

Les demandeurs répliquent: La valise a été reçue, avec plusieurs autres, comme bagage de commis voyageur appartenant aux demandeurs et non au commis qui a payé *extra*. Il était parti de Montréal avec un billet spécial comme c'est d'usage et est revenu avec un billet ordinaire en payant ce qui lui a été demandé.

Il est arrivé à Montréal le soir du jour de son départ après fermeture du magasin et a reclamé les valises le lendemain. On lui a remis les valises moins une.

Kellert et al. vs. G. T. R. Co.

Si elle a été volée c'est par la faute de la défenderesse.

Les demandeurs sont prêts à recevoir les effets à leur valeur actuelle et paiement de ceux qui manquent, ils en demandent acte et concluent au renvoi de l'exception.

Réponse générale et Réplique générale.

La défenderesse a fait des articulations de faits contenant tous ses allégués et ils n'ont pas été niés.

Cependant les parties ayant procédé à la preuve j'ai examiné celle-ci avec soin, et elle établit le plaidoyer de la défenderesse d'une manière suffisante, indépendamment de la présomption légale résultant du défaut de réponses aux articulations de faits.

Jugement :—

"Considérant que les demandeurs n'ont pas répondu aux articulations de faits de la Compagnie défenderesse et que celle-ci a prouvé tous les alléguée de son plaidoyer, et spécialement que la valise en question est arrivée à Montréal, par le convoi de dix heures et trente minutes du matin, jeudi, le vingt-huit d'Août mil huit soixante-treize, suivant le contrat intervenu à Napanee entre la défenderesse et les demandeurs, par leur agent voyageur ou commis, et qu'elle n'a pas été réclamée par le dit commis des demandeurs, à l'arrivée du dit convoi à Montréal, mais qu'elle a été laissée, par lui, à la gare de la dite Compagnie défenderesse sans même en donner avis à celle-ci ou à ses employés. Considérant qu'il est prouvé que les demandeurs ont négligé, jusqu'au lundi suivant de réclamer la dite valise et qu'ils n'ont pas allégué qu'un contrat spécial fût intervenu entre eux et la défenderesse, pour la garde et conservation de la dite valise, après son arrivée à la gare de la défenderesse, à Montréal, et qu'ils ont négligé de la réclamer et de pourvoir à sa garde et sureté ; et que la défenderesse n'en était pas responsable au même dégré et de la même manière qu'en vertu du contrat qu'elle avait fait de la transporter à Montréal. Considérant que si d'un côté les demandeurs ont tenté de prouver, sans l'avoir allégué, qu'il est d'usage pour la Compagnie de garder les bagages des voyageurs qui ne les réclament pas au moment de l'arrivée, et de faire payer dix centins par jour pour les articles non réclamés, de l'autre côté, il est prouvé que ces dix centins ne sont demandés que pour les jours postérieurs au premier jour de retard après l'arrivée des articles non réclamés ; considérant que les demandeurs ne réclament pas, par leur action, la valise en question ni les effets qu'elle contient ou ce qui en reste, mais seulement les dommages ; considérant que sous ces circonstances la Cour ne peut ordonner la remise aux demandeurs de la valise et des effets qui restent, et que la défenderesse s'est déclaré prête à remettre aux demandeurs, et qu'elle a même fait transporter, pour les leur remettre, à leur lieu d'affaires ; considérant que les demandeurs ne réclament que des dommages et que ces dommages, s'ils en ont souffert, peuvent être la conséquence de leur faute autant que de celle de la défenderesse ; la cour déboute l'action des demandeurs, avec dépens contre eux."

Monk & Butler, for plaintiff.
Duhamel & Co., for defendant.

COUR SUPERIEURE, 1878.

MONTREAL, 6 AOUT 1878.

Coram RAINVILLE, J.

No. 1538.

Joël Leduc vs. *Augustin Laberge, jr.*

JUGE:—1o. Que la qualification pour être échevin dans la cité de Montréal sous l'opération de la 37me Vict., ch. 51 (Q), ne peut reposer sur une propriété possédée par une société commerciale dont le dit échevin serait partie.

2o. Que l'hypothèque, étant indivisible de sa nature, frappe pour le tout chaque partie de l'immeuble hypothéqué ainsi possédé par une société soit civile, soit commerciale, et sur lequel tel échevin se serait qualifié.

Cette action (requête libellée), a été instituée sous l'opération de la clause 25 de la 37me Victoria, ch. 51, Statut de Québec, 1874. Ce statut renferme la charte de la cité de Montréal avec ses amendements.

Le défendeur avait été déclaré élu échevin pour le quartier St. Louis à l'élection municipale du 1er mars 1878. Le pétitionnaire prétendait que cette élection était nulle, et il invoquait comme moyens: 1o. des faits de corruption de la part du défendeur; 2o. son défaut de qualification.

La clause 17 du statut précité établit que: "Pour être élu échevin de la cité de Montréal, il faut avoir résidé et tenu feu et lieu dans la dite cité pendant une année avant telle élection, et avoir en propriété, et possédé en propre comme propriétaire, pendant les six mois qui précèderont immédiatement sa mise en nomination comme tel échevin, des biens immeubles dans la dite cité, de la valeur de deux mille piastres, cours actuel, après paiement ou déduction de ses justes dettes."

La clause 18 se lit comme suit:—"Nulle personne ne pourra entrer en office comme maire ou échevin de la dite cité, à moins qu'elle n'ait au préalable, déposé et remis entre les mains du greffier de la cité, une déclaration sous son seing, constatant qu'elle est éligible tel que requis par les sections précédentes, et contenant une description détaillée de l'immeuble qui la rend éligible."

Le défendeur Laberge s'était qualifié sur une propriété ainsi désignée dans la déclaration produite dans les archives de la Corporation: "Un terrain avec bâtisses sus-érigées, situé dans le quartier St. Louis de la cité de Montréal, et désigné sous le numéro 3 et 5 dans le dernier rôle de cotisation pour le dit quartier, le dit terrain borné en front par la rue Ste. Elizabeth, en arrière par la rue Sanguinet, d'un côté par une ruelle, de l'autre côté par la succession Leblanc, de la contenance de cinquante-quatre pieds de front sur cent soixante et six pieds de profondeur."

A l'enquête le pétitionnaire a prouvé, en produisant le titre, que cette propriété avait été acquise des héritiers Smith par Aug. Laberge, père, et Aug. Laberge, fils, "tous deux maîtres maçons et entrepreneurs, résidant en la cité de Montréal, et faisant affaires ensemble en société sous le nom et raison de A. Laberge & fils," laquelle société était représentée au dit acte par le dit Aug. Laberge, fils, le défendeur, acceptant pour lui et son co-associé.

Le pétitionnaire a prétendu, à l'argument, que le défendeur n'était pas qualifié selon le désir de la loi, parce que l'immeuble sur lequel il a déclaré se quali-

Leduc vs. Laberge.

fier ne lui appartenait pas en propre, mais appartenait à une société commerciale, la société A. Laberge & fils, dont le défendeur faisait partie; de plus que l'on ne peut se qualifier sur une propriété appartenant à une société commerciale quand bien même on serait membre de cette société.

De son côté le défendeur affirmait que la société qui existait entre lui et son père ne pouvait le priver du bénéfice de l'actif que représentait sa part dans la dite société, laquelle était strictement civile.

Mais la Cour a maintenu qu'en supposant que la société A. Laberge & fils serait une société civile, et que le défendeur serait propriétaire d'une moitié indivise, la propriété valant $12,000, est grevée d'une hypothèque au montant de $5,600, or une hypothèque n'étant pas divisible et s'appliquant dans son entier sur chaque part, la part indivise de M. Laberge, valant $6,000, est affectée par l'hypothèque au montant de $5,600, et ne peut le qualifier aux termes de la loi.

La Cour a maintenu ces deux moyens comme bien fondés, et cita Troplong sur Société, No. 58.

Voici les considérants du jugement:

"Considérant que le requérant n'a pas prouvé cette partie de la requête dans laquelle il attaque l'élection du défendeur comme étant entachée de corruption, rejetons icelle partie de la requête;

"Mais considérant que le défendeur, pour être qualifié suivant la loi, doit avoir en propriété et avoir possédé en propre comme propriétaire pendant les six mois qui ont précédé immédiatement la mise en nomination, des biens immeubles dans la cité de Montréal, de la valeur de $2,000, après paiement ou déduction de ses justes dettes;

"Considérant qu'il est établi en fait que l'immeuble sur lequel le dit défendeur a déclaré se qualifier a été acquis et est la propriété de la société "A. Laberge & fils," composée du dit défendeur et de son père, et faisant commerce sous la dite raison sociale;

"Considérant qu'en loi dans les sociétés commerciales au moins, l'un des associés n'est pas propriétaire en commun ou par indivis d'aucune partie d'un immeuble acquis par la société, et qu'il ne peut ni aliéner ni hypothéquer aucune partie du dit immeuble;

"Considérant, en supposant même que le dit défendeur serait propriétaire par indivis de la moitié de l'immeuble sur lequel il s'est qualifié, qu'il est prouvé que le dit immeuble était lors de sa mise en nomination hypothéqué pour une somme de $5,600, et qu'en loi l'hypothèque est indivisible, et frappe pour le tout chaque partie de l'immeuble hypothéqué, et que la valeur de la moitié du dit immeuble n'est prouvé être que de $6,000;

"Déclarons le dit défendeur non qualifié, suivant la loi, à être échevin de la cité de Montréal, et déclarons en conséquence sa mise en nomination et son élection nulle, et les cassons et annulons, et maintenons la requête du requérant pour autant, et rejetons cette partie de laquelle le dit requérant réclame le siége, et ordonnons qu'une nouvelle élection pour le quartier St. Louis de la cité de Montréal ait lieu suivant la loi."

Lareau & Lebeuf, avocats du pétitionnaire. Pétition accordée.
Lacoste & Globenski, avocats du défendeur.
(E. L.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 29TH JANUARY, 1878.

Coram SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 160.

BECKHAM, APPELLANT;

AND

FARMER, RESPONDENT.

HELD:—That where a proprietor, sued by a builder for the value of extra works beyond those mentioned in the contract and specifications, *voluntarily* admits on oath, when examined as a witness, certain items of such extra works for which no authority in writing had been granted by or with the sanction of the proprietor (as required by Art. 1690 of the Civil Code, the value of such items so admitted may be recovered in the suit.

This was an appeal from a judgment of the Superior Court at Montreal (Torrance, J.) rendered on the 15th of May, 1877, by which judgment the claim of the appellant (as builder) for extra works was rejected, the Court declaring "that, by article 1690 of the Civil Code, plaintiff cannot be allowed to make proof, either by parol testimony or the oath of the defendant, of the making or furnishing of the extras, the price whereof is sought to be recovered by this action."

SIR A. A. DORION, CH. J.—The main question in this case is as to what evidence is admissible under Article 1690 of the Civil Code, to prove a claim for works done by a contractor different from those mentioned in a written contract accompanied with plans and specifications.

The appellant entered into a contract, on the 23rd of October, 1870, to build a block of houses for the respondent, according to plans and specifications, for the sum of $16,000. Having completed his contract, he brings this action for $1,852.43, balance of the $16,000 stipulated for in the contract and of $1,269.18 for extra works done according to instructions which he received from respondent's architect.

By his plea the respondent denies any responsibility for *extra* works for which he had given no written order, and alleges that he has paid to the appellant more than he was entitled to receive under his contract.

The appellant by a statement filed has deducted $211.75 for works included in the contract which he did not complete. This leaves a sum of $15,788.25 to which he was entitled for the works done under the contract. An admission was given at *enquête* by the attornies of record that the respondent had paid him the sum of $15,715.00.

Subsequently, the appellant moved to be relieved from the effect of this admission and to re-open the *enquête*, on the ground that the admission had by mistake been given for a larger amount than that actually received by $589.85.

The Superior Court rejected the appellant's application to re-open the *enquête*, and dismissed his action on the grounds that he had been paid in full for the works done under the contract, and that by Article 1690 of the Civil Code, "he was not allowed to make proof either by parol testimony or the oath of the respondent of the making and furnishing of the *extras*."

Beckham and Farmer.

This Court does not find that the appellant has established that the admission of the sums received was given by his attorneys under a misapprehension or mistake so as to entitle him to re-open the *enquête*, and this admission, with the other evidence in the cause, shows that the appellant has been paid $16,177.47, or $389.22 more than he was entitled to for the works performed under the contract.

As to the *extra* works of which the price or value is claimed, some are entirely beyond the contract, such as the removal of an old building, the erection of a shed, &c., for which no provision was made. Others consist in mere alterations and additions to works contemplated by the contract and mentioned in the specifications.

The appellant has produced several letters directing him to make some of the additional works. These letters are from Mr. Mann, the respondent's architect, but there are none from the respondent himself.

In only two instances are the prices of the additional works mentioned in the written instructions, given by the architect, and the authority of the latter is positively denied by the respondent. The value of the additional works is proved by several witnesses under reserve of the objections made by the respondent to the legality of such evidence.

The respondent has been examined at great length in reference to these extra works, and admitted some of them to have been made at his request, and also their value. These admissions are most formal. For instance, to a question put by the presiding judge in this form, with regard to No. 1, (that is 1st item) did you give any order with regard to that?

A. Whether it means where the timber was put on the foundation, if so I admit it.

With regard to No. 2, I would admit half the amount.

With regard to Nos. 3, 4, 5, and 6, I do admit.

With regard to No. 6, I do admit.

With regard to No. 7, I do admit.

With regard to No. 8, I do admit.

With regard to No. 10, I admit six days' in the place of nine days' work, &c.

The items admitted in whole or in part amount to $712.22.

Notwithstanding these admissions the demand for the price of the extras or additional works was rejected, on the ground, as already stated, that the evidence adduced was contrary to article 1690 of the Civil Code.

This article is in the following terms:

1690.—"When an architect or builder undertakes the construction of a build-"ing or other works by contract, upon a plan and specifications, at a fixed price, "he cannot claim any additional sum upon the ground of a change from the "plan and specifications, or of an increase in the labor and materials, unless such "change or increase is authorized in writing, and the price of them is agreed "upon with the proprietor."

The rule here laid down is new, as may be seen by Kennedy & Smith, 6 L. C. Reports, p. 260, decided in 1856, wherein the Court of Appeals held that, even where the contract contained an express provision that no allowance would

be made for any *extra* or additional work, unless the same was ordered in writing, this did not relieve the proprietor from the obligation of answering upon *faits et articles*, as to verbal orders given by him, for additional works.

Under this article, which is almost identical with Article 1793 of the French Code, a builder who has entered into a contract for a fixed price, cannot recover the value of additional works arising out of alterations in those provided for in the plans and specifications, unless he proves: 1st, that the alterations were authorized in writing by the proprietor; and 2nd, that the prices for these alterations were agreed upon. It seems, however, that the agreement as to prices need not be in writing, but may be proved otherwise.

Troplong, on Art. 1793, Louage No. 1018, says:

"Il résulte de là, que la preuve des changements et des augmentations ne peut "résulter que d'une convention rédigée par écrit; l'écriture est de son essence. 1019. "Mais l'art. 1793 n'est pas aussi sévère sur la preuve du prix des augmen- "tations. Il faut, sans doute, que le prix soit convenu d'avance; l'architecte ne "pourrait à défaut de convention demander à faire estimer les travaux par "experts; mais autre chose est la convention sur le prix, autre chose est la "preuve de cette convention. Si l'architecte prouve par interrogatoire sur faits "et articles ou par le serment, que la convention sur le prix a positivement eu "lieu, que telle somme a été fixée, pour les travaux additionnels à exécuter, il sera "écouté dans sa réclamation." 4 Duvergier Nos. 366-7-8; 3 Zachariae § 374, note 16; 17 Duranton No. 256, Perrin, Code des Constructions No. 16; Marcadé T. 6, p. 542; Boileux T. 6, p. 193; Fremy de Ligneville, Leg. des Bâtiments No. 25.

A similar rule seems to exist in England, Taylor on Evidence, Vol. 1, No. 373, p. 406; Parton & Cole, 6 English Jurist, 370. It rests, however, upon different grounds.

The discussion on the French Code shows that this exceptional provision, and which is considered as a rigorous one, was adopted for the protection of unsuspecting proprietors who were taken advantage of by architects and builders who, by suggestions of apparently slight modifications in the plans and specifications, contrived to lead them into heavy additional expenditure. The Courts have, therefore, very properly restricted its application to cases coming within the precise terms of the article, and they have even tempered its rigor in cases which did not appear to be within the mischief sought to be remedied.

In the case of Lambert & Delpierre, Dalloz R. P. 1832, 2-4, which is a leading case, the Court of Appeal of Douai, while declaring that the Court of original jurisdiction had no right to order the appellant to answer interrogatories upon *faits et articles* to establish that she had verbally authorized changes to be made from the plans and specifications, and that she had promised to pay for the alterations, because the absence of a written authority established a presumption *juris et de jure* that the changes would not give rise to any additional claim, yet, in one of its motives, expressly recognizes that, if a proprietor chooses to answer voluntarily, he thereby renounces to the protection which the article affords him, and he becomes bound by his answers. The portion of the arrêt alluded to is as follows:—"Qu'en thèse générale et d'après l'Art. 1352 du Code

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"Civil, nulle preuve n'est admise contre la présomption de la loi; que si, par "exception, la loi permet de puiser une preuve dans l'aveu judiciaire, il n'est "pas douteux que cet aveu ne doive être purement volontaire, puisqu'il doit "emporter renonciation au droit acquis que confère la présomption legale."

The respondent in the present case did not object to the questions submitted to him. He voluntarily answered them, and according to the arrêt just cited, he thereby renounced the right to invoke the Art. 1690. If the answers were not complete in themselves, it would be difficult to admit them to be completed by extraneous evidence. But in this case, they are so comprehensive as to leave nothing to be supplied, and by themselves they amount to a confession of judgment as to the several items admitted.

If, by his plea, the respondent instead of contesting his liability had pleaded that he was only liable for $712.22 for extras, and that he had paid the contract price in full, or if he had confessed judgment for the $712.22, no Court of justice could have refused to give the appellant a judgment on such plea or confession. The respondent has not, it is true, given a formal confession, nor admitted his liability by his plea, but he has done so under his own signature and in the most formal manner. The Court is disposed to say that this is quite sufficient, and that the amount so admitted to the appellant must be allowed.

As to the orders given by the architect, they raise a strong presumption of good faith in favour of the appellant, but that is all. It was not proved that Mr. Mann was authorized by the respondent to give these orders. The duty of an architect who superintends the erection of a building for the proprietor is not to alter the contracts entered into with the builder, but to see that these contracts are duly carried out. There is, therefore, no implied authority given to an architect to order works in addition or different from those provided for by the contract, in the fact that he is employed to superintend the works under the contract.

We need hardly say that Art: 1690 does not apply to works which are altogether beyond the written contract. As these can form the subject of a different agreement, the builder can claim the price of these without any writing, for they do not affect the written contract. There are in this case a few items of this kind, and their value is included in the sum of $712.22 allowed for extra works.

This leaves a balance of $323 in favour of the appellant, and the judgment will go for that sum and costs in both Courts.

The following was the written judgment of the Court:—

"The Court..... considering that the respondent has admitted that appellant had done for him extra works in addition to what was provided for in the contract of the 23rd day of October, 1874, and the value thereof to the amount of $719.71. And that in view of such admission there is no occasion to apply to the works so admitted the rules of law contained in Article 1690 of the Civil Code of Lower Canada;

"And considering that the appellant erected the block of tenement-houses mentioned in the said contract, for which he was to receive $16,000, from which sum is to be deducted a sum of $211.75 for the price and value of certain works

which he did not perform as he was obliged to do by his said contract, thus leaving a sum of $15,788.25 which the appellant was entitled to receive under his said contract;

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"And considering that this last sum of $15,788.25 and that of $712.22 for extra works formed a sum of $16,500.47 which the appellant was entitled to receive from the respondent;

"And considering that the appellant has received from the respondent divers sums amounting to $16,177.47, leaving a balance of $323 which he is entitled to recover from the respondent;

"And considering that there is error in the judgment rendered by the Superior Court sitting at Montreal on the 15th day of May, 1877;

"This Court doth reverse the said judgment of the 15th day of May, 1877, and proceeding to render the judgment which the said Superior Court should have rendered, doth reject the motion made by the appellant to re-open his enquête and also the motion of the respondent to reject from the Record the affidavit fyled by the appellant on the 8th day of May, 1877, and doth condemn the respondent to pay to the appellant the sum of $323 with interest on the said sum from the fourth day of December, 1871, date of the service of process in this cause, and also the costs incurred both in the Court below and on the present appeal."

Judgment of the Superior Court reversed.

F. W. Terrill, for appellant.
Doutre & Co., for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 29TH JANUARY, 1878.

Coram SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 92.

OUIMET, APPELLANT;

AND

BERGEVIN, RESPONDENT.

HELD:—That professional attornies who carry on business under a firm name are liable as partners for monies collected by the firm.

SIR A. A. DORION, C. J.:—This is an appeal from a judgment rendered by the Superior Court, (Mackay, J.) at Montreal, on the 12th of February, 1877, condemning the appellant, as having been a member of the professional firm of attornies, Messrs. Bélanger, Desnoyers & Ouimet, to pay to the respondent certain monies collected by said firm and claimed by respondent to be payable to her. The only question raised under this appeal is, whether practising attornies who carry on business as such under a firm name, are jointly and severally liable to their clients for monies collected by the firm. We are all of opinion that

Ouimet and Bergevin.]

they are liable just as solicitors in England are. (1) The Judge below so found and we therefore confirm his judgment.

Judgment of S. C. confirmed.

Ouimet & Co., for appellant.
Archambault & David, for respondent.

(S.B.)

SUPERIOR COURT, 1878.

MONTREAL, 18TH NOVEMBER, 1878.

Coram TORRANCE, J.

No. 170.

Bousquet vs. *Brown.*

HELD:—That a party inscribing in review is entitled to a return of the deposit so soon as the judgment has been reversed in his favor.

This was an application by motion for an order upon the Prothonotary to return to the plaintiff a deposit which he had made in Review under C. C. P. 497.

Mr. *Hubert*, the Prothonotary, submitted to the Court that he was not bound to return the deposit until it was established that the defendant would not appeal to the Queen's Bench, or until that Court had confirmed the judgment in Review. Moreover the motion was premature, as fifteen days had not elapsed since the date of the judgment in Review.

PER CURIAM:—The words of the Code are, C. C. P. 497: "The amount "thus deposited is intended to pay the costs of the Review incurred by the "opposite party, if the Court should grant them; if not, it is returned to the "party by whom it was deposited." If we look at the terms of this article the deposit is a conditional one, and its intention is fulfilled so soon as the judgment in Review has been reversed in favor of the inscribing party. Desirous of securing uniformity in the holdings of the Court, I have conferred with my brother judges, and have also communicated with the Chief Justice. The Prothonotary of the District of Quebec informs the Chief Justice that his practice is to return the deposit without delay so soon as the inscribing party succeeds in Review. We are all agreed that the deposit should be returned.

Motion granted.

P. H. Roy, for plaintiff.

(J.K.)

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(1) Troplong, Société No. 373, Plumer & Gregory, 18 L. R. Eq. 631.

COUR DE CIRCUIT, 1878.

MONTRÉAL, 31 OCTOBRE 1878.

Coram PAPINEAU, J.

No. 4193.

La Compagnie d'Assurance des Cultivateurs vs. *Beaulieu.*

JUGE:—Que dans les causes de $60 et au-dessous de $60, les exceptions préliminaires doivent être reçues *gratuitement* par le Greffier de la Cour; et que le dépôt de £1 et l'honoraire de 6s 8d, mentionnés dans la 25e Règle de Pratique de la Cour de Circuit, ne sont exigibles que dans les causes au-dessus de $60.

L'action en cette cause, était de la quatrième classe de la Cour de Circuit.

La défenderesse ayant un garant à appeler, produisit à cet effet, une *exception dilatoire*, sans néanmoins faire le dépôt de $4 exigé par la règle 25e, ni payer l'honoraire de $1.40, qu'elle prétend avoir été introduit par erreur, dans les *copies* du tarif des causes de $60 et au dessous de cette somme.

N. Durand, de la part de la demanderesse, s'appuyant sur la règle de pratique de la Cour de Circuit, ci-dessus mentionnée, présenta la motion suivante, à l'encontre de l'exception dilatoire de la défenderesse:

Motion de la part de la demanderesse, que l'exception dilatoire produite par la défenderesse en cette cause, soit déclarée irrégulière, nulle et comme non-avenue et rejetée du dossier, parce qu'elle a été produite illégalement et n'a pas été revêtue des timbres requis par la loi et le tarif de cette cour; et aussi, parce que le dépôt de deniers, en pareil cas requis par la loi et les règles de pratique, n'a pas été fait, etc.

J. G. D'Amour, de la part de la défenderesse, résista à cette motion et soutint que la 25e règle de pratique de la Cour de Circuit, qu'on lui opposait, n'avait trait qu'aux causes au-dessus de $60, et nullement à la présente cause, qui était de la dernière classe de la Cour de Circuit; et que le tarif étant silencieux pour les actions de cette classe, aucun dépôt en faveur de l'avocat, non plus qu'aucun honoraire en faveur du greffier, n'étaient exigibles, dans le cas actuel, et que l'exception dilatoire de la défenderesse, devait être reçue *gratuitement*.

A l'appui de sa prétention, il cita la cause d'Alie vs. Gamelin, rapportée au 14 L. C. J., 134; et celle de Desjardins vs. Chrétien, qui se trouve au 15 L. C. J., 56, et produisit une copie authentique du tarif de la Cour de Circuit.

L'Hon. Juge prit la cause en délibéré, et après mûr examen, se prononça en faveur de la défenderesse, et déclara que la jurisprudence était maintenant fixée dans le sens des prétentions de cette dernière, non-seulement dans le district de Montréal, mais depuis très-longtemps, dans celui de Québec, et qu'il fallait s'y conformer; et il renvoya la motion de la demanderesse, sans frais.

N. Durand, pour la demanderesse.

D'Amour & Dumas, pour la défenderesse.

(J.G.D.)

SUPERIOR COURT, 1878.

MONTREAL, 13TH NOVEMBER, 1878.

Coram TORRANCE, J.

No. 183.

Prentice vs. *The Graphic Company.*

HELD:—That a plaintiff temporarily non-resident will not be held to give security for costs under C. C. 29, and the Court before requiring security must be satisfied that the non-residence is more than temporary.

PER CURIAM:— This is a motion for security for costs. The facts shown by affidavit are that the plaintiff's wife and family have been absent from the Province for more than one year; that the plaintiff has an office in St. James street; that he left the Province about the month of July, and has not yet returned, although there is an affidavit by William M. Ramsay, that he is expected back in December, and that his residence is here. It was held in *Cole* v. *Beale*, 7 Moore 613, that when a native of England quits for a mere temporary residence abroad, the Court will not require him to give security for costs. In that case Lord Chief Justice Dallas is reported to have said, "that it was incumbent on "a defendant to make out a clear case of permanent residence abroad, either "actual or intended, to entitle him to call on the plaintiff to give security for "costs, and that an affidavit founded on a mere belief was not sufficient for this "purpose."

