THE

LEGAL NEWS.

VOL. XVI. APRIL 15, 1893. No. 8.

SUPREME COURT OF CANADA.

OTTAWA, Feb. 20, 1893.

Quebec.]

STEVENSON v. CANADIAN BANK OF COMMERCE.

Insolvency—Knowledge of by creditor—Fraudulent preference—Pledge—Warehouse receipt—Novation—Arts. 1034, 1035, 1036, 1169, *C.C.*

W.E.E., connected with two business firms in Montreal, viz. the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and of Elliott, Finlayson & Co., wine merchants, made a judicial abandonnent, on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The Bank discounted for W. E. Elliott & Co., before his departure for England, on the 30th June, a note of $5,087.50 due 1st October, signed by John Elliott & Co., and endorsed by W. E. Elliott & Co. and Elliott, Finlayson & Co., and on the 5th July took as collateral security from Finlayson, who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On or about the 9th July 146 barrels were sold and the proceeds, viz. $3,528.30, were subsequently, on the 9th August, credited to the note of $5,087.50. On the 13th July, McDougall, Logie & Co. failed and W. E. E. was involved in the failure to the extent of $17,000, and on the 16th July, Finlayson, as agent for W. E. E., left with the bank as collateral security against W. E. E.'s indebtedness of $7,559.30 on the paper of McDougall, Logie & Co., customers' notes of the oil business to

the amount of $2,768.28, upon which the bank collected $1,603.43, and still kept a note of J. P. & Co. unpaid of $1,165.32.

On the return of W. E. E. another note of John Elliott & Co. for $1,101.33, previously discounted by W. E. E., became due at the bank, thus leaving a total debit of the Elliott firms on their joint paper of $2,660.53. The old note of $5,087.50 due 1st October, and the one of $1,101.33, were signed by John Elliott & Co., and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co., and secured by 200 barrels of oil, viz., 146 barrels remaining from the original number pledged and an additional warehouse receipt of 54 barrels of oil, endorsed over by W. E. E. to Finlayson, Elliott & Co., and by them to the bank. The respondent, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August and the giving of the notes on the 16th July to the Bank were fraudulent preferences. The Superior Court held that the bank had knowledge of W.E. E.'s insolvent condition on or about the 16th July, and declared that they had received fraudulent preferences by receiving W. E. E.'s customers' notes and the 200 barrels of oil, but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference. (*Vide* 1 B. R. Q. 371.)

On an appeal and cross appeal to the Supreme Court:

Held, 1st, that the finding of the Court below of the fact of the bank's knowledge of W. E. Elliott's insolvency dated from the 13th July was sustained by evidence in the case, and there had therefore been a fraudulent preference given to the bank by the insolvent in transferring over to it all his customers' paper not yet due. Gwynne, J., dissenting.

2nd. That the additional security given to the Bank on the 10th August of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co. was also a fraudulent preference. Gwynne, J., dissenting.

3rd. Reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court, that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil, and that they became immediately the property of the insolvent's creditors, and could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s

substituted notes. Arts. 1169 and 1034 C. C.—Gwynne and Patterson, JJ., dissenting.

Appeal allowed and cross appeal dismissed with costs.

Macmaster, Q.C., & Geoffrion, Q.C., for appellant.

Lash, Q.C., & Morris, Q.C., for respondent.

Quebec.]

VAUDREUIL ELECTION CASE. MCMILLAN v. VALOIS.

Election petitions—Separate trials—R.S.C. ch. 9, secs. 30 & 50—Jurisdiction.

Two election petitions were filed against the appellant, one by A. C. filed on the 4th April, 1892, and the other by A. V., the respondent, filed on the 6th April. The trial of the A. V. petition was by an order of a judge in Chambers, dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the judge in Chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the trial judges who, on the 26th October, before proceeding with the trial, dismissed the motion to have both petitions joined, and proceeded to try the A. V. petition. Thereupon the appellant objected to the petition being tried then, as no notice had been given that the A. C. petition had been fixed for trial, and subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The trial judges then delivered judgment setting aside the election. On an appeal to the Supreme Court,

Held, 1st, that under sec. 30 of ch. 9 R. S. C. the trial judges had a perfect right to try the A. V. petition separately.

