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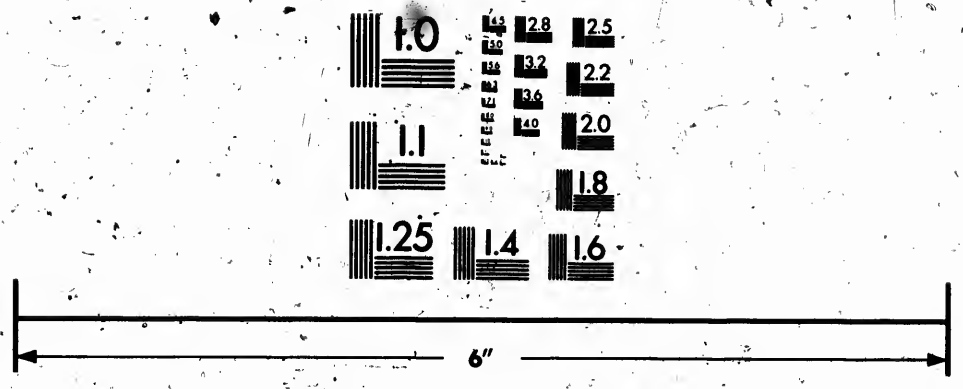

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THE

MONTREAL LAW REPORTS.

COURT OF QUEEN'S BENCH.

JAMES KIRBY, Editor.

CASES DETERMINED IN THE COURT OF QUEEN'S BENCH, MONTREAL.

1890.

(With some cases of previous years.)

CONTRIBUTORS: (*Reports distinguished by initials.*) { JAMES KIRBY. EUGENE LAFLEUR.

VOL. VI.

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1890.

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JUDGES

OF THE

COURT OF QUEEN'S BENCH.

1890.

THE HON. SIR ANTOINE AIMÉ DORION, KT., *Chief Justice.*

" ULRIC JOSEPH TESSIER,
" ALEXANDER CROSS,
" LOUIS FRANÇOIS GEORGES BABY,
" L. RUGGLES CHURCH,
" JOSEPH G. BOSSÉ. } *Puisne Judges.*

" M. DOHERTY, *Assistant Judge.*

Attorney General:

THE HON. J. E. ROBIDOUX.

Clerk of Appeals:

L. W. MARCHAND.

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DECIDED IN THE

COURT OF QUEEN'S BENCH IN APPEAL,

MONTREAL.

January 25, 1890.

Coram DORION, Ch. J., TESSIER, BABY, CHURCH, BOSSÉ, JJ.

JAMES McSHANE,

(*Mis en cause in Court below*),

APPELLANT;

AND

AUGUSTE T. BRISSON,

(*Petitioner in Court below*),

RESPONDENT.

Quebec Election Act, 38 *Vict. ch.* 7, *s.* 272—*Mis en cause*—*Quebec Controverted Elections Act*, 38 *Vict. ch.* 8—*Jurisdiction of Court of Review.*

At the trial of the election petition against the return of a member to represent the County of Laprairie, in the Quebec legislative assembly, evidence was given that the appellant had committed acts of bribery and corruption at the election, whereupon he was summoned, under Sect. 272 of the Quebec Election Act of 1875, to appear and answer the charges made against him. He appeared, denied the charges, went to evidence, and the case being heard before the Superior Court sitting in Review, as a Court of first instance, under the Controverted Elections Act of 1875, he was found guilty of two cases of corrupt practices, at the election, and condemned to pay a fine of $200 for each offence, with costs and imprisonment, in default of payment.

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HELD: (Reversing the decision of the Court of Review, M.L.R. 6 S.C. 102,

1. That the Quebec Election Act of 1875 confers no authority upon the Superior Court sitting in Review, to enquire into and determine any charge of corrupt practices against the provisions of the Act; the only authority conferred by the Act to try and determine such charges being conferred on the Superior Court held by one Judge thereof, as provided for by sects. 272, 273, 274 and 292 of the Act.
2. That the jurisdiction of the Superior Court sitting in Review is limited by the Controverted Elections Act of 1875, to the hearing of the parties to an election petition and the determination of the issues raised thereon between the parties to such petition, including charges of corrupt practices against any of the candidates, at the election, who are made parties to the Controverted Election petition.
3. That as the appellant was neither an elector, nor a candidate, nor a returning officer, nor a deputy returning officer, at the election, he could not be, and in fact was not, a party to the election petition, and was not amenable to the jurisdiction of the Court of Review, as a court of original jurisdiction.
4. That the power conferred by sub-section 4 of section 89 of the Controverted Elections Act, to determine all matters arising out of the election petition, refers to such matters only as are in issue on the election petition between the parties thereto, and does not extend to collateral and independent issues with parties unconnected with the election petition, such as charges of corrupt practices against persons who were not candidates at the election and are not parties to the election petition.
5. That the Superior Court sitting in Review had no jurisdiction to hear and determine, as a Court of first instance and without appeal, the charges of corrupt practices against the appellant; the Superior Court held by one Judge, or a Judge thereof, having sole jurisdiction in the matter, subject to a review before three Judges and to an appeal to this Court as provided for with regard to judgments rendered by the Superior Court.
6. That an appeal lies to this Court from every judgment rendered by the Superior Court sitting in Review for excess of jurisdiction, and that that part of the judgment of said Court by which the appellant was found guilty of corrupt practices and condemned to pay two fines of $200 each, with costs and imprisonment in default of payment, is *ultra vires* and must be set aside, and the record returned to the Superior Court, in order that the proceedings may be continued, as if the case had not been heard, nor adjudicated upon, by the Court sitting in Review.

APPEAL from part of a judgment of the Superior Court in Review, sitting as an election Court (JETTÉ, GILL, LORANGER, JJ.), January 3, 1889. The judgment of the Court below is reported in M.L.R., 6 S.C. p. 102; and the judgment of the Court of Appeal on the application for

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leave to appeal, is reported in 12 Leg. News, p. 42. The present appeal complained only of the portion of the judgment referring to the *mis en cause*, McShane. The appeal was based on the pretension that the Court of Review had no jurisdiction in the premises, and that the judgment in question, whereby the appellant was disqualified for seven years and condemned to pay two penalties of $200 each, was null and void.

Nov. 18, 1889.]

J. J. Curran, Q.C., was heard for the appellant *ex parte*. No counsel appeared for the respondent.

DORION, Ch. J. (for the Court) :—

On the controverted election petition of A. T. Brisson, one of the respondents, against the return of Odilon Goyette, as member to represent the County of Laprairie in the Legislative Assembly for the Province of Quebec, the Superior Court, sitting in review, declared the appellant guilty of corrupt practices in exercising, by menaces, undue influence over one Carmel, and by offering $1 to one Louis Dupuis, to induce them to vote for Goyette, and condemned him to pay a fine of $200 for each offence, with costs and imprisonment in default of payment, (38 Vict. c. 7, ss. 249, 258 and 300). By this conviction, the appellant is rendered incapable of being elected to and of sitting in the Legislative Assembly, and of voting at any election of a member of such house, or of holding any office in the nomination of the Crown or of the Lieutenant Governor in the Province. (50 Vict. ch. 10, s. 1.)

The appeal raises two important questions, namely : 1. Had the Court of Review any jurisdiction to entertain the charges against the appellant?

2. Is there an appeal from the judgment rendered by the Court of Review?

By sect. 292 of the Quebec Election Act (38 Vict. ch. 7), every prosecution concerning a penalty imposed by the Act, may be brought by an elector of the electoral district in which the infringement is alleged to have taken place,

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by an action of debt, before any Court, in such district, having civil jurisdiction for the amount demanded.

This is the general rule, and in the present case an action might have been brought by an elector qualified to vote in the county of Laprairie, against the appellant in the Superior Court, which is the Court having jurisdiction for the amount of the penalties awarded.

But by section 272, of the Quebec Election Act, it is provided, that, "Whenever it shall appear to the Court "or Judge trying an election petition, that any person "has contravened any of the provisions of the Act, the "Court or Judge may order that such person be summoned to appear before such Court or Judge, at the "place, day and hour fixed in the summons for hearing "the charge."

S. 273.—"If at the time so fixed by the summons, the "party summoned do not appear, he shall be condemned, "on the evidence already adduced on the trial of the "election petition, to pay such fine or undergo such imprisonment, in default of payment, to which he may be "liable for such contravention, in conformity with sect. "300."

S. 274.—"If, on the contrary, the party so summoned "do appear, the Court or *Judge*, after hearing such party "and such evidence as he may adduce, shall give such "judgment as to law and justice may appertain."

The *Judge* or *Court* mentioned in these sections is a *Judge* of the Superior Court, or such Superior Court held by one Judge thereof to whom the same powers, jurisdiction and authority are given for the trial of controverted election petitions, as to the Superior Court sitting in term. (38 Vict. ch. 8, ss. 4, 11, 45, 82 and 86.)

Two modes are thus provided for the recovery of penalties incurred under the Quebec Election Act of 1875, the one is by an ordinary action of debt brought by an elector before the Superior Court, and the second is upon the summons of the Superior Court, or of a Judge thereof trying an election petition, ordering the party to appear before the said Court or *Judge* and answer the

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charge, in which case the Court or *Judge* is authorized to summarily condemn the defendant, if he does not appear, or to find him guilty or not guilty of the charge, after hearing him and his evidence, if he does appear. Both remedies are provided for under the Quebec Election Act, (38 Vict. ch. 7.) In either case, the judgment is a judgment of the Superior Court, and is subject to review under Art. 494 of C. C. P., and to an appeal to this Court under Art. 1115, of C.C.P.

The Quebec Controverted Elections Act, 38 Vict. ch. 8, merely provides for the trial of election petitions.

An election petition can only be presented by one or more of the electors duly qualified to vote at the impeached election, or by one or more of the candidates at said election, and the only persons who can be made defendants or respondents on an election petition are the member returned, any candidate charged with having acted at the election in contravention to the Election Act, and any returning officer, or deputy returning officer, whose conduct was complained of by the petition. (38 Vict., ch. 8, ss. 6, 19, 21, 26, 28 and 29.)

The appellant was neither an elector nor a candidate, nor a returning officer or deputy returning officer, at the Laprairie election, so that he could not be a party to the election petition, either as petitioner or as defendant, and in fact he was neither a petitioner nor a defendant on the said Laprairie controverted election petition. *South Oxford election case*, 1 Hodgins, 238, Draper, C.J., "Held: that "there was no authority in the Election Acts or elsewhere, "for making an agent of a candidate a respondent on a "petition, on a charge of personal misconduct on his "part."

This case came under the Ontario Controverted Elections Act of 1871—which is somewhat different from the Quebec Controverted Elections Act of 1875, as regards parties to election petitions, but the principle upon which the above ruling took place applies equally to the present case, as shown by the report.

The only cases in which any jurisdiction is expressly

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given to three Judges of the Superior Court sitting in Review, by the Quebec Controverted Elections Act (38 Vict., ch. 8) are those mentioned in sect. 41 and in sect. 89 of the said Act.

Sect. 41 provides for the hearing in review on the preliminary objections to the petition, and has no reference to the present case.

Sect. 89 is in the following words: The Superior Court sitting in Review shall determine:

1. Whether the member whose election or return is complained of, has been duly elected, or declared elected; or

2. Whether any other person, and who, has been duly elected; or

3. Whether the election was void; and

4. All other matters arising out of the petition, or requiring its determination.

Sect. 90.—Such judgment shall not be susceptible of appeal.

A copy of the judgment must be transmitted without delay to the Speaker of the Legislative Assembly (Sect. 91); and when any charge is made in an election petition of any corrupt practice, the Court is further directed (Sect. 92), to transmit to the Speaker with its judgment a report in writing, stating:

1. Whether any corrupt practice has been proved to have been committed by or with the knowledge and consent of any candidate, the name of such candidate, and the nature of such corrupt practice.

2. The names of persons against whom any corrupt practice has been proved.

3. Whether corrupt practices have, or whether there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates.

It is not, I believe, contended that there is either in the Quebec Election Act of 1875, or in the Quebec Controverted Elections Act of 1875, any express provision giving to the Superior Court sitting in Review, the right to adjudicate on the charges of corrupt practices which a party may be

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summoned to answer, as provided by ss. 272, 273 and 274, of the Quebec Election Act; but it is suggested that this right is implicitly conferred by the terms of the 4th sub-sect. of sect. 89 of the Controverted Elections Act, requiring the Court to determine "*All other matters arising* "*out of the petition*, or requiring its determination," and also by the fact that the Court is bound to report to the Speaker any cases of corrupt practice proved at the trial.

Dealing first with the report to the Speaker, we say, it is no part of the judgment; it is not conclusive against the parties reported to have committed corrupt practices at an election, and it has nothing to do with conferring jurisdiction on the Court sitting in Review, to hear and determine such charges, on the summonses issued by the Court or Judge against parties accused of such corrupt practices.

The sect. 92 of the Controverted Elections Act, requiring such report, was in the Act of 1872 (36 Vict., ch. 5, s. 18), while sect. 272 of the Quebec Election Act was only enacted in 1875, so that the law required reports to be made to the Speaker three years before there was any means provided to summon the parties charged with corrupt practices, to answer such charges, unless they had been candidates at the election. The difference between the judgment and the report is very distinctly indicated by sects. 90 and 92 of the Controverted Elections Act, and was fully recognized by the Courts in England, in the case of *Stevens* v. *Tillett*, L. R. 6 C. P. 147, also in *Hopkins* v. *Oliver*, 1 Hodgins, 238, Draper, C. J., and in *Hibbard & Tupper*, Cumberland Election case, Johnson, Henry and James, JJ., of Nova Scotia Election Court, 16th August, 1874.

The report of the Court is only for the information of the Legislature, and can have no effect upon the rights and standing of the parties reported upon. *Cholette* v. *Bain*, Soulanges election case, 10 Supreme C. R. 652.

The contention that the necessity of making such a report authorizes the Court to d[illegible] questions of corrupt

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practices, so as to bind persons who are not parties to the election petition, is therefore unfounded.

There remains to ascertain the meaning of the words, "*All other matters arising out of the petition* or requiring "its determination," in sub-sect. 4, of section 89 of the Controverted Elections Act.

The petitioners, in an election petition, may complain of the undue return or undue election of a member, or of no return, or of a double return, or of matters contained in a special return, or of any unlawful act of any candidate not returned, by which such candidate is alleged to have become ineligible or be disqualified to sit in the Legislative Assembly, or of the conduct of any returning officer or deputy returning officer. (Sect. 6 and 21 of the Act.)

The defendant or respondent on such petition may also go into evidence to show that any other candidate has been guilty of corrupt practices, at the election, in the same manner and to the same effect as if he had himself presented a petition complaining of the conduct of such candidate. (Sect. 55.)

All these matters may form the subject of as many issues upon an election petition.

The first three sub-sections of Sect. 89 merely authorize the Court sitting in Review to decide the following issues, that is: 1. Whether the member returned has been duly elected; 2. Whether any other person has been duly elected; and 3. Whether the election is void. These sub-sections do not provide for the determination of the questions whether any candidate or any returning officer or deputy returning officer has been guilty of any unlawful act at the election, nor of a variety of other incidental questions which may arise on a double return, or on a special return, and it is to such questions, and to such questions only, that the expressions, "*All other matters arising out of an election petition*" in sub-sect. 4, can apply, that is to questions in issue between the parties to the election petition which are of the same character, *ejusdem generis*, as those mentioned in the three first sub-sections. They cannot apply to anything else, for courts

of justice are never called upon to decide what is not in issue, nor other issues than those arising between the parties to the particular suit, or proceeding, they have to dispose of.

We have already seen that the appellant was not and could not be a party to the election petition against the return of Odilon Goyette, and he could not therefore be a party to the issues raised on such petition.

That sub-sect. 4 does not apply to a charge of corrupt practice against a party who was not a candidate at the election, is made clearer still, by the difference in the proceedings to be adopted when the party charged with corrupt practice is a candidate, and those to be had when he is not a candidate.

In the first case the proceedings are taken under the provisions of the Controverted Elections Act, the candidate is made a party to the election petition, if he is not already in the case, and the whole case is enquired into as part of the proceedings on the election petition;—on the contrary, in the case of charges against parties who were not candidates, the whole proceedings are taken under the Election Act, which prescribes how the party shall be summoned, tried, and his case adjudicated upon without any reference to the election petition, and this may be done before or after the judgment on the petition, as appears by sections 272, 273 and 274 of the Election Act.

The two statutes were not only passed during the same session, but they were considered together, since they are respectively described as chapters 7 and 8 of the 38 Vict.; and if it had been the intention of the Legislature to subject the two cases to the same procedure, they would not have failed to apply the same enactment to both cases, instead of providing two different remedies, in two different statutes.

But there is more than this. It cannot be doubted that under sect. 273 and 274 of the Election Act, any Judge of the Superior Court trying the election petition, or the Superior Court held by one Judge, had the right to adju-

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dicate upon the charges against the present appellant, and that if instead of referring the case to the Court of Review, the Judges trying the charges had found him guilty of corrupt practices, the judgment, being the judgment of the Superior Court, would have been appealable, as any other judgment of the Superior Court, to the Court of Review and to this Court, at the option of the party wishing to appeal. It is also undoubted that if the Court of Review had a right to decide the case against the appellant, there would be no appeal from its judgment, since sect. 90 of the Controverted Elections Act expressly declares that the judgment rendered under sect. 89 is not appealable; the words are, "Such judgments are not susceptible of appeal."

The Legislature would thereby have provided in two different statutes, sanctioned on the same day, two remedies before two different tribunals, for the same offence committed by the same party, with appeal in one case and without appeal in the other. The Court of Review would thereby have been made a Court of Appeal under the Election Act, and a Court of original jurisdiction under the Controverted Elections Act.

In 1887, the sections 269 and 270 of the Election Act of 1875 were replaced by the following: "S. 269.—*If, on "the trial of any election petition, any candidate is proved to "have personally engaged at the election to which such petition "relates as a canvasser or agent, etc.*..... S. 270.—*Any person, "other than a candidate found, in violation of the provisions of "this Act, guilty of any corrupt practice, etc.* (50 Vict. ch. 10, s. 1.)

These two sections make it clear that candidates are to be tried for corrupt practices under the Controverted Elections Act, while other than candidates are to be tried under the provisions of the Election Act.

It will probably be asked, why this distinction? The answer is simple enough. When, on the trial of an election petition, the return of a member is set aside, it is almost always necessary to ascertain whether some of the other candidates are not entitled to the seat, and this must

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be determined at the same time that the return is set aside, for if the other candidates are disqualified for corrupt practices, none of them could be declared entitled to the seat of the member whose election is annulled, while the same reason does not exist in the case of other parties who were not candidates, for it is quite immaterial for the determination of an election petition whether or not parties, other than candidates, who may have been guilty of corrupt practices at an election, are prosecuted or not for such offences.

There is also an evident advantage in having the candidates at an election, who are always few in number, tried for corrupt practices on the election petition, as they are thereby all placed on the same footing, while it would lead to the utmost confusion and delay if ten, twenty or a greater number of other parties charged with corrupt practices, were made parties to the election petition, and it would almost become impossible in that case to arrive at a final determination on the election petition.

But the most cogent reason is that the Legislature has so ordered it. The trial of charges against a candidate takes place under the Controverted Elections Act, because they are part of the issues raised on the election petition, while the charge against other than candidates has no connection with the election petition; does not arise out of such petition, no more than a charge for contempt (38 Vict. c. 8, s. 67), or that a witness has committed perjury, on the trial of an election petition, could be said to be charges arising out of an election petition, and be determined by the Court of Review. In all these cases the trial of the election petition is the occasion on which the offences are discovered or manifested, but the charges do not arise out of the election petition, and the parties can only be tried in the mode provided for by law. In the case of the appellant the only mode provided was under sections 273 and 274 of the Election Act.

We therefore hold that the Court of Review had no jurisdiction over this case, and could not convict the

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appellant of corrupt practices and thereby deprive him of a right of appeal, which we have frequently allowed to parties in the same circumstances as the appellant. *Leroux & Prieur*; *Duval & Prieur*; *Elie & Prieur*, Montreal, 18 March, 1887; *Caron & Masson*; *Olivier & Pronovost*; decided at Quebec in October 1888.

We now come to the second question: Is there an appeal from the judgment rendered against the appellant?

The judgment contains three distinct adjudications. By the first, the Court of Review has avoided the election of Goyette: the second deals with charges of corrupt practices against the appellant, and the third with similar charges against one Bourassa. The three may therefore be considered as separate judgments, as each case might have been determined separately without reference to the other two. If the Court of Review had found the appellant guilty of corrupt practices before the case of the election petition had been inscribed or after it had been decided, there would undoubtedly have been an appeal from its judgment, under Art. 494 of the C. C. P., and the fact that the Court has joined a case in which it had no jurisdiction to one which came under its judicial authority cannot deprive the party aggrieved of a recourse which he would otherwise have.

The first requirement to the validity of a judgment is that it should be rendered by a tribunal clothed with authority to render it, and in every other country there is a remedy against a judgment rendered by a Court having no jurisdiction. The remedy here is by a writ of *certiorari* before the Superior Court, when the tribunal is one of inferior jurisdiction, and by appeal, when the judgment does not emanate from a Court of inferior jurisdiction, that is, inferior to that of the Superior Court. In the present case, the judgment being a decision from the Court of Review could not be impeached by *certiorari*, and it was rightly questioned by the ordinary proceeding of appeal applying to judgments of the Court of Review. Art. 494 C. C. P. If we were to hold that there is no appeal in this case, it would imply that there is an appeal

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from judgments of the Court of Review when that Court acts within its jurisdiction, as an appellate Court from judgments rendered by the Superior Court, but that there is no appeal and no remedy, when it acts without jurisdiction as a Court of first instance and of last resort.

The rule that all judgments rendered by a Court having no jurisdiction *ratione materiæ* are null and are susceptible of appeal, is so well settled under our system, that the ordinance of 1667, Tit. 6, contained express provisions to that effect, and the French code of procedure contains two articles on the subject.

They are articles 453 and 454. Art. 453 says: "Seront "sujets à appel, les jugements qualifiés en dernier res- "sort, lorsqu'ils auront été rendus par des Juges qui ne "pouvaient prononcer qu'en première instance....."

Art. 454 says: "Lorsqu'il s'agira d'incompétence, l'ap- "pel sera recevable, encore que le jugement ait été qua- "lifié en dernier ressort."

The terms of these articles show that Courts of Justice cannot acquire a jurisdiction they have not, by whatever qualification they may give to their judgments,—and this is self-evident since jurisdiction is a matter of public interest and public policy.

Carré & Chauveau, in their observations upon these articles, vol. IV, pp. 113 and 117, have shown that these articles were not adopted to give a new remedy against judgments rendered by Courts having no jurisdiction, but to settle a disputed point of jurisprudence, whether such judgments should be taken to the Courts of Appeal or to the Cour de Cassation.

Bonnier, Traité de la Procédure Civile, p. 415, says: "Les questions de compétence n'étant pas susceptibles "d'une évaluation pécuniaire donnent toujours ouverture "à l'appel."

The author shows that this rule has been applied to judgments rendered in commercial cases, and gives the reasons of the rule which is of general application.

This Court has already in a number of cases acted upon the same principle, and more particularly in the case of

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the *Town of St. Henri & Viau*, decided on the 21st of December, 1875.

The circumstances of this last case, were in some important particulars analogous to the present one. The question arose under the Quebec Election Act of 1875, which directs that the lists of electors are to be prepared and revised by the municipal councils.

By the 41st section of the Act, an appeal is given to a Judge of the Superior Court; such Judge is authorized to hear and decide such appeals (s. 44), and possesses all the powers conferred upon the Superior Court (s. 45), and the decision is final (s. 48).

In that case, Viau appealed, from the list of electors prepared by the council, to the Circuit Court instead of to a Judge of the Superior Court. The town of St. Henri being dissatisfied with the judgment, appealed to this Court. A motion to dismiss the appeal, for want of jurisdiction, was made by Viau, and he urged that both by the Election Act and by the Municipal Code, the judgment revising the lists was final; but the appeal was maintained, and on the 21st of December, 1875, the judgment was reversed on the distinct ground that the Circuit Court had no jurisdiction in the matter.

The same rule was held in several other cases, under different circumstances, and among others, in *McLaren & The Corporation of Buckingham*, 21st June, 1875, Ramsay's Appeal cases, 42; *Rolfe & The Corporation of Stoke*, 24 L.C.J. 103 and 3 Leg. News, 69; *Cooey & The Corporation of Brome*, 1 Leg. News, 519.

We are of opinion that the judgment must be set aside, because the Court of Review had no jurisdiction; but as the case was rightly before the Superior Court up to the time the Court of Review assumed without authority to adjudicate upon it, we consider that the proceedings, since the motion of the appellant, to reject the inscription in the Superior Court, should be set aside, and the record sent back to the Superior Court, for the case to be proceeded with in the ordinary course.

We do not think any costs should be awarded on

this appeal, and the costs in the Court below are reserved.

The judgment of the Court is recorded as follows:—

"The Court of Our Lady the Queen, now here, having heard the appellant *ex parte* by his counsel, examined as well the record and proceedings, etc.....

"Considering that the Quebec Election Act, 38 Vict., ch. 7, sections 272, 273 and 274, contains the following provisions, to wit, section 272: 'Whenever it shall 'appear to the Court or Judge trying an election petition 'that any person has contravened any of the provisions 'of this Act, such Court or Judge may order that such 'person be summoned to appear before such Court or 'Judge, at the place, day, and hour fixed in the summons 'for hearing the charge;' sect. 273: 'If at the time so 'fixed by the summons the party summoned do not 'appear, he shall be condemned, on the evidence already 'adduced on the trial of the election petition, to pay 'such fine or undergo such imprisonment in default of 'payment, to which he may be liable for such 'contravention, in conformity with sect. 300;' sect. 274: 'If, on the contrary, the party so summoned do appear, 'the Court or Judge, after hearing such party and such 'evidence as may be adduced, shall give such judgment, 'as to law and justice may appertain;'

"And considering that the said appellant was under the above provisions summoned, by order of the Judge trying the controverted election petition of respondent Brisson against the return of Odilon Goyette, to represent the County of Laprairie in the Legislative Assembly of the Province of Quebec, to appear before the Judge trying the said controverted election petition, to answer the charge of having committed, at said election, the acts of bribery and corruption mentioned in the petition annexed to the writ of summons;

"And considering that upon the said summons the appellant has appeared before the Judge trying the said controverted election petition, and has denied the charge made against him;

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"And considering that under section 14 of the Quebec Controverted Election Act, 38 Vict., ch. 8, whenever used in the said Act the word 'Judge' means any one of the Judges of the Superior Court of the Province, or such Superior Court held by any one Judge thereof;' that by section 9 of said Act, it is provided that 'the Superior 'Court of this Province shall have jurisdiction over 'election petitions and over all proceedings to be had in 'relation thereto, subject nevertheless to the provisions 'of this Act;' that by section 11, 'In all proceedings had 'under the authority of this Act, the Judge in term or in 'vacation shall have the same powers, jurisdiction and 'authority as the Superior Court sitting in term, subject 'always to the provisions of this Act;' and by sect. 45, that 'every election petition shall be tried before a Judge,' and that by virtue of the above provisions the Superior Court held by one Judge and a Judge of said Court trying the said controverted election petition and having the same power as the Superior Court, were alone duly authorized under the above provisions to take evidence and hear the appellant on said summons and charges to which it applied;

"And considering that under sections 19, 21, 26 and 27 of the Quebec Controverted Elections Act, 38 Vict., ch. 8, an election petition can only be presented by one or more of the electors duly qualified to vote at the election complained of, or by one or more of the candidates at such election, and that the only persons who could be made respondents on such a petition are the member returned, any of the candidates charged in said petition with having been guilty of illegal acts at such election, and any returning officer or deputy returning officer, whose conduct is complained of by the petition;

"And considering that the appellant was not a party to the said election, as he was neither a petitioner nor a candidate, nor a returning officer, or deputy returning officer, at said election, and could not under any of the sections of the said Act be made a party to the said election petition;

"And considering that the Superior Court sitting in Review is composed of three Judges of the said Superior Court, and that the authority and jurisdiction of the said Court so sitting in Review, under the Controverted Elections Act, is determined by sect. 41, which confers on that Court the power to confirm or reverse the decision given on the preliminary objections raised to the election petition by the Judge trying such election petition, and by sect. 89, which provides that the Superior Court sitting in Review shall determine, '1. Whether the member whose election or return is 'complained of, has been duly elected or declared elected,' or, '2. Whether any other person, and who, has been 'duly elected,' or, '3. Whether the election was void,' and '4. All other matters arising out of the petition, or 'requiring its determination;'

"And considering that the special cases to be determined by the Court sitting in Review under paragraphs 1, 2, 3 of the said section, are cases arising out of the issues raised by the election petition and contestation thereof, between the parties to the said election petition, and that the other provisions contained in the general expressions, 'all other matters arising out of the petition or requiring 'its determination,' necessarily refer to such matters which are similar to those mentioned in the special provisions contained in paragraphs 1, 2, 3 of said section, to wit, to matters arising out of the issues raised on the said election petition and between the parties to such petition, and which it was necessary to determine in order to adjudicate on the merits of the petition, such as complaints against any of the candidates at said election, or any returning officer and deputy returning officer, parties to the election petition, and reviewing the rulings of the Judge on the preliminary objections to the petition under sect. 41, also questions as to the admissibility or rejection of evidence, and other like questions, the rule '*ejusdem generis*' applying to this case;

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"And considering that the summons against the appellant has not been issued by virtue of any provision contained in the Quebec Controverted Elections Act, 38 Vict., ch. 8, but has been issued under the authority of a totally different statute, to wit, the Quebec Election Act, 38 Vict., ch. 7, sect. 272, and that the said Act provides by sections 273-274, above cited, a complete remedy before the Superior Court presided over by one judge, or before the judge trying the controverted election petition, who has the same power as the Superior Court, to the exclusion of the Court sitting in Review to which the Act gives no authority or jurisdiction either for issuing such summons, for taking evidence, or for trying or deciding the issues raised under such summons;

"And considering that the assumption by the said Court sitting in Review, of the jurisdiction of a Court of original jurisdiction not conferred upon it by any provision of either of the said two Acts, or by any other provision of law, had the effect of depriving the appellant of the right of appeal to which he would have been entitled, if he had been condemned by the Superior Court or by the Judge trying the election petition, which right of appeal is by law secured to any person charged with the same offence and tried by the Superior Court, under section 292 of the Quebec Election Act or by sections 273 and 274 of the said Act;

"And considering that the said Court sitting in Review had no jurisdiction to adjudicate upon the issues raised by the said summons against the appellant, and that in doing so, it did not act under the authority of any provision of the Quebec Controverted Elections Act of 1875; and considering there is an appeal from the decisions of the Court of Review unless that appeal is expressly denied by law; and considering that there is error in that part of the judgment rendered in this cause by the Superior Court sitting as Court of Review at Montreal on the 3rd of January, 1889, by which the said appellant was condemned to pay a fine of $200 for each of two of the contraventions of the provisions of the Quebec Election

Act, with which he has been charged by the said writ of summons, with imprisonment in default of payment, as provided by section 300 of the said Quebec Election Act, this Court reversing that part of the said judgment rendered by the Court of Review on the 3rd January, 1889, condemning the said appellant to pay the two said sums of $200 each, amounting in all to $400, doth reverse and annul the same, and doth order that the record be remitted to the office of the prothonotary of the Superior Court for the district of Montreal, in order that the said case may be proceeded with before the said Superior Court as from and after the closing of the *enquête* on the issues raised by the said summons, costs reserved on the proceedings in the Court below, but without costs on this appeal."

Judgment reversed.

Geoffrion, Dorion, Lafleur & Poirier, for appellant.

J. J. Curran, Q. C., counsel.

(J. K.)

September 27, 1888.

Coram TESSIER, CROSS, CHURCH, DOHERTY, JJ.

BENJAMIN BEAUCHAMP,
(*Defendant in Court below*),
APPELLANT;

AND

CHARLES L. CHAMPAGNE,
(*Plaintiff in Court below*),
RESPONDENT.

Slander—Criticism of conduct of member of Parliament—Imputation of dishonest motives.

HELD:—(Affirming the judgment of the Court of Review, M. L. R., 2 S. C. 484), That while the conduct of a member of Parliament in his public capacity is subject to criticism, and an action is not maintainable for an imputation which arises fairly and legitimately out

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of his conduct as such member, an imputation, unsupported by evidence, of dishonest motives in voting upon a question, and of selling his influence, is unjustifiable, and an action of damages based upon such accusation will be maintained.

APPEAL from a judgment of the Court of Review, Montreal, condemning the appellant to pay $250 damages. The judgment of the Court of Review reversed the judgment of BELANGER, J., in the Court of first instance, which dismissed the action.

The following observations were made by the judge who delivered the judgment of the Superior Court :—

BÉLANGER, J. :—

Cette action en dommages a été intentée le 18 janvier 1882.

Par sa déclaration, le demandeur allègue :

Qu'il a été élevé dans la paroisse de St-Eustache où il exerce la profession d'avocat depuis quinze ans.

Qu'il est le représentant du comté des Deux-Montagnes dans le parlement de Québec, depuis près de six ans.

Qu'il a toujours joui d'une réputation sans tache tant comme citoyen et avocat que comme homme politique, jusqu'aux époques ci-après mentionnées.

Que le défendeur réside à St-Hermas où il exerce une certaine influence.

Que depuis le mois de septembre alors dernier (1881) le défendeur a posé sa candidature en opposition à celle du demandeur pour les élections provinciales qui eurent lieu en novembre alors dernier (1881).

Que pour réussir à obtenir le suffrage des électeurs, le défendeur lança dans le public les insinuations et accusations les plus graves contre le caractère tant privé que public du demandeur, et de nature à le ruiner dans l'opinion publique et à lui faire perdre la confiance de ses constituants ; les accusations allant à dire qu'il avait vendu son influence politique et qu'il s'était vendu.

Que le ou vers le 3 novembre alors dernier, à une grande assemblée des électeurs du comté de Terrebonne tenue au village de Ste-Thérèse, le défendeur a dit et répété

devant un grand nombre de personnes, que le demandeur avait vendu son influence politique à l'Université Laval, et qu'il avait reçu ou dû recevoir au moins mille piastres pour supporter et faire passer en chambre le bill connu comme Bill de l'Université Laval.

Que le ou vers le 26 novembre alors dernier, en la paroisse de Ste-Monique, dans le dit comté des Deux-Montagnas, à une assemblée des électeurs de la dite paroisse Ste-Monique, convoquée par le défendeur en vue de l'élection qui se faisait alors, le défendeur sans droit et sans raison, mais par malice préméditée et dans le but de ruiner le demandeur dans sa réputation et de lui faire perdre l'estime, le respect et la confiance de ses concitoyens et électeurs, aurait par ses paroles, ses gestes et actes, dit et donné à entendre que le demandeur avait vendu son influence politique et qu'il s'était vendu lui-même en supportant le bill de l'Université Laval.

Que plus tard, savoir, le 14 décembre alors dernier (1881), après la dite élection terminée en faveur du demandeur, et alors que le défendeur se proposait de la contester ou la faire contester, comme de fait elle a été contestée depuis, le dit défendeur, toujours dans le même but, aurait dit et répété devant un grand nombre de personnes, toutes électeurs du dit comté, au village de Ste-Scholastique, que le demandeur avait vendu son influence politique et qu'il s'était vendu à l'Université Laval, pour promouvoir la passation du bill connu sous le nom de "Le Bill de l'Université Laval," en se servant des expressions suivantes: "L'Université Laval aurait bien pu "trouver un membre plus important et plus haut placé "que M. Champagne (le demandeur) pour le charger de "son bill, mais l'Université connaissait son homme, et "tout le monde n'était pas à vendre. M. Champagne a "reçu ou dû recevoir au-delà de mille piastres de l'Uni- "versité Laval, pour supporter ce bill; je ne le blâme pas "car il est avocat, il a travaillé pour ce bill, il s'est fait "payer," et plusieurs autres paroles comportant le même sens.

Que le défendeur ne s'est pas contenté de proférer des

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accusations, en assemblées publiques, mais qu'il les a répétées en conversations privées, donnant comme fait certain que le demandeur s'était vendu à l'Université Laval.

Que par ces accusations et propos injurieux et diffamatoires le défendeur a causé au demandeur des dommages de $1,000, pour lesquels il demande condamnation contre le défendeur.

Le défendeur a d'abord opposé à cette action un plaidoyer de reconciliation.

Je ne m'occuperai pas de ce plaidoyer, parce qu'il n'est soutenu d'aucune preuve, et que le défendeur n'a pas même tenté d'en établir les allégations.

Le second plaidoyer est une défense spéciale, par laquelle le défendeur allègue :

Que le demandeur a représenté le comté à la législature de Québec pendant le parlement précédant immédiatement les élections générales en décembre 1881.

Que le demandeur et le défendeur ont tous deux posé leur candidature respective à cette dernière élection.

Que durant la session précédant la dite élection, le demandeur avait présenté et supporté le bill Laval dans le but de permettre à l'Université Laval de prendre des facultés de droit et de médecine à Montréal, et de mettre fin à une cause pendante instituée à Montréal pour forcer l'Université Laval à fermer les facultés de droit et de médecine qu'elle y avait établies illégalement.

Qu'il a été signé dans la région de Montréal et particulièrement dans toutes les paroisses du dit comté, par le clergé et les principaux citoyens de chaque paroisse du dit comté et la masse du public, des requêtes contre ce bill qui y était considéré comme une tentative d'établir un monopole de l'enseignement universitaire catholique et français, en faveur de l'Université Laval et d'empêcher l'établissement à Montréal d'une Université catholique française.

Que ces requêtes ont été signées par la masse des électeurs, et ont été transmises à la législature de Québec et dont un grand nombre a été adressé au demandeur même ;

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ce qui ne l'a pas empêché de continuer à supporter le bill Laval et à travailler activement pour en assurer la passation, tant en chambre que devant le comité de la chambre.

Qu'il a mis du zèle et de la passion allant même jusqu'à voter contre la permission demandée par les opposants du bill de faire une enquête au soutien de la dite opposition. Que le demandeur a été le seul des représentants conservateurs de toute la région de Montréal, sauf une exception, à supporter le dit bill. Que cette conduite du demandeur a causé un grand mécontentement parmi les électeurs du comté des Deux-Montagnes, et que le défendeur lui a reproché sa conduite durant la dite lutte électorale.

Que tout le monde comprenait que le dit demandeur n'agissait pas ainsi sans quelque motif secret d'autant plus que lui-même déclarait ouvertement être opposé aux principes du bill qu'il soutenait.

Que la rumeur générale dans le comté des Deux-Montagnes et dans le public, ainsi que parmi les députés, était que le demandeur avait reçu quelques promesses de faveurs de la part de la dite Université Laval.

Qu'il est faux que le défendeur ait accusé le demandeur de s'être vendu pour de l'argent: qu'il a dit que le demandeur avait trahi ses constituants en supportant le dit bill, et que lui-même il s'était livré et avait livré son influence à la dite Université Laval, ce qui était vrai.

Que le défendeur a pu dire aussi que le demandeur devait avoir reçu quelques promesses ou faveurs de la part de l'Université Laval, et que de fait le demandeur avait reçu des promesses de faveurs de la dite Université Laval, et qu'il a reçu sa récompense quelque temps après la dite élection en recevant de la part de la dite Université un diplôme de docteur en droit pour les services qu'il avait ainsi rendus à cette institution, contrairement aux vœux de ses constituants et aux intérêts de la section du pays qu'il représentait;

Que le demandeur n'avait aucun autre titre à cette distinction de docteur en droit que celui d'avoir présenté le

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dit bill contrairement aux vœux de ses constituants et d'avoir travaillé, parlé et voté pour ce bill.

Que le défendeur était justifiable de reprocher au demandeur d'avoir présenté, supporté et voté pour ce bill.

Que le défendeur n'a pas agi par malice à l'égard du demandeur et n'a fait qu'user d'un droit qui lui appartenait.

Que le défendeur a pu dire que le demandeur avait vendu son influence à l'Université Laval, et que ces expressions voulaient dire simplement dans le langage ordinaire, qu'il a trahi ses constituants en travaillant en chambre contrairement aux vœux publiquement exprimés par eux.

Qu'il est faux que le défendeur ait accusé le demandeur vers le 14 déc. 1881, d'avoir reçu ou dû recevoir au-delà de mille piastres de l'Université Laval pour supporter ce bill, qu'il ne l'en blâmait pas parce que le demandeur est avocat et qu'il avait agi comme avocat pour ce bill et s'était fait payer comme avocat.

Qu'en outre ces dernières accusations ne comportent pas une accusation injurieuse aux yeux des électeurs, parce qu'il est bien compris par eux que celui qui agit comme avocat pour faire passer un bill ne le fait pas sans un honoraire, et que parmi les électeurs ces expressions ne pouvaient signifier que le demandeur avait vendu son influence comme député pour de l'argent.

Que toutes les allégations de la déclaration du demandeur sont fausses, sauf celles spécialement admises.

Que cette action est vexatoire et prise dans le but de nuire au défendeur dans une prochaine élection à la suite de l'annulation imminente de celle susdite de septembre alors dernier, provoquée par la contestation de cette élection par les partisans du défendeur.

Que de fait la dite élection a été annulée et le défendeur a été élu par une grande majorité.

Puis il nie avoir attaqué le caractère personnel du demandeur et de lui avoir causé aucun dommage par suite d'aucune des paroles qu'il a pu dire contre le demandeur.

Et il conclut au débouté de l'action du demandeur.

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Ce plaidoyer est suivi d'une défense générale en fait.

A cette défense spéciale le demandeur a répondu en substance, que sa conduite en chambre a toujours été celle d'un homme consciencieux et honnête, qu'au sujet du bill Laval, il n'a subi aucune influence induc de la part de l'Université Laval ni de qui que ce soit; qu'il n'a reçu aucune promesse, que le plaidoyer du défendeur est une répétition des injures et insinuations malveillantes déjà proférées par lui contre le demandeur.

Que le bill Laval a depuis reçu l'approbation de toutes les autorités auxquelles il a été soumis.

Que le titre de Docteur en droit a été octroyé au demandeur plus de six mois après la passation du bill, à son insu et sans qu'il en eût jamais été question par qui que ce soit, ni avant ni lors de la passation de la loi.

Que le défendeur en portant les dites accusations n'a pas agi dans les limites du droit d'un électeur de critiquer la conduite politique de son représentant ou d'un homme public, mais qu'il est responsable des dommages qui peuvent en résulter au demandeur.

Par son action le demandeur prétend que le défendeur a porté contre lui des accusations diffamatoires dans trois occasions particulières différentes, savoir: le 3 nov. 1881, à Ste-Thérèse, où le défendeur aurait dit que le demandeur avait vendu son influence politique à l'Université Laval et qu'il avait reçu ou dû recevoir au moins mille piastres pour supporter et faire passer en chambre le bill connu comme bill de l'Université Laval.

2o. Le 26 nov. alors dernier, 1881, à une assemblée à Ste-Monique, où le défendeur aurait par ses paroles, ses gestes, ses actes, dit et donné à entendre, que le demandeur avait vendu lui-même son influence politique et qu'il s'était vendu en supportant le bill de l'Université Laval, et:

3o. Le 14 déc. 1881, après l'élection, à Ste-Scholastique, devant nombre de personnes, où le défendeur aurait employé les expressions suivantes et autres ayant le même sens à l'adresse du demandeur: "l'Université Laval aurait "bien pu trouver un membre plus important et plus

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"haut placé que M. Champagne (le demandeur) pour le "charger de son bill, mais l'Université connaissait son "homme, et tout le monde n'était pas à vendre. M. Cham- "pagne a reçu ou dû recevoir au-delà de mille piastres de "l'Université Laval pour supporter ce bill, il s'est fait "payer."

Il n'y a pas de preuve de ce qui s'est passé à l'assemblée de Ste-Thérèse le 3 novembre.

Quant à l'assemblée du 26 novembre à Ste-Monique, les témoins qui parlent de cette assemblée de la part du demandeur et qui rapportent ce que le défendeur y a dit du demandeur, sont le Dr. Fortier, Chs. Champagne, avocat, de Montréal, L. C. Leduc et le défendeur lui-même.

Le Dr. Fortier dit qu'il ne se rappelle pas les paroles du défendeur, mais seulement le sens, il dit que le défendeur dans son discours a reproché en termes sévères au demandeur le peu de cas qu'il avait fait des électeurs contre le bill et que c'est alors que le témoin a compris par les paroles et le geste, et surtout le geste du défendeur, que le demandeur s'était chargé du bill moyennant finance, en disant: "Laval est riche," et en frottant le pouce contre l'index, indiquant la manipulation de l'argent; que le défendeur a prononcé ces paroles et fait ce geste à la suite du reproche qu'il faisait au demandeur d'avoir méprisé les requêtes des habitants des Deux-Montagnes. Le témoin dit en avoir pris note. Le demandeur n'était pas à cette assemblée.

Le témoin Champagne, dit que dans cette assemblée à Ste-Monique, où il était allé pour répondre au défendeur ou à ses orateurs, le défendeur a reproché au demandeur d'avoir soutenu le bill de l'Université Laval et a dit en substance: "Vous savez que des requêtes ont été en- "voyées à l'adresse de M. Champagne; si le comté des "Deux-Montagnes était tellement indisposé contre le bill "Laval, il a fallu que Monsieur Champagne eût eu des "promesses. On achète les gens, soit avec des places de "shérif, de protonotaire, de conseiller législatif, de séna- "teur. Et vous savez on peut acheter avec ça, en mon- "trant avec ses doigts et en faisant un geste du pouce et de

"l'index qui est bien compris de tous, ce qui veut dire que "ça s'achète avec de l'argent, c'est ce que j'ai compris et "il était impossible de comprendre autre chose. J'ai con- "sidéré que l'insinuation qui venait d'être faite par M. "Beauchamp était fatale à la considération de M. Cham- "pagne, était de nature à lui faire un tort très considé- "rable. Et je n'hésite pas à le dire, à cette assemblée, "ces avancés de M. Beauchamp ont paru être crus parce "qu'il s'était appuyé sur ces raisons-ci. C'est tout le "comté; c'est le clergé, ce sont les électeurs du comté "qui ont fait les requêtes, afin d'empêcher M. Champagne "de présenter le bill Laval, et le supporter. Pour qu'il "pût faire cela, il fallait qu'il eût un motif et il fallait "que ce motif fût de l'argent, des promesses de places "ou autre chose. Il a aussi été dit là que l'Université "Laval était très-riche et que pour faire prévaloir ses "vues, elle pouvait dépenser de l'argent. D'après ce que "je me rappelle, j'ai compris que définitivement on vou- "lait faire croire que l'Université Laval avait acheté M. "Champagne." Mais il ajoute qu'ensuite on disait à St-Augustin, à St-Eustache et à St-Joseph que le demandeur s'était vendu, que "vu que le comté était indisposé contre "le bill Laval, lui (le demandeur) n'aurait pas dû pré- "senter ce bill, et que s'il l'avait fait c'était pour consi- "dération, que les avances de M. Beauchamp étaient de "nature à être crues de tout le monde; moi j'aurais été "disposé à croire la même chose, si je n'avais pas connu "M. Champagne, parce que toutes les apparences pou- "vaient être contre lui."

Le témoin Leduc dit qu'il était dans la cuisine avec beaucoup d'autres personnes; qu'il a bien entendu le discours du défendeur, que le défendeur a dit dans son discours, que pour avoir présenté le bill Laval il fallait qu'il eût été promis quelque chose au demandeur; que c'est le sens de ses paroles.

Que pendant que le Dr. Fortier ou M. Champagne parlait, le défendeur est allé à lui dans la cuisine et lui a dit: "Je ne puis pas croire que vous soyiez pour un "homme comme M. Champagne, vous comprenez bien

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"qu'il n'a pas présenté ce bill sans récompense," que le témoin a répondu: ça se pourrait bien. Après cela plusieurs lui ont fait la remarque que le demandeur avait dû être récompensé pour se charger du bill et que le demandeur s'était vendu à Laval, que le bruit circulait dans toutes les paroisses.

Le défendeur dans sa déposition en parlant de ce qu'il a dit à l'assemblée de Ste-Monique, dit qu'il a reproché au demandeur sa conduite envers ses électeurs à raison du bill Laval, et de n'avoir pas accédé aux requêtes de ses électeurs. "Je savais que le demandeur tenait à continuer à représenter lè comté, et comme il ne faisait aucun cas des requêtes reçues de son comté je trouvais sa conduite étrange, et je disais que la rumeur qui circulait allant à dire que M. Champagne avait dû recevoir des considérations, qu'il était un vendu, car je l'ai entendu dire plus d'une fois moi-même, j'ai dit que dans mon opinion ces rumeurs avaient leur raison d'être, mais que pour moi je considérais la réputation d'un homme trop précieuse pour l'attaquer sans être plus certain, et je n'ai pas porté d'accusation moi-même, et j'ai fait ce signe (le témoin se frotte le pouce et l'index) j'ai dit: messieurs, quand on parle de considérations ça semble couler sur le doigt, j'ai fait ce signe-là (le témoin se frotte le pouce et le doigt) mais ne veuillez pas croire que je veuille porter d'accusation moi-même, je ne veux pas le faire, je ne le sais pas, je n'étais pas à Québec; j'ai donné toutes ces raisons-là."

Quant à l'accusation que le demandeur dit avoir été proféré par le défendeur contre lui à Ste-Scholastique le 26 novembre 1881, le demandeur a fait entendre quatre témoins, savoir, Ant. Séguin, Pierre Valois, Jos. Bricault dit Lamarche, L. O. Blondin, et le défendeur.

Le témoin Séguin ne peut rapporter aucune des paroles qui ont été dites par le défendeur dans cette occasion. Mais que l'impression qui lui en est restée, c'est que le défendeur a là donné à entendre que le demandeur avait été payé pour supporter le bill Laval. La discussion se faisait surtout entre le défendeur et M. Blondin. Sur la

question qui lui est faite : " Voulez-vous rapporter ce que M. Beauchamp a dit, non pas, ce que vous avez compris, mais ce qu'il a dit ? " le témoin a répondu : " Au meilleur de ma connaissance, M. Beauchamp a dit : croyez-vous que l'Université Laval n'aurait pas choisi un homme dans le district de Québec, là où il y a des hommes supérieurs à Monsieur Champagne, plutôt que d'aller prendre un homme à l'extrémité de la province, pour aller présenter un bill aussi important, sans lui promettre quelque chose, —c'est tout ce que je me rappelle dans le moment."

Le témoin Valois dit qu'une discussion s'est élevée entre lui et le défendeur au sujet du bill Laval ; que le défendeur s'est plaint que le demandeur eut présenté et soutenu le bill Laval, malgré les requêtes à lui transmises contre le bill ; que la discussion sur ce sujet a été longue et animée. " Il a dit qu'il était surpris que M. Champa-
" gne avait présenté ce bill, après avoir reçu une foule de
" requêtes de ses électeurs, qu'il fallait qu'il eût eu quel-
" que chose ; il n'a pas dit en propres termes qu'il avait
" reçu de l'argent, mais ça voulait dire cela dans le fond."

Le témoin Bricault dit Lamarche dit qu'il était à l'hôtel Poirier, à Ste-Scholastique, le 14 décembre, que là le défendeur a dit, en parlant du bill Laval, " pour que Cham-
" pagne ait présenté le bill de l'Université Laval à la
" chambre locale, il a dû le faire avec quelque considéra-
" tion, comme il y avait des hommes plus influents que
" lui dans la province de Québec," et le témoin ajoute,
" alors j'étais debout : quelques instants après je suis
" parti pour ne pas manquer mon train de six heures "

Le témoin Blondin était aussi présent à cette réunion à l'hôtel Poirier. Il dit : " La question Laval est venue sur
" le tapis, M. Beauchamp a pris la parole, il a dit que M.
" Champagne était accusé de s'être vendu, d'avoir eu
" pour motif de sa conduite une considération appréciable
" en argent, il a dit que ces rumeurs-là couraient sur son
" compte (autant que je me rappelle), que cette rumeur
" était dans son opinion dommageable surtout quand
" Champagne avait eu entre les mains des requêtes de
" plusieurs paroisses du comté, combattant cette mesure-là ;

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"qu'il ne pouvait pas s'expliquer comment il s'était "chargé du bill;" je dis que Beauchamp a dit, autant que je me rappelle, je ne dis pas que Champagne s'est vendu, mais comment se fait-il que M. Champagne se soit chargé de la passation de cette mesure-là, un bill contre nous surtout, je ne comprends pas comment il a pu se charger de ce bill-là."

Le défendeur dans sa déposition dit que là chez Poirier, il a dit: "Et j'ai dit que M. Champagne n'avait pas tra-"vaillé pour rien, dans mon opinion, mais je jure que j'ai "toujours ajouté, moi je n'en sais rien, je ne le sais pas. "J'ai dit que je pensais que M. Champagne n'avait pas "présenté ce bill pour rien, je ne l'ai pas accusé. On "discutait sur la conduite de M. Champagne à propos du "bill et je disais que la rumeur allant à dire que le de-"mandeur avait été payé avait sa raison d'être, j'ai dit, "je n'en sais rien, je n'étais pas à Québec, je n'ai pas porté "d'accusation."

Ce résumé succinct, mais correct suivant moi, étant fait, je me demande quel en doit être le résultat pratique pour cette cause, sans entrer dans un examen plus minutieux de la preuve de la défense.

Dans mon opinion je n'en vois pas l'utilité, je ne crois pas que le demandeur ait établi des paroles ou accusations par le défendeur contre le demandeur pouvant donner lieu en loi à une action en dommages dans les circonstances du cas actuel. Il ne faut pas perdre de vue que le demandeur était aux dates en question, et avait été depuis plusieurs années représentant du comté des Deux-Montagnes à la législature de Québec, et que comme tel, sa conduite en chambre et tous ses actes comme homme public étaient sujets à être examinés, scrutés et critiqués par le public en général et surtout par ses constituants, alors qu'il se présentait de nouveau pour demander leur suffrage en vue d'une nouvelle élection. Le public et les électeurs avaient droit sans aucun doute de scruter quels pouvaient être les motifs du demandeur pour méconnaître leurs requêtes contre l'Université Laval, et pour présenter et supporter le bill de l'Université Laval,

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contre leurs désirs formellement exprimés dans les requêtes. Voyant cette position prise par le demandeur, le défendeur qui était un des électeurs, et qui avec un grand nombre des électeurs, n'était pas satisfait de la position prise par le demandeur à propos du bill Laval, commence, dans les assemblées, à scruter les motifs du demandeur pour sa conduite sur ce bill. Il exprime son étonnement pour la position prise par le demandeur sur ce bill, et il ajoute qu'il ne voit pas d'autre motif au demandeur qu'un motif intéressé; et il soumet cette idée aux électeurs et se sert de cette arme pour combattre le demandeur; mais il a bien soin de ne pas accuser le demandeur de s'être vendu, ou d'avoir cédé à des promesses; il se contente de dire, voilà ce que le demandeur a fait, il a favorisé le bill Laval sachant que c'était contre votre volonté, n'avons-nous pas lieu de supposer qu'il avait un motif intéressé? Et, dit le témoin Champagne, rien de plus plausible que ce soupçon dans les circonstances, ajoutant que s'il n'avait pas si bien connu le demandeur pour un parfait honnête homme, il aurait pu avoir les mêmes soupçons, tant les circonstances et l'acte du demandeur y donnaient prise. Je ne vois rien en cela qui ne soit du domaine de la discussion publique; il en serait autrement si, sans motif apparent et connu du public comme dans le cas actuel, le défendeur avait dit qu'il soupçonnait le demandeur d'avoir commis un acte illégal et déshonorant, dans ce cas le public n'aurait rien pour se guider dans l'appréciation des motifs du demandeur, ni même de la vérité du fait imputé au demandeur, et l'accusation est dans ce cas d'autant plus répréhensible que le public n'aurait rien pour le guider dans son appréciation, et que l'accusation est plus influente et mérite plus la confiance

Mais, dit-on, le défendeur a invoqué une prétendue rumeur allant à dire que le demandeur avait vendu son influence, et qu'en cela il est répréhensible parce qu'en invoquant une rumeur fausse il en a assumé toute la responsabilité. Ce n'est pas tout à fait cela dans le cas actuel, le défendeur a bien dit (c'est lui qui le dit dans sa

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déposition) que la rumeur courait que le demandeur avait dû être payé ou avait dû recevoir des promesses, ou même qu'il avait reçu des promesses pour en agir ainsi; mais en même temps on voit par cette même déposition que le public a dû comprendre que cette rumeur ou ces on dits reposaient sur la même cause, c'est-à-dire sur la conduite inexplicable du demandeur au sujet du bill Laval, dans les circonstances. D'ailleurs, il me parait suffisamment prouvé que telle rumeur circulait plus ou moins dans certaines localités, et je suis d'opinion que le défendeur pouvait la faire connaître, dans les circonstances, pourvu qu'il ne l'indiquât que comme rumeur, sans en affirmer la vérité : c'est ce que parait avoir fait le défendeur ; car tout en mentionnant cette rumeur, il parait avoir ajouté qu'il n'en connaissait rien et qu'il n'accusait pas.

Je suis d'opinion que les paroles et les gestes du défendeur, tel que prouvé dans la présente cause, ne peuvent être considérés en loi, dans l'espèce actuelle, comme diffamatoires et qu'elles ne peuvent justifier la présente action, quelque désagréable que ces paroles aient pu être pour le demandeur, et quelque pur qu'ait été le motif du demandeur, dans sa conduite sur le bill Laval, ce dont je n'ai aucun doute.

L'action est déboutée avec dépens.

The judgment of the Superior Court was as follows :—

"Considérant que le dit demandeur n'a pas prouvé les allégués essentiels de sa déclaration, en l'action en cette cause ;

"Renvoie la dite action du demandeur en cette cause, avec dépens."

The judgment of the Court of Review, reversing the above judgment, and awarding the respondent $250 damages, is fully reported in M. L. R., 2 S. C. 484-490. The written opinion of JOHNSON, J., will be found in the same place.

May 22, 23, 1888.]

Pagnuelo, Q. C., for the appellant, contended that the appreciation of the evidence by the judge in the Court of first instance, who had heard all the witnesses, ought to

prevail. His decision exonerating the appellant should not have been disturbed by the Court of Review. It is the duty of every citizen to denounce venality in public men. If the charge made here were not true, at least there were circumstances which justified suspicion, as the respondent, in supporting the Laval bill, had disregarded the wishes and requests of his constituents.

Prevost, Q. C., for the respondent:—

Trois questions se soulèvent:

1o. Etant un homme public et briguant les suffrages des électeurs pour une prochaine élection, son adversaire l'appelant, tout en étant justifiable de le blâmer dans sa conduite politique relativement à l'Université Laval, avait-il le droit de scruter les motifs qui l'avaient engagé à supporter cette mesure et de les publier, surtout s'ils étaient faux, calomnieux et tendant à ternir non-seulement sa réputation d'homme public mais encore son caractère d'homme privé?

2o. Le défendeur avait-il le droit de se réfugier derrière une prétendue rumeur, pour se permettre de la répéter en public avec des paroles sarcastiques et des gestes ironiques, et ce, en présence d'un grand nombre de personnes qui n'en avaient jamais eu connaissance?

3o. Enfin, la preuve, telle que faite, est-elle suffisante pour appuyer les accusations diffamatoires de l'appelant sur le compte de l'intimé?

En résumé, on peut blâmer les actes politiques d'un homme public, mais on ne peut toucher à son caractère privé ni lui imputer des motifs déshonorants.

La rumeur, pas même la notoriété publique ne peut excuser les accusations diffamatoires, surtout lorsqu'elles ne sont que des calomnies.

Enfin, en principe, l'intimé n'est pas obligé de prouver tous les mêmes mots qui sont dans la déclaration, pourvu qu'il en prouve assez pour supporter son accusation.

TESSIER, J.:—

This is a case which involves a principle of consider-

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able importance. The action results from the fact that the appellant Beauchamp, during the election for the county of Two Mountains in 1881, when both parties were candidates, made a charge against Champagne, the respondent, of having sold his influence to the Laval University in promoting a bill in which that institution was interested. The Court of Review considered that this imputation of dishonest motives, which was not supported by proof, was going beyond the bounds of fair criticism of the acts of a public man. In that conclusion we concur. The limit of fair criticism is passed when the private character of a member is assailed. There would be no protection for men in public life if they were exposed to unfounded accusations of this nature, without the right to obtain redress.

On the question of amount of damages, we think the sum of $250 allowed by the Court of Review, is excessive, no actual damage being proved. But in view of the decision of the Supreme Court in *Levi* v. *Reid*[1], and in *Gingras* v. *Desilets*,[2] we do not see our way to interfere with the estimate of damages by the Court below. We think the award of damages is too high, but we submit to the jurisprudence established by the Supreme Court in the cases cited.

On the question of costs, however, we consider that the *enquête* was unnecessarily long, and the judgment will be modified to the extent of relieving the appellant from the costs of the *enquête* and printing, except as to the first three witnesses.

CROSS, J.:—

If I add anything to what has fallen from the learned president of the Court, it is only because I have had great hesitation in concurring in the judgment. The judgment of the Court of Review seems to me barely justifiable. Beauchamp stated that rumors prevailed with reference to Champagne, that he had sold himself. Considering

[1] 4 Leg. News, 91; 6 Can. S. C. R. 482.
[2] 4 Leg. News, 91.

the ordinary character of political controversy in this country, it does not appear to be a very serious thing to say that a person sold himself. There are certain rewards which are considered quite legitimate for political services. I think Mr. Champagne's character would have stood all that was charged against him. Politicians should not be too ready to come into Court with actions of this kind Their character should be good enough to withstand such attacks.

The judgment of the Court is as follows :

"La Cour, etc.....

"Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure siégeant en révision, à Montréal, le 30me jour de novembre 1886, et dont est appel, confirme le dit jugement avec dépens contre l'appelant en faveur du dit intimé, excepté qu'il est ordonné que chaque partie paiera ses frais d'enquête, y compris les dépens d'assignation des témoins et les frais d'impressions en Cour d'Appel des témoignages, moins les frais d'enquête et d'assignation relatifs aux trois premiers témoins du demandeur entendus et de l'impression de leurs témoignages dans cette Cour, lesquels frais restent à la charge de l'appelant Beauchamp."

Judgment confirmed.

Pagnuelo, Taillon, Bonin & Goun, for appellant.

Prevost, Bastien & Prevost, for respondent.

(J. K.)

January 19, 1889.

Coram DORION, Ch. J., TESSIER, CROSS, CHURCH, BOSSÉ, JJ.

ADOLPHE OUIMET,
(*Plaintiff in Court below*),
APPELLANT;

AND

LA COMPAGNIE D'IMPRIMERIE ET DE PUBLICATION DU CANADA,
(*Defendant in Court below*),
RESPONDENT.

Libel—Matter of public interest—Damages—Appeal—Costs.

HELD:—Where the Court below dismissed without costs an action of damages against the publishers of a daily journal, on the ground that the matters charged as libellous were substantially true, and referred to a subject of public interest: that an appeal should not be maintained from such judgment, where no damages were proved, even supposing that a small sum of exemplary damages might properly have been allowed the plaintiff by the Court of first instance on account of certain injurious expressions used by the defendants; but the Court of Appeal in such cases may exercise its discretion, and dismiss the parties without costs in either Court.

APPEAL from a judgment of the Superior Court, Montreal (Würtele, J.), Nov. 5, 1887, in the following terms:—

"La Cour, etc.....

"Attendu que le demandeur allègue dans sa déclaration que la défenderesse a publié des articles diffamatoires et libelleux à son adresse dans les numéros des 2, 3, 7, et 24 juillet 1886, du journal publié par elle à Montréal sous le nom de "*Le Monde*," et que la publication de cet article lui a causé des dommages considérables;

"Attendu que la défenderesse a nié que les articles en question fussent diffamatoires et libelleux, et a plaidé de plus qu'ils avaient pour objet une matière d'un intérêt

public; qu'ils étaient écrits de bonne foi, qu'elle avait raison de croire qu'ils étaient vrais, et que, de fait, ils étaient vrais;

"Considérant qu'il a été prouvé que les articles étaient substantiellement vrais et se référaient à une affaire d'un intérêt public;

"Considérant que, de fait, les articles en question ne constituent pas des écrits diffamatoires et libelleux, et de plus, ne sont pas de nature à faire un tort matériel au demandeur;

"Considérant que le demandeur n'a pas droit à des dommages et que son action doit être renvoyée, mais considérant que les dits articles, sans être diffamatoires et libelleux, constituent néanmoins des épithètes inconvenantes et que la défenderesse est blâmable de s'être servie de ces expressions qui blessent, tout en ne faisant pas tort:

"Déboute l'action en cette cause, mais sans frais."

Jan. 17, 1889.]

J. J. Beauchamp for appellant.

D. Girouard, Q. C., for respondent.

Jan. 19, 1889.]

DORION, Ch. J. (for the Court):—

The appellant complains of several articles which appeared in the journal called "*Le Monde*," and appeals from the judgment of the Court below by which his action of damages was dismissed. It appears that the appellant was President of the St. Jean Baptiste Society, and the articles complained that this Society had not adopted an address of congratulation to Cardinal Taschereau and Mgr. Fabre, and that this was owing to the hostility of certain persons influential in the Society. The appellant complained that he was indicated by these articles, and he brought an action claiming $5,000 damages.

There can be no doubt that some of the expressions used in the articles are of an injurious nature, and there is an

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animus which shows that the public interest was not the sole motive in writing them. One of the articles, which used the term *biche*, was certainly injurious. If the Court below had thought proper to allow a small sum as nominal damages, say $20, we would not have been disposed to change the judgment. But no damages were proved, and the Court below, while characterising the expressions as improper and injurious, held that the articles were substantially true, and dismissed the action, each party paying his own costs. We think both parties should have accepted that judgment as final. We agree with the Court below that the defendants used expressions which were of an injurious tendency, but we think the plaintiff should have been satisfied with the judgment by which he was relieved from costs. We confirm the judgment, but each party will have to pay his own costs in this Court as well as in the Court below. We also change the *motif* of the judgment which states that the articles were substantially true.

The judgment in Appeal is as follows :—

" La Cour, etc.....

" Attendu que l'appelant, demandeur en Cour de première instance, allègue dans sa déclaration que la défenderesse-intimée a publié des articles diffamatoires et libelleux à son adresse, dans les numéros des 2, 3, 7 et 24 juillet 1886, du journal publié par elle, à Montréal, sous le nom de " *Le Monde*," et que la publication de ces articles lui a causé des dommages considérables ;

" Attendu que l'intimée a nié que les articles en question fussent diffamatoires et libelleux, et a plaidé, de plus, qu'ils avaient pour objet une matière d'un intérêt public ; qu'ils étaient écrits de bonne foi, qu'elle avait raison de croire qu'ils étaient vrais et que, de fait, ils étaient vrais ;

" Considérant que l'appelant n'a pas établi qu'il ait souffert des dommages matériels, à raison des publications dont il se plaint dans son action, et qu'il ne pouvait, tout au plus, avoir droit qu'à des dommages minimes ou peu considérables ; que pour cette raison il n'y a pas lieu de maintenir l'appel ;

"Mais considérant que la compagnie intimée s'est servie dans la discussion d'une question d'un intérêt public, d'épithètes inconvenantes et blessantes pour l'appelant;

"Cette Cour renvoie l'appel, chaque partie payant ses frais, tant en Cour de première instance que sur l'appel."

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Appeal dismissed.

J. J. Beauchamp for appellant.

Girouard, de Lorimier & de Lorimier for respondents.

(J. K.)

January 25, 1890.

Coram DORION, Ch. J., CROSS, BABY, CHURCH, BOSSÉ, JJ.

WILLIAM McLACHLAN ET AL.

(*Plaintiffs in Court below*),

APPELLANTS;

AND

ACCIDENT INSURANCE CO. OF N. A.

(*Defendants in Court below*),

RESPONDENTS.

Jury Trial—Insufficient assignment of facts—Answers—New definition of facts ordered.

HELD:—Where both parties move for judgment on a special verdict, and there is no motion for a new trial, nevertheless, on appeal, if it appear to the Court that the facts as defined for submission to the jury were inapplicable and insufficient to enable a correct verdict to be rendered thereon, and that the answers of the jury were insufficient and contradictory to the extent that no correct judgment could be rendered thereon for either party, the Court of its own motion may set aside the judgment, and send the parties back to the Court below, to proceed anew to a proper definition of facts, for submission to a jury to be summoned by a *venire de novo*.

The condition of an accident policy, in favor of members of a firm of *McL. & Co.*, was: "Provided that on either of the above named members *quitting the said firm*, this insurance shall cease on his person,

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"etc." The jury were asked: "3. Were *McL. & Co. dissolved* on or about the 10th April?" To which they answered, "*Yes*; but *J. S. McL.* had a continued and active interest in the business." "4. Did *McL. & Co.* in that month publicly advertise that *J. S. McL.* had *retired* and that a *new firm* had been formed?" To which they answered, "*Yes*." "5. Was *J. S. McL.* a member of *McL. & Co.* on the 18th November?" (date of his death by drowning). To which they answered, "*No*, but had an interest in profits of."

HELD:—2. That inasmuch as the jury were not asked, and did not state, in the precise words of the condition, whether *J. S. McL.* had "*quit the firm*" on the 18th November, and their answers were insufficient to enable the Court to render a correct judgment thereon, it was a case in which the Court should order a new definition of the facts for the jury, with leave to the parties to proceed by *venire de novo*.

APPEAL from the judgment of the Court of Review, Montreal, Sept. 29, 1888, reported in M. L. R., 4 S. C. 365.

Nov. 16, 18, 1889.]

J. N. Greenshields, Q. C., (with him *Geoffrion*, Q. C., and *R. S. Weir*), for the appellants:—

The appellants submit:—

1. That the proof of record shows that J. S. McLachlan never did "quit the firm" of McLachlan Bros. & Co.

2. That admitting that his status in the firm was changed, the change did not constitute a "quitting of the firm." The expression "quitting the firm," which is purely colloquial, but easily enough understood, evidently means a complete stepping down and out: an absolute severance of all ties and relations formerly existing, and the winding up of previous business relations. No such thing took place as regards J. S. McLachlan. He continued to be in the firm. His interest was that of a partner, and whatever he did he certainly did not "quit the firm."

3. That even if it did constitute a quitting of the firm, the respondents had knowledge of it and acquiesced therein.

4. That the answers of the jury, construed in their entirety, show that J. S. McLachlan "still had an interest in the profits," and therefore continued to be a partner up to the time of his death.

5. That appellants are entitled to a reversal of the judgment of the Court below and to judgment on their own motion for judgment on the verdict.

6. That in any event there is nothing in the answers of the jury to justify the granting of the respondent's motion. If the answers are taken baldly and without the fair interpretation that appellants suggest, the contradictions do not warrant any judgment in favor of respondents.

J. C. Hatton, Q. C., for the respondents :—

The firm of McLachlan Brothers & Company was formally dissolved on the 10th April, 1886, when John S. McLachlan retired from it, and a new firm composed of the present appellants, was formed on the 14th day of the same month. The dissolution of the firm and retirement of John S. McLachlan, and the formation of the new firm are witnessed by formal declarations in writing dated respectively the 10th and 14th April, 1886, passed before Cushing, Notary Public, which were duly registered in the office of the Prothonotary on the 12th and 20th days of April, 1886, respectively. Authentic copies of these documents were produced as defendants' exhibits Nos. 2 and 3. Public notice of the dissolution of the firm and the retirement of John S. McLachlan was also given and published. This is established by admission of the parties filed at the trial.

Notwithstanding the foregoing facts, the appellants contend that John S. McLachlan was at the time of his death a partner in the firm, inasmuch as he had left his capital in it. At the trial a copy of an agreement between John S. McLachlan and William McLachlan, executed before Cushing, Notary Public, on the 10th April, 1886 (the date of the dissolution of the firm), was produced. This document sets forth the retirement of John S. McLachlan from the firm, declares that the parties thereto have settled their affairs, and that the capital of the said John S. McLachlan, "shall remain in the business, but the said John S. McLachlan shall only rank "as a creditor after the ordinary creditors of the firm."

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By this document John S. McLachlan also makes over the entire assets of the firm to William McLachlan, he, William McLachlan, binding himself to pay all the liabilities, to the exoneration of John S. McLachlan. William McLachlan also agrees to pay John S. McLachlan interest on the capital at the rate of seven per centum per annum, "and further that in consideration of the said John S. "McLachlan leaving his capital in the business as afore-"said, he will receive one-half of the profits the business "may realize during the current year, and the sum of "$2,000 a year thereafter, payable quarterly until his "capital is paid over to him."

By virtue of this agreement the appellants pretend that John S. McLachlan's interest was that of a partner, notwithstanding his own formal declarations to the contrary in the declaration registered in the Prothonotary's office on the 12th April, 1886, and in this agreement itself, and the publication of the dissolution of the firm, admitted as aforesaid.

At the trial the appellants examined several witnesses who swore that John S. McLachlan had never ceased to act as if he were still a partner in the firm up to the time of his death, and that he took an active part in the management. There was not however any proof made that he was a member of the firm or that he had any interest in it beyond that of a creditor; and the jury had no difficulty in finding that John S. McLachlan was not a member of the firm of McLachlan Brothers & Co on the 18th November, 1886, the day upon which he was drowned; and the Court of Review could not hesitate to declare that by virtue of the conditions of the policy sued upon, the respondents were entitled to judgment in their favour upon the verdict and findings of the jury.

Jan. 25, 1890.

CROSS, J.:—

On the 21st January, 1886, McLachlan Bros. & Co., as a commercial firm composed of John S. McLachlan, William McLachlan, Francis W. Radford and Thomas Brophy,

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applied to the Accident Insurance Company for a policy for $10,000, against accidental death on the terms of the instrument to be issued. The company issued a policy to the applicants bearing the same date subject to certain conditions, among which was the following: "Provided "that on either of the above named members *quitting the* "*said firm*, this insurance shall cease on his person, but "the interest in the policy may be transferred and apply "to any other eligible person who may become partner in said firm in his stead."

At the time the only registered partners in the firm were John S. McLachlan and William McLachlan. The interest of the two other partners, Francis W. Radford and Thomas Brophy, was very small, the first being book-keeper at a salary of $1,800 per annum, and the last being buyer and traveller at a like salary, with an additional credit to each of $3,200 for future purposes, and with a promise of sale to them of the business at the end of four years for a large sum of money; the whole on the terms stated in a notarial act dated the 15th October, 1885. The chief interest of the two latter parties was as hired clerks with a small share in the profits and a prospective interest of becoming proprietors of the entire business at the end of four years; but neither the smallness of their interest nor their non-registration prevented them from having the benefit of being covered by a policy, nor would the augmentation of their interest have excluded them.

John S. McLachlan and William McLachlan signed a declaration of dissolution dated the 10th and registered the 12th April, 1886; this referred to the registered partnership which had existed between these two. It bound them towards the public, but did not prevent them from having partnership interests not registered.

By an agreement dated the 10th April, 1886, between John S. McLachlan and William McLachlan, the former retired from the firm, that is the special firm of the two registered partners.

William McLachlan and Francis W. Radford signed a

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declaration of partnership dated the 14th and registered the 20th April, 1886. This did not prevent either of them having partnership relations not registered.

By an endorsement on the policy it appears that, on the 23rd September, 1836, the Accident Insurance Company were notified that Thomas Brophy had ceased to be a partner or member of the firm; that is, had ceased to have such a partnership interest as entitled him to have the benefit of and to be covered by the policy, and that J. E. Bizzey was substituted in his place.

John S. McLachlan met his death accidentally, by drowning, on November 18, 1886.

The Accident Insurance Company was notified of the death and a claim make upon them for the amount insured, which not being met, the present action was instituted on March 8, 1887, for its recovery.

The plaintiffs were originally William McLachlan and Francis W. Radford as McLachlan Bros. & Co.

The Accident Insurance Company pleaded the above recited condition, and that on April 10, 1886, John S. McLachlan ceased to be a member of the firm of McLachlan Bros. & Co., and consequently the policy, as regards him, became void and of no effect, also that if even they were liable on the policy, James E. Bizzey should have been a plaintiff in the suit as one of the firm of the McLachlan Bros. & Co.

James E. Bizzey, on the 3rd of October, 1887, made an intervention in the suit declaring that he joined himself to the plaintiffs and united with them in asking judgment against the Accident Insurance Company. This somewhat questionable proceeding does not seem to have been objected to, but it was rather taken for granted that it covered the irregularity of non-joinder pleaded in regard to Bizzey.

The case was tried by a jury, the facts defined and answers were as follows:—

Q—First. At the date of the policy, plaintiffs' exhibit No. 1,

(*a*) Did the defendant know that the only persons registered as interested in the firm of McLachlan Brothers & Co., were William and John S. McLachlan?

A—Yes, by the registration of declaration.

(*b*) Was the defendant aware that business relations existed between the McLachlans, Francis W. Radford and Thomas Brophy?

A—Yes, as shewn by application for insurance.

(*c*) Had Radford and Brophy to the knowledge of the company defendant, an interest in the success and existence of the business of McLachlan Brothers & Co.?

A—Yes, as shewn by application for insurance.

Q—Second. Did the defendant ever vary the terms of the policy, excepting by consenting to a transfer of insurance from the person of Brophy to the person of James E. Bizzey?

A—No.

Q—Third. Were McLachlan Brothers & Co. dissolved on or about the 10th April, 1886?

A—Yes, but J. S. McLachlan had a continued and active interest in the business.

Q—Fourth. Did McLachlan Brothers & Co. in that month publicly advertise that John S. McLachlan had retired and that a new firm had been formed?

A—Yes.

Q—Fifth. On the 18th November, 1886,

(*a*) Was John S. McLachlan a member of McLachlan Brothers & Co?

A—No, but had an interest in profits of.

(*b*) Had Bizzey any interest in the firm?

A—No evidence.

These questions and answers do not seem necessarily to solve the real question as to whether John S. McLachlan, on the 10th of April, 1886, quitted the firm in terms of the condition in the policy.

The question to be solved was whether John S. McLachlan had quitted the firm in the sense contemplated by the condition and intended by the parties. This I think, or the equivalent, should have been submitted to the jury, and I don't think it was.

It was clearly not intended that registered partners only should be covered by the policy. The non-registered partners, of whom there were then two, could not be affected by a declaration of dissolution of the registered partners. The compliance or non-compliance with the registry law made to secure the publicity of partnerships would have no influence on the partnership relations *inter se*. The insurance in question was effected by the four persons as partners to provide for or regulate matters *inter se*, and so

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long as any common interest subsisted between them, it seems to me the insurance held good.

In what sense was quitting the firm to be understood under the circumstances?

What was insured had no relation to the greater or less interest either of the partners had in the firm's assets; the insurable interest was only measured by each one of the individual partners being or not a partner in the concern. The insurance was on the lives of the partners while they remained partners, that is, while they retained such interest as constituted them partners. If non-registered partners were covered, why not registered partners becoming non-registered partners? It is obvious that the deed of the 10th of April, 1886, did not cause John S. McLachlan to cease to be a partner; he was still to receive half the profits of the business, and, in fact, continued to act as a managing partner, the same as before this agreement; to the creditors, he would be still held as a partner and his interest was as great as ever, the only change in his position was that he became a non-registered partner. The object of the condition in question was to admit of a new partner being substituted, in lieu of an old partner retired. In the present case there was no room for a new partner because the old partner retaining his interest remained a partner.

What difference did it make to the insurance company whether the registered partners continued to be registered? John S. McLachlan was the party who was insured; he appears to have remained a partner, and as such would appear to be still covered.

Had the interest of John S. McLachlan or any other partner been even varied or differently apportioned, did it make any difference to the insurance company? Had the accident of death happened to Bizzey in place of to John S. McLachlan, would not the insurance have held good, and would not John S. McLachlan have had his share in the indemnity? Had it happened to Radford, would it have made any difference whether he was at the time a registered or non-registered partner? The

interest of the firm and its different recognized partners was to secure the personal skill and ability of each of their partners, and to be indemnified in case they lost such skill and ability by an accidental cause.

If reduced to a doubt as to whether John S. McLachlan had quitted the firm, that doubt should be solved in favor of the plaintiffs, but this should be solved by the jury. The contract of the insurance company was not affected by the registration or non-registration; their undertaking was to indemnify for the loss of a partner, and till the interest of that partner was entirely exhausted it may be said they should remain bound.

The verdict, as rendered, seems to me to be quite as favorable to the plaintiffs as to the defendant, but the defective statement of the facts for submission to the jury and the necessary inconclusive answers seem to me to have left the case in such a condition of ambiguity as that no correct judgment could be entered thereon; it may, therefore, be said to be a mis-trial. In any case, on a special verdict such as the present, the Court has control of the case to prevent a possible injustice.

I do not think the answers of the jury to the third and fifth questions determine the real issue. "Third: Were "McLachlan Bros. & Co. dissolved on or about the 10th "April, 1886? *Answer*—Yes, but J. S. McLachlan had a "continued and active interest in the business. Fifth: "On the 18th November, 1886, was John S. McLachlan a "member of McLachlan Bros. & Co. *Answer*—No, but had "an interest in the profits of."

If it had been put to the jury whether John S. McLachlan had quitted the firm in the sense contemplated by the condition in question, it is not by any means certain that they would have answered in the affirmative, I think; it is quite as probable they would have answered in the negative. The jury were, in a measure, forced to answer according to the literal truth of a partial view of the case as to the fact of John S. McLachlan and William McLachlan having dissolved a registered firm of McLachlan Bros. & Co., and as to John S. McLachlan not

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being a member of that firm, although both answers contain a contradiction of the literal assertion by stating that John S. McLachlan had a continued and active interest and had an interest in profits; therefore, was still a partner.

Again, by the 8th of defendants' articulation of facts, it is admitted that the insurance was of the individual partners by name and, by the 16th, it is admitted that Bizzey, the new partner, became party to the contract entered into by the policy and that, on notice from the firm as it then stood, thus admitting that any changes made by dissolutions or registrations were acquiesced in, and had not affected the position of the other parties as partners.

It is urged that, because a new trial had not been asked for, the plaintiffs have lost any such remedy. To this, I would answer that, to my mind, the plaintiffs seem quite as much entitled to judgment as the defendants; that, if not so, the verdict is a special one, subject to the control of the Court and to the application of a proper remedy. I would set aside the verdict and all proceedings back to the plaintiffs' answers to defendants' pleas, direct a new definition of the facts for the jury with leave to the parties to proceed by *venire de novo*, or in such other manner as they may be entitled, to try the case on a proper definition of facts, and it is thus ordered by this Court. I may refer for a precedent to the case of *Tobin v. Murison*, Moore's Privy Council Reports, p. 110, but to be found more at length in 2 Revue de Législation, p. 200.

It was decided by this Court, 27th September, 1889, in the case of *Davie & Sylvestre*, M. L. R., 5 Q. B. 143, that under Art. 1831 of the Civil Code, participation in the profits carried with it liability as a partner.

DORION, Ch. J.:—

I agree with the judgment of the Court to send the case back to be tried upon a *venire de novo*; I do so, however, not because of any opinion I have formed upon the case, but from inability to arrive at a decision on the verdict. The condition was that if any member quit the

firm' the policy would lapse. The jury were not asked whether J. S. McLachlan quit the firm. They were asked, 'Was the firm dissolved?' They answered, 'Yes.' If that had been the only answer we might have inferred that he had quit the firm; but the jury went on to say that he had a 'continued and active interest in the business.' They do not explain the nature of this interest; they merely say, the firm was dissolved, but he had an interest. The question whether he had quit the firm was not asked, and not answered.

We do not wish by the present judgment to express an opinion on the case. We think that the verdict of the jury did not pass upon the real question in the case, that is to say, whether J. S. McLachlan had quit the firm. As to the form of the judgment I have felt some embarrassment. In the English books very little explanation is given of this proceeding, probably because these things are so familiar to them. We find that there is a considerable difference between ordering a *venire de novo* and ordering a new trial. It seems to me that a new trial cannot be granted without a motion for a new trial; but if the verdict does not pronounce upon the issue, the Court of its own motion may order a *venire de novo*.

In concurring in the judgment I wish it to be perfectly understood that I express no opinion as to what the verdict should be. As we are sending the case back to a jury they should be perfectly free to decide without any expression of opinion from this Court.

CHURCH, J. (*diss.*):—

I do not regret the decision at which the majority of the Court has arrived, as explained in the judgment just pronounced by the Hon. Justice Cross; inasmuch as it will allow of the issue being more squarely put (if another trial takes place), although I am unable to concur in it.

To my mind the verdict of the jury and the answers by them given to the questions proposed are clear, cate-

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gorical and precise, notwithstanding that the jury has gone beyond its province and volunteered to determine facts which it was not called to pass upon.

The questions 3 and 5 were sufficiently distinct that there should have been no difficulty in obtaining a direct answer to them; but the jury, after giving a direct answer, volunteered to the third question the following words, "but J. S. McLachlan had a continued and active "interest in the business," and to the fifth, "that J. S. "McLachlan had an interest in the profits."

Now they were not asked as to this; the words added to the direct answer to question No. 3, themselves are indefinite and meaningless in the light of the question. The Court was dealing with the meaning of the contract of insurance and the question of liability under it towards the plaintiff, hence its question was as to the fact of the dissolution of the firm. If there was no firm of McLachlan Bros. & Co., such as was described in the application signed when the insurance issued, there could be no surviving partners having an insurance interest in the policy and entitled to recover under it. The dissolution of the firm of McLachlan Bros & Co., composed of J. S. McLachlan, Wm. McLachlan, and F. W. Radford and Bizzey, terminated the firm and ended the insurance. The fact that another firm was formed two days after, had very little to do with the matter since it was not composed of the said persons; and especially so, considering that the insurance company had not consented to the substitution of the members of the new firm for the old one. The jury found that the firm as it existed at the time the policy issued and as altered, however, by the substitution of Bizzey's name for Brophy, was dissolved at the date of J. S. McLachlan's death and that, it appears to me, settles the matter. If it were permitted to look at the record and at the certificate filed by William McLachlan and F. W. Radford on the 20th April, 1886, we would see that the very plaintiffs in this case themselves certify that they are the only members of the firm, thus excluding the idea that J. S. McLachlan was a member of it. But,

as I have said, I don't think we can look beyond the verdict, if in itself intelligible and clear, and as I find it perfectly so, I do not look beyond it, and I find quite sufficient to enable me to determine that J. S. McLachlan was not a member of the firm of McLachlan Bros. & Co. at the time of his death, that he had quitted it, as had all the other members of the firm, that it was dissolved and that the policy had lapsed. I think, moreover, the new firm so understood it, or it would have applied to the company to substitute the names of the members of the new company for the old one.

Can the surviving members of a dissolved firm, some of whom have associated themselves together in partnership, and who have become possessed of the stock of the old firm, if the death of one of the members of the old firm (with whom they are not any longer associated together in business) occurs, claim under a policy issued in favor of the surviving members of the old firm, without having obtained the consent of the company to the members of their new firm being substituted for the members of the old firm as it stood when the policy issued? It does not appear to me reasonable that they should; there is, in a sense, a want of privity of contract. Besides, as remarked by the Hon. Chief Justice Johnson, the question is not whether J. S. McLachlan had an interest in the firm, the question rather is, had the firm an interest in him. I am of opinion that the judgment of the Court below should be confirmed.

The following is the judgment of the Court:—

"The Court etc.

"Considering that the facts as defined for submission to the jury in this cause were and are inapplicable and insufficient to enable a correct verdict to be rendered thereon, determining the true merits of the issue raised by the parties;

"Considering that the answers of the jury to the questions submitted to them as contained in said definition of facts were and are insufficient, contradictory and irregu-

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lar to the extent that no correct judgment could be rendered thereon for either party;

"Considering that all the proceedings in the cause had and taken subsequent to the filing of the plaintiffs' answers to the defendants' articulations of facts filed on the 12th November, 1887, were and are irregular, informal and insufficient;

"Considering that there is error as well in the said proceedings as in the judgment rendered by the Superior Court in Review at Montreal in this cause, on the 20th of September, 1888;

"The Court of Our Lady the Queen, now here, doth cancel, annul and set aside as well the said proceedings as the said judgment so rendered by the said Superior Court in Review on the 20th September, 1888, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth cancel, annul and set aside as well the said proceedings as the said judgment, without costs as to either party, and with liberty to the parties to proceed anew to a proper definition of facts for submission to the jury to be summoned by a *venire de novo*, or to take such other recourse as they or either of them may legally adopt from and posterior to the filing of plaintiffs' answers to defendants' articulation of facts. (The Honorable Mr. Justice Church dissenting.)"

Judgment reversed.

Greenshields, Guerin & Greenshields, attorneys for appellants.

Hatton & McLennan, attorneys for respondents.

(J. K.)

26 mars 1890.

Coram DORION, C. J., CROSS, BABY, CHURCH, BOSSÉ, JJ.

LES COMMISSAIRES DES CHEMINS À BARRIÈRES DE MONTRÉAL.

(*Défendeurs en Cour inférieure*),

APPELANTS;

ET

[illegible] RIBELE,

(*Demandeur en Cour inférieure*),

INTIMÉ.

Commission nommée par le gouvernement—Destitution d'employés — Secrétaire — Engagement à tant par année — Louage d'ouvrage — Mandat — Dommages — Salaire — Frais.

En vertu de leur charte les commissaires des chemins à barrières de Montréal, nommés par le gouvernement de la province, "auront et "pourront avoir succession perpétuelle et pourront ester en jugement "dans toutes les cours de justice et autres lieux."

Une autre section de leur charte pourvoit à ce que "de temps à autre ils "pourront nommer et employer un inspecteur, et tels officiers et per-"sonnes sous leurs ordres qu'ils jugeront nécessaire pour les fins de "cette ordonnance, et ils pourront destituer tels inspecteurs et autres "officiers et personnes ou aucune d'elles, et [illegible]mmer d'autres à "leur place."

Jugé:—1. Que les commissaires en question ne forment pas partie du service civil de la province, mais constituent une corporation indépendante dont les pouvoirs sont contenus dans l'ordonnance 3 Vict., c. 31, et les actes qui l'amendent.

2. Que, partant, les commissaires ne peuvent pas se prévaloir des prérogatives de la Couronne pour justifier le renvoi de leurs employés sans avis, sans cause et sans indemnité.

3. Que la clause de la charte citée plus haut ne fait que donner à la commission le droit de contracter avec ses employés, et que cette corporation ayant contracté avec l'intimé est responsable comme toute autre personne de la violation de ce contrat.

4. Que l'engagement de l'intimé comme secrétaire de la commission pour un salaire de tant par année constitue un contrat de louage d'ouvrage pour une année, sujet à tacite reconduction.

5. Qu'un tel engagement n'est pas pour un temps indéterminé, et n'est pas révocable à la volonté du locataire.

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6. Que, dans l'espèce, le salaire stipulé entre les parties doit être la base d'évaluation des dommages, aucune preuve de dommage n'ayant été faite.

7. Que l'action de l'intimé ayant été portée avant l'expiration de l'année pour la balance de salaire pour tout ce qui restait à courir de l'année, la demande était prématurée pour la somme représentant le salaire non encore échu à la date de l'action, et le jugement obtenu par l'intimé pour le plein montant de son salaire doit être réduit à ce qui était échu à la date de l'institution de son action.

APPEL d'un jugement de la Cour Supérieure (OUIMET, J.) rendu le 8 janvier 1889.

Les faits de la cause sont rapportées avec le jugement *a quo* (M. L. R., 5 S. C. 1), et sont d'ailleurs suffisamment expliqués dans l'opinion de la Cour d'Appel prononcée par l'honorable juge Bossé.

Béique, C. R., et *Demers*, pour les appelants :—

L'engagement en question n'était pas pour un an, mais il était sans terme et révocable à volonté. Autre chose est de dire : je vous paierai sur le pied de $2,000 par année, et de dire : je vous engage pour une année à raison de $2,000. *Demangeat*, vol. I, p. 360 ; *Lennan* v. *St. Lawrence & Atlantic Ry. Co.*, 4 L. C. R. 91.

Les commissaires sont les mandataires de Sa Majesté, et leur secrétaire n'est que leur sous-mandataire, sujet comme eux à être destitué *ad nutum*. Il est vrai qu'ils ont succession perpétuelle, qu'ils peuvent poursuivre et être poursuivis, qu'ils peuvent acquérir des propriétés ; mais il n'en est pas moins vrai que tous leurs biens appartiennent à Sa Majesté, pour les usages publics de la province (3 Vict., ch. 31, s. 3). En renvoyant l'intimé les appelants ont agi au nom de Sa Majesté, et la Couronne a le droit de destituer à volonté. C. Civ., art. 17, §17 ; *Samson* v. *Les Syndics, etc., de la Rive Sud*, 6 Q. L. R. 86. D'ailleurs les termes de leur charte (3 Vict., ch. 31, sec. 3) autorisaient expressément les commissaires à destituer à volonté leurs employés.

Quant aux dommages, il n'y en a pas de prouvés. Et si l'on prenait le salaire pour base d'évaluation, il n'y avait que $1,099.98 de salaire échu lors de l'institution

de l'action, au lieu des $1,650 que le jugement *a quo* accorde à l'intimé.

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Lafleur, pour l'intimé :—

L'engagement d'un secrétaire ou d'un employé supérieur à raison de tant par année doit être réputé un contrat pour une année. La cause de *Lennan* v. *St. Lawrence & Atlantic Ry. Co.* citée par les appelants paraît avoir décidé le contraire, mais cette opinion est insoutenable et repose sur une interprétation erronée d'un passage de *Pothier* (Louage, No. 176) qui dit que les domestiques *attachés à la personne* peuvent être renvoyés à volonté *quand même* ils sont employés à tant par an, et ceci en vertu des coutumes locales. Il faut suivre en cette matière l'analogie de l'art. 1642 qui s'applique aux baux de maisons. Cette question a été décidée par la Cour d'Appel dans la cause de la *Cité de Montréal & Devlin* (jugée le 13 mars 1878), et dans celle de *Cité de Montréal & Dugdale* (3 Leg. News, 204).

Les commissaires ne sont pas les agents de la Couronne, mais une corporation avec succession perpétuelle. *Regina* v. *Belleau* (L. R., 7 App. C. 473). La cause de *Samson* citée par les appelants est mal rapportée, et le *jugé* n'indique pas le vrai motif de la décision.

La clause de leur charte citée par les appelants n'autorise pas une destitution sans avis, sans cause et sans indemnité. *Grant*, on Corporations, p. 33, note f; *Cité de Montréal & Dugdale* (*sup. cit.*)

L'action serait peut-être prématurée pour partie si la déclaration ne réclamait pas une condamnation tant à titre de dommages qu'à titre de salaire, mais dans l'espèce le salaire n'est que la base de l'évaluation des dommages qui sont recouvrables avant l'expiration du terme.

Bossé, J. (pour la Cour) :—

L'action en cette cause a été portée contre l'appelante pour salaire et dommages allégués avoir été encourus par le renvoi de l'intimé, sans cause, dans le cours d'une année d'engagement.

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Le contrat entre les parties résulte d'une résolution adoptée par la Commission le 3 mai 1869 dans les termes suivants: "On the subject of appointing a secretary to "the Trust, it was proposed by B. H. Lemoine, Esq., "seconded by E. A. Dubois, Esq., that Joseph Rielle be "appointed this day secretary of the Road Trustees with "a salary at the rate of fourteen hundred dollars per "annum, with an allowance at the rate of two hundred "dollars per annum for the maintenance of a horse for "the uses of the Trust; Mr. Rielle having been sent for, "appeared before the board and accepted the above ap- "pointment with the full understanding that the Trust "shall be entitled to the whole of Mr. Rielle's time, but "that no objection shall be raised to his having surveys "performed by assistants or to his attending to matters "which do not interfere with the interests of the "Trust."

L'engagement a été continué d'année en année par tacite reconduction jusqu'au 3 juillet 1874, date à laquelle la Commission a adopté une autre résolution portant le salaire du demandeur à $2,200.

Les choses sont restées en cet état jusqu'au 24 juillet 1887, où une autre résolution nommant L. H. Senécal secrétaire-trésorier au lieu et place du demandeur a été adoptée, et le 28 du même mois, par lettre signée par le président, l'intimé a été informé de ces faits: il a protesté, offert ses services, et sur le refus de la Commission de le continuer dans son emploi il a porté l'action dont il s'agit, et réclamé son salaire pour toute la période de temps qui restait à courir pour l'année, savoir, du 24 juillet 1887 au 3 mai 1888. Il allègue aussi des dommages.

La défense a invoqué trois moyens:

1o. Droit de renvoyer le demandeur résultant d'abord de la nature du contrat qui permettait de le révoquer à leur gré, ensuite de ce que la Commission n'était que l'un des départements administratifs des biens de la province, que le demandeur était, partant, un employé civil et révocable à volonté;

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2o. Que l'engagement était au mois et révocable sur un mois d'avis ;

3o. Défense en fait et dénégation des dommages.

Le jugement en Cour Supérieure a maintenu l'action telle que portée et condamné la Commission à payer tout le montant réclamé.

De là l'appel.

Le moyen invoquant le droit de renvoyer le demandeur parce qu'il était un des employés civils de la province ne me paraît pas pouvoir être admis.

La Commission actuelle dérive ses pouvoirs de l'acte 4 et 5 Vict., ch. 35, et y est créée corporation ayant succession perpétuelle. Certains chemins sont mis sous son contrôle, il lui est donné pouvoir de les administrer, de faire tous les contrats nécessaires pour cette fin, de percevoir des péages, de poursuivre et d'être poursuivie.

Rien dans le statut n'établit la corporation comme partie du service civil de la province.

Nous n'y trouvons que la création d'une corporation indépendante, d'un être moral avec certains pouvoirs définis, à la seule condition que les individus qui la composent peuvent être à la volonté de l'exécutif démis de leur charge et remplacés par d'autres personnes.

D'ailleurs les diverses branches du service civil sont énumérées à la page 635 et suivantes des Statuts Révisés, et elles y sont toutes autres que les commissions des chemins à barrières existantes en cette province. Ceci est tellement reconnu que l'on serait fort étonné de voir les employés de ces corporations réclamer comme employés civils, soit une exemption de saisie de partie de leur salaire, soit une pension de retraite.

Mais, dit-on, la corporation a le droit spécialement indiqué au statut d'engager ses officiers et de les révoquer de leur place, et par conséquent l'appelante n'a fait qu'user de son droit en démettant l'intimé.

Ceci n'est pas une conséquence du pouvoir donné par le statut. La clause citée ne fait que donner à la Commission le droit de contracter avec ses employés. Comme corporation elle pouvait s'engager et s'obliger par ce con-

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trat comme toute autre personne, et comme cette personne elle est tenue en vertu de ce contrat et responsable des conséquences si elle le violait sans raison. Ceci me paraît disposer complètement de cette partie de la défense.

Quant à la seconde partie, à savoir, si le contrat lui-même était révocable à volonté, elle ne me paraît pas pouvoir non plus être adoptée.

La jurisprudence en France sur l'interprétation à être donnée à des contrats de cette nature, et sur les conséquences de la révocation de l'engagement sans raison, a beaucoup varié. Jusqu'en 1859, la Cour de Cassation déclarait que les engagements de cette nature étaient pour un temps indéterminé et, lorsqu'ils avaient été rompus par le maître, qu'il y avait lieu contre lui aux dommages-intérêts. Depuis 1859 l'on trouve de cette même Cour six arrêts différents qui jugent le contraire.

Mais la doctrine semble condamner cette nouvelle jurisprudence, et les auteurs les plus récents expriment tous le désir de voir la Cour revenir à sa première opinion. Voir 25 *Laurent*, Nos. 511 à 517, où ces opinions sont passées en revue. *Aubry & Rau*, vol. 4, p. 514. 30 *Dalloz*, vo. Louage d'ouvrage, Nos. 50 à 54.

En Canada nous avons la cause de *Lennan* v. *St. Lawrence & Atlantic Ry. Co.* (4 L. C. R. 91), où MM. les juges Smith et Mondelet ont jugé qu'un engagement à tant par année n'est pas pour l'année et peut être révoqué.

Ce jugement paraît reposer en entier sur une opinion de Pothier copiée par Troplong; mais il est à remarquer que Pothier dans le passage invoqué ne paraît s'occuper que du cas particulier des domestiques engagés au service de la personne du maître, et ne décide qu'en raison d'usages locaux que nous n'avons pas dans ce pays.

D'autre part, un jugement de cette Cour dans la cause de Dugdale et la corporation de Montréal (3 L. N. 204) a décidé qu'un engagement de cette nature était pour l'année et donnait lieu à des dommages-intérêts contre la partie qui le révoquait avant l'expiration de ce terme.

Ceci me paraît plus logique et plus conforme à nos mœurs.

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Dans cette province un commis employé dans une grande compagnie de chemin de fer ou autre, est, à moins de circonstances spéciales démontrant le contraire, engagé à l'année, il est censé ne pas avoir voulu s'exposer à un renvoi sans autre motif que le caprice ou l'intérêt du maître, et se trouver sans emploi à une saison de l'année où les engagements ne sont généralement pas faits. De son côté le maître ne peut être censé avoir voulu s'exposer à tous les inconvénients qui pourraient lui résulter de ce que, à un moment donné, un ou plusieurs de ses employés quitteraient ses bureaux.

Nous trouvons un autre exemple de cet usage dans les engagements de domestiques de ferme.

L'on a cité la cause de *Samson* v. *Les Syndics des Chemins à Barrières de la Rive Sud* (6 Q. L. R. 86), décidée par M. le juge-en-chef Meredith. Le rapport de cette cause n'est pas complet et pourrait induire en erreur : ce jugement a attiré mon attention lorsqu'il a été rendu. Les membres de l'ancienne Commission avaient été révoqués, d'autres avaient été nommés à leur place, et l'ancienne Commission avait cru pouvoir engager un secrétaire-trésorier pour un long terme, déclarer que cet engagement ne pouvait être révoqué, et imposer ce nouvel engagement à la Commission. Il était clair que les membres de l'ancienne Commission n'étaient plus commissaires au moment de l'adoption de cette résolution, et qu'ils ne pouvaient engager la Commission comme corporation. C'est ce qui a été jugé, et l'on voit que cette cause n'a aucune application à la présente.