Motion dismissed.

J. L. Morris, for plaintiff.
S. Bethune, Q.C., for defendant.
(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH DECEMBER, 1877.

No. 2045.

Coram RAINVILLE, J.

Evans et al. vs. *Hudon*, and *Browne, T. S.*

CONSTITUTIONALITY OF LOCAL ACT—SALARY OF PUBLIC OFFICER NOT SEIZABLE.

HELD:—1. That the salary of an officer of the Inland Revenue cannot be seized in the hands of the collector of Inland Revenue having an office in the City of Montreal, because he is not the head or the deputy head of the department, but only an employee himself.

2. That the exemption of the salaries of public employees from seizure is a matter of public order, and the Parliament of the Province of Quebec has not the power to declare seizable the salaries of employees of the Federal Government, and therefore the collector of Inland Revenue in Montreal is not bound to make the return required by 38 Vic. Cap. 12, Sec. 6.

The plaintiffs, by *saisie-arrêt* after judgment, required Mr. Dunbar Browne, collector of Inland Revenue, in Montreal, to declare in the usual form what money, etc., he owed to the defendant Hudon.

Mr. Browne made the following declaration : "That he has not now and is not aware that he will have hereafter in his hands, possession or custody any goods, credits, monies or effects belonging to said defendant, in any manner whatsoever. The defendant Alphonse Hudon is an officer of the Inland Revenue, and receives his salary from the Bank, on deposit of the pay-list signed by the different officers, and supported by official departmental cheque signed by me."

Messrs. Abbott, Tait, Wotherspoon & Abbott, on the 3rd of December, 1877, on behalf of the plaintiffs, made the following motion :

"Motion on the part of the said plaintiffs that inasmuch as it appears by the declaration of the said garnishee, Dunbar Browne, in this behalf made, that the defendant, Alphonse Hudon, is a public servant and employee in the Province of Quebec, and entitled to a salary as such, and that the said Dunbar Browne is the collector of Inland Revenue at the said City of Montreal, and the head there of the said department or office of Inland Revenue, in which the said Alphonse Hudon is so employed as a public servant ; but inasmuch as the said garnishee has failed to conform to the provisions of law in that behalf, and has not, as by law and the statute in that behalf required, made a report to this Court in this cause, under his signature, establishing the amount of the salary due at the time of the service of the writ of attachment in this cause and the amount of the salary to become due in each month to the said Alphonse Hudon, if he should continue in said employment ;

That he, the said Dunbar Browne, as such collector of Inland Revenue at Montreal, be ordered, within such delay as to this Honorable Court shall seem right, to make such report to this Court under his signature, establishing the amount of the salary which was due to the said Alphonse Hudon as an officer of the public department of Inland Revenue at Montreal aforesaid, in which he was an employee at the time of the service of the writ of attachment in this cause, and the amount of salary to become due him each month, if he should continue in said employment under the same conditions, the whole with costs."

The judgment is as follows : "La Cour, etc., considérant que d'après la loi, le tiers-saisi nommé n'est pas le chef, ni le député-chef du département ou bureau public dans lequel il est employé ;

"Considérant que d'après la loi le chef du département dans lequel le dit tiers-saisi est employé est le ministre du Revenu de l'Intérieur, et le député-chef du dit département le député du dit ministre ;

"Considérant que l'insaisissabilité des salaires des employés publics est d'ordre public, et que le Parlement de la Province de Québec n'a pas le pouvoir de déclarer saisissables les salaires des employés du gouvernement fédéral, et qu'en conséquence le dit tiers-saisi Browne n'est pas tenu de faire le rapport requis par la section 5ème de l'acte 38 Vic., chap. 12,

Rejette la motion des demandeurs avec dépens distraits à Messrs. J. & W. A. Bates, avocats du tiers-saisi.

Abbott, Tait, Wotherspoon & Abbott, for plaintiffs.

J. & W. A. Bates, for tiers-saisi.

(J.L.M.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 19th MARCH, 1877.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 11.

DAME LOIS RICKER, APPELLANT;

AND

DOSITHÉE C. SIMON ET AL., RESPONDENTS.

HELD:—1. That a copy of a notarial deed not certified by the notary is a nullity, and an action based on such exhibit will be dismissed.

2. A certificate of burial which does not purport to be an extract from a register of burials kept by a minister or other person authorized by law to keep such register is irregular.

The appeal was *ex parte* from a judgment of the Court of Review, Montreal, 29th February, 1876.

DORION, C. J. Le 29 mars 1869, Philemon Wright a loué pour sept ans à l'Intimé Simon, un lot de terre dans la ville de Hull, moyennant $100 par année et l'obligation de construire une maison de bois à deux étages.

Le 6 novembre 1869 Simon transporte son bail à Alfred Bourjeau pour assurer le remboursement d'une somme de $1000 payable dans deux ans, Bourjeau ne devant prendre possession des lieux que le 6 novembre 1871, si Simon ne lui payait pas les $1000 avant cette époque. [illegible] janvier 1870 autre acte stipulant que Simon ne pourra exercer le r[illegible]en payant $1,500 au lieu de $1,000.

Le 12 décembre 1871, Bourjeau tra[illegible] Philemon Wright tous ses droits sur la propriété loué à Simon, reservant à ce dernier le droit d'exercer le reméré pendant deux ans à compter du 12 décembre 1871, en payant $1,500. Le 17 mars 1873 Wright proroge d'une année le terme pour l'exercice de la faculté de réméré, qui en vertu de cette nouvelle convention ne devait expirer que le 12 décembre 1874.

Le 28 octobre 1874, Olivier Latour, l'un des Intimés, notifia Wright que Simon, étant devenu insolvable, lui avait fait une cession de ses biens. Que plus tard Edward Evans avait été nommé syndic par les créanciers; que Simon, ayant obtenu sa décharge et une retrocession de ses biens, lui avait cédé son droit de réméré.

Wright est mort le 22 mai 1874 après avoir fait un testament le 3 juillet 1867, par lequel il a fait l'appelante sa mère, sa légataire universelle.

C'est sous ces circonstances et en alléguant les faits ci-dessus, que le 15 janvier 1875, l'appelante a poursuivi les deux Intimés Simon et Latour et a conclu à ce qu'ils fussent tenus de lui remettre la possession du lot en question, et lui en payer les fruits et revenus à raison de $600 par année à compter du 12 décembre 1874.

Les Intimés n'ont pas répondu à cette demande et ont été condamnés.

Ils ont porté la cause devant la Cour de révision qui a renversé le jugement de la Cour Inférieure et déboute l'action faute de preuve.

En examinant le dossier l'on trouve que la copie du transport fait à Philemon Wright par Bourjeau n'est pas signée par le notaire qui a reçu l'acte. L'action étant fondée sur ce transport l'omission est fatale. L'extrait mortuaire de Philemon Wright n'est pas un extrait des régistres de l'église où il a été enterré, mais un certificat original donné par M. Todd qui se dit être l'un des ministres de l'église catholique apostolique à Hull dans la province de Québec. Ce certificat n'est pas régulier et le jugement est confirmé.

Ricker and Simon et al.

Macmaster & Hall, for the appellant.

Judgment confirmed.

(J.K.)

SUPERIOR COURT, 1878.

MONTREAL, 15TH NOVEMBER, 1878.

Coram TORRANCE, J.

No. 1642.

Melles et al. vs. *Swales.*

HELD:—That a motion for the production of a power of attorney and for security for costs cannot be presented after the expiration of four days from the return of the writ of summons.

This was a motion by the defendant for a power of attorney and for security of costs, presented within four days of the date of the defendant's appearance, but after the expiration of the four days after the return of the writ of summons.

Bethune, Q. C., for plaintiffs, contended it was too late. Such an application ought, strictly speaking, to be made by dilatory exception,* and although permission is granted in certain cases to do by motion what may be thus done by exception, where that course has been sanctioned by the practice of the Courts,† yet the time for so doing is limited to the four days following the return day of the writ of summons.‡ Whatever different practice may have prevailed prior to the Code, the provisions of the Code must now govern.§ He also submitted that the practice of the Court did not sanction the application for the power of attorney by motion.

The Court rejected the motion.

Motion rejected.

Bethune & Bethune, for plaintiffs.

Edward Carter, Q.C., for defendant.

(S.B.)

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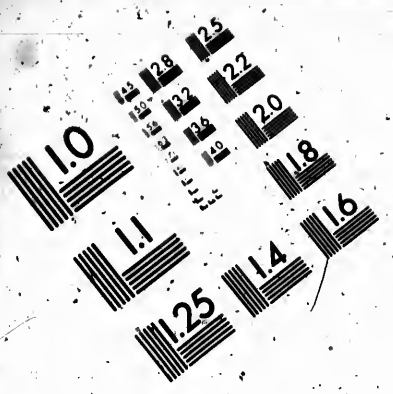
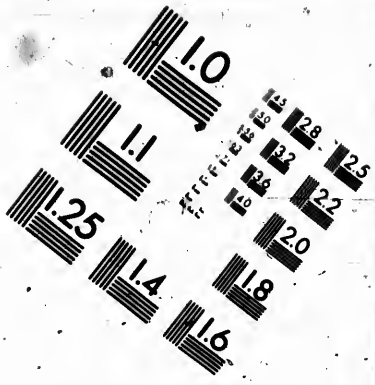
* Art. 120 C.C.P.
† Art. 135 Do.
‡ Art. 107 Do.
§ Art. 1360 Do.





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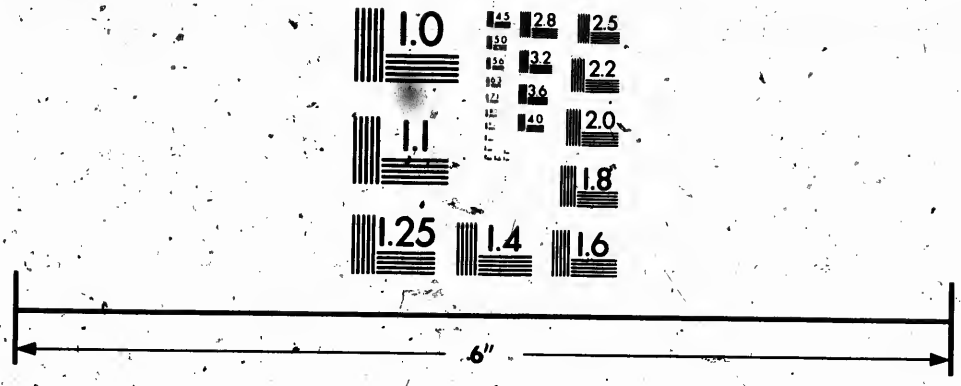

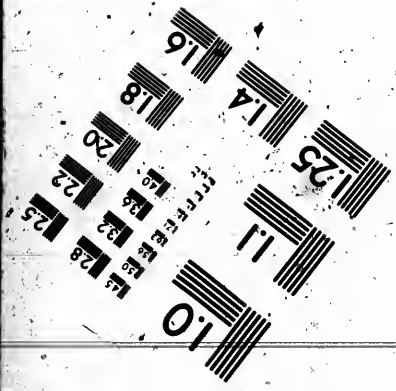

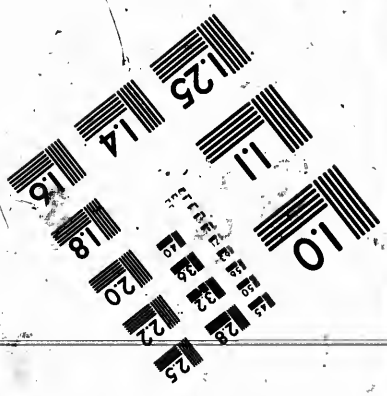

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

5TH MAY, 1876.

Coram SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

PIERRE GRAVEL,

APPELLANT;

AND

PIERRE P. MARTIN ET AL.,

RESPONDENTS.

HELD:—A clerk who had been entrusted with a sum of money by his employers to purchase goods for them, and who alleged that the money was stolen from him while on his way to execute the commission, must prove that the money was stolen and without fault or negligence on his part, in order to be relieved from liability to account for the same.

The action was brought by the respondents, Martin & Monat, against the appellant, Gravel, for the recovery of a sum of $2,883.23, which had been placed in charge of Gravel, and not returned. The defendant stated that he had been robbed of the money at Quebec, his valise having been opened while the steamer was at the wharf, and the money abstracted. The Court below, Beaudry, J., maintained the action, being of opinion that the defendant had not established his defence in a satisfactory manner. The defendant appealed.

In the Court of Queen's Bench, TASCHEREAU, J., dissenting, was of opinion that the judgment should be reversed. The young man, Gravel, who was a clerk in the employ of Martin & Monat, enjoyed a good character, and the facts were such as to lead his Honor to believe that he had really been robbed as he stated.

LORANGER, J., was of opinion that the judgment must be confirmed. At the same time he did not say that the appellant was guilty of theft, but he was accountable for the money, and his story of its disappearance, unsupported by proof of the theft, was not sufficient to relieve him from liability.

RAMSAY, J. This is an action by respondents, calling upon appellant, formerly their clerk, to account for a portion of a sum of money given to appellant to pay to their creditors in England.

Appellant, defendant in the Court below, denies having received this money, and says that he was robbed on board the Quebec steamer.

The evidence of appellant having received the money is complete. It is proved by Turgeon, and he himself locked the trunk in which it was placed, and in an affidavit made a few days after he acknowledged having received it. This denial might, therefore, very well have been left out of the case, and also the insinuation that respondents stole the money themselves after they had put it into his trunk. To credit this suggestion we must either believe that Messrs. Martin & Monat, having first robbed their poor clerk, with a salary of $700 a year, hired an accomplice to go to Quebec to cut open his trunk in order to supply him with a plausible defence to any action they might bring against him; or we must believe in a coincidence of the most incredible kind, namely,

that appellant, being first robbed by his employers, was practised upon by a second thief at Quebec, who broke open his window, and cut the straps and forced the lock of his trunk, to find that he was too late.

It being quite certain that appellant got the money, the rule of law which limits his responsibility is perfectly clear. He must use due diligence for its preservation, and, if he alleges that the thing entrusted to him was destroyed by *force majeure*, he must prove it.

Now we are told that if we confirm the judgment of the Court below we virtually affirm that the appellant stole the money. I do not see that we have anything to do with the conclusion people may choose to draw from our judgment. That may depend upon many circumstances which we cannot know; but certainly it is not the issue presented to us to decide. All we have to decide is whether the appellant has proved the fact of *force majeure* which he has alleged, and for my part I think he has not. His own evidence almost excludes the physical possibility of the theft being performed as he pretends it was.

His theory is this: that some one, having possession of the key of the next cabin, 102, passed on the gallery outside, forced open the window of cabin 101, locked the door of 101 on the inside to prevent interruption, cut the straps and broke the lock of the portmanteau, and stole out again with the money. At first, all this was done while the steamer was at the wharf at Quebec, and in the time that it took appellant to pass from his cabin on the third deck to the head of the stairs on the second deck where Biron was stationed, and to return with him *de suite*. In his deposition he wavers as to whether the steamer had not yet started to go alongside the ocean steamer, the *Nestorian*, and he lengthens the time during which the theft took place to fifteen or twenty minutes. These are important contradictions, and they are not calculated to strengthen appellant's position. Again, we have the presence of a number of soldiers insisted upon. Now, it sometimes happens that experienced burglars, who have become uncomfortably notorious, enlist in order to make their identification difficult, but it was not a soldier in uniform who could have committed this theft. The person who did it must have had access to the key of 102. No one ventures to hint that it was the occupant of room 102, who had gone away, (it is all but certain) before the theft could have taken place. The thief not being the occupant of 102, we are tempted to inquire how a person breaking into 101 had the key of 102. If he had the key also of 101 the thing is easily explained. He would take the key of 102 out of its door as he passed, open the door with 101 key, close it and lock it either with 101 or 102, place 102 in it to direct suspicion on the occupant of 102, and break out by the window. Any other mode possible under the evidence is violently improbable, for then we must suppose that some one knowing of the treasure in 101 took key 102 after the occupant had gone away, for the express purpose of stopping the lock of 101 on the inside, and that he then broke in through the window of 101. But while he was doing this, appellant was walking up and down in face of him; and appellant saw no one, or it must have been done in the few instants it took appellant to go from his room to fetch Biron, according to the statements of his affidavit. But one thing is

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very certain, that the theft could not have been performed at all, if appellant had put the pin in to fasten the blind and the window. He was fully alive to the danger, so much so that he did not go down to breakfast, though he had gone down to supper, and yet he tells us he did not think of the pin. However, he had opened the window, and he must have known it was out, whether he removed it or not.

The appellant having appealed to the Privy Council, the judgment was confirmed, as follows:—

PER CURIAM. On the 18th of June, 1869, the defendant, as a clerk or servant of the plaintiffs, was entrusted by them with a considerable sum of money for the purpose of carrying it to England to make purchases for them, and to pay debts which they owed in England. The money was packed by the plaintiffs in a valise, and that valise was put into a cabin, No. 101, which had been taken for the defendant in a steamer called the "Quebec," a river steamer, in which the defendant was to go from Montreal to Quebec, in order to proceed to England on board a transatlantic steamer which lay at Quebec. The defendant, having accepted the money, it was necessary for him to account for it if he did not use it in the manner in which he was employed to use it; and the account of the money which he gave to the plaintiffs was this: that whilst he was on board the steamer "Quebec" a portion of the money was stolen, and that he had put the rest into the hands of the captain, who had handed it over to the plaintiffs. It is admitted that the *onus* lay upon the defendant to prove that the robbery was committed. Many witnesses were called on the part of the defendant to prove that the money was stolen, and the Court must judge of the fact whether the money was or was not stolen by the evidence given at the trial by witnesses who were subjected to cross-examination, and not by depositions which were given before the magistrates, when the plaintiffs had no opportunity of cross-examining the deponents.

The learned Judge who tried the case in the first instance, Mr. Justice Beaudry, says,—"The defendant has not proved the exception which he has "pleaded, by which he alleged that he was the victim of a robbery of the bulk "of the money which had been confided to him, and he has not been able to "discharge himself from the obligation to account for the money."

The case was appealed to the Court of Queen's Bench, and was argued before four Judges, of whom the majority substantially affirmed the decision of Mr. Justice Beaudry. One of the Judges, however, Mr. Justice Taschereau, thought that the judgment of Mr. Justice Beaudry was wrong, and what we are called upon to do now is to reverse the decision of the majority of the Judges of the Court of Queen's Bench, and to say that they ought to have reversed the judgment of Mr. Justice Beaudry.

Their Lordships are always reluctant to reverse a finding upon a mere question of fact, even by a single Court of Justice, but they are still more reluctant so to do when the decision of the Court who tries the case in the first instance has been affirmed by a Superior Court of Justice, and when there are two concurrent judgments upon a question of fact. As a general rule their Lordships do not interfere with such a finding, and there must be some very good reason to in-

duce them to reverse a decision of a Court upon a question of fact, when that decision affirms the decision of a lower Court.

Now, dealing with the evidence which was given upon the trial, we are met by the statement which the defendant himself gave three days after the alleged robbery was committed. He says the robbery was committed on the 19th June. On the 21st of June he made a statement before the magistrates as to the circumstances under which the alleged robbery was committed. Now the circumstances which he then related, when the facts must have been fresh in his memory, are wholly at variance with the evidence which he gave at the trial, both as to the time at which the robbery took place and as to the place at which it took place. On the trial he stated that when he found the steamer moving he went to the steward to ask him to assist him in removing his valise. He says that about ten minutes elapsed between the time when he left his cabin and all was right and the time when he found the steward. But upon his first examination before the magistrates he stated that the robbery had taken place before the steamer left the quay, and that he gave information to the police upon the subject; and one of the detective police officers also states that defendant told him that the robbery had taken place before the steamer left the quay. Then the question is, are we to say that the judges were wrong in disbelieving the evidence which the defendant gave upon the trial of the cause when he had given previously, on the 21st of June, 1869, only two days after the alleged robbery had taken place, and when the facts must have been fresh in his memory, a statement wholly inconsistent with that evidence? There are many other discrepancies between the evidence which he gave at the trial and the statement which he made before the police magistrates; and there are also discrepancies between his evidence and the evidence of Biron the steward. He says that when he looked into the cabin he saw the valise on the floor, opened, and then he exclaimed "My God! I have been robbed." Biron, on the other hand, stated in his affidavit, that when he entered the cabin the valise was on the berth, and that the defendant opened the valise. So that the valise must have been lying, if Biron's evidence is correct, on the berth in the cabin, closed up; and if it was in that state, the defendant must have been wrong in stating that when he looked into his cabin he saw the valise lying on the ground, opened, and everything in disorder. But it must be said, with reference to that statement which Biron made in his affidavit, that he did not state in his evidence anything as to where the portmanteau was found. At page 64, line 20, he said: "After that "passed by the cabin No. 101; the defendant followed me, and we passed behind "the cabin. The defendant entered into the cabin through the window. As to me, "I do not recollect whether I entered in the cabin or whether I remained at "the window, but I recollect well upon entering the cabin the defendant lifted "the cover of the valise and took out his clothes, which he threw upon the "ground."

Now, with the inconsistent statement which the defendant made before the magistrates when the matter was fresh in his memory, we are called upon to say that the two Courts of Justice who have found that the defendant had failed to prove that the robbery was committed were in error, and that we ought to reverse

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their decision, and find that the defendant has proved satisfactorily by the evidence at the trial that a robbery was committed.

None of the judges found, as a fact, that the defendant himself committed the robbery, and their Lordships abstain from expressing any opinion upon that subject. All that the judges did below was to find that the defendant had not proved that the money was stolen, and that is all that their Lordships do in affirming the judgment of the Court of Queen's Bench.

Under these circumstances their Lordships will humbly recommend Her Majesty to affirm the judgment of the Court of Queen's Bench. The appellant must pay the costs of this appeal.

Judgment confirmed.*

Benjamin, Q. C., & Bompas, for appellant.
Matthews, Q. C., & Fullarton, for respondent.
(J.K.)

SUPERIOR COURT, 1876.

IN INSOLVENCY.

MONTREAL, 21st JULY, 1876.

Coram RAINVILLE, J.

No. 369.

Fisher et al. vs. *Malo*, and *Malo*, Petitioner.

HELD:—That the Court or Judge has power to authorize an insolvent to continue his trade during the proceedings on the writ of attachment.

The writ of attachment having been quashed, the plaintiff inscribed in Review. The defendant then moved to be authorized to continue his trade under such terms and conditions as the judge might order.

RAINVILLE, J., made the following order:

"Je soussigné, l'un des juges de la Cour Supérieure pour le Bas-Canada, ayant entendu les parties sur la requête à moi présentée par Ovide Malo aux fins de lui laisser continuer son commerce et de le faire remettre en possession des marchandises et effets de commerce, argents, monayes, billets de banque, magasin, livres de compte, etc.;

"Vu qu'un jugement antérieur a déjà remis le dit Ovide Malo en possession des magasin, marchandises, etc., ci-dessus mentionnés, en déclarant le bref en liquidation forcée, cassé et annulé;

"Ordonnons et enjoignons à Edward Evans, syndic en cette affaire, de remettre et donner la possession immédiatement au dit requérant, Ovide Malo, de son magasin, des clefs du coffre-fort, et du magasin, des livres de comptes, livres et documents, et des marchandises appartenant au dit requérant."

Doutre & Co., for petitioner.
Macmaster & Co., for plaintiff.
(G.D.)

* Compare *Soulière* v. *Lazarus*, 21 L. C. Jurist, 104, *Delaney* v. *Lazarus*, ante, p, 131, and *G. T. R.* v. *Citizens Ins. Co.*, ante, p. 235. (J.K.)

COURT OF REVIEW, 1878.

MONTREAL, 23RD NOVEMBER, 1878.

Coram TORRANCE, J., RAINVILLE, J., JETTÉ, J.

Anderson vs. *Gervais*, and *Gervais*, Petitioner.

HELD:—That a trader against whom a writ of attachment in compulsory liquidation has issued may be permitted by the Court or Judge to continue his trade, while the contestation of the writ of attachment is pending, on his giving security to the full value of his assets.

On the affidavit of the plaintiff, disclosing a debt amounting to $375, a writ of attachment was issued, under the provisions of the Insolvent Act of 1875, addressed to William Rhind, official assignee, and the estate of the insolvent was seized and attached thereunder.

On the following day the defendant presented a petition to quash the writ, and also a petition praying to be permitted to continue his business pending the contestation of the first-mentioned petition, and offering to give security to such an amount as might be fixed by the Court.

On the argument of this petition, the counsel for petitioner cited section 7 of the Insolvent Act of 1875, and contended that this section authorized the Judge to grant it, and that the security to be ordered should not exceed the amount of the debt disclosed in the affidavit of the plaintiff.

The plaintiff's counsel argued that section 7 did not apply to cases in which a writ of attachment had issued, but only to those in which a demand of assignment had been made. The preceding sections, 4, 5 and 6, referred entirely to proceedings on a demand of assignment, and to the petition against such demand. In section 8 proceedings on writ of attachment were first mentioned, and neither in section 18, which allows the insolvent to present a petition to set aside the writ, nor anywhere else in the Act, is authority given to a Judge to permit an insolvent to continue his business while the contestation of a petition to quash the writ is pending. If the Judge held he had such authority, the answer to the petition set forth that the defendant was indebted to plaintiff in a much larger sum than that disclosed in the affidavit, and security should at least be given for the full amount due by the defendant to plaintiff.

MACKAY, J., dismissed the petition on the ground that he had not power under the act to order or allow the prayer thereof in a case where a writ of attachment had issued.

The petitioner inscribed in Review, and the judgment was reversed. The *considérants* are as follows:

"La Cour, etc.;

"Considérant que d'après la section 9 de l'acte de faillite, 1875, le bref en liquidation forcée est sujet, autant que possible, aux règles de procédure de la Cour dans les actions ordinaires, quant à son émission, son rapport et à toutes procédures ultérieures devant la Cour ou un juge;

"Considérant qu'aux termes de la section 16 du dit acte, le syndic, après l'émission d'un bref en liquidation forcée, ne possède les biens du défendeur qu'en fidéi-commis, au bénéfice du dit défendeur et de ses créanciers, et sujets, les dits biens aux ordres de la cour ou du juge;

Anderson vs. Gervais.