2nd, that the ruling of the Court below on the objection relied on in the present appeal, viz. that the trial judges could not proceed with the petition in his case because the two petitions filed had not been bracketed by the prothonotary as directed by sec. 30 of ch. 9 R. S. C., was not an appealable judgment or decision. R. S. C., ch. 9, s. 50. (Sedgewick, J., doubting.)

Appeal dismissed with costs.

Bisaillon, Q. C., for appellants.

F. X. Choquette, for respondent.

Ontario.]

CAMPBELL v. PATTERSON.

MADER v. MCKINNON.

Chattel mortgage—Preference—Bonâ fide advance—Consideration partly bad—Effect on whole instrument—R. S. O. (1887), *c.* 124, *s.* 2.

R., being in insolvent circumstances, applied to P. his uncle, for a loan of $5,000 which he received, P. mortgaging his house for part of the amount and giving his note for the balance, which R. had discounted. The security for this loan was a chattel mortgage on R.'s stock of goods in his store. The money was applied by R. for the most part in taking up notes made by him and endorsed by his relatives. P. knew when he advanced the loan that R. was insolvent, but it was not shown that he knew how the money was to be applied.

R. gave another chattel mortgage to M. for another loan of money applied in the same way, but it was shown that part of the loan was his own money though alleged to have been advanced by his wife.

An action was brought on behalf of R.'s creditors to have these mortgages set aside as being void under R. S. O. (1887), c. 124, s. 2, and at the trial before the Chancellor both were set aside. The Court of Appeal reversed the decision setting aside the mortgage to P., and affirmed that setting aside the mortgage to M., holding as to the latter, following *Commercial Bank* v. *Wilson* (3 E. & A. Rep. 257), that the mortgage being void in part for illegal consideration the whole instrument was void.

Held, affirming the decision of the Court of Appeal in *Campbell* v. *Patterson* (18 Ont. App. R. 646, *sub nom. Campbell* v. *Roche*), that the mortgage to P. being given for an actual *bonâ fide* advance, the provisions of sec. 2 of the Ontario statute did not apply to it, especially as P. was not shown to have had knowledge of R.'s motive in procuring the loan.

Held, also, over-ruling the decision in *Mader* v. *McKinnon* (18 Ont. App. R. 648, *sub nom McKinnon* v. *Roche*) in so far as *Commercial Bank* v. *Wilson* was followed, that that case was decided under the statute of Elizabeth, and is not now law under the Ontario statute, and a mortgage may be set aside as to part and maintained as to the remainder, but affirming the judgment of the Court of Appeal on the ground that the evidence showed the

whole of the consideration for M.'s mortgage to be illegal and bad.

Appeal dismissed with costs.

McCarthy, Q. C., and *McDonald*, Q. C., for appellants and respondents respectively.

Moss, Q. C., and *Thomson*, Q. C., for respondents and appellants respectively.

Exchequer.]

THE QUEEN v. CLARKE.

Appeal—Limitation of time—Final judgment.

On the trial in the Exchequer Court, in 1887, of an action against the Crown for breach of a contract to purchase paper from the suppliants, no defence was offered and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the Court, and judgment was given against the Crown for the amount thereby found due. The Crown appealed to the Supreme Court, having obtained from the Exchequer an extension of the time for appeal limited by statute, and sought to impugn on such appeal the judgment pronounced in 1887.

Held, Gwynne and Patterson, JJ., dissenting, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter, unless the time was extended as provided by the statute, and the extension of time granted by the Exchequer Court on its face only refers to an appeal from the judgment pronounced in 1891.

Held, per Gwynne and Patterson, JJ., that the judgment given in 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings, and on appeal therefrom all matters in issue are necessarily open.

Appeal dismissed with costs.

Robinson, Q. C., and *Hogg*, Q. C., for appellant.

McCarthy, Q. C., and *McDonald*, Q. C., for respondents.

Ontario.]

HUSON v. SOUTH NORWICH.

Municipal Corporation—By-law—Submission to rate-payers—Compliance with statute—Imperative or directory provisions—Authority to quash.

The Ontario Municipal Act, R. S. O. (1887) c. 184, requires, by sec. 293, that before the final passing of a by-law requiring the assent of the rate-payers, a copy thereof shall be published in a public newspaper either within the municipality or in the County town, or published in an adjoining local municipality. A by-law of the township of South Norwich was published in the village of Norwich in the County of Oxford, which does not touch the boundaries of South Norwich, but is completely surrounded by North Norwich which does touch said boundaries.