Il doit par conséquent y avoir condamnation contre l'appelante ; mais l'action a été portée avant l'expiration de l'année et pour la balance de tout le salaire pour tout ce qui restait à courir de l'année ; elle est par conséquent prématurée pour la somme que représente le salaire non encore échu à la date de l'action.

Ce salaire, d'après les circonstances de la cause, me paraît devoir être la base d'évaluation des dommages, et en l'accordant pour tout le temps expiré à la date de l'institution de l'action, il forme une somme de $1,099.98, au

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lieu de $1,650 accordée par le jugement de la Cour Supérieure, et le jugement doit être réformé en conséquence.

Quant aux frais ils doivent être contre les défendeurs en Cour Supérieure, mais en appel je crois qu'ils doivent être partagés. D'une part l'appelante a nié toute responsabilité et demandé le renvoi pur et simple de l'action ; de son côté l'intimé a demandé la confirmation du jugement pour le montant entier sans se désister de la partie du montant qui représente le temps non échu à laquelle il n'avait évidemment pas droit.

Chaque partie devra par conséquent payer ses frais en appel.

Jugement réformé.

David, Demers & Gervais, avocats des appelants.
Lafleur & Rielle, avocats de l'intimé.
(E. L.)

June 26, 1889.

Coram DORION, Ch. J., CROSS, BABY, CHURCH, BOSSÉ, JJ.

LAURENT PIGEON,
(*Plaintiff in Court below*),
APPELLANT ;

AND

LA COUR DU RECORDER ET AL.,
(*Defendants in Court below*),
RESPONDENTS.

Constitutional law—City of Montreal—Butchers' private stalls —Taxation—37 Vict. (Q.) *ch.* 5[illegible] *s.* 123, *sub-sections* 27, 31—*By-law.*

H[illegible]—1. That sub-sections 27 a[illegible] 123 of 37 Vict. (Q.), ch. 51, [illegible] which the Council of the City [illegible]eal is authorized to regulate, license or restrain the sale, in[illegible]ivate stall or shop in the city, outside of the public meat mar[illegible] fresh meats, vegetables, fish, or other articles usually sold on [illegible] within the powers of the provincial legislature.

2. That the by-law passed by the City Council under the authority of the above-named sub-sections, fixing the license to sell in a private stall at $200, is valid.

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APPEAL from a judgment of the Superior Court, Montreal, (MATHIEU, J.), Sept. 1, 1888, in the following terms :—

"La Cour, etc.....

"Attendu que le 14 janvier 1887, le requérant, boucher, de la cité et du district de Montréal, fut poursuivi et assigné à comparaître devant la Cour du Recorder de la cité de Montréal, le 18 du même mois, pour répondre à la plainte faite contre lui par la cité de Montréal, pour avoir, le 12 du même mois, illégalement exposé en vente, dans un étal privé, tenu par lui en dehors des marchés à viande établis par le conseil de la dite cité, savoir : sur la ligne de la rue St. Denis, à l'angle de la rue Ste-Catherine, de la viande ordinairement vendue sur les marchés publics à viande, savoir, 150 livres de bœuf, sans avoir obtenu une licence du conseil de la dite cité, comme il est pourvu par les règlements du dit conseil ;

"Attendu que le dit demandeur et requérant allègue dans sa déclaration et requête, que la cité de Montréal, en portant la dite plainte contre lui, s'est basée sur le règlement concernant les marchés, passé le 9 juin 1882, et portant le No. 131 ; que la Cour du Recorder n'a aucune juridiction pour prendre connaissance de la dite plainte, parce que le règlement qui donne juridiction à la dite Cour et qui constitue l'offense dont se plaint la cité de Montréal, est illégal, *ultra vires* et nul ; que les sections 41 et 46 du dit règlement, sur lesquelles est basée la dite poursuite, se lisent comme suit : 'No person shall sell or 'expose for sale in any private stall or shop, in the city, 'outside of the public meat markets aforesaid, any meat, 'fish, vegetable or provisions usually bought and sold 'on public meat markets, unless he shall have obtained 'a license from the said council, as hereinafter provided.

'For each and every such license, there shall be paid 'to the City Treasurer by the person applying for the

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same, at the time of his making such application, the sum of $200.'

"Que la section 95 du dit règlement impose une amende, à la discrétion de la Cour du Recorder, mais n'excédant pas $40, ou un emprisonnement, encore à la discrétion de la dite Cour, mais n'excédant pas deux mois, pour toute infraction à ce règlement: que le conseil de la dite cité a, en passant ce règlement, prétendu agir en vertu de la sous-section 27 de la section 123 du chapitre 51 des Statuts de Québec de 1874, 37 Vict., qui ne lui confère pas le droit de se créer un revenu par l'émission de licenses pour étaux privés, mais seulement le droit de licencier, réglementer et régir, et de charger, pour une licence, un taux raisonnable, pour payer les frais inhérents à l'émission de telle licence; que le montant exigé par la cité, pour un étal privé, est exagéré, et nullement proportionné aux taxes que payent les autres citoyens pour l'exploitation de n'importe quelle industrie dans la dite cité; que la section 78 du dit Statut 37 Victoria, tel qu'amendée par la section 1 du chapitre 59 des Statuts de Québec de 1875, 39 Victoria, donne à la dite cité le pouvoir d'imposer sur tous les bouchers faisant affaires dans la dite cité, une taxe annuelle, dite taxe d'affaires, pourvu que cette taxe n'excède pas sept et demi pour cent, de la valeur annuelle des lieux occupés pour l'exploitation de ce métier ou commerce; que le demandeur a déjà été taxé pour l'exploitation de son étal situé sur la ligne de la rue Ste. Catherine, en la cité de Montréal, et désigné dans le dit bref d'assignation, jusqu'au montant de sept et demi pour cent, sur la valeur annuelle des lieux qu'il occupe pour l'exploitation de son dit commerce, et qu'il a payé cette taxe d'affaires, pour l'exploitation du même étal que celui pour lequel la dite cité prétend lui imposer une licence de $200; que le règlement en vertu duquel la dite cité a intenté les dites actions, est contraire au droit commun de l'Empire britannique, en autant qu'il établit double taxe pour l'exploitation d'un même commerce, et qu'il consacre un principe d'inégalité de taxation entre citoyens exerçant le même commerce; que ce règlement,

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en imposant une licence de $200 à quiconque veut faire le commerce de viande en dehors des marchés publics, dans la dite cité, impose une taxe indirecte, gêne le commerce et s'arroge un pouvoir que la cité n'a pas, et que la Législature Provinciale n'avait pas le droit de lui déléguer; que la dite section 27 du dit Statut de Québec 37 Vict., ch. 51, autorisant la dite cité à restreindre le commerce, est illégale et inconstitutionnelle; que par conséquent, ce règlement est nul, l'offense qu'il établit n'existe pas, et ne peut donner aucune juridiction à la Cour du Recorder de la dite cité, concernant cette prétendue offense, et conclut à ce qu'un bref de prohibition émane contre les défenderesses, la Cour du Recorder de la cité de Montréal et la dite cité de Montréal, leur enjoignant de ne pas procéder à entendre et décider la dite cause No. 152 des dossiers de la dite Cour du Recorder, maintenant pendante devant la dite Cour, sur la plainte de l'autre défenderesse, la cité de Montréal, contre le requérant, et à ce qu'il soit déclaré que le dit règlement No 131 est *ultra vires* et nul; que la dite sous-section 27 de la section 123 du dit Statut de Québec de 1874, 37 Victoria, chapitre 51, est illégale et inconstitutionnelle, et que la dite Cour du Recorder de la cité de Montréal, n'a aucune juridiction pour entendre et décider la dite cause, et à ce que le dit bref de prohibition soit déclaré absolu;

"Attendu que la dite défenderesse, la Cité de Montréal, a d'abord plaidé à cette action par une exception péremptoire, dans laquelle elle allègue que, d'après la loi, le droit de demander la cassation de tout règlement de la dite cité se prescrit par trois mois, à compter de la mise en force de tel règlement, qui est tenu pour valide et obligatoire après l'expiration de ce délai; que le dit règlement No. 131 a été passé et mis en force par le conseil, le 9 juin 1882, tandis que la présente action n'a été intentée que le 28 janvier 1887; que la demande en nullité est non-recevable et que le droit de demander la cassation du dit règlement est prescrit et était depuis longtemps, le dit règlement étant de la compétence de la dite défenderesse, la cité de Montréal;

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...endu que la dite défenderesse la cité de Montréal, par un autre plaidoyer, allègue que la sous-section 27 de la section 123 du chapitre 51 des Statuts de Québec de 1874, 37 Victoria, n'est pas inconstitutionnelle, et que le dit règlement No. 131 dont on attaque la validité était et est, encore de la compétence de la dite Corporation de la cité de Montréal ; que le dit règlement et particulièrement toutes les dispositions de l'article V sont conformes aux pouvoirs qui sont conférés à la dite cité par sa charte et les Actes qui l'amendent, et notamment par les sous-sections 27, 28, 31 et 32 de la section 123 du dit Statut, chapitre 51, 37 Victoria ; que le dit requérant n'a pas été taxé deux fois pour la même chose, le même but et le même objet ; qu'en effet, d'après la sous-section 2 de la section 1ère du ch. 52 du Statut de Québec de 1875, 39 Vict., la taxe de sept et demi pour cent est basée sur la valeur cotisée des prémisses occupées par toute personne faisant affaire dans les limites de la dite cité, et a pour objet de permettre l'exercice de tout commerce, manufacture, occupation, affaire, profession ou moyen de profit ou de subsistance qui sont maintenant, ou seront par la suite, faits, exercés ou en opération dans la dite cité ; que le but de la loi est de prélever un impôt sur la maison de commerce quelle qu'elle soit, tandis que la licence de $200 est spécifique, et s'applique exclusivement aux bouchers voulant faire le commerce de viande dans les étaux privés, en dehors des marchés, et est exigible en vertu d'une loi tout-à-fait distincte ; que le dit règlement No. 131 et les divers statuts sur lesquels il est basé sont conformes aux pouvoirs qui sont conférés aux législatures provinciales par la section 92 de l'Acte de l'Amérique Britannique du Nord de 1867 ; que le dit bref de prohibition est adressé à la Cour du Recorder, et à la cité de Montréal, tandis qu'il aurait dû être adressé à la Cour du Recorder seule, comme tribunal de juridiction inférieure ; qu'à la face même de la plainte portée contre le dit requérant par la dite cité, tel qu'allégué dans la dite requête, il appert que la dite Cour du Recorder a juridiction ; et que partant, il n'y a pas lieu en droit, au bref de prohibition ;

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" Attendu que le demandeur et requérant a répondu à l'exception péremptoire de la défenderesse, la cité de Montréal, par elle en premier lieu plaidée, que la prescription que la défenderesse invoque en faveur du dit règlement No. 131, ne s'applique pas à une nullité radicale et absolue, semblable à celle que le demandeur et requérant invoque contre ce règlement ; mais que cette prescription ne couvre que le défaut de formé ou de procédure ;

"Attendu qu'il a été prouvé que le demandeur et requérant a payé la taxe d'affaires de sept et demi pour cent, sur la valeur du loyer de l'immeuble occupé par lui comme étal privé et pour l'occupation duquel on prétend qu'il est tenu de prendre une licence comme susdit ;

" Attendu qu'après avis du demandeur et requérant, l'Honorable Arthur Turcotte, procureur général de Sa Majesté, pour la Province de Québec, est intervenu en cette cause, et a déclaré s'en rapporter à justice ;

" Considérant que par les dispositions des paragraphes 8 et 9 de la section 92 de l'Acte de l'Amérique Britannique du Nord de 1867, la Législature Provinciale a le pouvoir exclusif de faire des lois relatives aux institutions municipales dans la province, aux licences de boutiques, de cabarets, d'auberges, d'encanteurs, et autres licences, dans le but de prélever un revenu pour des objets provinciaux, locaux ou municipaux ;

" Considérant que par les dispositions des paragraphes 27, 31 et 32 de la section 123 du chapitre 51 des Statuts de Québec de 1874, 37 Victoria, le conseil de la cité de Montréal fut autorisé à faire des règlements pour établir et régler les marchés publics et les étaux privés de bouchers ou de regrattiers, et pour régler, licencier ou restreindre la vente de viandes fraîches, légumes, poissons, ou autres articles que l'on vend d'ordinaire sur les marchés ; pour ordonner que toute espèce d'animaux vivants ou toute espèce de comestibles et denrées, achetées et vendues d'ordinaire dans les marchés publics et qui seront apportées dans la dite cité pour y être vendues, soient transportées aux marchés publics de la dite cité et y soient ex-

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posés ; et qu'aucun animal vivant, comestible ou denrée ne soit offert ou exposé en vente, ou ne soit vendu ou acheté ailleurs dans la dite cité que sur les dits marchés publics ; mais le dit conseil pourra s'il le juge avantageux, par un règlement qui sera passé à cette fin, donner pouvoir à toute personne de vendre, offrir ou exposer en vente, en aucune place hors des limites des dits marchés ou des étaux des marchés de la cité, de la viande, des légumes et tous les comestibles qui sont ordinairement apportés et vendus sur les marchés publics, pourvu que telle personne obtienne à cet effet, une licence du dit conseil, pour laquelle elle paiera au trésorier de la cité telle somme qui sera fixée par tel règlement, pour imposer une taxe sur tous les marchés privés dans la dite cité, et sur ceux qui pourront y être établis à l'avenir, pour la vente d'animaux, provisions ou denrées, ou de toute autre chose qu'on vend ordinairement dans les marchés publics, avec pouvoir de régler et fixer la dite taxe par rapport à chaque marché en particulier, suivant que le conseil le jugera à propos ;

" Considérant que les dites dispositions du dit Statut paraissent être dans les limites des pouvoirs de la législature provinciale, et que les dispositions susdites du dit règlement de la cité de Montréal sont autorisées par le dit Statut ;

" Considérant qu'outre la taxe d'affaire imposée en vertu des dispositions de la section 78 du dit Statut, telle que décretée par la section 1 du chapitre 52 des Statuts de Québec de 1875, 39 Victoria, le conseil de la cité de Montréal est autorisé par les dispositions de la loi susdite, à licencier et à taxer les marchés privés, et qu'il a le droit de fixer lui-même par règlement la somme qui doit être payée pour telle licence ;

" Considérant que les dispositions susdites du dit règlement s'appliquent à tous ceux qui font le genre de commerce du demandeur et requérant en cette cause, et qu'il ne paraît y avoir aucune injustice quant à cette catégorie de commerçants ;

" Considérant que les dispositions du dit règlement ne

constituent pas une restreinte du commerce, mais sont le résultat de l'exercice légitime du pouvoir accordé par la loi au conseil de la cité de Montréal de licencier ce commerce dans le but de prélever un revenu pour des objets municipaux ;

" Considérant que la Cour du Recorder de la cité de Montréal paraît avoir juridiction sur la matière mentionnée dans la dite requête, et que, par l'article 1031 du Code de Procédure Civile, le bref de prohibition ne peut être adressé qu'à tout tribunal inférieur qui excède sa juridiction ;

" Considérant que par les dispositions de la section 12 du chapitre 58 des Statuts de Québec de 1879, 42-43 Victoria, le droit de demander la cassation de tout règlement passé par le conseil de la cité de Montréal est prescrit par trois mois à compter de la date de la mise en force de tel règlement, et qu'après ce délai tout tel règlement est tenu pour valide et obligatoire, à toutes fins que de droit, pourvu qu'il soit de la compétence de la dite Corporation ;

" Considérant que les dispositions susdites du dit règlement étant de la compétence de la dite corporation, il s'en suit que le droit de demander la cassation de ce règlement est prescrit, lors de l'émanation du présent bref de prohibition ;

" Considérant que les défenses de la dite défenderesse, la cité de Montréal, sont bien fondées et que la requête et la demande du dit demandeur et requérant sont mal fondées ;

" A maintenu et maintient les dites défenses de la dite défenderesse, et a renvoyé et renvoie la requête et demande du dit demandeur, et casse et annule le dit bref de prohibition avec dépens."

May 15, 1889.]

R. Laflamme, Q.C., and *Madore*, for the appellant :—

Les questions à décider dans cette cause sont essentiellement des questions de droit : les faits tels qu'allégués dans la requête sont vrais sans conteste.

Trois propositions ressortent des allégations de la requête.

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1. La cité de Montréal n'est autorisée par sa charte qu'à passer des règlements pour établir et régler les étaux privés de bouchers ou de regrattiers; et pour régler, licencier ou restreindre la vente de viandes fraîches, légumes, poissons ou autres articles, que l'on vend d'ordinaire sur les marchés. (Sous-section 27 sec. 123.)

Cette autorisation ne va pas jusqu'à permettre à la cité de Montréal de se créer un revenu, au moyen de la licence qu'elle émet : le droit de licencier ne comporte pas le droit de taxer ; et à moins que ce droit ne lui soit spécialement délégué par la législature, la cité de Montréal n'a pas le droit de l'exercer.

La sous-section 26, de la même section, se lit comme suit : "Pour licencier et régler les magasins de bric-à-"brac où se vendent des bouts de tuyaux en cuivre, en "plomb ou en fer, robinets, bouts de corde, vieux meu-"bles ou autres articles de rebut."

Comme on le voit, les deux dispositions du Statut sont identiques. Cette dernière sous-section a été interprétée par les tribunaux. En vertu de cette disposition, la cité de Montréal avait passé un règlement imposant une licence de $50 pour tout marchand de bric-à-brac exerçant son commerce dans les limites de la ville. Walker refusa de prendre sa licence ; il fut poursuivi de la Cour du Recorder qui le condamna ; mais sur *certiorari* la conviction fut cassée : *Ex parte J. R. Walker et la Cité de Montréal*, 5 Leg. News, p. 201. Walker alors prit contre la Cité une action en répétition de deniers, pour les licences payées les années précédentes, alléguant que le règlement était nul. Les conclusions de son action furent maintenues en Cour Supérieure, et le jugement confirmé devant cette Honorable Cour. The *City of Montreal & Walker*, M.R.L., 1 Q. B., p. 469. Cette Cour décida dans cette cause que le pouvoir accordé à une corporation municipale de licencier et régler un certain commerce, n'autorise pas cette corporation à percevoir un revenu, mais seulement un honoraire suffisant pour couvrir les frais d'émission de la licence, d'inspection et d'administration ; et que dans l'espèce une somme de $5[illegible] la licence était illégale.

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Or, la seule différence qu'il y ait entre la sous-section 26 et la sous-section 27, c'est que dans cette dernière, il y a eu outre des mots *régler* et *licencier* le mot *restreindre*. Le mot *restreindre* ne permet certainement pas, non plus, à la cité de Montréal, d'imposer une taxe.

2. La deuxième proposition est que, l'imposition d'une taxe de deux cents piastres par année pour tenir un étal privé de boucher, constitue deux impositions de taxes pour un même objet.

3. La troisième proposition c'est que cette imposition d'une taxe de deux cents piastres, constitue une inégalité de taxation en faveur de tous les autres commerces, au détriment du commerce le plus nécessaire, le commerce des viandes.

R. Roy, Q.C., for the respondents :—

En vertu des dispositions des paragraphes 8 et 9 de la section 92 de l'Acte de l'Amérique Britannique du Nord, de 1867, la législature provinciale a le pouvoir exclusif de faire des lois relatives aux institutions municipales dans la Province, aux licences de boutiques, de cabarets, d'aubergès, d'encanteurs, et autres licences, dans le but de prélever un revenu pour des objets provinciaux, locaux ou municipaux ; d'où il suit que, sous l'autorité des paragraphes 27, 28, 31 et 32 de la section 123 du chapitre 51 des Statuts de Québec de 1874, 37 Victoria, le conseil de la cité de Montréal a été autorisé à faire des règlements pour établir et régler les marchés publics et les étaux privés des bouchers ou des regrattiers, et pour *régler, licencier ou restreindre la vente de viande fraîche, légumes, poisson*, ou autres articles que l'on vend d'ordinaire sur les marchés ; pour ordonner que tous animaux vivants ou toute espèce de comestibles et de denrées, achetés et vendus d'ordinaire sur les marchés publics et qui seront apportés dans la dite cité pour y être vendus, soient transportés aux marchés publics dans la dite cité et soient exposés en vente, et qu'aucun animal vivant, comestibles ou denrées, ne soient offerts ou exposés en vente ou ne soient vendus et exposés ailleurs dans la dite cité que sur les dits marchés publics ;—mais le dit statut ajoute de

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plus que le dit Conseil peut, par règlement passé à cette fin, s'il le juge avantageux, donner pouvoir à toute personne de vendre, offrir ou exposer en vente, en aucun lieu hors des limites des dits marchés ou des étaux des marchés dans la dite cité, de la viande, des légumes et tous les comestibles qui sont ordinairement apportés et vendus sur des marchés publics : pourvu que *telle personne obtienne à cet effet une licence du dit Conseil pour laquelle elle paiera au Trésorier de la cité telle somme qui sera fixée par tel règlement, et qu'elle se conforme aux règles contenues dans le dit règlement* ; et finalement, dit le statut, le Conseil pourra imposer une taxe sur tous les marchés privés dans la dite cité, et sur ceux qui pourront y être établis à l'avenir pour la vente d'animaux, provisions, denrées, ou de toutes autres choses qu'on vend ordinairement sur les marchés publics, *avec l'autorisation expresse de régler et fixer la dite taxe par rapport à chaque marché en particulier, suivant que le Conseil le jugera à propos.*

Le pouvoir de taxer et licencier les étaux privés ou marchés privés dans les limites de la dite cité, paraît donc évident, et les termes de la loi sont tellement clairs et précis qu'ils ne peuvent laisser aucun doute dans l'esprit de ce tribunal ; les prétentions de l'appelant sont mal fondées quant à l'inconstitutionalité de l'Acte Provincial, qui est en tout conforme aux dispositions de la section 92 de l'Acte de l'Amérique Britannique du Nord.

Mais voyons maintenant si l'intimée, en passant le règlement No. 131, a agi *ultra vires* des pouvoirs susmentionnés. Les dispositions de l'article 5 de ce dernier traitent particulièrement de la matière.

La section 44 décrète que "nulle personne ne vendra "ou exposera en vente dans aucun étal privé ou bouti- "que, dans la cité en dehors des marchés aux viandes "susdits, *de la viande*, du poisson, des légumes ou autres "provisions ordinairement achetées et vendues sur les "marchés publics aux viandes, à moins qu'elle n'ait ob- "tenu une licence du dit Conseil comme il est ci-après "pourvu."

La section 46 pourvoit au paiement de $200 pour l'octroi de telle licence.

Il y a sans doute une grande distinction à établir entre le pouvoir de licencier et celui de taxer; le premier ne va pas au-delà des dépenses à encourir pour l'octroi et le maintien de telle licence, tandis que le dernier comporte un revenu direct dont le *quantum* est souvent discrétionnaire.

"Where the grant (to license) is not made for revenue, "but for regulation merely, a fee for the license may be "exacted; but it must be *such a fee only as will legitimately* assist in the regulation; and it should not exceed "the necessary or probable expense of issuing the license, "and of *inspecting* and *regulating* the licenses which it "covers."

Cooley on Taxation, ch. 18, p. 386.

Mais dans l'espèce le statut provincial a spécialement accordé à la cité le pouvoir conjoint de *taxer et licencier en même temps*; et il est évident que l'objet du règlement No. 131, n'est pas d'établir un impôt indirect, mais au contraire de créer un revenu municipal et en même temps de régler la vente de viandes de boucherie au double point de vue de la santé publique et de l'intérêt du commerçant.

Counsel referred, among other cases, to *Levesque* v. *City of Montreal*, 2 Leg. News, p. 306, and to *Mallette* v. *City of Montreal*, 2 Leg. News, p. 370, in which the question had already been decided.

June 26, 1889.]

CROSS, J., (for the Court):—

This case differs from *City of Montreal & Walker*, M.L.R., 1 Q. B. 469. In the *Walker* case the Council were empowered to make by-laws, among other things, "to license and regulate junk stores." No power was given directly to impose a tax or to use the licensing power for the purpose of raising a revenue; and we held that the power to "license and regulate" does not give authority to impose or exact a revenue duty, but only a moderate fee to

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cover the cost of regulating and granting a license. The judgment of the Court below in that case, which held that $50 was not a reasonable fee to cover the cost of regulating and licensing junk stores, was therefore confirmed by this Court.

In the present case, however, the power to tax is expressly given by the statute.

Sub-section 31 reads as follows :—"But the said Coun-" cil may, if they deem it advantageous, by a by-law to be " passed for that purpose, empower any person to sell, " offer or expose for sale, in any place beyond the limits " of said markets or market stalls of the said city, meat, " vegetables and provisions usually bought and sold on " public markets, upon such person obtaining a license " for that purpose from the said Council, *for which he shall* " *pay to the city treasurer such sum as may be fixed by such by-*" *law.*" We have no difficulty in holding that the by-law is covered by the terms of the Statute.

As to the power of the provincial legislature to pass such a statute, we do not think it can be seriously questioned. The judgment will therefore be confirmed.

Judgment confirmed. (1)

Laflamme, Laflamme, Madore & Cross, for appellant.

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

(J. K.)

(1) On appeal to the Supreme Court of Canada, the judgment of the Court of Queen's Bench was affirmed, March 9, 1890. See 13 Leg. News, 153.

November 20, 1889.

Coram TESSIER, CROSS, BABY, CHURCH, BOSSÉ, JJ.

JAMES S. EVANS,

(*Defendant in Court below*),

APPELLANT;

AND

THOMAS DARLING,

(*Plaintiff in Court below*),

RESPONDENT.

Expropriation—Railway—Arbitration—Arbitrator rendering additional services to party.

HELD:—The fact that a person who has acted as arbitrator in behalf of the landowner, in an expropriation by a railway company, has been paid by the company the amount taxed for his services as arbitrator, does not preclude him from recovering from the party appointing him, the value of additional services rendered to such party in connection with the same arbitration, but outside of the ordinary duties of an arbitrator, such as interviews, consultations, etc.

APPEAL from a judgment of the Superior Court, Montreal (WURTELE, J.), in the following terms:—

"The Court having heard the parties by their counsel on the merits of this cause, examined the proceedings and proof of record, heard also the witnesses in open Court and deliberated;

"Considering that the plaintiff is entitled to compensation for the services which he rendered to the defendant in the matter of the expropriation of his property by the Atlantic and North Western Railway Company, outside of the services rendered by him while acting officially as an arbitrator;

"Considering that the services rendered by him to defendant in connection with the said expropriation, outside of his official duties and his attendance at meetings of the arbitrators, have been proved to be worth over $100, but that the plaintiff limited his claim to compensation therefor to the sum of $100, by the account which he rendered and sent to the defendant;

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"Doth condemn the defendant to pay to the plaintiff the said sum of $100 for the price and value of the said services, with interest from the 8th of November last (1887), date of the service of process, until payment, and costs, of which distraction etc."

Sept. 18, 1889.]

R. A. E. Greenshields, for the appellant:—

The respondent was appointed by the appellant as arbitrator for him, in certain expropriation proceedings which were taken by the Atlantic and North Western Railway Company against appellant, for certain lands through which the said railway was passing in its entrance to the city of Montreal. The proceedings in question were taken under provisions of ch. 109 of the Revised Statutes, sect. 8, which provides for the expropriation of lands by railways.

The railway company offered a certain amount which was not accepted by the appellant, and arbitrators were named, the respondent acting as arbitrator for appellant.

Evidence was taken and an award rendered by the arbitrators, which was in excess of the sum offered by the company, and under sect. 8, s.-s. 22, it is provided that in the event of the award of the arbitrators being in excess of the sum offered by the company, then the costs of the arbitrators should be borne by the railway company.

The respondent's bill for services was taxed at $172, which was paid to him by the railway company.

This, appellant contends, was, first, all that the said services were worth, and fully paid respondent for his time and trouble; and, secondly, that inasmuch as the Act provides for the taxation of costs of the arbitrators, respondent cannot claim from appellant any sum in addition to that which he has received from the company.

The respondent received from the company all that he pretended to claim from the railway company, and if he had any greater or additional claim he should have made it against the company, and they were, under the Act, responsible for it.

The appellant never received any notice of respondent's bill against the railway company, or that respondent had any greater or further claims than those he made against the company, but respondent obtained the above sum from the railway company and afterwards preferred the additional bill for which the present action is brought.

All the services for which the respondent claims to be paid, were rendered in and about the said expropriation proceedings and were properly the services which an arbitrator should render, and under the Railway Act, above quoted, these are taxable against the railway company.

There is no evidence that the railway company disputed the payment of respondent's bill in any way, and if the respondent could have shown, as he now seeks to show, that he was entitled to the additional sum claimed by the present action, he should have included it in his bill against the railway company and had it properly taxed in his favor as against the company.

Throughout the whole of the arbitrations had in connection with the entrance of this railway company into Montreal, no proprietors' arbitrator has ever rendered a bill to the party for whom he acted, where his bill has been paid by the company.

S. Cross, for respondent :—

The demand is for services outside and beyond those as arbitrator.

Appellant may urge that an arbitrator is in the position of a judge, and therefore cannot claim for such services. The analogy, however, does not lie ; he is appointed by the interested party himself, and the law states that the costs, to which he as arbitrator will be entitled, shall be paid by the losing party ; he is consequently doubly interested ;—both for himself and his nominor. Whereas a judge is in a wholly different position ;—paid, irrespective of his decision, by neither party, and to be communicated with by neither, except publicly, in open court. It would be a mistake to attempt to assimilate the arbitrator of either party to a judge.

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BABY, J. (for the Court) :—

The appeal is from a judgment by which the appellant was condemned to pay the respondent $100, as compensation for services which he had rendered to appellant in the matter of the expropriation of the appellant's property by the Atlantic and North Western Railway Company. The answer to the action was that Darling was not entitled to anything from Evans, because he had acted as arbitrator, and his bill had been taxed, and the amount thereof paid by the company.

The Court would readily come to that conclusion if there did not appear to be something outside of the ordinary services of an arbitrator. Darling is an accountant, and was employed by Evans some time previous to the arbitration. Many interviews took place, and during a period of about six weeks he rendered quite a number of services. The Court below found that Darling had made proof of these services, and as he had sent in an account for $100, the judge restricted the judgment to that amount. We think this judgment is well founded. We see nothing in the law which prevents a man from acting as agent for the party, who had employed him previous to his appointment as arbitrator.

Judgment confirmed.

Greenshields, Guerin & Greenshields for appellant.

Selkirk Cross for respondent.

(J. K.)

May 28, 1889.

Coram TESSIER, CROSS, CHURCH, BOSSÉ, DOHERTY, JJ.

WILLIAM FARWELL ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

ALEXANDER S. WALBRIDGE,
(*Plaintiff in Court below*),
RESPONDENT.

Trustees—South Eastern Railway Company—43-44 Vict. (Q.), *ch.* 49—*Supplies furnished to company before trustees took possession.*

By the Act 43-44 Vict. (Q.), ch. 49, the South Eastern Railway Company were authorised to issue mortgage bonds to a certain amount, and to convey the railway franchise, rights and interest to trustees, representing the bond holders. The trustees were empowered to take possession of the road in the event of default by the company to pay the bonds, or interest thereon for 90 days. It was also provided (by sect. 10) that neither the company nor the trustees should have power to cease running any portion of the road. The respondent furnished supplies necessary for operating the road, after the execution of a trust deed in conformity with the statute above mentioned, but before the trustees took possession of the road for default by the company to pay interest on the bonds. The respondent first sued the company for the amount of his claim, and obtained judgment, and then brought the present action for the same causes against the trustees.

HELD:—1, (Reversing the judgment of JETTÉ, J., M.L.R., 3 S.C. 238), That the effect of the Act above mentioned, and of the deed executed in conformity therewith, was not to convey the possession of the road to the trustees from the date of such deed, so as to constitute them pledgees; and the trustees were not liable even for supplies necessary for operating the road, furnished before the time they assumed possession.

2. That although the supplies for which payment was claimed in this case were furnished at a time when the railway company were in default to pay interest on bonds, and when the trustees might have taken possession under the terms of the Act, but neglected to do so, the company were not thereby constituted *negotiorum gestor* of the trustees, so as to render the latter liable for supplies necessary for the operation of the road, obtained by the Company before the trustees took possession.

APPEAL from a judgment of the Superior Court, Mon-

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treal (JETTÉ, J.), Nov. 17, 1887, maintaining the respondent's action. The judgment of the Court below is reported in M. L. R., 3 S. C. 238.

March 23, 26, 27, 1889.]

O'Halloran, Q. C., and *Geoffrion, Q. C.*, for appellants:—

On the 5th October, 1883, the company being for more than ninety days in default of paying interest, the appellants under the eighth paragraph of the indenture of mortgage, for the first time took possession of the railway, and are still operating it with a view to earning and paying the arrears of interest. That is not a foreclosure. The proceedings to effect a foreclosure are very different, and are provided for in paragraph twelfth of the indenture.

The respondent's debt was contracted by the railway company, long prior to the 5th October, 1883, while the company had complete control of the railway, and operated it as its own property, for its own benefit, and at a time when appellants had no power or control over its management, or any benefit or advantage from its earnings. Respondent contracted with the railway company, delivered his property on the credit of the company, brought his action and took his judgment against the company, even after the railway was notoriously in possession of the appellants. Suing the appellants was purely an after thought, for if the appellants are liable to-day for debts contracted by the company, the appellants are liable for all obligations contracted by the company since the 12th of August, 1881, date of the mortgage.

The judgment is based on the assumption that the deed of trust is a pledge, *nantissement* or *antichrèse*. An *antichrèse* is defined as, *un contrat par lequel un débiteur remet à son créancier une chose immobilière avec pleine jouissance, pour sûreté de sa dette.* Pledge, by our law, is defined (C. C. Art. 1966) as a contract by which a thing is placed in the hands of a creditor, or, being already in his possession, is retained by him with the owner's consent, in security for his debt. But the judgment declares the deed of trust to be a pledge, with the modification that the property pledged should still remain in the hands of the

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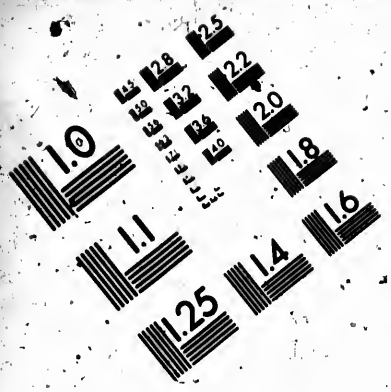
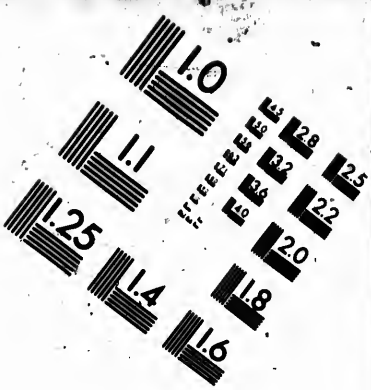
debtor. Who made the modification? Not the Legislature. The statute did not alter or derogate from the law of the land. The parties themselves made the modification, and in doing so, took it out of the category of pledge, as is clear from Art. 1969 C. C., which is as follows: "The privilege is only while the thing "pawned (pledged) remains in the possession of the creditor, "or of the person appointed by the parties to hold it." Possession is of the very essence of pledge, and Art. 1973, C. C., referred to in the judgment, applies solely to pledge as defined in our Code; that is, to property placed in the possession of a creditor to secure payment of his debt. The judgment is manifestly based upon this Art. 1973, which says: "The creditor is liable for the loss or dete- "rioration of the thing pledged, according to the rules "established in the title of obligations." Undoubtedly; but this article manifestly applies to pledge proper, without "modification." Could it be contended that the mortgagee of a farm, in whose favor a right of possession was stipulated in default of paying interest when due, is bound to pay the expenses incurred by the debtor while working the farm for his own profit? The indenture was an agreement to put the railway in pledge in default of payment of interest, and until the default occurred, appellants had no claim or right to demand that the railway be put in pledge. After the default, and possession given to appellants, they became, in a sense, pledgees, when their responsibility commenced, and Art. 1973 applied.

R. Laflamme, Q. C., for respondent:—

The principles upon which the judgment rests are elementary principles of our law. It is important to observe: 1st. That the charter incorporating this company is a provincial one; consequently subject to be interpreted, and limited and regulated by the rules of our provincial law. 2nd. That the pledgees or assignees (the appellants) were bound by the statute to run and operate the said road, and could not claim any part of the income or apply the same towards the payment of their claim





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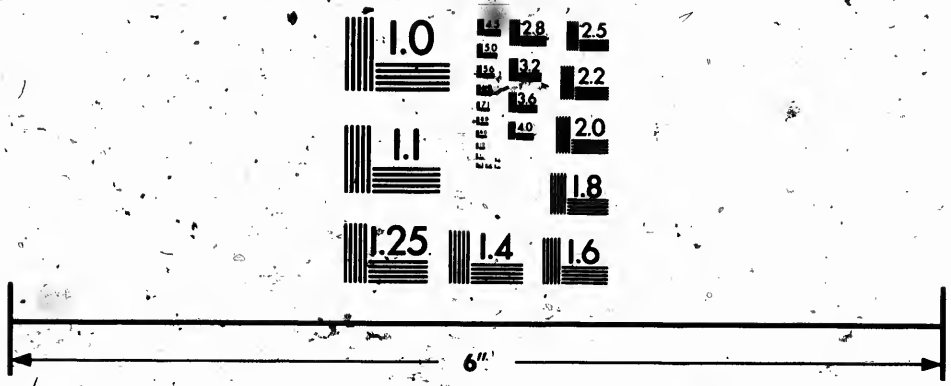

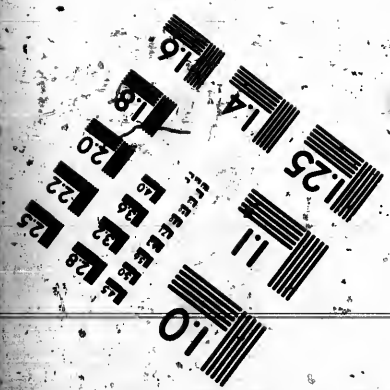

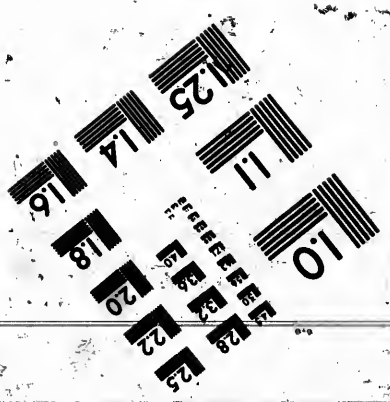

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before paying all working expenses by the rules of our common law. 3rd. An important fact to be taken into consideration is the provision of the statute which entitles the bondholders to take possession of the railway after a default of ninety days by the company, which implied that the trustees should enforce their rights in the interest of the bondholders within the specified delay of 90 days. If the trustees had carried out this provision, it would have been impossible for any party to enter into transactions of the nature of those made by the respondent with the company with any danger of loss. But on the contrary the trustees allowed three full terms of interest to accrue and accumulate without any notice to third parties that the company was in default, there being no provision made by the statute for the registration of the indenture of mortgage or of the bonds. The consequence of this forbearance of the trustees to urge their claim in the absence of any notice given to the public, was that parties were entitled to presume that the company was in solvent circumstances and could safely transact business with it.

The respondent submits that by reason of such inaction on the part of the trustees, after the prescribed time granted to them by the statute, to take advantage of the privileges given to them to take possession of the road or to adopt proceedings to that effect, they virtually transferred, or at least sanctioned, the administration and granted the control of the road to the company as their agents. It cannot be presumed that the Legislature of the province of Quebec intended, by the statute authorizing the mortgage of the railway, to confer powers conflicting with the principles of our common law. On the contrary the enactment of the Legislature must be taken in concurrence with the same and interpreted by them. If we take the clauses of the Act 43-44 Vict., ch. 49, and interpret them by the light of our common law rules, we must arrive at one of two conclusions:

First, the Legislature must have intended the company to convey its franchise to the bondholders represented by

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the trustees absolutely, the trustees becoming owners and proprietors of the railway from the date of the indenture with powers of administration granted to the company for the purpose of operating the railway so long as the interest on the bonds should be paid, with power to the trustees or bondholders to assume the administration and absolute control whenever a delay of ninety days would occur in the payment of the interest, with a right of redemption in favor of the company on payment of the amount advanced.

Secondly, the Act together with the indenture may be construed as a pledge of the entire property of the company, its railways, franchise, etc., for the security of the payment of the bonds and interest, coupled also with the special reservation granted by the legislature and the only exception to the general law of pledge, that the company might be allowed the possession and use of the railway with the right to the trustees to assume possession after the same delay of 90 days, in default of payment of interest, with the further power to the company to recover back after a certain delay during the period of two years the franchise and property pledged on repayment of the amount of bonds and interest.

The respondent contends that there is no other legal possible construction of the Act in question than one of those two alternative propositions.

If the first proposition is the correct one there can be no question as to the liability of the appellants; and the terms of the indenture seem to leave no doubt as to the absolute transfer of the property by the company to the trustees, the Act of the Legislature and the indenture declaring that the company shall and did convey its railway, franchise, and all property possessed by it, to the trustees with the special privilege granted to the company to retain possession of the said railway, so long as they would pay the interest on the bonds.

According to our law this agreement must be considered as an absolute conveyance and transfer, the company being divested of all ownership in the franchise

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and railway from the date of the execution of the indenture. This view of the case is, from the principles of our law, imperative, inasmuch as no pledge whether of movables or immovables is considered legal without the actual possession of the property by the pledgee, and there is nothing in the statute which could warrant the inference, that the Legislature intended to supersede the principles of our common law when the object it sought to attain could be effected without any such violation.

If we take the second proposition, which is the only other one on which the appellants could claim their right to the railway, the whole transaction resulting from the Act and the indenture must resolve itself into an actual pledge of the railway and its franchises, with this modification introduced by the Legislature, that the pledge would take effect, without the legal requirement for the pledgee to hold and actually possess the property. Besides this exception to the general law of pledge, all the other rules connected with such contract must be held to apply. If so, as the judgment of the Court expresses it, the pledgee is liable for the loss or deterioration of the thing pledged, and Article 1972, which enacts that it remains in his hands as a deposit, and Article 1802, which imposes on the depository the obligation of taking care of the thing deposited, as a prudent administrator, apply.

Cross, J. :—

The South Eastern Railway company was incorporated by the Act of the Province of Canada, 29 & 30 Vic., cap. 100. It was given authority to issue mortgage bonds to the amount of $750,000, and was subsequently amalgamated with the Richelieu, Drummond & Arthabaska Counties Railway company.

In 1880 the Act of Quebec, 43 & 44 Vic., cap. 49, was passed, which announced in its preamble that bonds had been issued by the first-mentioned Railway company to the extent of $150,000 and £640,000 sterling, and by the last-mentioned Railway company to the extent of $410,000. That the amalgamated company had been unable to pay

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the interest on the bonds, and that their earnings were insufficient for the purpose. That the great majority of the bondholders had agreed to accept therefor new bonds to carry first mortgage and charge upon the entire property of the company. Wherefore it was, among other things, enacted that it should be lawful for the company to issue mortgage bonds, not to exceed in all two millions of dollars, and for the purpose of securing payment of the same and the interest thereon, to convey the railway franchise and all property, rights and interest owned, possessed or enjoyed by it, and the tolls, income, profits, improvements and renewals thereof, and all additions thereto, to trustees, in trust for that purpose, such bonds and conveyance to be executed and issued at any time under the authority of a vote of the shareholders passed at any meeting of such shareholders legally called, the trustees to be designated by the shareholders at such meeting to be made in such form and to be executed in such manner as the shareholders at such meeting should direct; and the company and the trustees were therein among other things authorized to stipulate as to who should have the possession, management and control of the franchise and other property therein conveyed, and receive the tolls and income thereof, and how the same should be applied and disposed of while such bonds should be outstanding as well before as after default should be made in the payment thereof or of any of the coupons thereto attached, and might also stipulate therein how in the event of such default being made the company might be divested of all interest, equity of redemption, claim or title on or to the said railway franchise and other property therein conveyed, and how the same might become vested absolutely in the said trustees or the holders and owners of the said bonds and interest thereon, and might make such other provisions therein—not contrary to law—as might be considered necessary or convenient for the purposes of such trust.

By section 5, the trustees were authorized and empowered as such trustees, when and as often as default

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should be made in the payment of said bonds or the interest coupons thereto attached, to take possession of and run, operate, maintain, manage and control the said railway and other property conveyed to them as fully and effectually as the company might do the same.

By section 6, in the event of default being made in the payment of the bonds or any of the coupons thereto attached, and upon the performance of all things in the said conveyance stipulated and set forth as being necessary to divest the company of all interest, right of redemption, claim or title in or to said railway and other property therein conveyed, the company should be absolutely divested of all interest, right of redemption, claim or title in or to the said railway franchise and other property, and the same should thereupon immediately be and become vested absolutely in the said trustees or the holders and owners of the said bonds as in the said conveyance might be provided.

By section 7, it was declared that such conveyance should be to all intents valid and create a first lien, privilege and mortgage upon said railway. It was further, by section 10, expressly declared that neither the then present proprietors, viz., the said railway company, nor those contemplated by the said Act, should have the power to close or cease running any part of the said road.

Trustees appear to have been regularly named according to the provisions of this Act, and with due authority of the company and the trustees, representatives of the bondholders, a deed was executed bearing date the 12th of August, 1881, purporting to be the conveyance contemplated by the above-cited Act, making provision for the issue of the bonds authorized by the said Act, and conveying its railway franchise and all property, rights and interest owned, possessed or enjoyed by it and the tolls, income, profits, improvements and renewals thereof, and all additions thereto; and by said deed, which was styled indenture of mortgage, it was among other things provided, that until default should be made in the payment of the said bonds or in the payment of some portion

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of the interest thereon, and such default should continue for a space of ninety days, the company would be entitled and have the right to retain the possession of all the railway property, rights and interest thereby conveyed, and to run, operate and manage the same, and to take and receive all and singular the tolls, receipts, income and profits of the same, and the business thereof for their own use, benefit and advantage, in all respects, as fully and absolutely as if the said indenture had not been made, anything therein contained to the contrary notwithstanding. And if default should be made in the payment of the said bonds, or any of them, or the interest thereon or any part thereof, and such default should continue for the space of ninety days, then and so often as any such default should happen and should continue for the term aforesaid, the trustees would be entitled to have the right to take and receive the immediate possession of said railway and all the property, rights and interests thereby conveyed, or intended to be, and to run, operate and manage the same, and to take and receive all the tolls, receipts, income and profits of the same and the business thereof.

Further provision was also thereby made for the final forfeiture of the equity of redemption, and all title of the company to or in said railway franchise and property, in the event of the net earnings of the road being insufficient to pay the interest on the bonds and the default of payment thereof continuing for the space of six months.

Bonds were duly issued according to the provisions of said Act.

The Railway company remained in the possession, control and management of the road, and in receipt of the revenues thereof up to the 5th of October, 1883, when default having been made in the payment of interest on the bonds, a default which had continued for a considerable time beyond the ninety days specified in the conveyance or indenture of mortgage, the trustees took possession of the road, assumed the management thereof and the receipt of the revenue.

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The respondent, Walbridge, who is a manufacturer and furnisher of railway supplies, had in the meantime been furnishing the railway with supplies and doing repairs for the company to a large amount in value, for which he had not been paid. He sued the Railway company for the account, and on the 10th November, 1883, obtained judgment against the company for $7,970.88 besides interest and costs. He endeavored to enforce payment of this judgment by execution against goods and lands. To the former there was a return of *nulla bona*, and to the latter there was an opposition by the trustees claiming the real estate. He thereupon, on the 15th May, 1884, brought an action against the trustees, assuming that they were liable for what he had furnished to the company. This action, after proof and hearing on the merits, was, on the 29th November, 1884, dismissed, *sauf recours*, however, as expressed in the judgment. The present action was instituted by him on the 14th September, 1886, for the same account for which he had got judgment against the railway company, and for which he had sued the trustees in the action that was dismissed. The present action, however, contains additional allegations, to the effect that the work and supplies furnished by Walbridge were necessities without which the railway could not have been operated, and that the trustees, being bound to run the road, were liable for these supplies; also, that they added to the value of the road of which the trustees had the benefit; and the trustees being bound to run the road, the railway company were their agents in doing so.

To this action the trustees pleaded, first, *chose jugée*. Second, that the conveyance or indenture of mortgage was executed strictly in conformity to the provisions of the statute 43-44 Vic., c. 49, and operated as a mortgage and first lien on the road, with power to take possession after default made, as declared in the statute and as regulated by the deed which they had conformed to, and that they could not be liable for supplies furnished by Walbridge before they got possession, his claim being all

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for furnishings prior to that date; and until they got possession, the road was run by and in the interest of the railway company.

The facts were established as above narrated and alleged in the pleadings, by admissions and otherwise, the decision of the case turning chiefly on the interpretation to be given to the statute and the deed of conveyance or indenture of mortgage, of which a copy is produced.

The judge of the Superior Court seems to have held that the deed in question, as interpreted by our law, amounted to what was well known in the Roman law as an *antichrèse*, recognized also in our system although rarely practised, operating in effect as a pledge put into the hands of the trustees and vesting them with the proprietorship from the date of the deed. Being therefore pledgees, they were, from the date they became so, bound to see to the conservation of the pledge, consequently liable for necessary supplies from the date of the indenture in question; he consequently condemned the trustees, now appellants, by his judgment, to pay the amount sued for.

I am unable to take the same view of the case. The statute is not happily worded, but I think the substance of its meaning is sufficiently apparent. It provides, sec. 1, for what is therein termed a conveyance of the property and franchises of the road, but evidently not for an immediate transfer of possession, because in sec. 5 provision is only made for that possession in case of default being made in the payment of the bonds or interest, and sec. 6 provides that a further step may be taken by the trustees to wholly defeat and forfeit the equity of redemption and any reversionary rights which the railway company might still be supposed to have in the property notwithstanding the first default, this second forfeiture to be put in force in case the revenues of the road in the hands of the trustees should prove insufficient to pay the interest on the bonds.

It is true that by sec. 4 the company and the trustees were empowered to stipulate in the conveyance as to

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who should have the possession, management and control of the said franchise and other property therein conveyed, and receive the tolls and income thereof, and how the same should be applied and disposed of while such bonds were outstanding, as well before as after default. And although not under any obligation positively to provide for who should receive the revenues until default should be made, they nevertheless did so provide in said conveyance or indenture of mortgage that until default was made and continued for ninety days the railway company would be entitled to possession to operate and manage the road and to take and receive all and singular the tolls, receipts, income and profits of the same, which was reasonable, seeing that the road was then being run at the risk and for the profit of the railway company.

It is also argued that the trustees are bound to run the road, and, therefore, liable for the necessary supplies for that purpose; but the provision in the statute is not that the trustees shall be bound to run the road, but that neither the proprietors at the time of the passing of the statute, 24th July, 1880, viz, the railway company, nor those contemplated under the Act, viz. the bondholders or their representatives, should they become proprietors, should have the power to close or cease running any part of the said road. It, of course, applied to the trustees from the time they got possession, and only from that time.

It is very obvious to whom Walbridge gave credit and who was his debtor. That is proved by the suit he first brought against the railway company. They were his direct and his only direct debtors, and in suing them it seems to me he exhausted his direct remedy. He could not pretend that he furnished both the company and the trustees; one of them only could be his debtor, and he declared who that was by his suit. They represented interests quite opposed to each other. It would, of course, be quite different if he could show that he had a privilege like the privilege of vendor for the unpaid price of a thing which he could identify and follow, and show

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that nothing had occurred to defeat his privilege. He might then follow the specific thing and require its possessor to make option to relinquish it to be sold for [illegible] benefit, or in default to pay his claim.

To return to the operation of the conveyance or indenture of mortgage executed in favor of the trustees. It may be noted that by sec. 4 it was permitted to be made in such form and executed in such manner as the shareholders at their meeting should direct; it was to be to all intents valid and create a first lien, privilege and mortgage upon the railway and other property thereby conveyed. It is not surprising that under the circumstances the form of an English mortgage should have been chosen, one that is still every day practised with regard to lands in the Townships, and which is perfectly valid and sanctioned even by statutory enactment. See Con. Stat. for L. C., cap. 35, sec. 4, in the light of which all difficulty should disappear as to the interpretation of the form used and the intention of the parties; besides, the statute now in question permits of any form being used that the shareholders might approve of. It seems to me that much misapplied learning has been expended to interpret the deed in question. It may be a hardship for Walbridge to suddenly find his security disappear. The statute is an extraordinary one, but the insolvency of the company was imminent. The very statute should have warned him of the danger of trusting to a broken reed. Had the railway been sold at sheriff's sale, it seems to me he must have lost his debt. It is to be regretted that for recent necessary supplies he should not have had security or refused to furnish, but losses are every day made in the same way. I can take no other view of this case than that Walbridge's action is misdirected. He has no direct action against the trustees. The judgment he has obtained against them is erroneous; it must be reversed and his action dismissed.

CHURCH, J.:—

I am of opinion that there is more ground for the judgment of the majority of the Court in this case than in

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that of the Ontario Car & Foundry Company,(1) and I do not enter a formal dissent in the present case as I shall do in the other. But I concur in this judgment with great reluctance and doubt. The railway was a going concern, and the statute provided that whoever had possession of the road should continue to operate it. The trustees did not take possession when they might have done so, and it seems to me they occupy a position different from that which they would have occupied if they had taken possession of the road on the first default. The trustees and the company were both responsible for the operating of the road, and it has been shown that the supplies furnished and the work done by Walbridge were necessary to the operating of the road.

TESSIER, J., who was not present at the delivery of the judgment, recorded his dissent.

The judgment of the Court is as follows:—

"The Court, etc.....

"Considering that the work done by the respondent, and the materials by him provided, for which he claims payment by his present action, were not by him done or furnished to or for the appellants, but to and for the South Eastern Railway Company, to whom the respondent gave credit and not to the appellants;

"Considering that the respondent, in a former action, brought his suit against the said South Eastern Railway Company for the same causes of action for which he has brought the present action, and in the said former action obtained judgment against the said South Eastern Railway Company for the said same causes of action, and has not made good or proved any cause of action against the appellants;

"Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court, at Montreal, on the 19th day of November, 1887, the Court of Our Lady the Queen, now here, doth cancel, annul and set aside the said judgment; and proceeding to

(1) See next report.

render the judgment which the said Superior Court ought to have rendered, doth dismiss the said action of the said respondent Alexander Salomon Walbridge, with costs, as well of the said Superior Court as of this Court; costs in this Court to be taxed as in a cause of the first class; the Hon. Mr. Justice Tessier dissenting."[1]

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Judgment reversed.

J. O'Halloran, Q. C., for appellants.

Laflamme, Laflamme, Madore & Cross, for respondent.

(J. K.)

May 28, 1889.

Coram TESSIER, CROSS, CHURCH, BOSSÉ, DOHERTY, JJ.

WILLIAM FARWELL ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

THE ONTARIO CAR AND FOUNDRY CO.
(*Plaintiffs in Court below*),
RESPONDENTS.

Trustees—South Eastern Railway Company—43-44 Vict. (Q.) ch. 49—Cars sold to Company before trustees took possession.

By the Act 43-44 Vict. (Q.) ch. 49, the South Eastern Railway Company were authorised to issue mortgage bonds to a certain amount, and to convey the railway franchise, rights and interest to trustees representing the bondholders. The trustees were empowered to take possession of the road in the event of default by the company to pay the bonds, or interest thereon for 90 days. It was also provided (by sect. 10) that neither the company nor the trustees should have power to cease running any portion of the road. The respondents sold cars to the company, after the execution of a trust deed in conformity with the statute above mentioned, but before the trustees took possession of the road for default by the company to pay interest on

[1] On appeal to the Supreme Court of Canada the above judgment was affirmed June 13, 1890.

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the bonds. The respondents first sued the company for the amount of their claim, and obtained judgment, and then brought the present action for the same causes against the trustees.

HELD:—(Reversing the judgment of MATHIEU, J.), 1. That the effect of the Act above mentioned, and of the deed executed in conformity therewith, was not to convey the possession of the road to the trustees from the date of such deed, so as to constitute them pledgees; and the trustees were not liable for the price of cars necessary for operating the road, furnished before the time they assumed possession.

2. That although the cars for which payment was claimed in this case were furnished at a time when the railway company was in default to pay interest on bonds, and when the trustees might have taken possession under the terms of the Act, but neglected to do so, the company was not thereby constituted *negotiorum gestor* of the trustees, so as to render the trustees liable for the value of supplies necessary for the operation of the road, obtained by the Company before the trustees took possession.

APPEAL from a judgment of the Superior Court, Montreal (MATHIEU, J.), June 22, 1888, in the following terms:—

"La Cour, etc. . .

"Attendu que par le chapitre 49 des Statuts de Québec de 1880, 43-44 Victoria, intitulé "Acte pour amender "les actes concernant la compagnie du chemin de fer du "Sud-Est, et pour autoriser la dite compagnie à émettre "des nouveaux bons hypothécaires," il a été décrété que la compagnie pourrait émettre des bons hypothécaires jusqu'à concurrence de la somme de $12,500 par mille, et que dans le but de garantir le paiement des dits bons et des intérêts sur iceux, elle pourrait transporter la franchise de son chemin de fer, et toutes les propriétés, droits et intérêts qu'elle possédait ou dont elle jouissait et les droits de péage, le revenu, les profits, améliorations et le renouvellement d'icelui, et toutes les additions qui pourraient y être faites, à des fidéi-commissaires nommés à cet effet, et qu'il pourrait être stipulé dans le dit transport, qui devrait avoir la possession, gestion et le contrôle de la dite franchise et autres propriétés ainsi transportées;

"Attendu qu'en vertu du dit statut la dite compagnie de chemin de fer émit les dits bons, et par un acte en date du 12 août 1881, transporta son chemin à des fidéi-

commissaires nommés en vertu du dit statut, et il fut stipulé au dit acte que la dite compagnie garderait cependant la possession du dit chemin tant qu'elle ne ferait pas défaut, pour le temps y mentionné, dans le paiement des dits bons ou des intérêts dus sur iceux, mais que dans le cas où elle ferait défaut dans le paiement des dits intérêts, pendant le temps mentionné au dit acte, les dits fidéi-commissaires pourraient prendre la possession du dit chemin ;

" Attendu que pendant que la dite compagnie était ainsi en possession de ce chemin, après en avoir transporté la propriété aux dits fidéi-commissaires, elle acheta de la demanderesse pour l'usage du dit chemin dont elle était en possession comme susdit, mais qui appartenait aux dits fidéi-commissaires en propriété en vertu de la convention susdite, une certaine quantité de chars, pour le prix desquels la demanderesse a poursuivi la dite compagnie et obtenu jugement contre elle, et dont elle réclame le montant des dits fidéi-commissaires dans la présente cause ;

" Attendu que vu le défaut de la dite compagnie de faire le paiement des intérêts sur les dits bons, tel que convenu par le dit acte, le 12 août 1881, les dits fidéi-commissaires ont, le 5 octobre 1883, demandé la possession du dit chemin qui leur a été cédé par la dite compagnie ;

" Vu les articles 1043 et 1046 du Code Civil ;

" Attendu qu'il est constant que les chars dont la demanderesse réclame le prix en la présente cause étaient nécessaires pour l'exploitation du dit chemin, et qu'ils ont donné une plus value à ce chemin :

" Attendu que du fait de la livraison et vente de ces chars, est résulté entre la demanderesse et les dits fidéi-commissaires le quasi contrat *negotiorum gestorum*, dont les effets sont réglés par le dit article 1046 du Code Civil, bien que cet achat n'ait été fait que de l'ordre de la dite compagnie, et que la demanderesse n'a traité d'aucune manière avec les dits fidéi-commissaires à ce sujet ;

" Attendu que l'action que donnait à la demanderesse

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contre la dite compagnie de chemin de fer, l'obligation que cette dernière avait contracté envers elle, n'exclut pas l'action directe que le quasi-contrat lui donne contre les fidéi-commissaires, jusqu'à concurrence de la plus value, pour le remboursement de ce qui peut lui rester dû ;

" Considérant qu'on peut aussi appliquer à cette action les principes de l'article 417 du Code Civil, qui décrète que lorsque des améliorations ont été faites par le possesseur, le propriétaire doit en payer le coût, si elles étaient nécessaires ;

" Considérant que les défenses des dits défendeurs sont mal fondées, et que l'action de la dite demanderesse est bien fondée ;

" A renvoyé et renvoie les dites défenses, et a maintenu et maintient l'action de la demanderesse, et a condamné et condamne les dits fidéi-commissaires à payer à la dite demanderesse la somme de $45,556.97, pour balance du prix des dits chars, avec intérêt sur cette somme à compter du 30 décembre 1886, date de la signification du bref de sommation en cette cause, et les dépens, distraits, etc."

March 23, 26, 27, 1889.]

O'Halloran, Q.C., and *Geoffrion, Q.C.*, for appellants.

Laflamme, Q.C., for respondents.

CROSS, J.:—

This case arises from a claim against the same railway, the South Eastern Railway company, under the same legislation referred to in the case of *Farwell et al. & Walbridge*, which it is unnecessary again to pass in review. It appears that the Ontario Car & Foundry company had sold to the South Eastern Railway company a large amount of rolling stock, consisting of box, platform and cattle cars, for which there was due to it a sum of $45,556.97. The sales and deliveries of these cars had all taken place prior to the assumption of possession by the appellants under the conveyance or indenture of mortgage, of date the 12th August, 1881, of the South Eastern railway, with its property, franchises and

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appurtenances, and the Ontario Car & Foundry company had brought three several actions against the said railway company for different deliveries of said cars, and in each of the cases had obtained judgment against the South Eastern Railway company for sums aggregating, in the whole, the said sum of $45,556.97. It appears that each of these cases was accompanied by a conservatory seizure and a claim for the privilege of an unpaid vendor, which does not seem to have been maintained. The present action was instituted against the appellants, the trustees for the bondholders, the South Eastern Railway company being also therein impleaded as a *mise en cause*. The conclusions taken were: 1st. That the delivery of possession of the cars by the South Eastern Railway company to the trustees, the appellants, should be declared fraudulent, null and void and be set aside. 2nd. That the indenture of mortgage of the 12th August, 1881, the resolution of the shareholders authorizing the same, and the foreclosure and taking possession thereunder on the 5th of October, 1883, be also declared fraudulent, null and void, and be severally set aside in so far as respects the said cars. 3rd. That the South Eastern railway company should be summoned to hear said transfer, indenture and foreclosure set aside, and hear the final judgment. 4th. That said trustees be adjudged and condemned to pay the said Ontario Car & Foundry company, $45,556.97 damages as and for the use and detention of the said cars from the 5th October, 1883. 5th. That the South Eastern Railway company be ordered, enjoined and prevented from using said cars, until the said Ontario Car & Foundry company should have been paid the said sum of $45,556.97 with interest, and condemned to deliver up said cars within fifteen days of the final judgment, to be sold in satisfaction of said claim; and in default of compliance, that said trustees, 6thly, should be jointly and severally condemned to pay the Ontario Car & Foundry company the said sum of $45,556.97 with interest. And 7thly, That the South Eastern Railway company should be condemned to pay interest on $10,-

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712.94. It will be observed that no money condemnation is here asked for the price or value of the cars, the only direct money condemnation that is asked is damages for the detention of the cars. The principal object of the action seems to have been to have the cars sold and their proceeds awarded to the Ontario Car & Foundry company.

It is sufficient to say that the South Eastern Railway company and the trustees disputed these pretensions of the Ontario Car & Foundry company. The learned judge of the Superior Court in rendering the judgment now appealed from granted none of the conclusions of the Ontario Car & Foundry company, but granted them what they did not ask for, namely, a direct condemnation for the price and value of the cars. The learned judge seems to have held that the trustees became proprietors of the South Eastern railway from the date and in virtue of the indenture of date the 12th August, 1881, since which date the cars had been furnished; that they were necessary for the running of the road and had augmented its value; that although furnished directly to the South Eastern Railway company, it nevertheless gave rise to the contract *negotiorum gestorum*, the South Eastern Railway company becoming the *gestor negotiorum* of the trustees, acting for them, and binding them by the transaction; that the action of the Ontario Car & Foundry company against the South Eastern Railway company did not exclude their action against the trustees, and they were entitled to recover for the value they had added to the road.

I cannot coincide with the learned judge's views. I do not think the conclusions taken in the action warranted any direct condemnation as pronounced by the learned judge. I think the judgments taken against the South Eastern Railway company by the Ontario Car & Foundry Co. exhausted the direct recourse of that company against the South Eastern Railway company, and showed who was the debtor and to whom credit had been given; that if any recourse remained to the Ontario Car

& Foundry company it was a recourse *in rem* to follow the cars they had sold and have their proceeds awarded by privilege to them, the Ontario Car & Foundry company —a recourse which they seem to have asked for, as well in this action as in their former actions, where it had been refused them, and cannot for various reasons be awarded them in this action on the present appeal: 1. Because it was denied them in their former actions. 2. Although again demanded in the present action it has not been awarded by the judgment appealed from, and as the Ontario Car & Foundry company have not appealed from the judgment they have no conclusions on which it could be granted by this Court. 3. Article 2000 of the Civil Code shows that this privilege would not be good against the pledgee, and the trustees, by taking possession on the 5th October, 1888, converted what up to that time was a lien into a pledge, which would be an obstacle to the Ontario Car & Foundry company following the cars they had sold into the hands of the trustees.

I think these reasons are sufficient to entitle the appellants to a reversal of the judgment appealed from; it is therefore reversed, and the action of the Ontario Car & Foundry company dismissed.

CHURCH, J. (*diss.*):—

I have come to the conclusion that the trustees were the agents of both parties—agents of the company and agents of the bondholders; that they were bound to keep the road in operation; that to do so it was necessary to purchase the cars; that they were purchased when the company was in a state of insolvency; that this insolvency was not known to the plaintiffs, now respondents; and moreover, that the company was insolvent to the knowledge of the bondholders; that this knowledge was concealed from the public; that the trustees did not take the proceeding which the statute allowed them to take; that a large sum of interest had accrued. Then after two years' inaction, the bond-holders swooped down, took possession of the road, and also of the property which the

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company had bought during the period which had elapsed since the default to pay interest. It appears to me that that is a condition of things which the law never contemplated. Under the circumstances of this case, and seeing the manner in which the Act has been drawn, it is, to my mind, repugnant to reason and to justice that the trustees should take possession of property purchased after the insolvency of the railway company. My opinion is that the trustees might, and should, as a matter of justice and equity, when they took over this property, either have made up their minds to pay for it, or should have returned it to the plaintiffs. The possession of the trustees was possession not only of the bondholders but of the company, and the respondents had a right to follow their property into their hands. I think the judgment should be in that sense.

The dissent of TESSIER, J., who was not present at the delivery of the judgment, was also recorded.

BOSSÉ, J., regarded the question chiefly as one of procedure. The action concluded for the setting aside of the deed of 1881 for fraud, and then asked damages for the detention and use of the cars, and that the cars be placed in the custody of a guardian, and sold in satisfaction of the claim. This was the only conclusion. Could the Court come to the aid of the party and declare that there was a privilege? Under our system the Court cannot go beyond the conclusions and give a plaintiff what is not asked.

The judgment of the Court is as follows :—

" The Court, etc.....

" Considering that the respondents failed to prove that they sold or delivered to the appellants any of the railway cars or property in respect of which the present action has been brought, and considering that on the contrary it appears that the said railway cars and property were, by the said respondents, sold and delivered to the South Eastern Railway Company, to whom the respondents gave credit for the same, and not to the appellants ;

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"Considering that the judgment rendered by the Superior Court, at Montreal, on the 22nd day of June, 1888, in this cause, did not award the respondents any privilege upon or special recourse against the said railway cars and property, or the proceeds thereof, and that the respondents have not appealed from said judgment, or taken any conclusions before this Court on which any such privilege or recourse could be awarded to them, and further that such privilege and recourse appear to have been denied them in previous actions;

"Considering also that after the appellants had taken possession of the railroad on which the said cars and property had been placed, and to which they had become attached and accessory under and in virtue of their mortgage thereon and the statute in that case made and provided, the same became a pledge in their hands, debarring the respondents from claiming or enforcing any privilege they might otherwise have had thereon, or upon the proceeds thereof;

"Considering, therefore, that there is error in the said judgment so rendered by the said Superior Court, at Montreal, on the said 22nd of June, 1888;

"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 said action of the said respondents, with costs as well of the said Superior Court as of this Court, said costs to be taxed in this Court as in a cause of the first class. (The Hon. Justices Tessier and Church dissenting.)"

Judgment reversed. (1)

J. O'Halloran, Q.C., for appellants.

Laflamme, Laflamme, Madore & Cross, for respondents.

(J. K.)

(1) On appeal to the Supreme Court of Canada, the above judgment was affirmed, June 13, 1890.

June 19, 1890.

Coram DORION, Ch. J., TESSIER, BABY, BOSSÉ, DOHERTY, JJ.

SHERBROOKE TELEPHONE ASSOCIATION
(*Respondent in Court below*),
APPELLANT;

AND

CORPORATION OF THE CITY OF SHERBROOKE
(*Petitioner in Court below*),
RESPONDENT.

City of Sherbrooke—Telephone Company—31 *Vict.* (Q.) *ch.* 25 —*Arts.* 752, 757, *M. C.*

HELD:—(Affirming the judgment of BROOKS, J., 12 Leg. News, 354), That letters patent issued by the lieutenant-governor in council, incorporating a telephone company, with power to carry on business in the province under the provisions of Sect. 8 of 31 Vict. ch. 25 (now R. S. Q. 4705), to wit, to construct and operate a line or lines of telephone through, under or along the sides of and across streets and highways of towns, cities, etc., in the province, provided that passage or traffic in said streets or highways shall not be impeded or interfered with by the location of the poles and wires of the company, do not confer on the telephone company the power to plant poles and carry wires along and across the streets of a city without first having obtained the permission of the city corporation, in whom by Arts. 752, 757 M. C., the ownership of the streets is vested.

APPEAL from a judgment of the Superior Court, St. Francis (BROOKS, J.), June 28, 1889. See 12 Leg. News, p. 354, for report of case in the Court below, and the observations of Mr. Justice Brooks.

The text of the judgment appealed from is as follows:

"The Court having heard the parties, petitioners and respondents upon the merits of the injunction applied for and granted in this cause, by their respective counsel, examined the pleadings, proceedings and evidence, and deliberated;

"Considering that the petitioners have established the material allegations of their petition; that the respon-

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dents had prior to the said petition without the consent of the petitioners, or of the Municipal Council, entered upon the streets and squares of the said city of Sherbrooke, and made excavations and planted their telephone poles there, and carried on works of demolition and construction therein, and had carried, and were carrying and constructing their telephone system by means of poles planted and wires carried on, along and across the streets of the said city of Sherbrooke, to the obstruction of said streets, and have thereby interfered with the control and ownership of the streets of said city by petitioners, and the fire alarm system of the said city of Sherbrooke;

"And considering further that said petitioners were, and are by law, and by the enactment of the Legislature of the Province of Quebec, and particularly by the provisions of articles 752 and 757 of the Municipal Code, vested with, and owners of all such streets and squares, and have the control thereof, of which ownership and control they can only be deprived and divested by the authority of the Legislature of this Province, by special enactment;

"And considering that respondents have failed to prove that by any Act of the Legislature of this Province, they had or have a right to enter in or upon the streets and squares of said city of Sherbrooke, and to make excavations therein, and to construct works of demolition or construction therein or thereon, and to stretch their wires in, along, above, and across said streets, against the will of said city of Sherbrooke, and its municipal council, or without their consent; which respondents claim to have done, and to have a right to do, in their third plea filed herein;

"Considering that in view of the importance of the fire alarm system of the petitioners, and the electric light system furnished by petitioners, for the necessary safety and protection of the inhabitants of said city from fire, and the necessity of lights which are effectually carried on in said city by means of poles and wires planted in and on, and carried over, along and across the streets and squares of said city in every direc[illegible];

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"And considering that any interference with or danger to the said works under the control of said city, and necessary as aforesaid for the safety and convenience of the inhabitants thereof, must prove most injurious and disastrous, and that the said city are responsible for the proper supervision of their said works, the efficiency whereof is endangered by multiplying and increasing the number of similar wires and poles in the streets of said city in which there are, besides those controlled by and erected as aforesaid for the safety and convenience of the inhabitants of said city, other telegraph and telephone systems, specially authorized to construct and carry their works by means of poles and wires along the streets of said city, subject however to the supervision and control, as provided by the Legislature, of the municipal authorities of said city;

"And considering further that petitioners have not been divested by a competent authority of their rights of ownership of and control over the streets and squares of said city;

"Doth grant the prayer of petitioners in so far that said respondents are ordered to suspend and stop the planting of telephone poles, and the carrying and stretching of its wires in, along and across the streets and squares of the city of Sherbrooke, and to stop all work of excavation, demolition and construction in, upon and over said streets and squares and every of them; and in so far as above stated, doth make said injunction permanent, reserving to petitioners their legal rights and remedies in so far as relates to the demolition of the works already constructed; the whole with costs *distraits*, etc."

May 22, 1890.]

Terrill, Q.C., for appellant.

Brown, Q.C., for respondent.

June 19, 1890.]

BABY, J. (for the Court):—

This case raises a law point which the Court in Sherbrooke decided against the company appellant. Have they, by and in virtue of their Letters Patent, obtained

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from the Local Government and incorporating them, the right and power to proceed to make excavations and plant poles in the streets of Sherbrooke, and stretch their wires along and across said streets, and that without the permission and against the will of the corporation? The corporation most undoubtedly is the proprietor of the streets and roadways found within the limits of the city, and no one can make use of the same, outside of the legitimate use that streets are intended for, without infringing the right of the corporation, in fact becoming a trespasser.

The Letters Patent invoked by appellants as a justification, nay more an authorisation, do not in the least set aside that right. They do grant, of course, to the company powers, privileges and immunities required to carry on their business, but not the authority to ignore the ownership in the streets and squares of the city of Sherbrooke vested by law, (arts. 752 and 757 M. C.) in the corporation. Certainly not. In other words, these Letters Patent confer on a certain number of persons or individuals the authority to do, as a corporate body, certain things in a certain place, provided the consent of the municipal authorities, whose property they entered and made use of to carry on the object of their charter, be, at first, granted. Nothing more. No other interpretation can be put on them regarding the extent of the powers they may grant or give the appellants.

The appellants had therefore no legal right to trespass on the property of the corporation of the city of Sherbrooke as they did, and the latter were perfectly justifiable in petitioning the Court for an injunction to restrain them from carrying on their works in the streets and squares of the city.

This Court, taking this view of the case, as did the Hon. Judge below, maintains the judgment rendered, and dismisses consequently the appeal with costs.

Judgment confirmed.

J. L. Terrill, Q.C., for appellant.

Ives, Brown & French, for respondent.

(J. K.)

June 19, 1890.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, BOSSÉ, JJ.

DANIEL BERGEVIN
(*Plaintiff in Court below*),
APPELLANT;

AND

HENRI MASSON
(*Reprenant l'instance*),
RESPONDENT.

Litigious right—Advocate—Promissory note—Art. 1485, C.C.

HELD:—1. Where an advocate, in contravention of Art. 1485, C.C., becomes the buyer of a litigious right which falls under the jurisdiction of the Court in which he exercises his functions, his action for the recovery of such right will not be maintained.

2o. Where an advocate takes a transfer of a note after maturity, knowing that payment thereof has been refused by the maker because no consideration was received, he will be deemed to be buying a litigious right.

APPEAL from a judgment of the Superior Court, Montreal, Feb. 13, 1889, (TELLIER, J.) in the following terms:—

"La Cour, après avoir entendu les parties par leurs avocats respectifs sur le mérite de la cause, examiné la procédure, la preuve faite et les pièces produites, et sur le tout mûrement délibéré;

"Considérant que le billet servant de base à l'action, et échéant à huit mois de sa date, a été [illegible] après son échéance au demandeur par le nommé G[illegible]serres, moyennant une considération de $100 d[illegible]ndeur a alors donné crédit à ce dernier;

"Considérant que ce billet avait été mis avant son échéance, savoir le 4 juillet 1887, entre les mains du dit Gaspard Deserres par Joseph Edouard Frigon, le porteur [illegible]rin[illegible]e, comme sûreté collatérale du paiement d'un [illegible] billet portant la même date du 13 janvier 1887, consenti par le défendeur Masson pour le même montant de $171.50, payable à cinq mois de date, et remis après son

échéance, savoir : le dit jour 4 juillet 1887, au dit Gaspard Deserres, moyennant une considération de $50 qu'il a là et alors fournie au dit Frigon, et avec la promesse de payer à ce dernier une autre somme de trente et quelques piastres, quand il aurait obtenu jugement sur ce billet contre le défendeur Masson ;

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" Considérant que le dit Gaspard Deserres, par l'entremise de ses avocats MM. Bergevin (le demandeur) et Leclair, a poursuivi contre les défendeurs le recouvrement du dit billet échéant à cinq mois de sa date, par action intentée le 7 juillet 1887, sous le numéro 261, et rapportée devant cette Cour, et que les défendeurs ont plaidé à cette dernière action que le défendeur Masson n'avait pas eu considération pour ce billet, et que le dit Deserres, sur ce plaidoyer, a donné ordre à ses dits avocats de discontinuer cette action ;

" Considérant que demande de paiement du billet servant de base à la présente action a été faite par les dits Frigon, Deserres, Bergevin et Leclair, avocats, et le demandeur, et les défendeurs ont toujours refusé de le payer parceque considération n'avait pas été fournie au dit Masson ;

" Considérant que le demandeur, qui était et est un avocat exerçant ses fonctions dans le ressort de ce tribunal, a acquis le billet servant de base à l'action après son échéance, et dans un temps où il savait que les défendeurs en refusaient le paiement pour défaut de considération, et qu'une demande en justice devant cette Cour serait nécessaire pour en recouvrer le montant ;

" Considérant qu'il est établi en preuve que vers le 18 janvier 1887, le dit Frigon, agent d'assurance, a sollicité le défendeur Masson d'assurer sa vie dans la Compagnie d'assurance dite " New-York Life Assurance Company," que le dit défendeur Masson a consenti à prendre une assurance dans la dite compagnie pour la somme de $10,000 ; que la prime annuelle sur cette police d'assurance était de $686.60, payables par versements semestriels de $343.30 ; que le dit Frigon s'est fait consentir par le dit Masson divers billets s'élevant à $1216.20, dont

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deux de $343.30 chacun, un de $186.60, et deux de $172.50 chacun, que le dit Frigon n'a payé que $343.30 à l'acquit du défendeur Masson pour le premier versement de la dite prime d'assurance, et qu'il a négocié à son profit tous ces billets que le défendeur Taschereau, es qualité, a été obligé de payer, tous les deux, de $171.50 chacun, dont il est question en cette cause ;

" Considérant que le défendeur Masson a été interdit le 12 mars 1887, pour cause de prodigalité, et que le défendeur Taschereau a été nommé son curateur ;

" Considérant que le dit Frigon, interrogé comme témoin en cette cause, n'a pu établir quelle considération, si aucune a été donnée, il a fournie au défendeur Masson pour les dits deux billets de $171.50 chaque ;

" Considérant que le dit Deserres, interrogé deux fois comme témoin du demandeur en cette cause, jure dans sa première déposition qu'il a eu les dits deux billets de $171.50 chacun, du dit Frigon, celui échéant à cinq mois, après son échéance, et moyennant une considération de $50 payée comptant, et la promesse de payer une autre somme de trente et quelques piastres, au dit Frigon, quand il aurait obtenu jugement contre le défendeur Masson ; et celui servant de base à la présente action, avant son échéance et comme sûreté collatérale du paiement du premier billet ; et dans sa seconde déposition que le dit Frigon l'avait chargé de collecter ces deux billets ;

" Considérant que le droit au paiement du dit billet servant de base à l'action du demandeur était contesté et contestable, et que ce dernier le savait avant d'acquérir la possession du dit billet ;

" Considérant que dans les circonstances actuelles, les défendeurs sont en droit d'opposer au demandeur les exceptions et défenses qu'ils auraient pu opposer aux dits Gaspard Deserres et Joseph Edouard Frigon, et de demander la nullité de la cession faite au demandeur du billet poursuivi en cette cause ;

" Considérant que les avocats ne peuvent devenir acquéreurs des droits litigieux qui sont de la compétence

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du tribunal dans le ressort duquel ils exercent leurs fonctions (art. 1485, C. C.);

"Considérant qu'un droit est réputé litigieux lorsqu'il est incertain, disputé ou disputable par le débiteur, soit que la demande en soit intentée en justice, ou qu'il y ait lieu de présumer qu'elle sera nécessaire (art. 1583, Code Civil);

"Considérant que les défendeurs ont justifié leurs exceptions et défenses et que l'action du demandeur est mal fondée;

"Déclare illégale et nulle, et annule la cession faite au demandeur du billet en question, en cette cause, à toutes fins que de droit, et déboute le demandeur de son action, avec dépens;

"Attendu que par jugement interlocutoire, rendu en cette cause le 19 septembre dernier, cette Cour a permis aux défendeurs d'amender leurs plaidoyers, et même d'y ajouter un plaidoyer nouveau, avec réserve d'adjuger au mérite, sur les frais additionnels que cet amendement et la production de ce nouveau plaidoyer pourraient occasionner, et attendu qu'il en est résulté des frais additionnels pour le demandeur, la Cour condamne les défendeurs à payer au demandeur la somme de $21, pour les frais additionnels qui ont été occasionnés par l'amendement et la production du nouveau plaidoyer, dont $11 par les nouvelles articulations de faits et réponses à icelles, et $10 par les réponses au nouveau plaidoyer."

May 19, 20, 1890.]

Geoffrion, Q.C., for appellant, cited Laurent, Vol. 24, No. 59; Dalloz, Rép. Vol. 43, p. 470, art. 1997, to show that knowledge by the purchaser of refusal of payment was not sufficient to make a debt litigious.

Lajoie, for respondent.

June 19, 1890.]

BABY, J. (for the Court):—

Le billet qui fait ici le sujet du litige n'a pas été donné pour valable considération. Masson, un interdit pour cause de prodigalité, le consentit, avec d'autres, au montant de $1216, en faveur d'un nommé Frigon qui lui-même le céda à Deserres. Ce dernier, par son avocat, le

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demandeur, en demanda le paiement à l'intimé Taschereau, qui se refusa de le payer. Là-dessus, Deserres institua des procédés judiciaires contre le dit intimé qui répondit par un plaidoyer alléguant *non considération*. Alors Deserres abandonna sa poursuite, et passa le billet en question à son procureur l'appelant qui, à son tour, poursuivit l'intimé. Le jugement dont est appel débouta cette nouvelle action.

La question qui se présente est bien simple :—Un avocat pratiquant tombe-t-il sous le coup de l'art. 1485, C.C. ? Le jugement prononcé en Cour Supérieure dit que oui, et nous sommes unanimement de cette opinion.

L'appelant, en devenant propriétaire de cette créance, après échéance, savait parfaitement tout ce qu'elle comportait de litigieux, lui qui en connaissait la provenance, le refus qui avait été fait de la payer, et les raisons alléguées à cette fin, par l'intimé es-qualité. Il a acheté de fait un procès, et c'est ce que la loi défend expressément à ses officiers, et nommément aux avocats, de faire, c'est d'ordre public.

L'article prohibitif, le 1485 de notre code civil, se lit comme suit : " Les juges, les avocats et procureurs, etc., ne " peuvent devenir acquéreurs des droits litigieux qui sont " de la compétence du tribunal dans le ressort duquel ils " exercent leurs fonctions."

Dans le cours de l'argumentation on a voulu faire une distinction, en disant que cette défense ne pouvait pas s'appliquer à une transaction ou négociation d'effet au porteur transmissible de la main à la main. Peut-être, en effet, en thèse générale, y a-t-il une distinction à faire. Mais dans l'espèce, il ne saurait en exister, car quelque soit la nature de la créance, et la source de sa provenance, l'appelant tombe sous le coup de la loi qui, sans faire d'exception, défend aux avocats, de se rendre acquéreurs de droits litigieux. Sur le tout, l'appel doit donc être renvoyé avec dépens.

Judgment confirmed.

Bergevin & Leclair, for appellant.
Lacoste, Bisaillon, Brosseau & Lajoie, for respondent.

(J. K.)

November 16, 1889.

Coram DORION, Ch. J., CROSS, BABY, CHURCH and BOSSÉ, JJ.

JOSEPH LAFORCE,
(*Plaintiff in Court below,*)
APPELLANT;

AND

LE MAIRE ET LE CONSEIL DE LA VILLE DE SOREL,
(*Defendants in Court below,*)
RESPONDENTS.

Tutor—Appeal from judgment—Authorization—Art. 306, *C.C.*
—Procedure.

HELD:—1. That a tutor cannot appeal from a judgment, until he is authorized by the judge, or the prothonotary, on the advice of a family council. (Art. 306, C.C.)

2. That where an appeal has been taken by a tutor without such authorization, and the respondent moves for the dismissal of the appeal for want of authorization, the Court of Queen's Bench sitting in appeal, may continue the motion to the next term, with leave to the appellant to produce the necessary authorization; and on the production thereof, will permit the authorization to be filed on payment of costs of motion.

Geoffrion, Q.C., for respondent, moved (Sept. 26, 1889,) for the dismissal of the appeal, on the ground that it had been brought by a tutor without being authorized. He cited Art. 306, C.C.

Germain, Q.C., for appellant, said the tutor had been duly authorized to bring the suit, and this included the appeal. He moved, however, in case the Court considered a fresh authorization necessary, that the proceedings be suspended, to enable him to file an authorization for the appeal.

Sept. 27, 1889.]

DORION, Ch. J.:—

The appellant was authorized as tutor to bring an ac-

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tion in behalf of minors. The action was dismissed. Without getting a new authorization he instituted an appeal from the judgment. Now he finds himself in face of Art. 306 of the Civil Code, which says that a tutor cannot appeal from a judgment until he is authorized. The appellant proceeded without objection until the case was on the point of being heard on the merits, when the respondent moved for the dismissal of the appeal for want of authorization.

There is no doubt the objection ought properly to have been made at the outset, but it is an objection in the interest of the minors. We have decided this question before. In *Clément & Francis* (1) it was held by this Court that the curator to a person interdicted cannot appeal from a judgment until he is authorized. In that case the curator was given a delay to procure an authorization. We think the same course should be followed in the present case. It is even more necessary here that a delay should be granted, because the minors would lose their right, the year for appealing having expired. We therefore do not pronounce upon the motion to-day, but continue it to the next term, to allow an authorization to be produced. This will make the proceedings regular. In France, the authorization is allowed to be filed on the appeal.

The judgment (Dorion, Ch., J., Tessier, Cross, Church and Bossé, JJ.) was recorded as follows :—

" La Cour après mure délibération ordonne que la motion des intimés pour le renvoi de l'appel soit continuée au terme prochain, pour les parties être entendues sur icelle en même temps qu'au mérite de l'appel, avec permission à l'appelant de produire l'autorisation requise par l'art. 306 du Code Civil, dépens réservés tant sur la dite motion des intimés que sur la motion de l'appelant pour suspension de procédés."

Nov. 15, 1889.]

Germain, Q.C., moved for leave to file an authorization by a family council, authorizing the appeal.

(1) 6 Leg. News, 325.

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The Court granted the motion by the following judgment :—

" La Cour après avoir entendu les parties par leurs avocats tant sur la motion des intimés pour faire renvoyer l'appel que sur la motion de l'appelant pour qu'il lui soit permis de produire une autorisation qui lui a été donnée en justice sur avis du conseil de famille depuis les derniers errements en cette cause, et murement délibéré ;

" Accorde à l'appelant le bénéfice de sa motion, et lui permet de produire une copie authentique de la dite autorisation, mais le condamne aux dépens tant sur cette motion que sur la dite motion des intimés pour faire renvoyer l'appel."

Motion of appellant granted.

A. Germain, Q.C., for appellant.

J. B. Brousseau, for respondents.

(J. K.)

November 20, 1889.

Coram DORION, Ch. J., TESSIER, BABY, CHURCH and BOSSÉ, JJ.

NEILS L. JOHANSEN,
(*Claimant in Court below,*)
APPELLANT ;

AND

EDWARD CHAPLIN,
(*Contestant in Court below*),
RESPONDENT.

Bank—Powers of—Contract of Guarantee—Ultra vires.

HELD :—That a Bank is not authorized to enter into a contract of suretyship guaranteeing the payment by a customer of the hire of a steamship under a charter party.

APPEAL from a judgment of the Superior Court, Montreal, (TASCHEREAU, J.), April 19, 1886, maintaining a con-

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testation of a claim filed by the appellant upon the estate of the Exchange Bank of Canada, an insolvent bank which is being wound up under the provisions of 45 Vict. (D.) ch. 23.

The judgment of the Court below was as follows :—

"La Cour après avoir entendu les parties par leurs avocats sur le mérite du procès mu entre le réclamant Johansen et le contestant Chaplin, examiné la procédure et les pièces produites, entendu aussi les témoins cour tenante et délibéré ;

"Considérant que par jugement rendu le 22 février 1886, dans une cause ci-devant pendante devant cette Cour sous le No. 1251, dans laquelle le dit réclamant Johansen était demandeur contre Samuel W. Beard, défendeur, ce dernier a été condamné à payer au dit réclamant la somme de $1,230 avec intérêt du 15 septembre 1883, et les dépens ; la dite somme de $1,230 étant le montant qui aurait été chargé par erreur au dit Johansen lors d'un règlement de compte intervenu entre ses agents dûment autorisés et les agents dûment autorisés du dit S. W. Beard le 15 septembre 1883, à Belfast (Irelande), au sujet d'un contrat de charte partie en date du 19 juin 1883, par lequel le dit Beard aurait affrété le navire "Hermod" appartenant au dit Johansen ;

"Considérant que le dit Johansen fonde sa réclamation contre la Banque d'Echange en liquidation sur le fait qu'au dit contrat de charte partie serait intervenu le président de la dite banque, Thomas Craig, lequel en sa dite qualité de président aurait cautionné le dit Beard en faveur du dit Johansen pour l'exécution pleine et entière des obligations du dit Beard affréteur au dit contrat de charte partie, liant par là la dite banque, et la rendant solidairement responsable avec le dit Beard envers le dit Johansen pour toutes les obligations du dit affréteur, et conséquemment tenue au remboursement de la dite somme de $1,230 payée ainsi par erreur, ainsi que pour les intérêts et les frais mentionnés au dit jugement ;

"Considérant que la dite réclamation du dit Johansen est contestée par le dit contestant Chaplin, créancier de

la dite banque, lequel allègue que le dit Thomas Craig n'était pas autorisé à donner le dit cautionnement au voie de la dite banque, et représente de plus que la dite somme de $1,230 était le montant d'une traite tirée par le dit Beard le 14 août 1883, sur les agents du réclamant qui néanmoins aurait payé par erreur ce montant une seconde fois lors du dit règlement de compte du 15 septembre 1883, que ce règlement de compte étant final entre les dits Johansen et Beard libérait ce dernier de toute obligation en vertu de la charte partie, et que l'erreur susdite ne pouvait créer qu'un nouveau droit d'action de Johansen contre Beard, sans égard au contrat de la charte partie, lequel avait été annulé et cancellé à toutes fins quelconques ;

"Considérant qu'il appert de la preuve et des pièces produites, que lors du dit règlement de compte, les agents du réclamant Johansen, du consentement de l'affréteur Beard se sont emparés de la cargaison du navire "Hermod," l'ont fait vendre à leur profit en satisfaction de leur créance, et après avoir reçu le produit de telle vente, ont donné pleine quittance et décharge à l'affréteur ;

"Considérant que par l'article 2409 du Code Civil, la cargaison est affectée à l'accomplissement des obligations du locataire à l'affréteur, que par l'article 1959 du même code la caution est déchargée lorsque la subrogation aux droits et priviléges du créancier ne peut plus, par le fait de ce créancier, s'opérer en faveur de la caution, et que par l'article 1960 du même code l'acceptation volontaire que ce créancier a faite d'un effet quelconque en paiement de la dette décharge la caution ;

"Considérant que les dits articles sont applicables à l'espèce, et que la Banque d'Echange, en supposant que le cautionnement de son président aurait pu la lier, s'est trouvée déchargée par le fait du créancier qui a rendu la subrogation impossible et qui a accepté en paiement la cargaison qui faisait son gage ;

"Sans entrer dans l'examen des autres questions soulevées par la contestation, maintient la contestation du dit

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contestant Chaplin, et rejette la réclamation du dit réclamant Johansen comme non-fondée, avec dépens contre le dit réclamant distraits, etc."

Nov. 19, 1889.]

Atwater, for the appellant :—

On the question whether the contract was one which comes within the powers of the Bank as such, it is contended that a Banking Corporation is a corporation having all the powers of such under Art. 357 *et seq.* of the Civil Code, and except in so far as these powers and rights are restricted by particular Acts has right to exercise them to the fullest extent.

Article 358 states that a corporation may acquire, alienate and possess property, sue and be sued and contract and incur liability.

Article 362 states that besides the special privileges which are granted to each corporation by its title of creation or by special law, there are others which result from the fact of incorporation and which exist of right in favor of all corporate bodies, unless taken away, restrained or modified by such title or by law.

Article 367 prohibits corporations from carrying on the business of banking unless specially authorized to do so by their Charter.

Now it is contended for the respondent, that such a contract as that entered into by the bank, guaranteeing the obligation under the charter party, was beyond its power. We find nothing in the Bank Act prohibiting any such transaction. We find prohibitions imposed by this Act, 49 Vict., (D.) Ch. 120, as to holding property, making advances on real property or on the security of its own stock, and in regard to various other matters, but there is no prohibition to its becoming surety for the payment of a debt. It cannot be pretended if a restriction with regard to a bank loaning on security of real estate did not exist, that it would not have the right to do so, and in the same way, if there is no prohibition to guarantee or to become surety, unless the contract is ille-

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gal in itself, there can be nothing to prevent its being entered into by the bank.

It has frequently been held that a bank may guarantee the payment of drafts or bills of exchange. If the bank can validly pledge its credit in this way, it can do so also in respect of a contract of suretyship. It has been argued that there was no consideration for the bank assuming this responsibility, but even were this a valid ground of objection, it is not applicable, inasmuch as it is clear that by guaranteeing the charter party they enabled Beard to obtain possession of the ship, and thus carry on the business by which they were hoping to profit, through his account being kept by the bank. Beard was importing coal by these ships, and the bank was discounting his drafts against the bills of lading, and thus profiting by his account. In the ordinary course of affairs they would have had to pay freight upon the cargoes thus received before obtaining possession of the goods under the bills of lading, but by Beard becoming direct charterer of the ships, payment of freight was avoided, and by undertaking to pay the hire of the vessel the bank did no more than they would have had to do if they had paid the freight, had Beard been importing by a general ship, and probably the bank benefited in the saving which they would be able to effect in this manner.

R. A. E. Greenshields for respondent:—

Respondent relies upon three points for judgment in this cause:—

1. That the obligation of S. W. Beard & Company under the charter party had been fully discharged by him.

2. That in any event the Exchange Bank of Canada, if liable under the guarantee, stood in the relation of warrantor or surety of S. W. Beard & Company, and the claimant by his own act rendered it impossible for the bank to be subrogated in his rights and privileges with regard to S. W. Beard & Company.

3. That Thomas Craig was not authorized to execute the guarantee.

The respondent submits that if any binding contract

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existed between the Bank and the claimant, it was a contract of suretyship and is governed by the terms of article 1959 of the Civil Code, and the claimant, as the owner of the vessel, having taken possession of the freight and cargo, which, under the terms of article 2409, were affected for the performance of the obligation of S. W. Beard & Co., and having disposed of the same, was no longer in a position to subrogate the Bank in the rights, hypothecs and privileges of him, the claimant, and the obligation of suretyship was thereby at an end, and they could not compel the Bank as such sureties to the fulfilment of the obligations so alleged to have been undertaken by them.

The respondent further submits that the obligation of guarantee executed by Craig was not within his power and authority as manager of the Bank, and the Bank never derived any benefit therefrom, and it was not such a contract as is permitted by the Banking Act, and Craig signed the pretended guarantee without the knowledge of any of the directors of the Bank, and without their consent, and the same is not entered in any of the books of the Exchange Bank of Canada, nor was the same discussed at any meeting of the Board of Directors of the Bank.

Nov. 20, 1889.]

DORION, Ch. J.:—

Johansen, the appellant, makes his claim under a guarantee given by Thos. Craig in behalf of the Bank. Supposing that this guarantee were valid, it appears by the evidence that the claim guaranteed was settled, and the surety was discharged.

But there is another reason why this claim cannot be maintained. Banks are not authorized, either by their charters or by law, to guarantee transactions of this kind. The contract was wholly null.

We confirm the judgment, but we add a *motif* stating that the contract was entirely beyond the powers of the bank.

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The judgment in appeal is as follows:—

"The Court etc .....

"Considering that the appellant rests his claim upon a guarantee which it was not within the power of the Exchange Bank to enter into;

"And considering that the appellant is not in a position to claim the benefit of such guarantee given by Thomas Craig, because, from his own showing, he could not subrogate the respondent to the securities which he held against S. W. Beard & Co., which he had lost by his own laches;

"And considering that there is no error in the judgment rendered by the Court below, to wit, the Superior Court sitting at Montreal on the 19th day of April, 1888;

"This Court doth confirm the said judgment, and condemns the appellant to pay the costs incurred both in the Superior Court and on the appeal."

Judgment confirmed.

Atwater & Mackie for appellant.

Greenshields, Guerin & Greenshields for respondent.

(J. K.)

June 19, 1890.

Coram DORION, Ch. J., CROSS, BABY, BOSSÉ and DOHERTY, JJ.

CANADIAN PACIFIC RAILWAY CO.
(Defendants in Court below,)
APPELLANTS;

AND

DAME AGNES ROBINSON,
(Plaintiff in Court below,)
RESPONDENT.

Injury resulting in death—Claim of widow—Prescription—Arts. 1056, 2261, 2262, 2267, *C.C.—Verdict—Damages.*

The husband of the respondent was injured while engaged in his duties as appellants' employee, and the injury resulted in his death about fifteen months afterwards. No action for indemnity was instituted by him during his lifetime. In an action for compensation brought by his widow (under Art. 1056, C.C.) within one year after his death, the jury found negligence on the part of appellants, and awarded the respondent damages.

HELD: (affirming the judgment of the Court of Review, M. L. R., 5 S. C. 225), 1. That the action of the widow and relations under Art. 1056, C.C., in a case where the person injured has died in consequence of his injuries without having obtained indemnity or satisfaction, is a right distinct from that of the injured person, and is prescribed only by the lapse of a year from the date of death.

2. That the action under Art. 1056, C.C., exists, even supposing that at the date of death the injured person's action was prescribed by the expiration of one year from the date of the injury,—the fact that the claim of deceased was extinguished by prescription at the time of his death not being equivalent to his "having obtained indemnity or satisfaction" within the meaning of Art. 1056, C.C.

3. Where on a former trial the jury awarded the respondent $3,000 damages, but the verdict was set aside by the Supreme Court on the ground of misdirection, and on the second trial the jury awarded $6,500 damages: that the amount was not so excessive that the Court should set aside the verdict and order a new trial.

APPEAL from a judgment of the Court of Review, maintaining the respondent's motion for judgment on the verdict of a jury in her favor for $6,500, and dismissing the

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appellants' motions for a new trial, for judgment *non obstante veredicto*, and in arrest of judgment.

The judgment of the Court of Review is fully reported in M. L. R., 5 S. C., pp. 225-249.

May 16, 17, 1890.]

Hon. A. Lacoste, Q.C., and *H. Abbott, Q.C.*, for appellants:—

The action was one instituted by the widow and minor child of the late Patrick Flynn, who died on the 18th November, 1883, in consequence, it is alleged, of injuries received on the 27th August, 1882.

The questions which arise upon this appeal are:—

First. Whether the respondent has any right of action, it appearing from the allegations of her declaration that more than a year elapsed between the date of the accident and the death of her husband, without any action having been taken; it being contended by the appellants, that all rights of action resulting from the bodily injuries received by the deceased, were prescribed by the lapse of one year, under Article 2262 of the Code;

Secondly. Whether the appellants are entitled to a new trial, on the grounds, (*a*) that the verdict of the jury was unsupported by proof and contrary to the weight of the evidence; (*b*) that the verdict was informal and defective, the answers to certain of the questions being vague, uncertain and contradictory in their terms; (*c*) that the amount of damage awarded was excessive.

The appellants submit that if the prescription invoked against the respondent's right of action exists, it was unnecessary to plead it, and they were entitled to raise it in the manner in which they did, and it therefore only remains to be considered, whether such prescription does exist.