"Considérant qu'aux termes de la section 17 du dit acte, le défendeur, lorsqu'il a contesté le bref en liquidation forcée émis contre lui, n'est obligé de fournir un état de ses affaires au syndic que dans les dix jours à compter de la date du jugement rejetant sa requête demandant l'annulation du dit bref, et non dans les dix jours à compter de la signification de ce bref; et qu'aux termes de la section 20 du dit acte, dans le cas de contestation du bref, le syndic ne peut convoquer l'assemblée des créanciers du défendeur qu'après le rejet de la dite contestation;

"Considérant qu'il résulte de l'ensemble de ces dispositions que jusqu'à ce qu'un jugement soit rendu sur la contestation faite par le défendeur du bref en liquidation émis contre lui, le dit défendeur n'est pas définitivement dépouillé de la propriété et possession de ses biens au profit de ses créanciers, mais que la loi n'en donne au syndic qu'une possession provisoire, sujette à révocation dans le cas d'annulation du bref en liquidation forcée, et qu'il ne possède ainsi les dits biens que sujets aux ordres de la Cour ou du juge;

"Considérant qu'en tel cas et avant telle adjudication sur le mérite du bref en liquidation contestée, le syndic ne peut être considéré que comme un gardien ou dépositaire chargé de conserver les biens du défendeur par lui saisis, au profit tant du dit défendeur que de ses créanciers;

"Considérant qu'en toutes matières concernant la main levée d'effets saisis, l'établissement ou la décharge de gardiens, commissaires, dépositaires ou séquestres, la Cour ou le juge a une juridiction sommaire dont l'exercice n'est limité que par les circonstances particulières du cas soumis;

"Considérant, en fait, que le défendeur en cette cause a contesté le bref en liquidation forcée, émis contre lui, et que cette contestation est encore pendante;

"Considérant que le dit défendeur ne demande d'être mis en possession de ses biens qu'en donnant tel cautionnement qui pourra être jugé suffisant pour protéger les droits de tous intéressés;

"Considérant que l'intérêt du demandeur en cette cause et de tous autres créanciers du dit défendeur, à la maintenue de la saisie des biens, effets et créances du dit défendeur ne peut dépasser la pleine valeur des dits effets et autres biens, et la somme nominale des créances du dit défendeur dont il demande à être remis en possession, et que du moment que cette pleine valeur et somme nominale sont assurées par un cautionnement suffisant, les droits de tous intéressés sont valablement protégés et assurés;

"Considérant que refuser au défendeur, avec de telles garanties, la remise en possession de ses biens, effets et créances, et la permission de continuer son commerce, serait l'exposer injustement à des dommages;

"Déclare le premier jugement erroné," etc. Assignee ordered to give up estate to defendant, on the latter giving security to the full amount of his assets.

Judgment reversed.

Abbott & Co., for plaintiff.

Doutre & Co., for defendant and petitioner.

(J.K.)

SUPERIOR COURT, 1878.

MONTREAL, 11TH NOVEMBER, 1878.

Coram TORRANCE, J.

No. 188.

McCallum vs. *Harwood et al.*

HELD:—That a personal service upon the attorney *ad litem* of plaintiff, resident in an adjoining district, is good, though he have an elected domicile, where services could be made, in the district where the action was pending.

The defendant made a motion for *péremption d'instance* for want of proceeding for three years.

Trenholme, for plaintiff, said that the service, being only made upon the attorney *ad litem*, J. A. N. Mackay, Esquire, resident in another district, was a bad service, inasmuch as he had elected a domicile in this district where services could be made.

Bowie, for defendant Harwood, *è contra*.

The Court held the service to be good, and granted the motion.

Trenholme, for plaintiff. Motion granted.

Bowie, for defendant Harwood.

(J. K.)

SUPERIOR COURT, 1878.

MONTREAL, 13TH MAY, 1878.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 351.

Hutchinson et al. vs. *Ford*, and *Short*, intervening.

HELD:—That an intervening party cannot plead matters of form which are personal to the defendant.

On the 15th April last, the plaintiffs sued out a writ of attachment against the defendant under the Insolvent Act, 1875. John Short, the intervener, prayed that the attachment be set aside: 1st. Because the defendant was not indebted to the plaintiffs in the sum of $200; 2nd. Because the debt was not a commercial one 3rd. Because the first reason for belief in the insolvency of the debtor was untrue, and that no writ of execution issued against the defendant prior to the attachment; 4th. Because the second reason given in the affidavit for belief in the insolvency of the defendant was insufficient, namely, that plaintiff deposing had a personal knowledge of the insolvency; 5th. Because the affidavit is insufficient; 6th. Because the jurat of the affidavit has the date in blank.

PER CURIAM:—The plaintiff has proved that the indebtedness is sufficient, and it only remains to decide whether the grounds of informality urged by the

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intervener can have effect. I am of opinion that they cannot. This question was fully discussed in the case of the *Canada Paper Company* (limited) against *Hammond*, and *Mathews*, petitioner, decided by Mr. Justice Rainville on the 11th July, 1876, and confirmed in review on the 31st January, 1877 (*Johnson*, J., *Torrance*, J., *Papineau*, J.). A similar decision was given by the Court of Review in October, 1877 (*Torrance*, J., *Dorion*, J., *Papineau*, J.), in *Fabre* v. *Bricault*, & *Proulx*, intervener.

The petition of intervener is therefore dismissed.

Archibald, for plaintiffs.

Maclaren, for defendant.

(J.K.)

SUPERIOR COURT, 1878.

MONTREAL, 12TH DECEMBER, 1878.

IN CHAMBERS.

Coram TORRANCE, J.

No. 2594.

Roy et al. vs. *Thibault.*

ALDERMAN—PROPERTY QUALIFICATION—RESIDENCE.

HELD:—1. That the Court will exercise a discretion in granting the conclusions of a petition in the nature of a *quo warranto* information.

2. That a person occupying two adjacent rooms, one as an office and the other as a residence, in the city of Montreal, is a resident householder in the terms of 37 Vict., c. 51, s. 17, (1874, Quebec.)

The petitioners contested the right of the defendant to hold the seat of alderman for the St. Mary Ward in the city of Montreal, alleging two grounds: 1. That he was not a resident householder. 2. That he did not possess the necessary property qualification. The statute 37 Vic., cap. 51, s. 17 (A.D. 1874, Quebec) requires that a person capable of being elected as alderman shall have been a resident householder in the city for one year next before his election and, during the six months next before his nomination as alderman, be seized and possessed, as proprietor, of real estate, within said city, of the value of $2,000, after payment or deduction of his just debts.

PER CURIAM. The defendant was elected alderman for St. Mary's Ward on the 1st March, 1877. On the 8th March, 1877, he declared his qualification to be real estate in the St. Louis Ward. His seat was only contested by the present petition on the 21st June, 1878. The evidence shows that the defendant lived separate from his wife and children, and at the period under consideration occupied a couple of rooms in a house on Notre Dame Street, one of these rooms being used as his office as an advocate, and the other as his bedroom, where he generally took his meals. At least there is evidence that his meals, except his dinner or supper, were generally taken there. Was he a resident householder? There is no doubt as to his residence there. Was he a householder? I find

the following case in Fisher's Digest, vo. Election Law, 3419: A person occupied, as tenant, the whole of the upper floor of a house. The floor consisted of an inner and outer room opening into each other, and were together of the requisite value to confer a vote. He resided in one room and used the other as a shop. The outer room communicated with the landing on the staircase by an outer door, over which he had absolute control. The other floors of the house were occupied by other tenants in the same manner, and all the tenants had access to their several holdings from the street, through a door which was generally open in the day, but was allowed to swing to at night:—Held, that he occupied a house, Henrette & Booth, 15 C. B. R. 500. I think that there is a considerable resemblance between this case and the case now under consideration, though the latter has not such details as I should have liked on this point. I see an important difference between this case and the case of Lynch vs. Papin, Law Reporter, 109.

The next point to be considered is the question of property qualification. When the contest was raised, the property qualified upon appeared by an examination at the registry office to be charged with incumbrances which had in reality ceased to be a charge. This may have misled the petitioners, but I am of opinion that the question before us is not what appeared at the registry office, but what really was. Now, it may be a question of some delicacy to estimate accurately the value of the real estate in question on the 15th day of February, 1877, and during six months next preceding. If we take the statement of the petitioners, they say that, at best, the defendant, at that date had properties which were valued at $3200, and mortgaged to the amount of $1401.01 which would reduce the value of his real estate to $1798.99 being $201.01 below the requisite qualification.

The learned counsel for the defendant has said that the Court had a discretion to exercise in these matters of *quo warranto*, and I find in *Rex* v. Parry, 6 A. and E. 810, that it was discretionary in the Court to grant or withhold a *quo warranto* information, even where a good objection to the title is shown. Taking this into consideration, and the fact that the petitioners acquiesced in the election of the defendant, which was upwards of fifteen months without complaint; considering also the contradictory evidence as to the real value of the property qualification of the defendant in March, 1877, and previously; bearing in mind, also, that the term of office was undisturbed for over fifteen months and will be at an end within fifteen months, I do not see that it would be wise to listen to the prayer of the petitioners.

There remains the question of costs. These are unquestionably in the discretion of the Court, and seeing that the petitioners have been misled by the appearance of mortgages which had ceased to exist before March, 1877, I order that each party pay his own costs.

Petition rejected.

E. Lareau, for petitioners.
A. Lacoste, Q.C., for defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 21st DECEMBER, 1878.

Coram SIR A. A. DORION, Ch. J., MONK, RAMSAY, TESSIER & CROSS, JJ.

No. 46.

FAUTEUX ET AL.,

APPELLANTS;

AND

THE MONTREAL LOAN AND MORTGAGE COMPANY,

RESPONDENTS.

HELD:—1. That a sale by the Sheriff of Montreal, at his own office, of land situate in the Parish of l'Enfant-Jésus, a duly erected Parish for all civil purposes formed out of the Parish of Montreal, is illegal, null and void, and that such sale could only be legally effected at the church door of the Parish of l'Enfant Jésus.

2. That such nullity can be invoked by a hypothecary creditor by petition, without a writ of summons, duly served on all the parties interested. (Art. 715 C. of C. P.)

3. That such nullity may also be invoked by means of an opposition filed after the sale and served on all the interested parties, and containing all the essential allegations of a petition *en nullité de décret*.

SIR A. A. DORION, CH. J.:—Les appelants, bailleurs de fonds d'un immeuble vendu par le Shérif en vertu d'un bref de *venditioni exponas* émané dans une cause de Courtemanche contre Gauthier, demandent la nullité du décrêt qui a eu lieu aur leur débiteur.

La propriété dont il est question a été saisie, annoncée et vendue sous la désignation suivante:

"Quatre lots de terre ou emplacements situés au Côteau St. Louis, en la paroisse " de l'Enfant-Jésus, fesant ci-devant partie de la paroisse de Montréal, dans le " District de Montréal, étant connus et désignés au plan et livre de renvoi offi- " ciels du village du Côteau St. Louis, de la dite paroisse de Montréal, sous les " Nos. 18, 19, 20 et 21 de la subdivision du No. 167 des dits plan et livre de " renvoi officiels, avec quatre maisons en bois et dépendances sus-érigées."

La vente a eu lieu en un seul lot, au bureau du Shérif en la cité de Montréal.

Les appelants ont formé leur demande en nullité de décrêt par une opposition et non par une requête.

Par cette opposition qui a été signifiée à toutes les parties dans la cause, ainsi qu'aux adjudicataires, qui sont les intimés, et au Shérif, les appelants allèguent qu'ils ont une créance de bailleurs de fonds de $3,330.95 sur la propriété vendue, que cette propriété a été vendue en un seul lot quoiqu'elle en formât plusieurs: que le défendeur n'a pas été requis d'en donner une désignation exacte, ainsi qu'exigé par l'article 637 du Code de Procédure Civile: que la désignation donnée n'indique pas la rue, le rang ou la concession de la paroisse où ils sont situés, comme le veut l'art. 638 du Code de Procédure civile: que les avis de vente n'indiquaient pas le lieu où la vente pouvait se faire légalement, et que la propriété saisie, n'étant pas située dans la cité de Montréal, ne pouvait être vendue qu'à la porte de l'église de la paroisse où elle est située, conformément à

l'article 671 du Code de Procédure: que ces irrégularités ont été cause que la propriété ne s'est vendue qu'une dixième de sa valeur, et que les appelants ne peuvent être payés. Ils concluent à la nullité du décrêt.

Les intimés ont répondu par une exception à la forme, que le décrêt ne pouvait être annullé que sur une requête signifiée à toutes les parties, et présentée à un jour déterminé, et que les adjudicataires étrangers à la procédure ne pouvaient être assignés à comparaître que sur un bref de sommation.

Cette exception à la forme a été renvoyée parce qu'elle avait été produite plus de quatre jours après que les intimés eussent été mis en demeure de plaider.

Au fond, les intimés ont employé les mêmes moyens qu'ils avaient invoqués par leur exception à la forme, et de plus, que les lots saisis étaient contigus, les maisons y érigées ne formaient qu'un seul bâtiment ayant le même toit et les mêmes fondations, et que le Shérif pouvait vendre un tel immeuble en un seul lot; que l'ancienne paroisse de Montréal, dont celle de l'Enfant-Jésus est un démembrement, a toujours été regardée comme étant dans la banlieue de Montréal, et que les ventes d'immeubles qui y sont situés peuvent se faire comme elles ont toujours été faites, au bureau du Shérif, et enfin que les intimés avaient acheté de bonne foi.

D'après l'article 714 du Code de Procédure, le décrêt peut être déclaré nul:

"1o. A la poursuite du saisi, ou de tout créancier ou autre intéressé.

.....

"2o. Si les conditions et formalités essentielles prescrites pour la vente n'ont "pas été observées."

La demande doit être faite par une requête libellée dans la cause même, et doit être signifiée au saisissant et à toutes les autres parties intéressées. (Art. 715, C. de Pr.)

Les appelants créanciers hypothécaires ont le droit de se pourvoir en nullité du décrêt qui a eu lieu à leur préjudice, et quant à la question de forme, elle n'a aucune importance, puisque leur opposition contient tous les allégués essentiels à une requête en nullité de décrêt, et c'est de fait une véritable requête.

L'objection, que les intimés auraient dû être assignés par un bref de sommation, ne peut se soutenir, en présence de l'article 715, qui n'exige qu'une signification de la requête aux parties intéressées. La signification de la requête aux intimés est donc suffisante, nonobstant la décision contraire rendue par la Cour Supérieure, dans une cause de Joseph & Brewster & Haldane, (6 Déc. Jud. B. C., 486). Mais il est à propos de faire remarquer que ce jugement a été rendu en 1856, avant l'adoption du Code de Procédure.

Au fond, l'objection que le défendeur n'a pas été interpellé d'indiquer et de désigner ses biens immeubles ne devrait, il semble, n'être de quelqu'importance que dans le cas où le procès-verbal de saisie contiendrait une désignation inexacte des immeubles saisis, et qu'elle serait faite par le saisi lui-même, et avant la vente. D'après la preuve qui a été faite, les immeubles saisis pouvaient l'être comme ne formant qu'un seul lot.

Il reste deux autres objections. La première, est que le Shérif n'a indiqué ni dans le procès-verbal de saisie, ni dans les annonces de la vente, le nom de la rue où sont situés les immeubles saisis sur le défendeur. La seconde consiste,

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en ce que la vente a eu lieu au bureau du Shérif, au lieu de l'être à la porte de l'église de la paroisse de l'Enfant-Jésus.

L'article 638 du Code de Procédure, veut que la saisie des immeubles soit constatée par un procès-verbal qui doit contenir, 'entr'autres choses: " La des-" cription des immeubles saisis, en indiquant la cité, ville, village, paroisse ou " township, *ainsi que la rue, le rang ou la concession où ils sont situés, et le " numéro de l'immeuble, s'il existe un plan officiel de la localité, sinon les " tenants et aboutissants.*"

Les plans officiels auxquels réfère cet article, sont ceux mentionnés dans l'article 2168 du Code Civil. Il n'y en a pas d'autres qui soient reconnus comme tels, et quoique ce dernier article porte que lorsque ces plans auront été déposés, et qu'avis en aura été donné, le numéro de chaque lot indiqué à ces plans et au livre de renvoi correspondant, sera la vraie description de ce lot *et suffira dans tout document quelconque*, cela ne peut s'appliquer que lorsque la loi n'exige pas d'une manière expresse une plus ample désignation.

Le Code de Procédure, qui n'est devenu en force qu'après le Code Civil, a dérogé à l'article 2168, en exigeant que le procès-verbal de saisie et les annonces du Shérif indiquent et le nom des rues où sont situés les immeubles saisis, et le numéro du plan officiel, ou les tenants et aboutissants, s'il n'y a pas de plan officiel. Il semble donc qu'il ne suffit pas de donner le numéro seul du plan officiel et il y a d'excellentes raisons pour cela. Ce que la loi veut, c'est que les intéressés soient informés que les immeubles sur lesquels ils ont des droits ou des réclamations, ont été saisis, et doivent être vendus par le Shérif. La désignation par le numéro de l'immeuble qui, dans un contrat de vente ou d'échange, serait suffisante, parce que les parties connaissent ce qui fait l'objet de leur transaction, ne l'est pas toujours pour porter à la connaissance des tiers la situation exacte d'immeubles saisis. C'est sans doute pour cela que le Code semble exiger que l'on donne le rang ou la rue où est situé l'immeuble saisi, outre son numéro, qui n'est là que pour remplacer les tenants et aboutissants, qui sont encore requis, lorsqu'il n'y a pas de plan officiel.

La cour ne croit pas cependant qu'il soit nécessaire de décider dans la cause actuelle, si l'absence du nom de la rue dans le procès-verbal de saisie, et dans les annonces, est une cause de nullité, d'autant plus qu'il n'est pas clairement établi que la ruelle où sont situés les immeubles saisis, soit une rue publique.

Passant à la dernière objection qui a rapport au lieu de la vente, nous trouvons qu'il est admis que la paroisse de l'Enfant-Jésus formait jusqu'à ces années dernières partie de la paroisse de Montréal, et que les ventes d'immeubles situés dans la paroisse de Montréal se sont toujours faites par le Shérif, à son bureau, et non à la porte de l'église paroissiale.

L'article 671 veut que les immeubles qui sont situés dans la cité, ville ou chef-lieu, où se tient le bureau du Shérif, ou dans la banlieue, s'il y en a, doivent être mis aux enchères et vendus à ce bureau. Tous les autres immeubles (excepté ceux tenus autrement qu'en roture ou en franc aleu roturier et ceux situés dans le district de Gaspé) doivent être vendus à la porte de l'église de la paroisse dans laquelle ils sont situés.

Les intimés ont prétendu que l'ancienne paroisse de Montréal, en dehors des

limites de la cité, formait la banlieue de Montréal, et que les ventes d'immeubles qui y sont situés doivent encore se faire au bureau du Shérif.

Il est difficile de donner une définition exacte du mot "banlieue." Dans sa plus large acception, il s'applique à un territoire qui sans faire partie d'un territoire principal, y est cependant annexé comme en étant une dépendance. Relativement à une ville, l'on peut dire que la banlieue est un espace de terrain qui quoiqu'en dehors des limites de la ville, est soumis à la même juridiction et jouit des mêmes priviléges et immunités que la ville dont elle dépend.

Guyot, Répertoire, vo. Banlieue.

Denisart, vo. Banlieue.

La banlieue de Paris se divise en banlieue civile et banlieue ecclésiastique, dit Denisart, (*loc. cit.*) Il y a des paroisses voisines de Paris qui sont dans la banlieue pour le civil, et qui n'en sont point pour le gouvernement ecclésiastique. (*Idem.*) D'où il faut conclure que l'existence légale d'une banlieue découle de chartes ou décrêts qui en ont fait une dépendance de la ville qu'elle avoisine, ou tout au moins d'un usage immémorial qui l'a fait considérer comme telle.

Les banlieues des villes de Québec et des Trois-Rivières sont mentionnées dans plusieurs documents publics, mais il n'en a été cité aucun qui fasse mention d'une banlieue de la ville de Montréal. Le territoire qui environne la ville de Montréal, a toujours été reconnu et désigné comme formant partie de la paroisse Notre-Dame de Montréal jusqu'à ce qu'il ait été subdivisé en paroisses indépendantes. Cette ancienne paroisse de Montréal comprenait autrefois une partie de la paroisse de la Longue-Pointe, qui a été formée de partie de la paroisse de Montréal et de partie de la paroisse de la Pointe-aux-Trembles, par édit du 3 mars 1722. Cependant les ventes par le Shérif dans la paroisse de la Longue Pointe se sont toujours faites à la porte de l'église de cette paroisse et non au bureau du Shérif, où elles auraient dû se faire, si, comme on le prétend, l'ancienne paroisse de Montréal formait la banlieue de la cité.

Les intimés n'ont pas établi qu'il y avait jamais eu une banlieue dépendante de la ville de Montréal, et si les ventes d'immeubles situés dans la paroisse de Montréal se sont faites au bureau du Shérif, ce n'est pas parce qu'ils étaient situés dans la banlieue, mais bien parce que l'église paroissiale étant dans la ville se trouvait au chef-lieu du district et que les ventes faites au chef-lieu doivent se faire au bureau du Shérif.

Dès le moment qu'une partie du territoire de l'ancienne paroisse de Montréal, en est détaché pour former une nouvelle paroisse, c'est à l'église de cette nouvelle paroisse que les ventes doivent se faire. Il n'y aurait d'exception que pour les paroisses dont les églises seraient dans les limites de la cité, parce que, dans ce cas, les ventes devant se faire au chef-lieu où se trouve le bureau du Shérif, c'est à ce bureau qu'elles devraient avoir lieu.

La vente n'ayant pas été faite à l'église de la paroisse de l'Enfant-Jésus où elle aurait dû être faite, la Cour croit que cette irrégularité est fatale et que le décrêt qui a eu lieu doit être annullé.

The following were the reasons specially assigned in the written judgment of the Court:

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"Considérant que les immeubles qui ont été vendus par le Shérif de ce district le cinquième jour de décembre 1876, sur le nommé David Gauthier, * * * et adjugés aux intimés en cette cause, sont situés dans la paroisse de l'Enfant-Jésus, et non dans la cité ou paroisse de Montréal;

"Et considérant que lors de la saisie et la vente des dits immeubles, cette paroisse de l'Enfant-Jésus était duement érigée en paroisse pour toutes les fins civiles;

"Et considérant qu'aux termes de l'article 671 du Code de P. C., ces immeubles, n'étant pas inclus dans aucune des exceptions indiquées aux paragraphes 1 et 2 du dit article, ne pouvaient être vendus qu'à la porte de l'église de la paroisse de l'Enfant-Jésus;

"Et considérant que la vente qui en a été faite au bureau du Shérif est illégale et nulle, et que les appelants créanciers du dit David Gauthier, et ayant une hypothèque sur les dits immeubles sont bien fondés à demander la nullité de la vente qui en a été faite au bureau du Shérif, * * * casse et annulle, etc., etc."

Judgment of S. C. reversed.

Doutre & Co., for appellants.

G. B. Cramp, for respondents.

(S. B.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 21ST DECEMBER, 1878.

Coram HON. SIR A. A. DORION, CH. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

No. 135.

DALLAIRE,

APPELLANT;

AND

GRAVEL,

RESPONDENT.

HELD:—1. That the husband has no power to hypothecate an immoveable *conquêt* of the community after the dissolution of the community, and that a hypothec given by him at that time can only affect his half of the property.

2. That the heirs-at-law of the deceased wife are seized, by operation of law, of her share in such immoveable. (Art. 607 C. C.)

3. That although Art. 2098 of the C.C. obliges the heirs to register their title, the only penalty attached to their failure to do so is, that all conveyances, transfers or real rights granted by them are without effect.

TESSIER, J:—La question qui se présente est de savoir si le mari survivant à son épouse peut donner après la mort de sa femme une hypothèque valable sur la part, de l'immeuble dépendant de la ci-devant communauté, appartenant à ses enfants, et si cette hypothèque duement enrégistrée par le créancier peut valoir à l'encontre des enfants du mari, qui n'ont pas enrégistré une déclaration de successibilité ou de transmission par succession suivant l'article 2098 du Code Civil.

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Il appert que Casimir Dallaire, marié avec Emélie Fresne, aurait acquis durant leur communauté de biens l'immeuble saisi en cette cause.

Emélie Fresne est décédée à Montréal le 11 mai 1870, laissant de son mariage avec le dit Casimir Dallaire six enfants, dont cinq alors mineurs et le sixième est l'appelante. Cinq ans après la mort de sa femme Casimir Dallaire a consenti une obligation à Prisque Gravel, l'Intimé en cette cause, pour un emprunt de $600 suivant acte devant Bedard, Notaire, le 10 mars 1875, enrégistré le lendemain, par lequel le dit Casimir Dallaire a donné une hypothèque sur la totalité de l'immeuble dépendant de la ci-devant communauté entre lui et son épouse.

Cet immeuble ayant été saisi en vertu d'un jugement rendu en faveur de Prisque Gravel contre Casimir Dallaire, la fille de ce dernier, Emélie Dallaire, a produit une opposition afin de distraire, réclamant une sixième partie indivise, dans la moitié de cet immeuble comme héritière de sa mère décédée.

Le créancier Gravel a contesté cette opposition, en alléguant que "le père était resté en possession apparente de l'immeuble, et que l'opposante n'avait pas fait enrégistrer sa déclaration de successibilité suivant l'article 2098 du Code Civil, et que le créancier ayant duement inscrit son hypothèque avait une priorité de droit sur la totalité de l'immeuble en question à l'encontre de l'opposante.

La Cour Inférieure a accueilli cette prétention et par un jugement rendu le 20 avril 1877 a rejeté l'opposition d'Emélie Dallaire, comme suit:

"Considering the contestation by plaintiff of the opposition of said Emélie Dallaire well founded, particularly seeing article 2098 Code Civil, the formalities of which have been disregarded by opposant; considering that the Registry Office has never shown title of ownership, as regards the lands seized, save in favor of defendant and his auteur Desbarats, and that this helps the plaintiff; doth dismiss the said opposition, with costs, save only costs of *articulation de faits*."

C'est de ce jugement qu'il y a appel. Il est bon de considérer d'abord quelle est la nature du droit de propriété de l'opposante Emélie Dallaire, avant de faire l'application de l'article 2098, C.C.

L'opposante allègue que sa mère aurait fait un testament par lequel elle a légué la nue propriété de ses biens à ses enfants et l'usufruit à son mari, mais que ce testament n'a pas été enrégistré, de sorte qu'il faut considérer son droit à un sixième dans le dit immeuble, soit comme légataire, soit comme simple héritière, et voir de quel jour elle est saisie de son droit de propriété par la loi.

L'article 607 C. C. dit: "Les héritiers légitimes sont saisis de plein droit "des biens du défunt, mais l'époux survivant doit se faire envoyer en possession "par justice....."

"Art 891. Le légataire à quelque titre que ce soit, est par le décès du tes- "tateur, ou par l'événement qui donne effet au legs, saisi du droit à la chose "léguée."

Il est aussi évident que l'opposante a hérité de cette portion d'immeuble du chef de sa mère, et non pas du chef de son père; même en cas de continuation de communauté, "les immeubles qui composaient la première communauté en sont

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" tirés et deviennent propres au survivant pour la moitié, et aux enfants pour " l'autre. C.C. art : 1329. Il s'en suit que l'opposante et le créancier ne tiennent pas leur titre respectif ou leur droit respectif du même auteur.

Demolombe vol. 13, No. 131, " D'après les anciens auteurs que nos auteurs " modernes ont généralement suivis en ce point, la saisine héréditaire produirait " quatre effets principaux, savoir :

" 1. L'acquisition immédiate par l'héritier, *a die mortis*, de la propriété et de tous les droits qui appartenaient au défunt ;

" 2. L'acquisition, immédiate aussi, de la possession elle-même *sans aucun* " *fait d'appréhension :*" Il est donc évident que l'opposante Emélie Dallaire avait la possession légale de sa part dans cet immeuble. Maintenant faisons l'application de l'article 2098 au cas actuel. Cet article contient deux propositions distinctes.