Held, affirming the decision of the Court of Appeal (19 Ont. App. R. 343) that as the village of N. was geographically within the adjoining municipality, the statute was sufficiently complied with by the said publication.

This case raises also a question as to the constitutionality of what is known as the "local option Act" of Ontario, the argument on which was postponed until the validity of the by-law was settled, and will be proceeded with at the May Term.

Robinson, Q. C., and *Du Vernet* for the appellant.

Maclaren, Q. C., and *Titus* for the respondents.

Ontario.]

GRAND TRUNK RAILWAY CO. v. COUNTY OF HALTON.

Railway company—Bonus to—Bond—Condition—Breach.

The County of H. in 1874 gave to the H. & N. W. Ry. Co. a bonus of $65,000 to be used in the construction of their railway, and the company executed a bond, one of the conditions of which was that the bonus should be repaid "in the event of the company, during the period of twenty-one years, ceasing to be an independent company." In 1888, the H. & N. W. Ry. Co. became merged in the G. T. R. company, and as was held on the facts proved by the trial judge and the Divisional Court, ceased to be an independent line.

Held, affirming the decision of the Court of Appeal (19 Ont. App. R. 252), that there had been a breach of the above condition, and the County was entitled to recover from the G. T. R. the whole amount of the bonus as unliquidated damages under said bond.

Appeal dismissed with costs.

S. H. Blake, Q. C., and *W. Cassels, Q. C.*, for the appellants.

Robinson, Q. C., and *Bain, Q. C.*, for the respondents.

COURT OF APPEAL ABSTRACT.

Insurance, Guarantee—Notice to insurer of defalcation—Diligence.

By a condition of a guarantee policy insuring the honesty of W., an employee, it was stipulated that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had been guilty of any criminal offence entailing, or likely to entail, loss on the employers, and for which a claim was liable to be made under the policy. On the 22nd June, the employers' auditors notified them that an unexplained deficiency, amounting to $300 or $400, existed in the accounts of W., who was their secretary-treasurer. Respondents did not notify the guarantors, but gave W. a week to explain or rectify the matter. On the 29th of the same month the auditors, about 4 p.m., notified the employers of their discovery that a cheque for $14,000, received by W. on the 9th June, had not been entered in his cash book although it had been regularly credited to the employers' account at their bankers. The matter was discussed between the employers and auditors that evening, but notice of the discovery was not given to the guarantors until the following morning, when W. failed to appear at his place of business, and they did not authorize his arrest or detention until some hours afterwards, when it was too late to intercept him in his flight from the country.

Held, that the employers had not complied with the conditions of the contract as to immediate notice, and were not entitled to recover under the policy.—*Guarantee Co. of N. A. & Harbor Commissioners of Montreal*, Montreal, Lacoste, C. J., Baby, Blanchet, Hall and Wurtele, JJ., (Hall, J., diss.) December 23, 1892.

Billet promissoire—Prête-nom—Compensation.

Jugé:—Lorsqu'un créancier poursuit son débiteur sur obli-

gation, et offre de lui remettre ses billets, donnés comme sûreté collatérale, le débiteur peut, dans ce cas, compenser cette créance, et aucun recours ne peut être exercé sur ces billets.—*Hould & Tousignant*, Quebec, Sir A. Lacoste, J.C., Baby, Bossé, Blanchet, Hall, JJ., 21 juin 1892.

Municipal matters—53 Vic. (Q.) ch. 71, s. 699—Exemption from taxes as consideration for services to be rendered.

Held:—1. That there is no appeal from a judgment rendered by a judge of the Superior Court in municipal matters, unless there is an evident excess of jurisdiction on the part of the council, or a serious violation of general or statutory provisions.

2. A section of a town charter which authorizes the council "to provide for the purchase of fire engines, or apparatus destined for the same purpose, and generally to adopt all measures best calculated to prevent accidents through fire," sufficiently covers the exemption from taxation of private water works, the exemption being granted in consideration of the proprietor furnishing an improved water service for the town.—*Molleur & Ville de St. Jean*, Montreal, Lacoste, C. J., Baby, Bossé, Blanchet, Hall, JJ., November 26, 1892.

Droit paroissial—Election et résignation de marguilliers—Avis d'assemblées—Qualité d'ancien marguillier—Usage.