It will be observed that under Art. 1056 the right of action is given to the consort and relations only in the case where the person dies "without having obtained indemnity or satisfaction." It follows from this that if the deceased had obtained indemnity or satisfaction from the appellants during his lifetime, neither the widow nor

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his relations would have had any right of action. Thus showing that the right of action is the same in favor of the deceased and of his consort and relations, though the measure of damages is different; the deceased in the one case being entitled to damages for the sufferings and injuries personal to himself, and his consort and relations being entitled to damages for the pecuniary loss suffered by his death. But the foundation of the right of action is the same—viz., the bodily injuries which are alleged to have caused the death. It follows from the article that if that right of action was extinguished before the death of the deceased, it cannot be revived in favor of his consort or relations. This principle has been upheld in England in the interpretation of Lord Campbell's Act, from which Act our article is drawn (*Read* v. *Great Eastern Railway Co.*, L. R., 3 Q. B. 555; *Pulling* v. *Great Eastern Railway Co.*, L. R., 9 Q. B. D. 110.) And the Supreme Court has held in this very case, following the Privy Council in *Tremble* v. *Hill*, (5 Appeal Cases, 342,) and the House of Lords in *City Bank* v. *Barrow*, (5 Appeal Cases, 664,) that the construction by the Courts in England upon the English statute should be adopted by the Courts of this country. It is therefore submitted with confidence, that the appellants have the right to urge under Art. 1056, any matter, such as prescription, which extinguished the right of action before the death of the injured person.

It may be urged that the respondent has a right of action independently of the Statute, which the Code practically is; but this has already been authoritatively decided by the Supreme Court in this case, holding that the enactments of our Code leave clearly, for an injury caused by death, nothing but the action given by Art. 1056, and that the statutory action only now lies (10 Leg. News, p. 243.) But it is objected by the learned Judge Davidson that the prescription of the right of action is not equivalent to indemnity or satisfaction, because the prescription is not founded upon a presumption of payment, but on the higher reason of public policy. The learned

Judge has evidently misunderstood the contention of the appellants. They did not contend that this prescription created a presumption of indemnity or satisfaction, but that it was evident, from the terms of the Article 1056, that if the claim of the deceased were extinguished in any way, whether by payment, prescription or otherwise, there was no new right of action in favor of his widow created by his decease. It is submitted that if the right of action can be extinguished by payment to the injured person during his lifetime, it can also be extinguished by lapse of time, provided that the law has fixed such lapse of time as a limitation to the right to recover.

J. C. Hatton, Q.C., and *C. A. Geoffrion, Q.C.*, for respondent :—

The respondent's action is taken under the provisions of Article 1056, specially excepted in sub-section 2 of Article 2262, relied upon by the appellants.

Article 1056 provides that "in all cases where the person injured by the commission of an offence or a *quasi-offence*, dies in consequence *without having obtained indemnity or satisfaction*, his consort and his ascendant and descendant relations have a right, *but only within a year after his death*, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death."

To ordinary minds nothing can be clearer than this article, which is new law, and which gives a specific right of action, and limits the time within which it must be instituted. Sub-section two of Article 2262 also refers to the *special provisions of Art. 1056, and excepts them*. The appellants, however, pretend to have discovered another interpretation of these articles, which, until all other means of defence had failed them, even they had not discovered. They now urge that no action having been instituted by the husband of the respondent within a year after he was injured, the respondent lost all right of action; in fact, that her right of action was prescribed before it was acquired.

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To the pretensions of the appellants the respondent answers :—

1st. That her right of action only arose on the death of her husband, and did not cease to exist until a year after his death, even if his rights of action had become prescribed before his death, which is denied.

2nd. That Article 2262 of the Civil Code only refers to injuries inflicted with malice, as prescribed by one year, those inflicted without malice being quasi-offences, like the injury in question, coming under the provision of Article 2261 which are prescribed by a lapse of two years. The French version of the Code refers to "*injures corporelles*," and the word "*injures*" means injuries inflicted with malice, not as in the present instance. *Caron* v. *Abbott*, M. L. R., 3 S. C. 375.

3rd. That even if the respondent's rights were prescribed as alleged, prescription should have been specially pleaded.

The respondent's right of action only arose on the death of her husband. Prior to his death she had no right of action. How then could a right be prescribed before it came into existence? Yet this is the pretension of the appellants. The respondent is not claiming any successive rights. She has a right of action quite different from any right which her husband might have had, provided he did not during his life-time obtain indemnity or satisfaction from the appellants. It is not a successive right as representing her husband, but a right given to her by special legislation. There is no pretension that respondent's husband did obtain indemnity, but the appellants now pretend that prescription against his rights having been acquired, it must be assumed to be equivalent to payment.

At the argument in the Court below, appellants' counsel cited authorities to show that if the respondent's husband had during his lifetime accepted indemnity, no right of action would accrue to the respondent. If prescription is held to be equivalent and the same as payment, these authorities may be of value, but otherwise they can have

no bearing upon the case. The appellants were unable to cite any law in support of their pretension, that prescription was equivalent to, or a presumption of, payment.

DORION, Ch. J., (for the Court) :—

This is a claim by a widow, Mrs. Flynn (now respondent), for damages for the death of her husband. The injuries were received by the late Mr. Flynn as far back as the 27th August, 1882. Two jury trials have taken place. On the first trial the jury found in favor of the widow and her child, and assessed the damages at $3,000. Judgment was rendered by the Superior Court in Review ordering a new trial, but that judgment was reversed by this Court, and judgment was given for the plaintiff on the verdict. On appeal to the Supreme Court, the judgment was set aside on the ground that the jury had been erroneously instructed by the judge that in assessing the damages they had a right to, and might consider the anguish and mental suffering of the widowed mother and orphaned child. A second trial then took place, with the result that the damages were increased from $3,000 to $6,500, viz., $4,000 for the widow, and $2,500 for the child.

The appellants moved for judgment *non obstante veredicto*, and also in arrest of judgment, and the motions were based upon pretty much the same ground, viz., that there is no action now; that when the husband died, his action was prescribed, and the widow can have no action because her husband's right of action was extinguished before his death. These motions were dismissed by the majority of the Court of Review, and judgment was entered in favor of the plaintiff. The Company now appeal from the last mentioned judgment. The husband survived about fifteen months in a miserable condition, after being injured, and the contention of the appellants is, that his right of action was barred by the lapse of a year from the date of the injury, and that as his claim

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was extinguished before his death, his widow can have no action.

There is no doubt that if the husband had received compensation or indemnity before his death, the widow would have no action. But that is not the case here. The husband was ill from the effects of the accident—so ill that he could probably give little attention to the prosecution of his claim. I am disposed to think, without, however, expressing a decided opinion upon the point, that in such cases the prescription commences to run only from the time that the injury is complete. If a man were ill only one day from the effects of an accident, he would be entitled only to damages for one day; but if he were ill for fifteen months, he would be entitled to damages for that period, and the prescription could only run from the end of the fifteen months, because then only would the amount of damage be complete and ascertainable.

But it is not necessary to decide that question here. This is not an action by the injured person, but a different action. The Civil Code (Art. 1056) gives to the widow and children of one who dies from injuries received from the negligence of another an action against the guilty party. This action is not given to them in any representative quality, and the article expressly provides that it may be brought within a year from the decease of the injured party. The prescription against the action of the deceased did not therefore apply to the action of the wife and children. This was the opinion of the majority of the Court of Review, and it will be unanimously affirmed by this Court.

As to the amount of damages, it has been contended that they are excessive. But this was a matter entirely for the jury. The Court cannot say that $4,500 to the widow for the death of her husband after an illness of fifteen months, and $2,500 to the child, are amounts so excessive as to shock the sense of justice, and therefore the verdict

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will be maintained, and the appeal dismissed. This is the unanimous opinion of the Court.

Judgment confirmed.

Abbotts, Campbell & Meredith for appellants.
Hatton & McLennan for respondents.
(J. K.)

January 22, 1890.

Coram DORION, Ch. J., TESSIER, BABY, CHURCH, and BOSSÉ, JJ.

MONTREAL STREET RAILWAY CO.,
(*Defendants in Court below,*)
APPELLANTS;
AND
PERCIVAL K. LINDSAY,
(*Plaintiff in Court below,*)
RESPONDENT.

Sale—Latent defect—Redhibitory action—Art. 1530, *C.C.*

HELD:—1. Where horses, at the time of their sale, were suffering from glanders, but the disease was not sufficiently developed to be apparent until about twenty days afterwards, and the purchaser then notified the vendor of the fact, and that they would be destroyed if not removed within three days: that a redhibitory action instituted four weeks after the sale and delivery was brought with reasonable diligence.

2. That where evidence is conflicting and evenly balanced (as in this case as to the existence of the disease at the time of the sale), the Court of Appeal will not disturb the decision of the Court below.

APPEAL from a judgment of the Superior Court, Montreal (TAIT, J.), October 31, 1888, maintaining an action brought by the respondent for the return of the price of two horses bought by him from the appellants. The judgment of the Court below was as follows:—

"The Court, etc.....

"Considering that plaintiff has alleged in his declara-

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tion, and defendants have admitted by their affirmative answer to plaintiff's second articulation of facts, that defendants sold with usual and legal warranty to plaintiff, at Montreal, on or about the 15th day of December, 1887, one grey gelding horse and one grey mare, for the price together of $120;

"Considering that plaintiff has further alleged and proved that said horse and mare at the time they were sold and delivered by defendants to plaintiff, were affected with and were suffering from glanders, being a *vice redhibitoire*, but that the evidence does not establish that said disease was sufficiently developed to be then visible, or that the defendants then knew of the said defect;

"Considering that by article 1528 of the Civil Code the defendants are obliged to restore plaintiff the price and reimburse the expenses caused by the said sale;

"Considering that plaintiff hath proved that he incurred expenses caused by the said sale amounting to $64;

"Considering that plaintiff has brought his action with reasonable diligence seeing the nature of the defect, and the time of the discovery thereof, and that defendant's plea in urging want of diligence is unfounded;

"Considering plaintiff has proved the material allegations of his demand, and is entitled to a judgment for $184 in his favor, and that defendants have failed to prove their plea, doth reject said plea, and doth adjudge and condemn the said defendants to pay and satisfy to said plaintiff the said sum of $184, with interest, etc., and costs *distraits*, etc."

Nov. 18, 1889.]

A. Branchaud, Q.C., for the appellants:—

The respondent did not act with reasonable diligence. The suit was brought 12th January, 1889, while the sale and delivery took place on the 15th December previous. *Begin* v. *Dubois*, 1 Q. L. R. 381; *Darte* v. *Kennedy*, 15 L. C. J. 280; *Lanthier & Champagne*, 18 L. C. J. 254; *Donihee & Murphy*, 2 Leg. News, 94; *Crevier* v. *Chayer*, 8 Leg. News, 84.

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Notwithstanding the opinion of the veterinary surgeons examined by the respondent, as to the time the disease of glanders takes to develop to a patent state, we find it controverted by able writers who have written *ex professo* on the subject, and who state that glanders may arise spontaneously and develop likewise. This kind is called acute glanders.

The hardship these horses endured in the cars must have necessarily affected their system and caused a malady which may have degenerated into the disease supposed by the surgeons to be glanders.

The appellants submit that the evidence establishes that the horses were not sick nor suffering of any latent disease when they were sold and delivered to the respondent. Their illness is due to the improper care given by the respondent during their transportation.

To relieve himself of all responsibility the respondent's first duty would have been to warn the appellants immediately after the arrival of the horses of their then suffering condition, and procure them the necessary medical treatment. The respondent was negligent in not giving the horses immediate medical treatment and in not notifying the appellants of the condition of the horses on their arrival.

Selkirk Cross, for the respondent.—

As to the cause of the malady, almost all are agreed that it arises from contagion, and it might have been caught just from rubbing against another horse in the stables, or drinking water taken from a public drinking trough. It is absolutely incurable, so far as medical science goes, and may be taken by human beings as well as horses, and is probably one of the most terrible afflictions known, the body rotting away and dropping to pieces in a much shorter time than in the case of leprosy. Appellants' theory of the cold car would only, at most, suggest the idea of the catching of an influenza or horse distemper, as respondent supposed it to be at first; a trivial complaint, which can generally be speedily got over, but not

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a *vice redhibitoire*. The journey, as already stated, very likely developed the outward symptoms of the glanders, but certainly did not cause them.

Defendants further contend that proper diligence was not shown. To this respondent would reply: The horses arrived on the night of the 17th December, and being then found with apparently the epizootic or cold in the head, were treated for such, but not getting well, respondent on the 3rd January called in Dr. Barton, who, wishing for a confirmation of his opinion, secured the attendance of Dr. Ball for 9 a.m. on the following day, and the same day respondent sent off the notice to appellants, which was served on them at Montreal, on the 5th, giving appellants ample time—until the 7th at midday—with four trains daily to Hillhurst,—to come and examine the two animals, it being entirely out of the question to return them to Montreal, and in fact, respondent would probably thereby have rendered himself liable to a prosecution under the Contagious Diseases (Animals) Act.

CHURCH, J., for the Court:—

This is an action to recover back the price of a pair of horses sold in a diseased condition, and also the value of certain articles in use about them, which were destroyed.

The facts are substantially these: In December, 1888, Lindsay, the respondent, who is a farmer of the Township of Compton, came to Montreal to buy a pair of horses suitable for farm work. He applied to the Street Railway Company, and they offered him a pair which they stated were too slow in their movements for the Company's purposes. Lindsay spent five or six days in examining the horses before concluding the purchase. The matter was closed on the 15th December, 1888. The horses were removed to Point St. Charles, where they remained that and the following day in a stable. On the 17th December they were put on the cars and taken to Hillhurst, where Lindsay resided. Lang, the station agent, who let out one of the horses, noticed that it was discharging from the nose. They were removed at once

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to respondent's stables, which were commodious,—one hundred feet by fifty. The following day the horses were observed to be drooping, and their noses were discharging. The people about the place appear to have been under the impression that the animals were suffering from epizootic. They were set the next day to draw a load of wood, and were unable to draw it. The load was afterwards drawn home by a single horse. Some remedies were used, but the animals did not improve. A veterinary surgeon was called in, who at once suspected that the disease was glanders. He requested a consultation, and another veterinary surgeon being called in, the malady was declared by both surgeons to be glanders. This is a fatal disease, and also extremely contagious. The respondent at once (Jan. 4) wrote a letter to the appellants, telling them that the horses had glanders, and he was going to have them destroyed, but would hold them until the 7th, subject to the Company's order. They replied that they sold the horses as cast-off horses. On the 7th January the horses were shot and buried; the blankets, harness, etc., were burned. Lindsay then sued the Company for the return of the price, and for the expenses to which he had been put. The Company met the action by saying that the horses were in a healthy condition when sold; that they were put into a cold stable, and not properly cared for; and that they had died from a disease contracted after the sale. They also said that they sold the animals without any guarantee.

The respondent established by evidence as clear and precise as it was possible to conceive, that the horses were affected by disease at the time of the purchase; that the virus must have been in the blood at that time. On the other hand, there is evidence just as clear and just as precise, that the horses showed no indication of disease at the time of the sale. In these circumstances it is difficult for judges who have not seen and heard the witnesses, to overrule the conclusion of the judge in the Court below, which was that the sum of $120 paid for the horses, and

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$64 expenses for freight, medical attendance, and articles destroyed, should be allowed. After a careful examination of the whole case, this Court will not disturb the judgment. Perhaps if the judgment of the Court below had been the other way, there might have been the same disinclination on the part of this Court to disturb the judgment.

The appeal is therefore dismissed.

Judgment confirmed.

Julian, Branchaud & Bauset, for appellants.

Selkirk Cross, for respondent.

(J. K.)

June 26, 1889.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, BOSSÉ, JJ.

LA MISSION DE LA GRANDE LIGNE ET AL.,
(*Defendants in Court below,*)
APPELLANTS;

AND

ROMUALD MORISSETTE,
(*Petitioner for habeas corpus in Court below.*)
RESPONDENT.

Habeas Corpus—Appeal from judgment of the Superior Court—Jurisdiction.

HELD:—That the Superior Court and the judges thereof having concurrent jurisdiction with the Court of Queen's Bench in matters of *habeas corpus ad subjiciendum*, there is no appeal to the Court of Queen's Bench sitting in appeal from the judgment of the Superior Court, or of a judge thereof, in such matters.

APPEAL from a judgment of the Superior Court, district of Iberville (CHARLAND, J.), in chambers, Jan. 17, 1889.

The judgment of the Court below was as follows:—

"Ayant entendu les parties par leurs avocats respectifs, tant au mérite que sur la motion *to quash* des défendeurs,

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examiné la procédure, preuve, pièces produites, et sur le tout délibéré ;

"Attendu que le nommé Romuald Morissette, cultivateur, de la paroisse St. Michel, dans le comté de Bellechasse, dans le district de Montmagny, expose, par sa requête, qu'il est le père légitime d'Alexandrine *alias* Lédia Morissette, fille mineure âgée de dix-huit ans et plus, mais moins de dix-neuf ans, laquelle fille est actuellement détenue sans cause ni raisons justifiables, et illégalement et contre le gré et la volonté du requérant, par "La Mission de la Grande Ligne," un corps politique et incorporé, et ayant sa principale place d'affaires dans la paroisse de St. Valentin, dans le district d'Iberville, et par Godfroi Massé, gérant et procureur de la dite Mission de la Grande Ligne, les défendeurs en cette cause, dans la maison ou bâtisses de la dite Mission de la Grande Ligne, dans la dite paroisse de St. Valentin, et que, par telle détention, le requérant est privé de la garde et surveillance de son enfant susdite, et de son autorité et contrôle sur elle ;

"Attendu que le requérant expose que les défendeurs refusent de remettre et de lui livrer la personne et la garde de sa dite enfant mineure, et que, lorsqu'il serait allé chez les défendeurs, le ou vers le 1er janvier 1889, pour la réclamer et la ramener chez lui, les défendeurs la lui ont refusée, et que le défendeur Godfroi Massé a, là et alors, assailli et battu le requérant, et l'a mis hors de la dite maison dans laquelle les défendeurs détenaient la dite mineure ;

"Attendu que, pour ces faits, le requérant, par les conclusions de sa dite requête par lui assermentée, a demandé un bref d'*habeas corpus ad subjiciendum*, ce qui a été accordé ; lequel bref a été rapporté en Chambre devant moi, le 7 janvier 1889 ;

"Attendu que les défendeurs ont lié contestation par laquelle ils prétendent, *inter alia*, que la dite mineure n'est pas et n'a jamais été privée de sa liberté, ni détenue, ni soumise à aucune contrainte, par les défendeurs ;

"Attendu que, par leur dite contestation, ils allèguent qu'en octobre 1887 la dite mineure est entrée comme in-

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terne au collège des défendeurs à la Grande Ligne, à sa demande et suivant son désir, et qu'avant cela elle avait été placée par ses parents, il y avait environ trois mois, chez un de ses oncles ;

"Que, pendant sa dite résidence à Montréal, la dite mineure se serait faite protestante, et que, craignant l'opposition de ses parents, et persuadée qu'ils attenteraient à sa liberté de conscience, elle se décida à entrer à l'école des défendeurs à la dite Mission de la Grande Ligne ;

"Que la dite mineure a toujours été libre de quitter le dit établissement, mais qu'elle ne le voulait pas, et que, quand ses parents ont voulu l'amener, elle s'y est refusé, et que les défendeurs ne sont intervenus que quand le père voulut sortir son enfant par le bras, pour la protéger et lui faire lâcher prise, et que la dite enfant est libre de se choisir un domicile ;

"Attendu que, par sa réponse, le requérant nie le droit à sa dite fille mineure de se choisir un domicile, et allègue que les défendeurs, dans le but de la soustraire illégalement à la garde de son père, ont exercé sur elle une influence illégale et indue, et ont eu recours au fanatisme religieux, et qu'ils l'ont détenue illégalement par contrainte morale et physique, et ont refusé au requérant de la ramener avec lui, et se sont servis de la violence et de la force physique pour l'arracher des bras de son père qui la réclamait, et qu'ils la détiennent illégalement par contrainte morale et physique, sans cause ni raison valable ;

"Je, soussigné, un des juges de la Cour Supérieure de la Province de Québec, siégeant en chambre à St-Jean, dans et pour le district d'Iberville ;

"Considérant qu'il est établi par des admissions écrites de part et d'autre que la dite Alexandrine Morissette est mineure, enfant du légitime mariage du requérant et son épouse Philomène Lamontagne ; que le requérant et son épouse sont catholiques romains, sont nés, ont été élevés, et ont vécu dans cette religion ainsi que leurs enfants et leurs ancêtres, de dates immémoriales ; que la dite Alexandrine Morissette est née et a été baptisée dans la dite religion catholique romaine, et qu'elle n'a jamais mani-

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festé l'intention de changer de religion avant qu'elle soit allé demeurer à Montréal chez son oncle Edmond Morissette, et que jusqu'en juin 1886, elle avait toujours resté chez son père, le requérant; que vers ce temps, le requérant a placé sa dite enfant mineure chez son oncle le dit Edmond Morissette, alors catholique romain, à Montréal, pour lui permettre d'apprendre à coudre; que, quelque temps après, le dit Edm. Morissette et son épouse auraient renoncé à la religion catholique romaine, et auraient embrassé la religion protestante dite Baptiste, et que la dite Alexandrine Morissette aurait aussi, vers le même temps, pendant qu'elle demeurait chez son dit oncle Edmond Morissette, renoncé à la religion catholique romaine et embrassé la religion protestante dite Baptiste, hors la connaissance et contre le gré et la volonté du requérant; que, lorsque le requérant fut informé de ces faits, vers le mois de juin 1887, il se serait rendu à Montréal avec son épouse dans le but de ramener chez lui sa dite enfant mineure, mais que cette dernière se serait soustraite à la garde et l'autorité de son père et se serait retirée dans un lieu inconnu au requérant; qu'il est de plus admis que le requérant est un cultivateur à l'aise qui a bien traité sa dite enfant et qu'il est en position de lui donner les soins et le confort requis;

"Considérant que le requérant est d'abord venu à Montréal pour chercher la dite mineure, et que s'étant alors soustraite à sa garde elle serait allée chercher protection chez le Révérend Monsieur Therrien, et que ce dernier aurait favorisé son évasion en lui faisant même traverser la frontière, l'envoyant à Burlington, dans l'Etat du Vermont, un des Etats-Unis d'Amérique, puis favorisant son entrée à la Mission de la Grande Ligne, sachant qu'elle était mineure, qu'elle avait renoncé à sa religion à l'insu de ses père et mère, sans leur consentement, et qu'elle fuyait le toit paternel sans motifs ni raisons reconnus par notre loi;

"Considérant qu'il ressort de la preuve que le Révérend Monsieur Therrien était le pasteur de l'Eglise Baptiste française, à Montréal, fréquentée par la dite mineure,

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et qu'il est un des directeurs de la dite Mission de la Grande Ligne, et que les défendeurs connaissaient que la dite mineure se soustrayait à l'autorité paternelle et fuyait le domicile de son père, ce qu'ils favorisaient au nom de la liberté de conscience de la dite mineure ;

" Considérant qu'il ressort de la preuve que, quand le requérant a appris que sa dite fille mineure était internée à la dite Mission de la Grande Ligne, chez les défendeurs, il s'y est rendu, et, qu'au moment où il voulut ramener sa dite enfant mineure sous le toit paternel, les dits défendeurs assaillirent le requérant pour soustraire la dite mineure à l'autorité paternelle, et, de fait, réussirent à lui faire lâcher prise quand il la tenait par le bras pour la ramener avec lui ;

" Considérant que les défendeurs, par leur rapport même sur le bref d'*habeas corpus ad subjiciendum*, ont déclaré que la dite mineure pouvait quitter leur dit établissement quand elle le voudrait, qu'aucune contrainte n'était exercée sur elle, et qu'elle n'était en aucune manière privée de sa liberté, bien qu'ils admettent avoir empêché le requérant de ramener avec lui sa fille mineure et d'avoir paralysé ses droits de père par la force physique, et de l'avoir forcé de quitter leur dit établissement ;

" Considérant que, sous l'empire de notre droit, le mineur non-émancipé ne peut se choisir un domicile autre que celui de son père, où il est tenu de rester, à moins que le père ait rénoncé à son droit de garde et surveillance paternelle, ou en ait abusé de manière à se mettre dans l'exception ;

" Considérant que l'enfant mineur ne peut avoir de liberté dans l'espèce qu'en autant que lui en délègue et concède son père ; et qu'admettre que le mineur, quoique bien traité par ses parents en état de pourvoir à son avenir et lui donner l'éducation et le confort de la vie, ait le droit de se choisir un domicile contre le gré de son père, serait violer notre droit et admettre un principe subversif de l'ordre social ;

" Considérant que le consentement du mineur non-émancipé à demeurer ailleurs que chez son père, contre

la volonté de ce dernier, est nul et sans effet (sauf abus ou perte d'autorité), et, s'il est ainsi détenu ailleurs que chez son père, il y a détention illégale et privation de liberté;

"Considérant qu'il résulte de la preuve que les défendeurs ne pouvaient s'autoriser du prétendu consentement de la dite mineure pour la détenir chez eux, contre le gré et consentement de son père, sous prétexte d'une liberté qu'elle n'avait pas, liberté qui réside avec le père, à qui on a opposé force et violence comme susdit;

"Considérant que, par suite de ce qui précède, il y a eu contrainte morale et physique, détention illégale et privation de liberté au terme de notre droit, ce qui donne lieu au bref d'*habeas corpus ad subjiciendum*;

"Considérant que les faits exposés dans la requête du requérant sont suffisants pour donner lieu au dit bref, et que tous les allégués essentiels qu'elle contient ont été prouvés, et que la motion en demandant la cassation n'a pas sa raison d'être, et que la contestation des défendeurs sur le dit bref est mal fondée, et que les dits défendeurs n'ont aucunement justifié de la position par eux prises en cette instance;

"Renvoie les dites contestation et motion *to quash*, maintient le dit bref d'*habeas corpus ad subjiciendum*; et, toutes les parties étant présentes, ordonne aux défendeurs de remettre et rendre *instanter* la dite mineur au requérant, son père, le tout avec frais et dépens distraits, etc."

May 22, 1889.]

E. Lafleur (with him *C. A. Geoffrion, Q.C.*,) for the appellants:—

The present respondent was petitioner for *habeas corpus* in the Court below. In support of his petition he alleged that his daughter Alexandrine *alias* Lédia Morissette, of the age of eighteen years and over, was unlawfully and against his will detained by the defendants (now appellants) in their educational establishment in the parish of St. Valentin, and that he was in consequence deprived of his authority and control over her. The petitioner also complained that upon applying to the defendants at their

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establishment for the custody of his daughter, the defendant Godefroi Massé assaulted him and put him out of the house. Upon the petitioner's affidavit in support of these allegations a writ of *habeas corpus ad subjiciendum* was issued returnable before Judge Charland in Chambers, ordering the defendants to produce before him the body of Alexandrine Morissette and to explain the cause of the alleged detention.

On the day appointed, the defendants, accompanied by Miss Morissette, appeared before the judge, and made returns, supported by affidavits, to the following effect :— They set forth that in the month of October, 1887, Miss Morissette was admitted on her own application, and at her desire as a boarder in their school at St. Valentin, and that ever since that date she had remained there of her own free will and without the slightest coercion or restraint. That she was nearly 19 years of age and was possessed of sufficient intelligence to exercise a reasonable choice as to her domicile. That she had frequently expressed to the defendants her firm resolution to remain in their establishment, even against the wishes of her parents, in order to practice the Protestant religion to which she had attached herself after mature consideration, and to leave her parents, notwithstanding her sincere affection for them, inasmuch as they would deprive her of her liberty of conscience and compel her to return to the Catholic faith. The defendants further alleged that Miss Morissette was at liberty to correspond with her parents and friends, and to receive their visits as often as she liked. As to the alleged assault, the defendants said that on the contrary the petitioner and his wife had been hospitably received when they visited the institution, that they had been permitted to pass the whole evening alone with their daughter, and had been lodged for the night ; but that on the next morning, when the petitioner abused the confidence which had been placed in him and endeavored to carry away his daughter by force, notwithstanding her desperate resistance and repeated cries for help, the defendant Massé, director of the Institution, had

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without violence compelled the petitioner to loosen his hold and to set his daughter free. That being thus liberated from her father's grasp, Miss Morissette had voluntarily chosen to remain with the defendants, and that she had since then repeatedly told them that she intended to stay in the institution.

After making these returns the defendants presented a motion to quash the writ of *habeas corpus* urging, 1o, the insufficiency of the allegations of the petition which did not even state that Alexandrine Morissette was detained against *her* will, but merely that she was detained against the *petitioner's* will, without alleging that she was of tender years and unable to know whether she was restrained of her liberty; and 2o, the facts set forth in defendants' returns, showing that there had, in fact, been no constraint and no violation of the liberty of the young lady, and that she had always remained there of her own free will.

In addition to this motion the defendants filed a regular contestation, urging, in substance, the same grounds of defence. This contestation was duly answered, and issue joined in the regular way. The case was then inscribed on the roll for proof, and after the examination of Miss Morissette in open Court by the presiding judge and by the counsel on both sides, witnesses were examined for the petitioner and for the defendants. The *enquête* being duly closed, the case was then inscribed for hearing on the merits, and argued on the same day. On the 17th of January, 1889, judgment was rendered, ordering the defendants to deliver over Alexandrine Morissette to her father *instanter*, and condemning them to pay all the costs.

The facts proved at the trial may be summarized as follows:—

Miss Alexandrine Morissette was born and baptized in the Catholic faith, her parents and their ancestors having been members of that church. Up to the age of 16 she had lived with her parents in the parish of St. Michel de Bellechasse, and had manifested no intention of changing

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her faith. Towards the month of June, 1886, when she was between 16 and 17 years of age, her parents sent her to reside with her uncle and aunt in Montreal, intending that she should learn to sew. This uncle, Edmond Morissette, and his wife, were then Catholics, but some time after Miss Morissette's arrival in Montreal, the uncle, aunt and niece appear to have discussed religious matters and to have attended service in a Protestant Church connected with the defendant Corporation, "La Mission de la Grande Ligne." They subsequently applied for admission as members of this church, and were ultimately received as such. Towards the month of June, 1887, the petitioner, who had been informed of this change, came to Montreal with his wife with the object of bringing his daughter away. They appear to have discussed and argued with her, but without succeeding in their attempt to win her back to her former faith. During the course of these interviews, when her firm resistance appeared to exasperate her parents, Miss Morissette became convinced from their words and actions, especially on the occasion of an interview in St. Patrick's Church, where they had taken her to confer with a priest, that they would undoubtedly attempt to deprive her of her liberty of conscience if she remained under their control, and that they purposed to send her to a convent. Alarmed at this prospect, she escaped from the church, and ran to the house of the minister of the Protestant church which she had been frequenting. After receiving the protection of some ladies in Montreal, connected with the same church, she was assisted by them to go for a short time to Burlington, in the State of Vermont. Towards the month of October, 1887, she was admitted, on her application, to the defendants' educational institution at La Grande Ligne in the parish of St. Valentin, and she remained there of her own free will and entirely without compulsion, as long as she was permitted to stay. So far from exercising any constraint over her, the directors of the establishment advised her to write to her parents and allowed her to receive their visit. When the petitioner and his wife

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presented themselves at the establishment, they were hospitably received and lodged for the night, and were permitted to spend the whole evening alone with their daughter. They were told that the defendants only desired to respect Miss Morissette's wishes, and that if she gave the slightest intimation that she desired to leave the establishment, not the slightest obstacle would be put in her way. They were also informed that while they were under the defendants' roof they were expected to respect Miss Morissette's wishes, and that she would be protected from any attempt to remove her by force. On the morning of his departure, before leaving the house, the petitioner seized his daughter and endeavored to carry her off by force, notwithstanding her energetic resistance and her repeated cries for help, but was prevented in this attempt by two of the directors of the institution, who made him unhand Miss Morissette. As soon as she was liberated Miss Morissette fled to another part of the house and repeated her emphatic desire to remain against her father's wishes.

At the trial the young lady, who reached her nineteenth year during the pendency of the proceedings, was examined at some length by the presiding judge, and declared in the most unequivocal terms that she was perfectly free to go when she liked, and that it was her own wish to remain with the defendants.

Let us now examine the law which is applicable to the foregoing set of facts.

I.—The first proposition which the appellants submit is that upon the writ of *habeas corpus*, the only question which could be tried was whether Miss Morissette had been confined or restrained of her liberty against her will. It was not competent for the Court, upon these proceedings, to decide as to the claim of the father to the custody of his daughter, or to pronounce upon the question whether by his conduct he had lost his paternal rights, and justified the course taken by his daughter. The only point which could be discussed was whether there was any detention or constraint by the defendants, and in the

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absence of any proof of such detention or constraint, the Court was bound to leave the parties *in statu quo*, and to allow the young girl to elect with whom she would go. The only cases in which a Court or Judge will refuse to consult the wishes of the child upon such proceedings, are those where the child is of tender years and unable to judge for itself whether it is detained or not. In such cases the wish of the parent, or the person who stands *in loco parentis*, is consulted.

These rules have invariably been acted upon ever since the introduction of the writ of *habeas corpus* in civil matters in England, and the same principles are clearly laid down in our Code of Procedure, and in a whole series of judicial decisions upon the subject. *Cooper* v. *Tanner*, 8 L. C. J. 113; *Rivard* v. *Goulet*, 1 Q. L. R. 174; *Stoppelben* v. *Hull*, 2 Q. L. R. 255; *Reg.* v. *Hull*, 3 Q. L. R. 186; *Reg.* v. *McConnell*, 5 Leg. News, 386; *Ex parte Ham*, 6 Leg. News, 115.

II.—The appellants' next contention is that, apart from the impossibility of exercising his claims by means of a writ of *habeas corpus*, the petitioner forfeited his right to the custody of his daughter by making it impossible for her to exercise her liberty of conscience, when she had reached the age of discretion, and had exhibited sufficient intelligence and education to enable her to choose for herself in such matters.

There can be no doubt from the evidence of the young girl that her apprehensions as to the course which her parents intended to pursue were well founded, and that they would have employed coercive measures to prevent her from practising the religion which she had adopted during her stay with her uncle and aunt. She unquestionably gathered from their conversations and actions that they intended to place her in a convent, and the conduct of the father in attempting to carry her off by force notwithstanding her struggles and cries, sufficiently shows that he did not rely on moral suasion so much as on physical force. In the course of a somewhat animated discussion which took place at the educational es-

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tablishment in question, on the occasion of the parents' visit there, Mr. Morissette told the principal of the institution in the presence of Miss Morissette that he considered he had the same power over his daughter as he had over his horse! This is the old Roman doctrine of *patria potestas* pure and simple, and it is impossible to suppose that any good can result from allowing a parent, so disposed, to control the mature and sincere convictions of a girl of nineteen.

Our law evidently leans in favour of the early emancipation of minors, and in none of the cases contained in our reports is the doctrine contended for by respondent adopted, viz., that the child cannot think or act for himself until the age of majority. The age of discretion, not majority, is the test in these matters, and even in the case of *Ex parte Ham*, 6 Leg. News, 115, above quoted, where Mr. Justice Ramsay refused to allow a girl of 12 to exercise a controlling choice as to her education, the learned Judge does not pretend to refuse her the right because she is a minor, but because her opinions are not sufficiently formed.

There is no doubt that under the general rule laid down by our Code the father has control over his unemancipated child until the age of majority, but, as all the cases above cited show, there are numerous exceptions to this general rule. The father's abuse of his paternal authority will undoubtedly authorize the Court to curtail it or declare it forfeited altogether. It is obviously impossible to lay down with any degree of precision the boundary line between legitimate authority and abusive coercion, but in such cases, as in cases between husband and wife, the condition of the parties and their intellectual and moral development must be carefully considered by the Court. What may amount to cruelty, brutality and coercion in one case may not be so in another. Where the principle of liberty of conscience is so firmly established as in this province, and where there is no positive law stating at what age this liberty may be exercised, it is within the discretion of the Court to say whether in any

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particular case a minor is sufficiently developed and educated to claim such a right even in spite of parental wishes. A minor can, under the provisions of our Code, become emancipated from parental control on his own demand by any Court on the advice of a family council (Art. 315, C. C.,) and in a case like the one under discussion, assuming even that the petitioner had taken the proper proceedings, it would appear to have been within the power of the Judge and eminently desirable in the interests of the minor, to order the calling of a family council to advise on the matter, and to emancipate the minor if need be.

III.—Although the right of appeal in this case has not been questioned by the respondent, the appellants deem it advisable to say a word on the subject, especially as the learned Judge in the Court below assumed to render the judgment *a quo* in chambers instead of rendering it as a judgment of the Court. Under articles 1047 and 1048 of the Code of Civil Procedure, after the return of the writ, and after the regular trial of written issues including contestation, answer, articulation of facts, inscriptions for proof and for final hearing on the merits, it is obvious that any judgment rendered in the case must be a judgment of the Court. In the cases of *Barlow & Kennedy* (17 L. C. J. 253) and *Regina* v. *Hull* (3 Q. L. R. 136), such judgments were considered to be susceptible of appeal and review respectively, the appellant in the former case being the defendant in the proceedings on *habeas corpus*, and in the latter the petitioner for *habeas corpus*. The interest of the present appellants is sufficiently obvious. The judgment finds that they have been guilty of illegally detaining the child and of assaulting the father, and if this part of the judgment were allowed to be *res adjudicata* against them, they might be responsible in damages on these grounds. Again, they are condemned to pay all the petitioner's costs, and this alone, in a question of this kind which involves a principle, would justify the appeal.

But apart from these considerations the appellants

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claim that they would be entitled to bring this appeal in the interest of the minor. The writ of *habeas corpus* may be applied for not only by the person who is confined, but by *any other person on his behalf*, and as the liberty of the individual is the sole object and end of the writ, it must be competent for the defendant in the proceedings to represent the interests of the person whose liberty is at stake. If the writ of *habeas corpus* has in the present case been diverted from its legitimate object—if a writ designed to protect the liberty of the subject has been used to place in custody (whether lawful or not) a person who was perfectly free and unconfined—then it must surely be allowed to the party who protected the liberty of the subject to continue the proceedings *in favorem libertatis*.

Paradis, for the respondent:—

Cette cause se résume dans les deux questions suivantes:—

1o. La dite Alexandrine Morissette, mineure non émancipée, avait-elle le droit de se choisir un domicile autre que celui de son père, contre la volonté de ce dernier?

2o. Le requérant intimé pouvait-il dans l'espèce procéder contre les défendeurs appelants par bref d'*habeas corpus ad subjiciendum*?

La première question est clairement résolue dans la négative par les articles 243 et 244 de notre Code Civil, qui déclarent que l'enfant mineur reste sous l'autorité et la garde de son père jusqu'à sa majorité ou son émancipation, et qu'il ne peut quitter la maison paternelle sans la permission de son père.

Les articles 372 et 374 du code Napoléon sont dans les mêmes termes, et tous les commentateurs de ce code sont unanimes non-seulement à reconnaître ces droits chez le père, mais de plus à leur accorder une sanction, et à reconnaître au père le droit de réclamer le concours de la force publique pour faire ramener l'enfant dans la maison paternelle.

Ce n'est que par exception, à raison d'abus, de mauvais

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traitements ou mauvaise conduite, qu'on nie ces droits au père, mais ces exceptions confirment la règle.

4 Pandectes Frs., p. 328, sur art. 374. "Il suit de cet "article qu'un père peut contraindre, même par la force, "l'enfant qui a quitté la maison paternelle d'y rentrer; "et que sur réquisition, les tribunaux doivent l'appuyer, "en ce cas, de leur pouvoir."

6 Demplombe, p. 231, Nos. 303 et suiv.

4 Laurent, p. 367.

2 Chardon, puissance paternelle, No. 18, p. 17.

Merlin, Réperf. vo. puiss. patern. sect. 3, 4 et 6.

Pothier, des personnes tit. VI, sect. II.

2 Toullier, Nos. 1046 et 1047.

La nature et la loi imposent au père l'obligation de nourrir, d'entretenir et d'élever leurs enfants; pour cela la loi impose aux enfants l'obligation de rester sous le toit et sous le pouvoir paternel jusqu'à la majorité ou l'émancipation. Au père appartient le droit de diriger l'éducation de ses enfants, de les retenir auprès de lui, de les envoyer dans tel collége, ou autre endroit où il juge devoir les envoyer pour leur éducation. L'enfant ne peut entrer dans aucun état, se faire novice, faire profession religieuse, se marier, sans le consentement de ses père et mère, sous la puissance desquels il est. Nous trouvons dans les auteurs plusieurs jugements à cet effet rendus contre des communautés religieuses.

Et quelle est la sanction de cet article? Il est certain, dit Laurent, que, si l'enfant quitte la maison paternelle sans la permission de son père, celui-ci peut s'adresser à l'autorité publique pour le ramener, au besoin, par l'emploi de la force.

En outre, dans le cas actuel, il est parfaitement établi que non-seulement le père a toujours bien rempli ses devoirs et obligations envers son enfant, mais qu'il est en état de continuer à les bien remplir, et qu'il existe entre cette enfant et ses parents un attachement sincère et profond.

Venons-en maintenant à la seconde proposition, à la question de procédure.

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Nous avons constaté les droits sacrés de l'intimé sur son enfant; en parcourant les faits dévoilés par la preuve, nous avons vu les défendeurs faire changer cette enfant de religion à l'insu de ses parents, et sachant qu'ils y étaient opposés, puis l'enlever et la soustraire à la garde et possession de ses père et mère, en la faisant passer dans un autre pays, dans les Etats-Unis de l'Amérique, pour la tenir cachée et éloignée d'eux, et la placer ensuite dans une institution qu'ils savent ne pas convenir à ses parents, et lorsqu'ils connaissent l'opposition de ces derniers à ce que leur enfant soit tenue dans telle institution; près de deux ans s'écoulent sans que ce père puisse découvrir où est son enfant; dès qu'il l'apprend, il part pour la seconde fois, d'une distance considérable, pour la chercher et la ramener chez lui; les défendeurs non-seulement refusent de la lui laisser ramener, mais lui arrachent son enfant des bras, et le mettent à la porte de la maison dans laquelle ils retiennent malgré lui sa fille mineure, et après avoir défié le père par la force et la violence, ils prétendent maintenant défier la justice du pays et soutenir devant les tribunaux qu'elle est impuissante et incapable de protéger efficacement les droits de l'intimé.

La conduite des défendeurs à l'égard de l'intimé était certainement bien révoltante, toutefois elle était moins osée, moins audacieuse que celle qu'ils tiennent aujourd'hui devant les tribunaux. Admettant, disent-ils, que vous ayiez les droits les plus forts et les plus sacrés sur votre enfant, vous ne pouvez pas prendre contre nous un bref d'*habeas corpus* pour nous forcer à vous la livrer. Cette enfant est libre, disent-ils, aucune contrainte n'est exercée sur elle; il est vrai qu'étant sous la puissance de son père elle est tenue de lui obéir quand il lui ordonne de retourner chez lui, mais nous lui disons, nous, qu'elle n'est pas obligée d'y aller, qu'elle a droit de rester chez nous malgré son père, que nous ne permettrons pas à son père de l'amener malgré elle; et, quand le père a tenté d'amener avec lui son enfant, il est vrai aussi que nous la lui avons arrachée des bras, et que nous avons mis le père à la porte

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et retenu l'enfant chez nous, mais cela c'était pour protéger la liberté de l'enfant, et vous ne pouvez pas pour cela vous pourvoir par le bref d'*habeas corpus*.

Voila la position prise par les défendeurs; et comme c'est le seul procédé, sous notre droit, en vertu duquel on puisse obtenir la possession ou livraison d'une personne, il s'en suivrait, s'ils avaient raison, que la justice serait vraiment impuissante. Où en serait alors l'autorité paternelle, et quelle dérision que les prétendus droits du père?

Si dans notre pays, comme s'est exprimé l'honorable juge de la Cour Supérieure en rendant son jugement, le droit paternel doit recevoir l'interprétation que lui donnent les défendeurs, il est important que les tribunaux se prononcent, et que l'on sache, une fois pour toutes, si un père, bon citoyen, en état de bien élever sa famille et de lui inculquer des principes chrétiens, ne doit conserver ce titre et les droits qui en découlent, qu'en autant que son enfant mineur ne sera pas induit à laisser le toit paternel au nom d'une croyance religieuse quelconque. Je ne fais pas ici, continue l'honorable juge, de religion au bénéfice d'aucune des parties en cette cause; je désire faire l'exposition d'un principe reconnu dans une société intelligente et dans un pays libre, mais de cette liberté limitée par la loi, qui en est la plus sûre garantie.

En effet disons qu'il s'agit, non pas d'une mineure catholique romaine, mais d'une mineure protestante placée par son père dans un couvent catholique, pour y faire son éducation; et que le père, lorsqu'il viendrait la réclamer et tenterait de la ramener chez lui, se verrait empoigné et mis à la porte par les autorités du couvent, qui retiendraient son enfant sous prétexte qu'elle a cru devoir se mettre catholique, et que, pour pratiquer sa religion, elle préfère rester au couvent plutôt que de retourner dans sa famille, et s'entendrait dire: Monsieur, votre fille est libre, nous avons le droit de la retenir ici malgré vous, de diriger son éducation comme nous l'entendrons; vous, son père, vous n'avez plus rien à y voir!

Est-ce là l'interprétation qu'il faut donner à la puis-

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sance paternelle telle qu'exprimée dans notre Code? Sinon, la loi ne pourra-t-elle, sous de telles circonstances, venir au secours du père, et faire reconnaître et respecter ses droits?

Prétendra-t-on, dans l'espèce actuelle, que la position de fille mineure qui refuse d'obéir à son père et de retourner sous le toit paternel, est légale, et que l'action des défendeurs, qui lui prêtent main-forte pour la soutenir dans sa désobéissance, l'est d'avantage? Qu'il n'y a pas là, de la part des défendeurs, détention illégale et privation de la liberté bien entendue de cette enfant?

Et pourquoi alors ne pourrait-on pas, comme on l'a fait, prendre un bref d'*habeas corpus* contre les défendeurs, quand ce procédé existe dans notre droit, qu'il répond exactement au besoin, et surtout quand il n'y en a pas d'autre qui soit effectif?

Cette Honorable Cour, dans la cause de *Barlow & Kennedy*, 17 L. C. J. p. 253, a maintenu un bref d'*habeas corpus* pris par un père qui réclamait la possession et garde de son enfant, après avoir fait un contrat par lequel il y avait renoncé en faveur de celui contre qui le bref était dirigé. Cette Cour a déclaré ce contrat immoral, et malgré que la détention de l'enfant était moins illégale que dans le cas actuel, elle a cependant admis cette procédure et ordonné la livraison de l'enfant à son père.

Les appelants prétendent faire une distinction fondée sur l'âge ou l'intelligence de l'enfant, mais cette distinction, qui peut être conforme à certains jugements rendus sous une loi autre que la nôtre, (et probablement sous des circonstances particulières) est entièrement inadmissible sous notre code, en vertu duquel la puissance et les droits du père sur un enfant mineur non émancipé de vingt ans est exactement la même que ceux sur un mineur de vingt mois.

Sous notre droit, comme ailleurs, le mineur, qui a atteint un certain âge, a bien le droit d'être examiné et consulté, mais seulement dans le but d'éclairer la Cour ou le Juge, et nullement pour faire valoir sa volonté contre

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celle de son père, qui n'a perdu aucun des droits et pouvoirs que la loi lui confère et lui reconnait.

Hurd, on *Habeas Corpus*, p. 527, sect. VIII. "In cases "of any doubt or difficulty, a practice prevails both in "England and the United States, of consulting the wishes "of the infant, when of sufficient age and discretion, as "to its custody. And so common is the practice, that it "has come to be supposed, by some, that the infant pos- "sesses a controlling right of choice. But this is an error. "An infant has no controlling legal right of election as to "its custody. It was never designed to subject the legal "right of custody to the caprice of infant children, nor to "emancipate them from the rightful custody."

June 26, 1889.]

DORION, Ch. J. (for the Court) :—

The Court has come to the conclusion in this case that there is no appeal. The Superior Court and this Court have concurrent jurisdiction in matters of *habeas corpus*, and an appeal does not lie from one court to the other without a special provision of law to authorize it. There is no such provision, and therefore the appeal cannot be entertained. If the writ had been refused by the Superior Court, there is a mode provided by which application may be made before this Court. This provision indicates that there is no appeal in ordinary course, for, if so, this clause would have been unnecessary.

CROSS, J. :—

I concur; but I think it is subject for regret that there is no appeal, as such a remedy would be in the direction of liberty.

The judgment is as follows :—

"La Cour etc.....

"Considérant qu'en matière d'*habeas corpus ad subjiciendum*, la Cour Supérieure et les juges d'icelle ont juridiction concurrente avec la Cour du Banc de la Reine, et que dans ce cas il ne peut y avoir d'appel de l'une des cours ou de l'un des juges de l'une de ces cours à l'autre cour,

sans une disposition spéciale de la loi, disposition qui n'existe ni dans le code ni dans les statuts sur la matière ;

"Cette Cour renvoie l'appel de la partie appelante, et la condamne à payer à l'intimé les dépens encourus sur cet appel."

Appeal dismissed.

Lafleur & Rielle for appellants.
Paradis & Chassé for respondent.

(J. K.)

January 22, 1890.

Coram DORION, Ch. J., TESSIER, BABY, CHURCH, BOSSE, JJ.

JOSEPH LAFORCE, ès-qual.,
(*Plaintiff in Court below*),
APPELLANT ;

AND

LE MAIRE ET LE CONSEIL DE LA VILLE DE SOREL,
(*Defendants in Court below*),
RESPONDENTS.

Prescription—C. S. C., ch. 85, sec. 3—Negligence.

HELD :—1. That the prescription of three months under C. S. C., ch. 85, s. 3, is not applicable where the injury is sustained *without the limits* of the city or town, though the road be made and maintained by the corporation of the city or town.

2. That a municipality is not responsible for an injury sustained through the imprudence of the person injured ; as where a person crossing the ice on the St. Lawrence in winter, deviated from the course marked out by branches, and plunged into an opening in the ice, and was drowned.

APPEAL from a judgment of the Superior Court, district of Richelieu (OUIMET, J.), June 30, 1888, dismissing the appellant's action.

The judgment of the Court below was as follows :—

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"La Cour, parties ouies par leurs avocats sur le mérite de cette cause, examiné la procédure, la preuve et le dossier et délibéré ;

"Attendu que le demandeur, ès-qualité, allègue dans sa dite action :

Que vers la fin de décembre dernier, sous l'autorité du statut 23 Vict., ch. 75, et des lois l'amendant et notamment le statut de Québec, 45 Vict., ch. 103, et d'un règlement adopté par le conseil de la ville de Sorel, en force depuis plusieurs années, les défendeurs ont, au moyen de branches et de balises, ouvert, établi et tracé sur le fleuve St-Laurent, vis-à-vis de la ville de Sorel, pour la saison de l'hiver (alors dernier), une traverse sur la glace du dit fleuve, partant du port de la ville de Sorel, et gagnant la ville de Berthier, mais qu'ils ont fait ce tracé irrégulièrement et d'une manière insuffisante, avec seulement quelques balises et branchages peu visibles et sans observer les prescriptions requises par la loi en pareil cas ;

Que de plus, les défendeurs ont fait ou fait faire ce tracé, et ont établi ou fait ouvrir cette traverse, le long d'une mare qui se trouvait alors en face de la ville de Sorel, près de la rive et à l'endroit ordinaire où les défendeurs étaient dans l'habitude de faire la dite traverse entre la ville de Sorel et l'île St-Ignace, qui se trouve vis-à-vis ;

Que les défendeurs ont ainsi fait ce tracé, sans observer les formalités requises en pareil cas, prévues par la loi, et sans protéger le public, et le mettre en garde contre les dangers qu'offrait la dite mare aux gens voyageant sur la dite traverse, exposant ainsi le public et notamment les voyageurs venant de Berthier, à se précipiter dans cette mare et à y périr ;

Que le premier janvier alors dernier (1886), feu Antoine Labonté, cultivateur, de la paroisse de Berthier, et Aurélie Laforce, son épouse, les père et mère des mineurs ci-après nommés, qui sont représentés à cette action par le demandeur, sont partis de leur domicile dans l'après-midi du dit jour, pour gagner la paroisse de St-Antoine de la Baie du Febvre, en passant par la dite traverse des défen-

deurs et que, rendus à la dite mare, contre laquelle ils n'étaient aucunement prévenus, et qui n'était indiquée par aucune marque quelconque, la désignant aux voyageurs, ils s'y sont précipités avec cheval et voiture et y ont immédiatement trouvé la mort, en s'y noyant, laissant pour orphelins et pour leurs seuls héritiers six enfants issus de leur mariage, savoir: Emma, Napoléon, Emery, Angélina, Hector et Graziella, tous mineurs et en bas âge;

Que les dits enfants mineurs ont été ainsi privés de l'aide, de la protection et de l'affection de leurs dits père et mère, et ont souffert par leur mort, des dommages incalculables;

Que la mort des dits Antoine Labonté et Aurélie Laforce, est arrivée dans la circonstance susdite, par la faute et la négligence grossière des défendeurs qui auraient dû en établissant leur traverse le long de ce précipice, l'entourer ou l'indiquer aux voyageurs par des marques visibles et mettre ces derniers en garde contre le danger évident qu'il offrait;

Que les dits mineurs représentés par le dit demandeur ès-qualité, ont droit en vertu de ce que ci-dessus allégué, de réclamer des défendeurs une somme bien considérable, à titre d'indemnité, pour les dommages qu'ils ont soufferts par la mort de leurs dits père et mère, mais que pour éviter des frais, ils ne réclament que la somme de $12,000, cours actuel, que le demandeur ès-qualité de tuteur aux dits enfants mineurs, a droit de recouvrer des dits défendeurs;

Que depuis la mort des dits Antoine Labonté et Aurélie Laforce, le dit demandeur a été dûment élu tuteur en justice aux dits mineurs, savoir:—par acte d'assemblée des parents et amis des dits mineurs, tenue le 20 janvier, alors dernier (1886), devant Mtre. O. Lavallée, notaire, lequel acte d'assemblée a été dûment homologué en justice le 23 janvier dernier, et le demandeur régulièrement nommé tuteur en justice aux dits mineurs ainsi que constaté au dit acte de tutelle, dont une copie est produite au soutien et comme complément des présentes et le demandeur ès-qualité y réfère;

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Que le dit acte de tutelle a été peu de temps après son homologation en justice, enregistré au long et par transcription au Bureau d'enregistrement du comté de Berthier où les dits mineurs avaient alors leur domicile et les biens à eux laissés par leurs dits père et mère ;

Que les dits Antoine Labonté et Aurélie Laforce sont décédés *ab intestat*, et que leurs seuls héritiers sont leurs dits enfants mineurs qui sont en possession comme héritiers de tous les biens de leur succession ;

Que par assemblée de parents et amis des dits mineurs, tenue le 12 août, alors dernier, devant Mtre. O. Lavallée, notaire, le dit demandeur ès-qualité a été dûment autorisé à porter la présente action contre les défendeurs, pour indemniser les dits mineurs de la perte et des dommages par eux soufferts par la mort de leurs dits père et mère, et que le dit acte d'assemblée de parents et amis des dits mineurs a été dûment homologué en justice le 17 août, alors dernier, et le demandeur autorisé spécialement à porter la présente action, ainsi que constaté au dit acte d'assemblée des parents et amis et à l'homologation d'icelui, dont une copie est produite au soutien et comme complément des présentes et le demandeur ès-qualité y réfère ;

Que vu ce que ci-dessus allégué, le demandeur ès-qualité est bien fondé à recouvrer des défendeurs la dite somme de $12,000, cours actuel, à titre de dommages et d'indemnité pour les dits mineurs, tel que susdit, (laquelle demande est en date du 9 septembre 1886).

"Attendu que les défendeurs ont plaidé à la dite action : —

1o. Par une défense en droit, laquelle a été renvoyée par jugement de cette Cour, en date du 20e jour du mois de janvier 1887 ;

2o. Par une exception de prescription de l'action du demandeur, la dite action ayant été portée, instituée et signifiée après l'expiration de trois mois ou au plus de quatre mois depuis l'occurrence des prétendus dommages, et qu'il appert, d'après les allégués même de la déclaration du dit demandeur, qu'il se serait écoulé plus de neuf mois avant l'institution de la présente action et qu'en loi

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la dite action est éteinte et prescrite à toutes fins que de droit ;

3o. Par une exception péremptoire ;

4o. Par une dénégation générale ;

"Attendu que le demandeur ès-qualité, a répondu et répliqué généralement aux dites exceptions et défenses des dits défendeurs ;

"Considérant qu'il appert à la face même de la déclaration en cette cause, que les défendeurs pour l'ouverture, le tracé et l'entretien de la traverse mentionnée et décrite en icelle, sur le dit fleuve Saint-Laurent, ont agi sous l'autorité du statut 23 Vict., ch. 75 et des lois l'amendant, et notamment le statut de Québec 45 Vict., ch. 102, paragraphe 8 de la section 57 ;

"Considérant qu'il appert par les Statuts Refondus du Canada, ch. 85, sect. 3 (les mêmes dispositions de la loi étant reproduites dans nos Statuts Révisés du Canada, vol. 2, page 2413), que si la corporation municipale d'une cité ou ville incorporée néglige de réparer et entretenir une route, rue ou grand chemin dans ses limites, telle corporation sera responsable civilement de tous les dommages éprouvés par qui que ce soit par suite de cette négligence, pourvu que l'action pour le recouvrement de ces dommages soit intentée dans les trois mois après les dommages soufferts ;

"Considérant qu'il appert à la face même de la déclaration en cette cause que les prétendus dommages, dont se plaint le dit demandeur ès-qualité, auraient eu lieu et se seraient produits plus de neuf mois avant l'institution de la présente action ;

"Considérant que les lois de prescription d'action ci-dessus mentionnées et citées sont applicables dans l'espèce actuelle aux défendeurs en cette cause, les dites lois n'ayant jamais été amendées ou abrogées, mais au contraire icelles étant en pleine force et vigueur ;

"Considérant que la dite action du demandeur es-qualité est et était en conséquence, lors de l'institution d'icelle, prescrite et éteinte, à toutes fins que de droit ;

"Considérant que la dite exception de prescription

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plaidée par les dits défendeurs en cette cause est bien fondée en loi et en fait ;

"Maintenant la dite exception de prescription

"Déclare le dit demandeur non recevable en sa dite action et renvoie la dite action du demandeur, avec dépens, distraits, etc."

Nov. 21, 1889.]

A. Germain, Q. C., for the appellant :—

La prescription créée par le Statut Refondu du Canada, chapitre 85, n'est pas applicable au cas actuel, parce que la demande n'est pas basée sur ce Statut Refondu, mais sur le droit commun ; parce que le dommage réclamé n'est pas arrivé dans les limites de la ville de Sorel ; parce que le dommage réclamé n'est pas arrivé dans une des rues ou chemins ouverts dans les limites de la ville de Sorel ; parce que le dommage ne provient pas de la négligence de la corporation à entretenir les chemins ouverts dans ses limites.

Geoffrion, Q. C., and *Brousseau*, for the respondents :—

La défense des intimés en cette cause est fondée sur quatre moyens principaux :

1o. Les corporations municipales ne sont pas responsables civilement des défectuosités de leurs chemins, en vertu du droit commun ;

2o. Elles n'en sont responsables qu'en vertu de dispositions statutaires, et sous les restrictions et limitations de tels statuts, en vertu desquelles, dans l'espèce, l'action est prescrite ;

3o. Dans l'espece, la corporation intimée n'est nullement en faute ; l'accident n'ayant pas été causé par sa négligence, soit par commission ou omission de sa part ;

4o. Au contraire, les auteurs de l'appelant, feu Antoine Labonté et Aurélie Laforce, ont été seuls en faute ; l'accident étant résulté uniquement de leur imprudence et de leur négligence grossières.

Jan. [illegible] 1890.]

Bossé, J. (for the Court :—

This is an action of damages brought against the muni-

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cipality of Sorel by the tutor of the children of one Antoine Labonté. Labonté and his wife were drowned on the 1st January, 1886, while crossing the St. Lawrence on the ice, between Berthier and Sorel. The sleigh got into a *mare*, or hole, and both the occupants of the vehicle were drowned.

The declaration alleged that the road was under the control of the corporation of Sorel, and that the accident occurred through the negligence of the corporation in not marking the road with sufficient precision. The defence raised a question of law and a question of fact. The question of law was that the action, having been instituted nine months after the accident, was prescribed. The defence on the facts was that the accident was due to the negligence and imprudence of Labonté himself.

The Court below dismissed the action on the question of prescription, without entering into the merits. This Court is of opinion that the plea of prescription is not well founded. The statute in question, C. S. C., ch. 85, is of an extraordinary character. It was applied by this Court in the cases of *Corporation de Québec & Howe*, 13 Q. L. R. 315, and *Corporation de Sherbrooke & Dufort*, M. L. R., 5 Q. B. 266, in which actions against corporations were dismissed on the ground of this prescription. But this rigorous law will not be applied unless the case comes within the letter of the statute. Now what are the facts here? The place where the accident occurred was outside of the limits of the town of Sorel. The statute applies to cities and incorporated towns. Section 3: "If "the municipal corporation of any such city or incor- "porated town fail to keep in repair any such road, "street or highway within the limits thereof, etc... such "corporation shall be civilly responsible for all damages "sustained by any party by reason of such default, pro- "vided the action for the recovery of such damages be "brought within three months after the same has been "sustained." We think, therefore, that the statute does not apply.

But on the merits we are against the appellant. The

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road traced on the ice is usually double, one on each side of a line of *balises*. Labonté and his wife, wishing to visit Sorel on New Year's day, took the road over the ice. But when they got opposite the town, instead of keeping to the track marked by *balises*, Labonté left the road, and took the direction of King street. Here he fell into a *mare*, and was drowned. It is shown by the evidence that the road was a sufficient distance from the *mare*; that there were a sufficient number of *balises* to mark the road, and that many vehicles had passed safely. It appears from the tracks of horse's feet on the ice that Labonté's horse refused to advance, its instinct warning it of danger; that Labonté whipped it up, and then the horse advanced by bounds, and plunged into the hole.

Under the circumstances the corporation of Sorel cannot be declared responsible for the accident, and the action is therefore dismissed, but on a different ground from that stated in the judgment of the Court below. We hold unanimously that the plea of prescription does not apply, but that the action must be dismissed for the reason that the corporation of Sorel was not responsible for the accident.

The judgment of the Court is as follows:—

"La Cour, etc.....

"Considérant que la prescription fixée par le paragraphe 3, chapitre 85 des Statuts Refondus, invoquée en la présente cause, n'est applicable qu'aux actions résultant des accidents causés par le mauvais état des seuls chemins situés dans les limites de la corporation poursuivie; et que, dans l'espèce, il apparaît que le chemin près duquel l'accident est arrivé, de même que l'endroit où il est arrivé, ne se trouvaient pas dans les limites de la corporation de la ville de Sorel; que, partant, les dispositions du statut sus-mentionné ne sont pas applicables à l'espèce, et qu'en autant il y a erreur dans le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure, siégeant à Sorel, dans le district de Richelieu, le 30e jour de juin 1888;

"Mais, considérant qu'il n'apparaît pas au dossier que

la corporation défenderesse ait été coupable de négligence, mais qu'au contraire la mort d'Antoine Labonté et de sa femme Aurélie Laforce, paraîtraient être due à la faute et à l'imprudence du dit Antoine Labonté, et qu'il n'y a pas lieu à l'imputation d'aucune faute ou négligence à la corporation défenderesse, ou à ses employés, la Cour, pour cette raison, confirme le dit jugement dont est appel, et qui renvoie l'action du demandeur avec dépens; et quant aux dépens devant cette Cour, il est ordonné que l'appelant paiera aux intimés les frais par eux encourus, les dits frais à être taxés comme dans une cause de première classe (*Dissentiente* l'hon. juge Tessier, quant aux frais en Cour d'Appel.")

Appeal dismissed.

Germain & Germain, for appellant.
J. B. Brousseau, for respondents.
(J. K.)

May 23, 1890.

Coram DORION, CH. J., TESSIER, CROSS, BOSSÉ, JJ.

GEORGE IRVING, ES QUAL.
(*Contestant in Court below*),
APPELLANT;
AND
GODFROI CHAPLEAU
(*Claimant in Court below*),
RESPONDENT.

Sale with suspensive condition—Insolvency of purchaser—Collocation—Privilege—Art. 1998, *C.C.*

HELD:—Where a movable thing is sold with the stipulation that the title shall remain in the vendor until the price shall be entirely paid, and before payment of the price, but more than fifteen days after the delivery of the thing, the purchaser becomes insolvent and makes an assignment, that the vendor is not entitled to be collocated by privilege, for the price of the thing, on the insolvent estate of the purchaser.

APPEAL from a judgment of the Superior Court, Mon-

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treal (Do[illegible]ec. 31, 1889, dismissing the appellant's [illegible] of respondent's claim on the insolvent estate of Hector McKenzie *et al.*

The judgment of the Court below was in the following terms :—

"The Court having heard the parties by their counsel upon the merits of [illegible] said claimant and contestation thereof, examined the proceedings, etc.....

"Considering that said contestant has failed to prove the allegations of his said contestation ;

"Doth declare the collocation of said claimant for the sum of $148.03 as privileged, and doth dismiss said contestation with costs *distraits* etc."

The appellant is the curator to the insolvent estate of Hector McKenzie *et al.*, who carried on business in Montreal under the name of the Beaver Oil Company. The respondent is a safe manufacturer, who filed a claim on the insolvent estate, and claimed a privilege under a contract with the insolvents. The respondent represented that on the 25th May, 1887, the insolvents entered into negotiations with him to purchase a safe ; that the same day a contract was passed by which the respondent was to furnish them with the use of the safe on the conditions mentioned in the contract produced ; that by this contract the respondent reserved to himself the absolute property in the safe so long as the conditions mentioned in the contract should not have been fulfilled, and he was still the proprietor ; that as soon as appellant was named curator, the respondent exhibited to him the original of the contract, and left him a copy, and gave him the alternative of fulfilling the conditions, or of returning the safe, or of collocating him by privilege ; that the respondent left his claim in the appellant's hands, the latter telling him that he would fulfil the conditions of the contract ; that the appellant, instead of doing this, preferred to treat him as a privileged creditor, and that he was entitled either to his safe or to the fulfilment of the terms of the contract.

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The contract in question was in the following terms:

MONTRÉAL, 25 mai 1887.

G. Chapleau, atelier des coffres-forts du Canada est prié de me fournir un de leur coffre-fort No 7 avec serrure à combinaison pour être expédié via 70 St. Pierre, pour lequel nous convenons de payer $155.00 suivant les conditions mentionnées sur le dos de la présente.

Je ou nous certifions par les présentes que je ou nous convenons de ne point contremander cet ordre, et que si le présent coffre-fort n'est point payé 30 jours après la date de l'envoi, suivant les conditions de l'ordre, alors le compte deviendra dû, et par les présentes je ou nous convenons d'accepter et de payer une traite pour le montant ci-dessus mentionné. En outre la propriété du dit coffre-fort n'appartiendra à moi ou à nous que lorsque le montant total du prix aura été payé, et il restera votre propriété jusqu'à ce moment, quoique des traites ou des billets aient pu être donnés en à-compte. Dans le cas de défaut de paiement dans le délai d'un mois, des sommes ci-dessus mentionnées vous avez la liberté, sans procès, de reprendre et d'enlever le dit coffre-fort, et par la présente je ou nous abandonnons toute réclamation pour dommages auxquels je ou nous pourrions prétendre. Par les présentes il est aussi convenu et entendu que ci qui précède comprend tous les arrangements qui ont été faits entre nous et annule tout arrangement verbal ou autre qui n'est pas compris dans cet ordre.

Agent,

J. M. LARIVIERE.

THE BEAVER OIL CO.,

per P. McKENZIE,

Atty.

(ENDORSEMENT:)

We will furnish Mr. G. Chapleau with goods in our line for the amount of $150 at market quotations, less five per cent. Said goods to be delivered on demand.

(Signed) THE BEAVER OIL CO.,

per P. McKENZIE,

Atty.

March 27, 1890.]

H. Abbott, Q. C., for appellant:—

The issue between the parties is one of law. The questions that have to be decided are, firstly, what rights did the claimant acquire against the insolvents under the contract filed; secondly, what rights had he at the time of the insolvency and how has he exercised them; and lastly, on whom is the onus of proof.

1st.—To decide the question as to what rights the claimant acquired against the insolvent under the con-

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tract, the contract itself must be examined. It is a printed form made by Mr. Chapleau for the purpose of his own business, and in accordance with the well-known rule of construction must, where doubtful, be construed against him. By it he furnishes a safe to be paid for according to the conditions endorsed upon the agreement, and he bills the insolvent as for goods sold and delivered. The property is not to pass until the total price has been paid. In default of payment within a month, the safe can be taken away by him without legal proceedings. The insolvents bind themselves to pay in goods, and these goods are only to be delivered on demand. The account itself shows that within the month nothing was paid, only $5.51 within a year. No demand for goods was proved, nor any default of the insolvent to deliver goods, and the respondent did not exercise his right to remove the safe at any time. His position, therefore, is that he had sold the safe, and had allowed the month to elapse without exercising his right to resume possession of the same. His only other right was to get payment in goods, and for this a demand was necessary, and none is proved.

The endorsation too, as requiring a demand, must be taken as modifying the conditions as to the property passing, otherwise the respondent would have it in his power to prevent the property ever passing to the purchaser, and this by abstaining from demanding the last few dollars worth of goods.

This agreement, it is submitted, did not put him in any stronger position than Arts. 1543 and 1544 of the Civil Code, which provide that in the case of movables, the right of dissolution by reason of non-payment of price can only be exercised whilst the thing remains in the possession of the buyer without prejudice to the seller's right of revendication, and that in case of insolvency, such right can only be exercised during the fifteen days next after the delivery. The right to take the goods away can only be exercised after the buyer has been put in default to pay, which has not been done in this case. The respondent cannot exercise any right to the dissolution

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of the sale under Art. 1543, because more than fifteen days have elapsed since the delivery. Under the following article he could not resume possession of the goods, because the insolvent had never been put in default to pay. Under article 1998, his right would be a right to revendicate it, or a right of preference upon the price, and in the case of insolvent traders, these rights must both be exercised within fifteen days after the delivery, that is the 27th May, 1887, so that in either case he would not have a right either to recover possession of the goods or to a preference upon the price, much less a preferential claim upon the general goods of the estate: moreover, there is nothing to show what the safe was worth to the insolvent estate, or even that it was in existence or still part of the estate at the time the abandonment was made.

By the claim filed, the respondent alleges that he is entitled to privilege according to a certain contract. Not only is no such privilege stipulated for by the contract produced, but it would be out of the debtor's power to make a contract which would confer upon him a privilege to the injury of the other creditors. The respondent was evidently conscious of the difficulty of the position at the time he filed his answer, for he does not by the answer support the claim as made, but contends that he is entitled either to a return of the safe, or its value in goods, but he concludes merely for the dismissal of the contestation, so that there is no issue before the Court as to his right to claim the safe. This could only be done by an action in revendication, or by a petition in the nature of such an action, when the question as to whether the safe was at the time of the insolvency, among the goods of the insolvent, and if so, whether under the contract as made and carried out, the respondent could recover it against the general creditors of the estate, would have been raised and discussed, but no such proceedings have been taken. The attention of the Court may be called to the fact that the alleged offering of the alternative to the curator is entirely without effect, the

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curator being entirely without power to undertake either to give back the safe or pay in full. The only question that remains is what right the respondent has against the estate under their agreement to give him $155 in goods to be delivered on demand. It may be pointed out that there is no proof of a demand, and even if there were, the default to deliver the goods would only result in an action for the value of the goods, thus conferring upon him no privilege against the general estate.

Under the Code of Civil Procedure, claims are filed against an insolvent estate merely for the purpose of collocating the claims upon a dividend sheet. In the original claim, the respondent did not even ask for the return of the safe, but even if he had done so, it is submitted that he would not have been entitled to receive it, under the provisions of the Code. He might, it is true, by a petition addressed to the Court, perhaps exercise the same rights as he could under an action in revendication, but the whole issue as to his rights to receive it would then come up. But he cannot, by his answer to contestation, place his claim upon a different ground from that contained in his affidavit and claim as filed. As to the alternative allegation that he is entitled to receive the value in goods, it is unnecessary to discuss it, because, as far as the estate is concerned, the value in goods would be the same as the value in money. It is not shown that he would have any general privilege against the estate for the value in goods, and he would only be entitled to be collocated as an ordinary creditor in the manner that the curator proposes to do.

Under the circumstances, the curator would not be justified in collocating the respondent by privilege upon the general goods of the estate. Had he filed a claim alleging that the safe was still intact in the hands of the curator, and asked that it be sold, and he be collocated by privilege upon its proceeds, he might have raised a question as to whether he was entitled as the unpaid vendor to any special privilege in view of the fact that he was

out of the delay, but no such claim was made, nor is the existence of the safe proved.

A reference to the Code, (Art. 770 and following,) does not show that any particular form is necessary in filing claims, and the practice of filing claims accompanied by an affidavit has probably been adopted by analogy from Art. 604. Even if the affidavit is necessary, it is submitted that its force and effect is exhausted by the placing of the claim upon the dividend sheet, and that so soon as the contestation is made, the onus of proof falls upon the claimant. Under the *régime* in force in France under the Code de Commerce (Art. 491 and following) all the claims are verified by the judge, assisted by all creditors mentioned on the *bilan*, or whose claims have already been verified. The creditors' books are examined, and after the claim has been passed by the judge and the syndic and the other creditors, the claimant has to swear to his claim within eight days. If contested, it is sent before the Tribunal de Commerce, or the Tribunal Civil, as the case may be, and that creditor takes no further part in the deliberations of the estate until his claim is decided. In default of his affidavit in eight days, the creditor does not rank for dividend. Although this is not of any binding force here, it shows clearly that in the minds of the makers of the French Code, all claims had to be verified by the judge, before they were even placed upon the list, and that if contested, they were referred to a Court to be decided. It can hardly be contended that that Court would be bound to assume that the verification of the judge was correct, although the case for such a contention would be stronger than it is under our law. It is impossible to contend that the onus of proof is on the contestant under our law. In the first place, not only are those creditors who file affidavits placed upon the list, but also those whose claims are in the books of the estate. The dividend list thus made up, it would be impossible in a great many cases for anyone attacking the claim to make the proof sufficient to destroy a claim, if it were once admitted that the claim itself constituted a *prima*

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facie right. The transactions of the insolvent are, for the most part, unknown to his creditors and to the contestant. In many cases, the transactions are fraudulent. To take any individual claim, and say that it was incumbent upon the contestant to prove that that claim did not exist, or that if it had existed, had been paid, would involve in many instances the proof of a negative upon the contestant. It is submitted, therefore, that so soon as the claim is contested, the parties are placed in identically the same position as they would have been had the claim been brought in the form of an ordinary suit against the insolvent, prior to his failure.

Adam, for the respondent :—

L'appelant prétend que la promesse de vente avec tradition et possession actuelle équivaut à vente, et que, par conséquent, l'intimé a perdu la propriété de son coffre fort par la livraison qu'il en a faite.

Nous soumettons que cette prétention ne peut pas être soutenue en la présente cause parceque que le contrat en question ne renferme pas une promesse de vente pure et simple, mais une promesse de vente conditionnelle, et la condition de cette promesse est suspensive. L'article 1478 du C. C. qui dit que la promesse de vente avec tradition et possession actuelle équivaut à vente ne s'applique donc pas. Je vous vendrai mon coffre-fort si vous voulez me le payer le prix convenu, voilà le sens du contrat produit en cette cause. Le prix convenu n'a jamais été payé, et les faillis avaient formellement déclaré qu'ils ne seraient jamais propriétaires de ce coffre-fort tant qu'ils ne l'auraient pas payé, et l'appelant qui n'a pas plus de droits que les faillis eux-mêmes a donc tort de renier les conditions de ce contrat et de vouloir frustrer l'intimé des avantages qui en découlent.

Voici ce que dit Benjamin, on Sales, 3me édition américaine, 1881, p. 284 :

" When there is a condition precedent attached to a " contract of sale and delivery, the property does not vest " in the purchaser on delivery, nor until he performs the " condition, or the seller waives it ; and the right conti-

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"nues in the vendor, even against creditors and sub-
"sequent purchasers of the vendee."

Cette doctrine semble bien établie en cette province et les décisions suivantes en font foi :

Gould et al. v. *Cowan*, 10 L. C. J. p. 345 ; *May* v. *Fournier*, 8 Leg. News, p. 330 ; *Matthews* v. *Senecal*, 7 L. C. J., p. 222 ; *Beaudry* v. *James*, 15 L. C. J., p. 118 ; *Thomas* v. *Aylen*, 16 L. C. J., p. 309 ; *Grange* v. *McLennan*, 9 Supreme C. Rep., p. 391 ; *Richard* v. *La fabrique de Notre-Dame de Québec*, 5 L. C. J., p. 3 ; *Bertrand* v. *Gaudreau*, 12 R. L., p. 154 ; *Gray et al.* v. *Hopital du Sacré-Cœur*, 13 Q.L.R., p. 85 ; *Noel* v. *Laverdière & The British American Co.*, oppt., 4 Q. L. R., p. 247 ; *Goldie et al.* v. *Rasconi*, M. L. R., 4 S. C. 313.

Il nous parait évident qu'une promesse de vente peut être faite avec des conditions suspensives et résolutoires.

Troplong, Vente No. 182, commentant l'article du code Napoléon, dit :

"Puisque la promesse de vente est équivalente à la "vente, il faut dire qu'elle est susceptible des mêmes con-"ditions suspensives et résolutoires que la vente. Il est "même assez ordinaire qu'elle soit conditionnelle."

Pothier, Traité des obligations, ch. 3 art. 1er ss. 5, dit :

"L'effet de la condition est de suspendre l'obligation "jusqu'à ce que la condition soit accomplie, ou réputée "pour accomplie. Jusque-là il n'est encore rien dû ; mais "il y a seulement espérance qu'il sera dû. C'est pour-"quoi le paiement fait par erreur avant l'accomplissement "de la condition, est sujet à répétition."

Aubry & Rau, vol. 4, s. 302, p. 75 disent : "La condi-"tion suspensive venant à défaillir, l'obligation et le "droit qui y est corrélatif, sont *ipso facto*, à considérer "comme n'ayant jamais existé. Ainsi par exemple, "l'acquéreur qui aurait été mis en possessio de la chose "par lui acquise sous condition, serait obligé de la resti-"tuer avec tous ses accessoires et avec les fruits qu'elle a "produits."

L'article 1079 de notre code civil permet les conditions imposées dans le contrat en cette cause. Cet article dit : "L'obligation est conditionnelle lorsqu'on la fait dépendre

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" d'un évènement futur et incertain, soit en la suspen-
" dant jusqu'à ce que l'évènement arrive, soit en la résil-
" liant, selon que l'évènement arrive ou n'arrive pas."

Laurent, vol. 24, No. 4 dit: "A plus forte raison, les " parties peuvent elles stipuler que la propriété ne sera " transférée que lorsque l'acheteur aura payé le prix; la " vente aura toujours pour objet de transférer la propriété, " mais la translation sera conditionnelle, de sorte que le " vendeur restera propriétaire tant que la condition ne " sera pas accomplie, c'est-à-dire tant que le prix ne sera " pas payé."

Si l'intimé était et est encore propriétaire du coffre-fort en question, nous sommettons que l'appelant a eu tort de ne pas le lui livrer. S'il a cru qu'il avait le droit de vendre ce coffre-fort avec les biens des faillis, il a eu également tort de vouloir considérer l'intimé comme un créancier ordinaire, et de ne pas lui offrir même le produit de la vente de ce coffre-fort s'il l'a vendu. Comme la preuve le démontre clairement, c'est l'appelant lui-même qui a voulu et qui a porté l'intimé comme créancier privilégié, au lieu de lui remettre son coffre-fort ou de remplir les conditions du contrat.

May 23, 1890.]

CROSS, J., delivered the judgment of the Court, which reversed the judgment of the Court below, for the reasons stated in the recorded judgment as follows:—

"Considering that the claimant, Godfroi Chapleau, now respondent, has claimed and been collocated, in the dividend sheet prepared in this matter, as a privileged creditor for the sum of $148.03, as a balance due him for the price and value of a safe (*coffre-fort*) by him furnished to the insolvents, under a certain agreement in writing, of date the 25th May, 1887, which said *coffre-fort* has been, by the said curator, sold and disposed of, having been included in a sale of the assets of said insolvents;

"Considering that the said curator, thereto duly authorized, has contested the claim of the said Godfroi Chapleau, in so far as the privilege thereby claimed is

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concerned, and has by his contestation denied the existence in law or in fact of any such privilege in favor of the said Godfroi Chapleau;

"Considering that said claimant, Godfroi Chapleau, has failed to establish the existence of any such privilege in his favor for the price or value of said safe (*coffre-fort*);

"Considering that said curator contesting has admitted that said claimant Godfroi Chapleau is entitled to be collocated for the price and value of the said safe (*coffre-fort*) as an ordinary chirographary creditor without privilege;

"Considering that there is error in the judgment rendered in this matter by the Superior Court at Montreal, on the 31st December, 1889, dismissing the contestation of the said curator;

"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 overrule and set aside the said claim of the said Godfroi Chapleau, in all that regards the privilege thereby claimed, allowing the said claim to stand and remain as an ordinary chirographary claim without privilege, and with permission to the said Godfroi Chapleau to adopt any such other proceedings as he may be advised to take, for the proof of his said claim as an ordinary chirographary claim without privilege; the whole with costs against the respondent and in favor of the appellant, as well in the said Superior Court as in this Court."

Judgment reversed.

Abbotts, Campbell & Meredith, for appellant.

Adam, Duhamel & Plourde, for respondent.

(J. K.)

November 20, 1889.

Coram DORION, Ch. J., CROSS, BABY, CHURCH and BOSSÉ, JJ.

JOHN McDONALD,
(Claimant in Court below,)
APPELLANT;

AND

DAVID SEATH ET AL.,
(Contestants in Court below,)
RESPONDENTS.

Composition agreement—Not signed by all the creditors—Novation—Option—Tender.

HELD:—1. That where an agreement of composition is prepared, by which the creditors agree to accept a composition on the amount of their respective claims, and the agreement is not signed by all the creditors as was contemplated, and it does not appear that those who signed, individually intended to compound for the amount of their respective claims independently of the other creditors, novation is not effected of the claim of a creditor who signed the agreement but who subsequently refused to accept the composition, and did not in fact receive the same.

2. That even supposing the composition agreement to be binding, the curator to the judicial abandonment subsequently made by the debtor was bound, in his tender, to give the creditor the benefit of the option contained in the agreement, viz., satisfactory endorsed notes for 40 cents on the dollar, or 35 cents in cash, and in contesting the creditor's claim for the amount of the original debt, was bound to repeat the tender with option as above stated.

APPEAL from a judgment of the Superior Court, Montreal (MATHIEU, J.), maintaining respondents' contestation of appellant's claim upon the insolvent estate of C. H. Dougall & Bros.

The judgment of the Court below was in the following terms:—

"La Cour ayant entendu les parties par leurs procureurs sur le mérite de la contestation de la réclamation du dit John McDonald, avoir examiné la procédure, pièces produites, et délibéré;

"Considérant que les contestants ont prouvé les allégations de leur contestation—a maintenu et maintient la dite contestation avec dépens contre le dit réclamant, distraits etc."

Nov. 15, 1889.]

Campbell for the appellant:—

The question which arises upon the appeal is as to whether a claimant upon an insolvent estate is bound to reduce his claim by the amount of a composition offered by the insolvents previous to their insolvency, which the claimant agreed to accept without prejudice to his security, but which composition was not accepted by all the creditors of the insolvents, and has not been received by the claimant.

[After stating the facts, which will be found in the opinion.] There is no evidence of record to show why the appellant refused to accept the composition offered, but it is submitted on his behalf that he was not bound to accept the composition under an agreement which was by its terms made between the debtors and their creditors, and which was not signed and accepted by all of the creditors; and moreover it can be easily understood that the appellant would prejudice his security by accepting the composition of the original debt, without some further agreement between himself and the debtors and the sureties. Besides this the appellant was not bound to accept the notes, unless they were endorsed by persons approved of by him; he was not bound to accept notes offered unless the endorsers were acceptable to him; and his refusal is evidence of the fact that they were not. The debtors having failed to carry out this composition with their creditors, and having subsequently made an abandonment of their property, it is submitted that the appellant is entitled to be paid with the rest of the creditors, and on the same basis, without regard to an attempted agreement of composition which was never carried out.

It will also be observed that the curators do not renew the tender of the cash or notes with their contestation,

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and the effect of the judgment of the Court below is that the claimant has his claim reduced by three-fourths, and has no recourse for the balance except against his insolvent debtors.

It is submitted that the judgment of the Court below is erroneous, and a manifest injustice to the appellant. No reasons are given by the learned judge, simply the *considérant* that the contestants have proved the allegations of their contestation. It is submitted that they have not, and there is nothing to show that the endorsers on the notes were financially sound or responsible persons; and the mere fact that the appellant refused to accept the notes is sufficient to show that they were not approved by him. The Court will observe that the composition was to be forty cents in the dollar, "secured by approved endorsed notes;" the taking of thirty-five cents in cash being optional with the creditors. The appellant was not bound to take thirty-five cents in cash; he might have, and probably would have, preferred to take the forty cents, provided it was secured by approved endorsed notes; but it was for him to say whether he approved of the endorsement of the endorsers or not.

In any event, the figures in the contestation are manifestly wrong, as, if we deduct the amount of the composition at 40 cents, $1,666.32, from the amount of the claim without interest, $4,165.79, it leaves a balance of $2,499.47 whereas the contestation claims a reduction of $1,458.02, and this contestation is purely and simply maintained by the Court. How these figures were arrived at, the appellant is unable to understand.

Guerin for the respondents:—

The respondent submits that the serving of the notarial protest upon the appellant effected novation of the appellant's claim against Dougall & Bro., and that therefore the only amount which the appellant is entitled to claim is 35 cents in cash on the dollar on the debt which was due by the insolvent immediately after the tender had been made, viz., $1,458.02. Yet after Dougall & Bro. went into insolvency, and the respondents were named

joint curators, the appellant filed a claim for $4,223.86. Upon the advice of the creditors of the estate, the respondents contested the appellant's claim on the ground that he was only entitled to file a demand for $1,458.02, or 35 cents in the dollar cash. This is the only sum which the appellant can claim against the estate and upon which he can be collocated for a share in any of the monies in the hands of the curator.

Nov. 20, 1889.]

CHURCH, J. (for the Court) :—

This is an appeal from a judgment of the Superior Court, maintaining the contestation by the respondents of the appellant's claim upon the insolvent estate of C. H. Dougall & Brothers, and reducing the appellant's claim from $4,165.79 to $1,458.02.

The circumstances are somewhat peculiar. The contestation is filed by the joint curators to the estate. C. H. Dougall & Brothers were traders, and in the early part of 1886, being embarrassed, they made a proposition to their creditors to settle for forty cents on the dollar. A document was drawn up to the following effect :—

"MONTREAL, 23rd February, 1886.

"We, the undersigned, creditors of Messrs. C. H. Dougall & Bros., of Montreal, merchants, do hereby agree and undertake to accept forty cents on the dollar, on the amount of our respective claims against them. Said amounts payable in four instalments of ten cents each, at three, six, nine and twelve months from this date, respectively, secured by approved endorsed notes. We, the said creditors having the option of taking thirty-five cents on the dollar cash."

This document it was intended should be signed by all the creditors, but it appears to have been signed by only twelve or fifteen of them. The appellant was one of those who signed it, and he appended to his signature the words "not prejudicing my security."

In this incomplete condition the document remained from February, 1886, until the 9th of April of the same year, six weeks afterwards, when C. H. Dougall & Brothers engaged Marler, notary, to make tender to appel-

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lant of $1,458.02 in cash, being the composition at 35 cents on the dollar on his claim, and also, at his option, four promissory notes of C. H. Dougall & Bros., each for the sum of $416.58, and endorsed by W. & D. Yuile, making altogether $1,666.32, being a composition at the rate of 40 cents on the dollar. McDonald refused the tender, stating that he would have nothing to do with it. The matter remained in this position until April when Dougall & Bros. made an assignment. Then McDonald filed a claim upon the estate for the full amount of his original claim. The curators asked that they might be permitted to contest this claim, alleging that novation had taken place, and that McDonald was a creditor only for the sum of $1,458.02. Their petition being granted, they filed a contestation setting up the facts, and judgment was rendered by Mr. Justice Mathieu maintaining the contestation, and ordering that the claim be reduced to 35 cents on the dollar. Under these circumstances an appeal has been taken by the claimant McDonald. No evidence was adduced in the Court below on either side: the parties stand on their legal rights.

The judgment of the Court below, it will be observed, is a judgment maintaining the alternative sum that the appellant might claim in lieu of notes, viz. the 35 cents in cash. This appears to the Court here to be a fatal error to commence with. But this Court goes further, and says that the agreement was an incomplete agreement. It was an agreement which it was intended should be entered into by thirty or forty creditors, but was only signed by twelve or fifteen. In the next place, supposing the agreement to be binding, the respondents were not justified in asking that the appellants' claim be reduced to 35 cents—the most they could have asked would be that the claim should be reduced to 40 cents, or they should have shown that there was no reason why the notes should be objected to. Further, they should have tendered these notes or the cash with their contestation.

Under all these circumstances this Court is unanimously of opinion that the judgment rendered by Mr. Justice

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Mathieu is incorrect, and it is set aside accordingly, with costs of the Court below as well as of this Court.

The judgment in appeal is as follows :—

" La Cour, etc.....

" Considérant que sur la fail[illegible]ugall & Bro. l'appelant a réclamé la so[illegible]ui était due par les faillis ;

" Et considérant que les intim[illegible]luy, curateurs à la faillite de Dougall & Bro., [illegible]testé cette réclamation, alléguant que par un écrit [illegible] du 23 février 1886, l'appelant était convenu avec d'autres créanciers d'accepter la somme de 40 centins par piastre du montant de leur réclamation, cette somme payable en quatre instalments de dix centins chaque, à trois, six, neuf et douze mois, garantis par des billets endossés et approuvés par les créanciers, ou trente-cinq centins par piastre comptant au choix des dits créanciers ; le 9 avril 1886, C. H. Dougall & Bro. avaient fait des offres par un notaire à l'appelant de lui payer comptant $1,458.02 en argent, étant la composition de trente-cinq centins par piastre sur sa réclamation, et lui avaient aussi offert à son option quatre billets promissoires signés C. H. Dougall & Bro., datés du 23 février 1886, chacun pour la somme de $416.58, et endossés par W. & D. Yuile, faisant en tout $1,666.32, étant la composition sur sa créance à raison de quarante centins par piastre, suivant les termes de la convention du 23 février 1886 ;

" Et considérant que les intimés ont été nommés curateurs à la faillite de C. H. Dougall & Bro. le 4 juin 1886 ;

" Et considérant que toute composition signée à l'occasion de la faillite d'un débiteur n'est censée valable qu'à la condition qu'elle soit signée par tous les créanciers, à moins qu'il n'apparaisse que les créanciers ont voulu individuellement transiger sur leur créances respectives et indépendamment de celles des autres créanciers, et que le contraire apparait en cette cause ;

" Et considérant, de plus, que les intimés n'ont pas offert de payer comptant les trente-cinq centins par piastre du montant de la créance de l'appelant, ni de lui fournir

Bench, Criminal side, held by the undersigned, the prisoner William Doonan, was found guilty on a charge contained in the following indictment :—

"The Jurors for our Lady the Queen, upon their oath present that on the 2nd day of August 1889, at the Town-

The prisoner, by his counsel, then on the 4th instant moved that inasmuch as he has been convicted before this Honorable Court upon a charge of obtaining a valuable security by threats of violence, that this Honorable

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des billets endossés et approuvés au montant de quarante centins par piastre de sa créance, mais qu'ils demandent la réduction de la créance du demandeur à la somme représentant trente-cinq centins du montant de la créance de l'appelant, ce qui a été accordé par la cour de première instance qui a admis la contestation des intimés ;

"Et considérant que l'appelant, au lieu d'être payé comptant trente-cinq centins par piastre du montant de sa créance, ou quarante centins au moyen de billets endossés, ne se trouverait à avoir un recours que pour trente-cinq centins par piastre du montant de sa créance sur la masse de la faillite des dits C. H. Dougall & Bro., ce qui n'est pas conforme à l'engagement que comporte l'écrit du 23 février 1886 ;

"Et considérant qu'en supposant cet écrit comme liant l'appelant, les intimés ne pourraient se prévaloir des offres faites le 9 avril 1886, sans renouveler ces offres et mettre l'appelant dans la même position qu'il aurait été s'il avait accepté ces offres ;

"Et considérant qu'il y a erreur dans le jugement rendu par la cour de première instance, savoir la Cour Supérieure siégeant à Montréal, le 30me jour de juin 1888 ;

"Cette cour casse et annule le dit jugement, renvoie la contestation des dits intimés de la réclamation de l'appelant, et condamne les intimés à payer au dit appelant les frais encourus tant en cour de première instance que sur l'appel, les dits frais à être taxés en cette cour comme dans une cause de deuxième classe."

Judgment reversed.

Abbotts, Campbell & Meredith for appellant.

Greenshields, Guerin & Greenshields for respondents.

(J. K.)

January 22, 1890.

Coram DORION, Ch. J., TESSIER, BABY, CHURCH, BOSSÉ, JJ.

JEAN BAPTISTE MARION,

(*Opposant in Court below,*)

APPELLANT;

AND

HER MAJESTY'S POSTMASTER-GENERAL,

(*Plaintiff and contestant in Court below,*)

RESPONDENT.

Suretyship—Bond—Donation by surety.

HELD:—That where a bond has been given to the Crown for the fidelity of a public officer, no claim exists against the surety so long as the person whose fidelity is assured has not made default. Therefore a sale or donation made by the surety, of all his property and effects, *after* the date of the contract of suretyship, but *before* any default has occurred, will not be revoked at the instance of the Crown, in the absence of proof that any claim against the surety resulting from the bond existed at the date of the donation.

APPEAL from a judgment of the Superior Court, district of Richelieu (GILL, J.), Nov. 25, 1885, dismissing an opposition filed by the appellant.

The judgment of the Court below was in the following terms:—

"La Cour ayant entendu les parties par leurs avocats sur le mérite de l'opposition formée par le dit Jean-Baptiste Marion, à la saisie mobilière et immobilière, dirigée contre Dame Marie-Anne-Aurez Laferrière, sa mère, examiné la procédure et délibéré:—

"Considérant que l'opposant base son droit de propriété aux meubles et immeubles saisis, sur une donation entrevifs que lui en a consentie la défenderesse Dame Marie-Anne-Aurez Laferrière, veuve Mathias Marion, sa mère, par acte en date du 6 novembre 1881, devant Mtre T. D. Latour, notaire;

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"Considérant que la créance dont le demandeur poursuit le recouvrement par sa saisie contre la dite défenderesse repose sur un acte de cautionnement en date du 15 avril 1871, consenti par la dite Dame Marie-Anne-Aurez Laferrière, en faveur de la Couronne et du Gouvernement du Canada, au montant de $800; la condition du cautionnement étant que T. D. Latour, étant alors récemment nommé maître de poste à Lanoraie, remplirait fidèlement son devoir comme tel pendant tout le temps qu'il serait en office, et s'il rendait compte de toute somme de deniers qu'il toucherait en cette qualité, soit pour vente de timbres-poste ou autre cause, et en payait le montant au dit gouvernement, le dit cautionnement serait nul et sans effet, mais qu'autrement il aurait pleine force et vigueur;

"Considérant que, bien que le montant pour lequel les défendeurs ont été poursuivis n'ait été constaté que par une feuille de balance en date du 30 juin 1884, l'obligation de la dite Dame Laferrière, soit qu'on la considère comme une obligation pure et simple ou comme une obligation conditionnelle, doit toujours prendre effet de la date du cautionnement, car aux termes de l'article 1085 du Code Civil, la condition accomplie a un effet rétroactif au jour auquel l'obligation a été contractée, et conséquemment le demandeur est créancier de la dite Dame Laferrière, antérieur à l'acte de donation invoqué par l'opposant;

"Considérant qu'il est prouvé par le témoignage de l'opposant lui-même que, par le dit acte de donation la dite défenderesse Marie-Anne-Aurez Laferrière, s'est dépouillée de tous ses biens meubles et immeubles en faveur de l'opposant; qu'il ne lui reste rien et que, distraction faite des choses données, elle n'est pas solvable et que, dès lors d'après l'article 803 du Code Civil, le demandeur, même en l'absence de preuve de fraude, si ce n'est la présomption de l'article 1034, peut faire révoquer la dite donation, ainsi qu'il le demande par les conclusions de sa contestation;

"Maintenant la dite contestation pour ces motifs, ren-

voie la dite opposition du dit Jean-Baptiste Marion, déclare nulle et de nul effet à l'encontre de la créance du demandeur, et pour cette fin, révoque la dite donation faite par la dite Dame Marie-Anne-Aurez Laferrière, à son fils l'opposant, par acte reçu par Mtre T. D. Latour, notaire, le 6 novembre 1881, des meubles et immeubles saisis en cette cause;

"Déclare la saisie mobilière et immobilière pratiquée en cette cause sur la dite défenderesse bonne et valable, et ordonne qu'il émane un bref de *venditioni exponas*, pour sur icelui procéder à la vente des meubles et immeubles saisis, et condamne le dit opposant aux dépens distraits, etc."

Nov. 22, 1889.]

S. A. Germain, for appellant:—

En janvier 1885, le shérif de Richelieu est venu au domicile de l'appelant à Lanoraie, saisir ses biens meubles et immeubles sous l'autorité d'un bref d'exécution, en date du 19 du même mois; ce bref ordonnant au shérif de prélever sur les biens meubles et immeubles de T. D. Latour et Dame Marie-Anne-Aurez Laferrière, la somme de $223.50 de dette, pour remettre à l'intimé, et $37.00 de frais.

L'appelant a fait d'abord une opposition à la saisie de ses meubles, le 9 février 1885, et le 17 mars suivant (1885) une autre opposition à la saisie de ses immeubles. Par ses deux oppositions qui sont toutes deux fondées sur le même et identique moyen, l'appelant réclame être propriétaire, depuis et même avant, le 6 novembre 1881, près de quatre ans avant la saisie, pour les avoir acquis de ses deniers; entr'autres, en vertu d'un acte intitulé, "acte de donation," mais qui est un véritable acte de vente, à lui consenti par Marie-Anne-Aurez Laferrière, sa mère, le dit jour 6 novembre 1881, devant Latour, notaire.

L'intimé a contesté ces deux oppositions aussi par des moyens identiques, alléguant en substance ce qui suit:—

1o. Que, le 15 avril 1871, Marie-Anne Laferrière, la do-

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natrice de l'appelant, s'est rendue caution jusqu'à concurrence de $800, en faveur du Gouvernement de Sa Majesté, de T. D. Latour, récemment nommé maitre de poste de Lanoraie, pour la due exécution par ce dernier des devoirs de sa nouvelle charge, et la remise des deniers ou valeurs qui lui viendraient en mains en sa dite qualité.

2o. Que par l'acte invoqué au soutien des oppositions, du 6 novembre 1881, la dite Marie-Anne-Aurez Laferrière a donné tous ses biens mobiliers et immobiliers à l'appelant et qu'elle n'a pas d'autres biens que ceux ainsi donnés.

3o. Que cette acte de donation est simulé, fait dans le but de frauder les créanciers de la donatrice, notamment le Gouvernement, et d'éviter de payer l'obligation contractée par le dit acte de cautionnement du 15 avril 1871; que l'appelant a participé à cette fraude.

4o. Que le dit cautionnement a eu pour effet d'acquérir au Gouvernement sur tous les biens meubles et immeubles possédés à cette date-là par la dite caution, un privilége que le dit acte de donation ne pouvait affecter; et tel, que la donatrice ne pouvait pas disposer de ses biens au préjudice de ce privilége.

5o. Que par le dit acte de donation l'appelant s'est engagé à payer les dettes dues lors de la donation par la donatrice, laquelle était alors, même longtemps avant, débitrice de la dette réclamée, ce que connaissait l'appelant; que partant l'appelant qui s'y est obligé par le dit acte de donation, est tenu de payer la créance réclamée par le Gouvernement, laquelle a un effet rétroactif au jour du cautionnement.

Pourquoi le contestant conclut au renvoi de l'opposition, si mieux n'aime l'appelant payer le capital, les intérêts et les frais; à ce que le dit acte de donation soit déclaré nul relativement à la créance réclamée par le gouvernement; enfin à ce que la créance de l'intimé soit déclarée privilégiée.

L'enquête de l'appelant consiste dans la production de son titre, viz.: copie de l'acte intitulé donation du 6 novembre 1881, revêtu d'un certificat d'enregistrement, avec

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de plus un avis au régistrateur du comté, du renouvellement de l'enregistrement de cette donation, et il a, par les admissions même de l'intimé, prouvé péremptoirement tous les allégués de ses oppositions, à savoir: qu'il a acquis les biens saisis le 6 novembre 1881, par l'acte produit, en a toujours depuis été en possession comme propriétaire, et que la saisie de ces biens a été pratiquée au domicile même de, et sur l'appelant.

Du côté de l'intimé, ce dernier a fait sa preuve en produisant au dossier ce qui suit:

Premièrement:—un acte de cautionnement sous seing privé, daté du 15 avril 1871, par T. D. Latour, Gonzague Hervieux et Marie-Anne-Aurez Laferrière, en faveur du gouvernement, assurant l'exécution par Latour des devoirs de sa charge comme maître de poste, avec, annexé à ce cautionnement, un état intitulé: "Compte courant du maître de poste de Lanoraie pour le trimestre expiré le 3 juin 1884.

Deuxièmement:—la déposition de l'appelant lui-même qu'il a interrogé comme son témoin.

Par le témoignage de l'appelant, l'intimé a prouvé que les biens à lui cédés étaient tout ce que la donatrice possédait alors. Il a essayé de prouver que lui l'appelant connaissait le cautionnement, mais l'appelant a juré positivement n'avoir sçu et connu ce cautionnement que depuis les procédés de l'intimé, et que sa mère elle-même ne connaissait pas cette obligation, ayant cru, sur le dire de T. D. Latour, le principal obligé, qu'elle n'avait cautionné que pour un an.