La 1ère, c'est que " tout acte entre vifs transférant la propriété d'un immeuble " doit être enrégistré," et la pénalité, c'est que " à défaut de tel enrégistrement " le titre d'acquisition ne peut être opposé au tiers qui a acquis le *même* " immeuble *du même vendeur*, et dont le titre est enrégistré."

Remarquons que cette pénalité ne s'applique pas à l'opposante actuelle, parce qu'elle ne tire pas son droit ni d'un acte entre vifs, ni du même auteur ou vendeur.

La 2ème proposition, c'est que toute transmission d'immeuble par testament doit être enrégistrée avec déclaration du décès du testateur, et que toute transmission par succession doit être enrégistrée au moyen d'une déclaration énonçant " le nom de l'héritier, son degré de parenté avec le défunt, le nom de " ce dernier, la date de son décès et la désignation de l'immeuble."

Quelle est la pénalité pour défaut d'enrégistrer cette déclaration, ce n'est pas la même que celle de l'omission d'enrégistrer l'acte *entre vifs*, mais c'est la suivante.

" Jusqu'à ce que l'enrégistrement du droit de l'acquéreur ait lieu, l'enrégis- " trement de toute cession, transport, *hypothèque* ou droit réel par lui consenti " affectant l'immeuble, est sans effet." Il n'y a pas de délai fixé pour enrégistrer cette déclaration. Or l'héritier, C. C. art. 664, a 3 mois et 40 jours pour faire inventaire et accepter la succession ou y renoncer ; mais est-il obligé d'après cet article de faire sa déclaration immédiatement ; si non, durant ces 3 mois et 40 jours, le conjoint survivant peut vendre ou hypothéquer les biens des enfants. On ne peut supposer que les codificateurs aient voulu créer une position si contradictoire et dangereuse pour les héritiers et légataires.

Ainsi d'après cette dernière pénalité, quand bien même l'héritière ou légataire, Emélie Dallaire, aurait consenti l'hypothèque en question, elle serait encore sans effet au moins vis-à-vis des tiers, mais il y a loin de là à conclure qu'elle doit avoir son effet vis-à-vis même de celle qui n'a pas consenti cette hypothèque sur sa propriété. Il me parait donc, que par le défaut de l'opposante d'avoir enrégistré sa déclaration de successibilité ou d'avoir fait enrégistrer le testament de sa mère, le créancier Gravel n'a pu acquérir un droit d'hypothèque à l'encontre d'une autre personne, qui ne tient pas son droit du même auteur. C'est le cas d'appliquer par analogie l'article 2089 du Code.

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"La préférence résultant de la priorité d'enrégistrement du titre d'acquisition d'un héritage n'a lieu qu'entre acquéreurs qui tiennent leur titre "respectif *du même auteur*."

Si la doctrine contraire était maintenue, il s'en suivrait: qu'un père survivant, gardien et protecteur naturel de ses enfants, chargé du droit de faire enrégistrer la déclaration de successibilité de ses enfants mineurs, pourrait créer des hypothèques valables sur leurs biens immeubles, leur provenant de la part de communauté de leur mère, et par là pourrait ruiner les mineurs pour ses propres affaires. C'est là un principe fort dangereux qu'il est utile de ne pas adopter, à moins que la loi ne le prononce formellement. Heureusement la loi n'est pas dans ce sens.

Le Code Napoléon ne paraît pas contenir une disposition aussi expresse que notre article 2098 sur l'obligation d'inscrire une déclaration de la part de l'héritier; la loi du 23 mars 1855 ne paraît s'appliquer qu'à la transcription "des actes *entre vifs* translatifs de propriété immobilière ou de droits réels susceptibles d'hypothèque."

Cependant même pour ces actes *Troplong* dans son *Traité de la Transcription*, No. 160, pose la condition que pour qu'il y ait priorité en faveur du second acquéreur qui inscrit avant le premier, il faut que les deux acquéreurs tiennent leur droit du même vendeur.

"Ceci posé, dit-il, il faut nous arrêter à quelques hypothèses, parceque suivant la diversité des cas, les principes ne conduisent pas aux mêmes conséquences.

"Supposons d'abord, que les deux acheteurs ne tiennent pas leur droit du "même vendeur. Par exemple *Primus* prétend avoir une portion de pâquis "dans un pâturage appartenant à *Secundus*, qui l'a acheté de *Victor*, mais qui "n'a pas fait transcrire. *Secundus* intente contre *Primus* un procès en revendication. Dans le cours de cette contestation, *Primus* vend la portion de "pâquis en question à *Tertius*, qui fait transcrire son titre, puis le procès abou"tit à un jugement qui condamne Primus à délaisser à Secundus l'immeuble "contesté. Quelle sera l'influence de cette décision sur *Tertius*? Sera-t-il fondé "à prétendre qu'ayant transcrit son titre, il doit l'emporter sur *Secundus* qui "n'a pas promulgué le sien? Nullement.

"En effet *Primus* dont il tient son droit, n'était qu'un usurpateur, ou si l'on "veut, un faux propriétaire sans titre réel et légal.

"Car même sous la loi du 23 mars 1855, il est toujours vrai de dire avec le "Code Napoléon, que le vendeur ne transmet à l'acquéreur que les droits et la "propriété qu'il a lui-même sur la chose vendue. La transcription n'est destinée "qu'à faire connaître les droits acquis, elle ne les constitue pas dans leur "origine."

Dans la discussion de la loi de 1855, qui n'a pas assujetti les droits des successeurs *ab intestat* à l'inscription, Troplong en donne la raison à la page 32. "Une partie des membres de la commission a pensé que l'héritage *ab intestat* "devait être dispensé de la transcription, parce que l'héritier continue la per"sonne du défunt, et parce que son droit s'établit *publiquement* en vertu de la "loi et des *actes de l'Etat Civil*."

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Les actes de l'Etat Civil de naissance, de mariage et de sépulture sont publics, on n'en trouve pas la publication dans les bureaux d'enrégistrement, mais dans les régistres de l'Etat Civil. Ce n'est pas par le certificat du Régistrateur que l'on constate si un contractant est majeur ou mineur, s'il est marié ou veuf. Il en est autrement des actes entre vifs, ils sont privés, et ne deviennent publics que par l'enrégistrement.

Verdier, de la Transcription No. 342.

"A cette règle il faut en ajouter une autre ; c'est que toutes les fois que l'un "des prétendants sur un immeuble tiendra ses droits d'une personne qui n'est "pas propriétaire, ou qui est sans titre réel ou légal, il devra succomber, bien "qu'il ait fait transcrire son contrat avant son adversaire."

Il est à regretter que le créancier soit exposé à perdre une partie de ses droits, mais il devait examiner les titres, l'état civil et la position légale du débiteur ; s'il l'eut fait, il aurait appris que le débiteur n'était vrai propriétaire que de la moitié de cet immeuble, l'autre moitié appartenant à ses enfants comme héritiers de leur mère.

Cependant en venant au secours de l'opposante, cette Cour doit-elle la maintenir dans son droit de propriété; même à l'encontre de l'usufruit de son père. Entre le père et l'enfant qui ont fait défaut tous deux de faire enrégistrer le testament, ils sont tous deux en faute, et cette faute ne peut profiter à l'opposante. Il suit donc de là que son droit à la sixième partie dans la moitié de cet immeuble, ne doit être maintenu que pour la nue propriété, sujet à l'usufruit du père, et c'est dans ce sens que le jugement est rendu par cette Cour.

Sir A. A. Dorion, J. C. :—Il s'agit dans cette cause d'une propriété de peu de valeur ; mais la question engagée est de la plus haute importance au point de vue du système hypothécaire.

Le jugement, que nous allons rendre, aura l'effet de détruire cette impression sous laquelle sont un grand nombre de propriétaires et de capitalistes, qu'il suffit d'avoir recours à un certificat du Régistrateur pour acheter un immeuble ou prêter sur hypothèque avec une entière sécurité. Il n'en est cependant pas ainsi. Il y a souvent des circonstances qui affectent les propriétés immobilières qu'il est nécessaire de connaître, et sur lesquelles les bureaux d'enrégistrement ne sauraient nous renseigner.

Mon savant collègue, qui a exprimé l'opinion de la Cour avec tant de lucidité, en a cité un exemple; en disant, que ce n'était pas par le certificat du Régistrateur que l'on pouvait constater, si l'une des parties à un acte est majeure ou si elle est mineure. Il en est de même de tout ce qui regarde l'état civil des parties contractantes, outre le fait, que le vendeur d'un immeuble ou l'emprunteur qui veut l'hypothéquer a un titre régulièrement enrégistré, ce qui peut être constaté par un certificat du Régistrateur, il faut encore s'assurer de la condition de ce vendeur ou de cet emprunteur, et connaitre s'il a ou non changé d'état depuis l'enrégistrement de son titre d'acquisition.

Une fille majeure qui aurait acheté un immeuble et fait enrégistrer son titre, ne pourrait cependant pas vendre cet immeuble, du moins sans autorisation, si depuis elle s'est mariée, quoique d'après les régistres du bureau d'enrégistrement, elle paraisse et soit de fait seule propriétaire de cet immeuble, les régistres

ne pouvant contenir aucune mention de son mariage. Celui qui aurait été interdit ou qui serait mort civilement depuis son acquisition serait dans le même cas.

Il faut donc que l'acheteur ou le prêteur de fonds obtienne, en dehors du bureau d'enrégistrement, certains renseignements, que le certificat du Régistrateur ne peut fournir. C'est là la conséquence de cette règle empruntée au droit romain, que l'on est censé connaître la condition de celui avec qui l'on transige. "*Qui cum altero contrahit, vel est, vel debet esse non ignorans conditionis ejus.*" (*Leg.* 19 *ff de reg. jur.*)

Avant le code, nul doute, que le mari ne pouvait après la dissolution de la communauté vendre que sa part des immeubles qui en avaient fait partie, et qu'il ne pouvait aliéner la moitié de ces immeubles qui, par le décès de la femme, étaient échus aux enfants issus de leur mariage. Il est vrai que pendant la communauté, le mari peut disposer de tous les conquêts de cette communauté, mais il ne le fait pas comme propriétaire absolu des biens dont elle se compose, mais à titre de chef de la communauté et d'administrateur des biens qui en dépendent. (*Code Civil, Art.* 1292, 1293 et 1356.) S'il en était propriétaire absolu, rien ne l'empêcherait de disposer par testament de la totalité des biens de la communauté, d'en avantager ses propres héritiers au préjudice de la communauté, ou enfin d'abuser de son administration sans s'exposer à une demande en séparation de biens. N'étant qu'administrateur des biens d'une *quasi-société*, sa qualité cesse à la dissolution de cette société. Et lors même qu'il y aurait continuation de communauté, le mari survivant ne pourrait les aliéner parcequo comme conquêts de la première communauté, ils ne forment pas partie de la continuation de communauté, mais sont pour moitié propres aux enfants de l'époux prédécédé. (*Code Civil, Art.* 1329.)

Ces règles ont-elles été changées par les articles du Code, qui ont rapport à l'enrégistrement? Il faut dire que non.

D'abord, la priorité d'enrégistrement n'affecte que les parties qui dérivent leurs droits d'un auteur commun. (*Code Civil, Art.* 2089).

Ici l'appelante tient ses droits de propriété d'Emélie Fresne, sa mère, dont elle est héritière pour un sixième, et dès le décès de sa mère arrivé en 1870, elle a été saisi de sa part dans l'immeuble qu'elle reclame en cette cause. (*Code Civil, Art.* 607 et 644.)

L'Intimé au contraire dérive ses droits de l'hypothèque que lui a consenti, en 1875, Casimir Dallaire, le père de l'appelante. Ils ne tiennent donc pas leurs droits d'un auteur commun.

De plus, l'article 2098 qui exige que les légataires et les héritiers d'un défunt fassent enrégistrer les testaments et les déclarations constatant leurs titres d'héritiers et de légataires, ne prononce pas contre ceux qui omettent de le faire la déchéance de leurs droits à l'égard des tiers de bonne foi, comme il le fait pour les acquéreurs par acte entre vifs.

La seule pénalité qu'entraine cette omission, c'est que jusqu'à ce que l'enrégistrement ait eu lieu, les cessions, transports, hypothèques ou autres droits réels conférés par les héritiers et légataires en défaut, sont sans effet.

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Les commissaires chargés de préparer le Code ont clairement expliqué dans leur 6e. Rapport p. 67 que cet article 2098 n'avait d'autre portée que celle indiquée plus haut, et qu'ils n'entendaient pas priver les légataires et les héritiers en défaut de leurs legs ou droits successifs.

Voici comment ils s'expriment: "L'amendement à l'article 11, (projet de "l'art. 2098) dont il vient d'être parlé, a pour objet d'établir comme règle uni- "verselle, le système de la publicité et la préférence en faveur de l'enrégistre- "ment, en exigeant la transcription pour les ventes, donations, et autres actes "entre vifs, et la simple inscription pour les titres par testaments; et quant aux "titres successifs, la transcription d'un avis ou déclaration énonçant le nom de "l'héritier, son degré de parenté avec le défunt, le nom de ce dernier et la désig- "nation de l'immeuble. Et pour contraindre à l'enrégistrement, l'article "suggéré ne donne aucun effet à l'enrégistrement des actes de celui dont le titre "de propriété n'est pas enrégistré."

La version anglaise rend la chose encore plus évidente. Il y est dit: "And "in order to enforce registration, the suggested article attaches no effect what- "ever to the registration of any *subsequent act of a purchaser who has failed* "*to enregister his title.*"

Ce n'est pas le titre de l'héritier ou du légataire qui est sans effet, mais ce sont les titres subséquents que cet héritier ou ce légataire ont pu donner.

L'appelante n'a donc pas perdu son droit de propriété en ne fesant pas enrégistrer une déclaration du décès de sa mère, et elle est fondée à réclamer son sixième dans la moitié indivise de l'immeuble saisi sur le défendeur. Mais elle a elle-même allégué le testament de sa mère qui a légué l'usufruit de ses biens à son mari, le défendeur, et comme l'appelante ne peut invoquer le défaut d'enrégistrement de ce testament, il s'en suit qu'elle ne peut réclamer que la nue propriété de sa part de l'immeuble saisi, qui est grevée d'usufruit en faveur du défendeur pour sa vie durant.

Le jugement déclare l'opposition afin de distraire de l'appelante bien fondée quant à la nue propriété d'un sixième indivis dans la moitié de l'immeuble saisi, et lui en donne main levée.

The following were the special reasons assigned in the written judgment of the Court:—

"Considérant que lors du décès d'Emélie Fresne, épouse de Casimir Dallaire le défendeur en cette cause, arrivé le 11 mai, 1870, l'immeuble saisi sur le dit Casimir Dallaire faisait partie des biens de la communauté qui avait existé entre le dit Casimir Dallaire et la dite Emélie Fresne.

Et considérant que la dite Emélie Fresne a laissé six enfants issus de son mariage, et que l'appelante, l'un d'eux, a hérité d'un sixième dans la moitié indivise du dit immeuble, et qu'aux termes de l'art. 607 du Code Civil elle a été saisie de son sixième dans la moitié du dit immeuble dès l'instant du décès de sa mère la dite Emélie Fresne.

Et considérant que l'intimé a fait saisir cet immeuble en vertu d'un jugement obtenu sur une obligation consentie par le défendeur, en date du 10 mars 1875,

et enrégistrée le 11 du même mois, par laquelle le défendeur a hypothéqué la totalité du dit immeuble.

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Et considérant qu'aux termes de l'art. 2089 du Code Civil, la priorité d'enrégistrement n'a lieu qu'entre les parties qui tiennent leurs titres respectifs du même auteur, ce qui n'est pas le cas ici puisque l'appelante dérive son titre à un sixième dans la moitié indivise de l'immeuble saisi, de la succession de sa mère Emélie Fresne, et que l'intimé ne dérive ses droits que de l'hypothèque que lui a consenti le défendeur Casimir Dallaire.

Et considérant que quoique le dit Casimir Dallaire ait eu comme chef de la communauté et administrateur des biens qui en dépendaient le droit d'aliéner ceux qui en faisaient partie tant que la communauté a existé, il n'a jamais été propriétaire que de la moitié des dits biens, et que son droit d'aliéner la moitié de sa femme a cessé dès l'instant du décès de la dite Emélie Fresne, qui a transmis à ses héritiers sa part dans les dits biens.

Et considérant de plus que le Code Civil en imposant par l'article 2098, aux légataires et héritiers légitimes d'un défunt l'obligation de faire enrégistrer la déclaration requise établissant le titre d'héritier ou de légataire, en vertu desquels ils ont acquis des droits à un immeuble, n'a fixé aucun délai pour le faire et qu'il n'a pas attaché à l'omission de cette formalité la déchéance de leurs droits à l'égard des tiers qui ont enrégistré leur titres, comme il le fait dans la première partie du même article à l'égard des immeubles acquis par actes entre vifs.

Et considérant que l'appelante est bien fondée à réclamer comme elle fait * * * Mais considérant que par le testament de la dite Emélie Fresne, * * la dite Emélie Fresne a légué à son mari le défendeur en cette cause l'usufruit de tous ses biens meubles et immeubles, et que la dite appelante ne peut pas opposer le défaut d'enrégistrement de ce testament, en sorte que la saisie du dit immeuble est valable quant à la moitié indivise et les cinq sixièmes indivis dans l'autre moitié, et quant à l'usufruit la vie durant du défendeur Casimir Dallaire, et que l'appelante n'a droit qu'au sixième dans la moitié indivise de la nue propriété qui lui appartient à titre d'héritière de sa mère * * * casse et annulle, &c., &c."

Judgment of S. C. reversed.

Longpré & Dugas, for appellant.

M. E. Charpentier, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1874.

MONTREAL, 22ND JUNE, 1874.

Coram TASCHEREAU, J., RAMSAY, J., SANBORN, J., LORANGER, J., *ad hoc*

No. 6.

HUGH McLENNAN, ET AL.,

(*Plaintiffs in the Court below*),

APPELLANTS;

AND

RÉNÉ AUGUSTE RICHARD HUBERT, ET AL.,

(*Defendants in the Court below*),

RESPONDENTS.

HELD:—That the Prothonotary is not liable for the damages caused by the illegal issue of a writ of *saisie arrêt* before judgment unless it be proved that he acted in bad faith, or without reasonable and probable cause.

The judgment appealed from was rendered by the Superior Court, Montreal, on the 30th November, 1872, TORRANCE, J., dismissing an action in damages against the Prothonotary. The facts and pleadings are fully set out in the factums of the parties.

Girouard & Dugas, for the appellants:

This is an action in damages brought against Messrs. Hubert, Papineau & Honey, Joint Prothonotary of the Superior Court and also Joint Clerk of the Circuit Court for Lower Canada, sitting in and for the District of Montreal, for having issued a *saisie arrêt* before judgment "illegally and without any probable or reasonable cause."

The facts may thus be briefly stated: On the 4th September, 1871, the barge "Guard" was in the Port of Montreal, in tow of steamer "Relief," together with nine other barges, on their way to the United States. One Alphonse Marcile alleging that some wages were due him by one Albert Couvrette, barge captain, made the following affidavit before M. Papineau, one of the defendants, as Joint Clerk of the Circuit Court:

"Que le défendeur lui est endetté en la somme de sept dollars et vingt cinq "cents, étant, pour gages comme matelot à bord de la barge portant le nom "————, et que la dite barge est sur le point de laisser le Port de Montréal, "pour aller aux Etats-Unis d'Amérique, et que sans le bénéfice d'un bref de saisie "arrêt avant jugement pour saisir et arrêter la dite barge, son grément ainsi que "sa charge, le demandeur perdra sa créance et souffrira du dommage."

Upon this affidavit, Mr. Papineau ordered the issuing of a writ of *saisie arrêt avant jugement* commanding any bailiff of the Superior Court "de saisir et arrêter tous les biens, créances effets d'Albert Couvrette, capitaine de barge, de la paroisse de Ste. Cécile, District de Beauharnois, et particulièrement une barge et son grément et sa charge: la dite barge connue sous le nom de "Guard," maintenant et momentanément dans le port de Montréal."

The attachment of the barge was made on the same day, 4th September,

1871, when the last barge of the tow of the steamer "Relief" was locking in the Canal Basin, in the Port of Montreal. The consequence was a detention of the whole tow during ten hours, causing to the owners, the appellants, a damage of three hundred dollars, $100 for the steamer and $20 for each barge, without reference to consequential damages. This special damage is proved beyond any doubt, and would have been still greater had the barge seized been left behind.

On the 13th September, the day following the return day of the writ, Couvrette moved that the same be quashed, upon the ground that the affidavit of the plaintiff did not contain any of the substantial averments required by law for the issuing of a writ of attachment before judgment; and on the following day, 14th September, this motion was granted with costs.

The appellants (owners of the said steamer and barges, who were running the same for their own account and benefit at the time of the seizure, Couvrette and the other captains being only their agents and *employés* for that purpose), at once gave them notice of an action to recover the said damages, as required by law, alleging that they had acted "illegally and without any reasonable or probable cause." The present demand is such action.

The defendants pleaded—Firstly, a *défense en droit*, in which they set forth that, 1o, "Les défendeurs, comme Prothonotaire et Greffier, sont tenus, sur la demande qui leur en est fait par l'avocat de la partie, accompagnée d'un affidavit sérieuse et de bonne foi, d'accorder des brefs de saisie arrêt avant jugement, et autres brefs du même genre, et qu'ils ne sont pas et ne sauraient se constituer juges de la valeur légale et de la suffisance ou insuffisance de tel affidavit; 2o, que les défendeurs comme Prothonotaire, &c., sont tenus d'accorder des writs de saisie conservatoire pour le paiement des gages des matelots, en vertu de l'article 2253 du Code Civil, et qu'ils ne sont pas et ne sauraient être juges de la valeur légale, et de la suffisance ou insuffisance de tel affidavit."

Secondly, A plea to the merits, in which they say that at the time of Marcile's seizure the question as to whether a seaman had a right to obtain a *saisie conservatoire* for his wages, due on the last voyage, was controverted, and is still unsettled: that, in fact, the wages due to Marcile were for the last voyage, and finally that the defendants had acted in good faith, *de bonne foi et sans négligence ou impéritie.*

Thirdly, A general denegation.

The demurrer was dismissed. MACKAY, J., said: This is an action in damages against the Prothonotary for issuing a seizure against plaintiff's barges without sufficient cause. It is alleged that the affidavit was insufficient to justify an attachment before judgment, and that the Prothonotary should have known that the Court of Review had decided that a seaman had no right to an attachment on a vessel for his wages. And besides that he has a privilege only for his wages for the last voyage, and it is not alleged that this was for the last voyage. A demurrer is filed to the action, but I consider the declaration, if proved, to be sufficient to justify a judgment. Demurrer dismissed.

At *Enquête*, the appellants fully made out their case. They proved even gross negligence and incapacity on the part of Mr. Papineau. "Nous considérons," he said, "l'affidavit comme l'œuvre du déposant et de l'avocat, *et ne le*

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lisons pas; nous considérant comme responsables seulement du jurat et de la manière d'administrer le serment." For the reputation sake of our Prothonotary's office, it must be stated that Mr. Papineau's notion of the Prothonotary's duties does not agree with that of his colleague, Mr. Hubert. "Depuis," he said, "que je suis l'un des greffiers, je n'ai jamais généralement assermenté d'affidavits "pour obtention de writs spéciaux, tels que de saisie arrêt avant jugement ou de "revendication *sans les avoir examinés et lus.*"

The defendants proved nothing, not even that any wages were due to the seizing plaintiff, Marcile.

The case was heard upon its merits before Mr. Justice Torrance, who dismissed plaintiff's action.

TORRANCE, J., said :—"The declaration set out that the Prothonotary, in a certain case for $7, in the Circuit Court, improvidently issued a writ of *saisie arrêt* on an affidavit in the following words: That a barge was about to leave the port of Montreal to go to the United States, and that without the benefit of a *saisie arrêt* to stop the barge the plaintiff might lose his debt, and sustain damage. Upon this affidavit, the Clerk of the Court (Mr. Papineau being the particular clerk that had to do with this matter) issued a *saisie arrêt* before judgment, and under this writ the barge was stopped in the act of passing through the canal. She was one of a convoy of barges on the way to the United States, and the whole convoy was stopped for ten hours. The plaintiffs, who are the proprietors of the barge, say they disbursed a sum of between $60 and $70, and, besides that, suffered damages in all about $300. They now charge the Prothonotary with having issued the *saisie arrêt* without reasonable or probable cause; that they did it in ignorance of the law, which they ought to have known, as settled in the case of *Delisle and L'Ecuyer*, and in *Dagenais and Douglas;* and that under the circumstances of the case there was such great *laches* on their part that they ought to pay these damages. The function which the Prothonotary performed here may be regarded as a *quasi* judicial one, and in a case of *Carter and Burland* the Court has already to-day decided that a magistrate is not liable where there is no malice or misconduct on his part. Broom's Maxims show that even inferior magistrates cannot be called into question for a simple error. It is better that an individual should occasionally suffer wrong than that the course of justice should be impeded by constant apprehension on the part of those who have to administer it. The question here as to the issue of the *saisie arrêt* is one upon which different [illegible] different views, and is it to be said that a Prothonotary is liable because he does not refuse to give out a warrant of *saisie arrêt* on what at least appeared to be a sufficient affidavit? In this case, after the return of the process into Court, the attachment was at once quashed without any resistance in the case. Upon the whole the Court considers that the plaintiff has failed to prove that the *saisie arrêt* was issued without reasonable and probable cause, and the action is dismissed with costs.

This case presents many questions of no little importance. What is the nature of Prothonotary of the Superior Court or Clerk of the Circuit Court? Is he a ministerial or judicial officer, or both? What is the responsibility of a minis-

terial officer of a Court of Justice? Even if he is to be considered as performing *quasi* judicial functions, is he in the present case exempt from any civil responsibility? In other words, even supposing that the protection granted to the Judges of the Superior Court extends to the Prothonotary of said Court, will a Judge be civilly liable in a case like the present one? Finally, what is the civil responsibility of Judges?

A striking feature of this case is that the plea is contradictory and the judgment of Mr. Justice Torrance is at variance with the plea. The defendants pleaded that they are not judges, that they had no discretion in the matter, and Mr. Justice Torrance holds they were performing *quasi* judicial functions. In the first part of their plea the defendants contend that they are bound to issue writs of *saisie arrêt* before judgment, *capias ad respondendum*, etc., whenever demanded by an advocate, supported by an affidavit *sérieux et de bonne foi*, and in the latter part, they set forth that they are bound to do so without "se constituer juges de la valeur légale et de la suffisance ou insuffisance de tel affidavit." But who is to decide that the affidavit is *de bonne foi et sérieux* if the Prothonotary is not bound to take cognizance of the same? Mr. Hubert's notion of the duties of the Prothonotary is the only correct one, and there is no doubt that Mr. Papineau, in issuing *saisies arrêts* and writs of a like nature, without even taking the trouble of reading the affidavits, is guilty of a gross neglect, for which all the defendants are responsible. It is, indeed, a matter not of discretion with, but of imperative duty for, the Prothonotary of the Court to issue writs of *saisie arrêt* before judgment in all cases *provided* by law, and the want of power to exercise such a discretion is the very reason why he is a ministerial officer only, has none of the characteristics of judicial officers, and is always responsible not for mere clerical mistakes or irregularities, but for omissions, neglect and total or partial want of performing the duties of his office.