Jugé:—1. Qu'il suffit qu'une assemblée de fabrique soit convoquée suivant l'usage de la paroisse (art. 3438 S.R.P.Q.)

2. Que lorsqu'il est d'usage d'envoyer un avis par écrit à chaque marguillier le convoquant à l'assemblée et d'annoncer cette assemblée au prône, l'irrégularité qui a pu se glisser dans l'annonce au prône et couverte par l'avis par écrit en bonne et due forme qui a été adressé à chaque marguillier.

3. Que l'usage de la paroisse de Notre Dame de Montréal n'étant d'indiquer le but de l'assemblée que dans deux cas, l'élection des marguilliers et le rendition des comptes, il n'était pas nécessaire de spécifier le but d'une assemblée convoquée pour accepter la résignation de marguilliers démissionnaires.

4. Que des requérants qui attaquent une élection de marguilliers parcequ'on leur aurait refusé de prendre part à cette élection, et qui n'allèguent pas que l'élection aurait produit une autre

résultat si on leur eût permis d'y participer, soulèvent une objection qui est sans intérêt dans la cause.

5. Semble à la majorité de la cour qu'un marguillier qui se démet de ses fonctions comme marguillier du banc n'a pas droit à la qualité d'ancien marguillier.—*Auger & Labonté*, Montréal, Baby, Bossé, Blanchet, Hall et Doherty, JJ., 21 mai 1892.

Substitution—Acceptation—Révocation avant l'acceptation—Fiducie—Séparation de corps—Pension alimentaire—Réconciliation.

L'appelant avait remis aux intimés comme fiduciaires, une somme de $20,000, dont ils s'engagèrent à payer l'intérêt à sa femme à titre de pension alimentaire. Dans l'acte créant cette pension alimentaire se lisait la clause suivante:

"At the death of the said party of the second part (la femme de l'appelant), the capital sum of $20,000 shall revert to and become the property of the said four children, or the survivors of them, share and share alike according to law, payable to them on their respectively attaining the age of majority, and should the said party of the second part die before the said children, or any of them, attain such age of majority, then and in that case, the revenues of the said capital sum of $20,000, or the proportion thereof of such minors as have not attained the age of majority, shall be payable to the said party of the first part (l'appelant) until they shall have so attained said period of majority. But in case the said party of the second part survive the said party of the first part, it is agreed that the said payment of said trust shall cease, and that the said party of the second part shall be entitled to claim the sum stipulated in her contract of mariage, namely $1,500 per annum, unless she prefer the present payments in lieu thereof, and that she shall not be entitled to both sums."

Jugé (infirmant le jugement de la Cour Supérieure): Que la clause en question ne constitue ni une donation ni une substitution en faveur des enfants, l'appelant ne s'étant pas désaisi de la dite somme du jour de la dite donation et les intimés n'en étant pas devenus propriétaires à la charge de la rendre, mais étant seulement chargés de l'administrer.

Qu'aucune des parties à l'acte n'ayant accepté cette disposition au nom des dits enfants, elle pouvait être valablement révoquée par l'appelant.

Qu'un acte par lequel un mari donne une pension alimentaire à

sa femme perd tous ses effets par suite de la reconciliation survenue subséquemment entre les époux.—*Smith & Davis*, Montréal, Lacoste, C J., Baby, Bossé, Blanchet, Hall, JJ., 26 janvier, 1893.

Distraction de dépens—Opposition—Intérêt de la partie quand les frais ont été distraits à son procureur.

Jugé, que la partie, étant responsable du paiement des dépens qui ont été distraits à son procureur, a un intérêt suffisant pour contester une opposition à la saisie faite à la poursuite de ce procureur sur distraction de frais.—*Fee & Peatman*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchet et Wurtele, JJ., 28 février, 1893.

SUPERIOR COURT ABSTRACT.

Will—Legacy— Vagueness and uncertainty—Trust—Intervention—Procedure—C. C. P. 157, 158.

Held:—By the will in question in this cause a trust was created in favor of public Protestant charities and poor relations: and the terms creating such trust were not so vague and indefinite as to make it incapable of execution.

A party who has obtained leave to intervene in a suit, is justified, after the lapse of eight days from service of his petition, in considering his intervention as admitted (C. C. P. 158), and may thereafter produce his grounds of intervention, without demanding from the other parties a plea to his petition.