En transquestions, l'appelant a fait connaître que l'acte intitulé *donation*, était un titre onéreux, et non gratuit, ce qui se voit du reste à la simple lecture de cet acte.

Ainsi l'intimé n'a aucunement prouvé la simulation ou la fraude du titre de l'appelant, tel qu'allégué dans ses contestations. Et du reste, il n'avait plus le droit de demander l'annulation de cet acte, pour fraude, ne l'ayant pas fait dans l'année de l'acte. (Art. 1040, C.C.)

Sur les autres allégués de ses contestations, notamment sur la nature de la dette qu'il cherchait à recouvrer par la

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saisie des biens de l'appelant, et sur l'époque de la création de cette dette, l'intimé n'a pas même essayé de faire une preuve. L'acte de cautionnement du 15 avril 1871, et l'état y-annexé qu'il a produits ne prouvent pas qu'il avait en 1881, une créance contre Dame Marie-Anne-Aurez Laferrière en vertu de ces documents. Il lui eut fallu pour rendre utile à ses allégués la production de ces documents, faire par témoins ou autrement la preuve qu'il avait une créance contre la dite donatrice lors de la donation, et que cette créance était fondée sur ces documents ; il ne l'a pas fait ; ces documents ne prouvent rien par eux-mêmes.

H. Abbott, Q.C., for respondent :—

On the 15th of April, 1871, Dame Marie-Anne-Aurez Laferrière, the mother of the appellant, executed a bond, whereby she became the surety of T. D. Latour, the postmaster of Lanoraie, for the proper fulfilment of the duties of his office.

A judgment was recovered in this case against Mr. Latour and his sureties for a deficit due by him to the Postmaster-General.

Execution was issued in January, 1885, and the goods and lands of Dame Laferrière were seized under the judgment. An opposition was made by the present appellant to the seizure and sale of the movables seized as belonging to Dame Laferrière, on the ground that he was the owner under and by virtue of titles which the opposant declared he would produce when required.

The seizure and sale of the immovables was also opposed by him on the following grounds:—

That he had acquired the immovables from Dame Laferrière, his mother, by an act of donation, signed on the 6th November, 1881, before T. D. Latour, notary ; that the act of donation had been followed by immediate possession, and that he had always since been in possession as proprietor of the immovables.

Reference to the deed of donation shows a donation of the immovables and of all her movable effects and animals generally, excepting only her linen and two beds.

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The donation was made in consideration of certain undertakings to support and care for the donatrix during her life, and to pay certain sums of money, etc.

The respondent contested the opposition of the sale of the movables upon the following grounds: —

That the act of donation of the 6th November, 1881, was simulated between the parties, and made with the sole object of defrauding the donatrix's creditors and to avoid the payment of her debts, and in particular with the object of defrauding the Government, and of avoiding the payment of the obligations which she had contracted by the surety bond.

That by the bond in question, Dame Laferrière had become surety for a person accountable to the Crown, and that the government had by it a hypothec and lien on all the goods, movable and immovable, possessed by her at the time which the act of donation could not affect, and that Dame Laferrière could not dispose of her movables and immovables to the detriment of the Crown.

That the act of donation could not affect the rights and privileges of the Crown.

That the act was made by the donatrix, subject to the payment of all her debts, and that the donatrix was then and long before, the debtor of the Crown to the extent of the amount mentioned in the surety bond, and for the debt for which the action was brought, and by a retroactive effect given it by law was so indebted at the date upon which the surety bond was given.

That the defendant Dame Laferrière had no other goods or properties than those in the act of donation mentioned.

That the act of donation was made in fraud of her creditors, and could have no effect against the creditors, nor affect their rights, even if it had in it a clause obliging the donatrix to pay and discharge her debts.

That the opposant knew the obligations of Dame Laferrière, and especially the one which she was under towards the Crown, and could not excuse himself from the pay-

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ment of the debts contracted by his *auteur* prior to the act of donation.

The contestant prayed that the act of donation be declared null and void, and be without effect as against the claim of the Government, and that the said claim be declared privileged.

The opposition to the sale of the immovables was contested upon similar grounds in a prior opposition.

Reference to the bond will show that by it Dame Laferrière declared herself to be jointly and severally bound with the other sureties and with Mr. Latour for the payment to Her Majesty of the sum of $800. The condition of the bond was that if Mr. Latour should conduct the duties of his office without embezzlement and other misconduct, the bond should be void.

The evidence of the opposant himself, taken on behalf of the respondent, shows that Dame Laferrière is his mother, and that on the 6th November, 1881, she conveyed to him all her property movable and immovable, and that she had no property of any kind left; that since the donation, he had supplied her with food and necessaries according to her needs; that Mr. T. D. Latour is his uncle; that he did not know that his mother had become surety for his uncle.

It is admitted by appellants that the movables seized were so seized in the possession of the opposant, at his domicile, and that he had got them immediately after the donation of the 6th November, 1881, and by another admission, the appellant has admitted that the immovables seized were the same as those mentioned in the act of donation of the 6th November, 1881.

The questions before the Court are:

1. Was Dame Laferrière at the time of the donation, indebted to the respondent?

2. If so indebted, was the donation void?

As appears by the bond of suretyship, the acknowledgment of indebtedness is absolute. Mr. Latour and his sureties acknowledged to be indebted to the Government in a sum of $800.

It is only a condition of the bond that it shall be void if Mr. Latour fulfils his obligations and duties. This might have been a question to have been raised in the Court upon the original action, but there is no evidence in the record to show that he had fulfilled his obligations and the acknowledgment of the indebtedness is absolute. It is therefore submitted that the bond itself alone shows that at the time of this execution, namely, the 15th April, 1871, and since, Dame Laferrière was indebted to the Crown in a sum of $800.

Even if the bond was susceptible of another construction, and it could be argued that the obligation was not pure and simple, but a conditional obligation, nevertheless, by article 1085 of the Civil Code, the fulfilment of the condition would have a retroactive effect from the day upon which the obligation had been contracted. As appears by the account of the 30th June, 1884, these obligations were not fulfilled, and the sureties of the bond were therefore liable for the amount from the time the bonds were executed. This being the case it is submitted that the donation which is the opposant's only title to this property, is null, as being in fraud of creditors, and should be set aside. Article 803 of the Civil Code provides that if at the time of the gift, a deduction being made of the things given, the donor was insolvent, the previous creditors, whether their claims are hypothecary or not, may obtain the revocation of the gift, even though the donee were ignorant of the insolvency.

It appears by the opposant's own evidence that Dame Laferrière by the donation disposed entirely of all her property, and she therefore became insolvent, as no assets remained for the payment of her liability to the Crown, not to speak of the other liabilities mentioned in the deed, and the respondent therefore submits that the deed was null.

The *considérants* of the judgment of the learned Judge of the Court below show that guided by the same reasoning, he concluded that whether the obligation of Dame Laferrière was simple or conditional, she was indebted to

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the Crown prior to the execution of the deed of donation, and that consequent upon the deed of donation, she became insolvent, and that the respondent had a right to have that deed revoked, as he had prayed by the conclusions of his contestation, and he consequently declared the deed of donation null, as against the plaintiff's demand, and maintained the seizure of movables and immovables.

Jan. 22, 1890.]

BABY, J. (for the Court) :—

There is no proof that a claim existed against Marie-Anne-Aurez Laferrière at the date of the donation. The statute (R. S. ch. 35, s. 51) says that a postmaster who neglects to render his accounts for one month after the time, shall forfeit double the value of the postages which have arisen at the same office in any equal portion of time. This is good as against the postmaster. But here we have to do with the rights of a third party, and no proof has been made that at the time he acquired possession of the property any claim against the donor resulting from the bond was in existence. The judgment will therefore be reversed. We cannot give the appellant costs, but will recommend that they be paid him.

The judgment of the Court is as follows :—

"La Cour etc.....

"Considérant que l'intimé, demandeur en cour de première instance, n'a pas prouvé les allégations essentielles de sa contestation de l'opposition formée par l'appelant, à la saisie mobilière et immobilière dirigée contre Dame Marie-Anne-Aurez Laferrière, veuve Mathias Marion, sa mère, défenderesse en cour de première instance, et notamment qu'il eut une créance contre la dite Marie-Anne-Aurez Laferrière, lors de la donation entre vifs faite par cette dernière à l'appelant, par acte en date du 6 nov. 1881 (T. D. Latour, notaire,) et sur lequel acte l'appelant base son droit de propriété, sur les meubles et immeubles saisis; et, partant, que, dans le jugement dont est appel,

savoir, le jugement rendu par la Cour Supérieure pour le district de Richelieu, siégeant à Sorel, le 20me jour de novembre 1886, lequel jugement, maintenant la contestation du dit intimé, a déclaré nulle et de nul effet, à l'encontre de ce dernier, et revoqué la dite donation, et a déclaré bonne et valable la saisie pratiquée en cette cause sur la dite défenderesse, il y a erreur;

"Renverse et annule le dit jugement, et procédant à rendre le jugement que la dite cour de première instance aurait dû rendre, rejette comme non fondée la contestation faite par l'intimé de l'opposition formée par l'appelant, et déclare la saisie pratiquée en cette cause, comme susdit, illégale et de nulle valeur, et en donne mainlevée à l'appelant;

"Et quant aux frais encourus par l'appelant, tant en cour de première instance qu'en appel, la cour ne prononce aucune adjudication sur iceux, attendu que l'intimé représente la Couronne, mais elle déclare que l'appelant aurait eu droit à ses frais, si le procès avait été seulement entre particuliers."

Judgment reversed.

S. A. Germain for appellant.

Abbotts, Campbell & Meredith for respondent.

(J. K.)

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March 26, 1890.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, DOHERTY, JJ.

REGINA v. WM. DOONAN.

Receipt—Valuable security—R. S. Canada, ch. 173, s. 5.

HELD:—(CROSS, J., *diss.*), That a receipt or discharge of a debt is not a valuable security under chapter 173, of the Revised Statutes of Canada, and that the obtaining of such a receipt or discharge by means of violence or threats of violence, is not a felony coming within the terms of the 5th section of the Act.

RESERVED CASE from the district of St. Francis, in the following terms:—

On the 3rd of March instant, in the Court of Queen's Bench, Criminal side, held by the undersigned, the prisoner William Doonan, was found guilty on a charge contained in the following indictment:—

"The Jurors for our Lady the Queen, upon their oath present that on the 2nd day of August, 1889, at the Township of Ascot in said district, one William Doonan, of said Township of Ascot, trader, feloniously, and with intent to defraud The Eastern Townships Mutual Fire Insurance Company, a body politic and corporate, having its principal office and place of business at the Township of Stanstead aforesaid, in the district aforesaid, by unlawful threats of violence to the person of Charles H. McClintock, of the Township of Stanstead aforesaid, president and treasurer of the said Eastern Townships Mutual Fire Insurance Company, did compel and induce the said Charles H. McClintock, in his said quality, to execute, make and sign a valuable security, to wit, a certain receipt for a certain sum of money, to wit: for the sum of $14.40, there and then due and owing by the said William Doonan to the said Eastern Townships Mutual Fire Insurance Company, for assessments theretofore levied by the said Company under and by virtue of a certain insurance policy bearing the number 5875, prior to that time

issued by the said Company in favor of the said William Doonan, the said assessments then and there amounting to the sum of $85.81, in order that the said receipt might be afterwards made and converted into, used and dealt with as a valuable security, against the form of the statute in such case made and provided, and against the Peace of our Lady the Queen, Her Crown and dignity."

After all the evidence had been concluded, both for the Crown and the prisoner, counsel for the prisoner urged that the receipt mentioned in the indictment and proved, was not a "valuable security" within the meaning of Section 5 of Cap. 173 of the Revised Statutes of Canada.

I ruled that the trial should be proceeded with and the case submitted to the Jury upon the question of fact, which was done, and a verdict of guilty returned by them against the prisoner.

The prisoner, by his counsel, then on the 4th instant moved that inasmuch as he has been convicted before this Honorable Court upon a charge of obtaining a valuable security by threats of violence, that this Honorable Court now sitting do reserve for the consideration of the Judges of the Court of Queen's Bench for Crown cases reserved, the points of law raised herein by the defence:

1st.—Upon the question whether the receipt mentioned in the indictment is a valuable security within the meaning of Cap. 173 of the Revised Statutes of Canada.

2nd.—Upon the application made by the defence that the Court do instruct the Jury to discharge the prisoner, upon the ground that no legal evidence had been adduced by the Crown in support of the offence as charged in the indictment.

3rd.—Upon the objections made by the defence and noted overruled by the Court, to the admission of evidence on behalf of the Crown of the obtaining of a receipt by the prisoner for a sum of money other than the one mentioned in the indictment, to wit: for $14.40, which sum was paid by the prisoner prior to the giving of said receipt.

And further that this Honorable Court do postpone

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judgment upon conviction herein until the question shall have been decided.

Upon this application I have reserved for the consideration of the Court sitting in Appeal, the following question:—Is the receipt mentioned in the indictment and which the witness Charles H. McClintock swore that he signed in his quality of president and treasurer of the Eastern Townships Mutual Fire Insurance Company, on the 2nd day of August, 1889, without receiving any money, in the following form:—"Received from William Doonan the sum of $14.40, being the amount due to the Eastern Townships Mutual Fire Insurance Company, in full to date," a valuable security within the meaning of the 5th section of Cap. 173 of the Revised Statutes of Canada, or is it such a document that could be afterwards converted into or used or dealt with as a valuable security?

Judgment was postponed.

The prisoner was admitted to bail to appear at the next sitting of the Court of Queen's Bench to be held at Sherbrooke, in the district of St. Francis, on the 1st day of October next.

(Signed,) E. T. BROOKS,
J. S. C.

Sherbrooke, 5th March, 1890.

Mulvena, for the prisoner, urged that the indictment was based on Chap. 173 of the Revised Statutes of Canada; that under this chapter a receipt was not a *valuable security*, although defined as such under Chapter 164 of the Revised Statutes respecting larceny and similar offences; that the old Larceny Act (32 and 33 Vic.) formerly included the offence charged and also defined a receipt as a valuable security, but this Act had been repealed and replaced by two separate chapters of the Revised Statutes to wit: Chap. 164, "respecting Larceny and similar offences," and Chap. 173, "respecting the obtaining of valuable security by threats or violence." That the clause defining a receipt as a valuable security was re-enacted in Chap. 164 respecting larceny, and omitted in Chap.

178 respecting threats of violence, and consequently did not apply to the latter chapter nor to the offence charged under it.

Bélanger for the Crown, contended that the revision of the Statutes did not affect the definition of "valuable security," that the definition in the Larceny Act, Chap. 164, applied to *similar offences* and that it was not necessary to repeat this definition in Chap. 173, and quoted Mr. Justice Burbidge in support of this opinion. Both sides quoted the same clauses of the interpretation Act in support of their conflicting arguments.

March 26, 1890.]

CROSS, J. (*diss.*):—

The Larceny Act of 1869, 32 and 33 Vict., Cap. 21, Sect. 1, gives a definition of a valuable security including a receipt within the definition.

Sect. 15 of the same Act makes the stealing of a valuable security a felony.

The same statute contains various provisions against threats and violence, and among others, section 47 enacts to the effect that whoever with intent to defraud by threats or violence compels any person to sign any paper or parchment in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of felony.

These provisions are transferred to the Revised Statutes of Canada, but in place of being contained in the same chapter are respectively included in each of two separate chapters. The first, cap. 164, treating of larceny proper, includes within its provisions the definition of a valuable security. The second, cap. 173, treating separately of threats and violence, contains no definition of a valuable security, that remaining in the chapter concerning larceny proper, and not being transferred to or repeated in the separate chapter concerning threats and violence. It is consequently contended that the definition of a valuable security applying only to the chapter concerning larceny, being cap. 173 of the R. S. C. (making

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it a felony to compel a person to sign a paper or parchment to be afterwards used or dealt with as a valuable security,) cannot be considered applicable to the provisions against threats and violence contained in cap. 173, R. S. C.; and although sec. 5 of that chapter repeats sec. 47 of 32 and 33 Vic., cap. 21, making it a felony to compel a person by threats or violence to sign a paper or parchment to be afterwards used as a valuable security, yet as there is nothing in said cap. 173 to define what is a valuable security, (whereof a definition is only to be found in the Larceny Act alone,) the provisions contained in sect. 5 of cap. 173, R. S. C., become nugatory, and no conviction can be sustained thereunder, as the term valuable security can have no legal meaning as applicable to cap. 173 for want of a definition thereof in connection with or applicable to the provision that chapter makes against threats and violence.

I incline to think that this view of the case is too technical to be found entirely satisfactory; it seems to be much against the spirit if not even against the letter of the legislation on the subject. It is said that in the absence of a statutory definition a receipt would not be a valuable security at common law, nevertheless I apprehend that if in the absence of a statutory definition the Legislature had enacted Sec. 15 of the 32 and 33 Vic., cap. 21, the Court would have been bound to find a reasonable meaning to the term valuable security, and it should not be lost sight of that the offence consists of compelling the signature to *a paper or parchment to be used as a valuable security*. The violence being proved as the gist of the offence, it might be considered matter of appreciation whether the document contained value in the use to which it might be turned by the party obtaining it.

It is not necessary that the paper or parchment so procured to be signed should of itself be a valuable security, but only that it should be susceptible of being so used. The receipt in question was susceptible of being used as a valuable security, valuable to the recipient because it might be so used to claim a discharge from his liability,

and valuable to the signer because it entitled him to the money therein specified as a payment when relinquishing the receipt, irrespective of the statutory definition it was of value and was a receipt.

Again, by section 8 of the statute entitled an Act respecting the Revised Statutes of Canada, 49 Vic., cap. 4, it is declared that the said revised statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

If then the said Revised Statutes are thus a consolidation and not new laws, they should be read together as one Statute or law and interpreted each one chapter with all the others. In this way the definition of valuable security in the larceny chapter could be invoked as applicable to the cap. 173 respecting threats, in the same manner and to the same extent as could have been done in construing sec. 47 of the statute 32 and 33 Vict., cap. 21 in connection with sect. 1 of that statute containing the definition of the term valuable security. Effect would thus be given to the sect. 5 of cap. 173, R. S. C., in place of rendering that clause nugatory and all the offences therein intended to be provided against left entirely freed from any penal consequences. This reading would be giving effect to the provisions prohibitory of threats and violence, which according to the more technical construction proposed would be entirely devoid of effect and would reduce said sec. 5 to absolute inutility, that is make it entirely inoperative; while according to the more liberal interpretation which I suggest, both the prohibitory clause and the subject of it would retain their proper places in the statute book and have their intended operation. The Legislature could not have intended that a provision of law so important, directed against a class of grave offences, for so many years in force as part of the statutory law, should stand only as wasted denunciation, for want of an appreciable subject to which the denuncia-

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tion would apply, that the severe penal consequences would have no object to which they could apply by reason of a supposed omission in the wording of the clauses applicable to the subject, and that although the entire enactments of the previous Statutes are transferred to the R. S. C. in identically the same language. This very undesirable result is avoided by taking the context as a whole, which view, I think, is aided, perhaps wholly warranted, by the provision contained in sub.-sect. 56 of sect. 7, cap. 1 of the R S. C., which requires that every Act and every provision or enactment thereof in the R. S. C., should be deemed remedial, and should receive fair, large and liberal construction.

I would be for holding the conviction good.

DORION, Ch. J. (for the majority of the Court):—

Doonan was tried at Sherbrooke for having by unlawful threats of violence compelled and induced one Charles McClintock, President and Treasurer of the Eastern Townships Mutual Fire Insurance Company to sign and execute a valuable security, to wit: a receipt for the sum of $14.40, then due by him to the said Insurance Company. He was found guilty, and the Judge presiding at the trial reserved the point whether this receipt was a valuable security within the meaning of Sect. 5 of Ch. 173 of the Revised Statutes of Canada.

The question before us is simply one of interpretation of the Statute under which the prisoner was tried. By the Larceny Act of 1869, 32-33 Vict., Ch. 21, the term "valuable security" was defined as including any release, receipt, discharge or any instrument evidencing payment of money or the delivery of any chattel personal; and it was provided that such valuable security where value was material should be deemed to be of value equal to that of such unsatisfied money etc. This Act included all offences concerning larceny and also such as consisted in demanding and obtaining money by unlawful threats of violence, etc.

When in 1886, the Statutes were revised, the Larceny

Act 32-33 Vict., ch. 21, was repealed and its provisions were embodied in chapters 164 and 173 of the Revised Statutes of Canada, the first of which applies to larceny and similar offences, and the second to threats, intimidation and other offences of the kind. The interpretation clause defining what is to be considered a valuable security, which in the Larceny Act 32-33 Vict., ch. 21, applied to both larceny and the obtaining of money or valuable security by threats and violence, has been re-enacted and forms part of Ch. 164 of the Revised Statutes, and is expressly declared to be applicable to its provisions. It has not been included in Ch. 173, which contains no reference to it whatsoever.

As already stated the charge against Doonan was brought under Sect. 5 of Ch. 173 of the Revised Statutes, for having compelled and induced by unlawful threats of violence, the President and Treasurer of the Eastern Townships Mutual Fire Insurance Co., to sign a valuable security, to wit; a receipt for the sum of $14.40. Such a receipt is not in the ordinary acceptation of the word a "valuable security," and it was not held to be such and subject to larceny, until it was so declared by the Larceny Act of 1869, (32-33 Vict., ch. 21), and, in so far as I can judge, it is not yet considered as a valuable security under the imperial legislation concerning larceny, unless it has been so declared by some recent statute.

It is, I suppose, by some oversight that the provision declaring such receipts to be valuable security, was not repeated in Ch. 173 of the Revised Statutes, since Sect. 5 of that Act specially mentions valuable securities, without however defining what is a valuable security.

Penal statutes must receive a strict interpretation. They cannot be extended by construction, and no penalty can be incurred except for an act clearly within the spirit and the letter of the statute imposing such penalty. To hold that a receipt for money paid is a valuable security coming within the purview of section 5 of ch. 173 of the Revised Statutes, would be extending and construing

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this section by means of a section of another Act not referred to, and which is expressly declared to apply to a different class of offences. It would be declaring an act to constitute a criminal offence by mere implication of the intention of the legislative authority unsupported by any statutory provision.

It has been argued in aid of the verdict, 1. that by the 49th Vict. ch. 4, sect. 8, it is enacted that the Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as declaratory of the repealed Acts to which they are substituted; 2. that under sub-sect. 51 of sect. 7 of the Interpretation Act, the words "valuable security" in sect. 5 of ch. 173, should be interpreted according to the meaning given to them in the Larceny Act 32-33 Vict., ch. 21, to which ch. 173 has been in part substituted.

As to the first contention, the answer is that the first part of sect. 8 of the 49th Vict., ch. 4 can only be applied when the provisions of the substituted Act or Acts are in effect the same as those of the repealed Acts they have replaced, and that it cannot be applied to provisions which are omitted in the Revised Statutes, and this is made manifest by the second part of the same section, which provides for the case in which the provisions are not the same. This second part of this section would have no meaning if the contention of the Crown Prosecutor was well founded.

With regard to sub-sect. 51 of sect. 7 of the Interpretation Act, it provides for the special case, when in an unrepealed Act a reference is made to a repealed Act, and it provides that the reference shall be construed to be a reference to the provisions of the substituted Act relating to the same subject matter, and that if the substituted Act contains no provision on the same subject, then the repealed Act shall be considered as remaining in force, in so far only as it may be necessary to give effect to the unrepealed Act.

In the present case there is no unrepealed Act and no reference whatsoever to the provisions of a repealed Act,

so that on both grounds sub-sect. 51 of sect. 7 of the interpretation Act, fails to have any application.

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In the absence of any statutory provision declaring a receipt for money paid a valuable security coming within the provisions of Ch. 173 of the Revised Statutes, the verdict of guilty rendered against Doonan, for having obtained such a receipt by threats of violence cannot be maintained, and must be quashed, and this is the opinion of a majority of the Court.

The judgment of the Court is as follows:

"In a case reserved on conviction of having feloniously and with intent to defraud by unlawful threats of violence to the person of Charles H. McClintock, president and treasurer of the Eastern Townships Mutual Fire Insurance Company, compelled and induced the said Charles H. McClintock, in his said quality to execute, make and sign a valuable security, to wit: a receipt of certain sums of money then due and owing by the said William Doonan to the said Eastern Townships Fire Insurance Company, in order that the said receipt might be afterwards made and converted into, used and dealt with as a valuable security;

"After having heard counsel for the Crown and on behalf of the prisoner, and due deliberation had on the case transmitted to this Court from the Court of Queen's Bench sitting on the Crown side in Sherbrooke, in the district of St. Francis,—

"It is considered and judged and finally determined by the Court now here, pursuant to the statute on that behalf, that the said William Doonan could not be convicted under the circumstances disclosed in the case reserved for the opinion of this Court, of the offence charged in the indictment, of having compelled and induced the said Charles H. McClintock, in his said quality to execute, make and sign a valuable security within the meaning of chap. 173 of the Revised Statutes of Canada, and that the said William Doonan ought not to have

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been convicted, and his conviction is therefore quashed and set aside.

Conviction quashed, Cross, J., *dis.*

Bélanger, for the Crown.

Mulvena, for the prisoner.

(J.K.)

NOTE.—Since this case has been decided, the law has been altered by 53 Vict., ch. 37, s. 20, so as to meet the difficulty.

September 27, 1887.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, CHURCH, JJ.

EXCHANGE BANK OF CANADA,
(*Plaintiff in Court below*),
APPELLANT;

AND

CITY AND DISTRICT SAVINGS BANK,
(*Defendant in Court below*),
RESPONDENT.

Banking Act, 34 *Vict.* (*D*), *ch.* 5, *secs.* 26, 58—*Double liability—Responsibility of pledgees of stock—Savings Bank—34 Vict.* (*D.*), *ch.* 7, *secs.* 17, 18, 19.

HELD:—(Affirming the judgment of JOHNSON, J., M. L. R., 2 S. C. 51), 1. That a Savings Bank, holding bank shares as pledgee, and appearing as owner on the books of the bank, is not the owner of such shares within the meaning of sect. 58 of the Banking Act, 34 Vict. (D), ch. 5, and therefore is not subject to the double liability.

2. A bank, shares of which are transferred to a savings bank, is presumed to know that the shares are held by the latter as collateral security, inasmuch as under sect. 18 of 34 Vict. (D.), ch. 7, a savings bank cannot acquire bank shares or hold them except as pledgee.

APPEAL from a judgment of the Superior Court, Montreal (JOHNSON, J.), Dec 21, 1885, dismissing the appellants' action. See M. L. R., 2 S. C. 51, where the case is fully reported.

May 28, 1887.]

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J. N. Greenshields for the appellants:—

The present action is taken by the appellants to recover from the respondents a sum of $12,010 and interest, being two calls of twenty per cent upon 307 shares of the capital stock of the bank appellant, which shares stood in the name of the respondents at the date of the insolvency of the bank appellant.

The main facts involved in the case are covered by admissions signed by the parties; the insolvency of the bank appellant, the appointment of liquidators, the making of the calls, and the necessity of the calls, are all admitted.

It is also admitted that the 307 shares of stock so held by the bank respondents were obtained by them as collateral security from certain customers of the bank respondent, but that the bank appellant had no knowledge of the nature of the transaction other than as contained in the transfers, and were not aware, or any of its officers, that the bank respondent held the stock in question, other than as the absolute proprietor; the transfers are absolute transfers in so far as the bank respondent are concerned; they do not indicate on their face in any way that the stock was transferred to the bank respondent in any other way than as the absolute proprietor of the stock.

The judgment in the Court below turned upon the question that the bank respondent could only hold stock under their charter as collateral security for a loan; that their powers were conferred upon them by a public charter; that the bank appellant are presumed to have a knowledge of such, and that the transfer must be governed by this.

The appellant contends that the judgment is erroneous upon this point, and respectfully submits:—

First:—That the provisions of the Statute 34 Vict., ch. 7, invoked by Mr. Justice Johnson, did not, under the circumstances of the present case, relieve the respondents from liability as absolute owners of the stock in question on the books of the bank appellant. The judgment appealed from ignores the provisions of the Act 36 Vict., ch.

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72, which amends 34 Vict., ch. 7, in most important particulars; and appellant submits that it expressly removes from the Savings Bank, respondent, the restrictions that are claimed to have been imposed upon it by the provisions of the 34 Vict., ch. 7, being a copy of the charter governing the said bank respondents, and is as follows:

"1. So much of the sixth, ninth, seventeenth, eighteenth "or twenty-third sections, or any other part of the said "Act, as requires that the capital stock or any part of the "capital stock of a savings bank to which the Act applies "shall be or remain invested in Dominion stock or other "Dominion securities, or securities of any of the pro- "vinces of the Dominion, or as provides that beyond "the amount of its subscribed capital stock, a Savings Bank "to which the Act applies shall make no investment of "moneys deposited therewith, except only in the deben- "tures or Dominion stock therein mentioned; or, as em- "powers the Receiver General to issue to any such bank, "Dominion stock bearing interest greater by one per cent "per annum than that which at the time of such invest- "ment the bank is directed by the Governor in council to "to pay to depositors, is hereby repealed, except only as "respects such last mentioned Dominion stock issued before "the passing of this Act; and it shall be lawful for any "such Savings Bank *to invest or loan* any amount whatever "of the monies deposited with it or of its capital stock, "in any manner in which it may under the provisions of "the eighteenth section of the said Act, invest or loan "any amount of the monies deposited with it. Provided "always, that every such Savings [illegible] shall always hold "at least twenty per cent of the [illegible] deposited with it "in Dominion securities or deposit it in chartered banks "on call."

The Court will see by reference to sections 6, 9 and 13 of the 34 Vict., ch. 7, that the Savings Bank was restricted as to its investments of its capital stock and in its investments of monies deposited with it beyond the amount of its subscribed capital stock, to Dominion and Provincial securities; but this restriction is abolished by the Act 36

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Vict., ch. 72, which declares that "It shall be lawful for "any such Savings Bank to *invest* or *loan* any amount "whatsoever of the monies deposited with it, or of its "capital stock, in *any manner* in which it may under the "provisions of the section of said Act invest or loan any "amount of the monies deposited with it."

The only limitation, apparently, of the Savings Bank to make investments in the securities referred to in section 18 of, the Act 34 Vict., ch. 7, is contained in the proviso of section 1 of 36 Vict., ch. 72, which is "Provided "always that every such Savings Bank shall always hold "at least twenty per cent of the monies deposited with it "in Dominion securities or deposits in chartered Banks "on call."

The appellants therefore contend by this Act 36 Vict., ch. 72, the Savings Bank respondent had the right to invest in stock of the Bank appellants, and that having said right of holding [illegible] absolute owners of the said stock in question, was within its powers, and that it must be held to the position it took in the books of the Exchange Bank of Canada, the appellants, and after taking and maintaining such position without notice and protest during all the proceedings in liquidation and making of calls, cannot now defeat the right of appellants to recover by proof of the fact that they were secret undeclared trustees for some other persons.

Appellants contend that the liquidators had the right, and were bound to proceed against those who appeared as regular shareholders in the books of the Bank, appellants, and that their right to recover cannot be affected by the proof of an undisclosed trustee, or that the Savings Bank really held the stock as collateral security.

A. Branchaud for respondent:—

L'acte d'incorporation de l'intimée est un acte public; l'appelante est tenue de le connaître. Elle le connait, car son admission en fait foi. Il lui est impossible maintenant de prétexter ignorance sur la nature de la détention par l'intimée, des actions de son fond capital qui font la base de son action, puisque d'après cet acte d'incorporation, ces

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actions ne peuvent être détenues par l'intimée que comme fidéi-commissaire à titre de nantissement pour et au nom des personnes mentionnées dans la défense.

Ce fidéi-commis quoique non indiqué dans les livres de transfert de l'appelante, est cependant aussi bien connu que s'il l'était: car la charte y supplée. Or comme l'indication expresse de telle fidéi-commis dans les livres de transfert, enlèverait au fidéi-commissaire toute obligation ou responsabilité attachée à l'actionnaire, il s'en suit que suivant sa charte suppléant à cette indication expresse, l'intimée se trouve vis-à-vis l'appelante dégagée de toute obligation ou responsabilité qui peut atteindre ceux pour qui elle détient ces actions, de la même manière que tout fidéi-commissaire possédant des actions pour et au nom de personnes indiquées aux livres de transfert de l'appelante.

Sept. 27, 1887.

DORION, Ch. J. (for the Court) :—

The City and District Savings Bank, in the ordinary course of its business, made advances for which it received as collateral security shares of the Exchange Bank. The transfer of these shares to the Savings Bank was made on the books of the Exchange Bank. The liquidators of the Exchange Bank sued the City and District Savings Bank on the double liability for the shares they so held. The City and District Savings Bank answered that they merely held these shares in trust as collateral security. There is an admission to that effect in the record.

The Statute cited by the appellant affects the kind of security that the Bank may take, but the prohibition to purchase shares still remains, and a Savings Bank therefore cannot purchase shares of other Banks. If a person holds shares without disclosing the quality in which he holds them he is liable to third parties as if he were the real owner; but if he declares the quality in which he holds them he is not liable. The City and District Savings Bank having allowed itself to appear in the books of the Exchange Bank as owner would be

deemed the owner. But by law the City and District Savings Bank could not acquire these shares; it could hold them only as collateral security; and it is admitted that the shares in question were in fact held as collateral security. As the Court below said, and we think well said, it must be presumed that the law was known to the Exchange Bank, and that it was aware that the Savings Bank could only hold the shares as collateral security. For that reason the Court below dismissed the action of the liquidators of the Exchange Bank, and we are unanimously of opinion that this judgment must be affirmed, and the appeal dismissed.

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Judgment confirmed.

Greenshields, Guerin & Greenshields for appellant.

A. Branchaud for respondent.

(J. K.)

May 23, 1890.

Coram DORION, Ch. J., TESSIER, BABY, CHURCH, BOSSÉ, JJ.

EDMUND BARNARD,
(*Plaintiff in Court below,*)
APPELLANT;

AND

ALEXANDER MOLSON,
(*Defendant in Court below,*)
RESPONDENT.

Privilege—Attorney—Costs—Arts. 1994, 2009, *C.C.—Saisie-conservatoire.*

HELD:—(Reversing the judgment of WURTELE, J., M.L.R., 5 S. C. 374, DORION, Ch. J., and CHURCH, J., *diss.*) 1. In law costs (*frais de justice*) are included all costs incurred for the common interest of the creditors, whether it be in recovering property for the debtor, or in preventing his property from being carried away, diminished, or lost.

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2. Under Art. 2009, C.C., costs incurred for the common interest of the creditors, and declared privileged by this article, are not necessarily costs incurred in a suit; it is sufficient if they are expenses incurred for the common interest.

3. Counsel fees and disbursements incurred in saving for the *grevé* a sum of money of a substitution may constitute a privileged claim upon such money under Art. 2009, C.C., and a *saisie-conservatoire* may be made of such money.

APPEAL from a judgment of the Superior Court, Montreal, (WURTELE, J.), May 13, 1889, quashing a writ of attachment by garnishment before judgment. The judgment of the Court below, with the opinion of the learned judge, is reported in M.L.R., 5 S. C., pp. 374-379, where the facts are fully stated.

Nov. 26, 1889, Jan. 20, 1890.]

Hon. A. Lacoste, Q.C., and *C. J. Doherty, Q.C.*, for the appellant:—

As appears by the final judgment which dismisses the appellant's seizure, it rests upon two grounds: First, that the appellant's claim was not incurred *dans l'intérêt commun*, but on the contrary, had the effect of making the mass of the creditors lose the moneys in question. Second, that the moneys in question never were in the appellant's possession, and that no privilege as *mandataire* can therefore exist in his favor.

In answer to the first objection the appellant submits that the nature of his privileged claim has been looked at from too narrow a point of view, which has created confusion and led to error. The question of privilege has been considered in relation to its effect against third parties only. Technically the word privilege no doubt refers to the right of being collocated in a judgment of distribution by preference over other creditors, but it does not follow that a claim ceases to be a privileged one, in the broader sense of the term, simply because the debtor may have no creditors whatever, or his creditors, if he should have any, have not proceeded to the sale of his property by execution, and no question of distribution has actually arisen. The appellant claims the existence of a privilege

in his favor, on the ground that the moneys now before the Court have been saved to the respondent as *grevé*, his claim coming under Art. 1994 of our Code, in so far that the amount due him is for expenses incurred for what the French Code calls the *conservation de la chose*, a term far more limited in its legal effect than the term "in the interest of the mass of creditors," used in our articles 1994 and 1996 in addition to the term law costs, since the privilege under our law now extends to expenses for *l'amélioration de la chose*, as well as to expenses for the *conservation de la chose*, in other words comprises useful as well as necessary expenses,—those which have increased the value of the thing, as well as those without which the the thing would have ceased to exist,—a change suggested by the controversies to which the wording of the article of the French Code had given rise. It is objected that our Code speaks of expenses incurred in the interest of the mass of creditors. But it is obvious that expenses incurred in the interest of the mass of creditors, or *dans l'intérêt commun*—as the French version of our Code has it,—are incurred primarily in the interest of the debtor himself, the owner of the thing saved or improved. The claim is a privileged one against other creditors, on the ground that they cannot have any share or portion in the thing saved, until the person who has saved it is reimbursed—"Hujus enim pecunia salvam fecit totius pignoris causam"—as the Roman law puts it, or as the Pandectes Françaises No. 108 say: Ce privilége est une sorte de "droit de gage qui appartient à celui qui a fait ces dé- "penses sur la chose pour laquelle il les a faites, et du "droit du gage résulte naturellement le privilége;" or again in the words of Domat No. 808: "La chose conser- "vée est pour le conservateur comme sienne, jusqu'à con- "currence de ce qu'il y a mis. Quia sine his navis salva "pervenire non poterat." But it is evident, that what third parties cannot but submit to as just and equitable applies to the owner as well, since if the creditor cannot be said strictly and technically to have a privilege against the owner, he has against him the pre-existing rights upon

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which the right of privilege itself rests, that is to say the rights which result from the fact, that the expense incurred to save the thing is a *sorte de gage*, as the Pandectes Françaises expressly say in the passage above quoted, a doctrine which all the writers on the subject reinforce in every form. It is a *sorte de gage* just as the *mandataire's* right of retention is a *sorte de gage*. "Veluti quodam jure pignoris." Pothier, Mandat No. 59. In fact the right of the creditor as against the debtor himself, resulting from this sort of *droit de gage*, is even more efficacious than it ever can be against third parties, for no doctrine is better established in law than that which in many cases gives effect as against the debtor to the *gage*, or *quasi gage*, when the *gage*, or *quasi gage* might be clearly invalid as against third parties. The fact, therefore, that our Code specially gives a privilege for all expenses incurred in the interest of the mass of creditors, is conclusive as to the existence of a corresponding or pre-existing right, which can be exercised against the debtor himself; and from the very nature of the case the proper exercise of that right is by *saisie conservatoire*, the right being that of a quasi proprietor. And the appellant here would observe that such *saisie conservatoire* is, it seems, essentially a *saisie revendication*, although it may resemble from certain points of view a *saisie-arrêt* before judgment, as a *saisie revendication* itself is really a *saisie-arrêt* before judgment, looked at from another aspect. But putting the question of the name and nature of the writ aside, upon the point that the remedy is by *saisie conservatoire*, the jurisprudence of Lower Canada is now too firmly established to admit of question, the term privilege according to that jurisprudence having been invariably used, in its broader sense, to indicate the right of the privileged creditor against the debtor alone, in cases where there was no question of third parties at all.

What is particularly important is that the privilege (as here understood) of the creditor, in cases of *conservation de la chose*, does not depend in any manner upon his being in possession of the thing. Whether he has parted

with the possession or not makes no difference whatever. In fact, there are many cases where the creditor never had, and never could have had possession. In other words, it is not in any manner a question of *retention*. Upon this point all the writers, ancient as well as modern, agree.

As to the objection that the expenses here were incurred, not in the interest of the mass but against it, it is scarcely necessary to point out, that in matters of privilege, *l'intérêt commun* means the interests of the special creditors who have claims on the thing, to the exclusion, of course, of those who have not. Here the thing saved was saved for the benefit of the *grevé* and that of the substitution itself, and it is proved that not only are there creditors of the appellant as *grevé*, but that he is insolvent in his capacity of *grevé* as well as in his private capacity. If there have been no proceedings taken against him by his substitution creditors, it is solely because he has so far succeeded in keeping them quiet, by promising to pay them out of the moneys in Court, as soon as they come into his hands. But it is manifest that if the substitution creditors of the respondent had attached the moneys now before the Court, and the prothonotary had proceeded to prepare a judgment of distribution, the privilege of the appellant for the *conservation de la chose* could not have been successfully resisted, on the ground that the expenses had not been incurred in the interest of the general creditors.

So much cannot be denied. But is it not equally obvious that if the appellant has a privilege, he cannot be without some remedy in the meantime to prevent his debtor and the creditors of his debtor from doing away with the moneys? Those moneys, be it remembered, constitute the security of the appellant, whose privilege is a special one upon a specific amount, and not a general one upon all the property of his debtor. If the appellant once withdraws these moneys from the Court, how can they be identified afterwards, and how followed? What is to prevent the respondent, not only from spending

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them, but paying them away to other substitution creditors, over whom the appellant legally should be preferred, or even paying them away to his ordinary creditors? In the case of the creditors of a succession, they have a right to obtain the *séparation de patrimoine*, to prevent their security from disappearing, as it would if the property of the deceased were to be inextricably mixed up with that of the heir. Has not the appellant in a case like this a right to a remedy equally efficacious, and what remedy can he have if not a *saisie-conservatoire*? If the above reasoning is not correct, then all the decisions rendered so far in cases of privilege, wherein *saisies-conservatoires* were allowed, are equally incorrect, for they were all made to rest on precisely this line of reasoning.

With regard to the second objection, the Court below has overlooked the fact that while the moneys are in Court, not only is the respondent dispossessed of them, but they are constructively in the possession of those who duly enforce their claims on them. It is not necessary in law that the *gage* should actually be in the possession of the *gagiste* under article 1970 of our Civil Code; it is sufficient if the *gage* is in the possession of a third person appointed by the parties who hold it, and the case is stronger when it is the law which appoints the third party. One example given by the law writers on the subject is that of a deposit in the hands of the Government to secure the performance of their duties by public officers. C. N. article 2102 No. 7. Third parties may have claims to exercise on the moneys so deposited, and these moneys may constitute a real *gage* in their favor, although the moneys are not in their possession. The privilege of consignees mentioned in article 610 of our Code of Procedure is another case in point. The goods consigned may be deposited in a warehouse, subject to ever so many privileges which take precedence of that of the consignee, and still the goods are held to be constructively in the possession of the consignee to the extent necessary to protect his interests.

Here the moneys were seized in the hands of the *tiers-*

saisi Freeman, and it was after they were so seized and brought into Court, the respondent being in law wholly dispossessed of them in the meantime, that the appellant's claim for their preservation was incurred, and they constitute the *gage* of the appellant just as effectually as if they had been in his possession all along.

It follows from what precedes that the appellant claims in his favor the existence of three distinct privileges.

Whether any of them is maintained, or all of them are maintained, it is clear that if a privilege of any sort exists in favor of the appellant, he was entitled to a *saisie-conservatoire* to preserve it.

With regard to the nature of such a seizure, if the Court should hold that the case falls under Art. 866 of our Code of Procedure, relating to *saisie revendication*, as the appellant submits it does, then it must reverse the judgment appealed from as having been rendered in the exercise of a jurisdiction not recognized by law. This question of procedure is an important one in itself, as the present case must constitute a precedent, but the appellant is confident that under any circumstances he is entitled to the reversal of the judgment appealed from.

The whole case of the respondent amounts to this, that the seizure of the appellant should have been accompanied by an affidavit of secretion. That this is a case of secretion no one can doubt, who considers the facts, and bears in mind the provisions of the Roman law, *de doli mali exceptione*, which is the foundation of the entire French law on the subject of privileges and pledges. But the appellant so far has seen no necessity for declaring under oath that the respondent, insolvent as he is, is attempting to defraud him by running away with the moneys in Court without paying him—as he considers that the provisions in the old statute of George 3rd, as to *saisie-arrêt* before judgment, and the affidavit which must accompany it, are utterly without application to the present case. This statute, which, if applied literally, would have upset the whole French law system of seizure was, evidently, the work of an English lawyer, and it is curious

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to observe that the use now made of that statute is to support propositions which would be scouted in an English court, where the rights of an attorney in a matter like the present are fully protected as a matter of public policy. In the language of Lord Kenyon, C. J. (6 Term Rep. 361): "The party should not run away with the "fruits of the cause without satisfying the legal demands "of his attorney, by whose industry and, in many in-"stances, at whose expense those fruits are obtained;" and the judgment of Lord Mansfield in *Welsh* v. *Hole*, Doug. 238, is to the same effect. The appellant's contention is that the principles of our law are precisely those of the English law, and that attorneys here have practically the same rights that attorneys have in England, the United States, and all the other provinces of the Dominion of Canada.

Hon. R. Laflamme, Q.C., for respondent:—

Respondent submits that the judgment of the Superior Court should be confirmed for the reasons contained in the judgment itself, and on the other grounds set up in the petition to quash. The affidavit is insufficient. Between the caption and the *jurat* it sets up no facts sufficient to justify a seizure of any sort, the grounds of the seizure are not detailed in the affidavit itself, but are found only by reference to a copy of the declaration to be served and annexed to the affidavit as forming part of it. This declaration on the first page refers to certain accounts filed in the case as forming part of it. It is submitted that in an attachment, the affidavit signed by the plaintiff and authenticated by the prothonotary should set up in detail all the grounds on which the seizure was asked for, and be complete in itself.

The affidavit is clearly insufficient for an ordinary attachment before judgment such as contemplated by art. 834, C.C.P. In the present case the writ is styled a *saisie-arrêt conservatoire*, and the garnishees styled *mis en cause*; there is no article of the code providing for an attachment of such a nature

Appellant, recognizing that his affidavit will not sup-

port an ordinary attachment before judgment, tries to assimilate his case to a seizure in revendication.

It does not fall within the terms of art. 866, C. C. P., nor is there anything to show any right of ownership, even partial, in the said $13,712.50. Appellant's claim of privilege and right of attachment is based solely on the ground that he protected the particular moneys seized for Mr. Molson. If his claim be correct it follows that an attorney in every suit in which he is successful would have a right to attach the money or property his client had been declared entitled to receive from the opposite party, or retain in his own possession as the case might be. In such a view the allegations of fraud on the defendant's part, are altogether unnecessary and serve only to prejudice the case by placing the defendant in an unfavorable light. Such an interpretation of the case would result in extending the exercise of the rights of attachment far beyond the intention of the legislature; if in the absence of positive law to that effect an attorney has a right to seize in payment for his services any moneys or property he has been instrumental in obtaining or preserving for his client, there is no equitable reason why the same rule should not apply in favor of others who may have rendered similar services.

Appellant founds his right of attachment on an alleged privilege or right of retention. Respondent submits that the rules relating to privileges have no bearing on disputes between alleged debtor and creditor, but are to be referred to only when the claims of creditors conflict with each other (C.C. 1983.) As to a right of retention, there can be no retention where there has been no possession, and it is not pretended that the moneys attached were ever in the hands of appellant or in the possession of any one for him. The facts of the case show that for safekeeping the prothonotary was substituted as garnishee for the original garnishee in *Carter & Molson*, and that the moneys have always been held for the respondent Molson.

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With regard to the allegations of insolvency it is evident from the will of the Hon. John Molson, and from the judgments of record that the St. James street property and its revenues cannot be taken in satisfaction of the debts of ordinary creditors. If Mr. Barnard be an ordinary creditor he has no right to be paid out of these moneys declared *insaisissables* by the Privy Council. If his claim be of a special nature, and as alleged by him, for services rendered to the substitution, and he has the right to have it satisfied out of the moneys in court, then he has an equal right to be paid out of the other revenues or the real property itself. Mr. Molson in his ordinary capacity may be insolvent; Mr. Molson as institute under his father's will, and the substitution, are perfectly solvent.

In any case there is no right to hold the whole of the moneys in court. Mr. Barnard's claim is for $8,932.17, and his right of attachment, if any, must be limited to this sum. Or, looking at the case from another point of view, the ground on which he bases his special and proprietary right to the moneys in court is that the services were rendered to protect them from the attacks of creditors of Mr. Molson. A glance at the accounts filed as appellant's exhibits makes it plain that only a portion of the amount of the accounts is in connection with these moneys. A large portion is for services rendered, it may be admitted for the sake of argument, to the substitution generally and Mrs. Molson, but not to preserve the special sum of $13,712.50. In any case, therefore, Mr. Barnard has no right to attach any further sum than so much as appears clearly to be claimed for services in connection with the moneys attached.

Certain technical objections have been taken to the petition to quash. The first, that a judge in chambers has no jurisdiction. It is true that decisions have been rendered under art. 819, C.C.P., that a judge in chambers cannot quash the writ, but the same judgments decided that a judge in chambers has power to discharge the defendant. If the same rule be applied in cases of attach-

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ment (C.C.P. 854, 865,) then a judge in chambers has at least power to grant *main-levée* of an attachment. It appears moreover that the trial took place before the court and the judgment was rendered by the court in banco.

Respondent submits that the course of proceedings, the technical objections placed in the way of the contestation of the seizure, the persistency in attaching $13,712 for a claim of less than $4,000, and the documents of record, show that appellant has no cause to fear the non-payment of any amount for which he may obtain judgment, and that notwithstanding the affidavit, the seizures have been taken solely with the intent of embarrassing respondent, thus forcing him to the payment of what he considers an unjust claim.

May 23, 1890.]

DORION, Ch. J. (*diss.*):—

The question in this case is whether the appellant has a privilege for the amount of his account. If the costs claimed are *frais de justice* there is a privilege; but if not, there is no privilege. I have sought in vain for any decision which allowed a lawyer a privilege against his own client in circumstances like the present, and I am forced to come to the conclusion that the appellant has no privilege, and that the judgment should be affirmed.

CHURCH, J., also dissented.

BOSSÉ, J., delivered the judgment of the majority of the Court, which reversed the decision of the Court below. The reasons are stated in the judgment of the Court of Appeal as follows:—

"La Cour etc.....

"Considérant que par frais de justice, il faut entendre tous ceux faits dans l'intérêt commun, soit pour faire entrer la chose dans le domaine du débiteur, soit pour empêcher qu'elle ne soit enlevée, diminuée ou perdue;

"Considérant que sous l'article 2009 du Code Civil, les frais faits dans l'intérêt commun, et déclarés privilégiés par cet article, ne sont pas nécessairement des frais en-

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courus dans un litige, mais qu'il suffit qu'ils aient été exposés dans l'intérêt commun ;

"Vú la saisie conservatoire faite en cette cause, et le compte produit, par lequel le demandeur réclame certains déboursés et honoraires d'avocat, qu'il prétend lui être dûs par l'intimé, et avoir été encourus pour la conservation de la somme saisie en la présente cause ;

"Vu que les dits déboursés et honoraires, s'ils sont prouvés être dûs et avoir été encourus pour la conservation de la somme saisie, peuvent, soit en totalité, soit pour partie seulement, constituer, aux termes du dit article 2009, une créance privilégiée sur la dite somme, et qu'il y a erreur dans le jugement dont est appel, savoir le jugement rendu par la Cour Supérieure siégeant à Montréal, le 18 jour de mai 1889 ;

"Cette Cour casse et annule le dit jugement, et procédant à rendre le jugement qui aurait dû être rendu, déclare qu'il sera procédé à l'instruction de la requête contestant la saisie conservatoire, en même temps qu'à l'instruction de l'action, et la dite requête est pour cette fin jointe à la dite action, pour être décidée en même temps que le mérite de l'action, et quant à la motion de l'intimé pour permission de toucher une partie de la somme déposée, icelle est renvoyée, et vu l'allégation de l'insolvabilité du défendeur il est réservé aux parties de procéder en cour de première instance tel que de droit et qu'elles aviseront à ce sujet ;

"Et quant aux frais, il est ordonné que chaque partie paiera ceux par elle encourus devant cette cour, et ceux encourus en cour de première instance sont réservés. (*Dissentientibus*, l'hon. Sir A. A. Dorion, J. C., et Church, J.)"

Judgment reversed.

Doherty & Doherty for appellant.

Robertson, Fleet & Falconer for respondent.

(J. K.)

March 20, 1890.

Coram DORION, Ch. J., CROSS, BABY, BOSSÉ, JJ.

CANADIAN PACIFIC RAILWAY CO.

(*Defendants in Court below*),

APPELLANTS;

AND

HIRAM JOHNSON

(*Plaintiff in Court below*),

RESPONDENT.

Carrier—Responsibility—Railway Company—Person conveyed contrary to Company's regulations—Collision—Damages.

HELD:—That where a person, by giving a tip or bribe to the conductor of a train not intended for the conveyance of ordinary passengers, as he had reason to know, induces the conductor of such train to permit him to travel on the train contrary to the regulations of the railway company, he travels at his own risk; and if, while so travelling, he is injured by a collision, he is not entitled to be indemnified by the company for any damage to person or property sustained by him.

APPEAL from a judgment of the Superior Court, Montreal (TASCHEREAU, J.), April 14, 1888, condemning the appellants to pay the respondent $640 damages.

The declaration set up that on the 2nd April, 1886, the plaintiff (respondent), who was a trader, and had with him two valises, containing a large amount of jewellery, spectacles and furs, of the value of $700, at Cartier, in the Province of Ontario, applied to a conductor in the employ of the company, in charge of an accommodation train operated by them, to be carried from Cartier to White River, and that the conductor, upon receiving the sum of $6, undertook on behalf of the company to carry plaintiff safely to White River, with his baggage, and the plaintiff consequently went on board the train at Cartier, with his baggage, but that shortly before reaching White River, whilst the train in which the plaintiff was, was station-

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ary, another train of the defendants ran into it, and destroyed the car in which the plaintiff was, causing him serious injury. That for a time the plaintiff was insensible, but on recovering consciousness, he enquired for his baggage, and after some time, the two valises were found and brought to him in a broken and damaged condition, and some of the articles removed and others damaged. The declaration further stated that the plaintiff expected to receive a profit from his business trip of $100 a week; that he had to pay to return to Montreal $22, and he therefore claimed to be paid $5,000 for injuries, $389.10 for his goods, and $22 for fare to Montreal, making a total of $5,411.10. He alleged gross negligence on the part of the defendants.

The defendants pleaded a general denial, a special denial of the personal injuries, and further that the plaintiff could not by law recover the value of the articles alleged to have been lost or destroyed. By a further plea they said that the plaintiff was at the time of the accident unlawfully in and upon a freight train not intended for the carriage of passengers, and was at the time of the accident and previous to it riding on the said train contrary to the express rules and regulations of the company defendants, and that these rules were well known to him, and that he was so riding without the knowledge of the defendants or any person authorized by them to give permission or consent for him to ride upon the said train, and they had never received or been paid any fare or compensation for the carriage of the plaintiff.

By a further plea they raised a question of contributory negligence, and said that plaintiff was warned of his danger, and could, if he had exercised reasonable diligence, have escaped.

Upon the issue joined, the case went to trial.

The plaintiff examined witnesses whose depositions showed that the train in question was a freight train carrying colonists' effects to Manitoba and the North-West, their horses, cattle, furniture and baggage. The train before getting to White River was divided as being too

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heavy to handle with one locomotive, and the plaintiff happened to get on the first half of the train in a baggage car or caboose. Before getting to White River, the half of the train on which the plaintiff was, stopped outside the semaphore, and whilst waiting there was run into by the other half of the train which was following.

The judgment of the Court below was as follows :—

" La Cour, etc.....

" Considérant que la collision arrivée sur la ligne du chemin de fer de la compagnie défenderesse, le ou vers le 2 avril 1886, à l'endroit appelé White River dans la province d'Ontario, entre deux convois de la dite compagnie, a été causée par l'imprudence et la négligence grossière des officiers, conducteurs et employés de la défenderesse, dont celle-ci est responsable en loi ;

" Considérant que le demandeur qui se trouvait à bord d'un des dits convois comme voyageur, ayant dûment payé le prix exigé pour son passage par le conducteur du dit convoi, a été victime de la dite collision, ayant été frappé à l'épine dorsale ainsi qu'à la hanche et aux bras, et ayant été par suite de l'ébranlement de son système nerveux, causé par le dit accident, rendu incapable de vaquer à ses occupations ordinaires pendant l'espace d'au moins deux mois ;

" Considérant que le demandeur avait en sa possession, à bord du dit convoi, avec la permission et à la connaissance des employés de la défenderesse, lors de la dite collision, deux valises chargées d'effets de commerce consistant en montres d'or et d'argent et en fourrures ; que les dites valises furent brisées lors de la dite collision, et qu'une partie de leur contenu fut dispersée et perdue, et qu'une autre partie fut endommagée et détériorée ; que cette perte et ce dommage sont aussi le résultat de l'incurie et de la faute des employés de la compagnie défenderesse auxquels le contenu des dites valises avait été dûment déclaré, aux termes de l'article 1677 du Code Civil, et qui n'en ont pris aucun soin lors de la dite collision, et après, quoiqu'ils en eussent spécialement accepté le soin et la garde ;

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"Considérant que le demandeur a fait du contenu des dites valises et de sa valeur un commencement de preuve suffisant pour autoriser la cour à accepter sur ce point le serment du demandeur offert et prêté par lui, *ex necessitate rei* ;

"Considérant que d'après la dite preuve et le dit serment du demandeur il est constaté que la valeur des effets perdus par lui, lors de la dite collision, s'élève à la somme de $228 ; que la détérioration des autres effets s'élève à $140 ; que le demandeur a de plus déboursé, d'après la preuve, $22 pour venir de White River à Montréal, plus $50 pour frais médicaux nécessités par sa maladie ; et qu'il a droit de plus à des dommages résultant du dit accident et de l'interruption de son commerce pendant deux mois, lesquels sont arbitrés à la somme de $200 ; toutes lesquelles dites sommes formant celle totale de $640 ;

"Rejette les défenses, et condamne la compagnie défenderesse à payer au demandeur la dite somme de $640, avec intérêt à compter de ce jour, et les dépens distraits, etc."

Jan. 17, 1890.]

H. Abbott, Q. C., for appellants :—

The chief points to be decided by this Court are, has the respondent proved the allegations of his declaration, and secondly, is he, in view of the facts, entitled to recover ?

As to the first point, the only proof of damage to the goods is made by the respondent's own evidence. It is shown that the train was not an ordinary passenger train, nor carrying passengers from local points at all. It was run entirely for the accommodation of a special class of emigrants, and conveyed their cattle and furniture as freight. The plaintiff at a by-station got on board by a private arrangement with the conductor. He did not get into a passenger train, but into the caboose of a freight train in which only the persons who were there to look after their own cattle were entitled to ride. He knew apparently that he was doing a wrong, and instead of

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paying the fare that he would legally be obliged to pay, he got carried by bribing the conductor. The conductor himself says that he *tipped him*, but that no account was given by him to the company, of the money he so received. This evidence is only admissible under article 1677 of the Civil Code, which provides that carriers are not liable for gold or silver, or articles of a precious nature, unless declared, but that this does not apply to personal baggage of travellers, when the money or the value of articles lost is only of a moderate amount, and suitable to the circumstances of the traveller, and he is entitled to be examined upon oath in proof of the value of the articles composing such baggage; or under section 252 of the Railway Act, which says that "any passenger who pro-"duces such check may himself be a witness, in any "action or suit brought by him against the company, to "prove the contents and value of his baggage not deliv-"ered to him."

It is submitted that the respondent does not come under either of these provisions.

The goods that he claims to have lost are not in any sense personal baggage. They were not intended for his own use, nor looked upon by him in any other way than articles of trade. They were not even samples, but were the actual merchandise which he intended to dispose of, and therefore the amount, even if moderate, does not entitle him to make evidence for himself under the article of the Code.

As to the section of the Railway Act, it contains a condition precedent, namely, the production of a check. The respondent in this case never had any check, and in fact was riding wrongfully upon the car, and cannot avail himself of that section.

The next question is, even supposing that respondent had proved both personal injuries and the articles lost, ought he to succeed in obtaining a judgment for any amount? The appellants submit that he should not. The contract of a carrier differs in no way from any other contract in requiring a consideration. The appellants,

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unless they received a consideration for carrying the respondent to White River, were not bound to carry him there, nor if they violate that contract by not carrying him there safely, are they responsible for damages, because they never had any consideration for their undertaking. Except by consideration moving from the respondent there was no obligation of any kind in the appellants to him. He would be a mere trespasser on their railroad. The respondent, it is shown, was on a train which was not a regular passenger train, nor does he show in any way that it was usual to carry passengers in such a train at all. He apparently knew this, or he would not have boarded the train in the way he did. The appellants are not carriers of passengers, except by regular passenger trains. If, by a course of conduct, they allowed persons to ride on these freight trains, and received a consideration, they would certainly be liable for accidents to as great an extent as if the passengers were on a regular passenger train; but in the present instance this is not the case, as there is no proof whatever that such a course of conduct was tolerated. The conductor had no power to allow the respondent to ride on such a train, nor had he power to receive a sum of money less than the regular fare. The respondent in giving, and the conductor in receiving, a sum of money less than the regular fare, can only have contemplated it as a gratuity to the conductor, or else an embezzlement of the Company's funds by him. The conductor himself speaks of it as a tip, and says that he never rendered any account to the appellants. The respondent, therefore, knowing that the fare was greater than the amount that he paid, was not only a trespasser upon the company's property, but was actually engaged at the time of the accident in defrauding them.

The appellants submit that the action ought to be dismissed for the following reasons:

Because the respondent has not shown any negligence on behalf of the appellants' servants;

Because he has not shown any injuries sustained by

the respondent in consequence of the accident, except some slight disbursements of moneys ;'

Because he has not shown by legal evidence any loss or damage to his merchandise ;

Because he was unlawfully upon the appellants' cars, and engaged in defrauding them at the time of the accident ;

Because the appellants received no consideration for the contract which is attempted to be enforced.

M. Hutchinson, for respondent :—

The fact is established that the respondent boarded the railway train of the company appellants in the usual way, and paid the ordinary fare for his conveyance from Cartier to White River.

The witness Peter McIntyre says: "The conductor, "Dan McDonald, told me that he collected full fare from "the plaintiff from Chapleau to White River." And Richard A. Wallace says: "Coming near White River "and before the accident on said 2nd day of April last "past, I saw the plaintiff pay the conductor on the train "some money and receive from the conductor change; "and I presumed such was the payment of his fare."

The following also appears in the deposition of John McKinstry :

"Q.—Do you know if the plaintiff paid his railway "fare ? A.—I don't know what he paid him. He gave "him $10, and he, the conductor, gave him back some "change. What it was I don't know. Whatever he paid "him, the conductor, I believe the conductor gave in at "the station. I heard he paid it in at the station.

"Q.—This was for his fare ? A.—Yes."

As to the pretension of the company appellant that the respondent was travelling on a freight train and against the rules of the company, on reference to the deposition of Albert Winters, who was a fellow passenger with the respondent, it will be seen that these vans were frequently at that time used for the carriage of passengers.

As to the cause of the accident there can be no difference of opinion. The witness Richard A. Wallace, who

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was a fellow passenger with the respondent, states: "One cause of the collision was that the train on which "I was a passenger was not properly signalled. The "passengers all knew there was a train not far behind "us, and on our arriving a short distance from White "River aforesaid, the train was stopped, as it could not "get into the yard. The conductor of the train, on which "I was a fellow passenger with the plaintiff, had not put "any danger signal in rear of our train, until he was re-"quested to do so by one of the passengers, and after he "had put out the danger signal in the rear of our train "it was too late, as the train coming after us was coming "at a high speed, and was not stopped until it collided "with the train plaintiff and myself were on. The rea-"son the passengers knew that a train was coming be-"hind was because our train had been divided some time "before, and a new train made up to follow in the rear. "There was no danger signal on the rear of our train al-"though at the time of the accident it was about dusk. "The conductor sent out a man with a light when re-"quested to do so, but the man went but a short distance "when he was obliged to leave the track to avoid the "train coming in rear of the train plaintiff was on."

March 20, 1890.]

CROSS, J. (for the Court):—

This is an action brought by a person who claims to have been a passenger on a train of the company appellants, and who suffered damage, and had jewellery lost and destroyed by a collision. Johnson does not appear to have been a regular passenger. It was a colonists' train, not intended for passengers, but for the transportation of colonists' effects, stock, etc. Johnson offered $2 for his fare from Cartier station to White River. The conductor said that was not enough, and ultimately Johnson gave him $6. The train was divided into two portions. Johnson got into the forward part; it stopped near the switch; then the other half came up, and there was a collision. Johnson's goods were scattered and lost,

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and he himself sustained some injury. He seeks to hold the company liable. But it appears from the evidence that his position on the train was that of an intruder or trespasser; he got there by giving a bribe to the conductor. The company received no consideration for his conveyance. It does not seem to us that under the circumstances the company are liable. The court below, it may be remarked, not only gave respondent damages for personal injuries, but referred to his own oath as to the value of what was in his trunks. This consisted of merchandise, and not ordinary baggage. The judgment is reversed, and the action dismissed.

The judgment of the court is as follows :—

"The Court, etc.....

"Considering that when the collision of the appellants' railway trains occurred at White River, in the province of Ontario, on or about the 2nd April, 1886, whereby the respondent suffered injury to his person and to his baggage, goods or effects, the respondent had not acquired any right to be a passenger for hire on board of said trains or either of them, nor were said trains, as he had reason to know, regular trains for receiving ordinary passengers, nor were they by the appellants held out or pretended to be such, nor was the respondent lawfully on board either of said trains as an accepted passenger to be carried for hire, nor had he been received as such by the appellants or any person by them authorized, nor had he paid any fare to them or to any person by them authorized to receive fare for his passage, of which he was well aware, he was consequently travelling on board one of said trains at his own risk, and is not entitled to be indemnified for any injury or damages by him sustained to his person or property by said collision, as claimed by him in the present action ;

"Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court, at Montreal, on the 14th April, 1888, the Court of our lady the Queen, now here, doth cancel, annul and set aside the

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said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action of the said respondent, with costs as well of this Court as of the said Superior Court."

Judgment reversed.

Abbotts, Campbell & Meredith, for appellants.

Macmaster, Hutchinson & Maclennan, for respondent.

(J. E. M.)

May 23, 1890.

Coram DORION, Ch. J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

MATTHEW HANNAN,
(*Defendant in Court below*),
APPELLANT;

AND

THOMAS ROSS,
(*Plaintiff in Court below*),
RESPONDENT.

Sale of goods by weight—Contract, when perfect—Art. 1474, *C. C.—Damage to goods before weighing.*

HELD:—Reversing the judgment of TORRANCE, J. (M. L. R., 2 S. C. 395), TESSIER and BOSSÉ, JJ., dissenting, That where goods and merchandise are sold by weight, the contract of sale is not perfect, and the property of the goods remains in the vendor and they are at his risk, until they are weighed, or until the buyer is in default to have them weighed; and this is so, even where the buyer has made an examination of the goods, and rejected such as were not to his satisfaction.

APPEAL from a judgment of the Superior Court, Montreal (TORRANCE, J.), Dec. 14, 1886, maintaining the respondent's action. The judgment of the Court below is fully reported in M. L. R., 2 S. C., pp. 395-399.

March 24, 26, 1890.]

C. J. Doherty, Q. C., for appellant:—

The principal evidence made by respondent consists of

the testimony of William M. Fuller, the commission merchant who acted as respondent's agent in making the alleged sale.

There is no writing whatever to establish the alleged contract, and no *commencement de preuve par écrit*, the only question put to appellant himself as a witness on respondent's behalf, being whether or not William Hannan, the person with whom Fuller negociated as to the cheese, was in the habit of buying cheese for appellant, and whether the latter was aware that he entered into negotiations with Fuller about this cheese, which facts he admits.

Appellant submits that under these circumstances, parol evidence of the pretended sale was inadmissible under Article 1235, C. C.

But even if admissible what does this evidence show? It is substantially to the effect that William Hannan, acting for appellant, agreed to purchase 1648 boxes of cheese from respondent at 10½ cents per pound, such cheese to be tested, that is weighed and the number of pounds ascertained, prior to delivery. It proves at most a sale of things movable *by weight*, a sale governed by Article 1474 of our Civil Code, which says: "When "things movable are sold by *weight*, number or measure, "and not in the lump, *the sale is not perfect until they have* "*been weighed*, counted or measured."

Taking, then, Fuller's account of the agreement, which he tells us was made between him and William Hannan, on the 9th April, 1886, to be strictly accurate; or taking even the allegation of the pretended contract of that date, as set forth in plaintiff's declaration, to be proven, we have a sale of a quantity of cheese by the pound, with an express agreement that the weight should be *tested*, a sale not perfect until the cheese had been weighed, and the quantity and price ascertained.

That such a sale leaves the goods up to the time of the weighing or testing at the risk of the vendor, clearly results from the terms of Article 1474, C. C., above cited. The sale is not perfect; the property remains in the

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vendor; the purchaser has no recourse, failing delivery, but his action in damages.

That this is both the French and the English law, a brief examination of the authorities who have written under both systems, will clearly demonstrate.

That such was the law in France previous to the Code Napoléon, is undoubted. Pothier, Vente, paragraphs 308 and 309, makes this perfectly clear, and shows, moreover, that the sale now in question, is in its nature, a sale by weight, and governed by the rule above stated.

The commentators on the Code Napoléon, appellant submits, equally support his position. Troplong, Vente, paragraphs 81, and following, under Art. 1585, C. N., has a very full exposition of the doctrine of the French law upon this subject, which bears out perfectly appellant's contention. Marcadé, on the same Article (1585) of the Code Napoléon (vol. 6, pages 154 and following), also sustains the pretension of appellant, as does Mourlon (vol. 3, paragraph 478 *et seq.* under Articles 1585-86, C. N.)

It is true there is a divergence of opinion among the authors who have commented the French Code, resulting from the apparently limitative terms of Art. 1585 of that Code, as to whether or not in such a sale the property does or does not pass to the purchaser before weighing. All, however, are agreed that at all events the goods are, up to the time of weighing, at the risk of the vendor.

This difference of opinion seems to have arisen from the fact that the Article of the French Code does not declare a sale of the kind in question not perfect absolutely, as does the Article of our Code, but adds the words, which the authors who favor the doctrine of immediate transmission of property interpret as limitative, "en ce "sens que les choses vendues sont au risque du vendeur, "jusqu'à ce qu'elles soient pesées, comptées ou mesurées." Whether these words were intended to have the limitative effect attributed to them, may be more or less open to question, though the authors who hold they have not, appear to have the best of the argument. But under our Article any discussion of their effect would be beside the

question. Our Article declares absolutely that the sale is not perfect, thereby adopting the doctrine of Pothier, and of Marcadé and Troplong, who are the authors referred to by the Codifiers, under this article.

This should be sufficient to establish that under our law, a sale such as that alleged by respondent, does not transfer the property nor put the goods at the risk of the purchaser, up to the time of the weighing.

If we turn to the English law, we find the same rule applied there. It is laid down by Lord Blackburn, in his Treatise on the Contract of Sale, paragraph 175 (2nd edition, p. 127, "The second (rule) is that where anything "remains to be done to the goods for the purpose of ascer- "taining the price, as by *weighing*, measuring or *testing* "the goods where the price is to depend on the quantity "or quality of the goods, the performance of these things, "also, shall be a condition precedent to the transfer of the "property, although the individual goods be ascertained, "and they are in the state in which they ought to be "accepted." After discussing this rule he declares it to be "firmly established as English law" as having been adopted directly from the civil law. He cites numerous cases as sustaining this doctrine, among others a case of *Logan* v. *Lemesurier*, a Quebec case decided by the Privy Council, and directly in point in this case.

Benjamin on Sales, paragraph 319, cites with approval, the rule as laid down by Lord Blackburn, and refers to numerous cases in which the same was adopted by the Courts.

Appellant then submits that taking the sale as alleged by respondent to be proven, the effect thereof was not to pass the property in the cheese to appellant, nor put the same at his risk until weighing or testing.

Before this was done, and before any attempt was made to put appellant *en demeure* to do it, the water rose, flooding the premises of respondent's agent where the cheese was, and damaging the cheese.

When this happened, by law the property in the cheese

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had not passed, and it was still at the risk of respondent. By his pleas appellant had alleged this fact as being the necessary consequence and meaning of the contract, not only by law, but also by reason of the well established and universally recognized custom of trade. Although this allegation had been by the judgment of Mr. Justice Jetté declared to be well-founded in law, and such custom had been declared to be a valuable guide in arriving at the intentions of the parties to the contract—the Honorable Judge who rendered the judgment appealed from, absolutely refused to allow any evidence to be made of its existence, and ruled out the evidence tendered for that purpose by appellant. To this ruling the latter respectfully excepted. Although in view of the clearness of the law upon the subject, it may be unnecessary for appellant to insist upon his right to establish this custom by evidence, he nevertheless respectfully submits that he was entitled by law to do so. He had specially pleaded the custom, and its relevancy had been upon demurrer expressly maintained.

All contracts are made in view of the established customs and usages known to and constantly acted upon by the parties to them. The old rule of interpretation, "in contractibus tacite veniunt ea quae sunt moris et consuetudinis," has been expressly adopted by Art. 1017 of our Civil Code.

Appellant submits that the ruling on this question was erroneous, and that he should have been allowed to prove the custom pleaded as showing what the intention of the parties was in entering into the agreement in question. Had he been allowed so to do, he would have made abundantly clear the existence of the custom pleaded by him, which would have been of great importance in enabling the Court to arrive at a correct conclusion as to the effect of the agreement under discussion.

Another circumstance to which appellant would call the attention of this Court, is the gross negligence of respondent's agent who had possession of the cheese. It is proven that the approach of the flood was known in time

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to give ample opportunity to put the cheese in a place of safety. Whether it belonged to appellant or respondent, it was in either case the duty of the latter, who through his representative had possession of it, to use ordinary prudence in keeping it safe, and had he but done this, no damage would have been done the cheese, and for the damage done respondent was and is in consequence clearly responsible, and had no right to call upon appellant to take delivery of the damaged cheese.

As to the pretension that appellant was in default to take the cheese, before the damage occurred, the evidence completely disposes of that. Fuller in his testimony himself admits that appellant was to have till the 20th April to remove the cheese. The flood occurred and the damage was caused on the 17th of April, and it was not until the 24th of that month that respondent called on appellant to take the cheese, and then demanded he should take a larger quantity than it is pretended was purchased.

Upon the whole case appellant submits that the judgment appealed from is erroneous in finding that there was any perfect sale of the cheese in question, that the property therein had passed to appellant, that he was in default to take the cheese when the damage occurred, or was bound to take delivery when tendered to him, or that he was liable for the damages claimed by respondent in his present action.

Campbell, for respondent:—

The whole tenor of the evidence justifies the holding of the Court below, viz., that a complete sale had taken place, and that the property having passed on the 15th of April, the cheese selected and set apart was at the risk of the purchaser, and the loss must fall on him.

The sale was made of a certain special lot of cheese *en bloc*, the only condition being that the purchaser was to have the right of rejecting all cheese found to be unsound.

The purchaser, in accordance with this arrangement, sent his agent to the warehouse; the cheeses were examined, a very small proportion rejected and the remainder set apart. The purchaser then definitely appro-

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priated them to the contract and accepted them as his own property. By causing them to be coopered and removed downstairs he gave still stronger evidence of proprietorship. The weights of the cheeses were also taken by the purchaser, and it was by no means essential to the completion of the contract that those weights should be officially tested. The testing had merely to do with the calculation of the price and was not necessary to the determination of the thing sold. The cheeses when selected and coopered constituted a *corps certain* and were accepted as such by the purchaser. The terms of the original contract were fulfilled. Nothing remained to be done on the part of the vendor. The cheeses were to have been removed on the 16th of April. It was by Hannan's desire that Fuller kept the cheeses beyond that date. On the 18th, therefore, the appellant was in default to take delivery, and should bear the loss occasioned by his default.

Appellants attempted to show by evidence of an alleged custom of trade, that the risk of the property in contracts such as the one now in question, remained with the vendor. Respondent submits that this is altogether a question of law, and that by law the thing sold is at the purchaser's risk in the absence of any stipulation to the contrary. In this instance there was no such stipulation.

May 23, 1890.]

DORION, Ch. J.:—

The respondent Ross had a large quantity of cheese which was stored in the warehouse of W. M. Fuller, in the city of Montreal. The cheese was piled up in an upper story. The appellant's brother came to negotiate a purchase, and agreed to take the cheese at 10½ cents per lb. The cheese was to be weighed, and Hannan had until the 20th April to pay for it. Before the 20th arrived, and before Hannan was in default to take the cheese, the water flooded the premises, and a portion of the cheese was damaged. Ross then called upon Hannan to remove it, and pay for it. Hannan answered that he would not

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take it as it was damaged, and that the risk had been with the owner of the cheese. The Court below overruled this pretension, and Hannan has appealed.

The appellant relies upon Art. 1474, C. C., which says: "When things movable are sold by weight, number or "measure, and not in the lump, the sale is not perfect "until they have been weighed, counted or measured." This article is slightly different from Art. 1585 of the Code Napoléon, which reads as follows:—"Lorsque des "marchandises ne sont pas vendues en bloc, mais au "poids, au compte ou à la mesure, la vente n'est point "parfaite, *en ce sens que les choses vendues sont aux risques du "vendeur* jusqu'à ce qu'elles soient pesées, comptées ou "mesurées." The article of the French Code distinctly says that although there is a sale, the thing remains at the risk of the vendor until it is weighed. Our Code says the sale is not perfect until the thing is weighed. The majority of the Court are of opinion that the sale not being perfect, the risk was with the seller until the weighing, and that he has no claim for the damage sustained by the cheese before the weighing took place.

The judgment of the Court below is therefore reversed.

The judgment of the Court is as follows:—

"The Court, etc.....

"Considering that by his declaration the present respondent alleges that on the 9th of April, 1886, he sold to the appellant 1,643 boxes of cheese, at the rate of 10½ cents per pound, and that this sale was made through Wm. M. Fuller, his agent, in whose warehouse said cheese then was; that the appellant examined, selected, and set apart the 1,643 boxes of cheese, and that he removed the same from the second floor to the ground floor of Fuller's warehouse, where he had them coopered; that the weight was to be tested according to the mercantile custom, in view of a possible loss of weight; that on the 24th of April, by a notarial protest, he notified the appellant to have the weight of the cheese tested, and called upon the appellant to pay for and remove the

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cheese from Fuller's premises before the 29th of April, in default of which the respondent would advertise and sell the cheese at public auction, and claim the loss and difference from the appellant; that the appellant having disregarded the notification, the cheese was sold at a loss of $2,716.11, to which, adding divers charges, forms altogether an amount of $2,955.49, which he claims by his action;

"And considering that the defendant has by his plea alleged that there never was a sale of said cheese, but a mere proposal not accepted, that the property of the cheese never passed to the appellant, that it was not tested, nor delivered to the appellant, nor was the latter called upon to have it tested, until after the occurrence of the flood referred to in the plaintiff's declaration, whereby the cheese was seriously damaged and deteriorated; that had there been an agreement to purchase the said cheese, such agreement was not a complete contract of sale, but was at most an agreement requiring for its completion the doing of certain things, more especially the testing of said cheese and delivery thereof to the appellant; that this cheese remained the property of the respondent, and that having been damaged and deteriorated by the flood above referred to, the appellant was not bound to pay for the same:—appellant also pleaded the general issue;

"And considering that even if the said contract could be proved by verbal testimony, under the circumstances as disclosed by the evidence, it would appear that the cheese had to be weighed and paid for before delivery, and that the appellant was only bound to pay for the same and take delivery on the 20th of April; that the flood by which the cheese was damaged occurred on the 17th of April, 1886, before the appellant was in default of paying for and weighing the said cheese;

"And considering that the property of the said cheese still remained with the respondent, and was still at his risk when the same was so damaged by the flood which occurred on the 17th April, 1886;

"And considering that the appellant was not bound to take delivery of the cheese, or pay for the same, in the damaged condition it was after the 17th of April;

"And considering that there is error in the judgment rendered by the Court below on the 14th of December, 1886;

"This Court doth reverse the judgment rendered on the 14th of December, 1886, and doth dismiss the action of the respondent, with costs incurred as well in the Court below as on the present appeal, said costs to be taxed in this Court as in a cause of the second class." (The Hon. Justices Tessier and Bossé dissenting.)

Judgment reversed.

[illegible] & Doherty for appellant.

Abbotts & Campbell for respondent.

(J. K.)

November 22, 1881.

Coram DORION, Ch. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

COURT MOUNT ROYAL, No. 5694, ANCIENT ORDER OF FORESTERS FRIENDLY SOCIETY OF MONTREAL,

(*Plaintiffs in Court below,*)

APPELLANTS;

AND

CHARLES BOULTON ET AL.,

(*Defendants in Court below,*)

RESPONDENTS.

Charitable association—C. S. C. ch. 71—Division among members—Disposal of assets.

The majority of the members of a Friendly Association constituted under C. S. C. ch. 71, being expelled from the association, met in another place, and organized themselves for objects similar to those of the original association, but taking a different name. The trustees

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of monies belonging to the old association were among this number. In an action, brought in the name of the old association, calling on the trustees to account:

HELD:—(RAMSAY, J. diss.), That the members of the new association, although they had changed the name of the society, constituting as they did a majority, and the members claiming to be the old association being a minority, the latter were not entitled to demand the monies in the hands of the trustees.

APPEAL from a judgment of the Court of Review, Montreal, reversing a judgment of the Superior Court, Montreal (MACKAY, J.) April 30, 1879, and dismissing the appellants' action with costs.

The action was brought by the appellants against the respondents as trustees of the society appellants to recover from them $1,200, monies which, it was alleged, they held as such trustees, and refused to pay over:

The appellants, by their declaration, alleged that they are a corporation or association incorporated under the Act ch. 71, C. S. C., "An Act respecting charitable, philan-"thropic and provident associations." Under the provisions of this Act "any number of persons may unite "themselves into a society for making provision, by means "of contributions, subscriptions, donations, or otherwise, "against sickness, unavoidable misfortune, or death." The association is formed by making a simple declaration to that effect before a notary. After such declaration is made the association may sue or be sued.

The respondents pleaded that the society appellant had changed its name, and that the members had incorporated themselves under a new name called 'Independent Court Mount Royal,' and that they were accountable only to such new organization for the monies.

The appellants answered the first plea by saying that no legally constituted meeting ever passed a resolution dissolving the society, and that no new organization could have any legal claim to the monies and property of appellants, and that respondents are bound to account to appellants for the monies in their hands.

The judgment of the Superior Court was as follows:—

"The Court etc.....

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"Considering that plaintiffs have proved their allegations sufficiently to entitle them to judgment, to wit, the present judgment against defendants;

"Considering that plaintiffs have not by their declaration set forth the particulars of their Charter or Act of incorporation, but that defendants do not object to that, but in fact admit the Charter to be that involved in the act or deed of the 26th day of April, 1875, hereinafter mentioned;

"Considering the said act and deed of the 26th day of April, 1875, and that the corporation created by it still exists, and with right to plaintiffs to sue defendants as they have done; that the defendants who have pleaded, allege, but in vain, that from 21st of September, 1877, no society under plaintiffs' name has existed;

"Considering that defendants pleading affect, but in vain, to have dissolved the original charter act and deed of the 26th of April, 1875, and the corporation created by it;

"Considering that the defendants pleading have gone off from the original society, repudiate connection with it, have organized an independent society under another name, independence inconsistent with the fundamental compact or agreement of said 26th day of April, 1875; and particularly with the first of the rules, part and parcel of said compact;

"Considering that plaintiffs' funds and money have been appropriated by defendants wrongfully; that the defendants, before so taking wrongfully the said moneys, to wit, out of bank, had ceased to represent plaintiffs, and were not trustees for plaintiffs, and certainly are not now, but are bound now to give up to plaintiffs the said moneys;

"Considering that even if the defendants' expulsion from plaintiffs' body, to wit, in June, 1877, was irregular, defendants had a remedy, and might have got restored; but that their expulsion did not work dissolution of their original society;

"Considering that even if defendants and other their

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friends who left the original society in May, and were expelled in June, 1877, formed a majority of the members of the original society, the funds of the original society could not be carried away by them against the will of those remaining in the society and not expelled;

"Considering the proof and evidence, and that from them it appears that a number of the members of the plaintiffs' original society, though perhaps only a minority, as at date in May, 1877, when defendants left, or in June, 1877, when said defendants were expelled, has conserved the original charter and body, and is interested in the execution of the original trusts and under the original agreements for the governance of the society; that the original society, to wit, plaintiffs', still exists, and that the defendants are, contrarily to the original compact of the 26th day of April, 1875, diverting the plaintiffs' funds, and have illegally carried them to the use of another society, with a governance materially differing from that of the original;

"Considering finally that the defendants are bound to pay over to plaintiffs the trust moneys, to wit, $891.22, had and taken by defendants out of bank, and which belong to plaintiffs;

"Doth adjudge and condemn the said defendants jointly and severally to pay to said plaintiffs the said sum of $891.22, with interest thereon from the 25th day of May, 1878, till paid, and costs *distraits*, etc."

The judgment in Review, Dec. 29, 1879, (SICOTTE, JOHNSON, LAFRAMBOISE, JJ.), which reversed the above judgment, reads as follows:—

"The Court, etc.....

"Considering that at a meeting of the association formed in 1875 under the name of the 'Court Mount Royal No. 5694,' of the city of Montreal, by a resolution adopted in 1877, by a large majority of the members, it was decided that the name of the association would be hereafter The Independent Mount Royal, etc.,' and continued with

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this addition to the name, for the purpose provided by the statutes and their by-laws;

"Considering that the same association has continued to be in existence without interruption since 1875;

"Considering that it was lawful for the majority of the members of the association to pass such resolution, and make this change to their name; and that no new association was thus created;

"Considering that the defendants have remained officers of the association as trustees of the funds, and that they have accounted to the said association when and as they were called, they cannot be rendered liable to other parties or other association;

"Considering that the action is not brought by and with the consent of the association, but by a dissatisfied minority;

"Considering that there is error in the said judgment of the 30th of April, 1879, doth reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises, doth dismiss plaintiffs' action with costs, *distraits*," etc.

The appellants submitted:—

The body appellants had existed for a considerable period of time without being legally constituted, but were incorporated on the 26th of April, 1875, by a notarial act, passed before Smith, notary. To this deed is attached the rules and by-laws governing the body, appellants, and specially referred to in said deed of incorporation as forming a part thereof, and which is also of record.

That the object for which the society appellants was formed is in perfect harmony with those contemplated by the Act, chapter 71 of the Consolidated Statutes of Canada, may be gathered from the Sec. 1 of the rules and by-laws of appellants, attached to their deed of incorporation, which is as follows:—

"That this Court shall be called Court Mount Royal "No. 5,694..... And shall have for its object the raising of

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"funds, by entrance fees, subscriptions of the members, "fines, donations, and by interest on capital, for the follow- "ing purposes, namely: Insuring sums of money to de- "fray expenses of the funeral of deceased members or of "members' deceased wives or widows..... For rendering "assistance to members when sick and unable to follow "their employment, for supplying medical attendance "and medicine to members, for assisting members when "compelled to travel in search of employment. for grant- "ing temporary relief to members in distressed circum- "stances, and for giving assistance to widows and or- "phans of deceased members."

The members of the body appellants were known throughout the world as "Foresters," that is, as members of a sort of secret association, and as such had certain rules and regulations governing them. It was attempted, by respondents at the argument in the Court below, to show that the members of the corporation appellants having subjected themselves to the rules of this *mystic* association of "Foresters," they thereby lost or forfeited their legal character as an association formed under the provisions of the Statute whence they pretend to derive their being, and, consequently; have no *status* to appear in Court. That this argument can have no weight will at once be apparent, as there is nothing to prevent members of any of the various organizations of a similar character to unite for the purposes of the Statute invoked, and the Court below adopted this view.

The society appellants worked harmoniously until some time previous to May, 1877, when a large number of the members were expelled for violation of the rules of the society. The members so expelled left the society on the 27th of May or beginning of June. At the time of the expulsion of the members, the society was meeting in a room called the "St. Charles Club House," which was the regular place of meeting of the society, and the expelled members then moved in a body to the place called the "Victoria Bridge Hotel," and pretended to hold meetings as the society appellants. The appellants, however, con-

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tinued their regular meeting in the place regularly appointed for such meeting. It was at one of these meetings held by the expelled members, not in the regular place of meeting of the society, but at the Victoria Hotel, to which they had moved after their expulsion, that the resolution set out in the pretended deed of incorporation, was passed, by which they purported to dissolve the society appellants, and form the new society, Independent Court Mount Royal.

There can be no question about the fact that a large number of members were expelled, and amongst others, the defendants Boulton and James. The defendant Boulton himself admits the expulsion, and the same is fully admitted by all the other witnesses. Unfortunately for appellants, with those expelled were two of their trustees, the present respondents, who controlled the funds of the society, and, on going out from appellants, they took the money with them. The expelled members, having the money, conceived the idea of continuing to meet as Court Mount Royal, and eventually passed the resolution which purports to dissolve a body of which they were no longer members, and form a new one. It is not denied that the expelled members had the power to form a new organization, but such new organization could not in any way control the funds of appellants.

The Court of Review, in dismissing appellants' action, seems to have done so upon the principle that majorities were absolute, and hold the resolution passed by the expelled members of the body, after their expulsion from the society, to be a legal one, and that the minority are bound by it.

The respondents and their friends, even if they did, at the time they were expelled, represent a majority of the society appellants, could not organize a new society, independent in its character, differing in its objects from the society appellants, and appropriate to the new society the funds and property of appellants. This is what respondents pretend has been done. It is no answer to appellants' action for respondents to come before the Court and say,

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"We have paid over the money to this new organization, "and you have no claim on us."

The questions to be decided by the Court are:—

1st. Had appellants a legal existence under the deed of 26th April, 1875?

2nd. Did the expelled members legally only change the name of the society appellants, or did they go off from the original society, repudiate their connection with it and organize a new and independent society inconsistent with the fundamental principles of the original body?

3rd. Could even the majority of the society secede, erect themselves into a new corporation under a new name, dispose of the property of the original corporation, annul the original charter, thereby disfranchise the other members, and what is the effect of such secession as regards the remaining members and the rights and property of the corporation?

4th. Do the respondents now illegally retain from appellants the sum of $891.22?

That the appellants had a legal existence under the deed of 26th April, 1875, there can be no doubt. It is admitted in respondents' pleas.

As to the second question, the appellants submit that the pretended change of name invoked by the respondents is only a mere subterfuge adopted by the expelled members, under which they hoped, having possession of the funds of the original society, to be able to retain them. This is apparent upon every page of the evidence given by respondents. They considered the organization now invoked by them as a new and independent society, as in no way connected with the original society appellants. The best proof of this is from the evidence of respondent Bolton, though given reluctantly. After admitting that they had been expelled he says—

"*Question.*—Did you have anything to do with rules "and regulations now shown to you?"

"*Answer.*—No; we have nothing to do with them whatever."

"*Question.*—Is there any provision in these rules which

"allows the members to leave the institution and form one "entirely new and distinct from it ?"

"*Answer.*—There is a rule that if they are expelled and "do not leave it, they are put out, and *we, of course, form-* "*ed a new order of our own.*"

What stronger or more conclusive evidence could be given that *the change* was not merely changing the name of the society, but that a new and distinct organization was formed entirely independent of the old one.

Another fact which goes to show that the society "Independent Court Mount Royal" is a different society from appellants' is that this new organization does not recognize the constitution of appellants. It must be evident that the society here invoked by respondents is independent and distinct from appellants'. They differ in the the most material particular, they do not recognize the same constitution and by-laws. What the constitution of the new society is we know not, as none has been produced.

The respondents were expelled from the body appellants, and after such expulsion were bound, under the law governing the Act of incorporation and the by-laws of the society, to account for whatever monies they held belonging to appellants. They could not as expelled members of the society appellants and not at that time enjoying the rights and privileges of the society, organize a new society and carry the funds of appellants to it. Respondents, at the trial in the Court below, made a faint attempt to prove that their expulsion was illegal. Appellants submit now, as they did at the trial, that no evidence tending to show that the expulsion was illegal could be adduced by respondents under the pleadings, and, moreover, if proven, would be no answer to the present action. If the expulsion of respondents from the society appellants was illegal, the law gives them an action against appellants to be re-instated in their rights and privileges. This procedure, however, would not have suited their purpose.

If, however, respondents had not been expelled at all,

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but were, with those who left the society appellants, only a dissatisfied majority, could they form another society, such as they have, and take with them the funds of the original society?

This brings us to the consideration of the third question.

The appellants submit that in this case the respondents, even if they represented a majority of the original society, could not deal with the funds and property of the appellants as they might wish.

The society appellants was formed for a particular object, to assist the members in times of distress. Each member paid a certain weekly or monthly contribution to the general funds of the society, and in consideration of this payment was entitled to certain benefits under a certain condition of things. The charter or agreement of 26th April, 1875, was a contract entered into by all the members of the society, and each member had a *bona fide* and tangible interest in the funds of the society, so long as he had not forfeited them. The constitution of the society determines the rights of every member. Each member is entitled to a weekly allowance from the funds of the society while sick; to a sum of $30 on the death of his wife, and on the death of a member, his widow is entitled to the sum of $70 to defray his funeral expenses; and there are other subsidiary benefits attached to membership. The Court will see that this is a solemn contract entered into between the parties, which cannot be violated at the mere will of even the majority. If the judgment of the Court of Review is to be maintained, then those members who have violated this agreement are to have all, while those who wish to preserve it in its integrity sacrifice everything. Those members who conserved the original charter were never asked by the respondents and their friends to become members of the new body; they were not asked to become parties to the new charter; they never were notified to attend any of the meetings of the new society. According to the by-laws, each member is entitled to a notice of the meetings. That none was given to the now

members of the society appellants shows that they were not considered by respondents and their friends, as members of the new organization, and as not having any rights in the new body.

It is not even proven that the new society, "Court Mount Royal," is a benefit society, such as the society appellants, or that if the members of the latter were to join it that they could obtain the rights they are entitled to under the original charter.

If the act of the respondents and their friends is held by this Court as binding on the other members, it simply amounts to dissolving them of all rights in the original charter.

The respondents and their friends were bound under the compact to conduct themselves within the limits of their constitution, and then the law would have secured them their rights, if they had any grievances; but they, the majority, if you will, could not create of themselves a new body and take the money of the old. This is clearly laid down by Troplong, de la Société, V. 2, p. 213, No. 724:

"Mais remarquons-le bien, ce droit de la *majorité* d'obli-
"ger la minorité n'existe que pour les affaires de l'admi-
"nistration; son omnipotence ne va pas jusqu'à pouvoir
"changer les *conventions* primitives sur lesquelles s'appuie
"l'existence même de la société. Ici la résistance *d'un seul*
"des associés *suffit* pour rendre inutiles les projets de la
"majorité. Il faut rester dans les termes du contrat, ou
"se dissoudre; *l'unanimité peut* seul altérer les conditions
"constitutives de la société et substituer en quelque sorte,
"un contrat à un autre contrat. La raison dit, en effet,
"qu'on ne peut déroger aux clauses d'un contrat que par
"l'unanimité des contractants."

It has been held that "the common law containing no "principle allowing the *interest constituted in the funds of "the corporation to be taken away without the consent of the "whole body*, an injunction must issue."—Grant, on Corporations, p. 73.

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In the case of *Smith* v. *Smith*, referred to in Kent's Commentaries, Vol. 3, page 31, Judge Dessaussure is reported to have said, "The majority is without power to disfran-"chise any corporator, or to force a new charter on any "body of persons who do not choose to accept it."

The expulsion of the respondents and their friends from the society appellants had the same effect *quoad* appellants as though they had seceded. Their expulsion was the result of their own illegal acts, and the penalty, *expulsion*, is fixed by the constitution. But respondents, as expelled or seceding members, even though a majority, did not dissolve the body appellants, and as a corollary they could not as a body incorporated anew; if you wish, have any title or right to the property of the original body. The effect of their expulsion was merely to leave the society still in existence, though minus some of its members.

"If any portion of the members of a corporation secede, "and are even erected into a new corporation, the corpo-"ration property will not be *transferred or disturbed* in con-"sequence of the separation, but will remain with the "old corporation."

This principle is clearly laid down in *Dartmouth College* v. *Woodward*, 4 Wheaton, U. S. R. 518, a full history of which is also contained in a book published by J. M. Shirley on "The Dartmouth College Causes."

Also the same principle is recognized in *North Hampstead* v. *Hampstead*, 2 Wendell, N. Y. Rep., p. 135; *Brown* v. *Porter*, 10 Mass. Rep., p. 93; *Baker* v. *Fales*, 16 Mass. Rep., p. 488; *The Inhabitants of the County of Hampshire* v. *The Inhabitants of the County of Franklin*, 16 Mass. Rep. p. 75.

The Court is also referred to the following authorities upon the rights of majorities and the effect of members seceding from a corporation:—

Hodges v. *Wall*, Chancery, A.D. 1853. Judgment of Page Wood, V. C.; Bryce's *Ultra Vires*, 1st American edition of 1875, p. 540-671; Angel and Ames on Corporations, p. 770-771.

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The respondents submitted:—

These Foresters' associations have been imported from England. Whether they exist, in England, in a legal form or not, is not shown in the cause. In the absence of evidence tending to show the existence of a corporation in England, we have not to enquire whether such an organization if legal or constituted as a corporation in England, could extend its powers over branches of the same organization in Canada. So far as is proved in this cause, the courts of Canada have to deal with a voluntary and unincorporated body having a head in England.

As regards the Canadian association, styled under the name assumed by the appellants, it existed in Montreal since 1872; but it resorted to a form of association of incorporation only on the 26th April, 1875; when seven persons made a declaration before Smith, N.P., which constituted those seven persons and those who would become members thereafter, a Corporation under the provisions of ch. 71, C. S. C., as a benevolent society having for its object the raising of funds, by entrance fees, subscriptions of members, fines, donations and interest, for the following purposes, viz.: Insuring sums of money for the burial of members, or their wives or widows, *as provided for in the rules of the Limited District Branch of the Order*, for rendering assistance to members in sickness, for supplying medical attendance and medicine, for assisting members compelled to travel in search of employment, and for granting temporary relief to members in distressed circumstances and giving assistance to widows and orphans of deceased members.

A document filed by the appellants at *enquête*, is a declaration of incorporation, before Isaacson, N.P., 14th August, 1876, of four persons, who declare that there has, for some time past, existed and still exists in Montreal, an association of persons under the name of *The Montreal United District of the Ancient Order of Foresters Friendly Society*, for benevolent purposes, for raising funds to provide a sum of money on decease of a member or member's wife or widow, to defray the expenses of the district,

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render assistance to courts or bodies in connection herewith, whose funds have been exhausted, and to relieve distressed members upon satisfactory explanations,—and it is desirable that said society become incorporated under C. 71, C. S. C.,—the said parties (four in number) declare themselves to be incorporated under the said Act, and the name above mentioned.

No connection is established between this last organization and the other one, above mentioned, and the appellants thought this could be supplied by oral evidence, and it was attempted to be made out that the two organizations were one and the same thing; more than that,—that these two organizations were part of a far wider organization, having its head in England or Scotland,—which, is not clear, and that the lesser constellation, No. 5694, was ruled by a District Star Chamber, called indifferently the *Limited* or *United District Court*, controlled by an English or Scotch Planet, unknown and uncontrollable by the Courts of law of this country. This imitation of cosmogony did not work as harmoniously with the Foresters of Montreal, as with the astral bodies, where there exist, as in all parts of the British empire, some obnoxious notions, giving the upper hand to the majority, in corporations, as well as in voluntary associations.

The association existing under the name assumed by the appellants, seems to have worked tolerably well up to a certain period of 1877, some say May, others September. The members met in the hotel, kept by one Lomas, at Point St. Charles. Lomas became intolerable to the majority. He was expelled from the society, and a majority of 72 against 25 or 30, determined to remove from his house. But Lomas was one of the four members who had incorporated themselves as the United District Lodge, and the members of that Lodge reported the Court No. 5694, to the English Head Lodge, as refractory; and through a slow, and unexplained process, the minority of 25 expelled the majority of 72. In fact they expelled Lomas,—expelled the 72. It is that minority which modestly claims now the funds in the hands of the trustees, who were at one

time the respondents, but who had been replaced by other trustees, to whom they handed the money intrusted to them, long before the judgment of Mr. Justice Mackay, as it had been proved before him.

On the 30th April, 1879, Mr Justice Mackay condemned the respondents to pay a sum of money which had come into their hands through the will of the majority, and had gone out of their hands through the same medium. By that judgment the Court held, that a Corporation created under the provisions of our laws, could be governed, against the immense majority of its members, by an occult and unknown body, existing *dehors* the law and above the law, and deprive that majority of their funds, for the benefit of a small minority, in secret combination with the irresponsible and unknown body, sending its decrees from England.

Such views could hardly hold long. On the 29th September, 1879, the Court of Review, composed of Justices Sicotte, Johnson and Laframboise, unanimously reversed that judgment.

The respondents, in addition to the reasons assigned in the judgment, submit the following as grounds for affirming the judgment of the Court of Review:—

1. The respondents were elected officers of an association, acting through the majority of its members, and as such officers they were in duty bound to obey the orders of that association, embodied in resolutions regularly adopted by the majority.

2. The Court Mount Royal, No. 5961 was incorporated independently of all other organizations; and the law of the land did not justify any connection with other societies, unless these other societies were so connected or incorporated by the same instrument, or were connected in a manner to form one and the same Corporation, under the Charter of the Court Mount Royal.