Under the French *régime*, the *greffiers* were mere ministerial officers, and as such were civilly liable for their acts and those of their clerks who were appointed by them. "Un officier ministériel," says Boncenne, Proc. Civ. vol. 1, p. 583, "est celui qui est nommé par le roi, pour prêter son ministère aux magistrats ou aux parties. Tels sont les avoués, *les greffiers*, les notaires, les commissaires-priseurs et les huissiers. . . . . En général, les officiers ministériels répondent des dommages résultant des fautes qu'ils commettent dans l'exercice de leur profession." Ferrière, vo. Greffiers: "Ils sont responsables de leurs clercs ou commis, mais ils ne peuvent pour raison de ce être poursuivis que civilement." See also Journal du Palais, vo. Commis Greffier, No. 158; Rolland vo. Greffier, No. 28; Dict. du Notariat, vo. Greffier, No. 45; Merlin, vo. Nullité. "Les officiers ministériels," says Toullier, vol. 7, p. 265, "sont les *greffiers*, les avoués et les huissiers." Toullier, vol. 11, p. 254, note (1) further remarks: "La réparation des torts causés par *impéritie* s'applique aux avoués, huissiers, aux notaires, *greffiers*," etc.

In France under the old as well as under the new *régime*, *greffiers* were called upon to perform most of the duties imposed upon them in Lower Canada; they were bound to keep proper registers of the judgments and proceedings of the court, obey the orders of the judges, issue summons in conformity with such

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orders or the requirements of law, receive and adjudicate upon all demands for the appointment of tutors and curators, and in some of the Provinces execute testaments and last wills, and proceed with inventories of deceased. The Prothonotary or Clerk of our courts has no greater powers except perhaps that of rendering judgments in certain cases by default. Still this judgment does not become the judgment of the court, till the expiration of a certain lapse of time. C. P. C. 465. Article 92 declares that in actions by default, founded upon bills, notes, etc., the Prothonotary may, in vacation, *draw up* a judgment in the name of the Court, but this judgment does not become the judgment of the Court till after the expiration of the time fixed for filing opposition. So even in this particular instance, it cannot correctly be said that the Prothonotary is performing judicial or *quasi* judicial functions; again, to use the words of our Code, he *draws up* a judgment in the name of the Court, not in the exercise of a discretionary power, but in the performance of an imperative duty imposed upon him by the express provisions of the law. Like all other ministerial officers, he is, therefore, responsible for any manifest violation of his duties, whether defined by law or by the courts, whether the injury is occasioned by an unjustifiable misunderstanding of the judgment of the Court or by a clear misapprehension of the law; because again in so doing, he is guilty of a great want of private judgment, and public officers are required to bestow upon the performance of their duties at least that care, diligence, attention and knowledge which all citizens are bound to apply in the ordinary acts of life. Article 1050 of our Civil Code says: "*Every person* "capable of discerning right from wrong is responsible for the damage caused by "his fault to another, whether by positive act, imprudence, *neglect, or want of* "*skill.*" The appellants are not aware that the law has made an exception to this principle of eternal justice in favor of prothonotaries and clerks of courts of justice. The defendants understand so well that they are governed by it, that their sole plea is that they have acted in good faith, without neglect or want of skill, *de bonne foi, sans négligence ou impéritie.*

In England and the United States the same rule is laid down. "It is well "settled under the English system," says Sedgwick, on *Damages*, ed. 1858, p. 532, "that sheriffs and other ministerial officers, in case of neglect or violation of "duty, are responsible to the party aggrieved in a civil action." Shearman and Redfield, on *Negligence*, sec. 156: "Where the duty of a public officer is absolute, "certain, and imperative, involving merely the execution of a set task—in "other words, is simply *ministerial*—he is liable in damages to any one specially "injured, either by his omitting to perform the task, or by performing it "*negligently* or *unskillfully*." "Clerks of courts," they say on page 343, "of "counties and towns, prothonotaries, registrars of deeds, and other like officers, "belong to that class of ministerial officers to which we have referred on a pre-"vious page." (§ 156.)

The ordinary cases in which questions of responsibility of public officers have arisen, in England, the United States, and Canada, are suits against notaries, architects, collectors of Customs for over-charges and illegal forfeitures, against sheriffs, either for negligence, as the escape of parties arrested on legal process, for taking insufficient security under a *capias ad responden-*

dum, for neglect to seize or preserve property on execution, for an excess of their powers, excessive distress, etc. Gwynne, *on Sheriffs*, ed. 1849, p. 416; *McClure* vs. *Shepherd*, Stuart's R. 75; *Leverson* vs. *Cunningham* and *Boston*, 1 L. C. J. 86; 2 id. 297; 3 id. 223; *Irwin* vs. *Boston*, 2 L. C. J. 171.

Applying these principles to the present case, the defendants will be found guilty of neglect and gross violation of their duties. Our Code of Civil Procedure, art. 834–838, declares that the Prothonotary shall issue a writ of *saisie arrêt* before judgment, 1o in the case of *dernier équipeur*; 2o in all cases where the plaintiff produces an affidavit establishing that the defendant is *personally* indebted to him in a sum exceeding $5; that the defendant *absconds*, etc., or is *secreting* his property, with intent to defraud, etc. In the affidavit of Marcile, the word *personally* and the particulars of the debt are omitted, which omissions have often been held to be fatal to the writ, but are not perhaps sufficient to make the clerk of the Court civilly responsible. The clerk of the Court in effect does not guarantee as to the sufficiency of the affidavit, but he guarantees that there is an affidavit, that is, an affidavit containing the very substance and essence of the requirements of the law.

In the case under consideration, the Prothonotary has clearly acted without any jurisdiction, and has been guilty of a gross violation of his ministerial duties. He was bound to take communication of the affidavit, and exercising (not his discretion, as he has none) his own judgment, he was bound to see that the affidavit was establishing the requirements of the Code, before issuing the writ. If it substantially warranted it, he was bound to give it, for, as already observed, he has no discretion to exercise; he is a mere ministerial officer. If without any sufficient reason he refuses the writ, he may be compelled to issue the same, even by *mandamus*; and whether he gives or refuses it, he acts at his own peril: in both cases he is bound to act in a prudent and skillful manner.

If, in a case like the present, the clerk of the Court is not personally liable for the wrong inflicted, then the opinion of Mr. Papineau, that the Prothonotary is not bound to take communication of the affidavit, is correct, and a defendant arrested upon a mere blank piece of paper, or a sham affidavit, will be without remedy. If such a pretention be law, what becomes of the liberty and property of the subject! To bring a citizen to disgrace and misery, an unscrupulous and irresponsible individual will only be required to append his signature to a sheet of written paper, purporting to be an affidavit, wherein anything except what the law requires may be said, and to swear to it before the clerk of the Court!!

But, say the defendants, we did not intend to issue a writ of *saisie arrêt* under article 834 of the Code of Civil Procedure, but a *saisie conservatoire* under article 2383 of the Civil Code, declaring that "there is privilege upon vessels for the payment of the wages of the master and crew for the last voyage," that for years it had been customary to issue attachments of this nature in favor of seamen, and that, in fact, at the time of the issuing of the seizure of Marcile, it was and still is questionable whether a seaman is not entitled to a *saisie conservatoire* for his wages during the last voyage.

Do the facts support this plea? Has the affidavit at least the appearance of an affidavit for a *saisie conservatoire*? Mr. Justice Torrance held that it

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"appeared to be a sufficient affidavit." But the affidavit shows, 1stly, that a writ of *saisie arrêt avant jugement* was demanded. 2ndly. It is not alleged that the defendant, Couvrette, was the captain of the barge, nor that the plaintiff Marcile was a seaman on board of the same. 3rdly. The name of the barge is left in blank. 4thly. It is not established that the wages due had been incurred on board the said barge. 5thly. That they were for the last voyage. The affidavit discloses the fact that the debt was an ordinary personal debt. 6thly. The writ is not a writ of *saisie conservatoire*, that is in the nature of a *saisie revendication*, but a *saisie arrêt avant jugement* in the usual form, commanding the bailiff to seize the goods, chattels, effects and debts of the defendant, Couvrette, and more particularly the barge "Guard," then in the Port of Montreal. Nothing in the proceedings warrants, however, the supposition that she was not in the possession of a third party.

And now as to the alleged controversy of the question as to whether a seaman can obtain a *saisie conservatoire* for the payment of his wages for the last voyage, the appellants have alleged in their declaration that the point had been then recently decided at Montreal by His Honor Mr. Justice Berthelot on the 30th day of December, 1870, in a case of *Dagenais* vs. *Douglass et al.*, since confirmed in Review, and by the Court of Review on the 30th day of March, 1871, about six months previously, contrary to the pretentions of the *navigateurs*, as per copies of judgments filed and certified by the defendants themselves.

These decisions are in conformity with the settled jurisprudence of the Province; *Reid* vs. *Porteous*, 1825, per Reid, C. J., 8 L. C. J., 337; *Jasmin* vs. *Lafontaine*, 1862, Smith, J., 7 L. C. J. 119; *Dubeau* vs. *Robertson*, Berthelot, J., 1864.

The defendants have filed a copy of judgment rendered by Mr. Justice Berthelot on the 1st day of February, 1872, in a case of *Laplante* vs. *Mulligan*, to establish a contrary view. But on referring to a copy of the affidavit, also produced, it will appear that the affidavit contained all the necessary averments for a *saisie arrêt*, to wit, absconding from the Province with intent to defraud, etc. If, however, reference can be made to decisions rendered since the issuing of the seizure of Marcile, it suffices to refer to the case of *Graham* vs. *Côté*, decided by this Honorable Court on the 22nd day of January, 1871, to be convinced that no such *saisie conservatoire* exists under our present Code of Practice.

No contrary decision can the defendants quote, but the opinion of Mr. Justice Monk, who, in 1864, when sitting as a judge holding the Circuit Court in Montreal, rejected a motion to quash a *saisie conservatoire* issued in favor of a seaman. This isolated precedent, however worthy of respect it may be, cannot be sufficient justification for the defendants to disregard a jurisprudence of upwards of 30 years established by the majority of the judges of the country and to violate the express enactments of the Code. Even, up to the promulgation of the Code, if the practice of our Courts had been to issue and maintain *saisies conservatoires* of the nature under consideration, the Prothonotary would in this case be liable, because no judge can authorize him to do a thing expressly for-

bidden by the Code, and here the case of *Andrews* vs. *Morris*, 1 Q. B., 3, may be quoted as quite in point. In this case, the clerk of the Court ordered the arrest of Andrews, without an order of the Court. If the arrest had been made under such an order, it would have been valid; and although it appeared that a *practice had prevailed, with the concurrence of the judges*, that the clerk should issue attachments of that kind without any order, it was held that, in doing so, he was *usurping a power* which the judges could not confer upon him, and he was consequently condemned for trespass.

Therefore, even supposing that the affidavit was establishing all the necessary averments for a *saisie conservatoire*, and that the writ issued was in fact a *saisie conservatoire* and not an ordinary *saisie arrêt avant jugement*, it seems clear that the defendants became guilty of gross neglect of their duties and of contempt of the decisions of the Courts, by placing their own interpretation of the law above the well settled jurisprudence of the Province, and by issuing writs, the existence of which had been denied in the very Court and the very District in which they are sitting.

Mr. Justice Torrance entertains in this case a view different from that of Mr. Justice Mackay, and relying on Broom's Maxims and on his decision in the case of *Carter* vs. *Burland*, he holds that "the function which the prothonotary performed here may be regarded as a *quasi* judicial one." In the case of *Carter* vs. *Burland* it does not appear that the magistrate, although acting through bad faith and malice, had committed an injustice. Our courts have, moreover, often decided that magistrates were civilly liable to any party aggrieved for their neglect and want of skill. This principle was expressly maintained in the late case of *Lacombe* vs. *Ste. Marie et al.*, decided by the Court of Review, at Montreal, on the 30th September, 1871 (1 Revue Critique, 474). An information for perjury contained in three depositions prepared by counsel was laid before two Justices of the Peace before arrest. After the arrest, no examination was made of witnesses, nor did the accused confess; yet he was committed to jail, there to be kept till discharged by course of law. The accused was discharged on *Habeas Corpus*, and afterwards for want of prosecution. Action in damages against the Justices for $5000. Held, reversing the judgment of the Superior Court (Torrance, J.), that the commitment *not being based upon information reduced to writing before the magistrate*, was null, and that the magistrates were responsible for the false arrest. Judgment for $100 and costs. Mackay, Berthelot and Beaudry, JJ.

On reference to Broom's *Legal Maxims*, edition 1864, p. 63–64, it will be seen that the principle laid down by Mr. Justice Torrance is not supported by the authorities. Public officers performing *quasi* judicial functions, in fact all those engaged in the administration of justice, *every body, whatever be its name, are bound to obey where the law neither confers judicial power nor any discretion at all, but requires certain things to be done; and with the exception of the Legislature and its branches, every body is liable for the consequences of disobedience.*

"This principle," it is further observed by Broom, "applies where persons, required to perform ministerial acts, *are at the same time invested with the judicial character.*"

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This language is plain enough, and fully supports the last proposition of the appellants, that had the *saisie arrêt* of Marcile been issued by an officer invested with the judicial character, he would still be liable in damages, because in this particular case there was no discretion to exercise. Nay, more, a judge ordering the issue of a *saisie arrêt* under the circumstances, would likewise be responsible, because 1o. the wrong would have been caused by his neglect and want of skill, and 2o. because he would have acted without any jurisdiction in the premises.

Under the French law, there cannot be any doubt that public officers performing judicial or *quasi* judicial functions are accountable in damages for their neglect and gross violation of their duties. Article 8, tit. 1, of the *ordonnance* of 1667 enacts: "Déclarons tous arrêts et jugements qui seront donnés "contre la disposition de nos ordonnances, édits et déclarations, nuls et de nul "effet et valeur, et les juges qui les auront rendus, responsables des dommages et "intérêts des parties, ainsi qu'il sera avisé."

Besides this general enactment, the *ordonnances* and several other declarations, edicts, etc., specify many cases in which judges may be tried by reason of their judicial acts. The *ordonnance de Blois*, art. 147, declares that they will be answerable "lorsqu'ils auront jugé par dol, fraude ou concussion, ou que les Cours trouveront qu'il y a faute manifeste du juge, pour laquelle il doit être condamné en son nom."

The judge in default is to be tried in a special manner, known as *la prise à partie*, a proceeding which permitted the aggrieved party to summon the judge to answer for his proceedings before a superior tribunal. In the case of a *prise à partie* against the judges of Courts of final jurisdiction, the complaint is to be made to the Privy Council. The *prise à partie* can only be made against a judge; *greffiers* and other public officers performing ministerial or judicial functions or both are responsible in a direct ordinary action.

"Il résulte de toutes ces lois," observes Pigeau, vol. 1, p. 372, "que la "prise à partie ne doit avoir lieu en général que dans les cas de *dol, fraude ou* "*concussion, contravention aux lois ou faute manifeste, etc.* Ainsi, elle ne doit "pas être admise pour erreur dans le fait ou le droit."

In his commentaries on the *ordonnance* of 1667, page 444, Jousse says that the *prise à partie* lies "dans le cas d'abus d'autorité, comme lorsque le juge "excède son pouvoir, en connaissant des affaires qui ne sont pas de sa compé-"tence."

Such has been the law in France for centuries. See Toullier, Dr. Civil, vol. 11, p. 251 *et seq;* Code de Procédure, Art. 505; Sirey, Codes Annotés (Gilbert's ed). Code de Proc., p. 348; Pothier, Proc. Civile, p. 152; Merlin, vo. Garantie des Fonctionnaires Publics; Guyot, vo. Juge; Jousse, p. 444-446; Serpillon, Ord. de 1667, p. 473–477.

The reason of these enactments against judges is thus given by Toullier, vol. 11, p. 268: "Lorsque le préjudice causé par la faute grossière, par l'ignorance "crasse d'un juge, peut-être intérieurement méchant, est irréparable, il serait "évidemment injuste et contraire au droit naturel de refuser à la partie lésée un "moyen de réparation par la prise à partie. Tout fait quelconque de l'homme "qui cause du préjudice à autrui, oblige celui par la faute duquel il est arrivé, à

"le réparer," dit l'art. 1382; il ne dit pas seulement "par *le dol ou la fraude* "de qui il est arrivé."

Merlin, Vo. Quasi Délit, No. 11; "le juge est coupable d'ignorer ou de violer "la loi, car en se chargeant de la fonction de juger, il a promis les qualités "nécessaires pour la bien remplir. Il ne faut pas entendre par imprudence dans "le juge, une inhabilité absolue; car alors sa faute serait plus qu'un quasi délit, "il suffit qu'il se soit écarté de ces règles dont le bon sens ordinaire doit garantir "un magistrat."

There is no doubt that this law defining the responsibility of judges was in force in this Province up to the time of the cession to Great Britain. It is in our Statute book, *Ed. et Ord.* vol. 1, p. 184, 185; it was enforced by the highest Court in the colony in the celebrated case of the *prise à partie* of the Governor, reported at page 55, vol. 2 of the *Edits et Ord.* It is true that its provisions have not been reproduced in our Code of Civil Procedure, but at the same time it must also be admitted that they have not been repealed. The repeal was not express; and in face of article 1360 how can it be pretended that it is tacit and implied. That article says: "The laws concerning procedure in "force at the time of the coming into force of this Code, are abrogated:

"1. In all cases in which this Code contains any provision having expressly "or impliedly that effect;

"2. In all cases in which such laws are contrary to or inconsistent with any "provision of this Code, or in which express provision is made by this Code upon "the particular matter to which such laws relate."

But not only the Code of Procedure contains nothing contrary or inconsistent with the *prise à partie* or the old law concerning the responsibility of judges; the Civil Code by expressly declaring in article 1053 that every person is responsible for *the damage caused by his fault* to another, *whether by positive act, imprudence, neglect, or want of skill*, has affirmed in a general, but in a most positive manner, the principles of the old French law on the subject under discussion.

It may perhaps be asserted the *Act respecting the independence of the Judges* (C. S. L. C., c. 81) has virtually repealed this old French law. That statute contains, however, no such provision. It declares that the judiciary shall be independent from the Executive power; it enacts that the judges shall not be removed except by impeachment, upon the address of the House of Commons and of the Senate of the Dominion; but it does not say that they will be above the law which it is their duty to administer; it does not contain a single word concerning their civil responsibility to the public. That Act clearly has reference to their removal and recusation only, and to nothing else.

It may be said finally that the responsibility of the judges of a British Colony is to be governed by the rules of the English law. But the question under consideration is not a question of political law affecting the Crown; it is a question of private right or wrong, in short, of private civil law which should be decided according to the principles of the municipal laws of each colony.

And again, what is the rule of the English law concerning the responsibility of Judges? Does it hold that they are legally *impeccables*, as Mr. Justice

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Fletcher argued in a case for damages brought against himself, and reported in Stuart's R., p. 276. The appellants will merely quote from a leading case decided in 1850. *Houlden* v. *Smith*, 14 Q. B., 841, per Patteson, J.: "Here "the facts of the case, which were before the defendant, and could not be un "known to him, showed that he had not jurisdiction; and his mistaking the law "as applied to those facts cannot give him even a *primâ facie* jurisdiction, or "semblance of any." . . . . "Although it is clear that the Judge of a "Court of Record is not answerable at common law in an action for an erroneous "Judgment, or for the act of any officer of the Court, wrongfully done, not in "pursuance to, though under color of, a Judgment of a Court, yet we have found "no authority for saying that he is not answerable in an action for an act done "by his command and authority when he has no jurisdiction." In this case the Judge had jurisdiction over the demand, but not to execute judgment, as ordered by him.

See *Carratt* v. *Morley*, 1 Q. B. 18; *Watson* v. *Bodell*, 14 M. & W. 57; *Miller* v. *Seare*, 2 W. Bl. 1141; *Calder* v. *Halket*, 3 Moore's P. C. 28; *Taaffe* v. *Downes*, ibid, 36, note (a); *Lowther* v. *The Earl of Radnor*, 8 East, 113; *Pike* v. *Carter*, 3 Bing. 78; *Newbould*, 3 E. L. 4 E, 455; *Weaver* v. *Price*, 3 B. and Ad. 409; *Danboney* v. *Cooper*, 10 B. & C. 237; *Fernley* v. *Worthington*, 1 M. & G. 391; *Pricket* v. *Gratex*, 8 Q. B. 1020; *Leary* v. *Patrick*, 14 Q. B. 266; *Day* v. *King*, 5 A. & E. 359; Shearman and Redfield on Negligence, p. 195–224.

In a case of *Gugy* v. *Kerr*, decided many years ago in this Province, Chief Justice Sewell thus laid down the same rule: "When the members who con- "stitute a Court of Justice, of limited authority, err in their judgment, when "they are acting within the extent of their jurisdiction, they are not amenable "individually for their conduct in any shape whatever; *but if they assume to "themselves a jurisdiction or authority which they have not by law*, they "become liable to the parties aggrieved, and responsible to them for the conse- "quences of their misconduct." Stuart's R., p. 292. See also 10 L. C. R. 101.

What can the defendants now urge to claim an exemption from responsibility? If they are mere ministerial officers, they are answerable. If they are performing *quasi* judicial functions, they are likewise liable. Finally, if they are to be considered as judges, they are still responsible, because, according to the principles of the French law, they have acted *par imprudence, négligence et impéritie*, or, according to the principles of the English law, they have exceeded their authority and had no jurisdiction whatever in the matter.

In concluding, the appellants will take the liberty to observe to this Honorable Court that, in prosecuting this suit against the Prothonotary, they are not actuated by any ill-feeling towards them. They entertain the highest respect for these public functionaries and all others engaged in the administration of justice; they merely desire to obtain from the highest Court in the Province a decision upon a point of considerable importance to them and to ship-owners generally. For years past they have been subject to much annoyance, great loss of time and large expenses and damages by the *saisies conservatoires* which clerks of courts

of justice have granted, without any cause whatever, in favor of persons generally not worth the paper on which the proceedings were written on. Ever since the late decisions of *Dagenais* v. *Douglass*, *Delisle* v. *L'Ecuyer*, *Coté* v. *Graham*, clerks of Commissioners Courts have attached whole convoys of vessels upon the mere complaints of some dissatisfied members of the crews that some wages were due to them by the captains. The prosecution of this appeal is therefore a matter of necessity for the appellants, who are largely engaged in the shipping business of this country. They consider that nothing less than a condemnation of the Prothonotary of Montreal will put a stop to these illegal and vexatious proceedings; and they are confident that they will be held responsible in the present case, whether considered as ministerial officers or as officers performing judicial functions, and, finally, that the judgment of the Court below will be reversed with costs.

E. Barnard for respondent:—

The respondents in their capacity of Prothonotary issued a writ of *saisie conservatoire* against the barge "Guard" belonging to the appellants, for the security of the wages of one of the men working on board of her.

Under this writ the barge "Guard" was seized and detained for ten hours, and the convoy of which she formed part was also detained for the same space of time, although the seizure effected applied to the barge "Guard" only, and the appellants now pretend that they suffered damage in consequence to the amount of $300 altogether.

The writ was afterwards set aside by the Court, and the action dismissed upon motion, the case not being defended, the counsel of the plaintiff having stated to the Court that his client not having paid him his fees as promised, the action should be dismissed. The appellants, on the other hand, while they do not attempt to explain how the action came to be dismissed on a motion, assert that the *saisie conservatoire* was rightly quashed on account of the defects in the affidavit, 1st, because in law there is no conservatory process before judgment to secure the privilege given by Art. 2383 to the master and crew for the wages of the last voyage.

2nd. Because the writ was not a writ of *saisie conservatoire*, but a writ of *saisie arrêt avant jugement*.

3rd. Because the affidavit did not even allege that the wages claimed were for the last voyage.

And the appellants assert that under the circumstances the Prothonotary are liable for the whole damage.

With regard to the third and last objection to the affidavit, it is proved that the wages claimed were really for the last voyage.

As to the second objection, the blank writ used was that of an ordinary *saisie arrêt avant jugement*,—the clerk who prepared the writ omitting to make it applicable to the barge "Guard" only; but in point of fact the plaintiff never intended to seize, and never did seize, anything else under that writ than the barge "Guard."

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The only possible cause of complaint against the Prothonotary is therefore reduced to this: that they issued a writ of *saisie conservatoire*, which was afterwards quashed on the ground that although in law there is a privilege there is no *saisie conservatoire avant jugement* to secure it.

Upon that point the appellants insist that the Court of Review had just rendered a decision in the case of *Dagenais & Douglass* in that sense, that the Court of Appeals has since taken the same view of the law, and that therefore the Prothonotary have committed a gross error in law.

It turns out, however, that the decision in question of the Court of Appeals was influenced by the fact that the wages claimed were not for the last voyage, and that decision, moreover, was not rendered when the writ now in question was issued. As to the judgment rendered by the Court of Review, it is not even proved to have been known to Mr. Papineau when he issued the writ.

It seems that to give to a judgment so rendered, upon a question admitted by all to be a very doubtful one, the force of a rule of practice forbidding the Prothonotary from issuing such writs in future would not be reasonable, and the respondents therefore respectfully submit that whatever view may be taken of the law respecting the responsibility of the Prothonotary, whether they be considered as ministerial officers having no power to decide contested points, or be looked upon as persons acting in a judicial or quasi-judicial capacity, the judgment of the Court below dismissing the action should be confirmed.

Under these circumstances it is unnecessary to advert to the proposition of the appellants which would make the respondents responsible for the damage caused by the detention of the convoy. It is evident, at all events, that damages such as these are altogether too indirect and remote to form the basis of a legal demand.

TASCHEREAU, J., for the majority of the Court, remarked that the Prothonotary acted in a judicial capacity, and under the circumstances could not be held liable.

SANBORN, J., while not dissenting, could not but censure the Prothonotary for issuing a writ without reading the affidavit. He held that the Prothonotary is bound to see that the affidavit is apparently sufficient to justify the issuing of the writ asked for.

RAMSAY, J., remarked that the broad rule is that there must be no bad faith on the part of the officer. Here there was nothing to indicate the existence of bad faith, and therefore he thought the Prothonotary must be relieved from all responsibility.

Judgment confirmed, "considering that there is no error in the judgment "appealed from," &c.

Girouard & Dugas, for appellant.

E. Barnard, for respondent.

(J. K.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1878.

5th JULY, 1878.

Coram SIR JAMES COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, THE MASTER OF THE ROLLS.

ANGERS, ATTORNEY GENERAL PRO REGINA, APPELLANT;

AND

THE QUEEN INSURANCE COMPANY, RESPONDENT.

HELD:—That the Statute 39th Vict. cap. 7, (Quebec), intituled "An Act to compel Assurers to take out a License," is unconstitutional.