The premature production of such grounds would, in any case, constitute merely an irregularity, to be attacked by motion, and not by exception to the form.—*Ross* v. *Ross*, Quebec, S. C., Routhier, J., May 10, 1892.

Delegation of payment—Acceptance—Evidence.

Held, 1. An order in writing, addressed by a creditor to his debtor, directing him to pay a certain sum out of the moneys due to the drawer by the drawee, and to charge the same to the drawer, is not a bill of exchange, but an assignment to the payee of so much of the claim of the drawer against the drawee.

2. The acceptance and retention of such order by the drawee renders the delegation of payment perfect, without a written acceptance, and the subsequent insolvency of the drawer or assignor does not divest the payee of his right to such amount.

3. Verbal evidence is admissible to prove that the order was accepted.

4. Interest is due by the drawee on the amount of the order only from the time that he is put *en demeure* to pay the same.—*Ward* v. *Royal Canadian Ins. Co.*, Montreal, in Review, Johnson, C. J., Tait and Davidson, JJ., Dec. 30, 1892.

Avocats—Distraction de frais.

Jugé, que l'avocat, qui a obtenu distraction de frais, et qui a fait émaner, au nom de son client, un bref d'exécution pour le montant du jugement, en capital, intérêt et frais, peut, néanmoins, faire exécuter ensuite son jugement pour le montant des frais qui lui ont été accordés par distraction, en son nom propre, et que l'émanation du premier bref d'exécution au nom du client, ne peut être considérée comme une renonciation à la distraction.—*McNamara* v. *Gauthier*, Montréal, C. S., 10 octobre 1892.

Action paulienne—Droits immobiliers—Compétence—C. C. P. 1054 *—Fraude—Annulation de vente—C. C.* 1032 *et seq.—C. N.* 1167.

Jugé : La Cour Supérieure (ou la Cour de Circuit, appelable) est seule compétente à connaître des causes relatives à des droits immobiliers, lors même que la demande est pour une somme moindre de $100.

Par Casault, J. La révocation d'un contrat frauduleux est prononcée non seulement en faveur du créancier qui la demande, mais aussi en faveur de tous les créanciers auxquels le contrat attaqué porte préjudice. *Leduc & Tourigny et al.*, 17 R. J. Q. 385, discutée. Et, sous ce rapport, il n'y a aucune différence entre un paiement (C.C. 1036) et un contrat, tous deux faits par un débiteur insolvable et réputés faits avec intention de frauder.

Pour les actions pauliennes, comme pour toutes les autres actions révocatoires, la juridiction est déterminée par la valeur des choses qu'elles ont pour but de rétablir, les premières dans l'actif du cédant, les autres dans celui de la personne qui les intente.—*Beaulieu* v. *Levesque*, Québec, en Révision, Casault, Caron, Andrews, JJ., 31 décembre 1892.

Tuteur et pupille— Vente par un mineur, devenu majeur, à son tuteur —Compte de tutelle—Distribution de deniers—Art. 311, *C. C.*

Jugé:—Que lorsque les droits du mineur ont été clairement déterminés par l'inventaire de la succession échue à ce mineur, et que le compte de tutelle ne serait qu'une répétition de cet inventaire, les revenus des biens du pupille étant plus qu'absorbés par les frais de garde et de l'éducation du mineur, la Cour ne mettra pas de côté une vente consentie par le mineur, devenu majeur, à son tuteur, de ses droits successifs, pour la seule raison que cette vente n'a pas été précédée d'un compte de tutelle, surtout lorsque les parties ont référé à l'inventaire comme constatant les droits de ce mineur.—*Lefebvre* v. *Goyette*, Montréal, en Révision, Taschereau, Tait et Pagnuelo, JJ., 30 novembre 1892.

Damages—Libel—Criticism of conduct of public man.

Held:—Though fair public criticism of a public servant is justifiable in the public interest, yet attacks on a public man based on unreliable rumors are pernicious and indefensible, and merit judicial reprobation.

In the present case, $100 damages were allowed for the publication (without malice) of a newspaper article reflecting on the conduct of plaintiff as a public man, such article being based upon alleged rumors which the proof showed to be unreliable and unfounded, and the truth of which defendant took no means to test, though he might easily have done so.—*Pelletier* v. *Pacaud*, Quebec, S. C., Andrews, J., December 30, 1892.