3. By its Charter the Court Mount Royal or its members did not subject themselves to the *Limited or United District Branch*; and no by-laws could legally be adopted having for effect to subject the operations of the Court

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Mount Royal to the control of any other body, and thereby destroy its own Charter.

4. The law cannot recognize, under the Charter of the Court Mount Royal, any other controlling authority than that of the majority of its own members.

5. No connection could be established by by-laws or oral evidence between Court Mount Royal either with the *Limited or United District Branch* or with some irresponsible and unknown associations, possibly existing in England or Scotland, of a character to disfranchise the majority of the Montreal association.

6. The respondents were the servants of the association that had appointed them, and could not, without plain violation of duty, ignore the orders of the majority.

7. The majority could alter the constitution and by-laws and regulate their existence as they did, and the respondents were bound to obey the orders of the majority, even if that majority adopted a questionable course of dealing with the affairs of the association.

8. The respondents were bound to surrender their trust when called upon to do so by the majority, and they had surrendered the funds of the association to their successors in office long before the judgment of the first instance.

9. If the appellants were well founded in the contention that they are still in existence, they had no other action against the respondents than an action for rendition of account, and had not the *assumpsit* action by them adopted.

Nov. 22, 1881.]

RAMSAY, J. (*Diss.*) :—

This is an action by an incorporated body to recover from its former trustees the money of the association which may be in their hands. The plea to this action is thus resumed in respondents' factum :—

"That it was not true that the plaintiffs constituted a "body politic and corporate, that for a certain time there "existed in Montreal, under the name assumed by the

"plaintiffs, an incorporated benevolent society, composed "of a certain number of persons, including the defendants, "who were appointed treasurers under the name of trus- "tees, and as such the defendants were entrusted with a "certain sum of money which was the common property "of the said association; that at a meeting of the mem- "bers of the said association held at Montreal, on the 21st "September, 1877, the said society resolved and determin- "ed that, for the Province of Quebec, the name of the so- "ciety should be changed into the name of 'The Inde- "pendent Court Mount Royal Order of Foresters Friendly "Society, Montreal,' and then and there the members of "the said society or the majority thereof, incorporated "themselves under the latter name and signed a docu- "ment to that effect, and declared that, under that name, "the said society should be the same society as heretofore "incorporated, with the constitution, by-laws, rules and "regulations annexed to the deed incorporating the society "under the name assumed by the plaintiffs, in so far as "the same might be suited to the independent existence "of the said society, with the same officers, until replaced, "and with the succession, in all matters of the said here- "tofore society; that from and after the 21st September, "1877, no society has been in existence under the name "assumed by the plaintiffs, and since that time the de- "fendants have become the trustees of the said society, "'The Independent Court Mount Royal Order of Foresters "Friendly Society, Montreal;' that if any persons have "formed an association under the name assumed by the "plaintiffs, they have no claim against the defendants or "any of them, and especially the said Charles Boulton and "Charles James, inasmuch as the latter are not officers "and hold no trust from the plaintiffs."

There was no other plea than this except the general issue. It is important to understand what this plea really puts in issue, for under the view I take of the case, the judgment about to be rendered, confirming the judgment of the Court below, but for different reasons, completely displaces the question, and turns on what is neither

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pleaded nor proved. The special plea, [illegible] setting aside some unmeaning words, appears to me to amount to no more nor less than this, that the majority of an incorporated association can alter its name and its objects at pleasure. This was substantially the ground of the judgment of the Court of Review reversing the judgment of the court of first instance. A similar opinion was expressed by the judge in appeal in the case of *Dobie & The Temporalities of the Church of Scotland*; but I am glad to say it is not the opinion of any judge of this Court, and as I have said the judgment in this case will turn on totally different matter.

Now, the facts established clearly show that there was a disagreement among the members of the association, that there was a reference to a governing body in England, legal or the reverse it is unnecessary to enquire, and that the majority were expelled. Without contesting the regularity or effect of this decision, they acquiesced, and in order to keep together, as they say, they formed a new corporation, and the trustees, who adhered to the new company, carried off with them the whole funds of the old association. The only allegation of the plea that could be any answer to the demand is that the old association had ceased to exist. It was for those who admitted it had existed to show that it had ceased to exist. (368, C. C.) But of this there is not a shadow of evidence, nor is it even suggested by which of the known ways corporations are extinguished, this one ceased to exist. It is expressly declared in the Code that a corporation cannot be destroyed by the vote of a majority. It must be a unanimous vote. 368, C. C. I am therefore of opinion that the judgment of the Court of Review should be reversed.

DORION, Ch. J. (for the majority of the Court) :—

In the year 1872 a number of persons formed a society in connection with the Ancient Order of Foresters existing in England. In 1875 they incorporated themselves under the Act for the incorporation of friendly societies (C. S. C. ch. 71. It is not difficult to get incorporated under that

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Act. Three or four persons can go before a notary and make a declaration, and they become incorporated.

In 1877 dissensions arose between the members of the society. It is not necessary to say who were right or who were wrong; we don't find it in the record. The upshot was that the society could not get along very well. The minority were overpowered, and appealed to the district court, which sustained the appeal. Subsequently the majority of the members separated from the others, and formed themselves into an association with a change of name. It seems clear that the corporation is extinct *de facto*. The only difficulty is with reference to the division of the assets. These monies do not belong exclusively to the majority or to the minority, but to both. The part belonging to each ought to be determined amicably, and I would suggest that it should be left to the decision of two or three disinterested persons. The majority are not entitled to keep the whole, but, at the same time, it would be a great injustice to decide that the minority should get the entire sum. We cannot therefore maintain the present action. The judgment is confirmed, but not for the reasons stated in it, because we do not admit that the majority of the members of the corporation had a right to change its name. We hold that the action was not rightly brought.

The judgment of the Court of Appeal reads as follows:—

"The Court, etc.....

"Considering that it appears by the evidence in this cause that owing to dissensions among the members composing the society incorporated under the name in which this action has been brought, the members have separated into two bodies, each claiming to constitute and represent the said corporation;

"And considering that the present action has been brought at the instance of that portion of the members who are a small minority of those composing the said corporation;

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"And considering that the present action could not be brought against the present respondents to settle the difficulties existing between these two classes of members, and that the said respondents are not bound to account to the said minority who have brought this action, for monies claimed also by the members composing the majority;

"And considering that the said minority who have brought this action, have not proved that at the time of its institution, the respondents were in possession of any funds belonging to the said corporation, or of which they were accountable to the said minority;

"And considering that there is no error in the judgment rendered by the Court of Review at Montreal on the 29th December, 1879;

"This Court doth confirm the said judgment with costs, as well those incurred in the Court below as on the present appeal, (The Hon. Mr. Justice Ramsay dissenting)."

Judgment confirmed.

Macmaster, Hall & Greenshields for appellants.

Doutre & Joseph for respondents.

(J. K)

September 22, 1890.

Coram TESSIER, CROSS, BABY, BOSSÉ, DOHERTY, JJ.

JAMES D. McFARLANE,
(Plaintiff in Court below),
APPELLANT;

AND

SAMUEL C. FATT,
(Contestant in Court below),
RESPONDENT.

Partnership—Participation in profits—Judicial abandonment—Contestation of claim.

HELD:—(Following *Davie & Sylvestre*, M.L.R., 5 Q. B. 143), 1. That an agreement by which M. was to advance money to N. for the purposes of his business, and M. was to be manager at a monthly salary, and also to receive one-half of the net profits of the business, constituted a partnership between N. and M. as regards third parties.

2. Where the curator to an abandonment has been duly authorized to contest a claim upon the estate of the insolvent, the Court will not upon the contestation of the claim, revise the judgment authorizing the curator to contest.

APPEAL from a judgment of the Superior Court, Montreal (TAIT, J.), September 20, 1889, in the following terms:—

"The Court having heard the parties by their counsel upon the merits of the claim of said James D. McFarlane, and contestation thereof, examined the evidence and exhibits filed of record, and deliberated;

"Considering that the said contestant was duly authorized to contest said claim, and that, in any case, the Court cannot upon the present contestation, revise the judgment authorizing the contestant to contest said claim;

"Considering that the said contestant has established the material allegations of his contestation, and particularly that the said claimant was a partner with the said insolvent in the business carried on under the name of 'B. L. Nowell & Co.;'

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maintain said contestation, and reject said claim, with costs against said claimant."

The facts were as follows:—

Previous to June, 1887, B. L. Nowell was doing business in Montreal as a merchant, dealing in fertilizers, under the name of B. L. Nowell & Company, and not having sufficient capital in his business, he applied to the appellant in this cause.

After some negotiations, the parties entered into the following contract:—

This agreement witnesseth, That whereas B. L. Nowell, of the city of Montreal, merchant, doing business there as manufacturer of and dealer in fertilizers, under the name and style of B. L. Nowell & Company, is desirous of borrowing of J. D. McFarlane, of the same place, the sum of $2,000, to be used in the same business, and has employed the said J. D. McFarlane as manager thereof.

It is therefore agreed by and between the said parties as follows:—

The said McFarlane hereby loans to the said Nowell the said sum of $2,000 as he may require, and for which the said Nowell shall give to the said McFarlane his promissory notes, payable on the 1st of June, 1888; the said Nowell hereby engages the said McFarlane as manager of his said business for one year from the 1st of June instant, 1887, at a salary of $100 per month, payable monthly.

That as additional consideration for the services to be performed by the said McFarlane as aforesaid and of said loan, the said Nowell agrees to pay the said McFarlane, in addition to the said sum of $100 per month, one-half of the net profits of the said business during said year;

That in consideration of the premises and as additional security to the said McFarlane for the payment of the said loan, the said Nowell agrees not to draw from said business more than the sum of $100 per month, but said Nowell shall be entitled to charge said sum to expense account in arriving at the net profits of the year;

That at the end of the present agreement, to wit, on the 1st of June, 1888, the said Nowell agrees, if the said McFarlane desires to do so, to admit said McFarlane to said business as an equal partner on the said McFarlane's contributing at least $2,000 to the capital stock thereof, the said Nowell undertaking to contribute an equal amount.

Executed at Montreal aforesaid, this 3rd day of June, 1887.

B. L. NOWELL,
JAMES MCFARLANE.

It is further agreed that I will allow James McFarlane eight per cent interest per annum on the money loaned B. L. Nowell.

B. L. NOWELL.

After the passing of this agreement, the parties carried

out its terms, and appellant went into the premises of B L. Nowell & Company, and appeared there from day to day before the public and the customers of the firm as having apparent control over the business.

In the following year the business became unprofitable, and B. L. Nowell & Co. made an assignment to the respondent Fatt. In this abandonment Nowell put the appellant down as a creditor for $1,242.07.

After the estate had been realized, and was ready for distribution, the curator contested the claim of appellant. The grounds of the contestation were three:

1. The curator alleged that the agreement entered into between the appellant and the insolvent on the 3rd June, 1887, was a simulated document, and, while pretending to be an agreement for the loan of money and the hire of services, in reality constituted a partnership between them.

2. That claimant by his acts held himself out, and induced customers of the firm to believe that he was a partner, and was introduced as such by Nowell (the insolvent) without objection.

3. That he received a portion of the profits of the business during the first seven months after his connection with it, in addition to his interest and salary.

The contestation was maintained by the judgment cited above.

[May 21, 22, 1890.]

Geoffrion, Q. C., and *Leet*, for the appellant, contended that the agreement of 3rd June, 1887, did not constitute McFarlane a partner with B. L. Nowell, and that the case was not governed by *Davie & Sylvestre*, M. L. R., 5 Q. B. 143. Another objection to the judgment was this: The abandonment was made by B. L. Nowell only, doing business *alone* under the name of "B. L. Nowell & Co." Consequently, the creditors filed their claims, the curator and inspectors were appointed *not* to a *partnership* of *Nowell & McFarlane*, but to a business carried on by *Nowell alone*, doing business under the name of "B. L. Nowell & Co."

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The appellant contended that his position as creditor, upon the sworn statement and *bilan* filed by Nowell, could not be attacked without attacking the abandonment proceedings. Instead of contesting his claim as a creditor of B. L. Nowell, they should have proceeded to attack the abandonment proceedings, and have asked by their prayer that the abandonment made, and *bilan* filed by Nowell, be declared to be untrue and be set aside, and that appellant be called upon to make an abandonment as a member of the firm of B. L. Nowell & Co. Not only would these have been the legal and reasonable proceedings to be taken, but they would have given the appellant the opportunity of defending himself in a proceeding where the whole amount for which such proceedings would make him liable would be in question. Whereas, the present proceedings may deprive him of an appeal.

The appellant cited a judgment of Loranger, J., in the Superior Court, in the case of *Reid* v. *McFarlane*, Nov. 18, 1889, upon precisely the same evidence, which maintained the appellant's pretensions in the following terms:—

"La Cour, etc.....

"Attendu que le demandeur réclame du défendeur la somme de $110, valeur de marchandises et effets de commerce qu'ils ont vendus à la société B. L. Nowell & Co., et allègue qu'à l'époque de cette vente le défendeur faisait partie de cette société;

"Attendu que le défendeur nie les faits et plaide qu'il n'était que le gérant de la société B. L. Nowell & Co., avec un salaire de $1,200 et une part dans les profits, dans le cas où les profits nets du commerce s'élèveraient à plus de $1,200 par année, mais qu'il n'a jamais fait partie de la société;

"Considérant que la société alléguée n'a pas été prouvée, qu'il est vrai que le défendeur a prêté à la société B. L. Nowell & Co. une somme de $2,000 remboursables à des époques déterminées au taux de huit pour cent; que le défendeur devait en outre de son salaire participer dans les bénéfices si les profits s'élevaient à plus de $1,200;

mais il n'est établi qu'il y ait eu une société entre les parties ;

"Considérant que la participation dans les bénéfices ne constitue pas nécessairement une société et que c'est là une question à être résolue d'après les circonstances ;

"Considérant que dans l'espèce, les parties n'ont jamais entendu s'associer pour les fins du commerce, B. L. Nowell & Co. ; que la participation dans les bénéfices était subordonnée à une condition exceptionnelle, savoir, que le défendeur ne devait être admis à cette participation que dans le cas où les profits du commerce s'élèveraient à une somme déterminée ; que cette réserve indique que les parties n'avaient en vue qu'un encouragement offert au défendeur pour stimuler son zèle et l'engager à veiller avec plus de soin à la gestion des affaires du dit commerce ; que cette participation faisait partie du contrat de louage d'ouvrage intervenu entre les parties ;

"Considérant que les demandeurs n'ont pas prouvé les allégués de leur déclaration, que le défendeur a prouvé ceux de sa défense, renvoie l'action des demandeurs avec dépens."

Archibald, Q. C., for the respondent, relied on *Davie & Sylvestre*, M. L. R., 5 Q. B. 143.

Sept. 22, 1890.]

DOHERTY, J. :—

It has been contended on the part of the appellant that although there was to be a division of the profits, the mere fact that a person is entitled to a share in the profits of a business does not constitute him a partner. But this Court holds that whatever may be the rights of the parties between themselves, the agreement in question rendered them liable as partners to third persons, creditors of B. L. Nowell & Co. The judgment will therefore be affirmed.

BOSSÉ, J. :—

This Court recently, in the case of *Davie & Sylvestre*, M. L. R., 5 Q. B. 143, laid down the rule that participation in the profits of a business rendered the person par-

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ticipating liable as a partner as regards third parties, creditors. That principle must be followed here.

A technical objection was also urged by the appellant. It was said that the abandonment had been made by one partner only, and that the abandonment proceedings should have been contested. We do not think this objection can be urged on the present contestation.

The judgment is confirmed, adding a clause reserving appellant's recourse against the assets of B. L. Nowell individually.

The judgment reads as follows:—

"The Court, etc.:...

"Considering that the said contestant, now respondent, was duly authorized to contest said claim, and that in any case the Court cannot, upon the present contestation, revise the judgment authorizing the contestant to contest said claim;

"Considering that the said respondent has established the material allegations of his contestation, and particularly that the said claimant, now appellant, was a partner with the said insolvent in the business carried on under the name of B. L. Nowell & Co.;

"Doth affirm the judgment appealed from, to wit, the judgment rendered by the Superior Court at Montreal on the 20th September, 1889; doth maintain said contestation, and reject said claim as made against the estate of the said B. L. Nowell trading under the name of B. L. Nowell & Co., reserving his claim against the assets of the said B. L. Nowell individually, with costs against said appellant as well in the Court below as in the Court here."

Judgment confirmed.

Maclaren, Leet, Smith & Smith for appellant.

Archibald & Foster for respondent.

(J. K.)

September 22, 1890.

Coram DORION, C. J., TESSIER, CROSS, BABY, DOHERTY, JJ.

GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA,

(*Plaintiffs in Court below*),

APPELLANTS;

AND

MONTREAL TELEGRAPH CO.,

(*Défendants in Court below*),

RESPONDENTS.

Lessor and lessee—Arts. 1612, 1614, 1618, *C. C.—Disturbance of lessee's use—Claim for reduction of rent—Trespass—Judicial disturbance.*

HELD:—Affirming the judgment of WURTELE, J., M. L. R., 6 S. C. 74.

1. Until a judicial disturbance has arisen, and a partial eviction has been the consequence thereof, no claim by a lessee for a reduction of rent can be maintained. A judicial disturbance may arise either by an action of a third person setting up a claim of right to the detriment of the lessee, or by an exception setting up a claim of right, in answer to an action of damages brought by the lessee against a trespasser.

2. A lessee who is disturbed in his possession by the material act of a third party, whatever may be the assertion of right made by such third party at the time of the commission of the act, should treat such disturbance as a mere trespass, and should bring suit against the trespasser for the recovery of the damages which he has suffered by reason of such trespass, and to prohibit the trespasser from further disturbing him in his enjoyment. If the trespasser by his pleas raises a claim of right, the lessee should notify the lessor of the disturbance, and can then bring an action in warranty against the lessor for the purpose of obtaining a reduction of rent, and damages.

Per DORION, C. J.:—On the merits the action should be dismissed, the appellants by the agreement in question having assumed all risk of diminished income in the working of the telegraph lines transferred by respondents, and having entered into this agreement after the Canadian Pacific Railway Company had obtained authority from Parliament to establish telegraph lines for the transmission of messages for the public.

APPEAL from a judgment of the Superior Court, Mon-

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treal (WURTELE, J.), Jan. 31, 1890, dismissing the appellants' action which was instituted for reduction of rent and damages. The facts are fully stated in the judgment of the Court below, M. L. R., 6 S. C. 75 *et seq.*, and in the opinion of the Chief Justice.

May 26, 27, 1890.]

Irvine, Q. C., and *Girouard*, Q. C., for the appellants.

Lacoste, Q. C., *Geoffrion*, Q. C., and *H. Abbott*, Q. C., for the respondents.

Sept. 22, 1890.]

The unanimous judgment of the Court was delivered by the Chief Justice.

DORION, C. J.:—

This appeal is from a judgment rendered by the Superior Court, on the 31st of January, 1890, dismissing the action of the appellants and also their incidental demand, by which they claimed a reduction of the amount they had promised to pay annually to the respondents by an agreement entered into between the parties on the 17th of August, 1881, and also the reimbursement of a large sum paid under the same.

By this agreement, the appellants undertook for a period of ninety-seven years, to reckon from the 1st of July, 1881, to work and operate, by means of their own employees, the system of telegraph lines which the respondents had been operating before, the appellants receiving all the rates and charges for the transmission of messages and all other earnings to be derived from said telegraph lines, including those to accrue under the agreements made with the Credit Valley Railway Company, the South Eastern Railway Company, the Canada Central Railway Company, the Brockville and Ottawa Railway Company, the Prescott and Ottawa Railway Company, and other Railway Companies referred to in the said agreement,—for the working of telegraph lines in connection with the said railways.

The appellants were put in possession of the telegraph lines of the respondents and received all the earnings of

the said lines and those derived under the agreements made with the said railway companies from 1881 to 1886, when the Canadian Pacific Railway Company, which before the agreement of the 17th of August, 1881, had obtained a charter, authorising them to establish telegraphic communications along their lines of railway for the use of the public, having by lease, purchase and otherwise obtained the control of the railways referred to in the agreement of the 17th of August, 1881, began to operate for the use of the public, telegraph lines along the said railways, whereby the business of the appellants was injuriously affected. The appellants continued however to pay to the respondents, but under protest, the quarterly payments mentioned in the agreement of the 17th of August, 1881, until 1889, when they instituted their action by which they claimed that the amount they agreed to pay to the respondents by the agreement of the 17th of August, 1881, should be reduced by $40,000 per annum, and also to be reimbursed a sum of $80,000, which they had paid under protest during the preceding eighteen months. Later, the appellants by an incidental demand, claimed a further reduction of $40,000 per annum, on the amount payable to the respondents under the agreement of the 17th of August, 1881. By consent the pleadings and evidence were considered as applying to both the principal and the incidental demands.

The action was instituted under the summary proceedings provided by article 887, C. C. P., as arising out of the relations between landlord and tenant. To this the respondents objected by a preliminary plea which was dismissed. They then, without waiver of their exception to the judgment, pleaded to the merits of the demand by denying the allegations of the declaration and by alleging they had fulfilled all their obligations by placing the appellants in possession of all telegraph lines they possessed on the 1st of July, 1881,—that the agreement of the 17th of August contained no stipulation of guarantee on their part, the appellants having assumed all risks whatsoever, and that as to the claim made to recover the

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$80,000 they had paid, the appellants were not entitled to it, as they had paid this sum voluntarily under no restraint and without error;—they further urged that the Court in its summary jurisdiction had no power to reduce the amount payable under the agreement of the 17th of August, 1881.

Upon these pleadings and evidence adduced by the parties, the Court below dismissed both the action and incidental demand of the appellants, on the ground that the alleged interference by the Canadian Pacific Railway Company with the rights and privileges acquired by the respondents under the several contracts with the South Eastern Railway Company and other Railway Companies referred to in the agreement of the 17th of August, 1881, was a mere trespass which did not constitute a "*trouble de droit*" and did not authorise an action for a reduction of rent under Arts. 1616 and 1618 C. C.

From the evidence it appears that the Canadian Pacific Railway Company has obtained the control and management of the South Eastern Railway and other railways referred to in the agreement of the 17th of August, 1881, on the express condition, with perhaps one exception, that they should assume all the obligations of the said Railway Companies towards the respondents under the agreement referred to. The Canadian Pacific Railway Company not being parties to this case, their exact pretentions are not disclosed, so as to show that they intend to raise any question which would have the effect of ignoring the conditions under which they acquired these several lines of railway. On the contrary it would seem from the evidence that they contend they are strictly following the terms of the several agreements between these railway companies and the respondents. If so they raise no claim of independent right, and it becomes a mere question of the interpretation of the several agreements made by the respondents with said railway companies. If the appellants had instituted an action to restrain the Canadian Pacific Railway Company from establishing or operating telegraph lines on the portions

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of railways affected by the agreement with the respondents referred to in the deed of the 17th of August, 1881, they would have obtained either an order enjoining the Canadian Pacific Railway Company from transmitting telegraph messages in violation of the rights of the appellants, as was recently done in the case of the Western Union Telegraph Company against the Canadian Pacific Railway Company, reported in the 17th Supreme Court Rep., p. 151, or they would have obtained a clear statement of the pretentions of the company so as to enable them to call the respondents into the case to contest the pretentions of the company if they were such as to give rise to any guarantee. The appellants have not done so, and they have put themselves in a position to be unable to show that the acts of the Canadian Pacific Railway Company are anything else but mere acts of trespass, for which the respondents are in no wise responsible.

In that view of the case the judgment of the Court below, and the reasons on which it is based, are well founded, and this appeal must be rejected.

For my own part, I would have preferred that in a case of so much importance on account of the vast interests involved, which must necessarily suffer from any prolonged litigation, the whole merits of the case should have been disposed of at once. I am prepared to say that whatever may be the nature of the agreement of the 17th of August, 1881, whether the same be considered as an ordinary lease of real estate, or an emphyteutic lease, or a contract for hire of labour as it professes to be by its form, this agreement must like any other contract, be interpreted according to the avowed intention of the parties to be deduced from the terms of the stipulations it contains, and from the circumstances under which it was made

As already stated the agreement between the parties is not in the shape of a lease of property, but in the form of a contract for the hire of labour; it is made for a period of ninety-seven years, with the obligation on the part of the appellants to pay assessments, insurance and all re-

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pairs, with the stipulation that at the expiration of the term for which it was made the appellants should return to the respondents the whole property and rights, being the subject of the agreement, with any improvements or addition which may have been made thereto without indemnity. There is no warranty stipulated in the agreement, but on the contrary it is expressly covenanted that the appellants assumed all risks of any deficiency in their earnings, and agreed to make no claim upon the respondents for remuneration upon any grounds whatsoever, declaring that the true intent and meaning of the agreement was that the respondents should during the continuance of the agreement receive quarterly the sum of $41,250, whether the earnings of the said lines and property should amount to that sum, or to more, or less.

This agreement was entered into after the Canadian Pacific Railway Company had obtained by a public statute passed by the Dominion Parliament, the authority to establish telegraph lines for the transmission of messages for the public. It was with a full knowledge of such legislation that the appellants in their agreement with the respondents have assumed all risks of diminished income in the working of the telegraph lines of the respondents. The appellants have not shown that at the time of the agreement of the 17th of August, 1881, there were any defects in the titles of the respondents or in the agreements with the several railway companies referred to in said agreement, nor that they have not been put in possession of all the property and rights constituting the whole of the telegraph lines which they were operating at the time the said agreement was entered into. If they have been deprived of any of the advantages they expected to derive from said agreement, it is due to the competition of the Canadian Pacific Railway Company, and to circumstances which have occurred since the date of the agreement, and for which the respondents are not responsible.

I have therefore no hesitation in saying that apart from the technical grounds invoked against the action of the

appellants, and considering their claim on their own merits, their action and incidental demand were properly dismissed.

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Judgment confirmed.

Girouard & deLorimier for appellants.
Geoffrion, Dorion & Allan for respondents.
(J. K.)

November 22, 1890.

Coram DORION, C. J., TESSIER, BOSSÉ, DOHERTY, JJ.

W. B. LAMBE ES-QUAL.,
(*Plaintiff in Court below,*)
APPELLANT;

AND

ANDREW ALLAN ET AL.,
(*Defendants in Court below,*)
RESPONDENTS.

Commercial corporations—Tax on—45 Vict. (Q.), *c.* 22.

HELD:—Affirming the judgment of JOHNSON, J., M. L. R., 4 S. C. 394, That the Act 45 Vict. (Q.), c. 22, applies only to commercial corporations; and that persons associated as underwriters, but not incorporated, are not subject to the taxes imposed by the Act in question.

APPEAL from a judgment of the Superior Court, Montreal (JOHNSON, J.), Nov. 30, 1888, dismissing an action brought on behalf of the Crown to recover taxes under the Act 45 Vict. (Q.), c. 22. The judgment of the Court below, with the observations of the honorable judge who delivered it, is reported in M. L. R., 4 S. C. 394.

Sept. 20, 1890.]

Martineau, for the appellant:—

La présente action a été instituée pour recouvrer des défendeurs une somme de $1,640.50 pour taxes commerciales imposées en vertu du statut provincial 45 Vict., ch.

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22. Ce statut impose par la section 8 une taxe de $400 par année, payable par *toutes compagnies d'assurance*, autres que l'assurance sur la vie, plus une somme de $100 pour chaque bureau d'affaires à Montréal.

Le demandeur allègue dans sa déclaration :

Que les défendeurs se sont constitués en *compagnie d'assurance* pour assurer les animaux exportés à l'étranger, et qu'il a droit de recouvrer des défendeurs, qui *forment la dite compagnie d'assurance*, le montant ci-dessus mentionné, étant pour trois années de taxe (1885, 1886 et 1887).

Les défendeurs plaident par deux défenses :

1re—Que l'acte 45 Victoria ne s'applique qu'aux corporations, et que les défendeurs ne sont pas incorporés :

2me—Que les défendeurs ne forment pas une compagnie d'assurance.

L'honorable juge qui a entendu cette cause en Cour de première instance, ne s'est pas prononcé sur la deuxième défense, mais a débouté l'action, en décidant suivant la première prétention des défendeurs : que les taxes commerciales ne pouvaient être recouvrées que des compagnies incorporées.

Il convient, en conséquence, d'examiner séparément les deux questions que soulèvent les défendeurs.

La clause première de cet acte est rédigée en des termes assez clairs pour convaincre cette cour que le législateur a entendu faire une distinction entre les *différentes compagnies* qui devaient être frappées de l'impôt commercial ; ainsi on voit qu'il n'y a que les *compagnies incorporées* de prêt, les *compagnies incorporées* de commerce, les *compagnies de navigation incorporées*, qui soient tennes de payer la taxe ; les compagnies de commerce, les compagnies de prêt, et les compagnies de navigation *qui ne sont pas incorporées* ne sont pas soumises à cette taxe ; mais, par contre, le législateur omet le mot incorporé, lorsqu'il décrète que les *compagnies d'assurance*, les *compagnies de téléphone*, les *compagnies de télégraphe*, les *compagnies de tramways*, et de *chemin de fer* paieront la taxe qui leur est imposée dans la section suivante.

Peut-on croire que cette omission a été involontaire, et

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n'est-il pas plus raisonnable de croire que véritablement le législateur a voulu faire une distinction entre ces diverses compagnies ?

Il était, en effet, à la connaissance de la députation qu'un grand nombre de compagnies d'assurance anglaises n'étaient pas des compagnies incorporées ; que le parlement impérial avait spécialement et souvent déclaré qu'elles n'étaient pas incorporées, et qu'en limitant la taxe aux *compagnies d'assurance incorporées* seulement, la couronne perdrait un revenu considérable ; rien n'empêche non plus, que les chemins de fer ou les télégraphes soient exploités par des personnes ou par une compagnie qui ne serait pas *incorporée* ; car dans ce cas l'idée populaire désigne toujours l'association qui exploite un chemin de fer, ou une ligne de télégraphe sous le nom de *compagnie*.

Le législateur tenant compte de ces divers faits, et voulant frapper également toutes les classes d'un même commerce, décrète que *incorporées* ou *non*, les *compagnies* d'assurance paieraient la taxe commerciale ; *incorporées* ou *non*, les *compagnies* de *télégraphe*, les *compagnies* de *téléphone*, les *compagnies* de *chemin* de *fer*, les compagnies de tramway la paieraient également ; mais il n'y aurait que les compagnies de navigation, et les compagnies de prêt *incorporées* qui y seraient soumises.

Si l'on réfère aux statuts revisés, l'on voit également l'intention évidente de faire une distinction entre diverses compagnies et certaines corporations.

En l'article 1143, il est dit : " Afin de pourvoir au be-
" soin du service public, chacune des *compagnies* et *corpo-*
" *rations* suivantes, savoir :

" Toutes *compagnies d'assurance*, et acceptant des risques,
" et y faisant des affaires d'assurance, toutes *compagnies* de
" *télégraphe*, toutes *compagnies* de *téléphone*, toutes *compa-*
" *gnies* de *chemin* de *fer* ; et d'un autre côté, toutes *compa-*
" *gnies constituées en corporation*, et faisant quelques entre-
" prises commerciales, ou affaires, toutes compagnies de
" prêt *constituées en corporation*, toutes *compagnies* de *navi-*
" *gation constituées* en *corporation*."

La rédaction de cet article, quoique étant en termes

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plus explicites que le statut 45 Victoria, n'a cependant rien changé à la loi ; mais elle fait mieux voir l'intention du législateur.

Mais sommes-nous vraiment en présence d'une compagnie d'assurance ?

Que signifie le mot compagnie ? *An association* of persons for the purpose of carrying on some enterprise or business. It is used to represent members of a partnership whose names do not appear in the firm. It often signifies an incorporated association, or may mean *an association organized like a corporation though unchartered.* Abbott's Law Dictionary, vol. 1, p. 255. Et l'auteur renvoie au mot *Association*, p. 101.

Company. A society of persons joined in a common interest for the purpose of carrying on some commercial or industrial undertaking. Wharton, law lexicon, p. 175.

Il y donc des compagnies d'assurance non incorporées, de simples sociétés, mais que l'on ne désigne pas moins dans la doctrine que parmi le peuple sous le nom de compagnies.

Mais reproduisons quelques-unes des dispositions de l'acte d'association des défendeurs pour voir ce qu'ils ont formé : "The said parties hereto *have formed* themselves "into an association for the purpose of insuring and underwriting risks...

"The business of insurance shall be transacted *on behalf* "*of the association* by an agent or attorney..... The affairs "of the association shall be managed," etc.

N'est-ce pas l'association, la compagnie définie par les auteurs ci-dessus ?

Ce n'est pas une corporation, mais n'est-ce pas comme dit Abbott : "A body of persons united without a charter, "but upon the methods and forms used by incorporated "bodies ? "

L'association des défendeurs est en effet régie comme une corporation : Elle a un fond capital, des actionnaires, des directeurs, elle déclare des dividendes, tient des assemblées, on y vote par action et non par tête, on y admet des actionnaires du seul consentement des directeurs.

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H. Abbott, Q. C., and *Campbell* for respondents:—

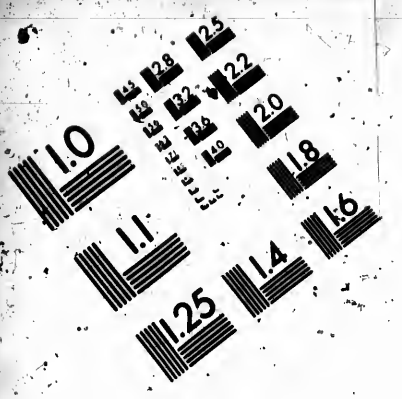
The respondents deny that they are an insurance company, and allege that by [illegible]ent of 31st March, 1885, they associated [illegible] as underwriters for the purpose of taking [illegible] insuring cargoes of cattle exported from [illegible]n-going vessels, each for himself and for [illegible]re; as appears by the deed above mentioned. They deny that they were ever incorporated or formed into a company. They are simply an association of individuals for the purposes mentioned.

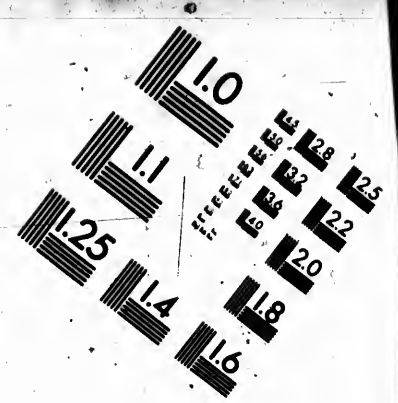
A glance at the Act will show that it was only intended to apply to corporations and incorporated companies, and not to individuals or associations of individuals. As well might it be attempted to impose a tax under this Act upon an ordinary partnership as upon the respondents.

Nov. 22, 1890.

DOHERTY, J.:—

In 1885, a number of gentlemen associated themselves together as underwriters for the purpose of insuring cattle exported from Canada. The question is whether this association is liable to pay the tax imposed by 45 Vict., c. 22. When Parliament undertakes to impose a new tax it must do so in specific and unambiguous terms. Now what do we find in this Act? The words "incorporated companies" are used, and the nearest thing to "association" we are able to find is the word "companies," which is used in another clause. Does the word "company" express the same idea as the word "association" used in the articles of agreement between these gentlemen? In my opinion the agreement does not contain the first element of a company. The respondents insure each for himself and his own share. This is quite different from the idea of a company. The intention of the Act was to impose a tax on commercial corporations,





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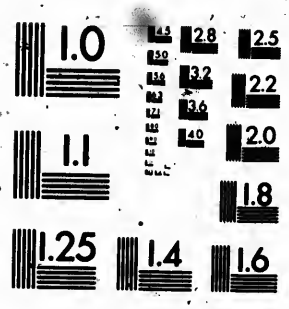

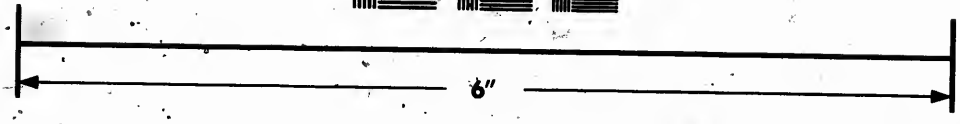

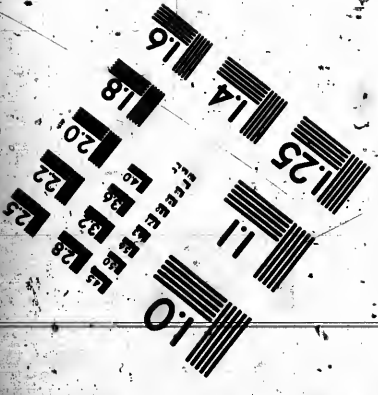

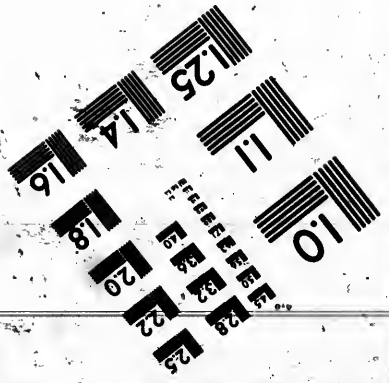

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and we hold that the respondents do not come within the scope of the Act.

Judgment confirmed, Tessier, J., *diss.*

C. Beausoleil for appellant.

Abbotts, Campbell & Meredith for respondents.

(J. K.)

September 22, 1890.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, BOSSÉ, JJ.

DOMINION OIL CLOTH CO.,
(*Defendant in Court below*),
APPELLANT;

AND

AUGUSTIN COALLIER,
(*Plaintiff in Court below*),
RESPONDENT.

Master and servant—Responsibility of employer—Negligence.

HELD:—Reversing the judgment of DOHERTY, J., M. L. R., 5 S. C. 97, That where an accident occurs to an employee, not in consequence of any fault or neglect of his employer, but solely through his own negligence and disregard of the directions given to him, the employee has no action to be indemnified. So where an employee was directed to change a belt after six o'clock, when the machinery would be stopped, and in disregard of the order he attempted to remove the belt before six o'clock while the shaft was still in motion, it was held that he had no right to be indemnified for the injury sustained.—*Desroches & Gauthier*, 5 Leg. News, 404; *St-Lawrence Sugar Refining Co. & Campbell*, M. L. R., 1 Q. B. 290, followed.

APPEAL from a judgment of the Superior Court, Montreal (DOHERTY, J.), Oct. 7, 1888, reported in M. L. R., 5 S. C. 97.

May 19, 1890.]

Béique, Q. C., and *Lafontaine*, for the appellant.

J. A. David, for the respondent.

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TESSIER, J., and BABY, J. (*diss.*), concurred in the view of the evidence expressed by the Court below, viz., that the respondent had been directed to perform a dangerous operation, and was working under the orders of his superior, Duclos, when he was injured. The appellants should be held responsible under the circumstances.

BOSSÉ, J.:—

The order given to the respondent was to change the belt after six o'clock when the machinery would be at rest, and there would have been no danger in executing the task. It is not proved that Duclos was the respondent's superior. Under the circumstances the accident must be held to have resulted from the respondent's disobedience, and while we regret that we are unable to come to the relief of the respondent, we have no alternative but to apply the law of responsibility, and to dismiss the action

DORION, C. J.:—

In two cases which have come before this Court we have reversed judgments of the Superior Court in similar circumstances. In *Desroches & Gauthier* (5 Leg. News, 404), where a laborer employed in discharging railway iron from a vessel, caused a chain to break which was sufficiently strong for the purpose for which it was used, and it was shown that the accident occurred through his disregard of the directions given to him, we held that he could not recover. In a later case, *St-Lawrence Sugar Refining Co. & Campbell* (M. L. R., 1 Q. B. 290), where the respondent was injured by an explosion, and there was no evidence of the cause of the accident, or of fault on the part of the employers, the judgment was also reversed and the action dismissed. In the present case there is no evidence as to what led to the accident, nor is there anything to show that the appellants were in fault. We are obliged to follow the same principle, and the judgment is therefore reversed, and the action dismissed.

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The judgment is as follows :—

" La Cour, etc.....

" Considérant qu'il n'est pas établi en preuve que l'accident dont le demandeur intimé se plaint soit arrivé par suite d'aucune faute ou négligence de la défenderesse appelante, et qu'il n'apparait pas au dossier que la dite défenderesse puisse en aucune manière être déclarée responsable de l'accident, et que partant il y a erreur dans le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure siégeant à Montréal le 25e jour d'octobre 1888 ;

" Renverse le dit jugement, et procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, déboute le demandeur de son action avec dépens tant en Cour de première instance qu'en appel. (*Dissentientibus* les honorables juges TESSIER et BABY)."

Judgment reversed.

Béique, Lafontaine & Turgeon for appellant.

J. A. David for respondent.

(J. K.)

September 24, 1890.

Coram DORION, C. J., TESSIER, BABY, BOSSÉ, DOHERTY, JJ.

THÉOPHILE CORBEIL ET AL.,
(*Petitioners in Court below*),
APPELLANTS;

AND

LA COUR DU RECORDER,
(*Defendant in Court below*),

AND

LA CITÉ DE MONTRÉAL,
(*Intervenant in Court below*),
RESPONDENT.

Constitutional law—City of Montreal—Licensing sale of meat —37 Vict. (Q.), ch. 51, s. 123, s.s. 27, 31.

HELD:—Following *Pigeon & Cour du Recorder*, M. L. R., 6 Q. B. 60, affirmed by Supreme Court, 17 Can. S. C. R. 195), 1. That subsections 27 and 31 of sect. 123 of 37 Vict. (Q.), ch. 51, by which the council of the city of Montreal is authorized to regulate, license, or restrain the sale, in any private stall or shop in the city outside of the public meat markets, of fresh meats, vegetables, fish, or other articles usually sold on markets, is within the powers of the provincial legislature.

2. That the by-law passed by the city council of Montreal under the authority of the statute above cited, fixing the license to sell in a private stall at $200, is valid.

APPEAL from a judgment of the Superior Court, Montreal (WURTELE, J.), annulling a writ of prohibition.

The proceedings were taken by a large number of butchers who refused to pay the fee imposed by by-law 131 on butcher's private stalls. The city having sued the butchers before the Recorder's Court, one Pigeon brought a test case, and it was understood that proceedings against the butchers would be suspended until judgment was rendered in the Pigeon case. The Pigeon case was decided by the Court of Queen's Bench adversely to the

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pretensions of the butchers in June, 1889, M. L. R., 6 Q. B. 60, and the case was taken to the Supreme Court. The present case was brought to prevent the exaction of the license fees until final judgment should be rendered in the Pigeon case. The city intervened, and the Court below quashed the prohibition. The appeal was from that judgment.

Sept. 22, 1890.]

Geoffrion, Q. C., for the appellants.

Ethier, Q. C., for the city.

Sept. 24, 1890.]

DORION, C. J.:—

This case presents a question identical with that raised in the case of *Pigeon & Cour du Recorder*, which was decided by this Court adversely to the pretensions of the appellants in June, 1889, (M. L. R., 6 Q. B. 60), and the judgment of this Court has since been affirmed by the Supreme Court of Canada (17 Can. S. C. R. 495). The judgment in the present case must follow that decision, and the appeal will therefore be dismissed.

Judgment affirmed.

C. A. Geoffrion, Q. C., and *O. Augé* for appellants.

R. Roy, Q. C., for respondent.

(J. K.)

September 22, 1890.

Coram DORION, C. J., TESSIER, BABY, BOSSÉ, DOHERTY, JJ.

DAME JESSIE McBEAN ET VIR,
(*Defendants in Court below*),
APPELLANTS;

AND

CANTELLO F. BLACHFORD,
(*Plaintiff in Court below*),
RESPONDENT.

Lessor and lessee—Art. 1624, *C. C.—Art.* 887, *C. C. P.—Jurisdiction.*

HELD:—1. An action under Art. 1624, C. C., to recover possession of the premises leased, where the lessee continues in possession after the expiration of the lease, may be brought by the lessor under the provisions of Arts. 887 *et seq.* regulating suits between lessors and lessees.

2. Where to an action to recover possession of the premises a demand is joined for the value of the use and occupation since the expiration of the lease, the action must be brought in the Superior or Circuit Court according to the amount claimed.

APPEAL from a judgment of the Court of Review, which reversed a judgment of the Superior Court, district of Beauharnois (BÉLANGER, J.), Dec. 26, 1889.

The first judgment was as follows:—

"La Cour ayant entendu le demandeur et les défendeurs sur la question soulevée de vive voix par les défendeurs quant à la juridiction de cette Cour, pour instruire, entendre et juger cette cause, examiné la procédure et sur le tout délibéré;

"Considérant que par son action en cette cause intentée sous les dispositions des articles 887 et suivants du Code de Procédure Civile de cette province, le demandeur demande la résiliation du bail par lui consenti aux défendeurs le 27 avril 1888, et l'expulsion des défendeurs des

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lieux loués, et demande en même temps que les défendeurs soient condamnés à lui payer une somme de $46 courant pour quatre mois de loyer ou valeur de quatre mois d'occupation des lieux loués, du premier mai dernier au premier septembre dernier;

"Considérant qu'en vertu de l'article 887 du dit Code les actions en résiliation ou rescision de bail, ou pour recouvrement de dommages provenant de l'infraction à quelques-unes des conventions du bail, ou pour l'inexécution des obligations 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;

"Considérant que par sa dite action le demandeur demande condamnation contre les défendeurs pour une somme de $46, comme montant du loyer à lui dû pour quatre mois d'occupation des dits lieux loués, ce qui rend la dite demande et la dite action, d'après le dit article du dit Code, de la compétence de la Cour de Circuit, et enlève toute juridiction de la Cour Supérieure sur la dite action ou demande;

"Considérant que cette Cour n'a et n'a jamais eu aucune juridiction ou compétence *ratione materiæ* pour instruire, entendre, et juger la dite cause;

"Met les parties hors de Cour, tant sur l'action principale que sur l'action en garantie, chaque partie payant ses frais."

The judgment in Review, Montreal, March 31, 1890 (GILL, TAIT, TELLIER, JJ), reversing the above judgment, was as follows:—

"La Cour après avoir entendu les parties par leurs avocats respectifs sur la demande du demandeur principal, le défendeur en garantie ayant fait et produit le 21 février dernier, 1890, un désistement par lequel il déclare qu'il se désiste de l'inscription en révision du jugement rendu par la Cour Supérieure siégeant dans le district de Beauharnois le 26 décembre dernier (1890), pour faire réviser le jugement rendu par la dite Cour Supérieure, siégeant

dans le dit district de Beauharnois, le 26 décembre dernier (1889), après avoir examiné le dossier et la procédure en cette cause et avoir sur le tout mûrement délibéré ;

"Considérant que le but principal de l'action du demandeur est d'obtenir possession de son immeuble, non pas en faisant résilier le bail qu'il en a consenti au défendeur, mais bien parce que le dit bail a pris fin ; que la demande de $46 pour l'occupation des lieux par le défendeur depuis la terminaison du dit bail n'est qu'un accessoire ;

"Considérant que vu les faits de la cause, la juridiction du tribunal est déterminée tant par la valeur annuelle de l'immeuble que par le fait qu'il s'agit d'obtenir la possession d'un immeuble, et que la dite valeur excédant $100 la Cour Supérieure du chef-lieu du district de Beauharnois a juridiction ;

"Considérant en conséquence qu'il y a erreur dans le dit jugement qui déclare que la dite Cour n'avait pas juridiction ;

"Casse et annule le dit jugement par lequel les parties ont été mises hors de Cour, remet la cause et les parties dans le même état qu'elles étaient avant le dit jugement, et ordonne que le dossier soit renvoyé à la Cour de première instance pour y procéder selon que de droit, avec dépens de révision, distraits, etc."

Sept. 15, 1890.]

J. S. Archibald, Q. C., for appellant :—

The question is whether such an action as is set forth in the respondent's declaration is within the jurisdiction of the Circuit or of the Superior Court. Respondent declares upon a lease which he alleges exists between him as lessor and appellants as lessees, of certain property in the village of Huntingdon, passed before Crevier, notary, on the 27th April, 1888, being for one year from the 1st May, 1888, the rent payable under the lease being $138 for said year. He then alleges that the lease expired 1st May, 1889, but that appellants continued in occupation of the premises against respondent's will more than

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three days after such expiry, and up to the time of instituting the action on the 6th September, 1889.

Then follows this allegation: "That on the 1st Septem-"ber, instant, the said defendants became and still are "jointly and severally indebted to the plaintiff in the "sum of $46, being as and for the price and value of the "use and occupation of hereinbefore described premises, "since the 1st of May last, 1889, to wit, during the months "of May, June, July and August now last past.

Then follow the usual conclusions upon a writ of *saisie-gagerie* in ejectment.

The writ issued was in the usual form of *saisie-gagerie*. It was dated on the 6th September, and made returnable the 16th of the same month, being a delay of nine days. It was served upon appellants on the 12th September, being three days only before the return day. Under what authority could such procedure have been adopted? Mr. Justice Bélanger found it under Articles 887 and 888, C. C. P. The resolution of this question is important because it is only by taking the case out of these articles that the Court of Review has been able to reverse the judgment of the Superior Court.

The *considérants* of the judgment in Review seem to mean that the Superior Court had jurisdiction for two reasons: 1st. Because such jurisdiction was conferred by the annual value of the property. 2nd. Because, apart from the lease, the action was of the nature of a possessory action, seeking to obtain possession of an immovable.

To this last reason it seems sufficient to answer that the respondent has not given the action the character of a common law possessory action. Such an action is not summary in its character. Respondent's action is summary. Such an action could not by law be accompanied by *saisie-gagerie*. Respondent's action is accompanied by *saisie-gagerie*. Such an action could not be joined to a demand for rent. Respondent's action is so joined. It is clear that this is not an ordinary common law possessory action. If we look at Art. 1624, C. C., we will find the respondent's action described in almost the same lan-

guage used in the declaration, viz: "The lessor has a "right of action in the ordinary course of law or by sum- "mary proceeding as prescribed in the Code of Civil Pro- "cedure: 2nd. To recover possession of the premises "leased in all cases where there is a cause for rescission, "and where the lessee continues in possession against "the will of the lessor more than three days after the ex- "piration of the lease." It will be observed that this article is under the heading "Obligations and rights of the lessor."

Respondent adopted the summary procedure mentioned in said article, and we are to enquire what are the provisions of the C. C. P., regulating the same. There are none except Arts. 887 and 888. What foundation, then, do these give to the jurisdiction based on annual value referred to by the Court of Review? Jurisdiction of the Court founded on annual value or rental is derived from the 18 Vict. cap. 108, s 5, consolidated in C. S. L. C., c. 40, s. 4. "Les actions en vertu du présent acte seront inten- "tées en la manière ordinaire dans la Cour Supérieure ou "de Circuit, et la valeur annuelle ou loyer de la propriété "louée déterminera la juridiction de la cour quelque soit "d'ailleurs le montant des dommages ou du loyer réclamé." This provision was modified by 25 Vict., c. 12, s. 1, as follows: "The fourth section of chapter 40 of the C. S. L. C., "intituled an Act respecting lessors and lessees, is hereby "amended so as to read as follows: 'Actions under this "Act shall be instituted in the Superior or Circuit Court "for the amount of rent or damages sued for, and the "costs shall be allowed and taxed in accordance with "the amount for which judgment shall be rendered.'"

The Code of Civil Procedure reproduced this provision in the following language, quoting from the French version which is more clearly expressed: Art. 887. "Les ac- "tions en résiliation ou rescision de bail, ou pour recou- "vrement de dommages provenant de l'infraction à quel- "ques-unes des conventions du bail, ou pour l'inexécution "des obligations qui en découlent d'après la loi, ou résul- "tant des rapports entre locateur et locataire, sont inten-

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"tées 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."

This is the state of the law at the present moment. It would seem then, that at present any jurisdiction founded upon annual value has been done away with.

We do not lose sight of Art. 1105, C. C. P., as follows: "The Circuit Court has jurisdiction in cases between "lessors and lessees whenever the rent or the annual "value or the amount of damage claimed does not exceed "$200."

This Article is excessively ambiguous. It is extracted from the Consolidated Statutes, apparently without reference to the amending Statute of 1862, and is manifestly inconsistent with Art. 887. Indeed, in the case of *Beaudry v. Denis*, 20 L.C.J. 254, Chief Justice Dorion remarked that this article was not of strong authority, and was partially, at any rate, repealed by subsequent legislation. Whatever opinion might be formed by comparison of the two Articles 887 and 1105, under the Code of Civil Procedure, it seems that no doubt could exist at the present moment. See provisions of the Revised Statutes of Quebec, under the heading of "Suits between Lessors and Lessees." The jurisdiction of the Superior and Circuit Court are enacted as they existed under Articles 887 and 888.

No mention whatever is made in the Revised Statutes concerning Article 1105, so that the whole subject being legislated upon, anything inconsistent with that legislation must be held to have been practically repealed.

This view seems also to have been held by Mr. Justice Mathieu in *Wood v. Varin*, M. L. R., 3 S. C. 110, where he held that at present, in an action between lessor and lessee, where no sum of money either for rent or damages was demanded, it was necessary to discover what was the actual amount of the interest of the plaintiff, and he held that that could be discovered not by the annual value of the property, but by the amount actually remaining due of such annual value, and in that case, the annual rent being $108, of which it appeared only $76 was

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due, he maintained a declinatory exception, holding that the matter was of the resort of the Circuit Court.

One of the reasons of the learned Judge was that by the amendment to the Lessor and Lessees Act made by the 25th Victoria, there was no longer any statutory regulation specially applicable to actions in resiliation of lease when no sum was demanded, and that it was necessary in such cases to have recourse to the general dispositions of the Code of Civil Procedure.

It does not need argument to establish that the Article above cited gives jurisdiction over the present cause to the Circuit Court. But the learned counsel ingeniously argues, "I might have brought this action without claiming any rent or damages. I might even now desist from such claim. Would not my action then be properly brought in the Superior Court? That is, by asking less, the Superior Court has jurisdiction, by asking more, the Circuit Court has juridiction." But this action is distinctly marked by the respondent for the Circuit Court, and he cannot complain if the Judge of the Superior Court treated it as it appeared before him without enquiring where it would have belonged if it were something different. It is clear from the language of the amending Statute, 25 Vict., c. 12, s. 1, that the Legislature had in view to protect tenants, great numbers of whom are very poor, from the exorbitant costs incurred in Superior Court actions. There is no possible ambignity in the Article of the C. C. P. above commented upon, nor can there be any doubt that Art. 1624, C. C., throws this case under Arts. 887 and 888 of the C C. P.

With reference to the statement made in the judgment of the Court of Review, that the object of the action in this cause was not to resiliate a lease actually existing, but to obtain possession of an immovable of which the lease had expired, we would say:

First—The Article 1624 of the Civil Code puts no difference between these two cases, but makes them all subject to the same provisions in the Code of Civil Procedure, at least when summary action is taken as in this case.

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Second—That taking the plaintiff's action altogether, it does not seem to be correct to say that the relation of lessor and lessee did not exist betwen the parties after the first of May, 1889. Such a relation is established either by express contract or tacitly.

What other explanation can be given of the demand of respondent against appellants for the sum of $46, as the price and value of the use and occupation of the premises for the four months of May, June, July and August, than that it constituted an acquiescence on the part of respondent that the occupation of appellants during that period should have the character of an occupation as a tenant?

Whatever interpretation can be put upon this allegation, one thing is certain, that it limits and establishes the interest of the plaintiff at the time action was brought, and so, as a matter of necessity, governs the jurisdiction.

We would call attention to the following cases:

Before the 25 Victoria little difficulty could arise in this matter as it was clearly and specially enacted that in suits between lessors and lessees the annual value or rental of the property was to govern the jurisdiction, no matter what might be the amount of money claimed but this also was held to govern only such suits as were taken under the lessor and lessees Act. So, in the case of *Fisher* v. *Vachon*, 6 L. C. J. 189, action was taken for $700 upon a lease for $200. A declinatory exception was filed, claiming that the action ought to have been in the Circuit Court. Mr. Justice Monk decided that it was properly brought in the Superior Court, because the common law remedy had been chosen and not the remedy provided by the lessor and lessees Act. So, in a case of *Barbier* v. *Vernier*, 6 L. C. J. 44, where $250 was demanded in an action in the Circuit Court upon a proceeding brought under the lessor and lessees Act, the rent being $200, it was held that the Circuit Court had jurisdiction.

After the 25 Victoria the case of *Guy* v. *Goudrault* was decided, 14 L. C. R. 202. There it was held that in an action for simple rescission of a lease where no rent or

damage is asked, the Superior Court has jurisdiction if the annual rent is sufficient.

This case is in accordance with one above cited of *Wood* v. *Varin*, in M. L. R., 3 S. C. 110, although in the latter case, the Judge did not adopt the annual value, but the amount of the rent due, finding jurisdiction, not because of annual rent, but because the rent due was the best measure which he could find of the interest of the party.

In the case of *Voisard & Saunders*, 1 Leg News, 41, it was held that in a case under the lessor and lessees Act, where rent or damages is asked, the amount asked governs the jurisdiction.

See also *Beaudry* v. *Denis*, 9 L. C. J. 254, where the same rule was adopted, and *Gauthier* v. *Desy*, 9 Q. L. R. 13, where Casault, J., reviews the law upon the subject, and expresses his opinion strongly in the same sense as the above decision.

It may, therefore, now be taken as the settled jurisprudence of the Courts that in an action under the lessor and lessees Act, where rent or damages is demanded, the amount of it governs the jurisdiction of the Court.

There cannot be any doubt that the present action is under the lessor and lessees Act, and that the amount demanded is $46. Consequently, the Circuit Court has jurisdiction.

It does not seem necessary to argue that where the want of jurisdiction is *ratione materiæ*, as in this case, the Court must declare itself without jurisdiction quite independently of any declinatory exception.

C. A. Duclos, for respondent:—

The only question raised by the present appeal is as to the jurisdiction of the Superior Court under the following circumstances.

By deed of lease passed before Crevier, notary, on the 27th April, 1888, the respondent leased to the appellants a dwelling house in the village of Huntingdon, for the period of one year to be computed from the 1st of May

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then next, 1888, at a rental of $138 per annum. The lease therefore terminated on the 1st of May, 1889.

After the termination of the lease, the appellants refused to vacate the premises, and more than three days elapsing, the respondent on the 7th of May, 1889, instituted an action before the Circuit Court (appealable) for the county of Huntingdon, alleging the termination of the lease and asking for the ejectment of the appellants and the possession of his premises.

This action was dismissed upon an exception to the form, because the writ did not state the occupation of the respondent, by a judgment rendered on the 3rd of September, 1889, reserving the respondent's right however to take a new action for the same cause, whereupon the respondent immediately took the present action before the Superior Court at Beauharnois, which has concurrent jurisdiction with the Circuit Court, (appealable) for the county of Huntingdon.

The question of jurisdiction was not raised by any of the pleadings; on the contrary the appellants took an action *en garantie* against one Peter Macfarlane and pleaded to the merits. The respondent closed his *enquête*, and it was only when the appellants were being pressed to proceed with their *enquête* and to avoid foreclosure that appellant's counsel for the first time made a *viva voce* objection to the jurisdiction of the Superior Court on the ground that the respondent's claim being only for $46 the Circuit Court had exclusive jurisdiction. This objection was maintained by the Superior Court, Beauharnois, but the Court of Review unanimously reversed this judgment. It is from this judgment that the present appeal is taken.

The respondent's action is instituted in virtue of Art. 1624, par. 2. of the C. C., which declares, that the lessor has a right of action to recover possession of the premises in all cases where the lessee continues in possession, against the will of the lessor more than three days after the expiration of the lease.

The declaration alleges:

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1o. The lease from respondent to appellant of the house in question for a period of one year to be reckoned from the 1st of May, 1888.

2o. The termination of this lease on the 1st of May, 1889.

3o. The continued possession of the appellants after the termination of the lease, against the will and consent of the respondent, and their refusal to vacate the leased premises.

4o. The institution of the first action, its dismissal, and a claim of $46 as compensation for the use and occupation of the premises, during the appellant's illegal detention of the same since the termination of the lease.

And the respondent concludes that the lease of the premises should be declared to have been terminated on the 1st of May, 1889, that the appellants be ordered to give him possession of the same and be condemned to pay the said sum of $46.

The respondent's action therefore consists of two separate and distinct demands, which could form the subject of two separate actions. First, the demand for the ejectment of the appellants and the possession of the premises, by reason of the termination of the lease. Secondly, a demand for $46 as compensation for the illegal detention of the premises since the lease was terminated.

The mere continuance in possession after the termination of the lease gives the lessor his right of action, so that the present action could be maintained and judgment could go for the respondent independently of the further demand for $46. So much is this the case that the respondent could desist from his demand for $46, and still maintain his action to recover possession of the leased premises, and it is certainly a peculiar logic that would lead us to the conclusion that by reducing our demand and desisting from a part of it, we could give a jurisdiction to the Superior Court which it did not possess before.

The error made by the appellants is confusing the present action with an action to cancel a lease for non-pay-

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ment of the rent. The distinction however is very clear. By the present action the respondent does not seek the cancellation of the lease by reason of the non-payment of $46; if that were so, to abandon the demand of $46 would be to abandon the action, but on the contrary he asks for the possession of the leased premises because the lease is already terminated.

The jurisdiction of the Court is fixed by the sum or value of the thing in controversy between the parties; so that, when the rescission of a lease is asked for by reason of rent unpaid or of damages suffered, the amount alleged always represents the interest of the party asking for the rescission and represents also the sum in dispute, and the jurisdiction of the Court is rightly determined by that amount. But in the present case, the lease is already terminated and what we ask is not its cancellation but the recovery of our property, so that the sum alleged can in no way affect that demand, it is not the measure of our interest, and does not represent the amount in controversy.

Such reasoning leads us to this position, that the respondent, having a good right of action in the Superior Court to recover possession of his premises, has by adding thereto a further claim for $46, brought his claim down within the exclusive jurisdiction of the Circuit Court. *Quod est absurdum.*

This is also well illustrated by the appellants' plea to the merits in which they claim to have purchased the property in question, so that if their pretension were maintained the title to an immovable property valued at $8,000 would be decided without appeal by the Circuit Court.

Another pretension urged by counsel for the first time in appeal, was that the respondent having joined a claim for $46 damages to his action for possession, could not institute the same under the summary provisions pertaining to lessors and lessees.

This is not however a question of jurisdiction. There is only one Superior Court for the province of Quebec;

there is not a special Court for the hearing of cases between Lessors and Lessees; it is one and the same Superior Court sitting for cases of this particular nature; so that this pretension, if founded, would be one of procedure, and there might be something to say for it, if it had been properly pleaded in due season by an exception to the form complaining of the want of proper delay, filed within four days of the return of the writ and accompanied by a deposit, but it cannot be now urged in appeal when the appellants have moreover waived their rights by pleading to the merits.

Cadieux v. *Portier*, M. L. R., 3 S. C., p. 453. *Jugé*: "que dans le cas où une saisie-gagerie en expulsion émanée de la Cour Supérieure, sous l'acte des locateurs et locataires, soulève des questions et fait voir un droit d'action qui ne tombent pas sous l'application de ce dit acte, il n'y a pas lieu à une exception déclinatoire, la Cour Supérieure ayant toujours juridiction, le défendeur doit plaider par exception à la forme." Mathieu, J.

This judgment was affirmed by Mr. Justice Jetté on the 31st of March, 1888, in rendering the final judgment on the merits, and both were confirmed by the Court of Review on the 30th May, 1888, Doherty, Tait and Davidson, JJ.

It is clear that the main object sought to be attained by the action is the recovery of our leased premises, and that the demand for $46 is merely an accessory and subsidiary claim arising out of the special circumstances of this particular case; an accessory claim which could be desisted from by the respondent or satisfied by the appellants without in any measure altering our action or diminishing our right to proceed with it.

Sept. 22, 1890.]

TESSIER, J. (*diss.*), was of opinion that the judgment of the Court of Review should be confirmed for the reasons assigned therein.

BABY, J., also dissented.

BOSSÉ, J., held that this was not a possessory action,

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but a question betwen lessor and lessee, and the Court was bound by the terms of Art. 887, C. C. P.

DORION, Ch. J., remarked that this Court, in *Voisard & Saunders*, 1 Leg. News, p. 41, gave a decision in a case analogous to this, and the majority of the Court followed the principle of that decision.

The judgment of the Court is as follows:—

"La Cour, etc.....

"Considérant que l'action en cette cause a été portée sous l'empire des articles du Code de Procédure Civile concernant les locateurs et locataires;

"Considérant qu'en vertu de l'article 1624 du Code Civil, le demandeur pouvait porter telle action pour obtenir la possession des lieux loués, détenus par le demandeur après l'expiration du bail;

"Considérant qu'en vertu de l'article 887 du Code de Procédure, telle action devait être portée en Cour Supérieure ou en Cour de Circuit suivant le montant du loyer ou des dommages réclamés;

"Considérant que dans l'espèce il n'est réclamé qu'une somme de $46, et que partant sous les dispositions spéciales concernant les locateurs et locataires, la Cour de Circuit avait seule, et à l'exclusion de la Cour Supérieure, juridiction pour entendre et décider ce litige, et qu'il y a erreur dans le jugement de la Cour Supérieure siégeant en révision, à Montréal, le 31e jour de mars 1890, dont est appel;

"Cette Cour casse et annule et renverse le dit jugement, et procédant à rendre le jugement que la dite Cour de Révision aurait dû rendre, renvoie l'action du demandeur;

"Mais considérant que le défaut de juridiction n'a pas été plaidé par le défendeur, l'intimé est condamné à payer ses frais à l'appelant tant devant cette Cour qu'en Cour de Révision, chaque partie devant supporter les frais par elle encourus en Cour Supérieure, (*dissentientibus* les honorables juges Tessier et Baby)."

Judgment of C. R. reversed.

Archibald & Foster for appellants.

McCormick, Duclos & Murchison for respondent.

(J. K.)

May 28, 1890.

Coram DORION, Ch. J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

CANADIAN PACIFIC RAILWAY CO.,
(Defendants in Court below,)
APPELLANTS;

AND

JOSEPH CHARBONNEAU ET AL.,
(Plaintiffs in Court below,)
RESPONDENTS.

Railway company—Bill of lading—Condition—Goods transferred to another company.

HELD:—That it is competent for a railway company which undertakes to carry goods over their line destined for a point beyond their own line, and receives the freight for the whole distance, to stipulate by an express condition of the bill of lading, that they will not be responsible for any loss or damage to the goods other than that which may occur while the goods are being carried on their line; and where such condition exists and the defendants prove that the goods were carried safely over their line and delivered in good order to the connecting company, they will be relieved from responsibility for any damage sustained thereafter.

APPEAL from a judgment of the Superior Court, Montreal (GILL, J.), February 29, 1888, condemning the appellants to pay the sum of $218.55.

The action was brought to recover the value of a shipment of apples from Montreal to Europe *via* New York, the defence being the conditions of the shipping note and bill of lading.

The circumstances were as follows:—

On the 4th January, 1886, the respondents addressed a shipping note in the ordinary form, to the Canadian Pacific Railway Company, asking them to receive 315 barrels of apples, addressed W. N. White, London, England, to the care of the National Line Steamship Co., New York,

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and subject to the conditions stated in the shipping note, which was signed by the respondents. On the face of the shipping note were written the words, "Owners' risk of frost." The 10th and 11th clauses of the conditions of the shipping note were as follows:

10. That all goods addressed to consignees at points beyond the places at which the company have stations and respecting which no direction to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them, or they may, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse, if there be such convenience for receiving the same, pending communication with the consignee, at the risk of the owner as to damage thereto, from any cause whatsoever, but the delivery of the goods by the company will be considered complete, and all responsibility of the said company shall cease when such other carrier shall have received notice that the company is prepared to deliver to them the said goods for further conveyance, and it is expressly declared and agreed that the said Canadian Pacific Railway Company shall not be responsible for any loss, misdelivery, damage or detention that may happen to the goods sent by them, if such loss, misdelivery, damage or detention occur after the said goods arrive at the said stations or places on their line nearest to the points or places to which they are consigned to, or beyond their limits.

11. That all property contracted for at a through rate or otherwise to or from places beyond the line of the Canadian Pacific Railway Company, if shipped by water, shall, while not on the company's railway, or in their sheds or warehouses, be entirely at the owner's risk. In case of loss or damage to any goods for which this company and connecting lines may be liable, it is agreed that the company or line so liable shall have the benefit of an insurance effected by, or for account of, the owner of said goods, and the company so liable shall be subrogated in such rights before any demand shall be made upon them.

Thereupon a bill of lading was issued in the following terms, "Canadian Pacific Railway and National Line of "Steamships, shipped in apparent good order and well "conditioned by J. Charbonneau & Co., *via* the Canadian "Pacific Railway," for New York, to be there shipped in "and upon the steamships of the above-mentioned line "for London, 315 barrels of apples, 'owners' risk of frost,' "being marked and numbered as in the margin, and "deliverable to W. N. White, or his assigns, freight pay- "able by consignee, inland rate to New York prepaid."

Amongst the conditions of the bill of lading was one

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that carriers should not be liable for loss or damage from frost, also a condition that in case of any loss or damage done to or sustained by any of the property receipted for during the transportation or delivery, whereby any legal responsibility should be incurred, that company or carrier should be responsible therefor in whose custody the same were or should be at the time of such loss or detriment, and there was also a condition that the responsibility of the Railway Company shall cease, and their part of the contract shall be performed, on the arrival of the goods at the station on their line where they are to be delivered for further conveyance, and they will not be liable for any delays or any loss or damage to, or claim in respect of said goods, which may happen to the goods or arise in respect thereof, after said goods have arrived at said station, and notice to the other carriers has been given, that they are ready to deliver, or which may happen after said goods have passed beyond their railway premises.

The appellants' agent requested that the respondents should put the goods in a heated car, and send a man down in charge of them, owing to the great risk of frost at that season of the year, but respondents declared that they would take the risk of frost if the apples were put in what is known as a refrigerator car, that being a car so built as to resist extremes of heat or cold, and the shipping note and bill of lading were made out accordingly. The goods were shipped in three refrigerator cars, two of which were cars of the Canadian Pacific Railway Company, and one a car of the National Despatch Company, and were conveyed to Brockville, in the province of Ontario, at which point they were transferred to the next carrier, namely, the Utica and Black River Railway Company, by whom they were taken on towards New York, and delivered to the New York Central and Hudson River Railway Company, which line ultimately conveyed them into New York. The inland freight was collected in advance by the Canadian Pacific Railway Company, who would retain out of it their proportion of freight,

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accounting to the Utica and Black River Railway Company, and the New York Central for the balance, as is the ordinary railway practice in these cases.

When the goods arrived in New York the respondents had telegraphed to Dixon & Dupré, asking them to examine the apples. This they did on the 8th of January, when they found the apples in good condition. Two days, however, elapsed before the goods were brought to the steamer, and in the meantime, cold weather setting in, they were damaged by frost, and were ultimately sold in a damaged condition, by agreement of both parties, on account of whom it might concern.

The Court below rendered the following judgment:—

"La Cour, etc.....

"Considérant que par connaissement daté à Montréal, le 4 janvier 1886, la défenderesse s'est obligée de transporter de Montréal à Londres, en Angleterre, par voie ferrée de Montréal à New-York et par la compagnie dite "National Line of Steamships," de New-York à Londres, 315 barils de pommes pour le compte des demandeurs, moyennant le fret convenu au dit connaissement et dont celui de Montréal à New-York s'élevant à $124, a été payé d'avance à la défenderesse par les demandeurs, avec stipulation que les demandeurs prévoient le risque du froid dans le transport;

"Considérant que les dites pommes ont été livrées à la défenderesse en bon ordre et sont arrivées à New-York encore en bon ordre le 7 janvier au soir, et sont demeurées en cet état au moins jusqu'au 9 janvier, mais que la défenderesse ayant omis de les faire mettre à bord du navire aussitôt que cela aurait pu être fait après leur arrivée à New-York, et que les ayant laissées exposées à un froid intense jusqu'au 12 janvier, il fut alors constaté qu'elles étaient gelées et absolument impropres à l'exportation, au point que, vendues à l'encan sur le marché de New-York, elles n'ont rapporté que $42.50;

"Considérant que la condition portée au connaissement 'owners' risk of frost' ne couvre pas la responsabilité de la défenderesse contre cette perte, car cette con-

dition ne s'applique qu'au froid dans le transport et durant le transbordement dans un délai raisonnable, mais non pas au point de tenir la défenderesse indemne des conséquences de la faute lourde qu'elle a commise en laissant les dites pommes au froid jusqu'au 12, quand il lui aurait été facile de les faire mettre à bord du navire au moins le 9 sinon le 8 ;

"Considérant que la défenderesse invoque en vain une autre clause du connaissement d'après laquelle sa responsabilité serait limitée aux pertes survenant sur son propre chemin, car à part que tel n'est pas le sens littéral de la dite clause et qu'en l'interprétant même judaïquement en faveur de la défenderesse, cela voudrait dire tout au plus que la responsabilité de la défenderesse ne s'étendrait pas aux pertes qui surviendraient sur le navire, et qu'aucune mention quelconque n'étant faite au connaissement des autres chemins de fer sur lesquels la défenderesse devait faire passer ses chars pour voiturer les marchandises jusqu'à New-York, elle ne peut maintenant, en prétendant qu'elle agissait comme mandataire ou agent de ces chemins de fer, mettre sa responsabilité à couvert de la dite perte, n'ayant pas alors dénoncé son mandat ;

"Considérant au surplus que rien ne prouve que l'attention des demandeurs ait été attirée à la dite clause limitative ; qu'il y a au contraire présomption violente qu'ils n'en ont eu aucune connaissance par le fait que sur la copie du connaissement qui leur a été remise, cette dite clause est complètement illisible ;

"Considérant qu'il est prouvé que la valeur des dites pommes était de $2.50 le baril, formant $787.50 pour les 315 barils, ce qui, ajouté au fret sus-mentionné payé à la défenderesse et les dépenses accessoires portées au compte des demandeurs, forme un montant total de $918.50, que les demandeurs ont droit de recouvrer de la défenderesse ;

"Rejetant la défense, condamne la dite défenderesse à payer aux demandeurs, la susdite somme de $918.50, avec intérêt depuis le 13 février 1886, date de l'assignation, et les dépens, distraits, etc."

1890. March 24, 1890.]

C. P. R. Co. & Charbonneau. *H. Abbott, Q. C.*, for appellants:—

If the liability of the Canadian Pacific Railway Company in the matter was clear, it might be a question whether or not the company had any obligation to protect the apples during the two days they were in New York. The goods being at the owner's risk of frost, and he having refused to send down a man in charge, it is difficult to see why the railway company should be responsible. It is not shown that they were put *en demeure* in any way to protect them, or that anything could have been done which was not done.

The respondent, on the other hand, had his own agent notified to look after them, and he, as a matter of fact, did nothing during the course of those two days.

Inquiry is, however, unnecessary upon this point for the purpose of a decision in this case. The law upon this point is well settled both in England and in this country, that a railway company who receive goods for conveyance to a place beyond the limits of their own line, in the absence of any special contract to the contrary, impliedly undertake the responsibility of the complete transit, and are, therefore, not discharged of their liability by handing over the goods to another company for further conveyance, and are liable for loss or injury to the goods, although the same may not have happened on their own line of railway. This is the general rule of the common law. See *Muschamp* v. *Lancaster & Preston Ry. Co.*, 8 M. & W. 421; *Scotthorn* v. *South Stafford Railway*, 22 L. J. Ex., 121; *Webber* v. *G. W. Ry Co.*, 33 L. J. Ex., 170; *Bristol & Exeter Ry. Co.* v. *Collins*, House of Lords cases, 194.

A question whether such a condition would not be *ultra vires* the appellants as to carriage in a foreign country might arise in this case, were it not that the case comes within the scope of a well-known exception to the rule, namely, that the railway company may stipulate, at the time they receive the goods, that they will not be liable for the damage to goods destined for places beyond their

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own line of railway, after they have delivered them over to another railway company, in the usual course, for further conveyance. *Vide, Aldridge* v. *The Gt. Western Ry. Co.*, 33 L. J. C. P. 161, and 15 C. B. N. S. 582, also *Fowles* v. *Gt. Western Ry. Co.*, 22 L. J. Ex., 76.

In order to claim exemption under such a condition, it is necessary to prove that the goods passed into the custody of some other railway company or carrier. *Vide, Kent* v. *Midland Ry. Co.*, L. R. 10 Q. B. 1; 44 L. J. Q. B. 18. These same rules have been upheld by a series of decisions in this country. See *Torrance* v. *Allan*, 6 L. C. J., p. 190; *Chartier* v. *G. T. Ry.*, 17 L. C. J., p. 26; *Livingstone* v. *G. T. Ry.*, 21 L. C. J., 13; *Cunningham* v. *G. T. Ry.*, 14 L. C. J., 107; *Pratt* v. *G. T Ry.*, 1 Leg. News, 69; *Robichaud* v. *C. P. Ry.*, 8 Leg. News, 314; *Dionne* v. *C. P. Ry.*, M. L. R., 1 S. C. 168; *Beaumont* v. *C. P. Ry.*, M. L. R., 5 S. C. 255.

In the present instance, the loss is proved to have occurred from an excepted risk, which was expressly taken by the owner of the goods. It is also proved that the goods were transferred by the appellants to the Utica & Black River Ry. Co., and they must have been then in good condition, as the respondents' own agent inspected them in New York on their arrival, and found them to be so. If the above is a correct statement of the law, no further proof is necessary. The conditions are on the face of the bill of lading, and are also contained in the shipping-note signed by the respondent himself. There is therefore no necessity for the appellants to show any further knowledge on his part.

The learned judge from whose decision the present appeal is taken seems to have entirely misconceived the nature of the agreement. He ignores entirely the shipping note, and refers only in his judgment to the bill of lading. He says that the words "owner's risk of frost," do not cover the appellant's responsibility in this instance, because it refers only to the risk of frost in transport, and during transhipment in a reasonable delay, apparently assuming that the two days' delay in New York was not

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reasonable, although there was no evidence of record sustaining this view. The delay, in fact, was absolutely necessary, because the goods were shipped to sail by a certain steamer, of a certain line, which was not advertised to sail until after those two days had elapsed.

The learned judge then takes up the other condition, as limiting the liability of the company to losses on its own line. This he says is not the literal meaning of the condition, which construed in its most favorable sense for the company, would only mean that its responsibility would not extend to losses on the ship, there being no mention in the bill of lading of other railways. Such reasoning as this hardly requires a serious answer. The condition does not say that the company will not be responsible for losses on other railway lines, but that its liability will be limited to its own, and that each carrier will be liable for the losses and damage happening when the goods are in its possession. There was no necessity to mention any other lines in the bill of lading. In this case, the company have no power to own, operate or control, roads in the States, and could not possibly carry goods on their own line to New York.

The learned judge apparently was conscious of the weakness of his position, for he adds another considérant, that there is no proof that the plaintiff's attention was called to this clause, but that on the contrary there was a presumption that it was not, from the fact that the copy is illegible. The copy is of record, and the appellants refer the Court to it upon this point. It is however not material, as nothing turns upon the copy. It is a tissue copy, handed to the shippers, after they had made and signed the shipping note, and after the original bill of lading had been delivered to them, in order that they might have a duplicate of it, the other one going forward to Europe, so that the fact does not create, the appellants submit, any presumption that they did not know the the condition, nor is it necessary that any proof should be made that their attention was called to it, if any was

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required, in view of the existence of the shipping note signed by the shippers themselves.

The point involved is entirely one of law, namely, as to whether or not the company could, by such a condition, limit their responsibility, and whether such a condition was a reasonable and legal one. If so, the judgment, appellants submit, must be rendered in their favor, and the judgment of the Court below reversed with costs.

J. N. Greenshields, Q. C., for respondents:—

The evidence establishes beyond doubt that the apples, when they reached New York, were in good order and condition. Mr. Dupré, who was telegraphed for by the company's agent at New York (Mr. McIlhanney), examined them on the morning of the 9th January, and reported them in first-class condition. This disposes of the company's pretention to escape liability under a supposed agreement with regard to box cars. Admitting there was such an agreement, which is not proved, the fact that the goods arrived safely at their railway destination would prevent the possibility of any claim arising under it. And the company's freight agent, Mr. Corbett, admitted that the cars in which they were shipped—refrigerator cars—were fitted to resist the cold in winter and heat in summer, and did not require a man in attendance.

The apples were examined in the cars at New York on the 9th January, and were found in first-class condition. The weather was then intensely cold. Mr. Dupré, the examiner, urged the company not to delay transhipment. On the 7th January, E. Holloway, the Montreal agent, wired Mr. McIlhanney to take measures to protect the apples. The same day Mr. McIlhanney replied that they had just arrived, and would go on the steamer the following day. On the 12th January, however, five days after arrival, they were still waiting shipment, and Mr. Holloway wired to know the cause of the delay. No reply was given. Mr. McIlhanney evidently feared the consequences of this delay, for he wired on the same day, the 12th January, Dupré & Dixon, to send a man to ex-

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amine the apples. Mr. Dupré immediately examined them, and found them frozen and worthless. There was thus a delay from the 7th to the 12th January, during which the goods awaited shipment, which the company failed to account for, and which must be attributed to their negligence and fault.

The company seek to evade liability on the ground that the bills of lading are marked "Owners' risk of frost." On this point the Judge in the lower court says :—

"Considérant que la condition portée au connaissement, "'owner's risk of frost,' ne couvre pas la responsabilité "de la demanderesse contre cette perte, car cette condi- "tion ne s'applique qu'au froid dans le transport et durant "le transbordement dans un délai raisonnable, mais non "pas au point de tenir la demanderesse indemne des con- "séquences de la faute lourde qu'elle a commise en lais- "sant les dites pommes au froid jusqu'au douze, quand il "lui aurait été facile de les faire mettre à bord du navire, "au moins le neuf si non le huit."

The loss sustained by the respondents in this cause was wholly due to the gross carelessness and negligence of the appellants, and whatever the conditions of the bill of lading may be, they cannot release the appellants from liability for their own acts.

The respondent carried out his part of the contract, and paid the freight in advance to New York to the appellants, and to them he looks for the loss he has sustained, and submits that the judgment of the Court below is right and will be maintained.

May 23, 1890.]

DORION, Ch. J. (for the Court) :—

In 1886, Charbonneau, the respondent, shipped 315 barrels of apples to New York by the appellants' line. The appellants carried them as far as Brockville, where they were transferred to another line and carried on to New York, whence they were to have been shipped by the National Line Steamship Company to Liverpool. When the apples arrived in New York they were examined

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and found to be in first rate condition, but soon after their arrival a severe frost occurred, and the apples were frozen and rendered almost worthless. The respondents brought an action to recover the loss from the Canadian Pacific Railway Company. The defendants, now appellants, pleaded that the loss occurred after the apples had passed out of their possession, and that by the conditions of the bill of lading (cited above) they were liable only for losses on their own line.

The question resolves itself into this: Is it competent for a railway company to limit their responsibility to the losses which may occur during the carriage of the goods on their own line? Here we do not know exactly when the damage occurred, but it was after the arrival of the goods at New-York, and the precise time is not material to the question raised by the pleadings, for if it was competent for the company to limit their liability as contended, there is no doubt that the damage occurred after the goods left the line of the Canadian Pacific Railway, and the appellants would not be responsible.

The question of restriction of liability has been one of very considerable difficulty, and has given rise to contradictory decisions in England, in the United States, and in Canada. We may say, however, that the latest decisions have settled the question, that it is competent for a railway company to take goods destined for a point on the line of another company, and to limit their liability to the losses which may occur on their own line. In the case of *Zunz* v. *S. E. Ry Co.*,[1] there was a contract to carry a passenger from London to Paris, with limitation of responsibility of the company to accidents occurring on their own line. On the way from London to Paris an accident occurred by which the plaintiff's baggage was lost. The Court held unanimously that the condition was binding. Cockburn, Ch. J., regretted that such should be the state of the law, but held that no limitation can be put upon the contract of the parties, and the company was therefore relieved from responsibility

[1] L. R., 4 Q. B. 539.

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for the loss. The defendants, it may be observed, had received the whole fare from London to Paris. In *Bristol & Exeter Ry. Co.* v. *Collins*,[1] an action was brought against the Bristol and Exeter Railway Company. They pleaded, first, that they had no contract with the plaintiff; secondly, that in their conditions was one which made them liable only for losses occurring while the goods were on their line. The action was in the first instance dismissed on the ground that there was no privity of contract; that judgment was reversed by the Exchequer Chamber; then the case went to the House of Lords. All the judges appeared to be of opinion that there was no difficulty that the company could limit their liability, but the Court came to the conclusion that the action was well brought against the second company. This case proves two things; first, that there is a remedy against the second company although there is no direct contract with it; secondly, that a condition exempting from liability for losses not on the company's line is binding.

We say, therefore, that it is clearly established in the English and American authorities that this condition is binding upon both parties, and that when a company limit their liability to their own line they cannot be held responsible for losses after the goods pass beyond their line.

In *Grand Trunk R. Co.* v. *McMillan*,[2] a case which came before the Supreme Court of Canada, the Grand Trunk Company undertook to carry goods from Toronto to Portage la Prairie in Manitoba. The goods were damaged after they had left the Grand Trunk line. An action was brought against the Grand Trunk Company which had received the goods and the freight. The question there was whether the condition in the bill of lading exonerated the Grand Trunk Company. Ritchie, Ch. J., was for reversing the judgment condemning the Grand Trunk to pay the damages. Strong, J., was of opinion that the

[1] 7 H. L. Cas. 594.
[2] 16 Can. S. C. R., 543.

Grand Trunk was not responsible, and he cited the two cases to which I have just referred. He held that the conditions were binding, and that the company were not responsible. Gwynne, J., was of opinion that the condition was not sufficiently explicit to relieve the Grand Trunk Company; and Fournier, J., agreed with Gwynne, J. The notes of the Chief Justice are not given, but he must have concurred in the judgment given by Strong and Taschereau, JJ., since the judgment of the lower Court was reversed.

If a company is under an obligation by law to do something, they cannot make a condition relieving themselves from their responsibility; but where they undertake something which is not obligatory upon them, they may by express contract limit their responsibility.

We think that the condition in the present case was as explicit as it was possible to make it, and that the appellants were relieved from responsibility for damage after the goods passed out of their possession.

The judgment is recorded as follows:—

"Considering that at the request of the respondents, the appellants agreed to convey 315 barrels of apples from the city of Montreal to the city of New York, there to be delivered to the National Steam Navigation Company, to be conveyed to London, England, on the express condition that the appellants should not be responsible for any loss, misdelivery, damage, or detention that might happen to the goods sent by them, if such loss, misdelivery, damage or detention occurred after the said goods arrived at the said stations or places on their line, nearest to the points or places to which they are consigned, to or beyond the limits of their own line of railway;

"And considering that after being examined at New York the said apples were found to be in good order and condition, they having left the line of the appellants' railway at Brockville, in the province of Ontario;

"And considering that the damage to the said goods happened at the city of New York, after they had left the line of the railway belonging to the appellants, and had

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been delivered, according to the contract entered into between them and the respondents, and that no responsibility attached to the appellants for the damages which the respondents may have suffered;

"Considering that there is error in the judgment rendered by the Superior Court sitting at Montreal on the 29th of February, 1888, which maintained the action of the said respondents;

"This Court doth reverse the said judgment of the 29th February, 1888, and proceeding to render the judgment which the said Court should have rendered, doth dismiss the action of the said respondents, with costs incurred as well in the Court below as on the present appeal, said costs to be taxed as in a cause of the second class in this Court."

Judgment reversed.

Abbotts, Campbell & Meredith, for appellants.

Greenshields, Guerin & Greenshields, for respondents.

(J. K.)

November 25, 1890.

Corum CROSS, BABY, BOSSÉ, DOHERTY, JJ.

DAME CATHERINE HART ET VIR,
(*Plaintiff in Court below*),
APPELLANT;

AND

JACOB HENRY JOSEPH,
(*Defendant in Court below*),
RESPONDENT.

Married woman separate as to property—Act of administration—Art. 177, *C.C.*

HELD:—That the making of a reduction in the rate of interest payable on a hypothecary claim, is not a mere act connected with the administration of her property which a wife separate as to property may do alone without the authorization of her husband, but is in reality a donation, which is null and void unless the husband becomes a party, or gives his consent in writing. (Art. 177, C.C.)

APPEAL from a judgment of the Superior Court, Montreal (DAVIDSON, J.), June 28, 1889, in the following terms:—

"The Court having heard the parties by their counsel upon the merits of the present cause; examined the proceedings and proof, seen the consent in writing filed by said parties that the exhibits and depositions in the present cause do serve and be common as well in this cause as in the cause No. 216 between the said parties and deliberated;

"Seeing plaintiff alleges transfer dated 23rd of May, 1877, whereby the defendant promised to pay interest on the sum of $13,612.25, at the rate of seven per cent *per annum*, payable half yearly from the 12th of December, 1876, to the plaintiff during her lifetime and after her death unto whomsoever might be lawfully entitled thereto;

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"Seeing plaintiff claims that under said deed there was due at the date of this action $1,361.15, balance of interest due as stated in her account Exhibit No. 2;

"Seeing defendant pleads that plaintiff reduced the said interest from seven to six per cent from the 8th of December, 1880, to the 8th of December, 1886, and from said last mentioned date further reduced it to five per cent, and that he has paid all interest at said dates due up to the 12th of December, 1887; that on the 16th of December, 1887, he tendered the interest due on the 12th, to wit: $340.31, and now renews such tender and deposits it in this Court;

"Considering that Theodore Hart appeared in said deed as curator to the estate of the late Harriet Judith Hart, of which plaintiff was one of the heirs;

"Considering that said Hart continued up to his death to receive said interest as the agent of plaintiff, and that on and before the 8th of December, 1886, with the knowledge and consent of plaintiff, he reduced the said interest from seven to six per cent, and that defendant paid from the said dates, upon accounts reduced, the amounts semi-annually due at said rate, and that on the first of said accounts it is expressly stated that the said interest has to be six per cent for the future;

"Considering that from the 10th of June, 1886, inclusive, up to and inclusive of June, 1887, the plaintiff's agents with her knowledge and acquiescence, at each half yearly payment, reduced said interest from six to five, and that defendant paid from the said date upon accounts reduced the amounts semi-annually due at five per cent:

"Considering that after the death of Theodore Hart, his son, R. A. Hart, became and was and still is her agent in the premises and for the institution of this action;

"Considering that the said agents severally and duly remitted to female plaintiff the several amounts for interest so paid at the rates of six and five per cent, and that she always received and accepted the same;

"Considering that plaintiff, when called upon to produce any letter or communications wherein there was

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anything other than concurrence in the acts of plaintiff's agents, has failed to show any protest against or objection to the same;

"Considering that the plaintiff must, by reason of said accounts rendered and said payments and her acceptance thereof, be held to have acquiesced in all that her said agents did; and that her husband must be held, even if his authorization were needed, to have authorized his wife in the premises;

"Considering that a wife separate as to property may do and make alone all acts and contracts connected with the administration of her property (C.C. 177) without the consent of her husband, (C.C. 1318);

"Considering that the said interest was a civil fruit of said obligation, and movable;

"Considering that said account plaintiff's Exhibit No. 2 expresses a contract for the future receipt of six per cent, but the accounts rendered for interest due 12th of June, 1886, December, 1886, and June, 1887, only represent a consent to accept the interest due at several dates at five per cent and no more;

"Doth adjudge the several receipts produced by defendant sufficient and discharges in full for the interest due at their several dates, and doth declare the said tender of $340.31 insufficient, and doth adjudge and condemn the said defendant to pay and satisfy to said plaintiff Dame Dorothea Catherine Hart, the sum of $408.36, with interest thereon from the 10th day of January, 1888, day of service of process, until paid, and costs *distraits*, etc."

Nov. 17, 1890.]

Béique, Q.C., for appellant:—

Il ne s'agit pas ici d'un simple acte d'administration ni même d'une aliénation, pour cause et pour considération, d'un effet mobilier, mais d'une véritable libéralité, en d'autres termes d'une donation. Or, la femme, même séparée de biens, ne peut consentir une donation, sans l'autorisation de son mari.

Telle est la loi et l'opinion unanime des auteurs.

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Demolombe, vol. 28, p. 268, No. 370.

"La remise est une donation, dit Pothier. Tel est en "effet son vrai caractère, l'abandon gratuit par le créan- "cier de sa créance au profit du débiteur et la renoncia- "tion au droit qu'il avait d'exiger de lui son paiement."

Laurent, vol. 18, No. 350 p. 375....."La remise gra- "tuite est une libéralité, or les donations sont régies par "de tout autre principe que le paiement. Il y a des créan- "ciers qui peuvent recevoir un paiement et qui ne peu- "vent faire remise de la dette; telle est la femme mariée "sous le régime de la séparation de biens."

Art. 177, C. C. B. C : "La femme, même non commune, "ne peut donner ou accepter, aliéner ou disposer entre "vifs, ni contracter, ni s'obliger, sans le concours du mari "dans l'acte ou son consentement par écrit.

"Si cependant elle est séparée de biens elle peut faire "seule tous les actes et contrats qui concernent l'adminis- "tration de ses biens."

Art. 768 C. C. B. C.: "La nécessité pour la femme d'être "autorisée de son mari s'applique aux donations entre vifs, "tant pour donner que pour accepter."

On nous oppose l'article 1318 C. C.—qui correspond à l'article 1449 C. N., et qui est dans les mêmes termes et stipule que la femme peut disposer de son mobilier et *l'aliéner*.

Or, c'est l'opinion unanime des auteurs que le mot *aliéner* dans l'article 1449 ne comprend pas la donation, et que l'aliénation qui est permise est l'aliénation pour considération et pour les fins de l'administration.

"La femme peut-elle disposer de son mobilier à titre "gratuit? On pourrait le croire d'après les termes de "l'article 1449, mais il faut combiner cette disposition "avec celle des articles 217 et 905," (177 et 768 C. C. B. C.)

"L'article 217 dit que la femme séparée de biens ne "peut donner, aliéner sans autorisation ; il distingue donc "la donation de l'aliénation à titre onéreux. Or, l'article "1449 ne déroge à l'article 217 que pour ce qui regarde le "droit d'aliéner, il ne parle pas du droit de donner ; donc "l'incapacité de donner subsiste. L'article 905 confirme

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" cette interprétation. Il établit en termes absolus l'inca-
" pacité de donner qui est prononcée par l'article 217;
" pourquoi le législateur reproduit-il une prohibition qu'il
" avait déjà consacrée? C'est qu'il y a un motif spécial
" de déclarer la femme incapable de donner, quelques
" soient les conventions matrimoniales des époux; les
" bonnes mœurs exigent que le mari intervienne pour au-
" toriser les libéralités que la femme veut faire. Ce motif
" domine toute autre considération. Voilà pourquoi l'ar-
" ticle 905 ne distingue pas sous quel régime la femme
" est mariée; l'intérêt moral sur lequel l'incapacité est
" fondée exclut toute distinction."

Laurent, vol. 22, No. 207 p. 319.

" Les femmes mariées étant inhabiles à faire quoique ce
" soit, si elles ne sont autorisées par leur mari, elles ne
" peuvent sans autorisation de leurs maris, donner entre-
" vifs; mais elles le peuvent avec son autorisation."

A. Branchaud, Q.C., for respondent:—

Les intérêts transportés à l'appelante sont de leur nature des droits mobiliers.

D'après l'article 177 du Code Civil, la femme, et même celle non commune en biens, ne peut donner, aliéner ou disposer entre vifs, ni contracter autrement, ni s'obliger sans le secours du mari dans l'acte ou son consentement par écrit, mais la femme séparée de biens, peut faire seule tous les actes et contrats qui concernent l'administration de ses biens.

Or, le mandat qu'elle a donné à Théodore Hart pour la perception de ses intérêts, ne peut être considéré que comme un acte d'administration.

L'article 1318 permet à la femme séparée de biens de disposer de son mobilier et de l'aliéner.

L'article 763 ne doit s'entendre, en ce qui regarde la femme, que dans le cas où l'autorisation du mari est nécessaire pour donner à la donation une valeur légale; mais cette autorisation n'est pas nécessaire au cas de donation de meubles suivant l'article 1318.

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Baby, J.

Si l'on traite cette réduction comme remise d'une obligation faite à l'intimé, l'appelante se trouve également liée par les actes de son mandataire suivant l'article 1181, qui dit que la remise d'une obligation peut être faite soit expressément, soit tacitement par des personnes qui ont les capacités légales d'aliéner. Cette remise peut pareillement être faite par procureur.

Or, comme l'appelante est séparée de biens, elle a le droit d'aliéner ses meubles, et d'en disposer sans l'autorisation de son mari, elle pouvait par conséquent faire une telle remise. L'acquiescement qu'elle a donné à la remise faite par son mandataire constitue une obligation qu'elle ne peut maintenant répudier et la lie vis-à-vis de l'intimé; d'ailleurs le mari a dû avoir connaissance de ce qui s'est passé entre son épouse et son mandataire Théodore Hart; il est impossible de supposer que l'appelante ait reçu de son mandataire ces paiements d'intérêts au taux réduit par lui depuis 1880 jusqu'en 1887, hors la connaissance de son mari.

Or, puisqu'il le savait, car il a dû le savoir, et qu'il n'a nullement protesté contre cet état de choses, il a dû également acquiescer avec son épouse dans les actes faits par le dit Théodore Hart, concernant la réduction du taux des dits intérêts.

Il nous semble que l'on ne puisse mettre en doute que les paiements faits par l'intimé, des intérêts au taux réduits et remis à l'appelante pendant une période de pas moins de huit années, ne soient considérés comme fin de non recevoir contre ses prétentions.

Nov. 25, 1890.]

BABY, J. (for the Court):

En 1877, feu Théodore Hart, en sa qualité de curateur à la substitution créée en vertu du testament de Harriet Judith Hart, et y étant autorisé par un acte spécial de la législature du Canada, permettant l'aliénation et vente des immeubles substitués, transporta à l'appelante la somme de $13,612 pour sa part dans la succession de la dite Harriet Judith Hart, la dite somme provenant de la vente

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d'un des immeubles de la dite succession. L'intimé, acquéreur de cet immeuble, comparaissant à cet acte de transport, se reconnut endetté envers l'appelante de cette dite somme, et promit lui en payer l'intérêt annuellement, au taux de sept pour cent, tant et aussi longtemps qu'elle vivrait, s'obligeant de plus à garder pardevers lui la dite somme capitale tant que n'aurait pas eu lieu le décès de l'appelante, cette dernière ne pouvant la réclamer et l'intimé la lui remettre sous aucun prétexte quelconque sa vie durante.

La poursuite en cette cause a été portée en recouvrement d'une partie de ces intérêts à raison de sept pour cent comme susdit. L'intimé rencontre cette demande en disant que ces intérêts ont d'abord été réduits à six pour cent, et puis définitivement à cinq pour cent, par l'agent ou mandataire de l'appelante de son consentement, et qu'il n'est pas obligé à plus. A cette défense, l'appelante répond spécialement qu'aucune telle réduction n'a jamais été faite, et que si Théodore Hart, le curateur, ci-haut nommé, ou son fils qui lui a succédé, a reçu des intérêts moindres que ceux stipulés dans l'acte de transport en question, qu'il l'a fait sans autorisation ni considération, et que, quant à elle, l'appelante, elle n'a jamais consenti à faire telle remise et n'y a jamais acquiescé ; qu'au reste, si elle avait fait une telle réduction ou remise elle serait nulle, n'y ayant point été autorisée par son mari.

Le jugement en première instance a donné gain de cause à l'intimé et de là le présent appel.

Les deux points à décider sont donc : 1o. Y a-t-il eu acquiescement et ratification de la part de l'appelante aux deux réductions successives d'intérêts faites par les deux curateurs ci-dessus indiqués ;

2o. En supposant que l'appelante eut eu connaissance de ces deux changements apportés à l'acte de transport contenant la convention intervenue entre elle et son débiteur, était-elle autorisée en loi, sans l'intervention de son mari, à consentir une telle réduction d'intérêts ?

En premier lieu, disons-le de suite, nous ne voyons pas que la preuve soutienne la prétention de l'intimé sur ce

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point. L'appelante est absente du pays; elle réside en Europe depuis un grand nombre d'années, et ce sont les deux Hart, le père et le fils successivement, qui, en leur qualité de curateurs, percevaient de l'intimé les intérêts en question, qu'ils remettaient à l'appelante par lettres d'échange non accompagnées d'états de comptes. Il est bien vrai que ces curateurs, sur les représentations que l'intimé leur fit que le taux de l'intérêt dans le monde financier était diminué et sur son refus formel et mal fondé de ne plus vouloir continuer à payer à l'appelante d'abord plus de six pour cent et ensuite cinq pour cent, consentirent, hors la connaissance et sans la participation de cette dernière, de recevoir de l'intimé ce qu'il lui plaisait leur donner, contrairement à une obligation définie et clairement déterminée. Mais dès qu'elle fut informée de la prétention insoutenable de Joseph, elle protesta ne point vouloir s'y soumettre, et se plaignit, à diverses reprises dans ses lettres, de la conduite que ce dernier tenait à son égard, en ne la payant pas intégralement, et alla même—ignorant la convention qu'elle avait elle-même faite avec Joseph, à savoir: que le capital ne pourrait être exigible de lui tant qu'elle vivrait—jusqu'à charger Hart-fils de retirer des mains de son créancier cette somme de $13,612 et de l'appliquer ailleurs, afin qu'elle en put retirer l'intérêt voulu. Elle touchait évidemment à titre d'acomptes seulement les sommes qu'on lui remettait du Canada et non autrement. Rien, absolument rien, ne fait voir qu'elle ait jamais, un seul instant même, consenti, soit de près soit de loin, à ces réductions invoquées par l'intimé à l'encontre de l'action.