The appeal was from the judgment of the Superior Court, 12th April, 1877, TORRANCE, J., reported 21 L. C. Jurist, p. 77.

On appeal to the Court of Queen's Bench, the judgment of the Superior Court was affirmed, 14th December, 1877, RAMSAY, J., dissenting.

The opinion of Mr. Justice Ramsay was delivered as follows:—

RAMSAY, J. I regret to be obliged to dissent from the judgment about to be rendered in this case, and by which the judgment of the Court below will be confirmed. It is probable I should not have expressed any dissent, if the judgment laid down any tangible principle which could be applied to other cases, for I am not unaware of the objections that may be made to the interpretation I would put upon the law. But the interpretation given by the Court appears to me to be open to every kind of objection. It would be a defensible position to say that the proviso of section 91 so controlled sub-sections 2 and 9 of section 92 as to render them inapplicable, although I do not think that this was the intention of the Imperial Parliament. But the majority of the Court does not adopt that view, and the judgment will not even lay down the rule that the Local Legislature cannot levy a license which may affect matters coming within the scope of Dominion legislation. The whole that the judgment about to be rendered affirms is, that the particular mode of levying a license adopted in the Statute before us is beyond the powers of the Local Legislature. To make the view I take, clear, I may briefly state that by an Act styled 39 Vic., cap. 7, the Legislature of the Province of Quebec imposed on "every assurer carrying on the business of assurance, other than that of Marine assurance exclusively," the duty of taking out a license from the revenue officer of the district before the 1st day of May in each year, and to remain continually under license. "The *price* of such license" was to consist of 3 per cent. on every fire policy, and 1 per cent. on every other policy, except marine policies. This price was to be collected by adhesive stamps in the manner regulated by the Act.

A number of insurance companies questioned the constitutionality of this Act, maintaining that the right to impose such a tax on assurers was not expressly given to the Provincial Legislatures, and, on the contrary, that it was given to the Dominion Parliament, which has alone the power to regulate trade and commerce. Hence this action.

The local Government, now respondent, contends that it is a license, and that the Local Legislatures have the right to make laws in relation to "Shops,

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Saloon, Tavern, Auctioneer, and *other Licenses* in order to the raising of a revenue for Provincial, Local or Municipal purposes." It contends further, that, if such a tax is not a license, the Local Legislature is still justified in imposing it as being "direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

The question of the constitutionality of this impost, it will at once be admitted, is one of an embarrassing kind. The form of the statute with regard to sections 91 and 92 is vicious, and some of the terms employed have not a definite signification, while others are not applicable. Thus in section 91 we have the Parliament of Canada endowed with the *exclusive* legislative authority over all matters coming within the enumeration of the section, while in section 92 the Provincial Legislatures "may *exclusively* make laws in relation to matters" within the enumeration of this section. If, unfortunately, the two enumerations clash, we should thus have two *exclusive* jurisdictions over the same matter, which is impossible. The difficulty of a conflict seems to have been to some extent apprehended, for a saving clause is added to section 91 in these words: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." In short, the exclusive authority of the local Legislatures shall yield to the exclusive authority of Parliament. Attempts have been made to explain away the use of the word exclusive as applied to the two powers, but it seems to me that they are fanciful and unsound. The exclusive authority of Parliament is absolute, while that of the several Legislatures is only so when the matter does not clash with the powers specially conferred on Parliament. The difficulty of a conflict in the terms of section 91 and 92 of the B. A. Act does not, however, it appears to me, arise in this case. The power to raise revenue for local purposes by licenses or by direct taxation is not in conflict with any matter in section 91. The exclusive power of taxation given to the Dominion Parliament is to employ "any," all and every mode or system of taxation, *i. e.*, for their own or general purposes, not for local or municipal revenue. The power of double taxation may exist. On this all the American authorities are agreed, and on this point American authority is applicable.

It is admitted that the business of insurance belongs to trade and commerce. We have, therefore, to enquire whether the tax imposed by the local Act in question is a license within the meaning of sub-section 9 of Sec. 92, B. N. A. Act, or a direct tax within the meaning of sub-section 2 of the same section.

We are unanimously of opinion that, within the meaning of the B. N. A. Act, a duty of the kind in question is not direct taxation. The expression "direct taxation" has been used in so many different ways that it cannot be said to have a technical sense. Its ordinary use is entirely relative, therefore it escapes scientific circumscription. All taxation is direct, strictly speaking. It seems to me, then, that the limit intended by the Act when it allows direct taxation, is taxation of property and income, or a capitation tax.

As to the other question, I agree with the appellants in thinking that the

condition of the license—its "price," according to the phraseology of the statute, does not affect the question, provided it be imposed "in order to the raising of revenue for provincial, local or municipal purposes." How the assurer is to be repaid, and whether he is to be charged a fixed rate or a percentage on the business is beside the question. The distinctive mark of the tax styled license is that it is voluntary on the part of the party paying it. It is a liberty to do, on certain conditions, (in local legislation which affects Dominion matters the condition must be in money) that which the law prohibits one from doing without such permission.

But it was contended by the respondent that at any rate the words "other licenses" must be restrained by those enumerated before, "shop, saloon, tavern, auctioneer," and that we must say that other licenses were those of a similar kind, or at all events that other licenses could only be imposed on such trades or occupations as were subject to license by the legislation existing at the time of passing the B. N. A. Act.

The rule of interpretation referred to is a good one, but it will hardly help the respondent in the present case. It is impossible to find out the *differentia* of any *genus* conveyed by the examples of the numeration. In the efforts to establish a *genus* we are told that "shop" means a shop where drink was sold. I am not sure that there is sufficient ground for saying so, but admit it, and what becomes of the auctioneer's license. It affects trade and, consequently, is the subject of Dominion legislation; yet it is expressly given, according to respondent's theory, as an illustration of a trade which may be licensed. Again, if we refer to the M. & R. Act, cap. 24, C. S. L. C., we find that the licenses then contemplated included licenses to ferries, for the sale of spirituous liquors by shopkeepers, tavern-keepers and other retailers, licenses to keep dogs, and for public exhibitions, licenses to pedlars, to common carriers and to all traders, *whether wholesale or retail*.

American authority has been cited to establish that the Courts should interfere where the rate of license complained of is so great as to interfere with trade. I am aware that this has been the motive of American decisions, following the ruling of Chief-Justice Marshall. In spite, however, of the authority of these decisions, the objection to them is so manifest that it can hardly be said they have been acquiesced in even in the United States. In fact, it is difficult to conceive any institution less fitted to decide the practical question of what amount of taxation this or that branch of trade could support without inconvenience, than a court of law. Again, it should be observed that there is a fundamental difference between our constitution and that of the United States. Here the powers of the Legislatures and Governments are partitioned by a supreme authority which has given to the Dominion organization not only all unassigned powers, not purely of a private or local nature, but also specially the power to control absolutely, by disallowance, the legislation of the Provinces. In the United States the central government holds its authority from the States, and has no power over the States' legislation other than that it may acquire through the Supreme Court. Here, then, we have by the constitution a complete check on any practical inconvenience arising from the

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abuse of the powers confided to the Provincial Legislatures, which is entirely wanting in the constitution of the United States, a defect which may justify to some extent the decisions there on this matter.

It may perhaps be said the Provincial Governments are jealous of any interference with their legislation, and that the Dominion Government does not like to meddle with it. This may be. The spirit of insubordination is tolerably active in the present age, but I do not see that we are called upon to perform a duty for which we are totally unfit, to relieve from responsibility those who ought to be, of all others, the most competent to decide the question of policy. Nor does it seem to me that the difficulty involved is very great. The Local Legislature must qualify the tax as a license, otherwise it would not be within sub-section 9, and it surely would not be considered as an impertinent interference to stop local legislation which, under the guise of a license, really created a prohibition or serious trammel to any branch of trade.

It seems to me, therefore, that the object of the Imperial Parliament in granting to the Local Legislatures the power to raise revenues for their purposes by means of licenses, was to give a power to tax, even though the tax did not fall within any definition which might be applied to "direct taxation," and although it might charge some matter falling within the scope of Dominion legislation, subject always, as all other legislation, to the controlling power of the Dominion Government.

I am, therefore, of opinion that the appeal should be maintained, and that the judgment of the Court below should be reversed.

TASCHEREAU, J., expressed the opinion that the tax was *ultra vires*, and that the judgment of the Court below was correct, and should be confirmed.

DORION, C. J. I concur in the judgment on the following grounds:

The Local Legislature has the right to impose direct taxes only.

It has also power to grant licenses as a means of raising revenue for Provincial and municipal purposes.

Now the charge imposed upon licenses is clearly an indirect tax. It is not imposed on the insurance itself, but upon the business which is doing—that is, the insurer is obliged to place a stamp on every policy issued, according to the amount of such policy. It is as much an indirect tax as the taxes of excise or of customs. They are not intended to be paid by the insurer, but to be paid by the insured, whoever they may be.

This case must therefore come under the provisions allowing the Local Legislatures to grant licenses. I am not prepared to state that the Local Legislatures have not the right to grant licenses to insurance companies, to banks, &c.; but if the Legislatures have that right they must do it in such form as not to violate one of the restrictions of the Confederation Act, which does not authorise them to impose indirect taxes.

The Local Legislatures are authorized to grant licenses and to raise revenue on such licenses as were usually granted. Now, it so happens that there was not, at the time the Confederation Act was passed, a single license granted on which the payment or fee was laid on the amount of business done—at least, if there was, I am not aware of any. All licenses granted were for a fixed sum.

This view was carried so far that in the Act to regulate the business of auctioneers, each auctioneer has to pay a fixed sum, which is described as the price of the license, and another sum of 1 per cent. on the price of the goods sold, this last sum to be added to the price of the goods sold.

The duty imposed by the Local Legislature is not therefore a license fee, such as was known in this country at the time of the Confederation Act. I therefore find that although in form a license appears to have been granted, in substance, it is an indirect tax which has been imposed. It is an evasion of the Act from which the Local Legislature derives its powers. The Local Legislature, no more than private individuals, cannot act as it were in *fraud of the law*, to use a technical term, that is, to do by indirect means what it cannot effect directly.

As to the question whether the Local Legislature has a right to force an Insurance Company to take a license, I am not called upon to express an opinion, and there is great difficulty in the question. In the few cases that have come before courts of justice the greatest diversity of opinion has prevailed. In the Queen's Bench in Ontario it has been held that a license of $50 on business was *ultra vires* and unconstitutional, while the Court of Appeals reversed the judgment, and declared the license constitutional. In New Brunswick the courts decided according to the view taken by the Queen's Bench of Ontario.

The rule of interpretation generally adopted by the authors and by the jurisprudence is that when in a provision of law general words follow special words applying to special cases, the general words extend the provision to similar cases only *ejusdem generis* to those specially mentioned. But this Act seems to escape from the ordinary rules of construction applicable to statutes generally. The Confederation Act must be interpreted according to the real or presumed intention of the Imperial Parliament, of the Legislatures of the several Provinces, and this intention must be gathered from the circumstances existing in the several Provinces at the time of the Confederation. Now I find that at that time it was within the power of the Legislatures to authorize municipal corporations to issue licenses to or to tax Insurance Companies and other commercial bodies or corporations, and I find that this power has been continued by the 129 sec. of the British North American Act. It would be very singular that the Provincial Legislatures should have the power to authorize municipalities to raise revenue from Insurance Companies, while it would have no power to raise such revenue for Provincial purposes, while the sub-section 9 of sec. 92 of the British North American Act speaks of raising revenue by means of licenses, as well for provincial and municipal purposes. On the other hand, it is urged with considerable force that a license means a permit, and if they have a right to permit, this implies a right to prohibit and, therefore, to regulate a matter affecting the trade of the country, which the Provincial Legislatures undoubtedly have not. But I have already said we are not at present called upon to give an opinion on this point which is undoubtedly of the greatest difficulty. For the reasons stated I confine myself to saying that the duty imposed upon insurance companies is an indirect tax which the local legislature had no authority to impose.

MONK and TESSIER, JJ., also concurred.

On appeal to the Privy Council the following judgment was rendered:—

Angers and The Queen Ins. Company.

PER CURIAM. In this case their Lordships do not intend to call upon the counsel for the respondents.

This is an appeal from a judgment of the Court of Queen's Bench in Canada, affirming a judgment of the Superior Court of the District of Montreal. The judgment appealed against was unanimous on one of the two points to which the appeal relates, and was decided by four Judges against one on the other. The real decision was that the clauses of a statute of the Province of Quebec, 39th of the Queen, Chap. 7, which imposed a tax upon certain policies of assurance, and certain receipts or renewals, were not authorized by the Union Act of Canada, Nova Scotia, and New Brunswick; which entrusted the Province, or the Legislature of that Province, with certain powers. And the sole question their Lordships intend to consider is, whether or not the powers conferred by the 92nd section of the Act in question are sufficient to authorise the statute which is under consideration?

It is not absolutely necessary to decide in this case how far, if at all, the express enactments of the 92nd section of the Act are controlled by the provisions of the 91st section, because it may well be that, so far as regards the two provisions which their Lordships have to consider, namely, the subsections 2 and 9 of the 92nd section, those powers may co-exist with the powers conferred on the Legislature of the Dominion by the 91st section. Assuming that to be so, the question is: whether what has been done is authorised by those powers?

The first power to be considered, though not the first in order in the Act of Parliament, is the 9th sub-section. The Legislature of the Province may exclusively make laws in relation to "shop, saloon, tavern, auctioneer, and other "licenses, in order to the raising of a revenue "for provincial, local, or municipal purposes." The statute in question purports to be, on the face of it, in exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a license, before the 1st day of May in each year, from the revenue officer of the district, and to remain continually under license. It then, by the second section, enacts what the price of the license is to be. And reading it shortly, it amounts to this: that the price of the license shall consist of an adhesive stamp affixed to the policy, or receipt or renewal, as the case may be. The amount of the adhesive stamp is to be, in the case of fire, 3 per cent., and 1 per cent. for other assurances on the premiums paid. Then the fourth section enacts that anybody who, on behalf of an assurer, shall deliver any policy or renewal or receipt without the stamp shall be liable for each contravention to a penalty of fifty dollars. The fifth section says that every assurer bound to take out a license shall be liable in each case to a penalty not exceeding fifty dollars if it has been delivered without an adhesive stamp. The sixth section says that every person who affixes the stamp shall be bound to cancel it so as to obliterate it, and prevent its being used again. And the seventh makes all policies, premium receipts or renewals, not stamped as required by the Act, invalid. It says they "shall not be invoked, and shall have no effect in law or in "equity before the Courts of this Province." Then there are certain sections of the Quebec License Act which are incorporated, and the Act is not to apply.

to assurances not within the Province. The only provision of the Quebec License Act which it is necessary to refer to is the 124th: "For every license issued "by a revenue officer, there shall be paid to such revenue officer, over "and above the duty payable therefor, a fee of one dollar by the person to "whom it is issued."

Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out the license, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "The price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them; or it may be that the assured buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this: that if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and everything said about the price of a license, and merely leave the rest of the Act in, the Government of the Province of Quebec obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt or renewal; it is not a penalty for not taking out the license. The result, therefore, is this, that it is not in substance a license Act at all. It is nothing more or less than a simple Stamp Act on policies, with provisions referring to a license, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license.

If that is so, it is of no use considering how far, independently of these considerations, the 9th sub-section of the 92nd section would authorize a sum of money to be taken from an assurance company in respect of a license. With regard to the precedents cited, it was alleged, on behalf of the appellants, that though at first sight it might appear that this was not a license, and that this was not the price paid for a license, yet it could be shown by the existing legislation in England and America that licenses were constantly granted on similar terms; and that therefore in construing the Dominion Act we ought to construe it with reference to the other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the in-

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stances which were produced were examined, it was found that they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it, was ascertained by these considerations. It was a license paid for by the trader, and the actual price of the license was ascertained by the amount of trade he did. This is not a payment depending in that sense on the amount of trade previously done by the trader. It is a payment on the very transaction occurring in the year for which the license is taken out and is not really a price paid for a license, but, as has been said before, a mere stamp on the policy, renewal or receipt.

As this is the result to which their Lordships come, it becomes necessary to consider the effect of the 2nd sub-section of the 92nd section. That authorizes "direct taxation within the Province in order to the raising of a revenue for provincial purposes." The single point to be decided upon is whether a Stamp Act—an Act imposing a stamp on policies, renewals and receipts, with provision for avoiding the policy, renewal or receipt, in a court of law, if the stamp is not affixed—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and, in trying to find out their meaning, we must have recourse to the usual sources of information whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau, in his elaborate judgment, it is not necessary here to more than refer to. But surely if one could have been found in favor of the appellants, it was the duty of the appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think that they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant.

Lastly, as regards the popular use of the words, two cyclopædias at least have been produced, showing that the popular use of the word is entirely the same in this respect as the technical use of the word. And, here again, there is an utter

deficiency on the part of the appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is, that finding these words in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the legislature of England to include it in the term direct taxation, and therefore that the imposition of the stamp duty is not warranted by the terms of the 2nd sub-section of section 92 of the Dominion Act. That being so, it appears to their Lordships that the appeal fails, and they will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and dismiss the appeal.

(J.K.)

Appeal dismissed.

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 18TH SEPTEMBER, 1878.

Coram SIR A. A. DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

No. 82.

SIR HUGH ALLAN ET AL.,

(*Defendants in the Court below*),

APPELLANTS;

AND

JOSEPHINE WOODWARD,

(*Plaintiff in the Court below*),

RESPONDENT.

HELD:—That the notice on a passenger's ticket, that the carrier will not be responsible for the safe-keeping of the passenger's baggage, is not binding on the passenger, without proof of notice to him of this limitation of liability.

The appeal was from a judgment of the Superior Court, 24th January, 1877, reported at 21 L. C. Jurist, p. 17, maintaining an action by the respondent against the appellants, for the recovery of the value of certain wearing apparel and jewellery, alleged to have been lost, by the negligence of the appellants, on a voyage from Liverpool to Portland, on board the Sardinian.

The allegations of the declaration were: that the respondent applied for a passage ticket, from Liverpool to Portland, and was a passenger by the Sardinian, when the effects claimed were in one of her trunks, which she had on board with her as such passenger.

That the appellants caused the trunk to be stowed away in the hold of the Sardinian, away from the reach and out of the control of the respondent.

That they were bound to safely convey the trunk from Liverpool to Portland, and there to re-deliver the same with the contents to the respondent. "But "plaintiff avers that so to do the defendants wholly failed, and that by reason "of the negligence, want of care and default of the defendants, their agents,

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"servants, or employees, the trunk of plaintiff, whilst so in their charge and "keeping, was broken open and the articles and effects above enumerated were "abstracted and stolen therefrom, and were wholly lost to the said defendant, to "her loss, damage and injury, at Montreal, aforesaid, of $272."

That the plaintiff immediately upon discovering the loss of the articles and effects above mentioned, to wit, upon opening the trunk at home in Sherbrooke aforesaid, notified the defendants, through their agents, Messrs. H. & A. Allan, thereof, and claimed payment therefor.

The appellants pleaded: that by the passage ticket which the respondent obtained from the appellants, it was provided, that the appellants should not be responsible for the safe-keeping during the passage, or for the delivery at the termination thereof, of the respondent's baggage; and that the ticket was issued to and acquired by the respondent only on those express conditions.

That if there was any loss, they were not liable for it. And that if the trunk was broken open on board the Sardinian, and the effects claimed were stolen from it, which they deny, it was not by reason of any negligence or want of care on their part, or on the part of their servants or employees.

They also filed a general denial of the allegations of the declaration.

The respondent replied, expressly denying that any such condition as that referred to in the plea was printed on the ticket that was granted to her (the said respondent), or ever made known or assented to by her; and alleging, that even if it was so printed, it could not operate as a defence to the appellants, not having been made known to respondent by appellants.

Abbott & Co., for appellants:—

The principal points raised in the case on behalf of appellants were the following:

1. That by the conditions of the passage ticket, of which the respondent was aware, the appellants were relieved from any responsibility for loss or injury to her baggage during the voyage, unless such loss or injury was proved to have been the fault of the appellants or of their employees.

2. That there is no sufficient proof that the effects were stolen from the respondent's trunk while it was on board the Sardinian.

3. That even if the effects were stolen while on board the Sardinian, there is no proof of any fault or negligence by the appellants or their employees in the care and safe-keeping of the trunk and effects.

On the first of these points the respondent contends:

1. That there were no such conditions upon the ticket.

2. That if they were any they were not made known to her by the appellants; and that therefore she was not bound by them.

The facts respecting the ticket are, that on the 3rd June, 1874, the respondent obtained a passage ticket from Messrs. H. & A. Allan, agents of the Allan line of Steamers, such as is commonly known as a return ticket: available to her for six months from its date, for a passage from Quebec to Liverpool, and back again.

On the back of the ticket was printed the following condition:—

"It is expressly agreed between the passengers within named, and the Mon-

treal Ocean Steamship Company, that the latter is not responsible for the safe-keeping during the voyage, and delivery at the termination thereof, of the baggage of said passengers."

There is no doubt, therefore, of the existence upon the tickets held by the respondent, of the conditions alleged by the appellants. And her denial of their being upon those tickets is unfounded.

The question whether or no the respondent is bound by those conditions is one of great importance.

Its decision will affect the interest of the carrying trade in every branch, both ocean and internal, and both by water and by land. And it is specially of so much importance to the appellants in this case, that they propose to discuss it at some length; and they consider that the public are also deeply interested in its decision.

The effect of conditions upon bills of lading and passenger tickets, by water and land, and upon other instruments of a similar character, affecting the obligations of depositaries and carriers, has been a fertile subject of discussion in the Courts. It was at one time considered that a carrier could not limit his liability by any conditions; that his duties and obligations were defined by law, and that he could not alter them by anything short of an express contract between him and his customer. But that rule never prevailed in this country. And a more equitable construction of the obligations of a carrier has always been adopted by our Courts. The principle upon which conditions have been held binding here, is embodied in article 1676 of the Civil Code.

The ordinary obligation of a carrier is established by articles 1672, 1802 and 1814.

Article 1672 is as follows:—

1672. "Carriers by land and by water are subject, with respect to the safe "keeping of things entrusted to them, to the same obligations and duties as "inn-keepers, declared under the title of depositary."

Article 1802. "The depositary is bound to apply, in the keeping of the thing "deposited, the care of a prudent administrator."

Article 1814. "Keepers of inns, of boarding houses, and of taverns, are re-"sponsible as depositaries, for things brought by travellers who lodge in their "houses."

Supposing, therefore, that no condition existed by which the respondent was bound, the appellants would have been obliged to apply in the keeping of the respondent's trunk "the care of a prudent administrator."

Article 1676 is as follows:—

1676. "Notice by carriers, of special conditions limiting their liability, is "binding only on persons to whom it is made known; and notwithstanding "such notice, and the knowledge thereof, carriers are liable whenever it is proved "that the damage is caused by their fault, or the fault of those for whom they "are responsible."

The result and effect of these articles is to place the carrier in this position towards the passenger:—

1. He is bound to use the care of a prudent administrator in the custody

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and carriage of the passengers' effects. And he is not liable for loss of, nor injury to such effects, unless he fail in the exercise of the care of a prudent administrator. So that the appellants would not be liable in any case for the effects in question, unless it is shewn that in the custody and carriage of them they had failed in the exercise of the care of a prudent administrator.

2. They may still further restrict their responsibility by notices limiting it, provided only the persons affected by such notice are aware of it.

The English article says:—

"Such notice is binding only upon persons to whom it is made known."

The French is more accurate, being in the following words:—

"Les avis * * * ne lient que les personnes qui en ont connaissance." Though, no doubt, both expressions are intended to have the same meaning, the literal meaning of the French expression is more in accordance with the jurisprudence than the English phrase. The latter, to some extent, implying the performance of some act by the carrier, in making known the notice; while the former simply requires that the passenger should have had knowledge of it. The authorities which will be cited establish the latter as the correct interpretation of the law; and it is that which the appellants submit should be adopted, if the Court is of opinion that there is any distinction between the two modes of expression.

Taking the questions arising in the case in the order in which the appellants have already stated them, the question as to the binding character of the condition is, whether or no the respondent had a knowledge of it. There is no direct testimony on this point on either side, that is to say, the respondent does not in her evidence admit, in express terms, that she had read the conditions, nor does she deny having done so. And no witness is produced to swear that, to his knowledge, she had read them.

But the question whether or no a person has a knowledge of the contents of a written or printed paper, is not necessarily, nor even ordinarily, decided by verbal testimony as to his having actually been seen to read it, or as to its having been read to him. There are other modes of establishing such knowledge, which are recognized by the law of evidence, and by the jurisprudence of the Court, in every class of transaction. The whole range of the law of contracts affords instances of the knowledge of the contents of a paper being conclusively assumed from the reception of such paper by a person capable of reading it. And it is proved in this case, by the respondent herself, that she was able to read. Notices of all descriptions are held to be proved, in all kinds of cases, if proof be made that the paper containing the notice has been delivered personally to the party affected by it. Any other rule would render it impossible to carry on the business of life. If a letter be written to a person, the contents of which it is necessary to prove he knows, such proof could not be made except by causing the letter to be delivered to him by a witness, and requiring such witness to stay till it is read. Notice of the dishonor of negotiable paper; demands of all kinds in commercial and other transactions; and innumerable documents which create an obligation, or cause it to attach to the person receiving them, are always held to be sufficiently proved, by proof of the reception of a document containing such

notice or demand. In this case the paper in question was delivered to the respondent at Montreal. She retained it in her possession for above six months. It was in plain, legible type, with the words intimating the existence of a condition, and specially calling her attention to it, printed conspicuously in different type upon the face of it. So that it would be impossible for any one possessing the ticket to avoid seeing it.

Suppose the respondent had, in a similar way, been presented with a notice, informing her of the protest of a note upon which she was endorser, or of a notice to quit the premises of which she was the lessee, or a demand for the performance of a contract in which she was in default; or a letter accepting an offer from her, and thereby completing a contract; would it have been competent for her to plead, when an action was based upon any one of such instruments, that she never received such notice; that she had no knowledge of the information such papers contained? It is plain that such an answer would be regarded as ridiculous, and she would be conclusively presumed to be aware of the contents of the documents which had been placed in her possession, whether she could read or not, it being her duty in such cases to have such instruments read for her, if she is unable to read them herself. As to the matter of fact, whether she really did or did not read the tickets, that is unimportant. She must be presumed to have read them, as otherwise she would have been guilty of a kind of wilful and gross negligence, which she could not invoke in her defence.

It may be argued, in reply to the foregoing proposition, that unless something more is required than the mere placing in the hands of the passenger, or freighter, a paper containing conditions, the article of the code has no force or meaning. But there are many cases where, from the circumstances, a passenger, or freighter, may have had no knowledge of the condition attempted to be imposed on him by the carrier; that is to say, either no notice at all, or no notice until too late to object to it, or to refuse to be carried, or to ship his goods, under its terms.