Certiorari—Summary convictions Act—Vagrancy—Costs— Amended conviction—R. S. C., c. 157, *s.* 8.

Held:—The provisions of the Summary Convictions Act apply to section 8 of chapter 157 of the Revised Statutes of Canada, respecting vagrants.

A mere informality in the drawing up of a conviction is not a sufficient cause for quashing it, nor (there being no substantial defect in the justice and legality of the proceedings before the convicting justice) any reason for the removal of such conviction into the Superior Court by *certiorari*.

Any such informality may be amended and a substituted conviction returned by the convicting justice.—*Reg. ex rel. Denis* v. *Beaudry*, Quebec, S. C., Andrews, J., December 24, 1892.

Procédure—Pension alimentaire—Insaisissabilité—Créance alimentaire—Art. 558, *C.P.C.*

Jugé, qu'une pension alimentaire déclarée insaisissable peut néanmoins être saisie à la poursuite d'une personne, dans l'espèce l'épouse du défendeur, à qui le créancier de cette pension alimentaire doit lui-même des aliments.—*Bélair* v. *Sénécal, & Sénécal, T.S.*, Montréal, C.S., Jetté, J., 1er. septembre 1892.

Arrestation mal-fondée—Erreur de nom—Publicité donnée à l'arrestation—Dommages—Responsabilité.

Un mandat d'arrestation ayant émané contre le frère du demandeur, deux officiers de police de la cité de Montréal, sans s'être procuré un signalement suffisant de l'accusé ni s'être renseigné sur ses prénoms et sa résidence, arrêtèrent le demandeur qui avait une certaine ressemblance avec son frère. Le demandeur passa la nuit dans les cellules d'une station de police et ne fut libéré que le lendemain.

Jugé: Que ce manque de précautions engageait la responsabilité des défendeurs, mais cette responsabilité ne s'étendait pas à la publicité donnée par les journaux à cette arrestation du demandeur, les défendeurs n'ayant aucunement participé à cette publicité.—*Bigras* v. *La Cité de Montréal*, Montréal, C.S., Jetté, J., 1er. sept. 1892.

Garantie de fournir et de faire valoir—Recours du cessionnaire—Insolvabilité du débiteur.

Jugé, que le cessionnaire d'une créance, qui lui est transportée avec garantie de fournir et de faire valoir, perd son recours contre le cédant, s'il retarde de plusieurs années à en poursuivre le recouvrement contre le débiteur, et si ce retard est cause de la perte de cette créance, à moins qu'il ne soit établi que ce dernier n'était plus solvable à l'époque du transport ou de l'exigibilité de la créance.—*Boisvert* v. *Augé*, Montréal, en Révision, Sir F. G. Johnson, J.C., Mathieu et Loranger, JJ., 13 février, 1892.

Sale—Contract in writing—Modification—Parol evidence.

Plaintiff, at Melbourne, sold to defendant lumber, intended for the New York market, which, by the terms of the contract in

writing, was "to be of good quality, and to be accepted at Belœil," thence to be forwarded to New York on defendant's own boat. At Belœil defendant pointed out to plaintiff, on the barge on which the lumber was laden, a quantity of culls which had been set apart on the deck, and objected to them. Plaintiff, according to his evidence, answered, "do the best you can with them," meaning, as he explained, that a small amount of lumber was nothing, in a quantity like the total amount sold; but he also asserted that he had refused to modify the contract, or to accept inspection of the lumber at New York. Defendant then paid $775 on account, and carried the lumber, including the culls, to New York, where the whole was sold. Defendant claimed that the contract had been modified, so as to make the lumber subject to inspection at New York.

Held, that the evidence of plaintiff did not justify the admission of parol evidence to show that the original contract, by which the lumber was to be accepted at Belœil, had been abandoned, or varied, so as to entitle the defendant to treat the entire cargo as sold subject to inspection at New York.—*Cross et al.* v. *Bullis*, Montreal, in Review, Johnson, C.J., Tait and Davidson, JJ., December 30, 1892.

SUPERIOR COURT.

SHERBROOKE, Jan. 31, 1893.

Coram BROOKS, J.

MOORE v. JOHNSTON et al.

Possessory action.