2o. Maintenant, tout en supposant que l'appelante n'aurait pas suffisamment protesté contre l'acte des deux curateurs, et pourrait être présumée avoir donné son consentement du moins tacite, sinon explicite, a ces nouvelles conventions, ces dernières sont-elles légales et obligent-elles l'appelante? La réponse négative n'est pas difficile à trouver, je crois. On prétend qu'il ne s'agit ici, de la part de l'appelante ou de ses représentants que d'un acte purement administratif. Or, il appert qu'elle a la libre

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administration de ses biens. Conséquemment, qu'elle pouvait faire légalement les nouvelles conventions en question sans y être autorisée par son mari, et qu'elle s'est liée. (Arts. 177, 1318 C. C.)

Nous l'avons vu, Joseph, l'intimé, n'avait aucun droit à la réduction d'intérêts dont il s'agit, et il ne pouvait se libérer sous aucun prétexte quelconque de l'obligation qu'il s'était imposée lui-même, dans un temps où il y voyait son avantage, envers l'appelante, de lui payer ses intérêts au taux stipulé de sept pour cent. Rien ne fait voir, du côté de l'appelante, qu'elle fut endettée de quoi que ce soit envers Joseph. Elle n'est pas plus riche qu'il ne faut, et ressent même, à ne pas s'y méprendre, la réduction que l'on veut opérer dans son revenu annuel. Nul motif n'a été révélé à la Cour dans lequel aurait pu se trouver la cause de ce nouvel arrangement entre les parties. Elle est donc apparemment sans motif et sans intérêt aucuns pour l'induire à faire cette prétendue remise. Alors, dans ces circonstances, peut-on dire que l'appelante n'a fait qu'un acte d'administration en réduisant ainsi son revenu sans aucune considération de la part de l'intimé? Non, assurément, ce ne peut être qu'une donation à titre gratuit à Joseph; quel autre nom peut-on lui donner? Or, notre code art. 177, décrète positivement qu'une femme, même non commune, ne peut donner, aliéner ou disposer sans le concours du mari. Ici jamais le mari n'est intervenu pour autoriser l'appelante à aliéner une partie de son revenu à titre gratuit ou autrement. Ces prétendus réductions d'intérêt ne sont donc d'aucun effet légal, et nous croyons que l'appelante est bien fondée dans sa demande. Pour toutes ces raisons, sur le tout, cette Cour ne peut que désapprouver le jugement rendu en première instance, et l'appel est en conséquence maintenu avec dépens.

The judgment is as follows:—

"La Cour, etc.....

"Considérant que par l'acte de transport du 23 mai 1877, par Théodore Hart, curateur de Dame Dorothée

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Catherine Hart, épouse d'Alfred Hart (Hart, notaire), l'intimé s'est engagé à garder pardevers lui la somme capitale de $13,612.27 y portée, et d'en payer l'intérêt semi-annuellement à raison de sept pour cent à l'appelante sa vie durant, pour la dite somme capitale être ensuite payée à qui de droit;

"Considérant que l'appelante n'a pas en aucun temps réduit le taux d'intérêt en question de sept pour cent à six pour cent, et ultérieurement à cinq pour cent, ainsi que le prétend l'intimé, soit par elle-même, soit par son agent, et que tout en supposant que celui-ci l'ait fait, l'appelante n'a jamais acquiescé à telle réduction, mais au contraire a toujours protesté contre icelle;

"Considérant qu'en supposant même que l'appelante aurait acquiescé à telle réduction, ce qui n'est pas prouvé, icelle réduction dans l'espèce serait et constituerait non un acte d'administration, mais bien une véritable donation, et qu'aux termes de l'article 177 du Code Civil, l'appelante ne pouvait consentir à et faire une telle donation sans le concours de son mari ou son consentement par écrit;

"Considérant, partant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 28me jour de juin 1889, et dont est appel, casse et renverse le dit jugement, et procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, renvoie l'exception péremptoire plaidée par le dit intimé, et condamne le dit intimé à payer à l'appelante la somme de $1,361.15, réclamée par son action, avec intérêt à compter du 10 janvier 1888, date de l'assignation, et les dépens tant en Cour de première instance qu'en appel."

Judgment reversed.

Béique, Lafontaine & Turgeon for appellant.

Judah & Branchaud for respondent.

(J. K.)

June 19, 1890.

Coram TESSIER, CROSS, BABY, BOSSÉ, DOHERTY, JJ.

JOSEPH PALLISER
(*Defendant in Court below*),
APPELLANT;

AND

ROBERT LINDSAY
(*Plaintiff in Court below*),
RESPONDENT.

Promissory note—Given as collateral security—Mutilation.

HELD:—1. Where the appellant gave his promissory note to respondent as collateral security for a hypothecary debt due by his (appellant's) father, and on the same piece of paper wrote a letter stating that the note was so given as collateral, upon condition that respondent should delay proceedings on the mortgage until the note was due,—that the respondent was entitled to sue the appellant on the note when due, without putting the principal debtor *en demeure;* and the appellant, not having demanded that the principal debtor be discussed, or proved that the mortgage was paid, was rightly held liable for the amount of such note.

2. The severance of the note from the letter written above it, was not a mutilation that could affect the validity of the instrument.

APPEAL from a judgment of the Superior Court, Montreal (JETTÉ, J.), May 31, 1887, by which the appellant was condemned to pay $250, amount of a promissory note, with interest.

The appellant pleaded to the action:—

That he never undertook in manner and form as stated in the respondent's declaration, nor signed the promissory note therein set forth, as alleged by respondent.

That on or about the date charged in the declaration he, appellant, made and signed a certain paper writing, wherein it was in fact and effect set forth as follows:

"Montreal, 5th Janv. 1888.

"Rev. Mr. Lindsay,

"Dear Sir,

"I herewith give you my note of this date for $250, payable "six months from date, as collateral for the payment of a certain mort-

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"gage held by you, and payable by my father against West Lynn pro-
"perty, upon condition that you delay proceedings upon said mortgage
"until the said note is due. This amount as I am informed covers the
"amount in capital and interest due on said mtge to this date; the pay-
"ment of the note or mtge shall cancel both.

"Yrs. very truly,

"J. PALLISER.

"Montreal, 5th Jany, 1886.

"Coll. for Mtge."

"$250.00.

Six months after date I promise to pay to Robert Lindsay "or order, $250, at the Ontario Bank here, for value received.

J. PALLISER.

"5-1-86.

"Received for Rev. Robert Lindsay above letter and note.

L. O. ARMSTRONG."

That the paper writing filed by the respondent, on which he purports to base his action, has been obtained by an illegal mutilation of the writing above set forth, and the obligation by the appellant undertaken has been materially changed and altered, and the obligation filed is not the obligation undertaken by the appellant;

That the appellant's undertaking was that of surety merely, and was delivered to and deposited with the respondent, as collateral security for the debt of another, as appeared at the time of the execution of the said obligation, by the letter at the time forming part thereof, and more particularly by the memorandum in the margin thereof, and which formed and was at the time of its execution, an integral and essential part of said obligation;

That the plaintiff was not the owner of said obligation, but only the pledgee thereof, and on payment of the principal debt for the security of which it was deposited with him, would have been obliged to deliver up and restore the said obligation to appellant;

That by reason of the mutilation and alteration of the paper writing delivered by appellant to respondent, and especially by reason of the mutilation and alteration of that part of it which purports to be a promise to pay the sum of $250, the said promise, obligation and undertak-

ing is absolutely null and void, and the respondent has no right of action thereon ;

That the position assumed by appellant in said paper writing was that of surety for another and not an absolute undertaking to pay, to the respondent, at all events, the amount therein mentioned, or any amount whatsoever ; that moreover it was the duty of the respondent, and a condition precedent to a right of action against said surety, that a demand should have been made and the principal debtor placed regularly *en demeure* to pay the principal obligation ; all of which respondent failed to perform, and has therefore lost all right of action on said undertaking, and the same is in consequence null and void ;

That the said undertaking was without consideration on the part of the appellant, and it was distinctly understood and agreed between the appellant and L. O. Armstrong acting for the respondent, that no action should be taken against appellant thereon ;

That as appears by the paper writing above set forth, the payment of the mortgage for which the undertaking was given as collateral security, was to cancel the said undertaking and *vice versa*, all which it was important to the appellant should appear, but which appellant is prevented from showing by the illegal acts of the respondent ;

That by reason of the premises and by law, the said paper writing filed by respondent is absolutely null and of no effect, and respondent's action should be dismissed.

The judgment of the Superior Court was as follows :

" La Cour, etc.....

" Attendu que le demandeur se pourvoit en recouvrement d'une somme de $250 que lui doit le défendeur par billet consenti le 5 janvier 1886, et payable à six mois de date, pour valeur reçue ;

" Attendu que le défendeur conteste cette demande disant :

Que le billet invoqué contre lui n'est que partie d'un document formant en son entier une convention com-

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plète, de l'ensemble de laquelle il résulte que l'obligation du défendeur, loin d'être pure et simple, n'était que collatérale et pour la sûreté du paiement de la dette d'un tiers, et soumise à la condition que si la dette garantie était payée, celle du défendeur serait éteinte, et le billet invoqué lui serait remis ;

Que le demandeur a illégalement mutilé ce document en en détachant les parties contenant les dispositions conditionnelles, et l'a par suite rendu nul et sans valeur ;

Que de plus le demandeur ne peut invoquer ce document contre le défendeur sans mettre préalablement le débiteur principal en demeure de payer, ce qu'il n'a pas fait, et qu'en conséquence il est mal fondé en sa demande ;

" Attendu que le demandeur répond à cette exception que le billet invoqué lui a été donné simplement pour régler une dette du père du défendeur, échue depuis longtemps et afin d'obtenir une prolongation de délai pour payer, et que ce document n'a été aucunement altéré ou mutilé ;

" Attendu qu'il appert aux pièces du dossier que le document qu'invoque le défendeur se composait simplement d'une lettre au demandeur lui transmettant le billet en question en cette cause, (écrit sur la même feuille de papier) comme garantie collatérale du paiement d'une hypothèque due par son père au demandeur, à condition que ce dernier accordât délai jusqu'à l'expiration du terme du billet ; étant entendu que le paiement du billet ou de l'hypothèque, éteindrait les deux obligations ;

" Attendu que la preuve n'établit aucune mutilation substantielle du document invoqué de nature à priver le défendeur d'un droit quelconque à lui garanti par la convention acceptée par le défendeur ; que même en supposant que les mots " sûreté collatérale pour hypothèque" se seraient trouvés en marge du billet, la position du défendeur n'en serait pas améliorée, et que le reste du document établit suffisamment cette stipulation pour que le défendeur en ait le plein et entier bénéfice ;

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"Attendu que la séparation du billet de la lettre l'accompagnant ne constitue pas une mutilation de document pouvant affecter la validité de l'obligation du défendeur ;

"Attendu que l'obligation du défendeur de payer à six mois de la date du billet invoqué, la dette de son père, bien que collatérale, donne droit au demandeur de s'adresser au défendeur directement pour le paiement de ce billet sans mise en demeure préalable au débiteur de la dette garantie, et que le seul avantage qu'aurait pu avoir le défendeur, si son obligation eût constitué un cautionnement pur et simple, aurait été de se prévaloir du bénéfice de discussion, ce qu'il n'a pas demandé ;

"Attendu qu'il n'a pas été prouvé que l'obligation du père du défendeur ait été payée et que par suite ce dernier est mal fondé à se refuser au paiement du billet invoqué ;

"Renvoie l'exception du dit défendeur et le condamne à payer au demandeur la dite somme de $250, avec intérêt, &c."

May 20, 1890.]

C. H. Stephens, for appellant.

C. B. Carter, Q.C., for respondent.

June 19, 1890.]

DOHERTY, J., (for the Court) :—

The appellant is sued on a promissory note, and the plea substantially is that he gave the note upon certain conditions ; that the conditions have been violated, and the amount of the note cannot be recovered. He says there was a letter written by him on the same piece of paper, which letter has been torn off ; that the document has been tampered with essentially, and that he is not liable. When we come to look at it; we find that there is no condition expressed in the promissory note ; it is a plain commercial note in the ordinary form. What the appellant means by saying the document was mutilated is that the letter was written at the top of the paper

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and the promissory note below; and when the respondent took out his action he tore the note off.

We do not consider the defence well founded, and we are unanimously of opinion that the judgment should be affirmed.

Judgment confirmed.

J. Palliser, for appellant.

Carter & Goldstein, for respondent.

(J. K.)

September 24, 1890.

Coram TESSIER, CROSS, BABY, BOSSÉ and DOHERTY, JJ.

DAME ANNA MARIA WILSON ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

L'HON. ALEX. LACOSTE ET AL., ES-QUAL.,
(*Plaintiffs in Court below*),
RESPONDENTS.

Donation inter vivos—Changing nature of deed of gift by subsequent deed—Giving in payment—Registration—Tender.

HELD:—1. The parties to a deed of gift *inter vivos* may, by a later deed, change its nature from an apparently gratuitous donation, to a deed of giving in payment.

2. The forfeiture (under Art. 806, C. C.) resulting from neglect to register, applies only to gratuitous and remuneratory donations.

3. The giving of a thing in payment being equivalent to a sale of it (Art. 1592, C. C.), and the necessity of registering a deed of sale existing only as to third parties acquiring the thing and hypothecary creditors, absence of registration of the original deed could not be invoked by the testamentary executors of the person giving, against the deed which converted it into a giving in payment, which, moreover, was duly registered.

4. A person who asks by his action that a deed of giving in payment be annulled, is bound to tender the amount of the debt discharged by the party receiving the thing.

APPEAL from a judgment of the Superior Court, Montreal (TELLIER, J.), Jan. 19, 1889, in the following terms:

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"La Cour, après avoir entendu les parties par leurs avocats respectifs sur le mérite de la cause, examiné la procédure, les admissions et les pièces produites, et sur le tout mûrement délibéré :

"Attendu que les demandeurs en leur dite qualité, demandent par leur action intentée le 12 juillet 1886, que l'acte fait à Montréal, le 7 juin 1872, devant Mtre Normandeau, notaire, et par lequel le dit hon. Charles Wilson a donné entrevifs et à titre gratuit, à la défenderesse présente et acceptant, et autorisée par son époux aussi présent à l'acte, l'usufruit et la jouissance, sa vie durant, de l'immeuble y décrit, et créé une substitution de l'immeuble donné, en faveur des enfants de la donataire, avec stipulation que cette dernière, à défaut d'enfants, serait autorisée à en disposer par donation entrevifs ou par testament, en faveur d'un parent du donateur, et que faute par elle d'avoir exercé ce droit, alors l'immeuble tomberait dans la succession du donateur, soit annulé et déclaré nul parce que cet acte n'a pas été enregistré, et que les héritiers et légataires du donateur ont été saisis du dit immeuble, et ont droit d'invoquer la nullité de la donation résultant du défaut d'enregistrement de l'acte; que le dit immeuble soit déclaré appartenir aux demandeurs ès-qualité et remis en leur possession ; que la défenderesse soit condamnée à rendre compte des fruits et revenus par elle perçus, et à payer tout reliquat dont elle pourrait être redevable ; et qu'à défaut par elle de rendre tel compte, dans le temps voulu, elle soit condamnée à payer la somme de $5,500, avec intérêt, étant la valeur de la jouissance de la dite propriété et des fruits et revenus ainsi perçus par elle depuis la date du décès du donateur, savoir, depuis le 4 mai 1877, à raison de $600 par année, durant les neuf ans et deux mois écoulés avant l'action ;

"Attendu que la défenderesse a plaidé à cette action : 1o. Qu'elle a accepté l'immeuble en question comme dation en paiement d'une somme de $2,000 avec tous les intérêts accrus sur icelle que le dit hon. Charles Wilson lui devait, aux termes de son contrat de mariage avec le dit Louis Masson, passé le 4 juillet 1859, devant Belle, notaire,

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et enregistré le 22 août 1859 ; que conformément à la dite convention, la défenderesse, par acte reçu devant Mtre. Normandeau, notaire, le 26 juillet 1875, et enregistrée le 15 novembre de la même année, a donné quittance finale et complète au dit hon. Charles Wilson de la dite somme de $2,000 et de tous les intérêts accrus sur icelle ; qu'aux termes de ce dernier acte il appert que la donation du 7 juin 1872, fut changée et convertie en dation en paiement ; que s'il y a différence de valeur entre la propriété cédée et la créance acquittée, l'acte du 26 juillet 1875, ayant été enregistré le 15 novembre 1875, la donation qui pourrait résulter de cette différence de valeur serait valable à toutes fins que de droit ; que l'acte du 7 juin 1872 ayant été changé comme susdit, ne fut pas enregistré, mais que la défenderesse continua à jouir de l'immeuble en question dont elle était en possession lors de la passation de l'acte du 26 juillet 1875, en vertu de ce dernier acte ; 2o. que si l'annulation du dit acte du 7 juin 1872 devait être prouvée, elle ne pourrait l'être qu'en déclarant nulle et non-avenue la décharge donnée au dit honorable Charles Wilson par la quittance du 26 juillet 1875, comme consentie sans valeur ni considération, et en faisant revivre la créance, en capital et intérêts, acquittée par le dit acte ; que cette créance s'élevait en capital et intérêts accrus au 26 juillet 1875, à $3,800 ; que si la défenderesse doit faire compte des revenus de la propriété depuis la mort du dit honorable Charles Wilson, les demandeurs ès-qualité de représentants de ce dernier doivent de leur côté tenir compte à la défenderesse des intérêts sur cette somme de $3,800, soit $228 par an, ce qui réduirait les fruits et revenus réclamés à $372 par année, soit $3,410 pour la période mentionnée dans la demande ; que cette dernière somme est compensée et au-delà par celle de $7,274.74, balance lui restant due par les demandeurs ès-qualité sur les legs annuels faits en sa faveur par le testament du dit feu l'honorable Charles Wilson ; que si l'annulation demandée est accordée elle ne pourrait l'être qu'à la charge par les demandeurs de payer la dite somme de $3,800 à la défenderesse, et avec droit pour cette

dernière de retenir la possession du dit immeuble jusqu'à tel paiement ; et 3°. que la défenderesse ne peut être condamnée à donner possession aux demandeurs au cas d'annulation du dit acte de donation, qu'en par eux payant le coût des impenses et améliorations utiles et nécessaires qu'elle a faites à la propriété pendant sa possession à titre de propriétaire et de bonne foi, lesquelles ont coûté et valent encore au-delà de $10,000, et qu'elle a un droit de rétention sur la dite propriété jusqu'au paiement de cette dernière somme ou toute autre fixée par la Cour ;

"Considérant qu'il résulte de l'acte du 26 juillet 1875 que la donation du 7 juin 1872 a été consentie dans la vue et le dessein par le dit honorable Charles Wilson, de compenser la réclamation que la défenderesse avait contre lui en vertu de son contrat de mariage ; et qu'en conséquence de cette donation cette dernière est convenue de décharger le dit honorable Charles Wilson de la dite réclamation, ce qu'elle a fait, tant pour elle-même que pour ses enfants, par le dit acte daté du 26 juillet 1875 et enregistré le 15 novembre 1875 ;

"Considérant que l'enregistrement de la dite donation était requis particulièrement dans l'intérêt des héritiers et légataires du donateur, de ses créanciers et de tous autres intéressés (arts. 804 et 805, C. C.), et que si le donateur personnellement n'était pas recevable à invoquer le défaut d'enregistrement, il est indubitable que ce défaut peut être invoqué par l'héritier du donateur, par ses légataires universels ou particuliers et par tous autres qui ont un intérêt à ce que la donation soit nulle (art. 806, C. C.) ;

"Considérant que l'enregistrement des donations entrevifs aux bureaux établis pour l'enregistrement des droits réels remplace l'insinuation aux greffes des tribunaux qui a été abolie (art. 804 C. C.), et que les donations sont sujettes aux règles concernant l'enregistrement des droits réels contenues au titre 18 du livre 3e du Code Civil, et ne sont plus soumises aux règles de l'insinuation (art. 809 C. C.) ;

"Considérant que l'enregistrement doit avoir lieu (art. 2131, C. C.) soit par la transcription qui se fait en trans-

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crivant en entier sur le régistre, le titre ou document qui crée le droit ou qui y donne lieu, ou un extrait de ce titre fait et certifié suivant les dispositions de l'article 1216 du Code Civil (art. 2132), soit par l'inscription qui se fait au moyen d'un bordereau ou sommaire contenant l'énonciation des droits réels qu'une partie intéressée entend conserver, et qui est remis au régistrateur et transcrit sur le régistre (art. 2136, C. C.);

"Considérant que le bordereau doit déclarer entre autres choses la date du titre et le lieu où il a été passé, le nom du notaire qui en a gardé la minute, la nature du titre, la description des parties et des biens affectés au droit réclamé, ainsi que de la partie qui requiert l'enregistrement, et la nature du droit réclamé (art. 2139, C. C.), et être présenté au régistrateur avec le titre ou document, ou une copie authentique du titre, et que le bordereau doit être reconnu par les parties qui l'ont fait ou l'une d'elles, ou prouvé par le serment d'un des témoins qui l'ont signé (art. 2140, C. C.);

"Considérant que le dit acte du 26 juillet 1875 ne contient pas toutes les énonciations que l'enregistrement, soit par transcription, soit par inscription doit faire connaître au public lorsqu'il s'agit d'une donation entrevifs, que si cet acte indique la date et la nature de la donation du 7 juin 1872, ainsi que le nom du notaire qui en a gardé la minute, et la description des parties, il ne mentionne pas le lieu où elle a été passée ni la description et la nature des biens donnés, qu'il porte seulement, que le dit honorable Charles Wilson a donné à la défenderesse un montant plus considérable que celui qu'il avait promis de lui donner dans et par son contrat de mariage, énonciation qui repousse l'idée même de la donation de l'immeuble et dépendances dont il s'agit dans l'espèce; qu'il ne peut point passer pour une donation suffisante en ce que l'immeuble donné n'y a pas été spécifié; et que partant le défaut d'enregistrement de la dite donation du 7 juin 1872 n'a pas été suppléé par l'enregistrement fait par transcription le 15 novembre 1875, au bureau de la division d'enregistrement de Montréal du dit acte du 26 juillet 1875; car

quoique dans ce dernier acte le notaire, par devant lequel la donation avait été faite eût été particulièrement désigné, on ne saurait prétendre avoir satisfait aux exigences de la loi parceque les minutes d'un notaire ne sont pas publiques pour être communiquées à autres qu'aux parties qui les ont passées (art. 1245, *et seq.*, C. P. C.) ; comme est un régistre d'enregistrement dont un régistrateur ne peut pas refuser la communication au premier qui l'en requiert (art. 2177 *et seq.*, C. C.) ;

"Considérant que l'enregistrement des actes portant substitution remplace leur insinuation au greffe des tribunaux et leur publication en justice, formalités qui ont été abolies, (art. 941, C. C.) ; que tel enregistrement est requis dans l'intérêt des appelés et dans celui des tiers (art. 938 C. C.) ; et qué la substitution peut être attaquée à cause du défaut d'enregistrement par tous ceux qui y ont intérêt, à moins d'une exception qui les concerne (art. 939, C. C.) ;

"Considérant que si l'on ne peut créer une substitution que par donation entrevifs en un contrat de mariage ou autrement, par donation à cause de mort en un contrat de mariage ou par testament (929, C. C.) ; et si le substituant, le grevé, non plus que leurs héritiers et légataires universels, ne peuvent se prévaloir du défaut d'enregistrement (art. 940, C. C.) c'est en ce qui concerne la donation entrevifs, qu'elle est parfaite entre le donateur et le donataire par le concours de leurs volontés sans tradition ni enregistrement (art. 755 et 777, C. C.) ; que le donateur personnellement non plus que le donataire ou ses héritiers ne sont pas recevables à invoquer son défaut d'enregistrement, et que la donation sans enregistrement n'a aucun effet contre l'héritier du donateur même et ses légataires universels ou particuliers (art. 806, C. C.) ; d'où il suit que la loi n'a introduit la publication de la substitution que pour être ajoutée à un acte parfait et qui a déjà commencé d'avoir son exécution, à l'égard même de l'héritier et des légataires universels ou particuliers du donateur ;

"Considérant que c'est, outre les effets de l'enregistre-

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ment, et du défaut d'icelui, quant aux donations et aux testaments respectivement comme tels, que ceux de ces actes qui portent substitution fidéi-commissaire, soit de biens meubles, soit d'immeubles, doivent être enregistrés, dans l'intérêt des appelés et dans celui des tiers (art. 938, C. C.);

"Considérant que la raison pour laquelle les donations entrevifs ne peuvent point valoir sans enregistrement, contre les héritiers et les légataires universels ou particuliers du donateur, regarde non seulement l'exécution, mais aussi la forme et la substance de l'acte, pour ce qui les concerne; que la donation non enregistrée est censée feinte et simulée à leur égard, et qu'elle demeure sans effet, et ne peut être d'aucune considération contre eux, pour tout ce qui en peut résulter;

"Considérant que le défaut d'enregistrement du dit acte du 7 juin 1872, entraîne sa nullité, que ce qui est nul ne peut produire d'effet, et que, partant, les demandeurs, en leur dite qualité, sont recevables à opposer aux défendeurs, le défaut d'enregistrement de cet acte, considéré tout à la fois comme donation et comme substitution;

"Considérant que la défenderesse est tenue d'abandonner et délaisser aux demandeurs, en leur dite qualité, la possession de la maison et dépendances en question, comme leur appartenant, et de leur rendre et restituer les loyers, fruits et revenus des dites maisons et dépendances, par elle indûment perçus, depuis le 4 mai 1877, date du décès du dit hon. Charles Wilson;

"Considérant que c'est à raison de cette donation que le dit hon. Charles Wilson a obtenu quittance et décharge du paiement de la somme de $2,000 qu'il avait promis de payer à la défenderesse, dans et par son dit contrat de mariage, sous un an, à compter du 4 juillet 1859, et des intérêts accrus sur icelle, ainsi que constaté par l'acte du 26 juillet 1875, que bien que cette donation du 7 juin 1872 ne puisse être considérée comme dation en paiement d'après les termes de cette quittance, néanmoins son annulation ne saurait être prononcée qu'à la charge par les demandeurs, ès-qualité, de payer à la défenderesse

la dite somme de $2,000, avec intérêts sur icelle, à compter du 4 juillet 1860, jusqu'au 7 juin 1872, et du 4 mai 1877 jusqu'au paiement, (les intérêts sur cette somme pour la période comprise entre le 7 juin 1872 et le 4 mai 1877 n'étant pas accordés parce que la défenderesse a perçu les loyers, fruits et revenus de la maison et dépendances à elle données durant cette période, et qu'elle n'est pas tenue d'en rendre compte) ;

"Considérant que les annuités léguées à la défenderesse par le testament de feu l'honorable Charles Wilson ne lui sont payables qu'après certains legs faits par le testament, et qu'en autant que les revenus des biens du testateur ne le permettent dans l'opinion de ses exécuteurs testamentaires ; qu'il n'y a pas de preuve que la défenderesse aurait dû recevoir pour ces annuités, plus que ce qu'elle admet avoir reçu ; qu'il n'y a pas de preuve du décès d'Anne Tracey, et que partant la défenderesse est mal fondée à offrir en compensation de fruits et revenus qui lui sont demandés par l'action et dont elle doit rendre compte, la somme de $7,274.74 qu'elle prétend lui être due par les demandeurs ès-qualité, pour balance de ces annuités qui lui ont été léguées comme susdit ;

"Considérant qu'il résulte des admissions produites que les parties ont consenti à ce que la cause fût soumise au mérite, sous la réserve que l'exception d'impenses et améliorations en cette cause soit référée à des experts, dans le cas où la défenderesse serait condamnée à abandonner la propriété et possession de l'immeuble dont il s'agit aux demandeurs ès-qualité, et que cependant il a été entendu entre les parties que l'action soit censée avoir été intentée à la date du décès de M. Wilson, le donateur, et que les vices du titre de la défenderesse lui ont été dénoncés par interpellation judiciaire à cette date, déclare nul et annule, pour défaut d'enregistrement d'icelui, l'acte de donation du 7 juin 1872, et déclare que l'immeuble y décrit comme suit (*description*), appartient aux demandeurs ès-qualité, condamne la défenderesse à abandonner et délaisser aux demandeurs ès-qualité la possession des propriété, maison et dépendances en question

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comme leur appartenant, et à leur rendre et restituer les loyers, fruits et revenus des dites propriété, maison et dépendances par elle indûment perçus, depuis le 4 mai 1877, le tout avec dépens contre la défenderesse, dont distraction, etc., à la charge par les demandeurs, en leur dite qualité de payer préalablement à la défenderesse les impenses et améliorations dont elle aura droit d'être remboursée suivant qu'il sera ci-après constaté par experts et ordonné par cette Cour, et de plus la somme de $2,000 qui lui est due en vertu de son dit contrat de mariage du 4 juillet 1859 avec intérêt sur icelle, à compter du 4 juillet 1860, jusqu'au 7 juin 1872, et du 4 mai 1877 jusqu'au paiement, et ce nonobstant la dite quittance en date du 26 juillet 1875, qui est par le présent déclarée nulle et non-avenue et annulée;

"Et avant de faire droit sur les autres conclusions de la demande et sur la réclamation de la défenderesse pour impenses et améliorations sur la dite propriété, la Cour ordonne que par trois experts convenus par les parties, sinon nommés d'office en la manière ordinaire, il soit procédé à vérifier, constater et évaluer le coût de même que la valeur actuelle des impenses et améliorations utiles et nécessaires respectivement faites par la défenderesse, aux propriété, maison et dépendances en question durant son occupation d'icelles en vertu du dit acte de donation du 7 juin 1872, le temps où elles ont été respectivement faites, et la plus value qu'elles ont donnée au dit immeuble, en distinguant les impenses et améliorations nécessaires de celles qui n'étaient qu'utiles, et qu'il soit en même temps et par les mêmes experts, procédé à constater, évaluer et liquider les loyers, fruits et revenus des dites propriété, maison et dépendances, depuis le 4 mai 1877, à l'effet de quoi et pour y parvenir, sera tenue la défenderesse de représenter, à la première sommation qui lui sera faite, les comptes, papiers de recettes et baux, si aucun il y a, et un état des taxes et impositions payées par elle, pour, sur le rapport des dits experts, être ordonné ce qu'il appartiendra."

May 20, 1890.]

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Geoffrion, Q. C., for appellants :—

A l'appui de notre première défense nous soumettons trois propositions :

1o. L'acte du 7 juin 1872, est une donation à titre onéreux, qui ne requérait pas l'enregistrement pour être valide.

2o. L'enregistrement de l'acte du 26 juillet 1875, a couvert le défaut d'enregistrement du premier acte de donation.

3o Si cette donation ne doit pas être considérée à titre onéreux elle est devenue une dation en paiement, par l'acte du 26 juillet 1875.

L'acte du 7 juin 1872, doit-il être considéré comme une donation à titre onéreux ? Pour trouver l'intention des parties à un contrat on peut sortir des termes même de l'acte et chercher en dehors d'icelui la nature même de ce contrat.

Les charges qui le rendront onéreux peuvent ne pas être exprimés dans cet acte et être établis par une convention séparée. Dans l'espèce il ne peut y avoir de doute que l'intention du donateur, lors de la donation, était d'être acquitté de la somme de $3,800, qu'il devait à madame Masson en vertu de son contrat de mariage. Il suffit de lire la déclaration des parties dans l'acte du 26 juillet 1875, pour se convaincre de la vérité de la proposition que nous émettons.

"That whereas by the marriage contract between the "said Louis Masson and the said Anna Maria Wilson, "bearing date and executed before J. Belle and colleague "notaries, the 4th of July, 1859, the said honorable Charles "Wilson agreed and bound himself to pay the said Anna "Maria Wilson the sum of £500 equal to $2,000, as more "amply set forth in the said marriage contract.

"That whereas by a deed of donation bearing date and "executed before P. E. Normandeau, the undersigned "notary, on the 7th of June, 1872, the said honorable "Charles Wilson granted to the said Anna Maria Wilson

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"a greater amount than the sum promised in the mar-
"riage contract *with the view and intention of compensating*
"the said Anna Maria Wilson *for her said claim* under the
"marriage contract; in consequence of which donation
"she has agreed to discharge the said hon. Charles Wilson
"of the said claim under the said marriage contract.

"Wherefore the said Anna Maria Wilson authorized as
"aforesaid, as well for herself as for the children that
"may be born from her present marriage did and doth
"hereby renounce in favor of the said hon. Charles Wilson,
"to her said claim of $2,000 under the said marriage con-
"tract and *to all interest accrued.*"

Les termes de cet acte indiquent bien quelle était la convention et l'intention des parties à l'époque de la donation, et lors même que cette convention et cette intention n'auraient pas été reconnues par les parties par un acte subséquent, les appelants auraient pu en faire la preuve par les moyens que la loi met à leur disposition. Dans l'espèce nous avons une déclaration dans un acte, revêtu de toutes les formalités voulues, de la convention et de l'intention des parties, à l'époque même de la donation. Nous irons plus loin en affirmant que si l'acte du 26 juillet 1875 eût comporté que les parties avaient entendu faire et accepter la donation du 7 juin 1872 à la charge d'une rente viagère, laquelle serait reconnue dans le dernier acte, qui aurait été enregistré, il y aurait une hypothèque sur l'immeuble donné pour cette rente en faveur du donateur.

Ceci nous conduit de suite à la seconde proposition soumise plus haut, et nous croyons devoir affirmer que l'enregistrement de l'acte du 26 juillet 1875, doit couvrir le défaut d'enregistrement du premier acte de donation. Il faut prendre les deux actes du 7 juin 1872 et du 26 juillet 1875 comme n'en formant qu'un seul, et arriver nécessairement à la conclusion que la donation était à titre onéreux. Rien dans le dossier ne fait voir que la valeur des biens cédés dépassait les $3,800, dues à Madame Masson par son contrat de mariage, et conséquemment l'acte de donation ne peut être annulé faute d'enregistrement.

L'acte du 26 juillet 1875, comporte-t-il une dation en paiement? Il est indiscutable que madame Masson avait une créance de $3,800 par son contrat de mariage contre l'hon. Charles Wilson, et il est aussi incontestable que ce dernier a déclaré dans l'acte du 26 juillet 1875, qu'il a donné l'immeuble en litige, pour payer cette somme, or ce dernier acte a un effet rétroactif, et il faut nécessairement que la convention stipulée dans icelui ait été arrêtée lors de la donation du 7 juin 1872.

Même encore en admettant que l'acte du 26 juillet 1875 n'aurait pas d'effet rétroactif, la loi ne s'oppose pas à ce que les parties changent leur convention plus tard; et ce dernier contrat, qui a été enregistré, étant valable, il faut lui donner un effet et quel devra être cet effet, sinon que le donateur a acquitté sa dette par le moyen de sa donation. Telle a été aussi l'intention des parties, laquelle doit être respectée.

Nous croyons même pouvoir dire que l'acte du 26 juillet 1875 a créé par lui-même un titre parfait en faveur de l'appelante, indépendamment de l'acte du 7 juin 1872, du moment qu'il n'y a pas lieu de se tromper sur l'identité de la chose qui a fait l'objet de cet acte. Or, personne ne peut se tromper et ne peut avoir de doute sur le fait que l'acte du 26 juillet 1875 a rapport à l'immeuble en litige en cette cause.

Le défaut de description de l'immeuble n'invalide pas une donation, du moment que l'identité de la chose donnée peut se constater; l'enregistrement de la donation est requis pour deux fins, 1o, celle concernant les lois générales de l'enregistrement des droits réels, 2o. celle concernant la validité de la donation. Pour cette dernière fin, aucune description des immeubles donnés n'est nécessaire: l'acte du 26 juillet 1875, ayant été dûment enregistré est seul et par lui-même un titre suffisant pour l'appelante.

Avant de passer à une autre partie de ce mémoire nous terminerons par deux observations: 1o. il n'y a aucune preuve que la propriété cédé excédait en valeur la créance qui a été éteinte par la prétendue donation, et s'il y

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avait excédant, le montant de ce surplus n'est certainement pas établi au dossier ; 2o. étant clairement démontré que la prétendue donation était onéreuse pour une partie, ou plutôt une dation en paiement, l'immeuble cédé doit demeurer la propriété de l'appelante dont le titre est valable sans enregistrement, et elle ne pourrait tout au plus qu'être condamnée à payer la différence de valeur en sus de sa créance si cette différence était connue.

Sur la seconde défense, la Cour inférieure a admis la prétention de l'appelante que sa créance résultant de son contrat de mariage devait revivre et compenser pour autant, les fruits et revenus de la propriété dont elle était comptable ; nous soumettons cependant qu'il y a lieu de modifier le calcul des intérêts sur la créance, qui avait été capitalisée et payée par la dation en paiement dont nous avons parlé plus haut. Les intérêts doivent être alloués sur la créance ainsi capitalisée et non pas sur le capital originaire seulement.

Une dernière observation avant de finir : les exécuteurs testamentaires d'un donateur peuvent-ils demander la nullité ou plutôt l'annulation d'une donation pour défaut d'enregistrement, art. 805 et 806, C. C. ? Cette question a d'autant plus d'à-propos que dans la présente instance, il appert que les héritiers du testateur sont opposés à la procédure en nullité adoptée par les intimés. Les exécuteurs testamentaires (les intimés n'ont pas d'autre qualité) sont sans intérêt, et quoique la question n'ait pas été soulevée en première instance, il n'y a rien qui empêche l'appelante de la soulever devant cette honorable Cour.

Lajoie, for respondents :—

Nous n'avons à considérer que trois points dans la cause.

1o. L'enregistrement de l'acte de quittance donnée par l'honorable Charles Wilson à l'appelante, est-il suffisant pour dispenser cette dernière de l'enregistrement de l'acte de la donation lui-même ?

2o. Cet acte de quittance démontre-t-il que la donation a été convertie en une dation en paiement ?

3o. Dans le cas où la donation serait annulée, la cré-

ance de $2,000 créée en faveur de l'appelante par son contrat de mariage, doit-elle revivre et l'appelante a-t-elle droit à l'intérêt sur icelle ?

I.—L'appelante a-t-elle satisfait à la loi, en enregistrant la quittance du 6 juillet 1875, qui mentionne la donation en question ?

L'article du Code sur lequel s'appuient les intimés, est l'article 806 qui se lit comme suit : "toutes donations en- "trevifs, mobilières ou immobilières, même celles rémuné- "ratoires, doivent être enregistrées, sauf les exceptions "contenues aux deux articles qui suivent. Le donateur "personnellement non plus que le donataire ou ses héri- "tiers ne sont pas recevables à invoquer le défaut d'en- "registrement ; ce défaut peut être invoqué par ceux qui "y ont droit en vertu des lois générales d'enregistrement, "par l'héritier du donateur, par ses légataires universels "ou particuliers, par ses créanciers quoique non hypothé- "caires et même postérieurs et par tous autres qui ont un "intérêt à ce que la donation soit nulle."

L'enregistrement d'un acte se fait soit par transcription soit par inscription (articles 2131 et 2132 Code Civil). Ici il ne peut être question de la transcription puisque celle-ci consiste à enregistrer l'acte en entier. L'inscription d'un autre côté peut se faire en enregistrant un simple bordereau contenant l'énonciation du droit réel que la partie entend conserver.

Ce bordereau doit déclarer la date du titre, le lieu où il a été passé, le nom du notaire qui en a gardé la minute, la nature du titre, la description des parties et des biens affectés aux droits réclamés, ainsi que de la partie qui requiert l'enregistrement.

Or, dans le présent cas l'acte de quittance du 6 juillet 1875, dont on invoque l'enregistrement comme remplaçant à toutes fins que de droit l'enregistrement de la donation, ne contient pas tous les énoncés requis par la loi. L'enregistrement de cet acte n'a donc pas satisfait aux exigences de la loi. En effet il faut remarquer que l'acte de quittance ne mentionne pas quel immeuble a été donné ; il dit simplement que l'honorable Charles Wilson

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a donné à l'appelante un montant plus considérable que celui qu'il avait promis de lui donner par son contrat de mariage. Le nom du notaire il est vrai, est mentionné, mais, comme l'a fait remarquer l'honorable juge en Cour inférieure, les minutes d'un notaire ne sont pas publiques.

Rien ne faisait connaître au public que l'immeuble en question était la propriété de l'appelante; au contraire au bureau d'enregistrement il apparaissait lors du décès de l'honorable Charles Wilson, que l'immeuble en question appartenait à ce dernier. L'esprit et la lettre de la loi sur l'enregistrement étaient donc violés, car l'enregistrement des donations est requis dans le but d'empêcher les donations feintes et simulées.

II.—L'acte de quittance démontre-t-il que la donation a été convertie en une dation en paiement ?

Il faut remarquer que l'acte de quittance en question mentionne l'acte de donation et le mentionne spécialement comme donation. L'intention des parties était donc de considérer l'acte en question comme donation.

La loi et la jurisprudence sont ici d'accord avec l'intention des parties ; car la dation en paiement doit être d'une chose qui est l'équivalent de la dette.

Or la propriété donnée est évaluée dans l'acte même à la somme de $16,000, et la dette n'était que de $2,000.

Pothier, au titre des donations, article 3, paragraphe 1, dit : "quand même les charges seraient appréciables à "prix d'argent, si le prix est de beaucoup inférieur à celui "de la chose donnée, c'est encore en ce cas une donation "qui pourrait être annulée faute d'insinuation, réservant "au donateur son action pour se faire payer s'il a accompli "les charges."

Laurent, tome 12, No. 334, parlant des donations rémunératoires, s'exprime comme suit : "On ne peut pas scinder "l'acte ; on doit le considérer ou comme une donation ou "comme une convention onéreuse. Il nous semble que "l'acte, dès qu'il contient une libéralité doit être soumis "aux formes qui régissent les libéralités. Telle est la "règle, il faudrait une exception pour qu'une libéralité "fût dispensée de l'observation des formes légales."

Le même auteur, au No. 340 du même volume, parlant des donations onéreuses, s'exprime comme suit: "à notre "avis il faut dire des donations onéreuses, ce qu'il faut "dire des donations rémunératoires; dès qu'il se trouve "dans un acte un élément de libéralité, il doit être fait "avec les solennités prescrites par la loi."

L'article 806 de notre code, sur lequel nous nous appuyons, s'applique aux donations rémunératoires comme aux donations pures et simples.

Nous soumettons donc que l'acte de donation du 7 juin 1872, a toujours été considéré comme donation par les parties, et que par la loi il ne peut être converti en une dation en paiement, par le seul fait qu'il aurait servi à éteindre une dette de $2,000, que l'honorable Charles Wilson aurait due à l'appelante.

III.—Dans le cas où la donation serait annulée, la créance de $2,000 créée en faveur de l'appelante par son contrat de mariage, devrait-elle revivre?

Sur ce point le jugement dont est appel maintient en partie les prétentions de l'appelante.

Les intimés devront payer à l'appelante une somme de $2,000 avec les intérêts depuis le 4 juillet 1860, jusqu'au 7 juin 1872, et depuis le 4 mai 1877 jusqu'au paiement. Pour la période comprise entre le 7 juin 1872 et le 4 mai 1877, les intérêts ne sont pas accordés attendu que l'appelante a joui de la propriété durant cet intervalle, et qu'elle n'est pas obligée de rendre les fruits. L'appelante avait réclamé dans son plaidoyer les intérêts sur la somme de $3,800. Elle voulait capitaliser une somme de $1,800, l'intérêt qui se trouvait lui être dû par l'honorable Charles Wilson, lors de la quittance du 6 juillet 1875. La Cour a repoussé cette prétention. En effet, aucun texte de loi n'autorisait l'appelante à capitaliser les intérêts à cette date et à réclamer les intérêts composés.

Sept. 24, 1890.]

Bossé, J., dissenting, was of opinion that the necessity for registering the first deed was not dispensed with by the registration of the subsequent deed.

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TESSIER, J., for the majority of the Court, held that it was permissible to the parties, to change the nature of the deed of 1872, and that the absence of registration of the original deed could not be invoked. The reasons are set forth in the written judgment of the Court, which reads as follows:—

"La Cour, etc.....

"Attendu que dans le contrat de mariage, exécuté le 4 juillet 1859, devant Mtre. J. Belle et son confrère, notaires, enregistré le 22 août 1859, entre l'appelante Anna Maria Wilson et Louis H. R. Masson, l'hon Charles Wilson a fait donation à sa nièce, l'appelante Anna Maria Wilson, de la somme de $2,000, qu'il promit lui payer, avec intérêt;

"Attendu que par un acte de donation, exécuté le 7 juin 1872, devant Mtre. P. E. Normandeau, notaire, le dit hon. Charles Wilson fit donation à la dite Anna Maria Wilson de l'usufruit viager d'un immeuble y décrit, situé en la cité de Montréal, à certaines conditions y indiquées;

"Attendu que par un acte déclaratoire du 26 juillet 1875 (Normandeau, notaire), enregistré le 15 novembre 1875, le dit hon. Charles Wilson et la dite Anna Maria Wilson autorisée de son époux, changèrent la nature du précédent acte de donation du 7 juin 1872, en déclarant que l'intention des parties, lors de cette donation du 7 juin 1872, avait été qu'elle était faite moyennant considération, savoir: que la dite Anna Maria Wilson acquitterait le dit hon. Charles Wilson de la dite somme de $2,000 qu'il lui devait en vertu du contrat de mariage suscité, avec intérêt du 4 juillet 1859, s'élevant en tout à une somme excédant $3,800;

"Attendu que les demandeurs, intimés actuels, ont demandé par leur action la nullité du dit acte de donation du 7 juin 1872, à cause du défaut de l'avoir fait enregistrer du vivant du donateur, et ont conclu à ce que l'immeuble y décrit, faisant partie du lot cadastral No. 1312, du quartier St-Antoine de Montréal, soit déclaré appartenir aux dits intimés, et les dits intimés remis en possession d'icelui, à ce que la dite Anna Maria Wilson soit con-

damnée à rendre compte des fruits et revenus par elle perçus, depuis le 4 mai 1877, et à payer tout reliquat dont elle pouvait être redevable, et, à défaut, condamnée à payer la somme de $5,500 ;

"Attendu que l'appelante Anna Maria Wilson a répondu à cette action, en invoquant l'acte déclaratoire du 26 juillet 1875, en vertu duquel elle a accepté l'usufruit de l'immeuble en question, en paiement de cette somme de $3,800, qui lui était alors due par le dit hon. Charles Wilson, et que ce dernier acte a été dûment enregistré, et qu'elle possédait le dit immeuble avant le dit acte de 1875, et le possède encore ;

"Considérant qu'il était libre aux parties de changer la nature de l'acte du 7 juin 1872, qui était en apparence une donation gratuite, et d'en faire un acte de dation en paiement, ce qu'elles ont fait par le dernier acte du 26 juillet 1875 ;

"Considérant que la déchéance résultant du défaut d'enregistrement, prononcée par l'article 806 du Code Civil, est de droit étroit, et ne s'applique qu'aux donations gratuites et rémunératoires ;

"Considérant que cet acte a été converti en un acte de dation en paiement, et que d'après l'article 1592 du Code Civil, la dation d'une chose en paiement équivaut à vente, et rend celui qui la donne ainsi sujet à la même garantie ;

"Considérant que la nécessité d'enregistrer un acte de vente ou dation en paiement, n'existe que vis-à-vis des tiers acquéreurs et des créanciers hypothécaires, mais non pas vis-à-vis du vendeur, de ses héritiers ou légataires, qui sont garants de la vente et de la dation en paiement ; et que d'ailleurs le dit acte du 26 juillet 1875 a été dûment enregistré du vivant des parties contractantes (C. C. 2098, 2100, 2127) ;

"Considérant que la différence de valeur de la jouissance du dit immeuble, et du prix payé, ne peut faire annuler le dit acte de dation en paiement ; parce que la lésion dans les contrats de vente ou équipollents à vente, ou autres, n'est plus une cause de restitution ou de nullité, depuis notre Code, en vertu de l'article 1012 ;

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"Considérant que le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure à Montréal le 19 janvier 1889, prononce la nullité de l'acte déclaratoire du 26 juillet 1875, sans qu'il y eut de conclusions de la part des demandeurs intimés à cette fin, et sans allégation de fraude ou cause de nullité, et qu'il n'était pas loisible au tribunal d'annuler cet acte, en renvoyant l'appelante, la dite Anna Maria Wilson, à courir le risque du recouvrement de la dite somme de $3,800, recours qui peut être illusoire et prescriptible, au moins pour les intérêts, et qu'en ce cas la partie qui voulait faire annuler l'acte du 26 juillet 1875, était tenue d'offrir et déposer préalablement la dite somme de $3,800, et les intérêts accrus depuis le 26 juillet 1875, ce qui n'a pas été fait;

"Considérant que les demandeurs intimés n'ont pas établi des qualités et un intérêt suffisant pour les justifier de porter la présente action (C. C. 805, 806);

"En conséquence cette Cour, prononçant le jugement qui eut dû être rendu, casse le jugement rendu le 19 juin 1889, par la dite Cour de première instance, et maintenant les exceptions de la défenderesse appelante fondées sur l'acte du 26 juillet 1875 susdit, déclare la demande des demandeurs intimés mal fondée, et déboute la dite demande avec dépens contre eux, tant en Cour de première instance que dans cette Cour; les frais à être taxés en cette Cour comme dans une cause de première classe. (*Dissentiente* l'hon. juge Bossé)."

Judgment reversed.

Geoffrion, Dorion & Allan for appellants.

Lacoste, Bisaillon, Brosseau & Lafoie for respondents.

(J. K.)

June 19, 1890.

Coram DORION, Ch. J., CROSS, BABY, BOSSÉ, JJ.

DAME EULALIE BONNEAU,
(*Plaintiff in Court below*),
APPELLANT;

AND

TOUSSAINT CIRÉ,
(*Defendant in Court below*),
RESPONDENT.

Séparation de corps—Grounds for separation—Ill treatment.

HELD:—That isolated acts of ill treatment and insulting expressions applied to a wife by her husband (a carter) are not sufficient to justify a *séparation de corps*, where it appears that the wife, on the occasions complained of, provoked the anger of her husband by her light behaviour and disobedience to his reasonable commands.

APPEAL from a judgment of the Court of Review, Montreal (DOHERTY, PAPINEAU and LORANGER, JJ.), June 30, 1887, reversing a judgment of the Superior Court, Montreal (TORRANCE, J.), Nov. 20, 1886.

The action was *en séparation de corps et de biens* by a wife against her husband. The parties had been eighteen years married, and had a child. The husband was a carter.

The evidence as to ill treatment was extremely conflicting, but the judgment of first instance maintained the action in the following terms:—

"La Cour, etc.....

"Considérant que le défendeur n'a pas prouvé son plaidoyer, le renvoie;

"Considérant que la demanderesse, épouse du défendeur depuis au-delà de dix-huit ans, a prouvé que le défendeur son mari s'est rendu coupable envers elle d'excès, de sévices et injures graves, et qu'il l'a assaillie et frappée violemment sur le corps;

"Considérant que le défendeur s'adonne fréquemment

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à la boisson et s'est porté sur sa dite épouse à des voies de fait ;

"Déclare, par ces raisons, que la demanderesse n'est plus tenue d'habiter le domicile du défendeur, et qu'elle est séparée de corps et de biens d'avec le dit défendeur, fait défense à ce dernier de fréquenter, troubler ou rechercher la dite demanderesse sous les peines de droit ; dissout, par les présentes, la communauté de biens existant entre les dites parties, déclare que la demanderessse, en conformité à la loi, aura la jouissance et administration des biens qu'elle peut avoir en vertu de ce jugement, ou à l'avenir, les biens actuels à être partagés sur dire de praticien à être nommé."

The judgment of the Court of Review, reversing the above judgment, was as follows :—

"La Cour, etc.....

"Considérant que la demanderesse n'a pas prouvé les allégués essentiels de sa déclaration, notamment que le défendeur s'est, aux époques mentionnées dans la déclaration, rendu coupable de sévices, excès et injures graves à son égard ;

"Considérant qu'il est prouvé que la demanderesse a elle-même provoqué, par la légèreté de sa conduite et par sa désobéissance aux ordres légitimes de son mari, la colère de celui-ci et s'est exposée aux traitements dont elle a fait la preuve ; qu'au reste, ces mauvais traitements sont isolés, et vu les conclusions de la demande ;

"Considérant qu'il est également prouvé que les expressions et les paroles dont le défendeur s'est servi à l'adresse de la demanderesse, toutes grossières qu'elles soient, ne sont pas, sous les circonstances, suffisantes pour autoriser et justifier la séparation de corps ;

"Considérant que le défendeur a prouvé les allégués de sa défense et conséquemment qu'il y a erreur dans le dit jugement du 20 novembre 1886 ;

"Casse et renvoie le dit jugement, et procédant à rendre celui que la Cour de première instance aurait dû rendre, maintient la défense du défendeur et renvoie l'action de

la demanderesse avec dépens tant de cette Cour que de la Cour de première instance, distraits, etc."

May 19, 1890.]

The case was submitted on the factums.

June 19, 1890.]

BABY, J. (for the Court), after stating the facts, said the Court saw no reason to disturb the judgment.

Judgment of C. R. confirmed.

F. L. Sarrasin for appellant,

Préfontaine & Lafontaine for respondent.

(J. K.)

June 19, 1890.

Coram DORION, Ch. J., TESSIER, BABY, BOSSÉ, DOHERTY, JJ.

JACQUES DENIS MICHON,
(*Plaintiff in Court below*),
APPELLANT;

AND

FRANÇOIS XAVIER LEDUC ET AL.,
(*Defendants in Court below*),

AND

DAMIEN BOUSQUET ET AL.,
(*Mis en cause in Court below*),
RESPONDENTS.

Partnership—Association to provide water supply—Action to dissolve partnership—Partition—Arts. 689, 1499, *C.C.*

HELD:—1. Where several persons, owners of lands in the vicinity of the River Richelieu, associated themselves by deed before notary, for the purpose of providing a water supply for their respective dwellings, that an ordinary partnership was not thereby created, and that an action for dissolution of partnership, brought by one of the associates who had ceased to have property there and had left the neighborhood, could not be maintained.

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2. That Art. 689, C. C., is not applicable to the state of things existing under the deed of association above mentioned, and that a partition could not be demanded by one of the associates, inasmuch as the association had no common property susceptible of partition, the water works being merely an accessory of the real property and designed for its perpetual use.

APPEAL from a judgment of the Superior Court, St-Hyacinthe (TELLIER, J.), March 18, 1889, dismissing the appellant's action for the dissolution of an alleged partnership. This judgment, which fully explains the case, is as follows:—

"La Cour après avoir entendu les parties par leurs avocats respectifs, tant sur le mérite de la cause que sur les trois motions du demandeur tendant l'une à faire rejeter les dépositions d'Auguste Brodeur, Clovis Senécal, Misaël Auclair et Anatole Tétreault, témoins entendus de la part des défendeurs et mis en cause, et les deux autres à faire maintenir les objections faites par le demandeur (tant celles qui ont été renvoyées, que celles qui ont été réservées) aux questions posées les 4 et 5 décembre dernier, à Moise Rémy et Alphonse Lussier, témoins entendus de la part des défendeurs Bonin et Gervais, et à faire rejeter les réponses données par ces témoins, à ces questions ainsi objectées par le demandeur; les défendeurs et mis en cause ayant tous comparu par procureurs et contesté l'action du demandeur, sauf le mis en cause Théodule Vogel qui a déclaré s'en rapporter à justice, examiné la procédure, etc.;

"Considérant qu'aux termes d'un acte reçu à St-Charles, le 5 septembre 1881, devant Mtre. Chabot, notaire, le demandeur et les défendeurs se sont associés dans le but de faire l'achat d'un aqueduc devant conduire l'eau de la rivière Richelieu aux demeures respectives des dits associés, et de pourvoir aux frais de placement et de mise en opération de cet aqueduc, sous les conditions énoncées au dit acte;

"Considérant que lors de cet acte, le demandeur était le curé de la paroisse de St-Charles, et occupait à ce titre, le presbytère de la paroisse et ses dépendances; et que les

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défendeurs étaient tous propriétaires et en possession de terrains et emplacements situés dans le voisinage du dit presbytère et de la dite rivière Richelieu ;

"Considérant que cette association dont la durée n'a été limité ni par le dit acte, ni autrement, a été formée entre le demandeur, de son propre aveu, et les défendeurs, afin de régler dans leur intérêt commun, la distribution des eaux à prendre dans la dite rivière, et nécessaires à l'alimentation de leurs demeures et propriétés respectives ;

"Considérant que le demandeur et les défendeurs procédant à exécuter l'objet stipulé au dit acte, ont immédiatement après sa passation, acheté une pompe mue par le vent, l'ont fait ériger sur le terrain du défendeur Rémy, avec tuyau prenant de la dite rivière, remontant à la dite pompe et de là à un réservoir en bois, construit sur le même immeuble, dans le même temps, et d'une capacité d'environ 575 gallons ; que cette pompe mise en mouvement par le vent, a commencé et continué à pomper l'eau de la dite rivière, et à la déverser dans le dit réservoir auquel a été fixé un fort tuyau qui se poursuit jusqu'au chemin de front du premier rang de St-Charles, et distribue au moyen de petits tuyaux qui y sont adaptés, aux propriétés et demeures respectives des dits associés, selon les besoins de chacune d'elles ; que ces tuyaux qui sont en bois ont été enfouis sous terre : que plus tard le dit réservoir qui n'était pas assez puissant pour les fins susdites, a été renouvelé et remplacé par un autre de la capacité d'environ 1,500 gallons, et que tous ces travaux ont été faits et entretenus à frais communs entre le demandeur et les défendeurs ou leurs successeurs dans les dites propriétés ;

"Considérant que le demandeur a cessé d'être le curé de la paroisse de St-Charles, le 29 septembre 1887, qu'il avait, dès avant, laissé son dit presbytère, pour cause de grosses réparations à y faire, qu'il a été remplacé comme tel curé par Messire Taupier qui a pris possession du dit presbytère aussitôt que les travaux de réparations le permirent, savoir : en mars 1888, et qui a joui depuis du dit aqueduc et payé sa part contributoire dans les frais de

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son entretien et de son fonctionnement ; et que le demandeur, depuis qu'il a laissé le dit presbytère, n'a pas profité du dit aqueduc, ni contribué, ni été recherché pour ces frais d'entretien ou autres ;

"Considérant que les défendeurs Gervais, Jacques et Bonin, ont, par actes à cet effet, vendu aux mis en cause leurs propriétés respectives alimentées d'eau par le dit aqueduc ainsi que leurs droits et intérêts dans le dit aqueduc, aux dates suivantes, savoir : le dit Gervais à Damien Bousquet, le 5 septembre 1883 ; le dit Jacques à Charles Bousquet, le 14 février 1887 ; et le dit Bonin à Théodule Vogel, le 19 mars 1888 ; que les mis en cause ont joui du dit aqueduc depuis les dates respectives de leurs dites acquisitions et en ont assumé et rempli les obligations d'entretien et de fonctionnement ; et que les défendeurs Gervais, Jacques et Bonin ont, depuis lors, cessé de jouir du dit aqueduc et d'y avoir des droits, intérêts et obligations, tant de fait qu'en vertu du dit acte du 5 septembre 1881 ;

"Considérant que le 3 mars 1888, le demandeur, par le ministère de Mtre. Chabot, notaire, a donné un avis dont il leur a laissé copie à chacun des défendeurs et des mis en cause Damien Bousquet et Charles Bousquet, qu'il entendait dès lors discontinuer la dite prétendue société et y mettre fin, sans délai, à toutes fins, et qu'il les requerrait collectivement et individuellement de procéder sous huit jours, ou sous tel autre délai qui pourrait être nécessaire, au partage à l'amiable, et à la liquidation et licitation volontaire des biens de la dite prétendue société ; et qu'à défaut par eux de ce faire, il entendait se pourvoir en justice pour les y contraindre, et les faire condamner à tous ses dépens et dommages-intérêts ;

"Considérant que dans son action, intentée le 9 avril dernier, le demandeur allègue, entr'autres choses, qu'à la suite de la construction d'un presbytère en la dite paroisse de St-Charles, quelques-uns des défendeurs ont malheureusement conçu contre lui, une haine violente qui fait que ses rapports comme membre de la dite prétendue société avec ces défendeurs sont devenus impos-

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sibles quant à ce qui concerne les affaires de la dite prétendue société ; qu'en conséquence de cette impossibilité, les affaires de la dite prétendue société sont tombées dans le désordre, au préjudice des dits associés ; qu'en outre le demandeur ne réside plus à St-Charles, et ne peut plus, en conséquence, donner aucun soin à la dite prétendue société, quand même d'ailleurs la haine dont il est l'objet comme susdit n'en serait pas pour lui un obstacle ; que lorsque le demandeur quitta la dite paroisse de St-Charles, la dite prétendue société ne fournissait plus d'eau au dit presbytère, ni à aucune maison appartenant au demandeur ou occupé par lui, ni à aucune propriété en laquelle il fut intéressé directement ou indirectement, au vu et su des défendeurs ; qu'en outre les défendeurs Gervais, Jacques et Bonin, hommes habiles, modérés et experts dans les affaires de la nature de celles pour lesquelles la dite société a été formée, et qui, par leur intelligence et leur habilité peuvent donner des soins et une direction à ses affaires très avantageux pour les dits associés, ont abandonné depuis un certain temps leur part de soin et de direction dans les affaires de la dite prétendue société, au grand préjudice de cette société, et ont cédé leur droits, parts et prétentions dans les biens de la dite société aux mis en cause ; que vu ce que ci-dessus énoncé, et vu, en outre, le fait que la durée de la dite prétendue société n'a pas été fixée par le dit acte, le demandeur a été et est bien fondé à demander que la dite prétendue société qu'il a contractée avec les défendeurs, par et en vertu du dit acte, soit dissoute à toutes fins que de droit ; que les défendeurs ont refusé et refusent encore de mettre fin au dit acte, à la dite prétendue société, et à décharger le demandeur de toute responsabilité ultérieure résultant de la dite prétendue société, sur les affaires de laquelle il ne peut plus désormais avoir sa part de contrôle, de surveillance et de direction ; qu'ils ont également refusé de procéder à la liquidation et partage des biens de la dite prétendue société, et entendent forcer le demandeur à rester membre de la dite société en vertu du dit acte, le tout à son préjudice et dommage, et de manière à le contraindre à

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prendre contre eux la dite action et demander que le dit acte de société et la dite prétendue société pour tout le temps à l'avenir et seront résiliés avec [illegible] du 3 mars 1888 ;

"Considérant que le demandeur conclut à ce que les défendeurs soient condamnés à mettre fin au dit acte de société et à la dite prétendue société, à les résilier et dissoudre à compter du 3 mars 1888, tout en se réservant le droit de prendre toutes autres procédures et conclusions à l'effet de parvenir à la liquidation de la dite prétendue société, en vertu du dit acte de société, et au partage du fonds commun, toutes dettes payées ;

"Considérant que les défendeurs et mis en cause, sauf le dit Théodule Vogel qui s'en est rapporté à justice, ont contesté l'action du demandeur, et qu'ils se sont opposés à la dissolution demandée par icelle, pour les motifs déduits en leurs défenses respectives, en par ceux d'entre eux qui ont encore des intérêts dans le dit aqueduc, reconnaissant que le demandeur est dégagé de plein droit des obligations résultant du dit acte du 5 septembre 1881, depuis qu'il a cessé d'occuper le dit presbytère, et offrant de lui en donner acte, quand requis et sans remboursement ;

"Considérant que le dit aqueduc n'a jamais servi à d'autres propriétés et demeures qu'à celles que le demandeur et les défendeurs possédaient le 5 septembre 1881, lesquelles sont possédées maintenant par Messire Taupier, comme successeur du demandeur, par les défendeurs Leduc et Rémy, et par les mis en cause, comme acquéreurs des défendeurs Gervais, Jacques et Bonin, et sont encore desservies par le dit aqueduc ;

"Considérant qu'il résulte clairement des dispositions et de l'ensemble du dit acte du 5 septembre 1881, et de l'exécution qu'il a reçue, que le demandeur et les défendeurs en s'associant pour créer, [illegible] construire et maintenir à frais communs, un [illegible] pour alimenter d'eau leurs demeures et propriétés respectives, et en s'engageant pour eux-mêmes, sans limiter le temps, et en cas d'aliénation de leurs dites propriétés pour leurs acquéreurs

respectifs, si ces derniers s'y refusaient à subvenir chacun pour une part égale, aux frais qui en résulteraient, ont voulu se procurer une chose acquise et mise en commun, dans un simple but d'utilité et d'avantage pour leurs demeures et propriétés respectives; que cette association a été formée dans l'intérêt des dits héritages, et non point dans celui des personnes, et qu'elle avait en vue d'acquérir et maintenir un aqueduc commun, non avec l'intention et la volonté de la part des contractants, de lui donner une existence propre, de le faire valoir comme propriété distincte et indépendante, et de se procurer par là, un gain matériel, des bénéfices à être recueillis en commun et partagés ensuite entre eux, mais dans le simple but qui est apparent au dit acte, de l'affecter à l'usage concurrent et nécessairement indivis de leurs dites demeures et propriétés qui sont distinctes, mais qui n'ont pas été désignées déterminément au dit acte; que l'usage de cet aqueduc commun a été restreint à l'utilité que pourraient en retirer les héritages dans l'intérêt desquels il a été acquis et laissé en commun; que sa destination se détermine, à défaut de convention, par sa nature même, et par l'usage auquel il a été de fait affecté; et que cette destination même, qu'il a toujours eue et conservée, lui imprime un caractère d'indivision forcée qui s'oppose à ce qu'on puisse en provoquer le partage ou la licitation forcée, que le dit aqueduc n'est pas susceptible de partage ni de licitation (sans le consentement de tous les intéressés) par le motif qu'il est destiné à l'usage concurrent des dites demeures et propriétés; que tel partage ou licitation n'ont pas été prévus dans le dit acte et que les parties ne les ont pas même anticipés, qu'elles n'ont stipulé aucune servitude sur leur fonds, pour, le cas échéant, assurer l'existence et le maintien du dit aqueduc; que le dit acte ne contient pas les énonciations et désignations des terrains dominants et servants, suffisantes en loi, pour créer une servitude d'aqueduc sur les propriétés en question en cette cause, et qu'on ne peut avoir recours à la preuve testimoniale pour suppléer, à cet égard, au titre qui est néces-

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saire ; que dans ces circonstances, le dit aqueduc doit être considéré comme accessoire destiné à l'usage commun, perpétuel, concurrent et indivis des divers héritages qu'il dessert et sur lesquels il a été placé, et peut être maintenu tant et aussi longtemps que le dit acte du 5 septembre 1881 sera en vigueur ; que les défendeurs Gervais, Jacques et Bonin l'ont considéré ainsi, dans les ventes qu'ils ont consenties aux mis en cause ; que leurs droits, intérêts et obligations, dans le dit aqueduc, ont cessé et sont passés aux mis en cause, en même temps qu'ils leur cédaient leurs droits et intérêts dans leurs demeures et propriétés respectives, et que le demandeur parait lui-même avoir considéré le dit aqueduc comme accessoire du presbytère qu'il habitait, lorsqu'il a contracté avec les défendeurs, et plus tard lorsqu'il a cherché à se faire payer une indemnité par son successeur en office ;

"Considérant que la simple communauté d'intérêt résultant de l'acquisition et du maintien du dit aqueduc, fait en commun, ne forme pas une société proprement dite, lorsque les parties, bien qu'elles aient qualifié de société leur association, n'ont pas eu en vue de réaliser le but caractéristique de ce contrat ;

"Considérant que vainement le demandeur allègue et soutient qu'on peut considérer cette association comme une société proprement dite, d'après l'article 1830 du Code Civil, dont les dispositions précises impliquent nécessairement un état de choses, un instrument de gain, et la poursuite d'une pensée de lucre qui font absolument défaut dans la dite association ; et que partant il n'y a pas lieu de lui appliquer la règle que toute société peut être dissoute, si la durée n'en est pas fixée au gré de l'un des associés, et cela en donnant à tous les autres avis de sa renonciation : ou pour une cause légitime, si la durée en est limité, (Arts. 1892, 1895 et 1896, C. C.) ;

"Considérant que vainement le demandeur s'arme de l'article 689 du Code Civil pour dire qu'on peut considérer à tout événement la dite association comme une communauté de biens et conséquemment lui appliquer la règle contenue dans cet article, et ce par le motif qu'elle

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n'a pas de biens communs ayant une existence propre et distincte, et pouvant être l'objet d'un partage ou d'une licitation forcée ;

"Considérant qu'à tout événement, le demandeur n'a aucun droit, ni intérêt à demander la dissolution pure et simple de la dite association, car si celle-ci est une société, elle a pris fin par la seule volonté du demandeur, signifié à cet effet le 3 mars 1888, et si elle est une communauté, il n'y a pas d'action en loi pour la dissoudre ; et dans l'un ou l'autre cas, le demandeur, pour faire une procédure utile, aurait dû demander le partage ou la licitation du dit aqueduc, ce qu'il n'a pas fait ; et partant son action est inutile et mal fondée ;

"Considérant que le demandeur n'a plus aucuns droits, intérêts ni obligations dans le dit aqueduc, depuis qu'il a laissé le dit presbytère de St-Charles, qu'il n'a jamais, depuis lors été recherché ni traité comme membre de la dite association ; et qu'il n'a aucune action à exercer contre les défendeurs et les mis en cause, au sujet du dit aqueduc ;

"Considérant que cette convention du 5 septembre 1881, aux termes de l'article 1022 du Code Civil, ne peut être résolue que du consentement mutuel de celles des parties qui l'ont formée et de leurs successeurs qui sont en possession des propriétés desservies par le dit aqueduc, que ce serait la révoquer positivement par la volonté d'une seule partie que d'ordonner, sur la demande de l'une d'elles, le partage de l'aqueduc, dont la conservation pour l'utilité de leurs demeures et propriétés respectives, avait été précisément le but et l'objet de la convention du 5 septembre 1881 ; que ce serait enlever à cet aqueduc sa destination convenue, le détruire ou le paralyser (faute de servitude pour le maintenir à l'avenir sur les dites propriétés) que d'en ordonner ou le partage ou la licitation ; que si le demandeur obtenait la dissolution du dit acte et de la dite association qu'il demande par son action, ce serait porter atteinte aux droits de propriété de tous les intéressés tel qu'il a été constitué par le dit acte du 5 septembre 1881, à raison de leurs dits immeubles, détériorer notablement l'usage de ces immeubles et détruire une

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[illegible] destinée et affectée au service des dits immeu-[illegible] : le dit aqueduc dans lequel le demandeur n'a plus ni droit, ni intérêt, et à raison duquel, son recours, si tel recours il a, ne pourrait être exercé que contre le propriétaire ou le possesseur du dit presbytère ; qu'on violerait ainsi formellement l'article 1022, et qu'on ferait une fausse [illegible] de l'article 689 du Code Civil ; qu'ainsi sous aucun rapport, il n'y a lieu de procéder au partage ou à la licitation que le demandeur ne demande pas, il est vrai, mais qu'il a eu vue par son action ;

"Considérant que le dit aqueduc ne peut profiter qu'aux héritages dans l'intérêt desquels il a été déterminément établi ; qu'à raison de sa nature particulière, de sa destination et du titre même qui l'établit, sans créer, de l'aveu du demandeur, de servitude pour le maintenir, il y a nécessité d'en maintenir l'indivision, comme étant un accessoire indispensable pour l'usage commun des dits héritages ; et qu'un tel aqueduc indivis n'est pas seulement une propriété commune entre les co-intéressés, mais que par son affectation au service des demeures et propriétés susdites, il forme avec elle un tout indivisible, s'y rattache par un lien de dépendance, par le seul effet de la loi puisqu'aux termes de l'article 1499 du Code Civil, la vente comprend virtuellement les accessoires de la chose vendue, et tout ce qui est destiné à son usage perpétuel ;

"Considérant que le principe général posé dans l'article 689 du Code Civil et portant que nul ne peut être contraint à demeurer dans l'indivision ; et que le partage peut toujours être provoqué nonobstant prohibition et convention contraire, ne s'applique pas aux choses communes qui sont destinées comme accessoires indispensables, à l'usage indivis de plusieurs propriétés principales appartenant à des propriétaires différents, et dont l'exploitation serait impossible ou notablement détériorée, si elles en étaient privées ;

"Considérant que si les défendeurs Gervais, Jacques et Bonin n'avaient aucun intérêt ni qualité pour contester la dissolution demandée par le demandeur, et conclure à frais contre lui, il est incontestable que ce dernier a pris

des conclusions personnelles contre eux, et qu'après leurs défenses, il a persisté dans ces conclusions, et à les tenir responsables des causes et conséquences de la demande ; et que dans les circonstances il y a lieu de leur accorder des frais contre le demandeur qui a lié contestation avec eux et qui succombe dans ses prétentions ;

"Considérant que les dépositions des témoins Senécal, Brodeur, Tétreault et Auclair, entendus de la part de tous les défendeurs et mis en cause, ont été prises et reçues sans objection aucune de la part du demandeur qui a transquestionné ces témoins ; qu'elles portent sur des faits pertinents et communs à tous les défendeurs et mis en cause ; que le demandeur n'a fait de son côté qu'une seule et même enquête, commune à toutes les contestations et que ses adversaires pouvaient après lui en faire autant ; qu'il n'en est résulté aucune injustice ; et qu'il n'y a pas lieu de rejeter ces dépositions, tel que demandé par le demandeur dont la motion à cet effet est renvoyée avec dépens ;

"Considérant que les objections faites par le demandeur le 4 et 5 décembre dernier, aux questions posées aux témoins Rémy et Lussier cités par les défendeurs Gervais et Bonin, sont mal fondées, et que les questions ainsi objectées sont légales et pertinentes, renvoie les dites objections, tant celles qui ont déjà été décidées que celles qui ont été réservées, maintient les dites questions objectées ainsi que les réponses à icelles, et renvoie les dites deux motions du demandeur à cet égard avec dépens ;

"Considérant que le demandeur n'a pas justifié sa demande et action, et que les défendeurs et mis en cause ont établi leurs plaidoyers respectifs, maintient les dits plaidoyers et déboute le demandeur de sa demande et action avec tous les frais contre lui ; desquels frais et dépens distraction est prononcée, etc. ;

"La Cour donne acte aux défendeurs Leduc et Rémy, et aux mis en cause Damien Bousquet et Charles Bousquet, de leur déclaration que le demandeur est dégagé de plein droit de ses obligations résultant du dit acte du 5 septembre 1881, depuis qu'il a cessé d'occuper le dit presby-

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tère de la paroisse de St-Charles, et de leur offre de lui en donner acte quand requis et sans remboursement."

May 22, 1890.]

Beauchemin for appellant :—

Les principes de la cause paraissent simples et d'une solution facile. Les parties ont formé une société. En voici l'acte solennel. Le corps social formé par cet acte, possède un actif ; l'un des associés (l'appelant) veut mettre fin à cette société (art. 1895), dont la durée n'a pas été fixée. Il fait signifier au préalable un avis à ses coassociés qu'il demande la dissolution. Les intimés refusent la dissolution ; prend contre eux l'action en cette cause, et demande que cette société soit dissoute *entre lui d'une part, et eux de l'autre.*

L'appelant est il fondé dans son action ?

Voilà toute la question.

"Le Code Napoléon (disent Aubry et Rau, vol. 2, p. "405) ne s'étant pas spécialement occupé de la copropriété "des choses individuellement considérées, c'est à la doc- "trine qu'incombe la tâche d'en construire la théorie, en "s'aidant avec discernement des matériaux, fournis, *tant* "*par le titre de la propriété*, que par ceux *des successions et* "*du contrat de société.*"

Cela est très-raisonnable.

Donc, si en l'absence de conventions, on doit suivre une règle si sûre, combien doit-il être sans difficulté de suivre à la lettre, comme dans l'espèce, le titre constitutif des rapports sociaux des parties, solennellement arrêtés entre elles dès le début.

Si un doute s'élevait dans l'esprit ; si l'on se demandait : "En dépit de cet acte, y a-t-il véritablement ici contrat de société ?" l'appelant prierait instamment cette Cour de voir les autorités françaises suivantes ; malgré la différence de notre article 1830, de leur article 1832, et malgré le fait considérable que dans notre cas il y a acte de société, et que dans le cas des décisions suivantes il n'y en avait pas.

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Dalloz, Jurisprudence générale, *verbo* "Société," No. 125, rapporte la décision *ad rem* suivante :

"Dans le cas où les propriétaires riverains d'un cours "d'eau se réunissent en association, afin de régler dans "leur intérêt commun la distribution des eaux nécessaires "à l'arrosement de leurs propriétés, et font à cet égard "des règlements dont l'exécution est confiée à des syn- "dics, on doit voir dans ces associations de véritables so- "ciétés."

Voir aussi :

Dalloz, Jurisprudence générale, *verbo* "Société," Nos. 94, 95, 99, 125, 318 et 319. Exploit, No. 484.

Ibidem, Nos. 110, 116, 118, 119, 124.

Ibidem, *verbo* "acte de commerce," No. 41.

Dalloz périodique de 1872, 1re part., pp. 9 et 10 ; et 2e part., p. 25.

Ibid. de 1850, 2e part. p. 187.
" " 1854, 5e " p. 12.
" " 1853, 2e " p. 84.
" " 1854, 2e " p. 238.
" " 1855, 2e " p. 61.
" " 1860, 1 " p. 83.
" " 1884, 1 " p. 357.
Sirey de 1846, 2e part. p. 655.
" " 1872, 1 " p. 8.
" " 1878, 1 " p. 456.
" " 1874, 1 " p. 345.
Journal du Palais de 1852, tom. 1, p. 402.
Pothier—Bugnet, "Société," No. 54.
Troplong, "Société," Nos. 18, 20 et suiv. et No. 315.
Pont, "Société," No. 84.

Et si, avec ces autorités et en dépit de l'acte de société, on restait encore avec un doute, il faudrait se demander du moins dans quelle classe de contrat il faut ranger celui que les parties ont formé entre elles dans l'espèce. Si l'on croyait qu'il n'appartient pas absolument à la classe des contrats de société, n'admettra-t-on pas du moins qu'il participe de la nature du contrat de société,

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et qu'en conséquence les règles de ce contrat doivent lui être appliquées ?

Les défendeurs l'ont qualifié, par leurs défenses, contrat de "communauté."

Dès lors, si l'on applique les règles de la communauté à ce contrat, on arrive au résultat réclamé par le demandeur en son action.

Voir :—4 Pothier—Bugnet, Premier appendice au contrat de société, Nos. 181, 182, 183, 184, 194, 195, 196, 197, 198.

Ibidem, du contrat de société, Nos. 153 et 154, où il enseigne que "Lorsque la renonciation à la société peut être "sujette à quelque contestation, il est de la prudence de "l'associé qui l'a faite, de faire assigner ses associés, pour "sa validité."

Merlin, à son tour, "Répertoire de jurisprudence," *verbo* "Société," section VII, dernier alinéa, enseigne : "Observez, dit-il, que quand la renonciation à la société peut donner lieu à quelque différend, l'associé qui l'a faite doit prudemment en faire prononcer la validité par le juge."

Duvergier, "Du contrat de Société," Nos. 40 et suiv., pose les principes de la communauté, qui, quant à sa dissolution ne diffèrent pas de ceux posés par Pothier. Ce sont, au fond, les mêmes que pour la dissolution de la société.

Ibidem, Nos. 457, 458, 459, 460 et 461.

Domat, "De la Société," sec. V.

Mais ici, nous avons une société ; les parties ont reconnu ce caractère à leur association. Elles ne peuvent plus le lui contester.

Dalloz, "Jurisprudence générale," *verbo* "Société," No. 99.

"Les conventions des parties sont la loi entre elles."

"*Modus et conventio, vincunt legem* (2 Rep. 73)."

"*Pacta conventa quæ neque contra leges, neque dolo malo inita sunt omni modo observanda sunt* (c. 2, 3, 29).

Béique, Q. C., for respondents.

Qu'il y ait eu société ou simple communauté entre les

parties, deux hypothèses également niées par les intimés, l'appelant n'aurait eu que deux actions à prendre, l'action *pro socio* dans la première et l'action *communi dividendo* dans la seconde. C'aurait été les seuls moyens pour lui de viser le but qu'il avait en vue et d'en arriver à mettre fin à l'état de choses pré-existant. Il n'a eu recours ni à l'un ni à l'autre, et il s'est borné à requérir de l'autorité judiciaire, une reconnaissance théorique qu'il était bien dans les deux cas prévus par les articles 1595 et 1596. Eût-il obtenu ses conclusions, l'aqueduc n'aurait pas cessé d'être commun. Il a donc fait une procédure inutile et nulle, que les dispositions si générales de l'article 21 du Code de Procédure Civile ne peuvent pas même contenancer. Les tribunaux ne sont pas institués pour entendre et adjuger sur les discussions de questions abstraites dont la solution, sans résultat pratique, n'aurait pour conséquence que la satisfaction morale de celle des parties, qui verrait son opinion prévaloir.

Les intimés après avoir nié dans leurs défenses, qui ne diffèrent que très peu les unes des autres, l'existence de la société invoquée par l'appelant, ont procédé à qualifier l'acte du 5 septembre et prétendu qu'il avait pour objet de créer entre les parties un droit de propriété conjointe sur l'aqueduc en question, copropriété à laquelle le principe, que nul n'est tenu de rester dans l'indivision, ne saurait s'appliquer.

Rien ne démontre mieux l'exactitude de cette prétention, que le résumé ci-dessous de la partie du jugement qui y a rapport :

Par cet acte, l'usage de l'aqueduc commun a été restreint à l'utilité que pourrait en retirer les héritages, dans l'intérêt desquels il a été acquis et laissé en commun. La destination se détermine par sa nature même et pour l'usage auquel il a de fait été affecté, et cette destination, qu'il a toujours eue et conservée, lui imprime un caractère d'indivision forcée, qui s'oppose à ce que l'on puisse en provoquer le partage ou la licitation.

Cet aqueduc n'est pas d'ailleurs susceptible de partage ni de licitation, sans le consentement de tous les intimés,

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par le motif qu'il est destiné à l'usage concurrent des dites demeures et propriétés. Tels partage et licitation n'ont pas été prévus dans le dit acte: les parties ne les ont pas même anticipés. Il doit donc être considéré comme accessoire destiné à l'usage commun, perpétuel, concurrent et indivis des divers héritages qu'il dessert.

Ce caractère d'accessoire, attribué au dit aqueduc, repousse l'idée de l'existence d'une communauté entre les parties, car pour qu'il y ait communauté, il faut des biens communs ayant une existence propre et distincte et pouvant être l'objet d'un partage ou d'une licitation forcée. Ordonner ce partage ou cette licitation à la demande d'une des parties serait enlever à l'aqueduc la destination convenue, le détruire ou le paralyser et porter atteinte au droit de propriété de tous les intéressés, et détériorer l'usage de leurs immeubles. Il est enfin indispensable pour l'usage commun des dits héritages, et par son affectation à leur service, il forme avec elle un tout indivisible, s'y rattache par un lien de dépendance et les suit en cas d'aliénation. Ce partage les priverait de l'usage de cet accessoire, rendrait leur exploitation impossible ou du moins la détériorerait notablement.

C'est pour ces considérations que les autorités ci-dessous citées, excluent de l'application de l'art. 689 certaines choses, affectées comme cet aqueduc à l'usage commun et perpétuel de plusieurs immeubles, appartenant à divers propriétaires.

Aubry & Rau, vol. II, p. 413, § 221 *ter*.

Demolombe, vol. 11, Nos. 425, 444 et suivants.

Duranton, vol. V, No. 149.

R. de Villargues, Dict. de Droit Civil, Verbis Indivis et Indivision, Nos. 37 à 44.

Pardessus, Servitudes, vol. I, No. 190 et suivants.

Solon, Servitudes, No. 593.

R. de Villargues, Rép. du Notariat, Vo. Propriété indivise, Nos. 39 à 43.

Dalloz, Dict. de Jurisprud., Vo. Servitude, No. 8, et Vo. Partage, No. 45.

Delvincourt, vol. 2, p. 344.

Merlin, Répertoire, Vo. Partage, § 10, No. 2.
D. P., 1858, I, 125.
D. P., 1868, II, 131.
D. P., 1875, I, 63.
Toullier, vol. III, No. 469 bis.
Sirey, 1857, II, 140.
" 1857, II, 61.
" 1877, I, 267.

A la lecture de ces auteurs, il est facile de se convaincre, que le seul droit appartenant à l'appelant est de signifier sa volonté de se retirer de la copropriété commune. Le fait de cesser d'habiter le presbytère, auquel l'aqueduc est attaché, implique cession de sa part dans cette copropriété indivise, et le fait des intimés de s'adresser à son successeur pour les contributions échues après son départ est une reconnaissance formelle de cet abandon implicite. Pour éviter toute ambiguité, les intimés Rémy, Leduc et Bousquet lui donnent acte de cet abandon dans les conclusions de leur exception, tout en concluant au renvoi de son action avec dépens contre lui, parce qu'ils lui donnent acte d'un fait, sans qu'ils aient en aucun temps été mis en demeure de le faire.

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DOHERTY, J. (for the Court) :—

In 1881, several persons holding lands at St-Charles, on the river Richelieu, came to the conclusion that it would be possible to convert part of the water of the river to their own use. They went before a notary, and entered into a specific agreement as to the mode in which the improvement should be made. In pursuance of this agreement, water works were constructed and went into operation. The appellant, who was *curé* of the parish of St-Charles, was one of the parties to the deed. He subsequently left the parish, and he now brings an action asking that the partnership formed by the deed be declared dissolved. The Court at St-Hyacinthe dismissed the action, and the plaintiff has appealed.

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The question comes up, did the deed passed before Chabot, notary, constitute these individuals partners? It is clear that the contract has not one of the essential elements of a commercial partnership. These persons simply joined together to lay the necessary pipes, so as to have each person's premises supplied from the reservoir. The pipes, etc., became part of the realty. It was an association, not a commercial company. The works were merely an accessory, under Art. 1499 of our Code, designed for the perpetual use of the property. The appellant, if he had any action under the circumstances of the case, has totally misconceived his recourse.

The judgment is therefore unanimously affirmed.

Judgment confirmed.

Beauchemin & Mallette for appellant.
Fontaine, St-Jacques & Fontaine for respondents.

(J. K.)

June 19, 1890.

Coram TESSIER, CROSS, BABY, BOSSÉ and DOHERTY, JJ.

THOMAS MOODIE,
(Defendant in Court below),
APPELLANT;

AND

JOSIAH P. JONES,
(Plaintiff in Court below),
RESPONDENT.

Principal and Agent—Diversion of money intrusted to agent for a specific transaction—Prescription—Transfer of debt—Signification.

HELD:—1. An agent who is entrusted by his principal with a sum of money, to be invested or employed in a particular transaction, is bound to comply with the instructions received, and if he employs the sum otherwise, he is liable to repay the same to his principal.

2. An action by the principal for the reimbursement of the money, is not a claim for damages resulting from an offence or quasi offence, and is not prescribed by two years.

3. Where a sale of a debt is made in duplicate under private signature, and one of the duplicates is delivered to the debtor, the transfer is sufficiently signified, and the buyer is entitled to bring suit for the debt.

APPEAL from a judgment of the Superior Court, Montreal (MATHIEU, J.), Jan. 24, 1888, maintaining the respondent's action. The judgment is as follows:—

"La Cour etc.....

"Attendu que le demandeur allègue dans sa déclaration que vers le mois de mars 1882, le défendeur et J. S. C. Coolican, Thomas Coolican, W. W. Proud et Robert Holmes, tous de la cité de Winnipeg, dans la province de Manitoba, et ci-après appelés la première compagnie, achetèrent de l'honorable Joseph A. Cauchon, un certain terrain, situé dans la paroisse de St. Boniface, dans la dite province de Manitoba; qu'ensuite, le défendeur et d'autres entreprirent de former une autre compagnie ou syndicat ci-après appelée la seconde compagnie, dans le but d'acheter le dit terrain de la première compagnie; qu'à cette fin un prospectus fut préparé; que vers le 10 mars 1882, le défendeur envoya le *prospectus* à J. C. Hamilton, avocat, de Toronto, qui était alors à la connaissance du défendeur, l'agent et procureur de Thomas C. Jones, teneur de livres, alors de la cité de Montréal, et qui avait dans le temps certains argents entre ses mains à placer sur des immeubles pour le dit Thomas C. Jones, accompagnant ce *prospectus* d'une lettre en réponse à une lettre écrite par le dit Hamilton, au défendeur, datée le 6 mars 1882; que le défendeur, par cette lettre et le prospectus, représentèrent à Hamilton que la seconde compagnie avait l'intention, aussitôt que possible, d'acheter le terrain de la première compagnie et de le diviser en vingt parts, et, qu'aussitôt que les dites vingt parts seraient prises ou souscrites, le terrain serait transporté à la dite seconde compagnie et possédé en fidéi-commis par un ou deux syndics qui seraient choisis par une majorité des actionnaires, et qu'aus-

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sitôt que toutes les actions seraient souscrites, une assemblée des actionnaires aurait lieu pour élire un secrétaire trésorier, qui serait le dépositaire de tous les argents pour la dite seconde compagnie, et qui ouvrirait un compte spécial dans une banque pour ces argents ; qu'à la date où la dite lettre et le dit prospectus furent transmis au dit Hamilton, onze parts avaient été souscrites dans la dite seconde compagnie, le défendeur en ayant souscrit une ; que dans la dite lettre, le défendeur indiquait que les dites parts allaient être promptement souscrites et la dite seconde compagnie organisée, et que l'argent nécessaire pour faire le premier paiement serait bientôt requis, et le défendeur offrait au dit Hamilton la moitié de sa part, ayant déjà tiré sur lui pour le montant de $2,375 que le dit Hamilton, agissant pour le dit Thomas C. Jones, paya, mais à la condition expresse qu'à moins que le dit terrain ne fût régulièrement transporté à la seconde compagnie dûment organisée et toutes les promesses et engagements contenus dans la dite lettre et le dit prospectus remplis et exécutés, la dite somme lui serait immédiatement remise ; que la dite seconde compagnie ne fut jamais organisée, ni les dites vingt parts souscrites, et que le dit terrain en question ne fut jamais vendu et transporté à la dite compagnie, et qu'aucune des promesses et aucun des engagements contenus dans la dite lettre et le dit prospectus ne fut exécuté, et que l'argent ainsi payé au défendeur fut par lui employé pour d'autres fins que celles pour lesquelles il fut payé, et ne fut jamais remis au dit Hamilton ; que subséquemment, le dit Thomas C. Jones, sur les représentations à lui faites, par le défendeur, que son argent avait servi à payer le dit terrain, poursuivit les personnes alors en possession du dit terrain, devant la Cour du Banc de la Reine, à Manitoba, pour recouvrer son argent, ou le terrain pour lequel il avait été payé, mais que lors du procès, il fut constaté que cet argent n'avait jamais été employé pour les fins pour lesquelles il avait été envoyé, et sur l'avis d'hommes de loi, le dit Thomas C. Jones retira son action et paya les frais qui s'élevèrent à $412.50, lesquels frais et le montant de la traite susdite, avec intérêts,

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s'élevaient, le 30 janvier 1886, à $3,357.50, que le défendeur devait alors au dit Thomas C. Jones; que par acte sous seing privé, daté du 30 janvier 1886, le dit Thomas C. Jones transporta au demandeur, pour valeur reçue, la dite somme de $3,357.50, lequel transport fut signifié au défendeur, le 30 mars 1886, et conclut à ce que le défendeur soit condamné à lui payer la dite somme de $3,357.50 avec intérêt du 30 janvier 1886, et les dépens;

"Attendu que le défendeur a plaidé que le transport fait au demandeur est irrégulier, et qu'il n'y a pas de lien de droit entre lui et le défendeur; que les transactions alléguées par le demandeur ont eu lieu plus de deux ans avant l'institution de son action, et que cette action est prescrite; qu'avant février 1882 les dits Thomas C. Jones et J. C. Hamilton demandèrent plusieurs fois au défendeur de leur trouver un placement, par l'achat d'immeubles comme spéculation à Winnipeg, ou de les admettre dans un syndicat qui pourrait être formé et dont le défendeur ferait partie; qu'en février et mars 1882 une occasion se présenta, dans une proposition faite par James S. Coolican et autres de former un syndicat de vingt membres, en vingt parts, sur une base de $332,250 pour les membres du syndicat généralement, et de $285,000 pour le dit Hamilton et certains autres membres du syndicat, pour acheter la propriété Cauchon, dix parts ayant déjà été prises; que le défendeur informa le dit J. C. Hamilton de la formation du syndicat proposé et prit une part avec lui, c'est-à-dire un onzième chacun pour moitié; que le 27 mars 1882, le dit J. C. Hamilton paya au dit James S. Coolican, $2,375, lequel montant fut employé au paiement du premier instalment du prix de la dite propriété, ainsi que le dit Thomas C. Jones l'a reconnu dans la poursuite mentionnée dans sa déclaration; que le défendeur n'eut rien à faire avec la disposition de la dite somme de $2,375, et que si le dit Hamilton l'a perdue c'est dû à une grande dépréciation dans la valeur de la dite propriété, qui eut lieu peu de temps après le paiement de cet argent, ce qui empêcha de compléter le dit syndicat; que le dit J. C. Hamilton a, à plusieurs reprises, reçu, sur paiement de la

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balance de la somme qu'il s'était engagé à payer, l'offre d'une partie de la dite propriété, représentant plus qu'un quatrième du tout, ce qu'il a refusé de faire, préférant perdre le montant et se retirer de la spéculation ;

"Attendu qu'il appert au dossier que le 6 mars 1882, le dit J. C. Hamilton écrivit au défendeur lui demandant de l'admettre, avec lui et quelques amis, dans une spéculation quelconque, sur les terrains, dans laquelle il offrit de mettre $2,000 ;

"Attendu que le 10 du même mois le défendeur lui répondit par la lettre et le prospectus ci-dessus mentionnés, et que le même jour il tira sur lui pour la dite somme de $2,375 qui fut payée par le dit J. C. Hamilton comme susdit ;

"Attendu que le 20 du même mois, le dit J. C. Hamilton répondit au défendeur qu'il avait accepté la dite traite et qu'il la paierait, mais avec l'entente qu'il aurait la moitié d'une part dans la propriété Cauchon, c'est-à-dire un quarantième sur une base de $285,000, le dit J. C. Hamilton déclarant aussi dans cette lettre qu'il présumait que le terrain avait été régulièrement transporté, et toutes les conditions du dit prospectus remplies, et qu'au cas contraire, son argent devait lui être remis sans délai ;

"Considérant que les promesses faites par le défendeur et contenues dans sa lettre du 10 mars 1882, et dans le dit prospectus, n'ont jamais été remplies, que le syndicat composé de vingt membres n'a jamais été formé, et que la dite propriété Cauchon n'a jamais été transportée à aucun syndicat ou à aucune personne pour le dit J. C. Hamilton ou le dit Thomas C. Jones et d'autres personnes intéressés avec eux ;

"Considérant que par les conventions susdites le défendeur était tenu de voir à ce que l'argent payé par le dit J. C. Hamilton ne fût employé qu'en paiement de partie du prix de cette propriété, et sur tel paiement d'obtenir un titre constatant l'intérêt du dit J. C. Hamilton ou du dit Thomas C. Jones dans la propriété ;

"Considérant que le défendeur, par les conventions susdites, ne devait pas se dessaisir de la somme payée par

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le dit J. C. Hamilton ou en abandonner le contrôle, avant que le dit syndicat proposé ne fût complètement formé, et que le fait que la traite payée par le défendeur aurait été faite à l'ordre de T. Coolican, ne peut soustraire le défendeur à ses obligations ;

"Considérant que le dit J. C. Hamilton agissant pour Thomas C. Jones, n'ayant consenti qu'à faire partie d'un syndicat qui n'a jamais été formé, il s'en suit qu'il n'a pas contracté d'obligation au sujet du dit terrain, et que d'ailleurs son obligation ne peut exister qu'en autant qu'on lui fournit considération, c'est-à-dire une part dans le terrain ;

"Considérant que la propriété en question a été vendue à William W. Proud pour le bénéfice du défendeur et d'autres personnes dont les dits J. C. Hamilton et Thomas C. Jones ne faisaient point partie, et que si le montant payé par le dit J. C. Hamilton a été employé à payer partie du prix de la vente à Proud, il a été employé pour le bénéfice personnel du défendeur et de ses associés, et non pour le bénéfice du dit J. C. Hamilton ou du dit Thomas C. Jones ;

"Considérant que le transport fait au demandeur est suffisant, et qu'en supposant que le demandeur ne serait qu'un prête-nom vis-à-vis de son frère, Thomas C. Jones, il n'en est pas moins le créancier légal du défendeur, et comme tel il a un intérêt suffisant pour poursuivre la présente action ;

"Considérant qu'il n'y a pas lieu d'appliquer à cette cause la prescription invoquée par le défendeur ;

"Considérant que l'offre que le défendeur prétend avoir faite au dit J. C. Hamilton d'une portion du dit terrain équivalant à la part de ce dernier, après la dépréciation de sa valeur, ne peut empêcher le demandeur de recouvrer de lui le montant de la dite traite, vu qu'il était du devoir du défendeur de ne pas employer ce montant pour d'autres fins que celle pour laquelle le dit Hamilton avait consenti ;

"Considérant que si le défendeur avait gardé sous son contrôle, comme il y était [illegible] l'argent payé par le dit

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J. C. Hamilton jusqu'à la formation du dit syndicat et le transport de cette propriété à ce syndicat, il en serait encore le dépositaire, vu que le syndicat en question n'a jamais été formé, et que le transport de cette propriété n'a jamais été fait, et que le défendeur ne peut aujourd'hui changer sa position et celle du demandeur en le forçant à entrer dans une transaction à laquelle il n'a pas consenti quand même il établirait, comme il le prétend, que la transaction à laquelle le dit J. C. Hamilton a consenti était plus mauvaise que celle que le défendeur lui propose aujourd'hui ;

" Considérant qu'il n'est pas prouvé que l'action intentée par le dit Thomas C. Jones, à Winnipeg, l'ait été sur les représentations et les suggestions du défendeur, et que ce dernier ne peut être tenu responsable des frais d'une action mal fondée lorsqu'aucune obligation de sa part n'est prouvée quant à cette action ;

" Considérant que les défenses du défendeur quant aux dits frais sont bien fondés mais qu'elles sont mal fondées quant au montant de la dite traite et des intérêts, et que l'action du demandeur est bien fondée quant à ce dernier montant ;

" A maintenu et maintient les défenses du défendeur quant à la dite somme de $411.72, montant des dits frais réclamés, et les renvoie pour le surplus, et a maintenu et maintient l'action du demandeur pour le montant de la dite traite et des intérêts, et a condamné et condamne le dit défendeur à payer au demandeur la somme de $2,945.78, avec intérêt sur cette somme à compter du 30 janvier 1886, et les dépens y compris les frais d'enquête ; et vu que le défendeur réussit dans sa défense de $411.71, a condamné et condamne le demandeur à payer au dit défendeur les frais d'une contestation comme dans une cause de $411, sans frais d'enquête, distraits, etc., lesquels dépens sont compensés jusqu'à due concurrence, et distraction pour le surplus est accordée, etc."

May 20, 1890.]

F. L. Béique, Q.C., for appellant :—

Par le jugement *a quo* l'appelant a été condamné à payer

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à l'intimé comme cessionnaire de Thomas C. Jones, une somme de $2,375 formant avec l'intérêt une somme de $2,945.78, montant d'une traite tirée par l'appelant et acceptée et payée par le céda[illegible] C. Jones, par l'entremise de son agent J[illegible] pour servir à l'acquisition d'une propri[illegible]

Avant d'entrer dans le [illegible] cause il importe de s'enquérir du droit de l'i[illegible] prétendue réclamation du nommé Thomas C. [illegible] vertu du transport invoqué, et si ce transport lui [illegible] aucun droit contre l'appelant.

Il est facile d'établir que ce prétendu transport est insuffisant et ne peut justifier la présente action pour plusieurs raisons:

Considéré en lui-même ce transport est vague et insuffisant. La réclamation que l'on prétend avoir été transportée n'est en aucune manière identifiée, et même ne rentre pas dans les termes du transport. Le transport peut s'appliquer à toute espèce de réclamations étrangères à celle pour laquelle on l'invoque; en sorte que l'appelant ne serait pas justifiable de payer la somme réclamée à l'intimé parcequ'il ne parait même pas en être saisi, et que si l'appelant payait cette somme à l'intimé, il pourrait être appelé à payer une seconde fois au nommé Thomas C. Jones, ou tout autre cessionnaire de ce dernier.

En second lieu, ce prétendu transport n'a jamais été signifié. Quoique l'intimé allègue que le transport ait été signifié, il ne justifie d'aucune signification; tout ce que le dossier nous apprend c'est ce que nous en dit l'appelant en transquestion, savoir:—qu'un huissier lui a remis le transport produit et que l'appelant lui ayant demandé ce que c'était, l'huissier a répondu qu'il ne le savait pas. Dans notre système l'huissier n'a aucun pouvoir pour faire la signification d'un transport et l'eût-il la signification devrait au moins être constatée, ce qui n'apparait pas.