Bills of lading are frequently only granted after a quantity of goods have been deposited in the hold of a vessel; and never until the entire quantity shipped has been received by the master. Frequently passage tickets are only procured on board the vessel itself which conveys the passengers. And in many other cases like that upon which the learned Judge decided the case in the Court below, the circumstances, coupled with positive evidence, justify and establish the ignorance of the passenger, or freighter, of the conditions attempted to be imposed upon him. In such cases the exception in the code would have its full force. A freighter, or passenger, could not have conditions imposed upon him in such modes, without his knowledge or consent; and he would be entitled to hold the carrier to the ordinary obligations to which he is subjected, namely, to the obligation to apply the care of a prudent administrator to the carriage of his person or goods. But no such principle can be made applicable, where the passenger, as in the present case, deliberately accepts the written or printed evidence of her contract with the shipper, retains it for six months without objection, and takes advantage of it at the end of that period. It would be repugnant to common sense, and to the ordinary rules which govern men in

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their daily transactions, to accept, without conclusive proof, the pretention that a person entered into a commercial contract of any description in ignorance of its terms, after half a year's possession of the paper containing them.

But in this case it is unnecessary to rely only upon the circumstances of the reception and retention of the passage ticket as the only proof of the respondent's knowledge of its contents.

There were conditions in both passage tickets in favor of the respondent in addition to the condition that she should be carried across the sea and back, which was the primary object of her transaction with the appellants. For instance, it contained conditions respecting her food; respecting the steward's fees; respecting the carriage of her baggage backwards and forwards free, and the like. But the appellants call special attention to the fact, that the ticket which she received in Montreal, in June, and retained until December, contained a condition that she should apply at Liverpool, at the office of the agents of the ship, when she desired to return to Canada for a passage or trip-ticket, to enable her to make her voyage home. She availed herself of all these conditions. *She applied for and obtained at Liverpool, for her passage back to Canada, a passage or contract-ticket, as the condition on the back of the original required her to do.* And is it credible that she did so without knowing what the conditions were, a knowledge of which could only presumably have been obtained by reading the paper containing them? It is not credible that she should have known that it was necessary for her to go to the office at Liverpool, and obtain there a trip ticket, unless she had read the paper which informed her, that it was necessary for her to do so, in order to obtain a passage back. The appellants therefore believe it to be unnecessary further to press this point of the case—as, according to every dictate of common sense respecting the intercourse of people with each other, and every rule which governs the conduct of individuals in their own affairs, the respondent must be conclusively held to know the contents of a paper, valuable to herself, respecting an occurrence of some importance in her life, which she retained in her possession for more than half a year, and of the provisions of which in her favor, she availed herself.

But in addition to discussing this branch of the case, by the light of our own Code, and by that of common sense and reason, it is necessary that the appellants should consider the jurisprudence of other countries in respect of the liability of the carrier, and of the value of notices limiting such liability, partly because such matters are, to a certain extent, international; partly because his Honor in the Court below relied chiefly upon an English case, in maintaining the respondent's action; and partly because the judges of foreign Courts, in interpreting the obligations of the carrier, and the limitation of those obligations, have acted upon the same principle as that which has been introduced into our Code.

It is true, that the ordinary liability of a carrier, under the Common Law of England, is much more extensive than that to which he is subjected by the Civil Law; but that is a reason which rather adds to, than detracts from, the weight of English jurisprudence upon this point. For if the ordinary principle

of the English Law imposes heavier obligations upon the carrier, than ours do, the recognition by the English Courts of limitations of that obligation should have the more weight on that account.

Referring then in the first place to the English jurisprudence, the case upon which the Judge in the Court below mainly supported his judgment, was that of Henderson against Stevenson, 2 House of Lords Cases, page 470.

In this case the plaintiff was a passenger from Dublin to Whitehaven, by steamer. He took a ticket at the moment of departure at Dublin, in the night, the ticket being a small piece of pasteboard, like a railway ticket, with only the words Dublin to Whitehaven printed upon its face, and no notice thereon of any conditions being on the back of it. On the back of it, a condition was printed, limiting the liability of the Company, in the event of a loss to the passenger such as described in it. The passage across was accomplished at night, and only occupied some two or three hours. The ticket was surrendered before the arrival of the steamer at Whitehaven, and it was proved at the trial by what the English Law recognizes as sufficient evidence, that the plaintiff never saw or read the condition on the back of the ticket, and was not aware that there was any condition upon it. Under these circumstances, the Court held that the plaintiff was not bound by the condition, and made the Company responsible for his loss. The principle upon which the judgment in that case was placed is plainly indicated by the language of their Lordships in rendering it.

This judgment is strictly in accordance with the provisions of our Civil Code. The question which the Judges investigated was, whether or not the plaintiff was aware of the limitation of the Company's liability printed on the back of the ticket, and they came to the conclusion that he was not, resting that conclusion partly upon the circumstances of the case, which did not of necessity lead to the presumption that he knew the contents of his ticket, and partly upon the direct evidence of record, proving that he was not aware of it.

If the circumstances of this case were similar, the case of Henderson and Stevenson would have supported the judgment of the Court below; but the appellants believe that it is different in every material particular.

Shortly after the decision of the case of Henderson and Stevenson, the case of Parker against the South Eastern Railway Company was tried in the Common Pleas, before Chief Baron Pollock. And the judgment in Henderson and Stevenson was discussed both by the Counsel and the Bench. In that case, the plaintiff was a passenger by railway. On his arrival at Charing Cross Station, he deposited his portmanteau and travelling-bag in the cloak room of the defendants; paid four pence, and received from the attendant a ticket, upon the face of which was an acknowledgment of the receipt of the two articles and a statement of the time within which they should be taken away, together with the words: "See back." On the back of the ticket was a notice that the Company would not be responsible for articles left, unless duly registered. A few hours after receiving the ticket, the plaintiff returned to the station, produced his ticket, and demanded his effects. He received the portmanteau, but not the bag, which was of the value of £24 10s.

The learned Judge having had his attention called to Henderson and Stevenson, left two questions to the jury:—

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1. Did the plaintiff read, or was he aware of, the special conditions upon which the article was deposited?

2. Was the plaintiff, under the circumstances, under any obligation in the exercise of reasonable and proper caution, to read, or make himself aware of the condition?

The jury answered both these questions in the negative; and thereupon the Judge ordered the judgment to be entered for the plaintiff, with leave for the defendants to move to enter the judgment for them.

In the course of the argument, the Judges and the counsel made frequent reference to the principle, that the knowledge of the plaintiff must be matter of evidence in every case; Lord Coleridge, in Parker and the S. E. Railway, more than once referring to the fact that, in Henderson and Stevenson, there was no reference on the face of the ticket to the conditions printed on the back of it. But he regarded that as only an element in the consideration of the question whether the plaintiff really became aware of the conditions or not. As the case came before the Court, they were bound to take the finding of the jury, that the plaintiff did not read, and was not aware of, the special conditions, and that he was not, under the circumstances, under the obligation, in the exercise of reasonable and proper caution, to read, and make himself aware of, the condition.

Under these facts and finding, the Judge was of opinion that the defendants were liable for the loss of the bag. He says:—"Now it seems to me to be "impossible in common sense, or upon the authority of any of the cases, to "lay down any definite and fixed line, with regard to which it can be said that "a railway company are bound, or not bound, by such a document as this. It "must in each case be a question of evidence and common sense."

His Lordship goes on to point out that, both in Henderson & Stevenson, and in Parker and the S. E. Railway, there was positive evidence that in point of fact the plaintiff did not read, and did not know, what was printed on the back of the ticket. He refers with approbation to the language of Lord O'Hagan, in Henderson and Stevenson:—"Proof of the respondent's knowledge "and assent might have been given in various ways. In certain circumstances "denial of them might not be permissible; in others, a jury or a Court might "be satisfied of their existence, from antecedent dealings, notoriety of custom, "publication of notices, verbal communications, and so forth. But I agree "with the Lord Chancellor that the mere receipt of a ticket, under such circum-"stances, and with such an endorsement as we have before us, is not shown by "the authorities cited at the bar to furnish, *per se*, sufficient evidence of such "assent or knowledge."

And Lord Coleridge again cites with approbation the holding of Willes, J., Law Reports, 4th Exchequer, p. 61, referring to several cases of a similar character that had been decided in favor of the Railway Company. In that case Judge Willes thus sums up the principle governing them:

"If," he says, "one person seeks to impose on another a liability by con-"tract, and he should choose to abstain from reading the terms of the docu-"ment in which the liability is sought to be expressed, he is in this dilemma:—

"Either he has chosen to accept the terms without taking the trouble to "inform himself what they are; or, having read them, he did not assent to the "terms proposed, then no action lies, because one side is intending one thing "and the other a different thing, and the transaction is vitiated by mutual error. "The first of these alternatives is probably the practical conclusion at which a "jury would arrive."

Lord Coleridge sums up by saying:—"In each case the question is "equally one of circumstances and construction. Was the plaintiff unaware of "the condition on which the Company consented to accept his deposit? And, "if he was, was it through his own culpable negligence that he was ignorant of "it."

Judge Brett in the same case says:—

"If the jury find that he did read the document, or that the circumstances "were such that, in the ordinary course of business, it might be assumed that "he had read it, then of course he would be bound by it."

The judgment in the case of Parker and South Eastern Railway was, of course, against the Company, because the jury distinctly found that the plaintiff did not read the ticket, and was not bound, in the exercise of ordinary diligence, to read it. But the case is valuable as showing the unanimous opinion of all the Judges of the Court, that, where the circumstances are such as to lead to the presumption that, in the ordinary course of affairs, the plaintiff had read the conditions, or could not be supposed to have abstained from reading them without negligence, his knowledge must be presumed.

In the same month a case turning on the same point was decided by the Court of Queen's Bench, viz., the case of Harris against the Great Western Railway Company.

In this case, the plaintiff was a passenger by this railway, and left a portmanteau and a box in their cloak room, receiving a ticket for them. The defence rested on the ground that the plaintiff was bound by the terms of the ticket. These terms were, on the face of it, a receipt for the portmanteau and box, with a statement of the fee; at the foot of which was printed, "left in the "name of————————, and subject to the conditions on the other side." And on the back of it a condition limiting the responsibility of the Company, on which they relied for their defence to the action.

The case was tried before Baron Pollock, without a jury; and a verdict was found for the plaintiff, with leave to move to enter judgment for the defendants, the Court to have power to draw inferences of facts.

In that case, therefore, the Court was exactly in the position of this Court, having the power to decide upon the facts, as a jury would do.

At the trial in the case, Richard Harris, who made the deposit of the effects, was called as a witness; and he swore, that when he left the box and portmanteau, his attention was not called to the conditions on the ticket, nor was he aware of them. He says also, "My attention was not called to any "conditions, and I never gave it a thought." He admits, however, that he believed there were some conditions. There was no evidence as to whether or not the plaintiff had read the conditions; but the Court held that Harris, being

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her agent, she was in the same position as he would have been, had he been the proprietor of the effects, and deposited them for his own benefit.

It is scarcely possible to conceive a case more on all fours with the present with this exception, that in this case the respondent knew positively that there were conditions upon the ticket, for she availed herself of them.

The remarks of the Judges and the judgment in the case of Harris would apply with perfect accuracy to the present case. The judgment of Mr. Justice Blackburn, expressing the opinion of the Court, is most elaborate, moderate and conclusive. It would be difficult to make extracts from it without injuring its effect.

In that case and in the public prints, and to a certain extent in the case of Parker and the South Eastern Railway, the language used by some of the Judges in the House of Lords, in Henderson and Stevenson, but especially that of Lord Cottenham, was criticised as severely as English Judges and newspapers permit themselves to comment upon the opinions of the higher Courts. And Judge Blackburn makes a distinction between the actual point decided by the Judges in that case, and the remarks they made in rendering their judgment. With the one he coincides; with the other he does not. The gist of his judgment follows his remarks upon a part of the judgment in Henderson and Stevenson. He says:—

"It certainly seems to me that this is, in other words, to say, that, though the "ticket was the contract, the passenger receiving such a ticket had not so con- "ducted himself as to justify the Company, or their agents, as reasonable men, "in thinking that he had read, or ought to have read, or otherwise made himself "acquainted with, what was on the back of the ticket, and consequently that "the passenger was not precluded from showing, that in fact he knew nothing "of what was on the back. But in the present case the ticket has on the face "of it a plain and unequivocal reference to the conditions printed on the back "of it, and any person who reads that reference could, without difficulty, look "at the back, and see what these conditions were; and, that being so, the ques- "tion comes up, whether the plaintiff is not precluded from setting up that Mr. "Harris, who acted for her in taking that ticket, never looked at the face of the "ticket, or bestowed a thought on what the conditions were? In other words, "whether by depositing the goods, and taking the ticket, he did not so act, as "to assert to the defendants that he had looked at and read the ticket, and "ascertained its terms, or was content to be bound by them without ascer- "taining them, and so induced them to enter into the contract with him, in the "belief that he had assented to its terms. I think he has so acted.

"It is true that Lord Chelmsford and Lord Hatherly are reported to have "thrown out an opinion that the contract was completed on the payment of the "passage money; and that the ticket was but a receipt for that money. This "certainly is no part of the decision of the House, and indeed seems to be "contrary to the view taken by the Lord Chancellor."

If, as is the fact, the respondent presented the ticket to the appellants at Liverpool, which she had had in her possession for six months, and asked for and obtained a trip-ticket in accordance with a condition forming part of its

contents, "did she not so act as to assert to the defendants that she had "looked at and read the ticket, and ascertained its terms, or was content to be "bound by them without ascertaining them, and so induced them to enter into "a contract with her, in the belief that she had assented to its terms?"

The appellants confidently believe that this Court will answer as the Court of Queen's Bench did in a similar but less favorable case: "We think "she has so acted."

In this country the precise point now in issue has not come up, to the knowledge of the appellants; but there are cases in which the doctrine contended for has been impliedly recognized.

In the Grand Trunk Railway Company vs. Cunningham, it was held that the condition on a return ticket, that it was good for that day only, was binding on the defendant, though there was no proof that he had read it. 16 L. C. R., p. 219.

In Torrance vs. Allan, 8 L. C. J., p. 57, a condition on a bill of lading was held to relieve the defendant from liability, though there was no proof that the plaintiffs had read the condition, or that the defendant had taken any steps to call their attention to it.

And other cases exist bearing more or less upon the point. But the appellants believe that enough has been said to demonstrate that, according to the opinion of jurisconsults of the highest rank, according to the ordinary rules of evidence, and according to common sense and reason, the respondent must be held to have been aware of the conditions of her ticket. And it is not disputed that if she knew them she was bound by them.

Assuming that this Court will hold a similar doctrine to that upon which the cases referred to were decided, the appellants will now proceed to show how the facts of the case stood, and that those facts do not throw upon them any liability, even if there had been no conditions upon the ticket. The law seems to be perfectly clear as to their obligations, as well in the absence as in the presence of conditions. As has been shown, if there had been no conditions, they would have been bound to apply to the keeping of the trunk "the care of a prudent administrator." If conditions existed, and were known, they would only have been liable "whenever it is proved that the damage is caused by "their fault or the fault of those for whom they are responsible." This proof is of course upon the claimant. When it is enacted that carriers are liable; "whenever it is proved that the damage is caused by their fault," the language of the law plainly conveys that they are so liable when their fault is proved by the claimant. It does not say they shall be liable unless they prove that they were not in fault, but shall be liable if it is proved that they were in fault.

The real effect of the notice in question, therefore, is *to shift the burden of proof*. If there had been no limitation of the appellants' liability, and if the respondent's effects had disappeared while in their custody, they would have been obliged to prove that they had applied to their safe-keeping the care of a "prudent administrator." As there was a limitation purporting to relieve them from liability for baggage, the respondent had to prove that the loss was caused by their fault, in order to get rid of the effect of that limitation.

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Davidson & Cushing for respondent:—

The respondent submits that the common carrier cannot limit the liability imposed on him by law by general notice of special conditions unless such notice is so fully made known to the traveller as to form, in effect, a contract between them; and that, even then, conditions exempting the carrier from the responsibilities incident to his employment are null—Article 1676 of our Code contains the outlines of our law as to conditions and notice; and it clearly confirms both branches of the principle above laid down.

Angell on Carriers § 244, p. 249, (Edit. 1849) where the Supreme Court of the United States assented to the law as laid down in Hollister vs. Nowlan (to be found in the appendix to above edition of Angell) and said "We lay out of "the case, the *notices* published by the respondents, seeking to limit their res- "ponsibility, because the carrier cannot in *this way* exonerate himself from "duties which the law has annexed to his employment," and again at § 245: "The right of a common carrier by a general notice to *limit, restrict*, or *avoid* "the *liability* devolved on him by the common law, on the most salutary "grounds of public policy, has been denied in American Courts after the most "elaborate consideration; at the same time.....it is now well settled that a "common carrier may *qualify his liability* by a general notice to all who may "employ him, of any reasonable requisition to be observed on their part in re- "gard to the delivery and entry of parcels and the information to be given to "him of their contents, the rates of freight and the like, &c. Notwithstanding "such notice the owner of the goods has a right to insist that the carrier shall "receive the goods subject to all the responsibilities incident to his employ- "ment." (The italics are from the text.)—And as to the second branch of the principle, the same author at § 247 says: "In all cases where the notice cannot "be brought home to the person interested in the goods, directly or construct- "ively, it is a mere nullity; and *the burden of proof* is on the carrier to show "that the person with whom he deals *is fully informed* of the terms *and effect* "*of the notice*."—Do. paragraph 250.

The same principles are laid down by the Supreme Court of the State of New York in Cole vs. Goodwin, 19 Wendell, p. 251.

Story on Bailments, page 506, end of § 553.

Also in Torrance et al. vs. Allan, 6 Lower Canada Jurist, p. 194, Berthelot, J., whilst enforcing the stipulation in the bill of lading there invoked, says: "La "condition insérée dans le bill of lading n'est pas en contradiction de ce qui "est de l'essence du contrat de fret. Il est vrai que dans ce contrat celui qui "s'oblige à transporter est responsable de la chose qui lui est confiée, il doit en "prendre tout le soin possible, et il est responsable de la perte par sa négligence "ou par accident autre que celui de force majeure. Il ne pourrait pas dans un "pareil contrat insérer valablement une condition qui l'affranchirait de la perte "de la chose résultant par exemple de *leakage* ou *breakage*, parceque ce serait "en contradiction de l'essence même du contrat," &c.

4 L. C. Jurist, p. 40, Harris et al. vs. Edmonstone et al.

Story on Bailments, p. 516, § 558.

Troplong, Droit Civil Expliqué, tome 3, p. 167, No. 942: "Sans doute, toute

"convention qui affranchirait le voiturier des soins qui excluent la faute serait "immorale et inadmissible, et je suis le premier à penser que le voiturier ne "pourrait trouver son refuge dans un tel moyen."

Pardessus, tome 2, No. 542.

Sirey, Code Napoléon, p. 881, note 14, Dépot nécessaire, where the principle is applied to a notice by an innkeeper; his liability being analogous to that of the carrier.

Chitty on Carriers, p. 96 and foot note 1 (Edit. 1857).

Shearman & Redfield on Negligence, p. 307, § 273: "A mere notice on the "part of the carrier that he will not be liable for injuries to passengers, even "though brought to their knowledge, has no effect upon their rights unless by "some act upon their part, *other than merely making the journey* under the "carrier's charge, they make it the foundation of a *special contract*." If this be true in regard to injuries to the passenger himself, against which the carrier is not held to be an insurer, how much more so in regard to the luggage of which he is an insurer.

Lacey, Digest of Railway decisions, p. 39 (Edit. 1875), vbo. Baggage. Contracts limiting the liability of Carrier, No. 79: "A carrier cannot limit his "liability from the consequences of the negligence, willful default or tort of "himself and agents."

Do. No. 80: "The liability of a railroad company for the safe carriage of a "passenger's baggage is not limited by a notice printed upon the face of the "ticket issued by it, stating the terms upon which the baggage will be carried." (Rawson vs. The Pennsylvania R.R. Co., 48 N. Y. Rep. 212.)

Do. No. 83: "A notice of" all baggage at the risk of the owners "is no protection to common carriers." (Camden & Amboy R. R. Co. vs. Belknap, 21 Wendell, (N. Y. 354.)

Do. No. 87–88, p. 40 (Camden and Amboy R. R. Co. vs. Burke), 13 Wendell (N. Y.), 611.

The spirit of the law of England in regard to carriers and the limitation of their liability by conditions such as are invoked by appellant, may be gathered from the terms of 17 and 18 Vict. c. 31, passed for the purpose of preventing Railway Companies and Canal Companies from escaping the provisions of the former Act, 1 Wm. IV. c. 68, which permitted of the limitation of the carrier's liability in regard to certain valuable articles above £10, and required a declaration of their nature and value and an increased payment; for 17 and 18 Vict. provides that no such contract—*i.e.*, for limitation of liability by notice on ticket or receipt—shall be of effect unless *signed by the party delivering the goods*, and it also makes any notice, condition or declaration limiting in anywise the liability of such Company for loss or injury occasioned by the neglect or default of such Company or its servants, null and void—and whilst permitting conditions with respect to the receiving (*i.e.*, the manner of), forwarding and delivering of articles and effects, yet makes the reasonableness or justness of such condition subject to the decision of a Court or Judge, in any trial where it may be invoked. Again, on referring to the ticket furnished to Miss Woodward, and filed by the defendants in the Court below as their exhibit num-

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ber 2, p. 8 of Record, it appears that it apparently was issued under the terms of the Imperial Statute 18 and 19 Vict., Cap. 119: "The Passengers' Act of 1855"; and if the contract can in any sense be regarded as formed in England, said Act would apply. But by sec. 71 of that Statute the form of ticket is fixed; and no permission is granted to vary the conditions and duties stated on its face (one of which is an engagement to land the passenger *with his baggage* at his destination) by any other condition endorsed on such ticket; or to endorse such condition at all; on the contrary, it is enacted that "Any directions contained in the form of such contract ticket shall be obeyed in the same manner as if herein set forth." The obligation to deliver luggage at the end of voyage being inserted by Statute in the form prescribed, cannot be affected, respondent submits, by the endorsement on such ticket, without authority of Statute or consent of the passenger of a condition ineffect abrogating the requirements of the Statute; but such condition is itself null and void, not only as being contrary to Statute, but also contrary to what Brett, J., in the Liver Alkali Company vs. Johnson (Law Journal Repts. Q. B., Exchcq. and Com. Pleas, 1873-74, p. 223) styles the "recognized custom of England."

By applying these principles to the present case, the respondent submits that it becomes perfectly clear, that the condition invoked by appellants is, and could be, of no avail against the respondent's demand. On the face of the ticket (p. 8 of Record) appears an engagement by the appellants to land Miss Woodward *with her baggage* at Portland; whilst the condition endorsed on the back, if of avail, would relieve them from this contract. It is only necessary to read the condition to see that it cannot in reality be regarded as a *limitation* of liability, properly speaking, it is *rather a complete and absolute cancellation of any liability whatever* whether for the acts of the owners themselves or those of their agents or employees. The condition is so absolute that it would deprive the traveller of any and every recourse for loss of baggage; it relieves the Company not merely from the responsibilities of a common carrier for hire, but even from the limited liability of a private carrier. It is, in fact, unmistakably a condition *en contradiction de l'essence même du contrat*," and one cannot but wonder at the hardihood manifested by the appellants, in not only invoking such a condition in a Court of Law in the first instance, but in reaffirming it in a Court of appellate jurisdiction. That a carrier whilst taking the luggage of the traveller and storing it away in the hold of their vessel, completely beyond the control of the passenger, and *solely under* their own care (as it is proven was the fact in the present case, see depos. of Dr. Duncan, page 2 of Appendix, line 5, and depos. of Riley), should yet attempt to stipulate for absolute immunity from responsibility even "*for the safe-keeping*" of such luggage, is monstrous; and respondent feels confident that this honorable Court will not hesitate to characterize the condition as one most unreasonable.

But were the condition such an one as could validly be made, and reasonable, yet there was still wanting such a communication of it to the respondent as would render it binding upon her. There is not a tittle of evidence of record to show that the attention of respondent was called to the condition when the ticket was purchased (it could not have been, as the purchase was

not made by herself) ; it is not shown that she was aware of it before embarking, or in fact that she ever saw it or read it, either before or after embarkation. The appellants, strange to say, most carefully refrained from putting any questions tending to show actual knowledge on the part of Miss Woodward of said condition, simply asking, after proving the ticket, whether respondent "knew how to read," whereas it ought to have been proved that she *did read* or was *aware* of the condition, and that, too, prior to her embarking, and in time to repudiate such condition if she so desired. The defendants apparently relied on the idea that the plaintiff, having had the ticket in her possession, must be *presumed* to have known of the conditions; but the undersigned submit that the burden of authority is against this view. The authority cited in support of the idea in the Court below was from Parsons' Mercantile Law, page 223, in which the words "on a ticket sold him" occur: but in the foot note to this same quotation it is stated "but the carrier is held to *very strict proof* that "the bailee had knowledge of the notice," and reference is made to Brown vs. The Eastern Railway Company, 11 Cushing's Repts., p. 97, in which it was held in the Common Pleas, and confirmed in appeal, "that the taking of ticket raised no legal presumption that the plaintiff "read the printed matter; that it was a question of fact whether she knew the "contents before she started on her journey, and that if she did not read it "until she was on her way, her rights were not affected by it," and in appeal it was stated "that it is necessary for him (the carrier) to show *clearly* that the "person with whom he deals is *fully informed* of the terms of such limitations "and conditions, &c.," and reference is made to 2 Campbell, p. 415, Butler vs. Heane.

2 Starkie, p. 279, Davis vs. Willan.

2 Starkie, p. 55, Kerr vs. Willan.

And 5 Bingham, Macklin vs. Waterhouse, in which the same views were held on this point.

So, too, 12 Gray (Mass.) p. 388, Malone vs. Boston & Worcester R. R. Co., (cited Lacey's Digest, p. 39, No. 82.)

"There is no presumption of law that a railway passenger has read a notice "limiting the liability of the Company for baggage printed on the back of a "check delivered to him, having on its face the words "look on the back," and "also printed on a placard posted in the cars and containing other notices which "he has read."

Angell on Carriers, p. 253, § 250.

Chitty on Carriers, p. 102.

Story on Bailments, p. 516, § 558.

There is no evidence of nor was it pretended that plaintiff had any actual or constructive notice of the condition in question, other than as derived from the ticket received by her, and on the above authorities, knowledge from this source cannot be presumed: "the special contract must be proved," and, therefore, for this reason alone, the condition would be unavailing.

But a still later decision, in the same sense, and in a case similar to the pre-

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sent, is to be found in Henderson vs. Stevenson, decided in 1875 by the House of Lords, confirming the decision of the Court of Session and the Lord Ordinary (Lord Gifford), Law Repts., vol. ii, p. 470, Scotch Appeal and Divorce cases, referred to by the learned judge in the Court below, when rendering judgment, which is thus stated in the heading of the Report:—

"Steam Packet Company's Responsibility for loss of luggage."

"A ticket having on its face only the words 'Dublin & Whitehaven' was "given to a passenger, who, without looking at it, paid for it, and went on "board. Having lost all his luggage, he brought an action against the Com- "pany. *Defence* of the company, that on the back of the ticket there was an "intimation that they were not to be liable for losses of any kind or from any "cause.' Judgment against the Company with costs.