HELD:—1. *That title can legally be pleaded to a possessory action in respect of lands held in free and common soccage in the Eastern Townships.*

2. *That a holder by sufferance is without quality to bring a possessory action.*

3. *That the proof in the present case establishes that the possession of the plaintiff was not* ANIMO DOMINI, *but rather a possession by tolerance and sufferance of the real owner.*

BROOKS, J.:—

This is a possessory action to recover possession of the north-west half of the south west half of lot 17 range 10, Windsor, coupled with a demand for $2,000 damages.

The plaintiff alleges that he had been illegally dispossessed of the property of which he had been in possession *animo domini* for upwards of a year and a day.

He alleges that the defendants illegally conspired together to oust him from his property, and that he had been greatly damaged thereby.

The defendants, Johnston and Fraser, plead a denial of the allegations of the plaintiff, and especially that plaintiff was not in possession as owner, but as a tenant of the defendant, Louis Duchesneau.

They further plead title in the defendant Fraser of the property in question. This plea is demurred to by the plaintiff on the ground that adverse title cannot be pleaded as a defence to a possessory action.

This demurrer or answer-in-law, was heard, and *preuve avant faire droit* ordered.

The demurrer is unfounded and must be dismissed.

The principle seems to be well settled that adverse title can be pleaded in respect of lands held in free and common soccage in the Eastern Townships.

I find that this principle has been held in our courts in several cases, some of which are unreported.

In a case from Arthabaska of *Hamel* v. *Jacques*, this point was decided by Mr. Justice Polette, and his judgment was confirmed by Judges Meredith, Taschereau and Stuart, in Review.

I have seen the record in that case, and the factum of the plaintiff Hamel, and a copy of the judgment.

It was a possessory action in respect of land of which Hamel had been in possession under a location ticket from the Crown.

During his absence in the States, the defendant Jacques recovered judgment against him, and brought this land to Sheriff's sale, buying it himself at a nominal price. Hamel returned and resumed possession and was afterwards forcibly dispossessed by the defendant Jacques. Hamel then brought a possessory action against Jacques who pleaded the Sheriff's title. This plea was demurred to and the demurrer was over-ruled on the ground that the land was situate in the Eastern Townships, and held under the free and common soccage tenure, and that title could be pleaded in respect of such lands. This judgment was confirmed in Review as before stated.

A similar judgment was rendered by the Court of Review at Quebec (Judges Casault, Andrews & Caron) in a case No. 113

Vigneau v. *Champoux*, also from Arthabaska. I have also seen the record in that case and examined the pleadings, and it appears to be in point.

The case of *Fahey* v. *Watts*, 11 Q.L.R. 354, decided by Judges Stuart, Casault & Andrews is to the same effect.

Then there was a case No. 58, *Millette* v. *Desrochers et al.*, from Arthabaska, in which this same question was raised by a demurrer to a plea. The demurrer was over-ruled by judgment of the Superior Court, and leave to appeal therefrom to the Court of Queen's Bench, Appeal Side, was refused. The record in that case has also been placed before me.

These decisions appear to be based upon Arts. 948 and 1110 C.P.C., and upon the principle that to allow title to be pleaded may avoid a circuity of actions.

I have less hesitation in holding this doctrine in the present case, from the fact, which to my mind is well established, that the possession of the plaintiff was not as owner but through tolerance, and that the defendant Fraser, was acting in good faith under the authority of a writ of possession granted him by the Court.

Plaintiff's possession was not *animo domini*, it was not such a possession as would entitle him to an *action possessoire*. Poth. Poss. 1-15-100-115., C.P.C. Art. 946. He produced no title whatever characterizing his possession, and it is proved that before Duchesneau bought this property on the 10th November, 1890, plaintiff occupied simply by the charity and tolerance of his brother W. H. Moore, who was the registered and actual owner, and who aided and assisted plaintiff by allowing him the use of the farm and by giving him money, seed grain and cattle, etc., with which to carry it on. It appears also that when this property was about being sold at public sale on the 10th November 1890, the plaintiff made some arrangement with defendant Duchesneau to buy in the property and allow plaintiff to remain on in possession.

I am satisfied from the evidence that after the 10th of November, 1890, the plaintiff occupied by the sufferance of the defendant Duchesneau who had the legal possession through the plaintiff his tenant. Poth. Poss. (Bugnet's Ed.) No. 15.

Action dismissed.

Brown & Morris for plaintiff.

Hurd & Fraser for defendants.