Enfin ce prétendu transport n'est qu'un papier blanc dans le dossier. Le transport étant fait sous seing privé il incombait à l'intimé d'en faire au moins la preuve, ce

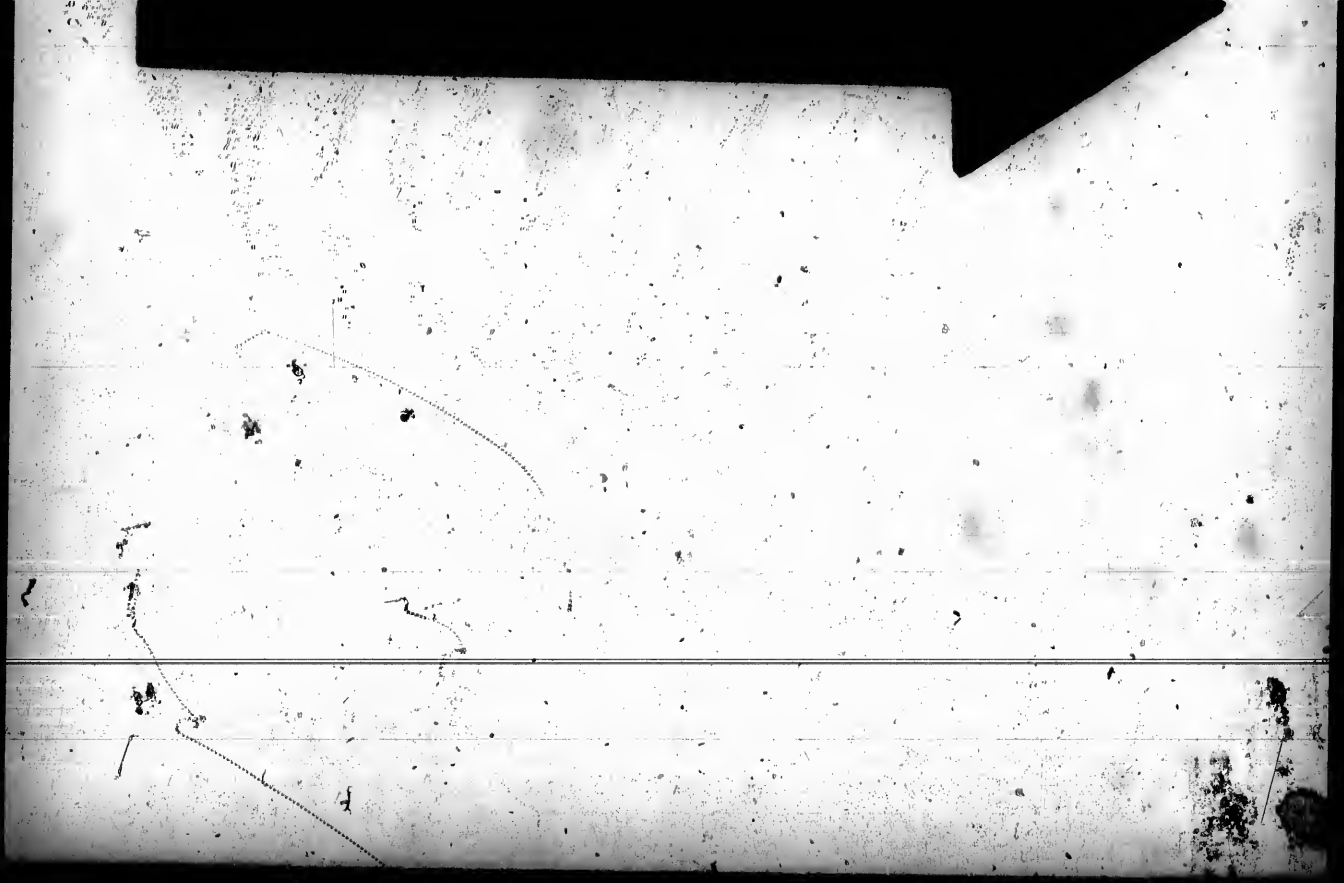

IMAGE EVALUATION
TEST TARGET (MT-3)

6"

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qu'il n'a fait en aucune manière. Le consentement du cédant, sa signature même au transport n'ont pas été prouvés, et rien ne démontre que l'appelant ne soit pas exposé à être recherché par Thomas C. Jones, pour les mêmes causes d'action.

Au mérite même, l'action de l'intimé n'est pas mieux fondée.

En premier lieu, à titre de dommages intérêts, par suite de la faute du mandataire, l'action est prescrite par deux années, l'action n'ayant été intentée que le 12 avril 1886. L'exception de prescription est en conséquence bien fondée. Art. 2261 C.C.

En deuxième lieu, pour que l'appelant fût responsable il faudrait que la perte éprouvée par l'intimé fût la conséquence directe de la faute. Or ce n'est pas parceque le syndicat n'a pas été complété et la propriété n'a pas été transférée que l'argent de l'intimé a été perdu. La perte est le résultat de la baisse très considérable qui s'est produite dans la valeur mercantile de la propriété presqu'au lendemain du versement des $2,375. Il appert clairement par la preuve que la formation du second syndicat et le transport de la propriété à ce syndicat n'eût pas empêché la perte.

Au reste, est-il vrai que les conditions auxquelles Hamilton a consenti à verser les $2,375 n'ont pas été accomplies ?

L'intimé prétend que l'appelant a appliqué les $2,375 payés par Hamilton à des fins autres que celles auxquelles ils étaient destinés. En d'autres termes, que Hamilton n'a consenti à payer cette somme qu'à condition que la formation du second syndicat fût complétée et que la propriété fût transportée à ce second syndicat, ou à quelqu'un pour son compte. L'appelant soumet que telle n'est pas l'interprétation qui doit être donnée à la correspondance échangée entre Hamilton et lui.

Au reste, il est de principe élémentaire que "le mandant qui a ratifié, même tacitement sans aucune protestation ni réserve, ce qui a été fait en son nom, n'est plus recevable à réclamer une indemnité contre son manda-

" taire, à raison des retards et changements apportés à " l'exécution du mandat." Ainsi jugé par la Cour de Cassation, Dalloz 1853-1-293. Voir aussi C. C. Art. 1720.

Or, dans l'espèce, en admettant même que l'appelant fut implicitement obligé envers Hamilton ou Jones à voir à ce que les $2,375, ne fussent payés qu'après la formation du second syndicat et le transfert de la propriété, et, par suite, responsable pour dérogation à cette obligation, toute responsabilité de sa part eût cessé du jour où Jones prit son action à Winnipeg. Car, par cette action, la formation du premier syndicat, l'achat de la propriété par Proud pour ce syndicat, l'offre de l'appelant, de céder une moitié de sa part à Hamilton pour une somme de $7,125, " payable upon the terms expressed in the said agreement from said Cauchon," l'acceptation de cette offre par Hamilton et le paiement par ce dernier, " at the request of said Moodie, to defendant James S. Coolican of the sum of $2,375, being one third of the purchase money of the said share," le paiement de cette même somme par Coolican à l'hon. M. Cauchon, le procès entre ces deux derniers et le compromis qui en fut la suite, en un mot tous les faits qu'invoque maintenant l'appelant étaient allégués et ses allégations constituaient une ratification des actes de l'appelant puisque Jones en demandait le bénéfice.

Leet, for the respondent :—

The first plea of appellant was disposed of by judgment of Mr. Justice Jetté, 17th September, 1886, as follows :—

" Considérant que la demande n'est pas une réclamation de dommages résultant d'un délit ou d'un quasi-délit, mais bien en recouvrement d'une somme confiée au défendeur dans un but spécial, et que le dit défendeur a gardée ou appliquée à ses propres affaires ;

" Considérant, en conséquence, que la prescription édictée par l'article 2261 du Code Civil ne s'applique pas à l'espèce ;

" Renvoie la défense en droit, etc."

This judgment was not interfered with by the final judgment, and respondent submits that it is correct, and should be confirmed.

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As to the second plea, that the sale of the claim to plaintiff was irregular and null, the respondent claims that he has explicitly complied with Article 1571 of the Civil Code.

The act of sale was made in duplicate, and one of said duplicates was delivered and signified on the appellant before institution of suit.

As to the third plea, respondent maintains that from the correspondence, it is clear that the draft was accepted and paid on the express understanding and agreement that the money was to be returned unless the full conditions of the prospectus were carried out.

June 19, 1890.]

CROSS, J. (for the Court) :—

It is quite clear from the evidence, and the correspondence between the parties, that the conditions specified by the respondent were not fulfilled, and that he was entitled to get his money back. The Court below came to the conclusion that the action should be maintained, and after a careful examination of the whole case we are unable to say that the judgment is wrong. It will therefore be affirmed.

[redacted]ment confirmed, TESSIER, J., diss.

Beique, Lafontaine & Turgeon for appellant.

Maclaren, Leet, Smith & Smith for respondent.

(J. K.)

November 22, 1890.

Coram DORION, C. J., TESSIER, BABY, BOSSÉ and DOHERTY, JJ.

JAMES BENNING ET AL.,
(Defendants in Court below),
APPELLANTS;

AND

NORMAN T. RIELLE,
(Plaintiff in Court below),
RESPONDENT.

Libel in pleadings—Justification—Probable cause—Counsel's opinion—Evidence of attorney of record.

HELD:—Affirming the judgment of TASCHEREAU, J., M. L. R., 4 S. C. 219,

1. That libels in pleadings are actionable, when the allegations complained of are false, or made without probable cause.
2. That malice is inferred by law from the nature and the falsity of such accusations.
3. That an unproved plea of justification constitutes an aggravation of the libel.
4. That executors are personally liable for libels published by them in their said quality.
5. That the mere fact of having taken counsel's opinion, apart from any other circumstances, does not excuse a party making libellous allegations.
6. That the attorney of record is only allowed to offer his testimony in favour of his client under exceptional circumstances; and that the introduction of the evidence of the defendant's attorney as to a private conversation between himself and the plaintiff, was under the circumstances improper, and such testimony would be rejected by the Court.

APPEAL from a judgment of the Superior Court, M[illegible]real, TASCHEREAU, J., Nov. 10, 1888, condemning the appellants to pay $250 damages for libel contained in their declaration, in an action taken by them in their quality of executors of the late William Moodie against the Atlantic & North-West Railway Company to set aside an award. The judgment of the Court below is reported in M. L. R., 4 S. C. 219.

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Sept. 17, 1890.]

Trenholme, Q.C., for appellants, submitted :—

1st. That there is no libel on respondent in the allegations he complains of; that the allegation as to the award being a fraud on appellants' rights and fraudulent, is a mere inference of law as against the Railway Company based on facts adduced, and which facts are proved to be true.

2nd. That the allegations are perfectly consistent with absence of fraud on the part of respondent, though not of disregard of duty.

3rd. That appellants having acted *es qualité*, and on the advice of counsel, and clearly only to defend rights entrusted to them, cannot be held to have acted maliciously unless express malice is proved against them, and ought not to be condemned.

4th. That the gross inadequacy of the award and circumstances were in any event adequate and probable cause for their action.

5th. The respondent did not show any damage caused by appellants' action which was unknown to the public.

Lafleur, for the respondent, relied on the reasons assigned by Taschereau, J., in rendering the judgment in the Court below. M. L. R., 4 S. C. pp. 220-226.

Nov. 22, 1890.]

BABY, J. :—

This is a case of interest to the bar. In an expropriation of property belonging to the succession of the late William Moodie, by the Atlantic & North-West Railway Company, the respondent acted as arbitrator for the railway company. The executors, being dissatisfied with the award, brought an action to set it aside. In their declaration they charged the arbitrators who made the award, one of whom was the respondent, with "such gross and "scandalous indifference to the clearest evidence and dictates of justice, and such gross and scandalous neglect "of duty or partiality, as to be a fraud on plaintiffs and

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"their rights." The respondent brought an action of libel based on these allegations, and the Court below maintained the action, and awarded $250 damages.

We are of opinion that the judgment was justified by the evidence, and it is unanimously confirmed. Nothing was proved against Mr. Rielle that could support the charge made. One of the attorneys for the defendants in the present action was examined as a witness in their behalf, and he related a private conversation which he had had with Mr. Rielle, the effect of which was that the latter had said that he relied upon his father's valuation, in which he had confidence. The Court below censured the practice of the lawyer in the case going into the witness box to support his own side. We concur in this opinion, and we think that it is in the interest of the profession that such a proceeding should be discountenanced. The sum of $250 damages awarded by the judgment was not excessive, in view of the circumstances. The principle that damages may be recovered for libel in a pleading was sustained by this Court and by the Supreme Court of Canada in the case of *The Mayor etc. & Hall*, 12 Can. S. C. R. 74.

Judgment confirmed.

Trenholme, Taylor & Buchan for appellants.

E. Lafleur for respondent.

(J. K.)

November 25, 1890.

Coram CROSS, BABY, BOSSÉ and DOHERTY, JJ.

EDWARD ELLIOTT,
(*Defendant in Court below*),
APPELLANT;

AND

DAME CECILIA SIMMONS ET VIR,
(*Plaintiffs in Court below*),
RESPONDENTS.

Married woman—Personal injuries—Right to sue for damages—Accident caused by defect of leased premises.

HELD:—Affirming the judgment of TAIT, J., M.L.R., 5 S. C. 182, 1. A married woman, common as to property, or who is presumed to be so in the absence of proof of her matrimonial domicile or of the law which regulates it, may bring an action in her own name, authorized by her husband, to recover damages for bodily injuries. (*Waldron & White*, M. L. R., 3 Q. B. 375, followed.)

2. The owner and lessor of a building is responsible for damages caused by a defect in its construction, to a person rightfully on the premises, *e. g.*, the wife of the lessee.

Semble, where the plaintiff alleges that she is separated as to property, the defendant, if not admitting the allegation, ought to deny it specially by his plea.

APPEAL from a judgment of the Superior Court, Montreal, (TAIT, J.), June 28, 1889, maintaining an action brought by the respondent to recover damages suffered by her, occasioned by her falling from the gallery of a house leased by her husband from the appellant. The judgment of the Court below is fully reported in M. L. R., 5 S. C., pp. 182-188.

Nov. 15, 17, 1890.]

M. J. F. Quinn, Q.C., for appellant:—

The action is one of damages by a married woman, the wife of a lessee, authorized by her husband, the lessee, against the appellant, the lessor, for injuries caused her by

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a fall from the gallery of a house rented by the husband from the appellant.

It is alleged in the declaration that the female plaintiff (respondent) is separated as to property, having been married in St. John's, Newfoundland; that her husband rented the premises in question from the appellant for the use of himself and his family; that appellant was bound to deliver the premises in good order, to the plaintiff's husband; that female plaintiff and her husband occupied the premises; that on the 6th of June, 1888, female plaintiff was standing on the gallery in the front of the house, when suddenly the railing gave way, and she fell to the ground and sustained injuries; that the appellant well knew and had been notified of the condition of the gallery and railing, and that the same was insecure; that it was through the fault and negligence of appellant that the accident occurred, and female plaintiff prayed for $5,000 damages.

To this action the appellant pleaded, first a general denial; and secondly, that if female plaintiff suffered any damage by the accident, she so suffered through her own negligence, and appellant is not responsible.

On these issues the parties went to trial, and the appellant submitted four points to the consideration of the Court.

First, that the female plaintiff had no right to sue in her own name at all, in an action of this nature. Right of action rests with the husband, and not with the wife.

Second, that a lessor is responsible only to the lessee for damages, such as are alleged in plaintiff's declaration; that he is not bound to warrant others than the lessee against defects of any kind, as no contract of any kind exists, except between lessor and lessee.

Third, that the landlord is not responsible, even to the lessee, for damages caused by hidden defects in his property, unless notified by the lessee; that he cannot be held responsible to anybody for damages in an accident of the nature set forth in the declaration.

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Fourth, that even if female plaintiff has the right to take action in her own name, and even if the lessor be responsible for damages of the nature described, the female plaintiff was the primary cause of the accident herself, and cannot claim any damages from appellant.

On the first point, the appellant submits that there being no proof in the record of the laws of Newfoundland, as regards the right of the wife to institute proceedings in her own name, she is presumed to be common as to property, and she is subject to the same disabilities as if she were married in this province, and community of property existed between herself and her husband.

In consequence of this, the present action ought to have been taken in the name of the husband, or in the name of the husband and wife jointly, and not in the name of the wife alone with the husband to authorize her. The husband is the head of the community, and he alone possesses the right to institute proceedings for the recovery of any debt due to the community, or for the recovery of any sum which ought to be applied to the benefit of the community. A married woman might have the right, either authorized by her husband or not, to institute proceedings against an individual for the recovery of damages for personal wrongs done her, such as slander, libel or assault, or for any injury inflicted on her person through malice or with premeditation. But, in this case, the injury, if any, was not a personal wrong, but rather a corporal injury to a member of the community, and the material sufferer was the community existing between the husband and wife, the payment made for doctor's bills, medicines, servant during her illness, and such like, all came out of the assets of the community. The right of action, then, is to reimburse the community for the loss suffered, and the husband alone has the right to take such action. Art. 1292, C. C.

On the second point appellant submits: The judgment in this cause tries to establish the relation of lessor and lessee between the parties, and cites 1613, 1614 and 1641 of the Civil Code in support of the judgment. But no

such relation existed between the parties. The appellant never guaranteed the respondent anything. The respondent never leased any premises from the appellant, and, consequently, appellant could not deliver to her the premises in good repair, (art. 1613) or warrant her against defects in it, (art. 1614) nor was he bound in damages to her for violation of the obligations of the lease (art. 1641.) No lease existed between them, her husband was the lessee, and if he suffered, he had a right of action.

On the third point appellant submits: The judgment in this cause declares the appellant responsible for all damages, caused even by latent defects in the house or premises leased, and that anybody injured on the premises by accident has the right to recover damages from the proprietor, even though the accident was caused by a hidden defect of which the proprietor could not know, and in support of this, arts. 1053 and 1055 of the Civil Code are cited. These articles do not apply to the present action at all; there was no negligence such as could be invoked under art. 1053, against the appellant. The negligence referred to in art. 1053, as regards the proprietor of a house, is explained by art. 1055, that is, damage caused by its ruin where it has happened from want of repair or from original defects in its construction. The respondent recognized the necessity of notifying the appellant of the condition of the premises, because she alleges in her declaration that defendant well knew and had been informed and notified of the condition of the railing and gallery, and had promised to put it in good order. But, although no proof is made of this fact, the judgment declares the appellant responsible for latent or hidden defects, and this not in favor of the lessee. Appellant submits, that even the lessee has no right of action for damages, in a case of this nature, having accepted the premises in the condition in which they were, until after he has put the lessor in default. Art 1070 Civil Code exacts the putting in default, before any damages can be claimed in a matter of this nature.

On the fourth point, appellant submits: The house was

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rented from appellant by respondent's husband for the use of his family. The gallery was not intended as a place from which to hang clothes-lines. Appellant had constructed, in rear of the premises, arrangements for hanging clothes-lines on.

R. C. Smith, for respondent :—

1st. As to the right of the female respondent to sue ; *Waldron & White*, M. L. R., 3 Q. B. 375, cited.

2nd. As to the responsibility of the appellant for the injuries, it may fairly be contended that the right of claiming damages from the lessor extends to the wife of the lessee. And when the lessor, as in the present case, is also the proprietor, his responsibility admits of no question.

Nov. 25, 1890.]

CROSS, J.—

This case presents several questions of importance. The respondent was plaintiff in the Superior Court, and the appellant was defendant. The respondent brought an action against the appellant, proprietor of the house occupied by the respondent and her husband under a lease to the latter. She complained that she was precipitated from a gallery of the house into the yard, and sustained injuries ; that the accident occurred in consequence of the rotten condition of the railing of the gallery. She alleged the lease to her husband, and the obligation of the lessor to keep the premises in repair, and claimed damages. The Court below held that she had made out her case, and awarded her $500 damages. The defendant has appealed from the judgment.

The appellant contends, first, that it is an action by a married woman, and that the action belonged not to her, but to her husband. The wife is described in the writ as separated as to property. That is an affirmative averment which should have been met by an exception to the form ; or, if the plea of general issue was sufficient, the plaintiff should have been warned that the defendant re-

fied on this objection. Then it would have been easy for the plaintiff to call witnesses to prove it. On that ground alone we think the objection should not be sustained. It may also be remarked that the appellant would not run much risk in paying the female respondent, as he would get a receipt from her authorized by her husband, and the latter would not be listened to if he brought another action for the same cause. Then, again, the damages claimed are personal to the wife, and this Court, in *Waldron & White*, M. L. R., 3 Q. B. 375, declared, in a case where a a wife had been libelled, that she had a right to sue, authorized by her husband. It is attempted in this case to make a distinction between damages for bodily injuries and damages for a libel, but we do not think that any sound distinction exists. This is certainly an action for personal wrongs; the damages claimed are personal to the wife, and we think the female respondent was entitled to sue.

The technical difficulty being disposed of, we come to the merits. Upon the merits it is a case of considerable doubt; but after full consideration of the evidence we are unable to come to the conclusion that a gallery that could not support a little extra pressure was sufficient, and we hold that the balance of proof is in favor of the respondent. We should in any case lean to the conclusion arrived at by the Court below. The action does not depend upon the lease, or the legal obligations of the lessor to the lessee, but upon the fact that the woman had a right to be where she was. She was there rightfully as a member of the family of the lessee, and she was injured through the weakness of the structure of the gallery. That was the fault of the proprietor and lessor.

As to the amount of the damages, the sum awarded by the Court below is a little high; but $500 is not a very large amount considering the nature of the injuries, and we are not disposed to interfere with the award of the first Court. The judgment will therefore be affirmed.

DOHERTY, J.:—

If I had been sitting alone in this case, in the place of

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the judge in the Court below, I would have dismissed the action on the proof, because I think the evidence supports the appellant's pretension. But the case cannot go further, and therefore I do not enter a formal dissent. As to the amount of damages, I think it is decidedly too high; but the Supreme Court has made a rule on this subject which we cannot disregard.

Judgment confirmed.

M. J. F. Quinn, Q.C., for appellant.
Maclaren, Leet, Smith & Smith, for respondent.

(J. K.)

June 19, 1890.

Coram DORION, Ch. J., CROSS, BABY, BOSSÉ, DOHERTY, JJ.

MONTREAL LOAN & MORTGAGE CO.,
(*Plaintiff in Court below*),
APPELLANT;

AND

DAMASE LECLAIR,
(*Defendant in Court below*),
RESPONDENT.

Petitory action—Promise of sale—Commencement of proof.

HELD:—1. Where there has been a sale, or promise of sale, of an immovable accompanied by possession, at a price to be subsequently determined by the parties, and afterwards fixed by a memorandum of the vendor's manager, the vendor is not entitled to bring a petitory action to recover the property, his recourse being an action to compel the purchaser to take a deed.

2. A promise of sale may be proved by verbal evidence where there is a commencement of proof in writing.

3. In the present case, a memorandum of figures in the hand writing of appellants' manager, with his statements when examined as a witness, constituted a sufficient commencement of proof.

APPEAL from a judgment of the Superior Court, Montreal (MATHIEU, J.), Sept. 14, 1887, dismissing a petitory action. The judgment was in the following terms:—

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"La Cour, etc.....

"Attendu que la demanderesse par la présente action pétitoire, veut contraindre le défendeur à lui livrer possession des immeubles décrits dans la déclaration comme suit:—"Two lots of land situate in the said heretofore Village of St-Jean-Baptiste, etc. [*Description.*]"

"Attendu que la demanderesse allègue, qu'elle a été, depuis le 29 mai 1878, la propriétaire légale des dits immeubles, les ayant acquis de Cléophas Beausoleil en sa qualité de syndic officiel aux biens du défendeur, en faillite, par acte de vente passé le 29 de mai 1878, devant O. J. Devlin, notaire, et enregistré le 6 juin 1878 dans le bureau d'enregistrement pour la division d'Hochelaga et Jacques-Cartier; qu'en 1878, le défendeur s'est illégalement emparé et mis en possession des dits immeubles, et qu'il a continué de les posséder et les possède encore sans aucun droit, percevant et faisant siens les revenus d'iceux; que ces fruits et revenus ainsi perçus se montent à la somme de $2,400; que la demanderesse a requis le défendeur de lui livrer les dits immeubles, mais que ce dernier a refusé de le faire; d'où la présente poursuite par laquelle la demanderesse demande, en outre de la possession des dits immeubles, la dite somme de $2,400 pour lui tenir lieu des dits fruits et revenus perçus par le défendeur;

"Attendu que le défendeur plaide en substance que s'il a occupé les dits immeubles, cela a été du consentement du gérant de la demanderesse, et à la suite d'une convention entre lui et le dit gérant; que la dite propriété avait été achetée par la demanderesse pour le défendeur; qu'il l'a aussi occupée de bonne foi, en retirant les revenus et en payant les charges; qu'il a payé à la demanderesse divers montants à compte du prix de vente, tant en argent que par des ouvrages qu'il a faits pour la demanderesse; que le 28 janvier 1884, il fut établi entre le défendeur et le gérant de la dite compagnie, une balance de $2,028 que le défendeur devait sur le prix des dits immeubles, et qu'il lui était loisible de payer en 150 versements mensuels de $20 chacun, comprenant les in-

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térêts ; que le défendeur a, depuis lors, entrepris et fait pour la demanderesse divers travaux, dont une partie du prix, savoir, la somme de $1,100 fut gardée par la demanderesse à compte du dit prix de vente, ce qui laissait à cette époque, savoir, au commencement de février 1885, une balance de $928 ; qu'il fut convenu entre le défendeur et le dit gérant qu'un titre serait donné au défendeur, laissant due la susdite balance de $928, mais que la demanderesse a toujours refusé de passer le dit titre ; que le défendeur est toujours prêt à signer un contrat de vente et à payer la dite balance du prix d'achat par versements mensuels de $20 chaque, tel que convenu, et qu'il ne saurait être contraint à remettre le dit immeuble ;

"Attendu que le défendeur a plaidé en outre, quant aux fruits et revenus dont la demanderesse réclame la valeur, qu'il a perçu ces revenus comme propriétaire de bonne foi ; et que dans tous les cas leur valeur est plus que compensée par celle des impenses et améliorations qu'il a faites sur ces immeubles, des charges qu'il a payées sur iceux et des travaux qu'il a exécutés pour la demanderesse ;

"Considérant qu'il est en preuve que la demanderesse a promis de vendre et a de fait vendu les dits immeubles au défendeur, et qu'elle ne peut en conséquence les répéter comme elle le fait par la présente action ;

"Maintient le plaidoyer du défendeur, et déboute la demanderesse de son action avec dépens, distraits, etc."

May 16, 1890.]

Lunn, for the appellant :—

To establish his plea, it was incumbent on the defendant to prove, by legal testimony, its allegations, viz : an agreement for a sale and the price and terms alleged to have been agreed upon.

It is not sufficient to prove that the plaintiff intended to sell, and defendant wished to buy ; and that defendant was in possession, under these circumstances ; the price, as defendant alleges in his plea, "to be fixed later on between plaintiff and defendant."

There can be no sale without a price certain and determined or, at all events determinable. Pothier, Vente, Nos. 23, 29.

It is the same thing with an agreement to sell at a price to be afterwards fixed by the parties, as its being carried out or not, is in the power of either, and therefore is no promise to sell or buy. It might be different if the alleged promise was to sell at the market value, or at its estimation by a third party, or at the price at which plaintiff was accustomed to sell similar lots.

Vide Nault & Price, 11 Q. L. R., p. 309.

Price & Nault, 13 Q. L. R., p. 286.

But here it is no such thing; defendant relies upon a contract of sale in which the price and terms were to be fixed and settled by the parties.

He therefore further states that this was afterwards arrived at. That there was an agreement between the plaintiff and defendant in January, 1884, establishing the balance then due by defendant to plaintiff on the purchase money at $2,028; which was agreed to be paid, including interest, by 150 monthly payments of $20 each (or $3,000).

The only written proof produced by defendant, in support of this pretention, are some figures in pencil made by plaintiff's manager, William L. Maltby, on the back of an account of defendant for work done by him for plaintiff.

As to the value of figures and calculations as proof, appellant cites Larombière, Théorie des Obligations, vol. 5, p. 94: "N'ont pas plus de valeur les chiffres et opéra-
"tions de calcul, sans mélange d'aucune écriture qui en
"détermine le sens et en indique l'intention. Ce n'est
"pas seulement à cause du degré insuffisant de vraisem-
"blance qu'un simple paraphe où des chiffres sont ha-
"bituellement appelés à produire; mais c'est aussi sur-
"tout parce que en droit, ils ne peuvent être considérés
"comme formant un écrit, dans le sens où la loi, d'accord
"avec le langage ordinaire, emploie cette expression."

That these figures were the result of an agreement, a

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bargain between defendant and plaintiff's manager, is denied by the latter, who made them, and who proves that they were mere calculations. Even if they were supposed to show what the plaintiff's manager was willing to do, there is no evidence that he was authorized by the company or that defendant ever accepted them, carried out the terms, or made one payment in accordance therewith. If plaintiff had brought an action against defendant alleging such a sale to him, it could only have been dismissed for want of proof.

It is true that the accounts rendered by plaintiff and the circumstances of the case, speak strongly of a wish or intention to sell on the part of the plaintiff and to buy on the part of the defendant; and this was to be expected. Plaintiff was a lender who had only become proprietor from necessity to protect its mortgage.

Having purchased, it only sought for an opportunity to sell, and why not to the defendant, the old proprietor, provided always terms could be agreed upon? And he, also, was willing to buy, no doubt; and paid money or did work, on account of the price to be agreed upon, when they came to terms; and this he could very safely do whatever might happen, as he was in receipt of the revenues of the property and had besides the responsibility of the plaintiff corporation to pay back any money received.

But this does not constitute a sale; and now when after mutual carelessness and drifting, the parties fail to agree upon terms of sale, the legal position is that plaintiff is the owner of the property, and defendant is to get back any money he has paid in excess of the rents and revenues received by him.

Charbonneau, for the respondent:—

L'appelante a pris une action pétitoire revendiquant la propriété et réclamant $2,400 pour la valeur de l'occupation depuis le 29 mai 1878, jusqu'à la poursuite.

L'intimé plaide, 1o. qu'il n'y a pas lieu à l'action pétitoire, qu'il y a eu vente ou au moins promesse de vente suivant les actes et les faits sus relatés; que l'appelante

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aurait dû prendre une action en passation de titre ; qu'il a toujours été prêt à passer titre suivant les conventions sus relatées ou suivant la valeur, et qu'il est encore prêt à le faire. 2o. Que, après déduction du loyer qu'il a reçu et la valeur de son occupation, il lui resterait dû, s'il n'était pas reconnu propriétaire, une somme de $813.65 pour réparations et améliorations indispensables ainsi que pour argent payé en acompte de la vente, et que l'appelante ne pourrait se faire remettre en possession de la dite propriété sans lui rembourser préalablement ce montant.

L'appelante répond qu'il y a eu négociations entre les parties vers le mois de décembre 1883 pour la vente de la propriété moyennant une somme de $3,000 due par l'intimé à Ferrier & Co., et transportée à l'appelante, et en sus $600 à être payées à madame Papineau, mais que ces négociations n'ont jamais abouti ; que les argents payés et réparations faites, l'ont été en acompte du loyer, et qu'elle réduit sa demande de $2,400 en conséquence.

1o. En droit, l'intimé propose les principes suivants :

Pour faire renvoyer l'action pétitoire prise par l'appelante, il suffit qu'il y ait eu vente ou promesse de vente avec tradition, et prix fixé, ou même sans prix établi d'une manière définitive. Articles 1472, 1478 et 1493, C. C. Pothier, Vente, No. 24, 25, 26 et 28 ; Larombière, tome 5, No. 30, pp. 108 et 109.

La vente ou promesse de vente, ou partie de l'une ou l'autre, peut être prouvée par toute espèce de preuve et notamment par témoins, lorsqu'il y a un commencement de preuve par écrit. Art. 1233, § 7.

Le commencement de preuve par écrit se trouve dans tout écrit émané de la personne à laquelle on l'oppose, ou de son mandataire, qui rend vraisemblable ce qui est allégué. Art. 1347, C. N. Larombière, tome 5, p. 86, No. 5, et p. 88, No. 7.

2o. En fait, la vente ou promesse de vente, car dans l'espèce il serait assez difficile de faire la distinction, et d'ailleurs pour les fins de la présente cause cette distinction n'est pas nécessaire, se trouve établie par une reconnaissance écrite.

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Il apparaîtrait à la lumière des principes émis plus haut et des faits résumés, qu'il était au moins impossible à l'appelante de prendre une action pétitoire. Tout ce qu'elle aurait pu faire aurait été de prendre une action en passation de titre, sur laquelle l'intimé aurait pu faire ses offres ou bien se faire rembourser du montant payé par lui en accompte de cette vente. Si l'appelante réussissait à faire maintenir son action et à déposséder l'intimé, surtout sans lui faire préalablement les remboursements plaidés en second lieu par l'intimé, l'appelante aurait été remboursée de son montant, aurait la propriété pour rien, et l'intimé serait en outre tenu de lui payer environ $1,800 d'occupation.

June 19, 1890.]

DOHERTY, J. (for the Court) :—

The Court is of opinion that there is a good *commencement de preuve* in writing, and that the promise of sale is proved. From this it follows that the appellants were not entitled to bring a petitory action. The action should have been to call upon the respondent to take a deed.

Judgment confirmed.

Lunn & Cramp for appellants.

Trudel, Charbonneau & Lamothe for respondent.

(J. B.)

November 22, 1890.

Coram DORION, Ch. J., TESSIER, BABY, BOSSÉ, DOHERTY, JJ.

WILLIAM A. REBURN,
(*Plaintiff in Court below*),
APPELLANT;

AND

THE ONTARIO & QUEBEC RAILWAY CO.
(*Defendant in Court below*),
RESPONDENT.

Railway — Expropriation — 2 *R. S. C., ch.* 109, *s.* 8, *s. s.* 33, 36, 37—*Interest.*

HELD:—Affirming the judgment of TAIT, J., M. L. R., 5 S. C. 211, That where a railway company obtains possession of land on making a deposit, and the arbitrators subsequently make an award of a sum of money for the value of the land, and "in full payment and satisfac- "tion of all damages resulting from the taking and using of the said "piece of land for the purposes of said railway," the company is liable for interest on the amount of the award only from the date thereof—and not from the date when the company obtained possession of the land. It will be presumed that the arbitrators included in their award compensation for the company's occupation of the land prior to the date of the award.

APPEAL from a judgment of the Superior Court, Montreal (TAIT, J.), June 28, 1889, dismissing the appellant's action to recover interest on the amount of an award of arbitrators, from the date when the respondents deposited the plan and book of reference up to the date of the award. The judgment of the Court below is fully reported in M. L. R., 5 S. C., pp. 211-215.

Sept. 27, 1890.]

R. Laflamme, Q. C., and *A. G. Cross* for appellant:—

The appellant's action was for interest upon $4,500, amount of compensation awarded to him as a result of an arbitration under the Consolidated Railway Act, 1879, and its amendments, for a strip of his land expropriated for the line of respondents' railway, this interest being

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claimed for a period beginning with the deposit of the company's plan and book of reference on the 12th May, 1886, and ending with the rendering of the award on the 12th November, 1887. The appellant was paid the amount of the award with interest from the date of the award, but reserved his recourse for prior interest.

The case has been reduced to a single legal issue which may be embodied in the question:—Are the respondents liable to appellant for interest upon the amount of compensation awarded to him for any period before the rendering of the award, particularly if they have been in possession of the land expropriated?

The appellant by his action alleges such liability on the part of the respondents, and the latter, while admitting the circumstances, deny their liability.

The amount of compensation awarded was greater than the sum offered by the respondents in their notice of expropriation, so that appellant's refusal to accept the latter sum in no way put him in default.

The railway plan and book of reference were deposited on the 12th of May, 1886. Appellant was served with a notice of expropriation on the 22nd of June, 1886. The company took possession under order of Court on the 21st of July, 1886. The award was rendered only on the 12th of November, 1887.

So the respondents were in possession of the land over one year and three months pending the arbitration, but refuse to pay interest on the compensation for any part of that time, and the judgment has held them not liable for it.

That a purchaser of land who goes into possession without paying the price is liable for interest, independently of any stipulation, is a proposition not open to serious controversy. Merlin, Rép., *vo.* "Intérêt," sec. 9; Civil Code, Art. 1534; VI Toullier, sec. 269.

But the respondents in this case are in a much less favorable position than an ordinary purchaser would be. The company took appellant's property under expropriating powers against his will.

Appellant could not legally be thus deprived of his property except in "consideration of a just indemnity *previously paid.*" Civil Code, Art. 407. The Railway Act required the company at the outset to make tender of a specific sum to appellant, and the respondents were therefore from the beginning in the position of a party in default to pay the compensation, especially where, as in the present case, the amount tendered was insufficient.

Authorities holding an expropriating party liable for interest from the time of taking possession are readily found.

III. Toullier, sec. 276. "Après la fixation des indemnités il faut en effectuer le paiement. L'art. 545 du Code Civil exige que ce paiement soit préalablement exécuté, mais la loi du 8 mars 1810 a prévu le cas où des circonstances particulières empêchent le paiement actuel en tout ou en partie, et elle veut que l'intérêt en soit dû à compter du jour de la dépossession d'après l'évaluation provisoire ou définitive de l'indemnité."

DePeyronny & Delamarre, *Lois d'expropriation*, p 565, sec. 684; *Atlantic & North West Ry. Co.* v. *Prud'homme*, Montreal Law Reports, 2 S. C. 21.

Respondent was liable for interest not only from the 21st of July, 1886, when it took possession, but from the 22nd of June, 1886, when it served its expropriation notice, for from that date, if not sooner, it was legally bound to have offered appellant $4,500, instead of $800, which it did offer, and also because the enquiry by the arbitrators was restricted to finding the compensation as at the date of deposit of the company's plan and book of reference. This deposit is declared to be a notice to all interested parties, "and the date of such deposit shall be the date "relatively to which the indemnity or damages aforesaid "shall be fixed." *Vide* Consolidated Railway Act, 1879, sec. 9, paragraph 11, as amended by 47 Vict., ch. 11, sec. 11. This enactment clearly implied that the arbitrators' award must speak as if made at the time of deposit of the plan, and that from that date the appellant was powerless to deal with the land as his own. In the face

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of such an enactment it cannot surely be logically or legally held as the judgment holds, "that there is nothing "in said Act to prohibit or prevent said arbitrators from "including in their award compensation of damages to "the owner of land for the use and occupation of such "land by the railway company previous to the award, or "to arrive at the amount of such compensation or damages "in such way as they may deem best."

No doubt the arbitrators could fix the compensation in the way that seemed best to them, but the compensation which they were charged to fix had to be fixed as at the date of deposit of the plan.

The judgment appealed from ought to be reversed:

First: Because it has not recognized the principle that the purchaser of an immovable who has gone into possession is liable for interest on the price, at least from the time of taking possession, *de jure*, and without stipulation to that effect;

Second: Because no provision of the Consolidated Railway Act of 1879, or even of the Railway Act of 1887, prevents even inferentially the application of this principle to the present case, especially as these statutes enact that the compensation should be fixed with reference to the time of deposit of the company's plan and book of reference;

Third: Because the judgment practically gives legal effect to a tender of $800, made with the expropriation notice, whereas the award shows this tender to have been quite insufficient.

Should interest be allowed only from the time of taking possession the appellants' claim would be for $354, but as he claims interest from the time of deposit of the plan the suit was taken for $398.

H. Abbott, Q. C., for respondent.

Nov. 22, 1890.]

DOHERTY, J. (for the Court):—

The party expropriated, appellant in this case, has been paid the damages awarded. Now he claims interest on the

amount of the award from the date of the deposit of the plan and book of reference up to the date of the award. The question is whether he is entitled to this interest.

Interest never arises except by contract to pay it, or by holding over money wrongfully where the party is in default to pay. How could the company be in default to pay until the award was made? We are of opinion that the judgment is well founded, and it is affirmed unanimously.

Judgment confirmed.

Laflamme, Madore & Cross for appellant.

Abbotts, Campbell & Meredith for respondents.

(J. K.)

November 22, 1890.

Coram DORION, C. J., BABY, BOSSÉ, and DOHERTY, JJ.

JAMES BENNING ET AL. ÈS-QUAL.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

ATLANTIC & NORTH-WEST RAILWAY CO.,
(*Defendants in Court below*),
RESPONDENTS.

Expropriation under Railway Act (*R. S. C., cap.* 109)—*Requirements of arbitrators' award—Inadequate compensation amounting to fraud—Objections to arbitrators.*

HELD:—Affirming the judgment of WURTELE, J., M. L. R., 5 S. C. 136, 1. The Railway Act (cap. 109, R. S. C.) only requires that the award in arbitration proceedings should state clearly the sum awarded and the property for which such sum is to be the compensation. It does not require that the award should mention the person to whom the award is to be paid, nor what amount is to be paid for land, and what amount for buildings to be taken, nor what amount has been deducted for increased value to be given to the remnant of the property.

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2. The Act in question does not require that the award should show on its face that a day had been fixed, on or before which the award had to be made, or that it was made within the time so fixed; it is sufficient that it should be proved that as a matter of fact such time was fixed, and that the award was made within the delay.

3. When the arbitrators in the record of their proceedings make a minute of the sum to be awarded as compensation, and agree that the sum shall be in notarial form, and such award is afterwards drawn by a notary and signed by all three arbitrators, and duly served on the parties, such notarial award is the true award and is valid.

4. The party expropriated cannot object to the arbitrator named by the company on the ground of his relationship to the surveyor whose certificate accompanies the offer made by the company, nor on the ground of alleged inexperience, especially when these facts were known to the proprietors before the appointment of the third arbitrator.

5. The fact that the third arbitrator in the expropriation proceedings has since the award, represented the company in other similar proceedings, forms no legal ground of objection to such third arbitrator.

6. When all the requirements of the law have been observed, the award made by the arbitrators, or any two of them, is final and conclusive; and the compensation awarded is entirely within the discretion of the arbitrators in the absence of fraud on their part, and is not in such case subject to review by the courts.

7. Inadequacy in the sum awarded may be such as in itself to constitute proof of fraud on the part of the arbitrators, and in such a case the Court may annul and set aside such award by reason of such fraud; but to justify such action by the Court, the sum awarded must be so grossly and scandalously inadequate as to shock one's sense of justice —which was not the case in this instance, the arbitrators having acted in good faith and with proper discrimination.

8. The principle to be followed by arbitrators in making such an award is that the proprietor shall be left in the same position financially as he was before his property was expropriated, without allowing any *prix d'affection*; and therefore, when, as in this case, the evidence of the proprietor's witnesses proves that the value of the remnant of the property, added to the sum awarded as compensation, is greater than the price for which the proprietors were willing to sell the whole property before the [illegible] the award must be held to be reasonable and adequate.

APPEAL from a judgment of the Superior Court, Montreal (WURTELE, J.), June 22, 1889, dismissing an action to set aside an award. The judgment of the Court below is reported in M. L. R., 5 S. C. 136.

Sept. 27, 1890.]

Trenholme, Q. C., and *Béique*, Q. C., for the appellants, relied, first, upon the gross unfairness and inadequacy of

the award, amounting to a fraud on appellants' rights. Secondly, upon the fact that the two arbitrators who made the award, took into consideration a supposed enhanced value to be given to the balance of the property by the railway on the assumption that a depot would be established in the locality, and thus give facility of access between the property and the city. The Honorable Judge delivering the judgment, in his *considérant* on this point, misapprehended the position taken by appellants on this head. The appellants never pretended that the company had promised to establish or maintain a depot in the locality, or that the arbitrators had assumed that they had promised it. On the contrary, what appellants said was that the two arbitrators assumed that there was to be a depot there, and on that assumption awarded appellants less than they would have done, and that they had neither promise or warrant of any kind from the company to make any such an assumption. Thirdly, that the notarial award and its contents were never agreed upon by the arbitrators properly met to consider it. The notarial award does not reproduce the only decision properly arrived at by the arbitrators, as it omits all mention of what appears the important consideration of the award, viz.: the supposed enhanced value given to the balance of the property by the railway.

H. Abbott, Q. C., for the respondents.

Nov. 22, 1890.]

Bossé, J., delivering the judgment of the Court, held that no valid objection had been urged against the award. The decision of the arbitrators as to the amount of damages was not shown to be unfair. The judgment would therefore be affirmed.

Judgment confirmed.

Trenholme, Taylor & Buchan for appellants.
Abbotts, Campbell & Meredith for respondents.

(J. K.)

May 28, 1889.

Coram TESSIER, CHURCH, BOSSÉ, DOHERTY, JJ.

JOHN L. CASSIDY,
(*Defendant in Court below*),
APPELLANT;

AND

LA CITÉ DE MONTRÉAL,
(*Plaintiff in Court below*),
RESPONDENT.

City of Montreal—Proprietors par indivis—Joint and several liability for taxes.

HELD:—Affirming the judgment of TELLIER, J., M. L. R., 4 S. C. 32, That the obligation to pay the taxes imposed by the corporation of the city of Montreal on real property is indivisible, *solutione*, and that the city is entitled to recover the entire amount of such taxes from any one of the co-proprietors *par indivis* whose name is entered on the assessment roll as one of the owners.

APPEAL from a judgment of the Superior Court, Montreal (TELLIER, J.), March 22, 1888, maintaining the respondent's action for taxes. The judgment of the Court below is reported in M. L. R., 4 S. C., pp. 32-36.

The appellant jointly with Mr. Adolphe Roy, Mr. Justice Jetté, Messrs. F. L. Béique, P. Demers and N. Larivée, in 1874, purchased from Mr. Justice Cross, Nos. 1386 and 1387, St. Ann's ward, Montreal, and the property was held in common, and appeared on the assessment rolls in the name of "Cassidy, Larivée, Demers *et al.*" The city claimed that where property is owned *par indivis* by several persons it is sufficient to name one of the co-proprietors, and the whole amount of taxes thereon may be collected from him, saving his recourse against his co-proprietors. The action for overdue taxes was brought against the appellant alone.

The defence was, first, that the appellant was not liable for the whole amount; that there were six proprietors,

each of whom owned one-sixth of the real estate in question; that they were named in the deed of sale and were known to be proprietors, and the assessors could not enforce against one the claim which should be divided among six.

To this the city answered that the assessment roll, which only mentioned three owners, had not been complained of within the delay fixed by law, and could not now be assailed.

The Court below maintained the action, holding that under sections 84 and 95 of the City charter, 37 Vic, ch. 51, the city was entitled to recover the whole amount of the taxes due on a property held by several persons in common, from the owner whose name appeared on the assessment roll, or from any person occupying it, or part of it, as tenant or otherwise. It was further held that the obligation to pay taxes on real estate is indivisible, *solutione*, and the city is entitled to claim the whole amount from any one of the co-proprietors. Judgment was therefore rendered against the appellant for the whole amount of taxes due.

March 20, 1889.]

Lajoie for the appellant:—

La section 84 de la charte de la Cité se lit comme suit: "Chaque fois qu'une cotisation sera imposée sur une pro- "priété immobilière appartenant à plusieurs co-héritiers, "ou possédée par indivis par plusieurs personnes dont les "noms ne pourront être facilement constatés par les éva- "luateurs, il suffira que les dits évaluateurs inscrivent "dans les livres de cotisations le nom d'un des co-héritiers "ou co-possesseurs; et le co-héritier ou co-possesseur, "dont le nom sera inscrit dans les dits livres, sera tenu "au paiement entier de la cotisation ainsi imposée, sauf "son recours contre ses co-héritiers ou co-possesseurs, con- "formément à la loi."

Comme on le voit, à la simple lecture de cet article, il s'agit de rendre la tâche des évaluateurs plus facile, en leur permettant, dans certains cas, de n'inscrire que le nom d'un des co-propriétaires.

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Ceci arrive lorsque les noms des co-propriétaires ne peuvent être facilement constatés.

Il semble donc clair que lorsque les noms des co-propriétaires peuvent être facilement constatés, il n'est pas permis aux évaluateurs de n'inscrire que le nom d'un seul. Il ne leur est pas permis, afin de leur rendre plus facile la collection des taxes municipales, de faire peser tout le fardeau sur les épaules d'un seul co-propriétaire solvable. C'est bien plutôt une punition que l'on impose par cette section aux co-propriétaires qui ne veulent pas rendre publics les noms de ceux qui possèdent avec eux.

Peut-on prétendre qu'il serait permis aux évaluateurs de se prévaloir de cette section, lorsqu'un acte dûment enregistré fait connaître au public les noms de tous les co-propriétaires des immeubles sur lesquels on impose les taxes? Peut-on dire que les noms de ces personnes ne peuvent être facilement constatés, lorsqu'il suffit pour les évaluateurs de se rendre au bureau d'enregistrement qui est à deux pas de l'Hôtel-de-Ville, pour se les procurer? Evidemment non.

L'intimé prétend aussi dans sa déclaration que la charte permet dans tous les cas de co-propriété par indivis, de n'inscrire que le nom d'un seul des co-propriétaires. Mais cette interprétation est contraire au texte même de la section 84 qui ne donne ce pouvoir exorbitant aux cotiseurs que lorsque les noms ne peuvent être facilement constatés.

Les évaluateurs n'avaient donc pas le droit, dans ce cas, de n'inscrire que le nom d'un seul des co-propriétaires pour le rendre seul responsable des taxes.

Maintenant l'ont-ils fait? Ont-ils inscrit le nom d'un seul co-propriétaire? Le rôle d'évaluation démontre le contraire. Les évaluateurs, employés de la demanderesse, connaissaient parfaitement tous les co-propriétaires de ces immeubles. Ils savaient que le titre d'acquisition était enregistré, et il est probable que c'est en consultant ce titre d'acquisition, qu'ils ont eu les noms des co-propriétaires qu'ils ont inscrits comme suit, sur le rôle: "MM. Cassidy, Larivée, Demers *et al.*?" Trois des co-propriétaires sont inscrits nominativement. Les autres sont dé-

signés par les mots "*et al.*" Rien dans le rôle ne fait voir qu'il y ait des co-propriétaires inconnus. Rien ne fait voir qu'on veut se prévaloir du privilège de la section 84 et rendre un seul des co-propriétaires responsables pour le tout. Tous les noms sont inscrits. La demande se connaissait tous les propriétaires, puisque, dans sa déclaration, elle donne tous leurs noms ainsi que le titre en vertu duquel ils possèdent. Si les évaluateurs n'avaient pas connu les noms de tous les co-propriétaires, ils ne les auraient pas inscrits de la manière dont ils l'ont fait et ils se seraient prévalus de la section 84 pour n'inscrire que le nom d'un seul. Ils ne l'ont pas fait, ils ne se sont pas conformés à la lettre et à l'esprit de l'article 84; ils ne peuvent maintenant se prévaloir de cette disposition exorbitante du droit commun.

Cette disposition est de droit stricte. La loi rend un des co-propriétaires responsable seul pour le montant entier des taxes, lorsque les évaluateurs n'ont pas pu facilement constater les noms des autres co-propriétaires et lorsqu'ils ont inscrit le nom de celui-là seul sur le rôle.

La Cour inférieure a fait erreur lorsqu'elle a jugé que l'obligation de payer les taxes à l'intimée était indivisible *solutione*.

Dans la section 95, il n'y a rien qui oblige l'appelant qui n'est pas occupant, mais simplement co-propriétaire, à payer à lui seul le montant entier des taxes.

Quant à la section 84, nous soutenons qu'elle ne s'applique pas à la cause, attendu que:

1o. Il était facile pour les évaluateurs de s'assurer des noms de tous les co-propriétaires.

2o. Que tous ces noms ont été suffisamment inscrits sur le rôle de cotisation.

Si la Cour arrive à la conclusion que notre premier plaidoyer est mal fondé et que la cité n'a le droit de procéder que contre ceux qui sont inscrits nominativement sur le rôle, savoir: MM. Cassidy, Demers et Larivée, elle devra, dans ce cas, maintenir notre deuxième plaidoyer et limiter la condamnation à la somme de $527.91.

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Ethier, for the respondent :—

Le tribunal n'a en réalité qu'une question à juger, savoir : si l'action pouvait être dirigée contre un seul des co-propriétaires des immeubles taxés, quoique les noms de trois d'entre eux fussent portés aux rôles.

La créance réclamée dans l'instance est-elle indivisible ? Si elle l'est, il n'y a pas lieu de discuter, puisqu'elle peut être réclamée de tout contribuable en possession de l'immeuble grevé. Or la taxe ou cotisation est une charge publique prélevée sur la propriété, non sur le propriétaire ; comme telle, elle est exigible *in toto* et constitue non pas une dette hypothécaire mais bien une dette privilégiée, (37 Vict., ch. 51, §96) ; elle peut être réclamée d'un de plusieurs co-propriétaires (§84), d'un de plusieurs co-héritiers (§84 et 46 Vict., ch. 78, §10) ou d'un propriétaire, de l'occupant ou du locataire, (37 Vict., ch. 51, §95).

May 23, 1889.]

TESSIER, J. :—

This is an appeal by Cassidy from a judgment which condemned him to pay the whole amount of taxes due the city of Montreal, on a property which he owns *par indivis* with five others. Cassidy objects to the judgment which condemns him to pay the whole, because he is only interested in the property to the extent of one-sixth. It appears that the names of himself and two others are entered on the assessment roll. The question is whether the corporation are obliged to sue all the proprietors, or whether an action can be brought against any one of them for the whole amount due. The judgment of the Court below condemned Cassidy to pay the full amount, $2,736.

If we refer to the Acts relating to the corporation of the city, we find that there are provisions to facilitate the collection of taxes from co-heirs and co-proprietors, and that it is sufficient to enter the name of any one of the co-owners on the assessment roll to make such person liable to an action for the whole amount. In this case the names of three of the co-proprietors were entered on

the roll. The corporation might have sued the three. If it sues only one, can judgment be obtained against him for the whole amount? We are of opinion that the debt is indivisible, and that the judgment which condemned the appellant for the whole is correct. It is admitted that Cassidy has sued his co-proprietors in warranty. He has availed himself of the remedy which the law allows him. The legislature, we hold, intended to permit an action to be brought against any one of the co-proprietors for the whole amount, and we see no reason to disturb the judgment.

DOHERTY, J.:—

The plaintiff in this case might have avoided a difficulty if the declaration had been drawn differently. The city charter allows a co-proprietor to be sued for the whole amount of taxes due, if it is not easy to find out who the other owners are. Here the declaration was drawn without reference to that "if" at all. It is not alleged in the declaration that it was difficult to find out who the other owners are. Has the plaintiff, then, brought himself within the statute? This is the principal difficulty that I see in the case. There is a weakness in the declaration. We do not consider, however, that this is fatal to the action. Cassidy omitted to see how the property was taxed until the roll was confirmed. Otherwise I could not get over the omission to allege that there was a difficulty in obtaining the names of the co-owners. Under the circumstances I concur in the judgment.

Judgment confirmed.

Lacoste, Bisaillon, Brosseau & Lajoie for appellant.
R. Roy, Q. C., for respondent.
(J. K.)

September 24, 1890.

Coram DORION, C. J., CROSS, BABY, BOSSÉ, and DOHERTY, JJ.

CHARLES HAGAR,
(Contesting claim in Court below),
APPELLANT;

AND

ROBERT SEATH,
(Claimant against insolvent estate of John Stephen in Court below),
RESPONDENT.

Insolvency—Insolvent Act of 1864*—Proof of claim.*

HELD:—Reversing the judgment of PAGNUELO, J., M. L. R., 5 S. C. 426 (DORION, C. J., and CROSS, J., *diss.*), That the claim filed by the respondent on the insolvent estate of John Stephen was not legally established by the evidence which was as follows:—(1) that the claim was mentioned by the insolvent in his *bilan*, but under a different name; (2) affidavit of claimant filed with his claim, and copy of transfer to him from Francis Stephen; (3) evidence that claimant consigned goods to Francis Stephen who handed them over to John Stephen, the insolvent.

[The judgment of the Court below being reversed solely on the insufficiency of the proof of claim, the question of prescription was not passed upon by the majority of the Court.]

APPEAL from a judgment of the Superior Court, Montreal (PAGNUELO, J.), Dec. 30, 1889, maintaining the respondent's claim against the insolvent estate of John Stephen. The judgment of the Court below, with the observations of Mr. Justice Pagnuelo, are reported in M. L. R., 5 S. C. 426.

May 17, 19, 1890.]

Barnard, Q. C., and *Doherty, Q. C.*, for appellant:—

The judgment appealed from was rendered by the Superior Court of Montreal, sitting in insolvency.

The claim of the respondent as filed with the assignee on the 20th Oct. 1885, consists of an affidavit of Robert

Seath, the respondent and claimant, and of a copy of the notarial transfer referred to in the judgment.

The affidavit is as follows:

INSOLVENT ACTS OF 1864, 1869 & 1875.

In the matter of JOHN STEPHEN, of the city of Montreal, Trader, an Insolvent,

AND

ROBERT SEATH, of the said city of Montreal, Merchant Tailor, claimant.

I, Robert Seath, of the city and district of Montreal, merchant tailor, being duly sworn depose and say:

I am the claimant.

The insolvent is indebted to me in the sum of $3,645.03 being the amount due by him to the late Francis Stephen in his life time of the said city of Montreal, gentleman, for goods consigned and delivered to the insolvent and amounting to the sum of $3,384.90, and for costs of insurance paid and disbursed and amounting to the sum of $260.63, and which claim was transferred to me by the said late Francis Stephen on the 24th March, 1881, before G. R. W. Kittson, N. P., a copy of said deed of transfer is hereto annexed.

I hold no security for the claim.

And I have signed.

ROBERT SEATH.

Sworn before me at the city of Montreal, this 20th day of October, A. D. 1885.

J. MOSS, J. P.

The principal questions arising on the appeal, are, first: whether the claim should not have been rejected without any contestation, on the ground that it was not one which the assignee should have received at all; and, second, whether the claim has been established by proper evidence on the point raised by the contestation.

I. Has this claim ever been legally filed and proved before the assignee?

Section 94 of the Insolvent Act is as follows:

"If it appears to the assignee on his examination of the "books of the insolvent or otherwise, that the insolvent "has creditors who have not taken the proceedings re- "quisite to entitle them to be collocated, it shall be his "duty to reserve dividends for such creditors according "to the nature of their claims and to notify them of such "reserve, which notification may be by letter through "the post addressed to such creditors' residences as nearly

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"as the same can be ascertained by the assignee; and if "such creditors do not file their claims and apply for "such dividends previous to the declaration of the last "dividend of the estate, the dividends reserved for them "shall form part of such last dividend.

Section 104 of the same Act says:

"The claims of creditors furnished to the assignee in "Form P. attested under oath and accompanied by the "vouchers on which they are based, or when vouchers "cannot be produced, accompanied by such affidavit or "other evidence as in the opinion of the assignee shall "justify the absence of such vouchers, shall be considered "as proved unless contested, in which case the claims "shall be established by legal evidence on the points "raised."

In this case there were no vouchers produced to establish the alleged consignment, and no affidavit filed to account for the absence of vouchers.

Moreover Form P. evidently requires the oath of a person having a personal knowledge of the facts. Here Robert Seath does not swear that he knows personally that the goods in question were consigned by Francis Stephen to John Stephen.

It will be noticed also that the fact that goods are consigned does not create a debt for their value, without an averment that the consignee has done or omitted to do what alone makes him debtor for some specific amount. Here there is no such averment. The Court below in its judgment refers to the price of the goods as if they had been sold, whereas all the claim is that they have been consigned, and the form of the affidavit is such that it does not even state what the value of the goods consigned was.

The claim therefore has never been proved at all. The assignee under the Act should not have received it, and no contestation of it was necessary beyond what was required to call upon the Court to reject it.

II. Has the claimant upon the contestation proved the existence of the particular claim supposed to have existed

in favor of Francis Stephen against John Stephen, as by the Insolvent Act he was bound to do?

It will have been noticed that the judgment says that the claim is proved not only by the list of creditors furnished by the insolvent, but by his deposition in the present case as well, and that it is further proved by the deposition of David Seath.

It is submitted that the Court below has confounded two claims which are really distinct,—one to which the evidence referred to applies and another to which it does not apply. The claim to which the evidence does not apply is that which is at present under contestation,—while the claim to which the evidence does apply is a claim of Robert Seath against John Stephen, which if it ever existed and still exist, a point which is not at all clear, belongs to the creditors of Robert Seath, an insolvent who has got his discharge, but has never got back his estate.

It is only necessary to clear up the confusion as to these two different claims to remove all difficulty on the present appeal.

The evidence, which has been taken subject to objection as to its legality, discloses the following facts:—

David Seath, the son of the claimant (whose evidence is that alluded to, in the judgment), says that in November, 1863, his father consigned the specific goods, now in question, of the value of $3,384.90, to Francis Stephen, who had agreed to go to Nassau, (evidently to run the blockade, for this was during the American war between the North and the South). When the time came, Francis Stephen refused to go to Nassau, and "he handed over the goods to John Stephen."

This is absolutely all the evidence there is in the record of the alleged consignment from Francis Stephen to John Stephen.

It will be seen by the respondent's admission that his pretention is that the precise goods which he originally consigned to Francis Stephen, were by the latter soon afterwards reconsigned to John Stephen. It should be

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stated at the outset that the parties to these alleged consignments are near relatives, Francis Stephen being the brother in law of Robert Seath and the uncle of John Stephen.

Whether John Stephen went to Nassau or not, whether he ran or did not run the blockade, and, what is the more important question, what became of the goods, does not appear. David Seath on the other hand is very anxious that it should be believed that the "handing over" of the goods by Francis Stephen to John Stephen was without his father's consent, and that his father had never pretended to have any personal claim against John Stephen, his sole claim being against Francis Stephen alone, all which his father equally insists on. But the evidence leaves no doubt that whatever claim existed, if the whole thing constituted a claim at all, was originally considered a claim by Robert Seath against John Stephen and against him only.

R. S. Weir (with him *R. Laflamme, Q. C.*), for respondent, relied upon the reasons assigned by Mr. Justice Pagnuelo.

Sept. 24, 1890.]

DORION, Ch. J. (*diss.*):—

I have the misfortune to differ from the majority of the Court, and Mr. Justice Cross, who is not present to-day, is also in the minority. We concur in the conclusion of the Court below that the existence of the claim is sufficiently established, though the proof might have been more complete.

Then the question arises whether prescription was acquired. All the authors are agreed that from the moment the estate is put into the hands of the assignee, prescription ceases to run against the claims of creditors. Here the proceedings were suspended for a long time by the fact that John Stephen obtained his discharge, and then proceedings were taken to set aside the discharge, and were successful; so that the case is in the same position as if the estate had never gone out of the hands of the assignee, and no prescription can run in such case. The

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judgment of the Court below was in favour of Seath, and the equities of the case are entirely on his side.

DOHERTY, J. (for the majority of the Court) :—

During the American civil war Seath, the respondent, furnished certain goods to Francis Stephen who was to introduce them into the confederated States by running the blockade. Subsequently Francis Stephen came to the conclusion that he would not take the risk, and he handed the goods over to John Stephen. Nothing is known as to what became of the goods.

John Stephen became insolvent under the Act of 1864. He put Seath's name down in his *bilan* for the value of the goods. For twenty years this item lay dormant; Seath never filed a claim; the debt was apparently the property of nobody. On the 19th February, 1879, the assignee prepared his final dividend sheet. In 1885, Seath comes in and makes his claim. Hagar seeing this claim come in after the money had been distributed, contests it. Seath makes no reference in his pleadings to the fact that John Stephen had put the debt in his *bilan*; he claims under a transfer from Francis Stephen. There is no proof made of the existence of the debt; there is no proof of a sale of the goods. Where did Francis Stephen get a claim that he could transfer to Seath? Francis Stephen had no money claim. The fact that John Stephen put Seath's name in his *bilan* is no proof of the existence of the claim.

Under the circumstances the majority of the Court have come to the conclusion that the existence of the debt is not proved. The judgment will therefore be reversed, and the contestation of the claim maintained.

The judgment is as follows :—

"The Court, etc.....

"Seeing that the claim of Robert Seath, the claimant in this matter, is based solely on the transfer to him, by Francis Stephen, his brother-in-law, of the sum of $3,384.90, alleged in said transfer as having been a debt

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heretofore owing and due by one John Stephen, the nephew of said Francis Stephen as well as of said Seath, and the insolvent in this cause;

"And seeing that the said insolvent became such, and made his assignment in the year 1865, accompanied by a list of his liabilities, in which the name of said claimant is given as one of his creditors for the sum of $3,384.90, of which credit the said Seath never availed himself, claimed or proved, or attempted to prove, as against said John Stephen, the insolvent, pretending and, in fact, proving that he never had nor pretended to have any claim or dealings with said John Stephen, and that his claim now contested never existed as against the insolvent, but against the said Francis Stephen, under the transfer aforesaid;

"And considering that the contestant Hagar, one of the creditors, hath contested the said claim of Seath now in question, upon the grounds, substantially, that, as admitted and even proved by the claimant himself, he never had claim or dealings in respect of said sum of money with the said John Stephen; nor attempted to prove or enforce such claim, and that his dealings in respect of the claim now in dispute were with the said Francis Stephen to whom he looked as his debtor; and further contested, upon the grounds that claimant never sold, or delivered, in completion of such sale, the goods referred to, to Francis Stephen, and that the said goods were consigned or sent to said Stephen for a special purpose, to wit, for running the blockade, as pleaded and proved, and not as having purchased or become the owner thereof, nor debtor therefor, as purchaser, to the claimant; and further that said goods were afterwards sent by Francis Stephen to the insolvent as a consignment of the same nature as that of claimant to him, and not as a sale thereof from him, F. Stephen, to the insolvent, and without any intention of such a sale, or of the insolvent becoming the debtor or a purchaser thereof;

"And considering that the claimant, Robert Seath, hath failed to establish, both in law and in fact, the material

and essential allegations of his claim in the premises, and more particularly a sale or transfer of the property in question, either to Francis Stephen or John Stephen, or that such a sale was ever intended or contemplated between them, and that no such sale is alleged or set forth in the claim or answer of claimant to the contestation thereof by the contestant, and that such a sale is disproved by David Seath, claimant's son and witness;

"And considering that claimant hath failed to produce any particulars of the goods in question, as to their quality, quantity, kind or value, and that he hath failed to prove by legal or sufficient evidence such quality, kind or value;

"And considering that contestant hath established the material allegations of his contestation of said claim, and that claimant never spoke of or produced the same for twenty years after the insolvent's assignment, to wit, in the year 1885, and after the final dividend sheet had been published and the assets and dividends paid over to creditors, and long after the claimant had become himself insolvent and his estate wound up, and that there is error in the judgment *à quo*, to wit, the judgment rendered by the Superior Court at Montreal, on the 30th of December, 1889,—in this, that it maintains the claim of said Robert Seath except as to the sum of $260.63;

"Doth reverse, annul and make void said judgment, except as to the sum last mentioned;

"And proceeding to render the judgment which the said Court below ought to have rendered, for the reasons hereinbefore set forth, doth maintain the said contestation of said Charles Hagar, and dismiss the said claim of the said Robert Seath, with costs in the Court below as well as in this Court, said costs to be taxed in this Court as in a cause of the second class."

Judgment reversed, DORION, C. J., and CROSS, J., *diss.*

Barnard & Barnard for appellant.

R. S. Weir for respondent.

(J. K.)

June 26, 1889.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, BOSSÉ, JJ.

SAMUEL NORDHEIMER,
(*Defendant in Court below*),
APPELLANT;

AND

CHARLES ALEXANDER,
(*Plaintiff in Court below*),
RESPONDENT.

Responsibility—Force majeure—Fire—Fall of wall after fire—Damages.

HELD:—Affirming the judgment of LORANGER, J., M. L. R., 3 S. C. 283, That where a person pleads inevitable accident in answer to an action of damages, he is not relieved from responsibility if it appear that the accident was preceded by negligence or fault imputable to him, which conduced to the accident. And so, where the damage complained of was caused by the fall of a wall during a high wind, seven days after a fire by which a building of defendant was destroyed and the wall in question left standing, and the defendant had taken no precautions to prevent the accident by pulling down the wall, although there had been ample time to do so, and he had been notified of the danger, it was held that it was not a case of inevitable accident, and that the defendant was liable.

APPEAL from a judgment of the Superior Court, Montreal (LORANGER, J.), Oct. 31, 1887, condemning one of the defendants, now appellant, to pay $2,638.57 damages. The judgment of the Court below is fully reported in M. L. R., 3 S. C. 283.

May 16, 1889.]

Butler, Q. C., for appellant, submitted:—

1. That the building was burnt by accident, and the defendant cannot be held responsible for any injury caused thereby, the immediate cause being the fire.

2. That from the time of the fire until the fall of the building, it was in the hands of the insurance companies, and that the defendant could not be expected to meddle

with it, unless, indeed, there was cause to apprehend and notice of immediate danger of falling, which he could not foresee.

3. That being assured by the architects and builders, men of great experience, that there was no danger of the wall falling, no such danger could have been apprehended by him, and he was not bound to take more precautions than he did.

4. That the extraordinary rain and subsequent wind on the day when the building fell could not have been expected, and that the defendant cannot be held responsible for the injuries resulting from them.

5. That supposing the defendant is responsible under any circumstances, the appellant could not be held liable towards the respondent for anything further than the actual value of articles destroyed by the falling of the wall, and that in any case the judgment must be reversed as to the sum of $800 allowed as injury to his business, and that the sum of $1,838.57 is much more than should have been allowed for damage to furniture and goods.

Laflamme, Q. C., *Duhamel, Q. C.*, and *Rainville* for respondent.

June 26, 1889.]

DORION, Ch. J., for the Court:—

This is an action brought by Alexander, a confectioner, against Nordheimer the appellant, and Mrs. Campbell, under the following circumstances: Alexander occupies a house belonging to Mrs. Campbell; this house adjoined a building belonging to Nordheimer. The wall of Nordheimer's building was considerably higher than the roof of the house occupied by Alexander. On the 17th December, 1886, Nordheimer's building was burned down, but the wall adjoining Alexander's premises remained standing. A day or two after the fire Alexander thought the premises occupied by him were in danger from this wall which, as already said, was considerably higher than his roof. He therefore called upon the corporation building inspector to examine the wall. The inspector

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came, saw that the wall was dangerous, and immediately gave notice to the appellant that he must pull it down. Nothing was done, however, and on the 24th of December, seven days after the fire, during a high wind which prevailed at the time, the wall fell down and damaged Alexander's premises. It being the holiday season, he says the accident interfered considerably with his business, the repairs occupying nearly a month.

Alexander instituted an action against his lessor Mrs. Campbell, and also against Nordheimer, owner of the adjoining building, alleging that the wall which fell was a *mitoyen* wall, and that the two proprietors were jointly and severally liable. It was proved that although the wall was *mitoyen* to a certain height, the upper part, which was the part that fell, belonged to Nordheimer alone. The action against Mrs. Campbell was therefore dismissed.

Nordheimer's defence was that the falling of the wall was due to accident; that there was a strong wind blowing at the time, and this caused the wall to fall. The Court below gave judgment against Nordheimer for $2,638 damages, and he has appealed.

If the wall had fallen while the building was on fire it would have devolved upon Alexander to show that the fall was due to defective construction, and not to the effect of the fire. But the fall occurred seven days after the fire; therefore it could not be pretended that it was the fire which caused it to fall. It was in a dangerous state, for Alexander complained and protested, and went to the building inspector about it. There was plenty of time to get it pulled down. The wind on the 24th was a strong one, but not such a wind as would overthrow a sound wall. As Nordheimer was in fault in not getting it taken down immediately, he cannot pretend that the damage was caused by the wind.

As to the amount of damages, I find the sum awarded by the Court below rather high; but it is very difficult to estimate such damages exactly. I might have given less if I had been sitting in the Court of first instance. But

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we think upon the whole, although the damages may be considered a little high, that we are not justified in disturbing the judgment on the evidence before us. The appeal is therefore dismissed.

Judgment confirmed.

Butler & Lighthall for appellant.

Duhamel, Rainville & Marceau for respondent.

(J. K.)

May 21, 1890.

Coram DORION, C. J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

ALEXANDER M. FOSTER,
(*Plaintiff in Court below*),
APPELLANT;

AND

WILLIAM FRASER,
(*Defendant in Court below*),
RESPONDENT.

Sale of real estate—Action by purchaser to enforce sale—Putting vendor in default.

HELD:—Where by a contract for the sale of real estate the buyer is to pay part of the price in cash within a fixed delay, in order to put the vendor legally in default to execute a deed the buyer must tender the cash payment within the delay; and in a suit to enforce the sale, and asking that the judgment be equivalent to title, he must renew the tender and pay the money into Court.

APPEAL from a judgment of the Superior Court, Montreal (TAIT, J.), Nov. 30, 1888, dismissing an action by the purchaser to enforce a contract of sale. The judgment of the Court below is fully reported in M. L. R., 4 S. C., pp. 436-441.

March 19, 20, 1890.]

Archibald, Q. C., for appellant:—

The first ground for the judgment dismissing the appellant's action was, that the clause of the contract, which

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required the deed to be passed in ten days, had not been carried out, the clause being as follows: "Six thousand dollars on passing the deed, which is to be done in ten days' time."

This *considérant* of the judgment is founded on the case of *Munro & Dufresne*, M. L. R., 4 Q. B. 176; but we contend that it is a misapplication of that case. There an offer had been made, subject to acceptance up to a given date, and the Court held an acceptance insufficient which was not accompanied by some tangible evidence of good faith on the part of the purchaser.

In the present case, the contract was completed by the offer on one side and the acceptance on the other, and it was incidentally stated that a deed would be passed in ten days. Here the Court will perceive also that the offer is in the handwriting of the appellant, and was made by him, and the clause relating to the passing of the deed in ten days was a stipulation made by him in his own favor.

The Court will also perceive that the same letter contains provisions as to the title. The title to be perfect, the property commuted. All deeds of the property and searches to be furnished by the vendor.

In the first place, we contend that the sale was completed by the consent of the parties on the 27th of September.

The fact that a deed was to be passed later does not take away from the completion of the contract previously made between the parties. If it did, no person could ever, upon a private writing, compel another to take a deed of the property.

We, therefore, say that the obligation to pass the deed was subject to the ordinary rule relating to default, and that the respondent could not be relieved of his obligation to sell until he had put the appellant in default to pass a deed for the property, which he never did.

In the second place, we contend that the delay of ten days was expressly waived by both parties, because after

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the expiry of that delay, both parties were present in the notary's office, for the purpose of carrying out the contract made between them. The appellant was then ready to carry it out as it stood, but the respondent refused, because he said it contained the clause relating to the lease of the property to which he had never agreed, and he charged his agent, Jones, with having deceived him in reference to that particular clause.

The third reason why the respondent cannot take advantage of the expiry of the ten days is because he himself was responsible for the delay. The title deeds were not perfect. The delay was caused by him in attempting to perfect them.

With regard to the reason urged, that the parties cannot succeed without depositing in Court the amount previously tendered, we submit that this is not borne out by the jurisprudence of this Court.

We cite *Perrault* v. *Arcand*, 4 L. C. R. 449. The circumstances of that case were very similar to those in issue now before this Court, and it was held not to be necessary to make the deposit, in a case where it appeared that the defendant had sold the property for which a title was sought, although, in that case also, the plaintiff asked that judgment should be equivalent to a title, just as the appellant asks by his action in this case.

If it be essential that the money should have been deposited, it would result in this way. The respondent keeps possession of the property during the long period necessary to conduct the cause through the Courts, draws the rent, and the appellant is obliged to dispossess himself of the price of the property, so losing the interest of his money for the whole of said period, notwithstanding that the respondent has secured the rents and issues of the property itself.

S. Bethune, *Q. C.*, for respondent, referred to Pothier, *Vente*, No. 480; 6th Marcadé (7th ed.), p. 177; and the case of *Munro & Dufresne*, M. L. R., 4 Q. B., p. 176, in support of the proposition that the respondent was discharged *de plein droit* from all liability under the letter,

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by the failure of the appellant to put him *en demeure* within the delay specified in the letter. And as to the necessity of an actual deposit with the prothonotary of the appellant's alleged tender, the respondent referred to the remarks of Meredith, J., in the case of *Perrault* v. *Arcand*, 4 L. C. R., pp. 451 *et seq.*, and to the case of *Marcoux* v. *Nolan*, 9 Q. L. R., p. 263.

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CROSS, J. (for the Court):—

The principal question to be determined in this case is whether a repetition of the tender with the action and the payment of the money into Court was necessary. This is a question of considerable difficulty, but two of the cases cited by the respondent seem to us to be in point, and should control the case. First, the case of *Munro & Dufresne*, M. L. R., 4 Q. B. 176, in which the Court of appeal held that a repetition of the tender with the action was necessary. Secondly, the case of *Marcoux* v. *Nolan*, 9 Q. L. R. 263, seems to follow the same principle. We hold, therefore, that the judgment appealed from is correct.

Judgment confirmed.

Archibald & Foster for appellant.

Bethune & Bethune for respondent.

(J. K.)

May 21, 1890.

Coram DORION, Ch. J., TESSIER, CROSS, BOSSÉ and DOHERTY, JJ.

DANIEL McMANAMY ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

THE CORPORATION OF THE CITY OF SHERBROOKE,
(*Plaintiffs in Court below*),
RESPONDENTS

Constitutional law—47 Vict. (Q.), ch. 84, s. 8—Power of local legislature to authorize municipal corporation to tax wholesale liquor dealers—Statute imposing taxation must be specific.

HELD:—1. An Act authorizing a municipal corporation to levy an annual tax for municipal purposes, on wholesale liquor dealers doing business within the municipality, is within the powers of the local legislature.

2. Where an Act of the local legislature authorizes a municipal council to tax certain trades and occupations specially enumerated in the statute, and generally all commerce, manufactures, etc., exercised in the city, a by-law made by the council under the authority of such Act, taxing certain trades and occupations, and omitting to tax other trades and occupations, is not illegal on the ground of discrimination.

3. Where the legislature authorizes the council of a municipality to levy taxes for municipal purposes, the trades or occupations subjected to taxation must be clearly designated in the statute. Hence a power to levy annual taxes on wholesale liquor dealers and "generally on all commerce, manufactures, callings, etc.," does not sufficiently authorize the municipal council to impose a special and additional tax as compounders on persons who compound or bottle spirituous liquors for the purposes of their business as wholesale liquor dealers.

APPEAL from a judgment of the Superior Court, district of St. Francis (BROOKS, J.), February 28, 1889, in the following terms:—

"The Court, etc.....

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"Considering that the plaintiffs have established the material allegations of their declaration: that, on or about the 8th day of March, 1886, the municipal council of the city of Sherbrooke passed a by-law, number 116 of said council, by which, for the purpose of raising a revenue for said city, they imposed an annual tax of $50 upon every wholesale liquor dealer having a place of business in said city, and an annual tax of $100 upon every distiller, manufacturer, compounder or bottler of spirituous liquors, having a place of business in said city, which by-law was duly published under the provisions of 47 Vict., ch. 84, sect. 18, and by which by-law it was declared that the duties and taxes thereby imposed should be payable on the 1st day of May of the then present year, to wit: 1886, and each following year, which by-law came into force on or before the 1st day of May, 1886, and which was made under the provisions of the Act incorporating the city of Sherbrooke, 39 Vict., ch. 50, as amended, and particularly as amended by the 47 Vict., ch. 84 of the statutes of Quebec, and which was duly and legally enacted and published: and

"Considering that, at the time of the passing of said by-law, the defendants in this cause were wholesale liquor dealers, and became and are liable as such to the annual tax of $50 thereby imposed, and further that they also carried on business and acted as compounders and bottlers of spirituous liquors, and as such became and were liable to pay an annual tax of $100, and that under said by-law 116, both of said annual taxes became and were due on the 1st day of May, 1886;

"Doth adjudge and condemn defendants jointly and severally to pay and satisfy to plaintiffs the sum of $150, with interest thereon, from the 27th of August, 1886, and costs of suit, *distraits*, etc."

March 21, 1890.]

Bélanger for appellants:—

On the 8th of March, 1886, the city council enacted by-law No. 116, in virtue of which, sec. 14, an annual tax

of $100 is imposed and shall be levied on every distiller, manufacturer, compounder or bottler of spirituous liquors, having a place of business in said city; and in virtue of which, sec. 11, an annual tax of $50 is imposed and shall be levied upon every wholesale liquor dealer having a place of business in the said city. These taxes were made payable on the 1st of May then next (1886) and each following year, sec. 21. This by-law was passed under 47 Vict., chap. 84, sec. 8, an Act to amend the city charter, 39 Vict., chap. 50.

The action was instituted to recover these two taxes for the year commencing on the 1st May, 1886. The appellants are wholesale liquor dealers, under Quebec License Act, R. S. Q., sec. 828, sub.-sec. 12 and sec. 831, and they hold a license as such. It is alleged that they were and are also distillers, manufacturers, compounders or bottlers of spirituous liquors: As to the legal meaning of the word "compounder," *vide* R. S. C., chap. 34, sec. 163 and following; and as to the legal meaning of the word "bottler," *vide* R. S. Q., sec. 828, sub.-sec. 30.

The appellants met the action by four pleas:

1. Special denial of all the respondents' allegations, and especially the allegation that the appellants were and are distillers, manufacturers, compounders or bottlers of spirituous liquors. It may as well be stated here that the respondents have given up their pretension as to the appellants being either distillers or manufacturers of spirituous liquors. They insist that the appellants were and are compounders and bottlers. It may be well also to note that, under the by-law, sec. 14, the tax is imposed on every compounder or bottler. The respondents allege that the appellants were and are both.

2. The appellants say that as duly licensed wholesale liquor dealers, they have a right to compound and bottle, it being part of their trade and business; but that they are not distillers, etc., as alleged against them, and do not carry on business as such, and that they import all their liquors in bulk and have to break bulk and bottle to

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carry on their business, although they are not compounders nor bottlers, that is, carrying on business as such.

3. The by-law is *ultra vires* of the city council, and the said Act 47 Vict., chap. 84, sec. 8, *ultra vires* of the provincial legislature.

4. Under the by-law all the persons and businesses enumerated in the statute last above cited are not taxed, but only the wholesale liquor dealers and others mentioned in sec. 14 of by-law, which is also discriminating, unjust and oppressive, and such special taxes must be general on all persons of the same business, and all manufacturers should be taxed under it, whilst they are not, and the appellants are the only persons in the whole city from whom the taxes are demanded.

The respondents replied generally to the first plea.

To the second plea, after denying the appellants' allegations, they say that the question as to whether Murray is subject to the tax or not is not in issue, as he is not exempt from it if he comes under it. They reiterate their pretension that the respondents are distillers, etc.

In answer to the third plea, they say the by-law is *intra vires* of the city council, and the Act of Quebec cited in said plea is not *ultra vires* of the provincial legislature.

With regard to the fourth plea, they answer: 1st, in law, 1. That the conclusions do not flow from the premises and are not the legal consequence thereof; 2. Said plea wholly unfounded in law; 3. City council not bound to impose all taxes which, by its charter or by-law, it may be empowered to impose; 4. Because, even if the Council had omitted to tax certain trades, professions or businesses, the appellants have no legal right to complain thereof, or to refuse to pay said taxes; 5. Because the imposition of a tax upon some of the trades, professions or businesses, and not upon others, is a matter of discretion with the council, and is not an unjust discrimination; 6. Because the council has a right to select the different trades, businesses or professions which it deems proper to tax, and the taxes so imposed cannot be avoided by reason

of discrimination, so long as all persons in such class, calling, trade or profession, are equally taxed.

The parties were heard on this answer in law, which was maintained and the fourth plea was dismissed.

The present appeal is upon all the issues raised by the pleadings.

McManamy examined as a witness, states that they sell a large portion of their liquors as imported, and part of it otherwise, that is either reduced or mixed and flavored. He explains how mixing is done. He also admits that they bottle for the requirements of their trade as wholesale dealers.

Under section 8 (47 Vict., chap. 84), the council is empowered to fix by a by-law and to impose and levy certain annual duties or taxes on "brewers, distillers, wholesale liquor dealers," but not upon "manufacturers, compounders or bottlers of spirituous liquors."

The tax can only be imposed, if the business, etc., is enumerated in the statute, and cannot be imposed under the general mention "and generally on all commerce, manufactures, callings, etc.," at the end of the section.

The case of *Acer & City of Montreal*, M. L. R., 5 S. C. 117, is in point. It was held that the business must be specially enumerated.

Furthermore, the taxes are declared in the by-law to be imposed on every distiller, etc., "having a place of business in said city." There is nothing of the kind in the statute, which only provides for "all commerce, manufactures, etc., which have been or which may be introduced into, or exercised in the said city."

Brown, Q. C., for respondents:—

The action is one to recover from appellants an annual tax claimed to be due by them to the city corporation under two different sections of by-law 116 of the city council.

These sections are respectively XI and XIV and read as follows:

"XI. An annual tax of fifty dollars is hereby imposed,

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"and shall be levied upon every wholesale liquor dealer "having a place of business in the said city."

"XIV. An annual tax of one hundred dollars is hereby "imposed and shall be levied on every distiller, manu- "facturer, compounder or bottler of spirituous liquors, "having a place of business in said city."

This by-law was passed on 8th March, 1886, and by section XXI of the same by-law the taxes imposed under the sections XI and XIV are made payable on the 1st day of May then next, and each following year. This section reads as follows:

"XXI. The duties and taxes hereinbefore imposed, "whereof the time of payment is not already determined, "shall be payable on the first day of May of the present "year, and each following year."

The taxes sued for are those becoming due on the first day of May, 1886.

The action is met by four pleas, as follows:

1. Express denial of the allegations of the declaration.

2. That defendants are wholesale liquor dealers, holding a wholesale license, issued under the laws of this province.

That they are neither manufacturers nor distillers, and that under their provincial license they have the right to compound and bottle, as incidental to and necessary in the business of a wholesale liquor dealer.

That the tax of $100 as manufacturer, distiller, compounder and bottler has been imposed by the city council, not on every one carrying on such business, but on defendants only, and that other persons in the same business have not been taxed, and notably one, William Murray, a member of the city council, who compounds and bottles spirituous liquors.

That herein there has been unjust discrimination, and the section XIV of said by-law is illegal and null.

3. That by-law 116 of the city is *ultra vires* in so far as it imposes a tax upon the wholesale liquor dealers or upon the distiller, manufacturer, compounder or bottler of spirituous liquors doing business in said city.

That section 8 of the Act 47 Vict., chap. 84, delegating the power to the city council to pass such a by-law, was and is *ultra vires* of the provincial legislature.

That a tax upon the wholesale liquor dealer, distiller, manufacturer, compounder or bottler of spirituous liquors is a restraint upon trade and commerce, and as such can be imposed only by the parliament of Canada.

4. That under the Act 39 Vict., chap. 50, incorporating the city, and amending Acts, the city council are authorized to levy annual taxes on persons and property, movable and immovable, as designated in said Act, and the amending Acts, and all by-laws imposing such taxes should reach all classes and kinds of commerce, manufactures, callings, arts, trades and professions, enumerated in the statute.

That the city council cannot pick out certain classes of persons and commerce for taxation and thus discriminate against them, in favor of other branches of commerce not taxed.

We take these pleas in their inverse order.

The 4th plea was dismissed on demurrer.

The pretention of the appellants in this plea is, that because the legislature has empowered the city council to tax certain trades and callings, specially enumerated in the statute, and generally all commerce, manufactures, etc., exercised in the city, a by-law taxing certain trades, callings and professions, and omitting to tax other trades, callings and professions exercised in the city, is unjust, and so illegal for discrimination.

Manifestly this plea is unfounded in law.

The principle that taxation shall be equal and uniform does not preclude the selection of certain callings, trades and professions for taxation. The taxation will be uniform and equal if all persons in the same calling, trade or profession within the city are taxed alike. The principle of equality is violated only when a discrimination is made as between those carrying on the same business. A license tax cannot be deemed unequal because reaching one occupation only, if it reach all who follow that occupation.

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Cooley on taxation (Ed. 1881), pp. 128, 138, 143, 384, speaking of manufacturers and dealers in liquors. This writer says (p. 390), This is a *class of dealers commonly selected* for exceptional taxation. Their occupation is sometimes taxed for federal, state and municipal purposes, though their stocks are taxed as property, and whatever has been imported has paid a heavy duty. The right to levy these several taxes has almost ceased to be contested.

The third plea, which raised the constitutional question whether the local legislature can tax or delegate to a municipal corporation the power to tax a wholesale liquor dealer, a distiller, manufacturer, compounder or bottler of spirituous liquors, was probably made on the strength of the judgment of the Supreme Court in the case of *Severn & The Queen*, 2 Supreme Court Reports, p. 70.

Properly, the Attorney General of the province should have been notified to intervene in this matter, 45 Vict., c. 4. No such proceeding was taken however, but rather, the grounds of this plea were abandoned in the argument before the Court below.

The appellants themselves recognize the provincial power as they plead and produce not a Dominion, but a Provincial license.

Suite & Corp. of Three Rivers, 5 Leg. News, Q. B., 330; *Hodge & The Queen*, 7 Leg. News, 18; *Molson & Lambe*, M. L. R., 2 Q. B. 381; opinions of Judges of Supreme Court, *Re Molson & Lambe*, 11 Leg. News, pp. 291, 298, 306.

The B. N. A. Act, sec. 92, pp. 2, 8, 9.

Report of Privy Council, *Re* Federal License Act, 12 Leg. News, p. 207.

The second plea is of a two fold nature.

It claims in the first place that compounding and bottling are branches of the business of a wholesale liquor dealer, and necessary therein; inferring but not directly stating that sections 11 and 14 of the by-law 116 are tantamount to duplicate taxation.

In the second place it claims that section 14 is bad, because it discriminates, and the defendants alone have

been selected for taxation though others are equally compounders and bottlers.

The second part of their plea has no foundation at all; the tax is general, and is applicable to every one carrying on the business named therein.

It is no objection to a tax, that the rule of apportionment which has been provided for it fails in some instances, or even in many instances of enforcement. Evasions of duty are liable to occur under all laws; but an evasion by one individual cannot give another a legal right to be excused.

If the by-law establishes a uniform rule its validity cannot depend upon the certainty or uniformity of its enforcement. Cooley, taxation, ed 1881, pp. 181, 182.

As regards the plea of duplicate taxation, were it founded upon fact, it is manifest that appellants are holden for one tax, and cannot ask the dismissal of the action. But, again, duplicate taxation is of common occurrence and, in many cases, cannot be avoided.—Cooley, taxation, pp. 158 et seq.—"The power to tax twice is as ample as to tax once."

West Chester Gas Co. v. *Chester county*, 30 Penn. St. 232, cited in Cooley, p. 162.

"But a merchant paying a tax as such, if he adds to "that occupation another though kindred business which "is separately taxed is not by his license as a merchant "excused from paying the tax on such other occupation." Cooley, p. 390. Case of a merchant taxed as junk dealer also. *Hirch* v. *Commonwealth*, 21 Grat. 785.

As a matter of fact, however, the business of compounding at least, forms no part of a wholesale liquor dealer's business. It may be necessary in that business to bottle and to reduce the strength of the liquors, but not to compound.

The Inland Revenue Act of Canada has special provisions for licensing a compounder of liquors. Revised Stat. of Canada, c. 34, s. 163, 164, 165.

It was no part of respondent's duty in this case to show that appellants were compounders in the sense of the

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word as interpreted in the Inland Revenue Act, in order to enforce payment of the tax, but the evidence of McManamy, one of the appellants, has established that they were and are compounders in that sense and carrying on such business under the eyes of the officers of the Inland Revenue Department, without any license.

This witness says, "we mix our liquors, but I am not "going to give you how we do it." He also states that the spirits when mixed or compounded are labelled with labels purchased in Montreal bearing names that are not genuine.

In his second examination witness admits that appellants make or compound a spirit consisting partially of imported brandy mixed with Canadian whiskey and flavoured in a way that he refuses to disclose, which is bottled by appellants, labelled and sold as "Jas. Morrissey & Co., Cognac."

There is no such firm as Jas. Morrissey & Co., but the name and design of the label is manifestly made and intended to deceive people, being but a slight variation from the label of "Jas. Hennessy & Co." the manufacturers of a well known brand of "Cognac." Cognac is a French and *imported* spirit.

This compounding, mixing, manufacturing and flavoring of spirits and selling them under spurious titles as imported brandies, whiskey, etc., is no part of the legitimate business of a wholesale liquor dealer.

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DOHERTY, J.:—

The fourth plea was dismissed on demurrer, and, I think, correctly. The third plea raises the question whether the local legislature can delegate to a municipal corporation the power to tax a wholesale liquor dealer, distiller or compounder. The appellants contend that this is *ultra vires* of the local legislature. In that position we think they are in error. But they take the further ground that the by-law is illegal because the council have not power under the Act to tax compound-

ers. The question, therefore, comes up, what is a compounder? The appellants say, only a person who carries on the business of compounding is a compounder. The appellants say, under our license as wholesale liquor dealers we had a right to compound. The proof shows that the appellants do compound to a considerable extent. Can they be classed as compounders? The appellants say the compounding is incidental to their business as liquor dealers. The respondent denies this. On reference to the statute we think the power of taxation generally is not conferred. The authority to tax occupations must be specific. We hold that the by-law is *ultra vires* as to the tax on compounders, and that the tax of $100 is invalid. The judgment will be modified therefore to this extent, holding the tax of $50 as a wholesale liquor dealer good, and the tax of $100 as a compounder bad.

CROSS, J.:—

I think a by-law could be framed to make the defendants liable as compounders, but the by-law as drawn, taxing compounders, without showing that it is a business distinct from that of wholesale liquor dealer, is not right.

DORION, Ch. J.:—

The question is whether the corporation has imposed a tax which it is authorised to impose The word "compounder" is not to be found in the Act. The appellants are not described anywhere as exercising the occupation of compounding. They are described in the writ as being wholesale liquor dealers. As such they are taxed $50. That is right. But in addition they are taxed $100 as compounders, without any allegation that they are exercising the occupation of compounding, but merely that for the purposes of their business as wholesale liquor dealers they compound. If this were right every person who made wines or syrups from garden fruits would be liable, for they compound in doing so.

The judgment is as follows:—

"The Court, etc.....

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"Considering that this action was instituted in the Superior Court, at the city of Sherbrooke, by respondents against appellants, to recover $50 business tax, as being wholesale liquor dealers, and $100 such tax as being compounders of liquors at the said city, under the by-law No. 116 of the respondents, imposing said taxes upon appellants as being such dealers and compounders;

"And considering that, amongst other matters and grounds of defence, the appellants pleaded that the legislature of this province had not constitutionally the power to authorize the making of said by-law, and that the enacting and passing thereof was therefore *ultra vires* of respondents and the council under the Charter Act, 39 Vic., ch. 50, and amendment thereof, 47 Vict., ch. 84, and more particularly so *ultra vires* as to the said $100 tax imposed by said by-law on appellants as being compounders;

"And considering that neither the said charter nor amending Act, in enumerating and specifying the numerous and specific trades, businesses and occupations, to wit, in the 7th sub-section of said charter and Act, respectively, hath specified or included as being liable to such taxation, compounders as assumed by said by-law, and that this omission is not covered so as by inference legally to include compounders by the uncertain meaning to be given to the vague, general and indefinite last lines of sub-section 7 of said Acts, more particularly too vague and uncertain in the matter of taxation as in the present case;

"Considering, therefore, that the legislature hath not delegated, by either of said Acts, or otherwise, to the corporation respondents the power to impose the said tax of $100 upon appellants as compounders, and that in passing the said by-law, in so far as relates to and concerns the said tax of $100, the respondents have acted *ultra vires*, and without right or authority so to do, and that the same is null and void in respect of and as regards the imposition of the tax of $100 upon appellants as compounders, but to no greater extent;

"Considering the said by-law *intra vires* in so far as it provides for and imposes the tax of $50 upon appellants as wholesale liquor dealers, claimed by this action;

"Considering that there is error in the judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Sherbrooke on the 28th of February, 1889, in this only, that it condemns the appellants to pay respondents the said tax of $100 so illegally imposed as aforesaid; doth modify, reverse, annul and make void said judgment in so far as it concerns and relates to the said tax of $100 only; and proceeding to render the judgment which the Court below ought to have rendered, doth dismiss this action in so far as it claims the said tax of $100, and confirm the said judgment to the extent of, and in so far as it condemns appellants to pay plaintiffs the said sum of $50, to wit, the tax legally imposed upon them as wholesale liquor dealers as aforesaid, with costs of an action of $50 to plaintiffs in the Court below, and costs of appeal to the appellants against the respondents in this Court, said costs to be taxed as in a cause of the second class in this Court."

Judgment reformed.[1]

Bélanger & Genest for appellants.

Ives, Brown & French for respondents.

(J. K.)

[1] On appeal to the Supreme Court of Canada, the case was held not appealable; 14 Leg. News, 98.

September 25, 1886.

Coram DORION, Ch. J., MONK, TESSIER, CROSS, BABY, JJ.

ALEXANDER McGIBBON,
(*Defendant in Court below*),
APPELLANT;

AND

JOSEPH BEDARD,
(*Plaintiff in Court below*),
RESPONDENT.

Nuisance—Tannery.

HELD:—That where the person complaining of the offensive smell caused by chemicals used in a tannery, and which emptied into a drain passing by his property, was thoroughly acquainted with the condition of things before he purchased, having been five or six years employed in the tannery, and, moreover, it appeared that he had promoted the covering of the drain, and thereby caused an aggravation of the nuisance, an action of damages against the proprietor of the tannery would not be maintained.[1]

APPEAL from a judgment of the Court of Review, Montreal (DOHERTY, JETTÉ, LORANGER, JJ.), May 30, 1885.

The respondent by his declaration, alleged that he is a resident proprietor of Lachute, in the district of Terrebonne, and there carries on several branches of business, about fifty yards from appellant's tannery; that for the last two years the appellant has used a small ditch or drain in which to deposit the refuse of the tannery; and that this ditch passing near respondent's premises, causes a smell detrimental to his health and that of his family, and is injurious to his business; that appellant has continued to use this drain for this purpose, notwithstanding frequent notices and protests by several persons, and by the plaintiff in particular. Conclusion that he has suffered damage in business, health, and comfort, to the extent of $200.

[1] See also *Claude & Weir*, M. L. R., 4 Q. B. 197, (affirmed by the Supreme Court), where this case was cited, p. 222.

The appellant pleaded :—

(1.) That he had no notice of complaint of his use of the said ditch either by the respondent, or anyone else, previous to the action taken herein.

(2.) That he acquired the property on which the tannery is erected from the same *auteur* as respondent in 1851, for the sole purpose of carrying on the tannery business, and in the same deed acquired the use of the water of a certain spring, with servitude for the use thereof, over the rest of the *auteur's* property, of which the respondent's property at that time formed part; that the said ditch is the natural water course of the said spring, and respondent by his deed from said *auteur*, is bound to carry the said ditch across his property, and to keep it in good order.

(3.) That he has uninterruptedly carried on the said tannery business, and used the said water for the working operations thereof, for a period of over thirty years, letting the water flow after he had used it in its said natural course.

(4.) That no refuse or solids of any kind, are ever put into said ditch, but only such water as may be pumped out from the vats occasionally. That a stream of pure water from the said spring, is kept constantly running by appellant through the tannery into said drain, near where the polluted water is pumped out. That respondent does not suffer at all as alleged, or in any manner whatsoever, other than from living near a tannery.

(5.) That the respondent is in collusion with other neighbouring proprietors to close the said tannery, and thereby enhance the value of their properties.

(6.) That the respondent acquired his property some seventeen years after the erection of the tannery, and was working as an employee in the said tannery at the time and for the six years immediately previous to the said purchase, and was well aware of the nature of the tanning operations.

(7.) That appellant conducts his tanning business in a clean and orderly manner, and that if deprived of the

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right to empty water in the said water-course he would have to close his tannery.

The appellant further specially pleaded, that if respondent suffers by the use appellant makes of the said water-course as alleged, respondent brought it on himself by petitioning for and actively promoting the construction by the municipal council of a close box drain from near the plaintiff's shop to the tannery where it tapped the said open water-course, and that the same was so constructed in July, 1882, in virtue of a by-law of the council under the direction of a special superintendent and a committee duly appointed—the respondent himself being one of the committee.

The Circuit Court for the county of Argenteuil (McDOUGALL, J.), Nov. 17, 1884, dismissed the action. The case being taken to review, the following judgment was rendered:—

"The Court now here, sitting in review, having heard the parties by their counsel upon the demand of plaintiff, for review of the judgment rendered by the Circuit Court in and for the county of Argenteuil, in the district of Terrebonne, on the 17th day of November, 1884, having examined the record and proceedings had in this cause, and deliberated;

"Considering that there is error in the judgment *a quo* to wit: the said judgment of the 17th day of November last, doth reverse and annul the same, and rendering the judgment which the Court below ought to have rendered in the premises;

"Considering that the plaintiff hath proved the material allegations of his declaration, and that he is entitled to damages by reason of the illegal manner in which defendant used, and continues to use and work his tannery, and the drainage and appurtenances thereto belonging as complained by plaintiff;

"And considering more particularly that defendant hath aggravated plaintiff's cause of complaint, by making and using for the purpose of such drainage a covered, instead of an open and uncovered drain or outlet for the

refuse of putrid and polluted liquids and waters flowing from the vats and operations of said tannery;

"Considering that such covering prevents the escape and exhalation of the impurities and noxious gases of said liquids, until the same are exposed to the open atmosphere in concentrated form contiguous to the door of plaintiff's dwelling and place of business, at the mouth of said drain;

"And considering that defendant hath failed to establish the allegations of his pleas to this action, and that plaintiff hath by reason of the premises suffered damages to the amount of $20, dismissing said pleas, doth adjudge and condemn the said defendant to pay to said plaintiff the said sum of $20, for his damages by him suffered by the fault of defendant, with interest from this day and costs of suit as brought, *distraits*, etc."—(Mr. Justice LORANGER, *dissenting*).

The appellant appealed from the foregoing judgment, and by his petition to appeal set forth:

1. That he is a resident proprietor of Lachute, in the district of Terrebonne, where he carries on his trade as a tanner in a building erected for that purpose in 1851, where he has ever since carried on his said tanning business, using the water of a certain spring granted for that purpose in his deed of his said tannery property.

2. That the respondent, who was for some six years previous thereto an employee of appellant in the said tannery, acquired a piece of low land nearly opposite the tannery in 1868, on which he erected a shoe-maker's shop and dwelling, where he has since carried on his shoe-making business.