"Per The Lord Chancellor:—It would be extremely dangerous to hold that "where a document is complete on the face of it, but having on the back of it "something which has not been brought to the knowledge of a contracting "party, he shall be held to have assented to that which he has not seen, and of "which he knows nothing.

"Per Lord Chelmsford:—A mere notice from the Steam Packet Company, "without the passenger's assent, will not discharge them from performing the "very essence of their duty, which is to carry safely and securely, unless pre- "vented by unavoidable accidents.

"Per Lord Hatherley:—A ticket is in reality nothing more than a receipt "for the money which has been paid.

"Per Lord O'Hagan:—When a company desires to impose special and strin- "gent terms upon its customers, there is nothing unreasonable in requiring that "these terms shall be distinctly declared and deliberately accepted."

In the face of this decision by the highest tribunal in the land, the respon- dent feels that further argument on this branch of the case must be superfluous.

In appeal the judgment was confirmed. The Court were unanimous as to the point of law, that the carrier could not limit his liability by a condition not notified to the passenger.

CROSS, J., differed only on a question of fact, considering that it was not sufficiently clear that the loss occurred on the steamer Sardinian during the passage to Portland, and, therefore, the carriers could not be held liable. (See The Legal News, (A.D. 1878) pp. 458, 459, for observations of Court on this point).

Judgment confirmed.

Abbott, Tait, Wotherspoon & Abbott, for appellants.

Davidson & Cushing, for respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 14TH JUNE, 1878.

Coram SIR A. A. DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

No. 86.

THÉOPHILE ARPIN,

(*Plaintiff in the Court below*),

APPELLANT;

AND

JOSEPH N. POULIN,

(*Defendant in the Court below*),

RESPONDENT.

HELD:—That the endorser of a composition note given by a debtor to his creditor in carrying out a settlement (not under the Insolvent Act) for fifty cents in the dollar, was not liable for the amount of such note where it appeared that the debtor, for whom he endorsed the note as surety, and from whom he had taken a transfer of his estate as collateral security, had secretly given the plaintiff (the creditor) his own notes for the balance of his claim, in order to obtain his assent to the composition, and the creditor had already received 50 cents on his claim.

The action was brought to recover the amount of a promissory note, made by one Massé, and endorsed by the respondent. The latter pleaded that in 1875 Massé made a composition with his creditors (including Arpin, the appellant) for 50 cents in the dollar, payable in 4, 8 and 12 months. That respondent consented to endorse the composition notes on getting a transfer as collateral security of all Massé's stock-in-trade and assets. That at the same time that appellant compounded with Massé for fifty cents in the dollar, and took endorsed notes therefor, he made Massé give him his own notes for the balance of his claim, one of which had been paid. That this was a fraud on respondent, who endorsed on the supposition that the composition would be faithfully carried out. Lastly, that Massé had again become insolvent. The plea concluded by asking to have the deed of composition declared fraudulent, and respondent's endorsement obtained by fraud and false pretences, and that respondent be freed from all liability on the endorsement.

The Superior Court at Montreal, JOHNSON, J., 31st January, 1877, maintained the plea and dismissed the action. The judgment was as follows:—

"The Court, etc.;

"Considering that the defendant has proved the essential allegations of his first plea, and that the note now sued on is one of the three endorsed by him at the request of the plaintiff and of the said E. Massé in the said plea mentioned, on the express condition also mentioned and agreed to in the writing of 27th July, 1875, by the plaintiffs and others, the said Massé's creditors; that the said Massé was to be completely and fully discharged from his whole debt to the plaintiff upon payment of fifty cents in the dollar, the amount of which payment at that rate is represented by the said three notes, two of which have been paid;

Theoph. Arpin, and Jos. N. Poulin.

"Considering that the said writing of the 27th July, 1875, was only executed by the plaintiff and others in fraud of the defendant, and that the fundamental ground and condition thereof is therein stated to be, as far as the plaintiff is concerned, a complete discharge to his debtor of the whole of his debt for one half thereof, while, in fact, by taking from the said Massé other notes for the other half thereof, as the plaintiff is proved to have done, he, the plaintiff, has not for one half discharged him in full, but on the contrary still holds him for the whole, and is thereby making the position of the defendant, who was the said Massé's surety, much worse than it would have been if the other fifty cents had remained on the estate of the said Massé;

"Considering, therefore, that the said pretended writing and agreement of the 27th of July, 1875, is not in effect a discharge in full for fifty cents in the dollar, but was and is fraudulent and simulated, doth dismiss the plaintiff's action with costs distraits to Messieurs Lacoste & Globensky, attorneys for defendant."

The learned Judge, in rendering judgment, made the following remarks:—"The defendant is sued as indorser of a promissory note made by one E. Massé for $104.33. He pleads to the action that, in July, 1875, the maker of the note, being insolvent, conspired with the plaintiff and others of his creditors to get one-half of his debts secured by the defendant's endorsement, and applied to him for that purpose, and got his name on the note now sued upon, which was one of three of similar amount given to the plaintiff, and constituting 50 cents on the dollar on the whole amount of his claim against Massé, whose creditors, including the plaintiff, agreed by a writing of the 27th of July, 1875, to give him a full discharge on payment of the notes. That, believing in Massé's good faith, and in that of the creditors, the defendant endorsed all this composition paper, among which was the present note, on the express condition that Massé should mortgage to him four lots of land, and also transfer his stock and book-debts, and continue his business only for the purpose of paying the notes which the defendant had endorsed. That Massé paid the first note, but failed to pay the second, which was taken up by the defendant, and that he, the defendant, has since then learned the true character of the arrangement between Massé and his creditors, which was that this discharge for 50 cents should only be executed in appearance, while in reality the debtor was not to be discharged at all, but was to remain liable for the other 50 cents, for which he was to give his notes. That Massé has since made an assignment under the Insolvent Act, and the defendant has fyled his claim against his estate. The only witnesses are the plaintiff and defendant themselves, and Massé. The facts alleged in the plea are proved. The so-called composition and discharge is here. The note sued on is proved to be one of three given, as the plea alleges, and the plaintiff only signed the composition on condition of getting Massé's own notes for the balance, and got them. This case does not rest, as was argued by the plaintiff, on the validity or invalidity of the contract between Massé and his creditors to pay the other half of his debt. That may or may not be a good contract, as between the parties to it; but we have nothing to do with that. The defendant here says to the plaintiff: "You and Massé fraudulently got me to lend my name;

the condition was that your debtor was to get a discharge, but, instead of this, you are holding him for the whole debt. That was not my contract with you at all. I never would have endorsed merely to get him delay. I became liable in order to get him a full discharge for 50 cents on the dollar, so that he might have means to pay me back. It was not, therefore, a composition and discharge at all that you gave him; it was a mere pretence and a fraud to get one-half of your debt secured at all events." I believe the thing is too evidently iniquitous to require comment. I am entirely with the defendant, and the action is dismissed."

Jetté, Béique & Choquet, for appellant:—L'intimé se plaint de ce que son endossement ait été obtenu par fraude, de connivence entre l'appelant et Massé, et de ce que le billet de Massé, seul, ait été payé à l'appelant à même des garanties données à l'intimé. La preuve ne justifie ni l'un ni l'autre de ces griefs.

Il est bon de remarquer que l'acte de composition entre Massé et ses créanciers a été fait sous le droit commun et non sous l'acte de faillite alors en force. L'acte de composition avait été exécuté le 27 juillet, et les billets personnels de Massé ont été donnés à l'appelant le treize ou le quatorze du mois d'août suivant. Parceque Massé avait obtenu cette composition de ses créanciers, il n'en restait pas moins leur débiteur, au for intérieur du moins, et la promesse qu'il contractait de payer sa dette naturelle était parfaitement légitime. Massé, Droit Commercial, Tome 4, page 90, est bien précis sur ce point. "Par "exemple, dit-il, le concordat par lequel une remise partielle est faite à un failli "opère novation quant à la partie remise, qui de dette civile devient dette natu- "relle; et si plus tard le failli s'oblige de nouveau à payer à ses créanciers la "partie de leurs créances dont ils lui avaient fait remise, cette nouvelle obligation "est incontestablement valable; elle trouve sa cause et son fondement dans la "dette naturelle qui subsistait toujours pour cette partie, et à laquelle l'obligation "nouvelle fait novation en la transformant en une dette civile." Voir aussi Demolombe, Tome 28, No. 256, et les autorités qui y sont citées.

La position est ici la même que si tous les billets personnels donnés par Massé avaient été payés. Or, prétendra-t-on que Massé n'aurait pu faire validement le paiement de ces billets! Assurément ça n'est pas parceque l'intimé avait endossé les billets de Massé qu'il était défendu à ce dernier de rembourser à ses créanciers, le montant qu'il leur avait fait perdre.

La fraude entre Massé et ses créanciers est alléguée, mais encore une fois, elle n'est pas prouvée. L'intimé s'est lui-même chargé d'établir que les billets personnels de Massé n'ont été donnés à l'appelant que le treize ou le quatorze d'août. Or, dès le onze du même mois, Massé avait garanti l'intimé contre la responsabilité qu'il pouvait encourir par l'endossement des billets de composition en lui consentant une hypothèque sur quatre immeubles. Voir pièce No. 23 du dossier, où il est stipulé que cette hypothèque est donnée à l'intimé pour le garantir du paiement de *tous ou partie* des dits billets. Au moins l'intimé aurait-il dû alléguer et prouver que cette hypothèque était insuffisante pour le garantir de la responsabilité qu'il avait assumée. Mais il ne l'a pas fait.

Lacoste & Globensky, for respondent:—

Les faits sont les suivants:

Théoph. Arpin and Jos. N. Poulin.

Le 27 juillet 1875, Massé, marchand de Richelieu, composa, sous le droit commun, avec ses créanciers, pour le montant de 50 centins dans la piastre, payables en paiements égaux à 4, 8 et 12 mois, à la condition que des billets seraient donnés aux créanciers et revêtus d'un endossement qui leur conviendrait. En conséquence de cette composition, les créanciers consentaient à donner à Massé une décharge finale et générale pour la balance de leurs dettes. Cette composition est imprimée et se trouve à l'appendice de ce factum.

Au nombre des créanciers de Massé se trouve l'appelant pour un montant de $1226.00. Comme tous les autres créanciers, il a signé la composition.

Massé, muni de cet écrit, alla trouver l'intimé qui était un de ses amis et le pria de devenir son endosseur. Par pure amitié et sans aucune considération autre que le plaisir d'obliger, l'intimé consentit à mettre son nom sur le dos des billets de composition. Mais il exigea de Massé une hypothèque sur certaines propriétés qui dans le temps, étaient déjà chargées d'hypothèques, et de plus un transport de son fonds de magasin et de ses livres; mais il fut convenu que Massé demeurerait en possession de son fonds de magasin et percevrait les dettes, et qu'à même les recettes, il paierait les billets de composition.

Cette garantie fut donnée à l'intimé par Massé, le 11 août 1875, par acte notarié passé devant Mtre. Bessette, N. P. Cette acte est imprimé à l'appendice. Et le même jour, les billets de composition furent remis aux différents créanciers ainsi que l'atteste le reçu. Et l'appelant reçut 3 billets de $204.33 chacun, faits payables, le 1er, à 4 mois, le 2e, à 8 mois et le 3e, à 12 mois, du 22 juillet 1875, date de la composition.

Le premier de ces billets de composition a été payé par Massé, mais le 2e a dû être payé par l'intimé, Massé étant dans l'impossibilité de le rencontrer.

L'action est basée sur le 3e de ces billets de composition.

Mais depuis le paiement du 2e billet, Massé qui avait fait faillite sous l'autorité de l'acte de faillite de 1875, a avoué, sous serment, qu'en sus des billets de composition, il avait donné à l'appelant et à d'autres de ses créanciers qui avaient accepté la composition, ses billets personnels pour la balance de leur créance, et que même l'un de ses billets personnels dont le montant correspondait à celui des billets de composition avait été payé à l'appelant.

L'intimé, sous ces circonstances, se croit justifiable de refuser le paiement du dernier billet de composition, parce que son consentement a été surpris et que l'acte de composition du 27 juillet, n'a été qu'une conspiration et une fraude pour tâcher d'obtenir sa garantie pour la moitié des dettes de Massé.

L'acte de composition contient une décharge générale de la balance que devait Massé, et c'est sur la foi de cette décharge là, que l'intimé a consenti à se porter caution croyant que Massé, qui n'aurait pas pu payer le montant entier de ses dettes, pouvait rencontrer 10 chelins dans le louis.

C'est donc contre la foi de cet arrangement que Massé a donné, et que l'appelant a accepté, aussi bien que d'autres créanciers, les billets personnels de Massé pour la balance. C'est là une fraude qui est admise par l'appelant lui-même. Il admet que ces billets personnels lui ont été donnés pour couvrir la balance de ses créances contre Massé.

Il est de preuve que ces billets lui ont été donnés dans le mois d'août, en

même temps que les billets de composition, et l'Honorable Juge qui a présidé la Cour Supérieure, lors de l'audition de la cause a été d'opinion que ces billets personnels avaient été consentis au détriment de l'intimé et en fraude de ses droits, et qu'ils ont été consentis en violation des conventions arrêtées entre Massé et ses créanciers sur la foi desquelles l'endossement de l'intimé a été obtenu.

Que, par conséquent, ce consentement de l'intimé a été surpris et que les billets de composition ont été endossés par lui, par suite de fraude et sans considération réelle.

En conséquence, il a débouté l'action sur ce premier moyen invoqué par l'intimé.

Il reste à l'intimé un second moyen, c'est que le premier billet personnel par Massé à l'appelant a été payé. Il est d'un montant correspondant à celui des billets de composition. Or, Massé a payé ce billet personnel à même les biens qu'il a transportés comme garantie à l'intimé; il se trouve ainsi à avoir accompli sa convention, c'est-à-dire à avoir acquitté les 10 chelins dans le louis qu'il s'est obligé de payer par la composition du 27 juillet, et l'appelant se trouvant à avoir reçu ses 10 chelins dans le louis ne peut plus rien réclamer de l'intimé.

TESSIER, J. Il s'agit de la responsabilité d'une caution d'un failli dans un concordat.

L'appelant, Théophile Arpin, était l'un des créanciers de Henri Edmond Massé, marchand de Richelieu.

Le 27 juillet 1875, Massé composa, sous le droit commun, avec ses créanciers, à raison de cinquante centins dans la piastre, moyennant des billets à 4, 8 et 12 mois, revêtus d'un bon endossement à la satisfaction des créanciers. M. Joseph N. Poulin consentit à se faire endosseur dans ces conditions là.

Massé a signé cet acte de composition et alors reçut trois billets endossés par Joseph N. Poulin pour la moitié de sa créance. Le 1er de ces billets a été payé par Massé, le 2e a été payé par l'intimé Poulin, le 3e fait le sujet de la présente action pour $204.33.

L'intimé Poulin a plaidé qu'au temps de son endossement, mais hors de sa connaissance, certains créanciers et entr'autres Massé s'était fait donner par Massé des billets promissoires pour l'autre moitié de sa créance, que s'il eut connu cet acte de fraude vis-à-vis de lui, il n'aurait pas donné son endossement, et que le créancier par cette conduite a déchargé l'intimé qui n'est après tout qu'une caution comme endosseur.

L'intimé plaide de plus que lorsqu'il a consenti à se rendre caution, il s'est fait transporter le fonds de magasin de Massé, mais par amitié et pour le favoriser il lui a laissé la possession de ce fonds de magasin pour lui donner les moyens de payer ses billets de composition, mais que ce créancier Arpin s'est fait payer à même les moyens de Massé, fournis par Poulin, un billet du même montant que celui qui est réclamé et que par conséquent le dit créancier Arpin a ainsi reçu le montant entier de la composition, savoir la moitié de sa créance. La Cour Inférieure a maintenu ces prétentions de l'intimé et débouté l'action. Cette Cour est unanime à dire que ce jugement est correct.

La position de la caution ne doit pas être changée par le créancier, c'est là

Théop. Arpin and Jos. N. Poulin.

l'esprit de l'article 1956 du Code Civil. La subrogation aux droits du créancier, tels qu'ils existaient lors du cautionnement ou de l'endossement, n'est plus la même, parceque le créancier a diminué par son fait l'actif du débiteur.

Pour ces raisons le jugement doit être et est confirmé avec dépens.

Judgment confirmed.

Jetté, Bélique & Chaquet, for appellant.

Lavoie & Globensky, for respondent.

(J.K.)

CIRCUIT COURT, 1878.

MONTREAL, 4TH NOVEMBER, 1878.

Coram PAPINEAU, J.

No. 4034.

The National Insurance Company vs. Cartier.

HELD:—Where the contract, though bearing date at Montreal, is proved to have been made at Sorel, in the District of Richelieu, that the cause of action arose at Sorel.

The plaintiff sued the defendant upon a note dated at Montreal, and payable at Montreal.

The defendant pleaded by an *exception déclinatoire*, alleging and proving that the note, though dated at Montreal, had been signed at Sorel, in the District of Richelieu.

The defendant cited *The Railway and Newspaper Advertising Company* vs. *Hamilton et al.*, 20 L. C. J., p. 28, and *Mulholland* et al., vs. *The Chagnon Foundry Company*, 21 L. C. J., p. 114.

The exception was maintained, and the action was dismissed.

Davidson, Monk & Cross, for plaintiff.

Loranger, Loranger, Pelletier & Beaudin, for defendant.

(L. & CO.)

SUPERIOR COURT, 1878.

ENQUETE SITTINGS.

MONTREAL, 5TH DECEMBER, 1878.

Coram LAFRAMBOISE, J.

No. 97.

Joseph E. Lareau vs. *Marie C. Beaudry* et vir.

HELD:—That under the Quebec Act, 35 Victoria, chap. 6, sect. 9, the right to examine a consort as a witness is conferred upon the adverse party only.

PER CURIAM:—An application is made by a wife *séparée de biens*, and defendant in this case, to be allowed to examine her husband as a witness to prove certain acts of administration of her property. The Court is of opinion that the Statute 35 Vict., chap. 6, was only made in the interest of the adverse party in a case. Application rejected.

Roy & Boutillier, for defendants and petitioners.

Lareau & Lebeuf, for plaintiff.

(E.L.)

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" :—*Vide* APPEAL.

" :— " SAISIE-ARRÊT.

" :—Where a deposit of £500 has been made as a security under Article 1179 C. C. P., on an Appeal to the P. C., and the judgment appealed from is confirmed in the P. C., but without costs in the P. C., the deposit will nevertheless avail to liquidate the costs in the Court below, and cannot, therefore, be withdrawn by the appellant. (Lemoine, appellant, & Lionais, respondent, Q. B.)..... 23

" :—Where persons are sued as partners, and a cause of action is only established against one of them individually, the action will be dismissed with costs. (Fletcher vs. Forbes et al., S. C.)..... 24

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" " COSTS, SECURITY FOR.

" " POWER OF ATTORNEY.

—A party inscribing for *enquête* and hearing at the same time will be held in his option under C. C. P. 243, although the other party inscribed same day inscribed for *enquête* in the ordinary way. (Bourgouin et al. and La Compagnie du Chemin de Fer de Montréal, Ottawa & Occidental, and l'Hon. A. R. Angers, Attorney General *pro Regina*, 1st party, Q. B.) 22

—*Vide* AFFIDAVIT.

" " INSOLVENT ACT OF 1875.

" " EXECUTION.

—Where, after a defendant has been foreclosed from pleading, a "transaction" has been made between him and the plaintiff's attorney *ad litem*, to the effect that the cause was stayed on certain terms of payment, which "transaction" the defendant has subsequently avoided, and then (with the permission of the Court) pleaded to the action, and the plaintiff has subsequently brought another action to enforce the compromise, the pendency of the first action will not be a bar to the second action, the proper mode of enforcing the "transaction" being by a separate action. (Cushing, Plank and Pinsonneault, respondent, P. C.) 58

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" " EVIDENCE.

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" " PÉREMPTION D'INSTANCE.

" " EXCEPTION *à la forme*.

" " JURISDICTION.

" " WRIT OF ERROR.

" " PRIVY COUNCIL.

—In an action in this Province on an Ontario judgment, it is not necessary to prove that the Ontario Court had jurisdiction over the case, and the proof of personal service on the defendant in this Province of the summons in the original action is a complete bar to any right by the defendant to question the correctness of such judgment. (Alcock et al. vs. Howie, C. of R.) 145

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" " DISCONTINUANCE.

" " FAITS ET ARTICLES.

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—*Vide* EXCEPTIONS DILATOIRES.

—A party inscribing in Review is entitled to a return of the deposit, so soon as the judgment has been reversed in his favor. (Be[illegible] vs. Brown, S. C.) 266

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—A copy of a notarial deed, not certified by the notary who [illegible] the original, does not make proof of its contents, and an [illegible] thereon will, therefore, be dismissed. (Ricker, appellant, and [illegible] al., respondents, Q. [illegible] 270

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" :—Where the contract, though bearing date at Montreal, is proved to have been made at Sorel, in the district of Richelieu, the cause of action will be held to have arisen at Sorel. (The National Ins. Co. vs. Cartier, C. C.) 336

" :—The right granted by the Quebec Statute, 35 Vic. ch. 6, to examine a consort as a witness, is conferred upon the adverse party only. (Lareau vs. Beaudry *et vir*, S. C.) 330

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PRIVY COUNCIL:—Leave to appeal to the, from a judgment of the Court of Queen's Bench, will be granted, although the opposite party has already obtained leave to appeal to the Supreme Court of Canada from the same judgment. (The City of Montreal, appellant, and Devlin, respondent, Q. B.). 136

PROMISSORY NOTES:—The stamps thereon need not necessarily be affixed and obliterated by the maker, and may be legally affixed and obliterated by any other party on the day the note bears date. (Delbar vs. Landa, S. C.) 46

" " :—Where several persons, trustees to an insolvent estate under a deed of composition, which gave them no power to draw or accept bills or make promissory notes, signed promissory notes with the words "Trustees to Estate C. D. Edwards" after their signatures, they were personally liable. (Brown et al. vs. Archibald et al., S. C.) 126

" " :—In an action on, the Court may, on motion of the plaintiff, authorize the striking out of all endorsements subsequent to those recited in the declaration. (Fisher et al. vs. McKnight et al., S. C.). 146

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" :—In the case of a, of a moveable to two different persons, the purchaser who has obtained actual possession and is in good faith shall be preferred, as respects the ownership of the moveable, although his title be posterior to that of the purchaser. (Stanforth vs. McNeely and McNeely, int. party, C. of R.)..... 50

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" :—Notwithstanding a clause in a deed of sale of land, that the purchaser might at any time keep the whole or any part of the purchase money in his hands until the vendor should furnish him with a Registrar's certificate, showing the property to be free and clear of all mortgages and incumbrances whatsoever, the purchaser, in an action for the recovery of a portion of the purchase money, will be condemned to pay, in the absence of such a certificate, when it is shown that he has in his hands a sufficient balance of the purchase money to meet any possible disturbance or trouble in the possession of the land sold. McDonell, appellant, and Goundry, respondent, Q. B.)..... 221

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STAMPS :—*Vide* PROMISSORY NOTE.

SUBSTITUTION :—Land purchased by the *grevé de substitution* with monies arising out of the redemption of a constituted rent which belongs to the substitution, takes the place in all respects of the constituted rent, so much so that the *appelés* to the substitution have a right to the land or its value, and not merely to the value of the constituted rent. (Guy et al., appellants, and Guy, respondent, Q. B.)..... 213

SUPREME COURT :—The penalty in a security bond, on appeal to the Supreme Court, which stipulates that the penalty should become due and payable in case the appellant failed to prosecute his appeal and the judgment appealed from be affirmed, cannot be recovered, when the appellant, after giving security, discontinues his appeal. (The South Eastern R. W. Co. vs. Bambkin et al., S. C.)..... 221

TRADITION :—*Vide* SALE.

TRANSFER :—A, by deed of dissolution of copartnership of the partnership estate and debts to two of the former copartners, who continue the business, does not require to be signified before action brought against third parties indebted to the former copartnership. (Tate vs. Torrance et al., S. C.)... 48

" :—Under the clause of *garantir fournir et faire valoir*, in a deed of transfer of a debt, the assignee cannot sue the assignor, without previously discussing the debtor and establishing his insolvency. (Homier vs. Brosseau et al., Q. B.)..... 135

VESSEL :—A, registered under ch. 41 of the Con. Stat. of Canada, may be mortgaged in the form usual under that statute notwithstanding the repeal of the statute by the Dom. Act 37 and 38 Vic. ch. 128, s. 3. (Dhoust vs. McDonald, and Norris, opposant., C. of R.)..... 10

" :—It was not necessary to the validity of a mortgage on such vessel, that she should first be re-registered under the Imp. Merchants Shipping Act of 1854, and the form I. of said Act adhered to. (Do.)..... 79

" :—The form of bill of sale by way of mortgage was in the case of such vessel sufficiently near the form I. of the Merchants Shipping Act to be valid thereunder (Do.) 79

" :—The privilege accorded by Art. 2383 of the C. C. to the wages of the master and crew of ships for the last voyage does not apply to a balance of wages of a season's continuous navigation on the St. Lawrence and lakes in trips of a few days' duration, even when the master and crew sign articles for the season, and are paid by the month and not by the trip. (Do.)..... 79

" :—A mortgagee of a vessel has no right to oppose and cannot prevent the sale under execution by a judgment creditor, but such sale will not purge his mortgage, and will only convey to the purchaser the rights of the judgment debtor in the vessel, and the mortgagee will retain his rights under his mortgage against the vessel in the hands of the purchaser. (Do.)..... 79

UNIVERSAL LEGATEES :—The, under a will, who have not renounced, are bound to pay the debts of the testator, notwithstanding he may have appointed executors, whom he vested with all his estate. (Beaudry et al. vs. Rolland et al., S. C.)..... 72

VENDOR :—A, who grants to the purchaser of goods from him a receipt, to the effect that he holds the goods on storage, and that the goods are deliverable only on the surrender of the receipt duly endorsed, cannot refuse to deliver the goods to a third party, holder of the receipts duly endorsed to him, and who has *bonâ fide* made advances to the purchaser on the faith of such receipts, on the ground that the price of the goods was still unpaid. (Robertson et al., appellants, and Lajoie, respondent, Q. B.)..... 169

WAGES :—*Vide* VESSEL.

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WAREHOUSE RECEIPT:—A. given by a warehouseman when the goods in question are not in his possession, is null and void. (Williamson, appellant, and Rhind, respondent, Q. B.) 166

" " :—*Vide* VENDOR.

" " :—A, granted [illegible]y by the President and Secretary of a Company [illegible]iness as warehousemen, is invalid. (Hearle, appellant, and [illegible], respondent, Q. B.) 230

WILL:—*Vide* UNIVERSAL LEGATEES.

WORKMEN:—*Vide* PRIVILEGE.

WRIT OF ERROR:—On a, the Court cannot look beyond the record for what took place at the trial, and affidavits purporting to contradict the record are inadmissible, and the notes taken by the judge presiding at the trial do not form part of the record. (Da[illegible], plaintiff in error, and Regina, defendant in error, Q. B.) 133