3. That a certain natural open water-course or ditch, which drains the country around, and especially the water of the said spring, runs past the premises of appellant across a road, and then across the said property of respondent, emptying into a river some distance further on.

That the respondent purchased from the said *auteur* as appellant, and was bound in his deed to keep the said

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ditch open, and to pay certain charges connected therewith.

That on the 8th January, 1888, the respondent took the present action for $200 against appellant, alleging damage to business and health, by reason of the water which was pumped from the tannery after being used therein, and allowed to run into the said ditch or drain.

That on trial the said action was dismissed by the Court of first instance; but on revision this judgment was reversed, and the said judgment appealed from rendered.

The appellant complained of the judgment for the following among other reasons:

(1). Because, by the evidence adduced, the respondent has wholly failed to prove the allegations of his declaration, or to make out any case that would justify the said judgment in review.

(2). Because it does not appear from the evidence, that the respondent ever suffered any damage to his business or health, or in any manner whatsoever, or that there was any real cause of action.

(3). Because the allegations of appellant's pleas are well founded, and fully established by the proof adduced.

(4). Because there is error in the said judgment in review, inasmuch as by proof of record, the said covered drain from the tannery to respondent's, referred to in said judgment, was constructed under a by-law of the council of the municipality, by a committee formed for that purpose under the direction and supervision of an officer of the said council, and not by appellant as erroneously adjudicated.

(5). Because there is no proof of record that appellant made the said covered drain, or in any manner desired to use the same; but on the contrary there is proof of record that the said drain was made by the said committee, and that the respondent was a member thereof, actively urging and supervising the construction and location of the said covered drain, instead of the open ditch by a different course as previously existing.

(6). Because by proof of record the said committee and special officer located and constructed the said covered drain so as to receive the water from appellant's tannery, and filled up the open ditch; and appellant was unable to prevent their so doing.

(7). Because the said drain is a natural water-course, used as a common sewer by all the neighborhood; and respondent's property is bound by deed to allow the same to cross his property, and to keep it in good order.

(8). Because by proof of record any smell there may have been was caused by respondent and not by appellant.

(9). Because, by proof of record, it appears that the appellant has acquired a right to carry on his said tanning operations, and use the said water and water-course, and that the right has not been aggravated by any act of the appellant.

(10). Because, by proof of record, the appellant conducts his tannery in an exceptionally clean and orderly manner, and specially so during the two years preceding the respondent's action.

March 24, 1886.]

The case was submitted on the factums.

The following authorities were cited by the appellant:

Civil Code. Arts. 499 *et seq.* 502, 549, 550, 2242, 2270.

18 L. C. Jurist, p. 253. *Doutre* v. *St-Charles*

4 Q. L. Reports, p 154. *Parent* v. *Daigle.*

7 Leg. News, p. 34. P. C. Judgt. on Arts. 500, 550 C. C.

Taillandre, Législation des Manufactures.

Brunet, Etablissements insalubres.

Trabuchet, Code des établissements dangereux.

Wood, Law of Nuisances (2d ed.)

Addison on Torts 1 vol., Wood ed.

Sept. 25, 1886.]

CROSS, J.:—

This appeal is from a judgment of the Court of Review reversing the judgment of the Circuit Court for the county of Argenteuil.

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The respondent, Bedard, brings an action of damages for injury caused by the appellant's works. The appellant, who is a tanner, uses chemicals in his business, which emit a smell, and the respondent complains of the offensive odour. The works of the appellant empty into a drain which passes the property of the respondent.

There is no doubt that some inconvenience is suffered by Bedard where the drain passes his house. McGibbon, however, says he purchased his property in 1851 for the purpose of a tannery, and that for many years there has been no complaint from any of the neighbours or tenants of anything offensive. Bedard was in his employ for five or six years, and was well acquainted with the appellant's business, and knew that the chemicals passed into the drain. It was then an open drain, and the matter soon became innocuous, and caused no smell or inconvenience. Bedard, knowing the condition of things, purchased property from the same *auteur*, and remained for years without making any complaint, because the drain at that time caused no inconvenience to any one. But the corporation subsequently took upon themselves to change the condition of the drain, and to make it a covered drain instead of an open one. The respondent himself was an active promoter of this change, and the trouble arises from covering the drain, the drainage passing from the covered drain just in front of respondent's premises.

As to the injurious character of the chemicals used, the evidence is contradictory. Mr. Justice McDougall, before whom the case was tried, was of opinion that there was no ground of complaint whatever, and he dismissed the action. The case went to review, where two of the judges reversed the judgment, and awarded Bedard $20 damages. Mr. Justice Loranger dissented, so that the case now stands two judges against two.

The case is an embarrassing one. There is some evidence of a nuisance, and on the other hand there are the circumstances I have mentioned which tend to show that the responsibility for the inconvenience falls upon Bedard.

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himself. Upon the whole the Court is of opinion that the original judgment is more in accordance with justice than the decision of the Court of Review. The judgment of the Court of Review is therefore reversed, the original judgment is restored, and the action dismissed.

DORION, Ch. J.:—

I would rather, for my part, have confirmed the judgment of the Court of Review, but the evidence being so evenly balanced I do not enter a dissent from the opinion of the majority here.

The judgment of the Court is as follows:—

"The Court, etc.....

"Considering that the respondent has failed to prove the material allegations of his declaration, more especially that by the acts or fault of the appellant he has been caused any damage for which the appellant is bound to indemnify him;

"Considering therefore that there is error in the judgment rendered in this cause by the Superior Court sitting in Revision the 30th May, 1885;

"The Court of Our Lady the Queen now here, doth reverse, annul and set aside the said judgment; and proceeding to render the judgment which the said Superior Court sitting in Revision ought to have rendered, doth dismiss the action of the said respondent with costs as well of this Court as of the said Superior Court in Review, and of the Circuit Court for the county of Argenteuil, in the district of Terrebonne."

Judgment of C. R. reversed.

J. Palliser for appellant.

J. A. N. Mackay for respondent.

(J. K.)

November 20, 1886.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

ALEXANDER McGIBBON,
(*Defendant in Circuit Court*),
APPELLANT;

AND

JOSEPH BEDARD,
(*Plaintiff in Circuit Court*),
RESPONDENT.

Judgment—Rectification of clerical error in judgment.

HELD:—That an accidental omission which occurs in the draft of a judgment rendered in appeal, may be corrected, even after the record has been transmitted to the Court below.

In the Circuit Court for the county of Argenteuil, the action of Bedard was dismissed *without costs of enquête*. This judgment was reversed by the Court of Review, Montreal, and the action maintained. On appeal to the Court of Queen's Bench the first judgment was restored, by which the action was dismissed. By an accidental omission in drawing the judgment, it was not stated that the action was dismissed *without costs of enquête*, as expressed in the original judgment which the Court of Appeal intended to restore.

The respondent, plaintiff in the Court of first instance, presented a petition (Nov. 15, 1886,) in which it was alleged:

"That whereas it appears by the judgment of the Circuit Court in and for the county of Argenteuil, rendered in this cause on the 17th Nov. 1884, that the action of the said respondent against the appellant was dismissed with costs, but no costs of *enquête*, meaning thereby that the appellant should pay his own costs of *enquête*;

"And whereas by the judgment of the Superior Court in Revision rendered in said cause on the 31st of May, 1885, the judgment of said Circuit Court was reversed,

and judgment was rendered in favor of respondent for the sum of $20, with interest and costs;

"And whereas judgment was rendered by this Honorable Court on the 25th of September last past, whereby in effect the said last named judgment was reversed and set aside, and the judgment of the said Circuit Court was affirmed and restored; and the action of the respondent was dismissed;

"And whereas in and by the *procès-verbal* or draft of the said judgment of this Honorable Court, it was further adjudged and ordered that the respondent should pay the costs, as well of this Court as of the Superior Court in Review, and of the said Circuit Court;

"And whereas the evident intention of this Honorable Court was to restore in full-force and effect the judgment of the said Circuit Court, including that portion of the said judgment by which the respondent was exempted from the payment of the costs of the appellant's *enquête* before said Circuit Court, and by which appellant was held to pay his own costs of *enquête* in said Court;

"And whereas the draft of the judgment of this Honorable Court is ambiguous upon that point, and may be interpreted to mean that the said respondent is bound to pay all the costs incurred by said appellant in said Circuit Court, including his costs of *enquête*;

"Wherefore your petitioner humbly prays that the said judgment rendered by this Honorable Court may be modified and rectified, in so far as may be necessary to make it clear that the said respondent is not liable for any greater costs under the judgment of this Honorable Court than were awarded against him by the judgment of the said Circuit Court; and that all necessary orders may be given by this Honorable Court to the end that the said respondent shall not be taxed for the costs of the appellant's *enquête* in the said Circuit Court; and that such further orders may be given as to law and justice may appertain."

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RAMSAY, J. (*diss.*) :—

This is a motion to amend the record of a judgment of the last term of this Court, on the ground that the judges did not mean to say what the record unmistakably says. As I did not sit in the case, I could not properly join in granting the motion, for I have no independent means of knowing what was intended other than what I learn from the authentic record But I am of opinion that the Court has no jurisdiction to alter its judgment when the whole matter is complete and posted up. In this case the judgment has been entered up, the record has been sent down and part of the costs have been paid. There is no precedent so far as I know going to the extent of the judgment about to be rendered. There is doubtless much to be said in favour of the convenience of correcting error at all times; but that convenience will be outweighed by the inconvenience of allowing the courts after their functions are at an end to disturb the rights which seem to be settled for ever by their judgment. However plausible the pretext, it is establishing arbitrary rule for law and order. I am therefore to refuse the motion.

CROSS, J. :—

This case comes up on a petition to correct a clerical error in a judgment rendered by this Court on the 25th of September last. While we are aware of the danger of making changes in judgments, it seems to us that the application in this case should be granted. I base my opinion on two precedents. In *McGillivray & Montreal Assurance Co.*, the case lay over for six months or a year before the judgment was corrected, but the Privy Council had no doubt as to their power to correct their order. In *Rattray & Young* the Supreme Court changed their judgment and allowed more than the first judgment had done. I think this shows that an order may be corrected.

In this case Bedard sued McGibbon in damages. McGibbon defended the case, and not satisfied with a reasonable amount of evidence, swelled the *enquête* to an enormous extent. The judge of the first Court, in dismissing

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the action, throught proper to charge McGibbon with the unnecessary costs of *enquête*. McGibbon acquiesced in this judgment. Bedard took the case to Review, where the judgment was reversed. The second judgment being in favor of Bedard, the question of the costs of McGibbon's *enquête* did not come up. The case then came to appeal, and here the judgment of the Court of Review was reversed, and the original judgment was restored. Notes of the judgment appeared the next day in the *Montreal Gazette*, and there is no doubt as to what the judgment was. But the judgment as drafted, while restoring the original judgment so far as the dismissal of the action was concerned, omitted to relieve the plaintiff from the costs of the defendant's *enquête*, as was ordered by the original judgment, and as this Court manifestly intended to do. The plaintiff asks relief from the consequence of this error, and we think he is entitled to it.

DORION, Ch. J.:—

As I view this application, it is a question whether we have a right to correct a clerical error in a judgment. Mr. Justice Cross rendered the judgment, and in his written notes he says that the judgment of the Circuit Court is maintained. The original judgment dismissed the action with costs, except the costs of defendant's *enquête*. In the judgment of this Court as drafted, there is an omission of the words referring to the costs of the defendant's *enquête*, and the plaintiff asks to be relieved from this error. It is not a question of changing the judgment. The question is, the judgment not being drawn as it was rendered by this Court, whether we have the right to correct the order. In several cases in the district of Quebec we have done so. If the parties do not consent to the change, application should be made to the Court. Several such applications have been made. In *Ouimet & Bedard* there was a mistake as to the collocations: we corrected the order. In *Ross & Murray* we ordered that a description of a lot be corrected. In *Beaudry & La Banque d'Hochelaga* it was entered that the party had consented to

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the appeal to the Privy Council. It proved to be merely a consent to be heard at once, and not a consent to the appeal This was corrected. In *Doran & Canada Gold Mining Co.*, the judge of the Court below ordered the defendants to be imprisoned in the common gaol at Beauce. The judge afterwards changed the judgment, and ordered the imprisonment to be in the common gaol of Quebec. Doran appealed, but the Court of appeal rejected the appeal, holding that the change was immaterial. In *Lasalle & Hart*, and in *Fournier & Morin*, corrections were also made. In the English Courts such corrections are constantly made.

I do not think there is any difficulty in this case in ordering the judgment to be corrected so as to conform to the judgment actually rendered by this Court.

Petition granted.

Abbott, Tait, Abbotts & Campbell for respondent, petitioner.

Joseph Palliser for appellant, *contra*.

(J. K.)

November 27, 1890.

Coram DORION, C. J., TESSIER, BOSSÉ, DOHERTY, JJ.

THOMAS T. TURNBULL,
(*Defendant in Court below*),
APPELLANT;

AND

DAME ELIZA A. B. BROWNE,
(*Plaintiff in Court below*),
RESPONDENT.

Aliment—Obligation arising from marriage—Art. 167, *C. C.*

HELD:—1. That a person is bound to maintain his mother-in-law who is in want, she not being re-married, and the daughter through whom the affinity exists being still alive.*

2. The son in law may be sued alone for the alimentary debt, without his wife being in the cause.

APPEAL from a judgment of the Superior Court, Montreal (JETTÉ, J.), June 28, 1889, condemning the appellant to pay an alimentary allowance to his mother-in-law, the respondent.

The judgment was as follows :—

"La Cour, etc.....

"Attendu que la demanderesse se pourvoit contre le défendeur, son gendre, pour lui réclamer une pension alimentaire de $20 par mois, alléguant qu'elle est dans le besoin et que le mis en cause, son mari, est un ivrogne d'habitude complètement incapable de la faire vivre ;

"Attendu que le défendeur a contesté cette demande en disant qu'il est faux que le mis en cause est un ivrogne, qu'il a toujours été prêt à faire vivre sa femme, la demanderesse, suivant ses moyens, mais que ladite demanderesse, qui est d'un caractère difficile et méchant, refuse sans raison de demeurer avec lui, et qu'elle est sans droit contre le défendeur ;

"Attendu que la demanderesse a suffisamment prouvé que son mari, le mis en cause, est incapable de la faire

* See also *Mallette v. Latulippe*, 12 Leg. News, 97.

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vivre, qu'elle est dans le besoin, et que le défendeur est en état de payer une pension de moins de $7 par mois;

"Attendu qu'il n'est pas contesté que le défendeur soit le gendre de la demanderesse, que sa femme, fille de cette dernière, est vivante, et qu'il y a des enfants nés de ce mariage;

"Attendu que le défendeur n'a fait aucune preuve de nature à détruire celle de la demanderesse;

"Attendu que les gendres et belles-filles sont placés sur le même pied que les enfants, et que leur obligation n'est pas seulement subsidiaire à celle de leur conjoint; que d'ailleurs la dette alimentaire est une charge de la communauté et qu'en conséquence elle peut être poursuivie contre le mari sans que sa femme soit en cause;

"Vu les articles 166 et 167 du Code Civil;

"Renvoie l'exception et la défense du défendeur, et le condamne à payer à la demanderesse à compter du 5 avril 1884, et tant que la demanderesse sera dans les mêmes conditions, une pension alimentaire de $7 par mois payable le cinq de chaque mois, et dont le premier paiement comptera du 5 mai 1884 pour de là continuer le 5 de chaque mois suivant, et condamne le défendeur aux dépens, distraits, etc."

Sept. 20, 1890.]

R. Short for the appellant.

P. H. Roy for the respondent.

Bossé, J. (for the Court):—

We concur in the judgment of the Superior Court, as regards the allowance of $7 per month, but as the case has been allowed to drag for several years, we are disposed to relieve the appellant, who is a poor man, from the payment of arrears, and grant the allowance only from the date of the judgment. It is an action between relations, and no costs will be allowed in either Court.

Tessier, J. [illegible] not present when judgment was rendered, filed the following dissent:—

"Je suis d'opinion de maintenir l'appel et débouter l'action de la demanderesse intimée, chaque partie payant

ses frais dans les deux cours ; réservant à la demanderesse son recours pour pension à l'avenir si elle peut établir d'une manière plus certaine sa position et celle de son mari et les moyens pécuniaires de son gendre l'appelant."

The judgment is as follows :—

"La Cour, etc.....

"Considérant que le jugement dont est appel est bien fondé en autant qu'il déclare l'appelant tenu aux aliments en faveur de l'intimée ;

"Mais considérant que les parties ont négligé de procéder en Cour Supérieure dans un délai raisonnable ; que l'action y a été pendante du 5 avril 1884 au 28 juin 1889, date du jugement dont est appel ; que pendant tout cet espace de temps l'intimé parait avoir vécu, soit chez quelqu'un de ses enfants, soit au moyen de sommes et aliments qui lui auraient été fournis par son mari et ses enfants ;

"Considérant le peu de moyens pécuniaires de l'appelant, et qu'une condamnation aux arrérages de pension alimentaire accrus depuis la date de l'action à aller jusqu'à la date du jugement sur icelle serait ruineuse pour lui ;

"Considérant enfin la position des parties et leur dégré de parenté, cette Cour modifie le jugement dont est appel, et maintient la condamnation aux aliments prononcée contre le défendeur, mais ce à compter seulement de la date du dit jugement en Cour Supérieure, savoir, le 28 juin 1889, à compter de laquelle la dite pension alimentaire de $7 par mois devra commencer à courir, condamne le défendeur à payer icelle, à compter de la dite date ; quant aux frais il est adjugé que chaque partie paiera ses propres par elle encourus tant en Cour Supérieure que devant la présente Cour. (*Dissentiente* l'hon. juge Tessier)."

Judgment modified.

R. Short for appellant.

Roy & Roy for respondent.

(J. K.)

March 20, 1890.

Coram DORION, Ch. J., CROSS, BABY, BOSSÉ, JJ.

L'HON. L. A. JETTÉ ET AL. ÈS-QUAL.,
(*Defendants in Court below*),
APPELLANTS;

AND

PIERRE A. A. DORION,
(*Plaintiff in Court below*),
RESPONDENT.

Pledge—Rents transferred as security—Discharge of debt by transferee—Art. 1972, *C. C.*

D. bought certain real property for which he agreed to pay an annual sum during the lifetime of the vendor, and as security for the payment of this annual sum the vendor reserved the right to collect the rents of the property, the purchaser undertaking to make up any deficiency which might occur. By his last will the vendor discharged D. from all debts which he might owe him (the testator) at the time of his death.

HELD:—That the rents of the property were merely pledged to the vendor for the payment of the annual sum above mentioned, and that D. remained the owner of the rents. Hence, although it appeared that he was indebted to the vendor on account of the annual payments at the time of the vendor's death, yet, being discharged from this debt by the will, he was entitled to the rent due by the tenant of the property at the time of the vendor's death; and the vendor's executors, who had collected this rent, were ordered to refund it to D.

APPEAL from a judgment of the Superior Court, Montreal (MATHIEU, J.), Oct. 4, 1888, in the following terms:

"La Cour, etc.....

"Attendu que le dit demandeur allègue, dans sa déclaration, que par acte de vente passé, à Montréal, le 24 novembre 1881, Papineau, notaire, il a vendu à George W. Stephens, avec garantie de toutes servitudes, une propriété connue sous le numéro 12 des plan et livre de renvoi officiels pour le quartier ouest de la cité de Montréal; que le 23 septembre 1882, le dit Stephens prit contre feu François-Xavier Beaudry, alors propriétaire du lot

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voisin, le numéro 11 du dit quartier, une action négatoire, pour faire cesser l'exercice de certaines servitudes que Beaudry prétendait avoir droit d'exercer sur le lot vendu à Stephens par le demandeur; que le demandeur qui était le neveu de Beaudry se trouvant garant de Stephens, et voulant éviter un procès avec son oncle, fit avec lui le marché suivant: par acte de vente, passé à Montréal, devant Mandeville, notaire, le 14 avril 1883, Beaudry vendit au demandeur tous les droits qu'il pouvait avoir en vertu du testament de feu Pierre Beaudry, dans le dit numéro onze du quartier ouest de la cité de Montréal; que ces droits et prétentions étaient ceux de grevé de substitution; que la dite vente fut ainsi faite, à la charge d'une rente de $1,000, payable par le demandeur à Beaudry, sa vie durant, en deux paiements de $500 chacun, dont l'un le 1er mai et le second le 1er août de chaque année, jusqu'au décès de Beaudry; que pour sûreté de l'accomplissement des obligations du demandeur, le lot vendu fut spécialement hypothéqué, et que, de plus, pour plus grande sûreté, Beaudry se réserve le droit de retirer lui-même le loyer, le demandeur s'obligeant à parfaire les $1,000 s'il n'y en avait pas assez, et ce, au cas où le demandeur ne paierait pas tel que convenu: que dans une cause des dossiers de cette cour, numéro 2541, Jean-Baptiste T. Dorion, contre le demandeur en cette cause, le dit Jean-Baptiste T. Dorion, ayant obtenu jugement contre le demandeur pour $2,353.54, prit contre lui, le 1er février 1884, un bref de saisie-arrêt après jugement entre les mains de Charles McKiernan qui était alors locataire du demandeur, dans la maison connue et désignée sous le numéro 11; qu'en conséquence de cette saisie-arrêt, le loyer de la dite maison fut arrêté entre les mains du locataire McKiernan, dont le loyer était payable $500 le 1er mai et $500 le 1er août 1884; que le demandeur en cette cause contesta le dit bref de saisie-arrêt après jugement, plaidant compensation et que durant l'instance en contestation, Beaudry qui voulait favoriser le demandeur, ne le força pas à payer sa rente annuelle, avant qu'il eût pu retirer son loyer; qu'en conséquence, le 24 mars 1885 le

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demandeur en cette cause devait à Beaudry, en vertu du dit acte de vente, une somme de $1,000, savoir: $500 échues le 1er mai et $500 échues le 1er août 1884; que le 27 février 1885, Beaudry fit, à Montréal, son testament solennel, devant Mandeville, notaire, par lequel il institua les mis en cause, ses légataires universels, et nomma pour ses exécuteurs testamentaires et fidéi-commissaires, les deux défendeurs, à qui il lègue à titre de fidéi-commis, tous ses biens meubles et immeubles, droits et actions, pour le tout, être par eux géré et administré tant et aussi longtemps que subsistera la substitution créée par le dit testament; que, par codicile, reçu devant le même notaire, le 23 mars 1885, le dit Beaudry ajouta à ses dispositions testamentaires, qu'il voulait que tous les biens par lui légués aux mis en cause, par son testament, fussent administrés par les défendeurs ès-qualité, de la même manière que ceux par lui légués à ses enfants et petits-enfants, mais que les pouvoirs des dits exécuteurs testamentaires, quant aux dits biens, prendront fin après 25 ans; que par le même codicile, Beaudry déclara qu'en récompense des services à lui rendus par son neveu, le demandeur en cette cause, il lui faisait pleine et entière remise de toutes les sommes de deniers qu'il se trouverait à lui redevoir lors de son décès, lui en accordant toute quittance générale et finale, et même obligeant son légataire universel à lui donner telle quittance; que Beaudry décéda le 24 mars 1885; que les défendeurs ès-qualité, ont accepté les charges à eux imposées par les dits testament et codicile, et que les mis en cause n'ont accepté que sous bénéfice d'inventaire, se réservant le droit de renoncer et refuser après les 25 ans d'administration des défendeurs ès-qualité; que Beaudry a donc par son codicile, donné quittance au demandeur de l'arrérage de $1,000 qu'il lui devait lors de son décès pour la rente annuelle; mais que nonobstant telle quittance, les défendeurs ès-qualité, prétendant agir comme administrateurs des biens légués aux mis en cause, donnèrent à Jean-Baptiste T. Dorion, le demandeur, sur la saisie-arrêt, une garantie de rapporter les deniers pour être payés à qui de droit, lors de la décision de la contes-

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tation de la saisie-arrêt et se firent payer vers le mois d'octobre 1885, par McKiernan, hors la connaissance du demandeur en cette cause, tous les loyers dus depuis le 1er mai 1884 au 24 mars 1885, date du décès de Beaudry; que McKiernan tenait le bail, en vertu duquel il occupait du dit Beaudry, avant la vente de l'usufruit de la propriété au demandeur et que le dit acte de vente n'ayant pas été signifié à McKiernan, ce dernier était justifiable de payer aux représentants de Beaudry; que le montant ainsi retiré par les défendeurs ès-qualité, comme partie des biens légués aux mis en cause, est de $903.65, qui représente le loyer dû par McKiernan du vivant de Beaudry; que ce loyer était dû au demandeur en cette cause, et que les défendeurs ès-qualité, ni les mis en cause ne pouvaient retirer la rente annuelle due à Beaudry, puisque ce dernier en avait donné quittance au demandeur, que les défendeurs ès-qualité ayant retiré ce qui ne leur appartenait pas, doivent l'intérêt sur cette somme, à compter du jour qu'ils l'ont retirée; que les défendeurs ès-qualité, les mis en cause, ont donné au demandeur la quittance finale que Beaudry les a obligé de lui donner par acte passé à Montréal, le 30 mars 1886, Papineau, notaire; que depuis que les défendeurs ès-qualité se sont fait payer le loyer dû par McKiernan, la dite saisie-arrêt de Dorion a été réglée et que le demandeur sur la saisie-arrêt, Jean-Baptiste T. Dorion a fait signifier au demandeur en cette cause, un avis de discontinuation; que tous les obstacles étant maintenant écartés, le demandeur est en droit de se faire payer le loyer que lui devait McKiernan, mais que ce dernier l'avait payé aux défendeurs ès-qualité, qu'il croyait les ayant droit de Beaudry, les dits défendeurs ès-qualité sont redevables au demandeur du montant par eux reçu; que pour éviter un circuit d'actions, les défendeurs ès-qualité ayant retiré le loyer, alors que leur auteur n'y avait pas droit, il vaut mieux poursuivre directement les défendeurs que de les faire appeler en garantie par McKiernan, et il conclut à ce que les mis en cause soient assignés à comparaître pour entendre déclarer que le loyer dû par McKiernan à compter

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du 1er mai 1884 au 24 mars 1885 appartient au demandeur, et à ce que les défendeurs soient condamnés à payer et rembourser au demandeur la dite somme de $903.65, avec intérêt depuis la date qu'ils l'ont retirée et les dépens ;

"Attendu que les dits défendeurs ès-qualité ont plaidé à cette action qu'ils ne doivent rien au demandeur ; que la somme retirée par eux de McKiernan, leur était légitimement due par ce dernier, qu'aux termes du dit acte de vente par Beaudry au demandeur en cette cause, Beaudry pour se payer d'une rente viagère annuelle de $1,000 que le demandeur s'obligeait de lui payer, stipula qu'il se réservait le droit de retirer lui-même des locataires qui occuperaient la maison, tous les loyers sans exception, le vendeur ne s'obligeant pas à remettre au demandeur le surplus de la somme de $1,000, s'il y en avait un, mais obligeant le demandeur à parfaire cette rente de $1,000, si les loyers n'étaient pas suffisants pour le payer en entier ; que le bail de cette propriété avait été consenti par Beaudry à McKiernan et que Beaudry, après la vente au demandeur, continua comme auparavant à percevoir le loyer dû qui demeura la propriété de Beaudry, et continua à s'arrérager en faveur de ce dernier, jusqu'à son décès ; que le demandeur n'a jamais été propriétaire du loyer accru du vivant de Beaudry et n'en est pas devenu propriétaire par le décès de ce dernier ; que les loyers accrus du vivant de Beaudry, devenaient la propriété de ce dernier, jour par jour, et lui étaient dus même avant de les avoir perçus, et que lors du décès de Beaudry, le demandeur n'était son débiteur que de la différence entre le loyer accru et les arrérages de la rente viagère, si toutefois il y avait différence, et conséquemment le legs invoqué par le demandeur dans le codicile de Beaudry, ne comprenait que cette différence, si elle existait : que ces arrérages de loyer sont tombés dans la succession de Beaudry, comme toute autre créance qui pouvait lui être due, et que les défendeurs, en vertu des pouvoirs à eux conférés par le testament de Beaudry, étaient les seuls créanciers des dits arrérages des loyers et n'ont fait que recevoir

leur dû en recevant cette somme ; que Beaudry et Dorion ont toujours, du vivant du premier, interprété cet acte, dans le sens ci-dessus, Beaudry ayant seul le contrôle des loyers et en tenant seul le compte avec le locataire, sans jamais en informer le demandeur ou lui en rendre compte ; que le legs comportant quittance au demandeur, et invoqué par celui-ci, ne s'applique pas aux arrérages mentionnés dans la déclaration, mais simplement aux trois obligations s'élevant en capital à $8,000, que le demandeur devait avec arrérages d'intérêt à Beaudry, lors de son décès ; que la quittance donnée par les défendeurs en exécution de cette disposition du codicile, doit s'interpréter par l'acte de transaction qui a précédé cette quittance et au moyen duquel les défendeurs ont déclaré renoncer à contester les dispositions du codicile, à raison du règlement des autres réclamations énoncées au dit acte, et qu'il résulte de cette transaction que les réclamations des parties à icelle étaient censées couvrir tout ce qu'elles pouvaient se demander pour quelque cause que ce fût et se trouvaient réglées par le dit arrangement ; que le demandeur, lors de cette transaction, n'a rien réclamé pour ces arrérages de loyer, et que s'il l'avait fait, les défendeurs n'auraient pas consenti à transiger, et concluent au renvoi de l'action du demandeur ;

"Attendu que le demandeur a répondu à la défense des dits défendeurs, que la réserve que Beaudry s'était faite de retirer le loyer n'était que comme sûreté collatérale, et dans le cas seulement où le demandeur n'aurait pas payé tel que convenu à l'acte ; que Beaudry n'ayant jamais retiré le loyer, mais ayant au contraire donné quittance au demandeur, pour toute réclamation qu'il prétendait avoir contre lui, ce dernier se trouvait entièrement déchargé de la partie de la rente qu'il devait à l'heure du décès de Beaudry ; que l'acte de transaction sus-mentionné ne s'applique pas à la réclamation dont il est question en cette cause, vu qu'elle n'a eu lieu qu'entre les héritiers de Théodore Beaudry et le demandeur, et que le demandeur ignorait lors de cette transaction, que les défendeurs avaient retiré ce loyer qu'il croyait encore entre

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les mains de McKiernan ; que cet acte de transaction ne s'applique qu'aux matières qui y sont mentionnées ;

"Attendu que la réserve en faveur de Beaudry, partie au dit acte du 14 avril 1883, de retirer lui-même les loyers de la maison érigée sur le lot numéro 11, est en ces termes :

'Pour sûreté du paiement des taxes et cotisations comme 'susdit et de la dite somme de $1,000 par année, le lot 'numéro 11, au plan et livre de renvoi officiels du dit 'quartier ouest de la cité de Montréal, demeurera spécia- 'lement obligé, affecté et hypothéqué en faveur du dit 'François-Xavier Beaudry ; en outre, pour plus grande 'sûreté, le dit sieur Beaudry se réserve le droit de retirer 'lui-même des locataires qui occuperont la dite maison, 'tous les loyers sans exception, le dit Dorion s'obligeant, 'au cas où le dit sieur Beaudry ne pourrait retirer assez 'des locataires, pour se payer de la dite somme de $1,000 'par année, de lui payer ce qui lui manquera, suivant les 'termes et aux époques plus haut mentionnées, et ce, au 'cas où le dit Dorion ne paierait pas tel que convenu ;'

"Attendu que la dite disposition du dit codicile, du 23 mars 1885, est en ces termes : 'Pour récompenser Pierre 'Achille Adélard Dorion, mon neveu, de tous les services 'qu'il m'a rendus jusqu'à ce jour, je lui fais par mon pré- 'sent codicile, pleine et entière remise de toutes sommes de 'deniers qu'il se trouvera me redevoir, lors de mon décès, 'lui en accordant et lui donnant toute quittance générale, 'et même obligeant mon légataire universel à lui donner 'telle quittance ;'

"Considérant que lors du décès du dit François-Xavier Beaudry, le demandeur était son débiteur pour toute la dite rente de $1,000, et que le loyer dû par McKiernan ne pouvait être perçu par le dit Beaudry, qu'à titre de gage, pour assurer le paiement de la créance qu'il avait contre le dit demandeur ;

"Considérant que le demandeur était le propriétaire de la créance résultant du dit loyer et dont le dit Beaudry était en possession à titre de gage ;

"Considérant que le legs fait au demandeur par le dit François-Xavier Beaudry, de tout ce que le dit deman-

deur pouvait lui devoir à son décès, a eu l'effet d'éteindre cette créance pour la dite rente de $1,000 et d'obliger les représentants du dit François-Xavier Beaudry de remettre au demandeur la dite créance contre McKiernan;

"Considérant que les défendeurs ne peuvent invoquer contre la réclamation du demandeur, la transaction mentionnée dans leur plaidoyer, vu que cette transaction ne s'appliquait qu'aux choses qui y sont mentionnées, et qu'il n'est pas même prouvé que le demandeur connut alors que les défendeurs avaient retiré de McKiernan, la somme réclamée d'eux par le demandeur en cette cause;

"Considérant que les défenses des dits défendeurs sont mal fondées, et que l'action du demandeur est bien fondée;

"A renvoyé et renvoie les dites défenses et a maintenu et maintient l'action du demandeur, et a condamné et condamne les dits défendeurs ès-qualité, à payer au demandeur, pour les causes ci-dessus mentionnées, la dite somme de $903.65, avec intérêt sur cette somme, à compter du 8 novembre 1886, date de l'assignation en cette cause, et les dépens, distraits, etc."

Jan. 17, 1890.]

Geoffrion, Q. C., for appellants:—

Le loyer en question était dû par McKiernan, en vertu d'un bail consenti par François-Xavier Beaudry lui-même, le 25 janvier 1882, c'est-à-dire avant la date de la vente du 14 avril 1883, par Beaudry à l'intimé. De sorte que McKiernan est toujours demeuré le locataire du dit Beaudry soumis aux conditions de ce bail. Par l'acte de vente dans lequel il est stipulé que Beaudry conserverait ses droits acquis par ce bail il devient clair et évident qu'il n'a pas voulu cesser d'être propriétaire des droits que lui conférait le dit bail tant et aussi longtemps qu'il aurait droit de retirer cette rente annuelle de $1,000. Il est aussi évident que par cette transaction entre Beaudry et l'intimé celui-ci n'a jamais eu la propriété et la possession de la créance établie par le bail, car pour avoir tels droits de propriété et de possession il aurait fallu de la part de Beaudry un transport de ces droits acquis par le bail au dit intimé et que ce transport fut signifié au dit McKier-

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nan. Sans cela l'intimé ne pouvait avoir de possession utile et sans la possession il ne pouvait donner cette créance en gage. D'ailleurs, la stipulation dans l'acte de vente de Beaudry à l'intimé comporte une réserve en faveur du vendeur de l'usufruit sa vie durante, car cette rente annuelle de $1,000 est payable annuellement pendant sa vie durante, et il s'est réservé le droit de jouir de la propriété vendue en en retirant les loyers, qui sont les seuls fruits que pouvait produire cette propriété pendant toute la durée de cette rente viagère. Pendant la vie de François-Xavier Beaudry, l'intimé ne pouvait pas jouir de l'immeuble et en retirer aucun revenu. Alors Beaudry, comme usufruitier, suivant l'article 451 du Code Civil, a acquis les revenus de l'immeuble jour par jour, et chaque jour de loyer acquis par Beaudry appartient à ses héritiers ou légataires. N'est-il pas aussi évident, d'après cette clause de réserve portée au dit acte, que l'intimé n'a jamais eu la jouissance et la possession de l'immeuble et que Beaudry n'a pas cessé d'en jouir? McKiernan n'a jamais eu besoin d'être notifié de la transaction entre Beaudry et l'intimé, il ne l'a jamais été, a toujours continué à occuper en vertu du bail de Beaudry à lui, et si par la faute et la négligence de Beaudry McKiernan n'eut pas payé le loyer, ce n'est pas l'intimé qui en aurait souffert la perte, mais bien Beaudry. En effet, sur la saisie-arrêt dont il est question dans la cause, si McKiernan n'avait pas payé le montant et si cette saisie-arrêt n'avait pas été discontinuée, il aurait été du devoir de Beaudry de prendre les moyens nécessaires pour assurer le paiement du loyer de McKiernan en intervenant dans la dite cause et en revendiquant le montant du dit loyer.

Nous disons qu'à la mort de Beaudry, l'intimé ne devait pas $1,000 pour un an de rente annuelle, car si Beaudry n'avait pas à sa mort reçu le montant du loyer dû par McKiernan, il n'en était pas moins devenu le créancier, ce loyer était sa propriété et chaque jour accru éteignait pour autant la rente viagère qui, elle aussi, se gagnait jour par jour. Beaudry vis-à-vis l'intimé était censé avoir reçu le loyer terme par terme et l'avoir appliqué

suivant la condition. Admettons encore que Beaudry n'aurait pas fait la remise contenue dans le codicile à l'intimé et que les héritiers auraient réclamé le paiement des $1,000 de rente annuelle échues à la mort de Beaudry et que par la négligence de celui-ci McKiernan n'aurait pas payé le loyer et serait devenu insolvable, n'est-il pas raisonnable de dire que les héritiers de Beaudry auraient eu à supporter la perte due à la négligence de leur auteur et que l'intimé aurait droit d'imputer sur l'année de rente le montant de loyer que Beaudry aurait pu percevoir sans sa négligence. Les termes de l'acte du 14 avril 1883, entre Beaudry et l'intimé, indiquent assez que le loyer devait tenir lieu de la rente annuelle jusqu'à concurrence du montant du bail, et que l'obligation réelle de l'intimé était de parfaire la dite somme de $1,000, dans le cas où les loyers ne la couvriraient pas, c'est-à-dire que l'intimé n'aurait rien à voir au sujet de ces loyers, et qu'il ne pouvait être recherché par Beaudry que pour la différence.

L'intimé n'avait acheté les droits de Beaudry, quels qu'ils fussent, que pour remettre fin à un procès et de plus évidemment dans l'intention de faire valoir contre les petits enfants de Beaudry, après la mort de celui-ci, certains prétentions plus ou moins fondées. Beaudry ne se dépossédait de rien, il se réservait tous les loyers sans exception; en considération de la cession des droits que l'intimé avait en vue, il garantissait que ces loyers ne seraient jamais moins que de $1,000 par année; les arrérages accrus du vivant de Beaudry demeuraient donc la propriété de celui-ci et les appelants en les percevant du locataire McKiernan n'ont reçu que leur dû et ils n'ont rien à rembourser à l'intimé.

Madore, for the respondent.

March 20, 1890.]

DORION, Ch. J., rendering the judgment of the Court, held that the executors were not entitled to the amount of rent received by them, and the judgment of the Court

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below which ordered them to pay this sum to Dorion was correct.

Judgment confirmed.

Geoffrion, Dorion & Allan for appellants.
J. A. C. Madore for respondent.
(J. K.)

May 21, 1890.

Coram DORION, C. J., BABY, CHURCH, BOSSÉ, JJ.

PAUL FOURNIER,
(*Plaintiff in Court below*),
APPELLANT;

AND

ANTOINE LEGER,
(*Defendant in Court below*),

AND

WILFRID LEROUX,
(*Mis en cause in Court below*),
RESPONDENTS.

Right of redemption—Refusal to retrocede—Tender not followed by consignation—Right to revenues of property.

HELD:—Affirming the judgment of DAVIDSON, J., M. L. R., 4 S. C. 233, That a vendor, seeking to give effect to a right of redemption, and who makes a tender to the purchaser, not followed by consignation, does not thereby acquire a right to the revenues of the property pending the contestation, if the purchaser refuses to retrocede, although the result of the contestation is that the purchaser is ordered to retrocede, but is allowed $40 additional for improvements. A consignation, to be effective, should be made, *partie appelée*, at a place and time and with a person duly designated to the holder of the property.

APPEAL from a judgment of the Superior Court, Montreal (DAVIDSON, J.), Nov. 7, 1888, dismissing the appel-

lant's action. The judgment of the Court below is fully reported in M. L. R., 4 S. C., pp. 233-238.

The previous case between the same parties is reported in M. L. R., 1 S. C. 360, affirmed in appeal, M. L. R., 3 Q. B. 124.

Jan. 20, 21, 1890.]

R. Laflamme, Q. C., and *Madore*, for the appellant:—

Le 22 août dernier, l'appelant prit la présente action contre l'intimé alléguant en substance:

Que le 20 juin 1885 l'intimé fut condamné par la Cour Supérieure du district de Montréal à rendre et retrocéder à l'appelant, sous quinze jours, l'immeuble numéro officiel 428 des plan et livre de renvoi officiels pour le quartier St-Antoine, dans la cité de Montréal, en par l'appelant payant à l'intimé la somme de $3,000, plus tous les frais encourus sur une première action entre les mêmes parties.

Que ce jugement déclare en outre qu'à défaut par l'intimé de s'y conformer, le jugement lui-même servira de titre à l'appelant, sur consignation par ce dernier au greffe de la Cour, de la somme de $3,000 et des frais taxés.

Que l'action dans laquelle le dit jugement fut rendu fut précédée d'un protêt notarié en date du 1er juin 1883, par lequel l'appelant a offert à l'intimé la dite somme de $3,000, plus $246.15 pour les frais de la première action, et sauf à parfaire, à condition que l'intimé lui signe un acte de rétrocession du dit immeuble, franc et quitte de toutes charges consenties ou créées par l'intimé.

Que ce protêt requérait en même temps l'intimé de signer un projet d'acte de rétrocession et de fournir les certificats du bureau d'enregistrement et les reçus des taxes et cotisations, mais que l'intimé a refusé de signer et d'accepter les offres.

Que l'intimé appela à la Cour du Banc de la Reine du jugement du 20 juin 1885, et qu'il donna comme cautions les mis en cause qu'il poursuivrait l'appel et paierait le montant de la condamnation, les frais et dommages jusqu'à concurrence de mille dollars—qu'en outre les mis en cause se portèrent aussi cautions, que si l'intimé venait à

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être condamné à rendre compte des fruits et revenus du dit immeuble, il en rendrait compte suivant la loi.

Que le dit jugement fut confirmé par la Cour d'Appel le 31 décembre 1886, que l'intimé porta sa cause devant la Cour Suprême, donnant pour cautions les mis en cause, et que la Cour Suprême confirma le jugement de la Cour du Banc de la Reine.

Que pendant le temps requis pour faire vider ces différents appels l'intimé a gardé la possession de l'immeuble en question et en a retiré tous les revenus.

Que l'intimé a retrocédé le dit immeuble dans les 15 jours du jugement de la Cour Suprême, mais qu'il a refusé et refuse de rendre compte des fruits et revenus qui s'élèvent à une somme d'au moins $3,000.

Conclusion, à condamnation de reddition de compte des fruits et revenus depuis la date du protêt, le 1er juin 1883, et à défaut, à payer $3,000 pour tenir lieu de compte.

L'intimé plaida: qu'il occupait la propriété en question comme propriétaire et conséquemment de bonne foi, qu'il est vrai que la Cour Supérieure a rendu le jugement mentionné dans la déclaration, mais que ce jugement n'a pas été confirmé en appel, ni à la Cour Suprême; qu'au contraire la Cour d'Appel modifia le dit jugement déclarant que les offres au lieu d'être de $3,000 auraient du être $3,040, que l'intimé avait droit de jouir de la dite propriété aussi longtemps que la dite somme de $3,040 ne lui était pas remise et déposée et consignée en Cour; que l'appelant n'a jamais consigné ni les $3,000 ni les $3,040, et que sur les premières offres faites par l'appelant de la dite somme de $3,040 l'intimé les a acceptées et s'est conformé au jugement.

Conclusion au débouté de l'action. C'est sur cette contestation ainsi liée que fut rendu le jugement dont est appel.

La défense comme on le voit soulève deux points. 1o. Les offres de l'appelant étaient insuffisantes, puisque la Cour d'Appel les a augmentées de $40. 2o. L'appelant n'a pas régulièrement offert et consigné le montant qu'il était tenu de payer à l'intimé pour rémérer.

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La prétention de l'appelant est qu'il y a chose jugée entre les parties sur la question de la suffisance des offres. En effet, quatre conditions sont requises pour qu'il y ait chose jugée: que la nouvelle action ait le même objet que la première, qu'elle ait la même cause; que ce soit entre les mêmes parties, et que les parties agissent dans la même qualité. Ces quatre conditions sont ici réunies.

Le jugement rendu par la Cour Supérieure dans la première cause, maintenait les offres faites par l'appelant et condamnait l'intimé à rétrocéder la propriété dont nous demandons compte des revenus.

La Cour d'Appel a confirmé ce jugement ajoutant seulement une somme de $40 au montant que la Cour Supérieure avait trouvé suffisant, mais sans altérer en quoi que ce soit le premier jugement ni en amoindrir l'effet. La Cour considère que $40, en proportion de la somme en litige était une bagatelle pour laquelle elle n'a pas cru même devoir diviser les frais.

Les termes du jugement de la Cour d'Appel font voir que la Cour a considéré les offres suffisantes, dans les circonstances, et sur ce point elle confirme le jugement de la Cour inférieure, et condamne, comme la Cour Supérieure, l'intimé à rétrocéder la propriété en question.

La Cour Suprême a confirmé le jugement de la Cour d'Appel.

Dans la présente action, l'intimé plaide que nous n'avons pas droit aux fruits et revenus de la propriété, parce que les offres de l'appelant ne sont pas suffisantes.

Dans la première cause tous les tribunaux ont décidé que les offres de l'appelant en date du 1er juin 1888, étaient suffisantes pour que l'appelant eût sa propriété, conséquemment qu'il avait droit, à partir de cette date et lors de ces offres d'entrer en possession; et dans la présente action l'intimé prétend que ces mêmes offres étaient insuffisantes pour permettre à l'appelant d'avoir les fruits et revenus à compter de la date qu'elles ont été faites. C'est donc la même contestation qui se renouvelle, c'est sur le même objet; la première action avait pour but la chose elle-même, la seconde les revenus de la même chose.

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Pothier, (éd. de Bugnet), Traité des obligations, Nos. 891 et 892, établit que ce serait demander la même chose que celle demandée dans une première action dont le jugement a donné congé, que de demander une chose qui est provenue et qui n'appartiendrait au demandeur ou lui serait due, que si celle dont elle provient et qui a été demandée dans la première action lui avait appartenu ou lui était due. Ulpien dans les pandectes, livre 44, tit. 2, *De exceptione rei judicatæ*, parag. 3, 4, 5, exprime le même principe. "Si ayant échoué dans la demande particu-"lière des effets d'une succession, on demande la succes-"sion entière, ou réciproquement, on sera débouté pour "une fin de non recevoir, tirée du jugement qui est inter-"venu."

Non-seulement il y a identité d'objet, mais dans cette deuxième action, c'est la même cause, et de demande et de défense.

Pothier, éd. Bugnet, No. 894 du traité des obligations, dit: "Lorsque par un jugement qui vous a donné congé "de ma demande en revendication d'une certaine chose "il a été jugé que la propriété de cette chose ne m'appar-"tenait pas, je ne puis avoir d'autres actions contre vous "pour réclamer cette propriété, ce serait renouveler la "même question qui a été terminée par le jugement, car "cette question était uniquement de savoir si la chose "m'appartenait ou non." Or ici n'est-ce pas renouveler la même question qui a été terminée par le jugement, que de prétendre que les offres n'étaient pas suffisantes pour donner à l'appelant le droit d'exiger la possession de son immeuble à compte de ses offres.

Enfin l'intimé ne conteste pas que les parties soient les mêmes, agissant dans la même qualité Donc il y a chose jugée sur la question de la suffisance des offres ; et puisque la Cour a décidé que ces offres telles que faites étaient suffisantes pour contraindre l'intimé à livrer la propriété, elle a décidé par là même que ces offres étaient suffisantes pour contraindre l'intimé à livrer les revenus. Nous n'avons pas à examiner si c'est à tort ou à raison que la Cour a ainsi décidé dans la première action : *res judicata pro veritate habetur.*

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Au reste l'appelant prétend que ses offres ont été légalement faites, et qu'elles sont suffisantes, et c'est là le deuxième point soulevé par l'intimé dans sa défense.

D'abord les offres sont suffisantes, parce qu'elles ont été de toute la somme convenue.

Les $40 ajoutés par la Cour d'Appel à la réclamation de l'intimé sont pour une amélioration faite hors de la connaissance de l'appelant, sans que l'intimé l'eut notifié, et dans des circonstances qui mettent en doute la bonne foi de ce dernier. Voilà pourquoi, prenant aussi en considération le peu d'importance de la somme, en proportion du montant en litige, cette honorable Cour n'a pas voulu dire que le défaut d'avoir offert ces $40, affecte la validité des offres.

De plus les offres ont été régulièrement faites avec consignation légale.

En effet, qu'est-ce que c'est que la consignation ?

Pothier, (éd. Bugnet), Traité des obligations, No. 572, dit : " La consignation est un dépôt que le débiteur fait par " autorité de justice de la chose ou de la somme qu'il doit, " entre les mains d'une tierce personne."

Pothier n'exige pas que l'argent offert soit déposé en justice ; tout ce qui est nécessaire c'est que cet argent soit déposé entre les mains d'une tierce personne. Or ici comme sur la question de la suffisance des offres s'applique l'exception de la chose jugée. Si cette Cour a déjà décidé que la consignation telle que faite était suffisante pour permettre à l'appelant d'exiger sa propriété, n'est-il pas évident qu'elle a par là même décidé qu'il a droit aux revenus de cette propriété à compter de la date qu'il avait droit d'exiger d'être en possession ? Du reste le même Pothier dans son Traité de la Vente (ed. Bugnet), No. 410, après avoir parlé des différentes Coutumes qui se sont exprimées sur ce point, dit : " Nonobstant ces raisons, la commune opinion est que la Coutume de Paris, " de même que dans les autres qui ne sont pas ex- " pliquées, il doit être fait raison au vendeur, dans le cas " du réméré, de tous les fruits perçus, depuis ses offres, " quoiqu'elles n'aient pas été suivies de consignation.

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"L'acheteur ne doit pas profiter de sa demeure, et des "mauvaises contestations qu'il a faites sur la demande "du réméré, pour se conserver la jouissance d'un héri- "tage qu'il était obligé de délaisser aussitôt que la de- "mande lui en a été faite. Il ne peut pas se plaindre "d'être, pendant le temps qu'a duré le procès, privé à la "fois de la jouissance de l'héritage et du prix puisqu'il "n'a tenu qu'à lui de recevoir le prix qui lui était offert, "et de ne pas faire de procès."

Ainsi la consignation n'est pas nécessaire. Dans notre cas, il y a eu consignation régulière, et jugée régulière par cette Cour. Les offres sont suffisantes et légales et l'ont été déclarées telles, par jugement de cette Cour entre les parties.

Non-seulement donc il y a chose jugée; mais la preuve en cette cause démontre que les prétentions de l'intimé sont mal fondées. Si donc il a été condamné à remettre la propriété il doit la remettre avec les fruits et revenus à compter du jour que l'appelant était bien fondé à en prendre possession.

T. C. deLorimier, *Q. C.*, and *J. O. Joseph*, for respondents:—

Le présent appel est d'un jugement de la Cour Supérieure, Montréal, qui a renvoyé l'action en reddition de compte de l'appelant, instituée sous les circonstances suivantes:—

Dans une action antérieure, mûe entre les mêmes parties, la Cour Supérieure, par un jugement du 20 juin 1885, avait ordonné au défendeur (intimé) de rétrocéder au demandeur (appelant) une propriété qu'il lui avait vendue à réméré, moyennant le paiement d'une somme de $3,000 et les frais d'une autre action précédente, et que sur le refus du défendeur, le jugement servirait de titre au demandeur en par lui consignant le dit montant au greffe. Le jugement refusait au défendeur les impenses et améliorations qu'il demandait.

Sur appel porté devant cette Cour, le jugement fut confirmé en partie, mais matériellement modifié sur la question des impenses, car il accordait à l'intimé sur ce chef

une somme de $40, qu'il déclarait qu'aux termes de l'article 1546, C. C., l'intimé avait le droit de répéter. 1890. Fournier & Léger.

La Cour Suprême confirma ce dernier jugement, deux des honorables juges étant dissidents quant au montant des impenses, qui étaient à $302.

L'appelant [illegible] subséquemment à l'intimé le montant de [illegible] l'appel, celui-ci rétrocéda la propriété au d[illegible]

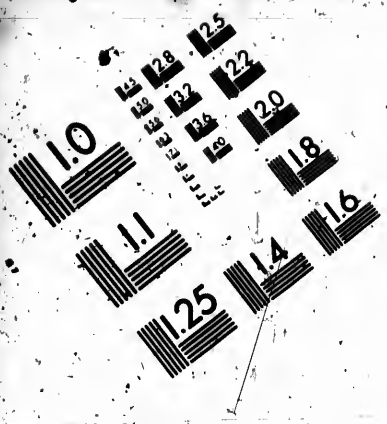
La présente [illegible] alors instituée par l'appelant, par laquelle il demanda à l'intimé de lui rendre compte des fruits et revenus qu'il a perçus durant l'instance et aussi de lui payer les intérêts, alléguant qu'il possédait de mauvaise foi, et qu'à son refus, il soit condamné à payer $3,000.

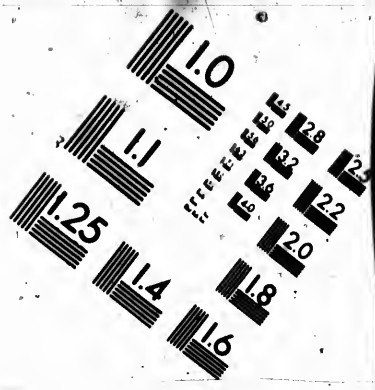
L'intimé plaide : Qu'il jouissait de la propriété de bonne foi, comme propriétaire, en vertu d'un titre même de l'appelant ; que cette bonne foi est reconnue par les jugements d'appel par les impenses qu'ils lui ont accordées ; que la somme de $3,040 que l'appelant était tenu de payer et consigner avant de rentrer en possession, n'avait été ni offerte, ni consignée aux termes du jugement d'appel, que même celle de $3,000 du jugement de la Cour Supérieure n'avait pas été consignée au greffe ; qu'il avait le droit de retenir la propriété et d'en jouir aussi longtemps que l'appelant ne se conformait pas au jugement ; qu'il avait rétrocédé la propriété à l'appelant sur les premières offres qui lui avaient été faites après le jugement, et que l'action était mal fondée.

La Cour Supérieure a maintenu le plaidoyer et renvoyé l'action, et c'est de ce jugement qu'il y a appel.

Pour donner effet au jugement d'appel, et se faire livrer la possession de la propriété ou lui permettre d'en réclamer les fruits, l'appelant n'avait qu'à remplir les conditions qui lui étaient dictées par le jugement, lesquelles n'étaient que l'expression de la loi.

Car l'exercice du droit de réméré et le droit à la possession ou aux revenus de la propriété rémérée, sont deux choses bien distinctes.





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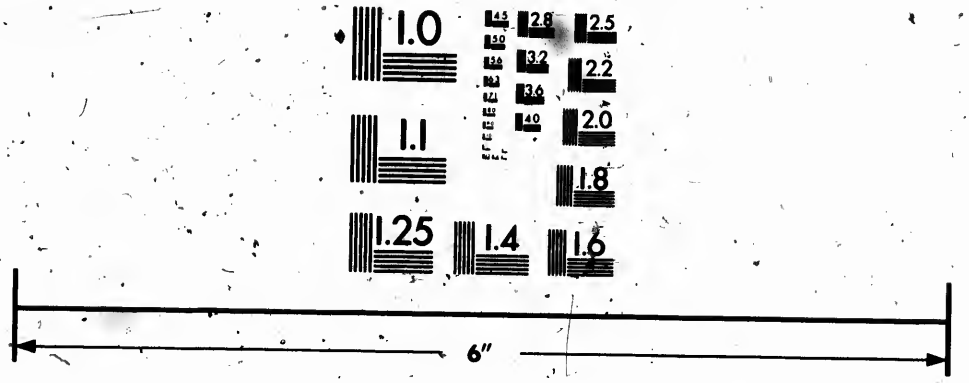

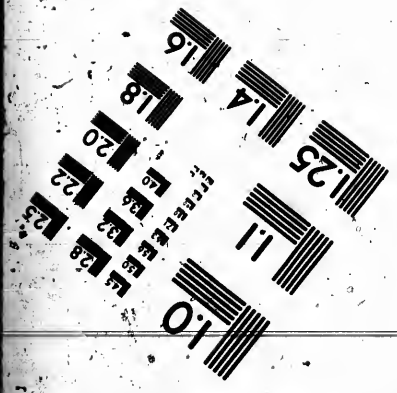

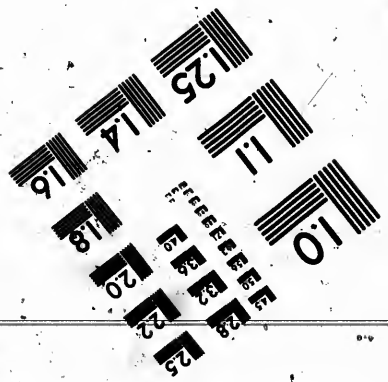

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Dans le premier cas, le vendeur (ici l'appelant) peut prévenir ou couvrir son défaut par de simples offres, mais dans le second cas, il faut qu'il fasse les offres et consigne le montant, car ce n'est que de cette manière qui équivant à un paiement effectif, qu'il se libère et qu'il puisse avoir la jouissance.

Art. 1162, C. C., et les autorités citées par deLorimier sous cet art., pp. 117 et 122.

Dans la présente cause le jugement ordonnait la consignation au greffe, non-seulement il n'y a pas eu de consignation, mais il n'y a pas eu même des offres du montant du jugement d'appel.

Or ce jugement déclarait qu'il y avait erreur dans le jugement de la Cour Supérieure quant à la question des impenses, lesquelles avaient augmenté la valeur du terrain au montant de $40, et que l'intimé aux termes de l'article 1546 du Code Civil, avait le droit de répéter cette somme contre l'appelant, formant $3,040 que ce dernier devait payer et consigner au greffe, avant d'obtenir un titre à la propriété.

L'art. 1546, C. C., se lit ainsi : "La faculté de réméré "stipulée par le vendeur lui donne le droit de reprendre "en en restituant le prix, et en remboursant à l'acheteur "les frais de la vente, ceux des réparations nécessaires, et "des améliorations qui ont augmenté la valeur de la chose "jusqu'à concurrence de cette augmentation.

"Le vendeur ne peut entrer en possession de la chose, "qu'après avoir satisfait à toutes ces obligations."

Il ne peut y avoir d'équivoque, ni double interprétasion sur un texte de loi aussi formel.

Si le vendeur ne peut entrer en possession, l'acheteur reste en possession et jouit de la propriété, car c'est lui qui en a le titre et qui le conserve jusqu'à ce que le vendeur se conforme à ses obligations.

L'article 1546 de notre Code est la reproduction textuelle de l'article 1162 du Code Napoléon; et est commenté dans ce sens par tous les auteurs français, et cette Cour dans plusieurs de ses décisions, a appliqué cette doctrine.

Nugent v. *Mitchell*, 12 Q. L. R. 149; *Ellis* v. *Courteman-*

che, 11 L. C. J., 325 ; Sirey, C. N. annoté, Nos. 10, 11 et 30 sous l'art. 1673.

Dans la présente cause, il n'y a pas à chercher bien loin pour savoir si l'appelant a fait ce qu'il devait, pour obtenir ce qu'il demande.

Sa déclaration même constate qu'il n'a offert à l'intimé que la somme de $3,000, sans égard au jugement d'appel qui lui ordonnait de payer au préalable $3,040, et toute la preuve consiste dans son protêt ou acte d'offres pour ce montant de $3,000.

Sous ces circonstances, l'intimé n'étant pas remboursé du montant qui lui était accordé, avait droit de retenir la propriété, et l'appelant étant en défaut non-seulement de consigner, mais même d'offrir ce qu'il devait, n'a aucun droit à une reddition de compte ; l'appelant ne peut jouir à la fois des revenus de la propriété et des intérêts du capital qu'il a retenu entre ses mains, la loi les déclare compensés.

May 21, 1890.]

The Court being of opinion that there was no error in the judgment, it was unanimously confirmed.

Judgment confirmed.

Laflamme, Madore & Cross for appellant.

T. C. deLorimier, Q. C., for respondent.

(J. K.)

May 23, 1890.

Coram DORION, Ch. J., CROSS, BABY, BOSSÉ, JJ.

THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING
(*Plaintiffs in Court below*),

AND

GEORGE BARRINGTON ET AL.
(*Intervenants in Court below*),
APPELLANTS;

AND

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,
(*Defendants in Court below*),
RESPONDENTS.

Jury trial—Verdict—Jury unable to answer question—Art. 414, C. C. P.

HELD:—Where the jury, in answer to a question submitted to the [illegible] the trial, reply "impossible to say," such answer is not a compli[illegible] with Art. 414, C. C. P., which requires that the verdict be explicitly affirmative or negative upon each fact submitted; and there is a right to a new trial.

APPEAL from an interlocutory judgment of the Court of Review, Montreal (JOHNSON, LORANGER, DAVIDSON, JJ.), Nov. 9, 1889, setting aside a verdict, and ordering a new trial. The case is explained in the following observations made by JOHNSON, J., in delivering the judgment of the Court of Review:—

No less than four motions are before us in this case. There was a jury trial, and on the findings of the jury the plaintiffs ask for judgment in their favor. Then there was an intervention by the party whose premises were burned, and who consented that the plaintiffs, mortgagees, should get the insurance money, and they moved

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to the same effect as the plaintiffs. Thirdly, there was a motion by the defendants for judgment in their favor *non obstante veredicto;* and finally the defendants moved for a new trial on several grounds, the principal ones being misdirection, admission of illegal evidence at the trial, and the insufficiency of the answer made by the jury to No. 6 of the assignment of facts.

It is with the last motion, of course, that we are first of all concerned; the consideration of the others being unnecessary if it should be granted.

The case was one of a very unusual complication, the mortgagee bringing the action, and the defendants contending in one part of their case that there was a three-quarter co-insurance clause in the contract, and that the Barringtons, who intervened, and who were mortgagors, had restored the property destroyed, so that the plaintiffs at the time of the fire were put in the same position as previously to its occurrence. To question No. 6, which directly asked whether this was the fact or not, the jury made answer by the words: "Impossible to say." The defendants contend that this is in violation of Art. 414, C. P., which requires expressly that "when there is an "assignment of facts, the verdict must be special and "articulated upon each fact submitted, and be explicitly "affirmative or negative." We cannot hesitate at saying that the requirement of the law in this respect has been violated, with the result of possible injustice to the defendants; as an explicit finding one way or the other would have disposed of the case as far as that point was concerned. We hold also that the answer to the defendant's motion on this head—viz., that even if the answer was insufficient it was not material to the merits of the case—is not a satisfactory answer as the case presents itself just now. The co-insurance and the restoration of the property so as to leave the plaintiffs' security unchanged, may or may not be material to be ascertained in order to render final justice to all the parties; but that is not the question now. It is certain that on this record, as it went to trial, the enquiry made by question No. 6

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was held material to the issues as they then stood, and had to be tried, and if it is not material to the issues it should have been struck out before going to trial. It is equally certain that the verdict being in this respect informal and defective, gives a right to a new trial under Article 433, par. 17.

It was further argued by the plaintiffs that objection should have been taken by the defendants at the time; and that they are too late now; and the great authority of Chief Justice Meredith in *Cannon* v. *Huot* (1 Q. L. R., p. 139), was cited. But that case, admitting, of course, its decisive weight where it can be applied, does not reach the present one at all. There the jury was asked whether a statement of facts in a libel were true or not; and they answered that they were partly true and partly false. The Chief Justice held substantially that they might have been asked at the time what part was true and what false; but in the case now before us, the jury said it was impossible to answer; and the question, therefore, remains as entirely unanswered as if they had said they would not or could not answer it at all; and it would, I should think, have been quite useless to ask them to do what they said was impossible. The judge of course had power to send them back; but I think he acted wisely in not doing so, as neither of the parties asked it; and all the jury meant may possibly have been that they could not agree.

We think therefore that the question was material as the facts were settled for trial, and should have been answered directly by saying either that the fact enquired of was proved, or that it was not proved, that is to say they could and should have given their judgment upon the fact put to them. The other grounds, misdirection and admission of illegal evidence, need not be referred to.

The new trial is therefore granted, and the other motions are useless, and dismissed.

Jan. 27, 1890.]

Trenholme, Q. C., for the Royal Institution.

R. S. Weir, for intervening party.

C. J. Doherty, Q. C., and *Kavanagh* for the Scottish Union Insurance Company.

May 23, 1890.]

DORION, C. J., and CROSS, J., after referring to the circumstances of the case, expressed the opinion that the judgment of the Court of Review was correct, and that the appeal should be dismissed.

Judgment confirmed.

Trenholme, Taylor & Buchan for the Royal Institution, appellant.

H. J. Kavanagh for the Scottish Union and National Insurance Co., respondent.

R. S. Weir for Barrington et al., intervening.

(J. K.)

May 21, 1890.

Coram DORION, C. J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

LA CORPORATION DE LA PAROISSE DE STE-GENEVIÈVE,
(*Petitioner in Court below*),
APPELLANT;

AND

LA COUR DE CIRCUIT,
(*Defendant in Court below*),

AND

GODFROI BOILEAU,
(*Mis en cause in Court below*),
RESPONDENT.

Prohibition to prevent execution of judgment—Discretion—Appeal—Circuit Court.

HELD:—Affirming the judgment of GILL, J., M. L. R., 5 S. C. 417, Where there has been no plea to the jurisdiction, and no demand has been made for a writ of prohibition while the case was pending before the

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Court which rendered the judgment complained of, the Superior Court, or a judge thereof, has discretionary power to grant or refuse a writ of prohibition to prevent the execution of the judgment; and a Court of appeal will not interfere with the exercise of this discretion unless the absence of jurisdiction be apparent on the face of the proceedings.

[Question whether the Circuit Court is a Court of inferior jurisdiction not passed upon.]

APPEAL from a judgment of the Superior Court, Montreal (GILL, J.), Nov. 21, 1889, refusing a writ of prohibition to prevent the execution of a judgment of the Circuit Court. The judgment of the Court below is reported in M. L. R., 5 S. C. 417. All the facts of the case will be found in the report of the case in the Circuit Court, *Boileau* v. *Corporation de la paroisse de Ste-Geneviève*, 18 Leg. News, 26.

March 17, 19, 1890.]

Bastien for the appellant.

R. Laflamme, *Q. C.*, and *F. D. Monk* for the respondent.

May 21, 1890.]

DORION, Ch. J. (for the Court):—

It is not necessary to decide the question whether the Circuit Court is a Court of inferior jurisdiction to which a writ of prohibition will lie, and no opinion will be expressed by this Court on that point. The view which we take of the case is this: Where there has been no exception to the jurisdiction and no application has been made for a writ of prohibition while the case was pending before the Court, a writ of prohibition will not be granted after final judgment has been rendered, to prevent the execution of the judgment, unless the absence of jurisdiction is apparent on the face of the proceedings. Here the judge in the Court below refused the application on two grounds, first, that the Circuit Court is not a Court of inferior jurisdiction; and, secondly, that it was apparent from the proceedings that the Circuit Court had jurisdiction. On the first point, as I have already observed, we do not think it necessary to express any opinion. On the other point, we see no reason to doubt that the Circuit Court had jurisdiction to entertain the

appeal. The appellant does not complain exactly that the Circuit Court had no jurisdiction, but he says there should have been a *plainte* in writing. It is not clear from the record whether there was a written *plainte*. For my own part I think the appeal to the Circuit Court lay whether there was a *plainte écrite* or not. But in any case absence of jurisdiction is not apparent on the face of the proceedings, and the judge of the Court below exercised a sound discretion with which we are not disposed to interfere, in refusing the application for a writ. We dismiss the appeal, but we will strike out the first reason given in the judgment of the Court below.

The judgment is as follows:—

"La Cour, etc.....

"Considérant que la corporation appelante n'a pas, comme elle aurait pu le faire, demandé un bref de prohibition avant le jugement final dont elle se plaint, et que, ne l'ayant pas fait, elle ne peut, après jugement, obtenir un bref de prohibition, qu'en établissant par la procédure même, que la Cour de Circuit n'avait pas de juridiction, ce qu'elle n'a pas fait;

"Et considérant qu'il est laissé à la Cour Supérieure, ou à un juge d'icelle, dans l'exercice d'une saine discrétion, de permettre ou de refuser l'émanation d'un bref de prohibition, suivant qu'il juge que les raisons alléguées par le requérant sont suffisantes ou insuffisantes, pour justifier l'adoption de cette procédure extraordinaire, et qu'une Cour d'Appel ne doit intervenir dans l'exercice de cette discrétion que lorsqu'il est évident que le tribunal inférieur n'avait pas de juridiction;

"Considérant que dans l'espèce la corporation appelante ne se plaint pas d'un défaut absolu de juridiction dans le tribunal inférieur, mais de l'inobservance de formalités dans la plainte faite devant le conseil de comté, et qu'il n'apparaît pas suffisamment que cette formalité n'a pas été observée, en sorte qu'il n'y a pas lieu à l'intervention de cette Cour, tel que requise par l'appelante;

"Et considérant qu'il n'y a pas d'erreur dans le jugement rendu par la Cour de première instance, savoir, la

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Cour Supérieure siégeant à Montréal le 21e jour de novembre dernier, 1889;

"Cette Cour, pour les raisons ci-dessus, et sans adjuger sur les autres questions soulevées dans cette cause, confirme le dit jugement, avec dépens contre l'appelante, tant en Cour de première instance que sur l'appel."

Judgment confirmed.

Prevost & Bastien for appellant.

F. D. Monk for respondent.

(J. K.)

May 21, 1890.

Coram DORION, C. J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

LOUIS LARIVÉE ET AL.,
(Plaintiffs in Court below),
APPELLANTS;

AND

LA SOCIÉTÉ CANADIENNE-FRANÇAISE DE CONSTRUCTION DE MONTRÉAL ET AL.,
(Defendants in Court below),
RESPONDENTS.

Building Society — Liquidation — Resolution to wind up — Resolution cancelling vote to wind up.

HELD:—That where a Building Society has passed a resolution to wind up and liquidate the business of the Society under R. S. Q. 5455, and liquidators have been appointed to carry out and give effect to the resolution, and the liquidators have prepared a dividend sheet accordingly, the contract binding the members of the Society is by such entrance into liquidation dissolved, and cannot be resuscitated without the unanimous consent of its former members, and a resolution passed by a majority vote at a subsequent meeting, resolving that the Society shall continue its business, is null and of no effect.

APPEAL from a judgment of the Superior Court, Montreal (GILL, J.), June 11, 1888, in the following terms:—

"La Cour, parties ouïes sur le mérite des deux fins de

non recevoir des défendeurs, examiné la procédure, les pièces produites et la preuve, en autant qu'ayant rapport aux dites fins de non recevoir, et délibéré ;

"Attendu que bien qu'il soit vrai que la Société de Construction défenderesse soit entrée en liquidation par la résolution adoptée à l'assemblée de ses membres le 15 août 1887, la prétention contraire des défendeurs, basée sur le défaut d'avis, n'étant pas fondée, il n'en est pas moins vrai que les biens et affaires de la dite société sont encore dans le même état qu'ils étaient lors de la dite entrée en liquidation, les quelques opérations faites par les liquidateurs étant des actes qui se présentent tous les jours dans les opérations et l'administration d'une société de construction, et que ces actes n'ont pas pu modifier la position de la dite société ;

"Considérant que d'après la loi qui régit la liquidation des affaires des sociétés de construction (Statuts de Québec, 1879, chap. 32, sec. 15 *et seq.*, l'existence légale d'une société ne cesse pas par le seul fait de son entrée en liquidation, au contraire, la section 20 décrète que la dissolution n'aura lieu que lorsque toutes les affaires auront été liquidées et que les actionnaires réunis en assemblée auront définitivement voté telle résolution et l'abandon de la charte ;

"Considérant en conséquence qu'il était parfaitement légal pour la dite société de reprendre et de continuer ses opérations et de sortir de l'état de liquidation tel qu'il a été résolu par la presqu'unanimité de ses membres à l'assemblée du 19 janvier, et partant l'action des demandeurs tendant à empêcher le paiement d'un premier dividende que les liquidateurs avaient préparé n'a plus sa raison d'être, puisque par suite de la dite résolution la liquidation cesse, le dit dividende demeure sans effet et n'est pas payé, et la dite société doit continuer ses opérations comme ci-devant avant son entrée en liquidation ; maintenant donc la seconde des dites fins de non recevoir comme bien fondée, et prenant acte de ce qu'il y est conclu que les dépens soient à la charge de la défenderesse, a débouté et déboute les demandeurs de leur action, mais

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condamne la dite Société de Construction Canadienne-française de Montréal à payer tous les dépens de la présente cause, distraits, etc."

March 18, 19, 1890.]

Lamothe (with him *Geoffrion*, Q. C.) for appellants :—

La Société Canadienne-française de Construction de Montréal, est une société formée sous l'opération du Statut Général de cette province, S. R. B. C., ch 69.

D'après ses règlements, elle s'est constituée d'une manière temporaire. Son but était d'assurer à chacun de ses membres, un prêt de $2,000, remboursable par versements sans intérêt.

Voici quelle était sa manière de fonctionner. Chaque membre versait, chaque semaine, cinquante centins. S'il y avait 400 membres, la somme recueillie hebdomadairement s'élevait à $200. Ce montant était déposé en banque, et quand il atteignait $2,000, il y avait, entre les membres, un tirage au sort, pour savoir lequel aurait cette somme en prêt.

Quand le sort avait décidé, le membre favorisé recevait $2,000 en donnant des garanties hypothécaires pour le remboursement.

Le remboursement se faisait en dix ans, par versement mensuel de $16.66.

Aucun intérêt n'était payé sur ce prêt.

Le sociétaire favorisé par le sort continuait seulement à payer ses versements hebdomadaires de cinquante centins, comme les autres, en outre du versement mensuel de l'emprunt.

Ces versements hebdomadaires constituaient le capital versé de chaque membre dans la société, et ce capital versé avait été limité à $624 pour $2,000 de parts.

Chaque prêt devant être remboursé en entier, la société se serait trouvée, à la fin de ses opérations, avec un capital payé de $249,600, à être distribué entre ses membres, en supposant que ces derniers seraient toujours restés au chiffre de 400.

L'intérêt retiré sur les dépôts faits dans les banques, les amendes, etc., étaient censés être plus que suffisants

pour couvrir les dépenses, fort légères d'ailleurs, de l'association.

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Afin de permettre à ceux qui ne seraient pas favorisés par le sort de jouir des avantages de l'emprunt, il y avait alternativement des tirages au sort et des ventes à l'enchère d'appropriation. Les premiers $2,000 recueillis étaient tirés au sort ; les seconds étaient vendus à prime.

Les sociétaires les plus favorisés étaient naturellement ceux qui pouvaient jouir le plus tôt de l'emprunt remboursable sans intérêt.

Tout fonctionna bien jusqu'en 1878, époque à laquelle une majorité prétendit changer la constitution; le contrat social, pour y substituer un autre fort différent. D'après des règlements passés alors, on a voulu changer, sans le consentement de tous les membres, deux points fondamentaux : 1o. Dispenser du remboursement ceux qui auraient leur emprunt ou appropriation immédiatement avant la liquidation ; 2o. Permettre aux sociétaires d'emprunter sur un mode différent. Ces règlements du 20 décembre 1878, sont attaqués comme illégaux et nuls ; mais cette question ne se soulève pas sur le présent appel.

Le but de ceux qui faisaient passer ces règlements, s'il n'était pas alors bien apparent, le devient peu après. Car à compter de 1878, ces sociétaires refusèrent de prendre les emprunts (appropriations) que le sort leur accordait sans intérêt, et préférèrent emprunter, sans donner d'hypothèque, sur la garantie de leurs parts.

Leur dernière carte devait être celle-ci : Mettre la société en liquidation en s'en divisant entre eux l'actif sous forme d'appropriations, et *ne pas rembourser* en vertu du règlement de 1878, art. 41.

Et c'est ainsi qu'une société dont les membres les plus favorisés devaient être ceux qui auraient eu *les premiers* leur emprunt, devenait au contraire une société dont les membres les plus favorisés seraient ceux qui n'auraient leur emprunt que *les derniers*.

Aussi lorsque près de dix ans se furent écoulés à compter des nouveaux règlements ; lorsque conséquemment tous les emprunts donnés au sort ou vendus avant cette

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date furent remboursés ou à peu près et tous les versements de capital hebdomadaires furent faits, ces mêmes membres qui avaient prétendu et cru changer le contrat social, qui avaient refusé de prendre leurs appropriations, et qui dans l'intervalle avaient joui de l'argent par emprunt sans hypothèque et avec un intérêt modique, s'avisèrent de mettre la société en liquidation en vertu du statut provincial 42-43 Vict., ch. 32, sect. 15 (reproduisant presque textuellement le statut fédéral 42 Vict., ch. 43).

Le 15 août 1887, par résolution adoptée à l'assemblée générale spéciale des membres, la Société Canadienne-Française de Construction de Montréal fut mise en liquidation.

Trois membres seulement se prononcèrent contre l'opportunité de cette mise en liquidation. Le sentiment général était qu'il fallait liquider.

Trois liquidateurs furent nommés et se mirent en fonctions. Ils réglèrent les réclamations pendantes, et le 24 novembre 1887, ils déclarent un premier dividende de $100 par part payée, mais *au bénéfice seulement* de ceux qui n'avaient pas voulu prendre d'appropriation, ignorant complètement les droits des autres sociétaires qui avaient eu des appropriations (emprunts) et qui les avaient remboursés intégralement, bien que ces derniers eussent comme les autres, des parts payées.

Les appelants qui avaient des parts payées en entier, attaquèrent ce dividende par action prise le 14 décembre 1887 et signifiée le même jour.

Après avoir allégué les faits ci-dessus relatés ils continuent :

"Que le ou vers le quinzième jour d'août dernier (1887), la dite Société Canadienne française de Construction de Montréal ayant un surplus considérable a été mise en liquidation en vertu de l'acte de cette province 42-43 Vict., ch. 32, et que les défendeurs Joseph Edmond, Joachim Isaïe Dumont, et Louis Charles de Tonnancourt ont été nommés liquidateurs ;

"Que le 24me jour de novembre dernier (1887) les dits liquidateurs ont déclaré un premier dividende de $100 par

part payée, au bénéfice de ceux seulement qui n'ont pas voulu prendre d'appropriations, et ignorant complètement les droits des autres membres qui ont eu des appropriations mais qui les ont remboursées et qui ont comme les autres des parts payées ;

"Que le demandeur Louis Larivée, père, et Jean Louis Peltier ne sont aucunement portés sur ce dividende malgré qu'ils aient, le premier $1,000 de parts payées et le second $2,000 de parts toutes payées ;

"Que ce dividende est irrégulier, illégal, injuste et nul —les demandeurs ainsi que tous ceux qui ont de parts payées ayant droit d'y figurer au même titre que les autres membres colloqués et au *pro rata* de leurs droits et intérêts ;

"Que les liquidateurs ont illégalement et injustement ignoré les droits des demandeurs et qu'ils ont considéré ces droits comme n'existant pas ;

"Que les demandeurs ont le droit d'être traités comme membres dans le dit dividende et être colloqués au *pro rata* de leur mise payée ;

"Pourquoi les dits demandeurs concluent à ce que le dit dividende de $100 par part non appropriée, annoncé comme payable le 15 décembre courant, soit déclaré illégal, irrégulier et injuste ; à ce que ce dit dividende soit amendé en y insérant les collocations des demandeurs au *pro rata* de leur mise payée respective ; à ce que ordre soit donné aux dits liquidateurs de préparer un autre dividende au *pro rata* de la mise payé des membres, et notamment des demandeurs ou à amender le dividende déclaré suivant qu'il y aura lieu ; concluent en outre les dits demandeurs à ce que les règlements adoptés le 20 décembre 1888 et particulièrement l'article 41 des dits règlements soient déclarés illégaux, nuls et annulés en autant qu'ils sont contraires aux conventions originaires, bases de la dite société et aux droits acquis des membres individuellement."

Après la signification de cette action, il se passa quelque chose d'extraordinaire. Les liquidateurs et ceux des membres dont les intérêts personnels étaient semblables,

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voyant se dissiper le rêve qu'ils avaient fait de s'emparer de tout l'actif de la société, et craignant de manquer le but si mystérieusement poursuivi depuis le 20 décembre 1878, s'imaginèrent de remettre la société en fonctionnement, en faisant table rase de la mise en liquidation.

En conséquence ils convoquèrent pour le 19 janvier une assemblée des membres de l'association, et là, contrôlant la majorité des votes, ils décidèrent de remettre la société en fonctionnement.

Plusieurs membres protestèrent contre cette assemblée, la dénoncèrent comme illégale. Parmi eux se trouvent des personnes qui avaient voté pour la mise en liquidation, plusieurs autres qui n'avaient pas assisté à l'assemblée du 15 août 1887, mais qui en avaient accepté les décisions, et deux membres qui avaient jugé la mise en liquidation inopportune mais qui s'étaient ralliés subséquemment au vote de la majorité.

Malgré ce protêt, renouvelé lors de la séance du 19 janvier 1888 par quelques membres présents, la majorité passa outre et décréta que la mise en liquidation serait mise de côté. Et ceux qui votaient ainsi l'annulation de la mise en liquidation étaient ceux-là même qui cinq mois auparavant, avaient par leur vote assuré cette mise en liquidation.

Après cette assemblée, subséquente à l'institution de l'action, les intimés plaidèrent :

1o. Que la mise en liquidation du 15 août 1887 était illégale et nulle, attendu que les avis adressés par la poste ne portaient pas la signature du secrétaire-trésorier.

2o. Que le 19 janvier 1888, (savoir plus d'un mois après l'institution de l'action,) sur requête de quelques membres, les liquidateurs auraient convoqué une assemblée générale et que là, à une majorité des intéressés, il aurait été décidé de relever la société de son état de liquidation. Que conséquemment, la société n'étant plus en état de liquidation, il n'y a plus lieu de continuer l'action. Et ils demandent le renvoi de l'action avec dépens contre la société.

Toute la cause roule sur le second plaidoyer. De con-

sentement, les parties ont ajourné la discussion des autres points qui pourraient se soulever au mérite.

Toute la question est de savoir si, après s'être mise en liquidation d'après le statut 42-43 Vict., chap. 32, être restée en cet état pendant plus de cinq mois, avoir procédé à la liquidation et même déclaré des dividendes, la société intimée pouvait, par le vote d'une majorité de ses membres, se remettre à fonctionner comme si rien ne lui était arrivé.

La mise en liquidation termine le contrat social—quant à toutes transactions futures. L'être moral continue d'exister, mais seulement eu égard aux transactions passées et en autant qu'il est nécessaire pour arriver à la liquidation.

La Société mise en liquidation n'est pas tout-à-fait morte, mais elle est entrée dans une phase nouvelle. Elle vit encore, mais d'une vie particulière et limitée ; elle vit dans le passé et pour le passé ; le futur, l'avenir, lui devient fermé, lui est interdit.

La loi le dit on ne peut plus clairement : " ..... Toutefois, la société ne devra pas faire d'autres opérations que celles requises pour *parvenir à la liquidation*."

La société a subi une transformation. S'il nous était permis de donner un exemple tiré de la nature, nous dirions : Le ver est devenu chrysalide. Il n'a pas cessé de vivre, mais il vit d'une autre vie. Il a fait une évolution ; et cette évolution était nécessaire pour arriver à sa fin. C'est encore le même être, mais avec des facultés différentes, avec une nature changée. Il lui est devenu impossible, par sa propre puissance, de reprendre la forme antérieure, de refaire en arrière le pas qu'il a fait en avant.

La Société intimée peut-elle, par le vote d'une majorité de ses membres, revivre de sa vie antérieure ?

Non. La mise en liquidation opérait un effet fatal—elle mettait fin au contrat social quant à toute transaction ultérieure—non nécessairement requise pour arriver à la liquidation.

Chacun des membres se trouvait dégagé du lien social quant au futur, et se trouvait à avoir des droits acquis à la

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distribution immédiate de l'actif. Ce lien social ne pouvait se renouer qu'avec le consentement individuel de chaque membre. La majorité n'avait pas plus droit de forcer la volonté d'un membre sous ce rapport qu'elle n'avait eu droit à l'origine de le forcer à entrer dans la société.

En un mot, le lien d'association des membres entre eux devenait rompu en puissance; il ne restait plus à opérer que le partage de l'actif.

M. E. Charpentier (with him *R. Laflamme, Q. C.*), for the respondents:—

Toute la question est de savoir, si la Société défenderesse après avoir été mise en état de liquidation, par l'assemblée du 15 aout 1887, en a été relevée par l'assemblée du 19 janvier 1888.

Dans l'opinion des intimés il ne saurait y avoir de doute pour l'affirmation, pour les raisons suivantes:

1. Parce que la mise en liquidation de la défenderesse n'a jamais été suivie d'exécution; que le dividende déclaré par les liquidateurs n'a jamais été payé, et que lors de l'assemblée du 19 janvier 1888, relevant la dite défenderesse de son entrée en liquidation, la déclarant nulle, de nul effet et non avenue, tous les biens et affaires de la dite société, étaient encore absolument dans le même état qu'ils étaient avant sa mise en liquidation, et que dans ces circonstances la volonté de tous les membres de la dite société (moins trois ou quatre) doit prévaloir.

2. Parce que les quelques opérations que les liquidateurs ont pu faire pendant leur gestion, n'étaient que de simples actes d'administration qui sont d'occurrence journalière dans les sociétés de construction, et que ces opérations n'ont pas eu pour effet de changer ou modifier en aucune manière la position de la dite société.

3. Parce que d'après le Statut de Québec de 1879, chap. 32, section 15 et suivantes, qui a trait à la liquidation des sociétés de construction, l'existence légale d'une société du genre de celle-ci ne peut nullement être mise en question et ne cesse pas, par le simple fait de son entrée en liquidation; loin de là, la section 26 du dit Statut déclare, que la dissolution d'une telle société n'aura pas lieu avant

que toutes les affaires de la dite société n'aient été liquidées, et que les actionnaires réunis en assemblée générale, n'aient définitivement voté la dissolution de telle société et l'abandon de sa charte, ce qui n'a jamais été fait.

Que pour ces raisons il est donc vrai de dire que la défenderesse a été bien et dûment relevée de son entrée en liquidation, qu'elle a le droit de continuer ses opérations comme par le passé; et qu'en conséquence l'action des demandeurs n'a plus maintenant sa raison d'être, si l'on considère de plus, que le dividende en question n'a jamais été payé, est demeuré sans effet, et que les frais de ce procès en Cour inférieure ont été payés par les intimés.

May 21, 1890.]

DOHERTY, J. (for the Court):—

The Society, respondents, was formed in 1870, under C. S. L. C., ch. 69, and the business was carried on prosperously for seventeen years until 1887. On the 15th August, 1887, the Society resolved to go into liquidation. There was no apparent necessity for this step. A considerable sum of money had accumulated in the hands of the Society, which no one wanted. Liquidators were appointed and commenced operations. They collocated $100 to each share of the members who had not received appropriations, leaving those who had received appropriations out of the question. Almost all the members were in favour of winding up, but when the members who had received appropriations found that they were left out they were dissatisfied, as they thought that they should have been collocated also. Two of them, Larivée and Peltier, brought an action to set aside the report of distribution. The liquidators called a meeting which was largely attended, and then almost the same persons who had formerly voted for the liquidation, finding that their proceedings were complicated by the action, resolved the contrary,—that they would not wind up, and that they would go on with the business. They now meet the action by two pleas; first, that the meeting of 15th August, 1887, had been illegally called,—secondly, that the

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proceedings in liquidation had been commenced and carried on to a certain stage, but that they had undone all that; that they were going on with the business, and therefore the *raison d'être* of the action had ceased. The appellants answered to this, "You had not power to revoke your resolution; you had put yourselves in liquidation, and you had not the right to retrace your steps." The first plea has been abandoned; the case, therefore, rests upon the second plea. The judgment of the Court below dismissed the action, but with costs against the Society, holding that the costs should be borne by the Society. That judgment is now appealed from by the plaintiffs in the suit. The question is, had the Society a right to abandon the liquidation. In view of the Statute 42-43 Vict., ch. 32, regulating the winding up of Building Societies, the Court here is of opinion that the judgment of the Court below is erroneous, that the Society had not the right to resuscitate itself and make a new contract binding on the members. The judgment of the Court below is therefore necessarily reversed with costs.

The judgment is as follows:—

"The Court, etc.....

"Considering that by a resolution passed almost unanimously by the members of the Society respondents on the 15th August, 1887, under the provisions of the Act 42-43 Vict., ch. 32, providing for the liquidation of Building Societies, it was resolved to put into liquidation and to wind up the business of said Society, and that liquidators were then and there appointed to carry out and give effect to the said resolution;

"And seeing that said liquidators, therefore, proceeded to the execution of their said office, and prepared a first dividend sheet, collocating certain members of the Society upon their shares for $100 respectively, omitting so to collocate the appellants and to recognize them as members of the Society in any way;

"And seeing that the appellants refused to be bound by such collocation, protesting that the liquidators had acted illegally and unjustly, in ignoring their claims

and rights as members, and in excluding their names from the dividend sheet;

"And seeing that appellants, on the 14th December, 1887, instituted this suit, to have said collocation and dividend sheet declared illegal and unjust, and to have the same annulled and set aside, and a new collocation made and dividend declared, recognizing their rights and including them therein as members of the society respondents;

"And seeing that upon service of this said action on respondents, they caused the liquidators to call another meeting of the members of the Society for the 19th January, 1888, at which, by a large majority, it was resolved to ignore and abandon the proceedings towards liquidation of 15th August, 1887, and to take up and continue the business of the Society as if such proceedings had never been had, or such liquidation contemplated;

"And seeing that thereupon, and upon proceedings taken as aforesaid, after the institution of this action, the respondents pleaded thereto that the proceedings to liquidate had on the 15th August, 1887, were illegal and null, upon the grounds, 1st, that the meeting of that date was illegally convened, by a notice unsigned by the secretary-treasurer; and 2nd, that they had on the 19th January, 1888, cancelled the resolution of the said 15th August, and all proceedings thereat, and were resolved to go on, and were going on with the business of the Society as if such proceedings in liquidation had never been commenced or taken;

"And seeing that the Court below dismissed said first plea of want of notice calling the said first meeting, and that respondents acquiesced in that judgment, there remained only the plea secondly pleaded as aforesaid;

"And seeing that appellants joined issue with respondents on said second plea, the parties having postponed, by consent, discussio and proceedings on the merits of the action proper until the sufficiency or insufficiency of this plea was decided, hearing was had, and judgment rendered on the merits of this plea only, and the

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judgment *à quo* rendered maintaining the same, and dismissing the action with costs against respondents, and that from this judgment this appeal hath been instituted;

"And considering that by the said Act 42-43 Vict., ch. 32, to wit, the Winding-up Act, and by sections 5455 and 5459 of the Revised Statutes of the Province of Quebec, it is enacted that from and after the adoption of the resolution to liquidate, to wit; the said resolution of the 15th August, 1887, the Society shall be deemed to be in liquidation, and that after the appointment of liquidators the Society shall not transact any business, except such as may be requisite for the purpose of accomplishing the liquidation;

"And considering that the contract binding the members of the Society is by such entrance into liquidation dissolved and cannot be resuscitated or reinstated without the consent of its former members, which consent hath not been given to or obtained by the respondents now wishing to continue said business;

"Considering, therefore, that said second plea is unfounded in law, and insufficient as an answer to this action, that the appellants have made good their answer thereto, and that there is error in the said judgment appealed from, rendered in the Superior Court at Montreal on the 11th June, 1888, doth reverse, annul and make void the said judgment;

"And proceeding to render the judgment which the Court below ought to have rendered, and upon the grounds and reasons above stated and set forth, doth dismiss the said plea so secondly pleaded, with costs as well in the Court below as in this Court."

Judgment reversed.

Trudel, Charbonneau & Lamothe for appellants.

M. E. Charpentier for respondents.

(J. K.)

May 21, 1890.

Coram DORION, C. J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

BENJAMIN DESVOYEAUX DIT LAFRAMBOISE,
(*Defendant in warranty in Court below*),
APPELLANT;

AND

LUC TARTE DIT LARIVIÈRE,
(*Principal plaintiff in Court below*),

AND

ISAIE TAILLEFER,
(*Principal defendant and plaintiff in warranty in Court below*),
RESPONDENTS.

Action en bornage—Settling the boundaries—Art. 504, C.C.—Procedure—Costs.

HELD:—1. In an action *en bornage* the Superior Court cannot order a surveyor to place landmarks to define and separate the respective properties of the parties without at the same time settling the boundary line between the properties and the points where the landmarks shall be placed. A surveyor appointed by the Court before the boundary line is settled is only an expert whose office it is to report on the locality and indicate where, in his opinion, the boundary line should be drawn, for the guidance of the Court in settling the boundaries.

2. Under Art. 504, C. C., not only the costs of settling boundaries should be common to the parties, but also the costs of the suit when it is not contested. Only in case of contestation are the costs of the suit in the discretion of the Court.

APPEAL from a judgment of the Superior Court, Montreal (JETTÉ, J.), Nov. 14, 1889, in the following terms:—

"La Cour, etc.....

"Attendu que le demandeur, propriétaire de l'immeuble suivant, savoir:

'Un lopin de terre situé dans la Côte de Vertu, paroisse 'St-Laurent, de la contenance de deux arpents de front, 'plus ou moins, sur 5½ arpents de profondeur, aussi plus 'ou moins, tenant d'un côté et par derrière à Pierre Robi- 'taille au No. 189 du cadastre de la dite paroisse, d'autre

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Desvoyeaux dit Laframboise & Tarte dit Larivière.

'côté à Isaac Taillefer, représentant Benjamin Desvoyeaux 'dit Laframboise au No. 182 du dit cadastre et par devant 'au chemin public, le dit lopin de terre portant au ca-'dastre le dit No 190,' se pourvoit contre le défendeur propriétaire de l'immeuble suivant contigu à celui du demandeur, savoir :

'Un lot de terre situé au même endroit, contenant un 'arpent et neuf perches et demie, plus ou moins, de front, 'sur une profondeur de six arpents, plus ou moins, tenant 'd'un côté à William Boa ou représentants, d'autre côté 'au demandeur, c'est-à-dire au No. 190 du cadastre sus-'mentionné, par derrière au trait-quarré, partie à Augustin 'Viau et partie à Pierre Robitaille et par devant au che-'min public, lequel terrain porte au cadastre le No. 182 ;'

"Et allègue :

Que depuis douze ans le demandeur souffre dans la possession de son immeuble par suite d'empiètement de la part du défendeur et de son auteur, et que la ligne de division a été sciemment déplacée et reculée au détriment du dit demandeur, et concluant à ce que, vu le refus du défendeur de se conformer à une mise en demeure notariée en date du 16 octobre 1888, il soit ordonné que les dits héritages sus-décrits soient bornés en justice, conformément à la loi et aux titres et possession des parties ;

"Attendu que sur cette demande, Taillefer a appelé en garantie Desvoyeaux, son vendeur, alléguant spécialement que ce dernier lui a vendu la terre ci-dessus en second lieu désignée, telle qu'enclose et clôturée et qu'il s'est formellement rendu responsable envers lui des frais qui pourraient être encourus au sujet d'une partie de clôture de ligne existant entre le dit immeuble et celui du voisin, demandeur actuel ;

"Attendu que Desvoyeaux a déclaré prendre le fait et cause du défendeur principal et a plaidé à l'action que si la ligne de division entre le demandeur et le défendeur n'a pas été bien placée, c'est sans mauvaise intention et que les défendeurs ont toujours été et sont encore prêts à borner mais à frais communs ;

"Attendu qu'il résulte du procès signifié par le deman-

deur au défendeur principal le 16 oct. 1888 que ce dernier a alors été mis en demeure de consentir au bornage demandé sous deux fois 24 heures ; que néanmoins il n'a pas répondu à cette mise en demeure et que par suite le demandeur était fondé à prendre son silence pour un refus et à se pourvoir comme il l'a fait ;

"Attendu que le défendeur est en conséquence responsable au demandeur des frais de la demande, frais dont le défendeur en garantie doit cependant l'indemniser ;

"Attendu que dans ces circonstances, bien que le bornage doit avoir lieu à frais communs, les défendeurs doivent supporter seuls les frais de la demande ;

"Donnant acte aux défendeurs de la déclaration qu'ils sont prêts à borner, ordonne en conséquence qu'il soit procédé à frais communs entre les parties, au bornage des dits terrains contigus, conformément à la loi, aux titres et aux droits des parties ; ordonne en conséquence qu'il soit procédé par les dites parties, si elles peuvent s'entendre, si non d'office, par cette Cour, à la nomination d'un arpenteur pour tirer, fixer et rétablir les lignes de division entre les dites propriétés des parties et y planter des bornes pour marquer et déterminer d'une manière légale et définitive les dites lignes de division entre leurs propriétés sus-décrites et désignées, et ce, tant en présence qu'en l'absence des parties, après qu'elles auront été dûment notifiées, et pour le dit arpenteur, faire rapport de ses procédés devant cette Cour ;

"Mais condamne le défendeur principal à payer les frais de l'action distraits à Mtre. J. H. Mignerou, avocat du demandeur, et condamne le défendeur en garantie à payer et rembourser les dits frais au défendeur principal et à tenir ce dernier indemne de la condamnation susdite, à toutes fins que de droit."

March 18, 1890.]

A. Dorion, for appellant ;—

Le demandeur principal, Luc Tarte dit Larivière, a poursuivi en bornage le défendeur Isaïe Taillefer.

Par son action il se plaint de prétendus empiètements de la part du défendeur principal, demande à ce que dé-

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fense lui soit faite de les continuer et conclut aux dépens contre lui.

Le défendeur a appelé les appelants, ses auteurs, en garantie.

Les appelants sont intervenus dans l'action principale et par leur plaidoyer, ils déclarent qu'ils sont prêts ainsi que le défendeur principal à procéder à un bornage en justice, à frais communs, et demandent le renvoi du surplus des conclusions de l'action principale, avec dépens de contestation.

Aucune preuve n'a été faite par les parties ; la cause a été inscrite au mérite, et, par son jugement, la Cour Supérieure a ordonné le bornage demandé.

Il y a deux dispositions de ce jugement dont nous nous plaignons.

La première c'est celle par laquelle il condamne le défendeur principal à payer les frais d'action au demandeur principal et les appelants à indemniser le défendeur de cette condamnation.

La deuxième c'est celle par laquelle il déclare que l'arpenteur devra lui-même établir les limites des propriétés et poser les bornes.

1re *Disposition.*—La Cour Supérieure a évidemment fait erreur sur la question des dépens. Du moment qu'on admet le principe que l'une ou l'autre des parties a droit à un bornage en justice, les frais du bornage y compris ceux de l'action non contestée, devaient être supportés en commun ; quant à ceux de contestation ils devaient être payés exclusivement par la partie qui succombait dans ses prétentions.

Or, le demandeur principal, non-seulement n'ayant aucune preuve mais encore ayant déclaré qu'il n'en avait pas à faire, devait être condamné à payer les frais d'une contestation sur laquelle il devait succomber, faute de preuve.

2e *Disposition.*—C'est le tribunal et non l'arpenteur qui doit déterminer l'endroit où les bornes doivent être placées ; le tribunal n'a pas le droit de déléguer son autorité à cet effet. Tout ce que l'arpenteur a à faire c'est de préparer

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un rapport qui puisse aider le tribunal à déterminer la ligne de démarcation des propriétés des parties et à ordonner le placement des bornes dans cette ligne.

Frais d'appel.—Les intimés ont persisté dans leur jugement malgré le conseil qui leur a été donné par cette Cour de s'en désister ; aucune question d'équité ne saurait donc militer en leur faveur. Vis-à-vis l'appelant les deux intimés doivent être condamnés aux frais d'appel.

Le jugement rendu en faveur des deux est erroné ; ce sont les appelants qui souffrent de cette erreur.

Nous soumettons donc que le jugement dont est appel devra être modifié avec dépens, conformément aux prétentions que nous avons ci-dessus énoncées.

*J. H. Mignero*n, for the respondents.

May 21, 1890.]

Bossé, J., for the Court, was of opinion to reverse the judgment for the reasons which he set forth in the judgment of the Court, as follows :—

" La Cour, etc.....

" Considérant que sur une action en bornage de la nature de celle soumise maintenant à cette Cour, la Cour Supérieure ne pouvait ordonner à un arpenteur d'aller placer des bornes pour diviser les héritages des parties, sans en même temps désigner les lignes qui devaient séparer leurs héritages et l'endroit où seraient placées ces bornes ;

"Considérant que l'arpenteur que nomme la Cour, avant d'avoir déterminé la ligne de séparation, n'est qu'un expert chargé de faire rapport sur l'état des lieux et d'indiquer l'endroit où, dans son opinion, la ligne devait être établie, et ce pour éclairer la Cour et la mettre à même de déterminer la ligne ;

" Considérant qu'il y a erreur dans cette partie du jugement qui a ordonné qu'un arpenteur soit nommé pour aller borner les héritages des parties sans avoir au préalable déterminé l'endroit où ces bornes seraient placées ;

" Et considérant qu'aux termes de l'art. 504, C. C., non seulement les frais de bornage même doivent être communs aux intéressés, mais aussi les frais de la demande

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en bornage lorsqu'elle n'est pas contestée, et qu'il n'y a que les frais du litige, lorsqu'il y a contestation, qui doivent être laissés à la discrétion de la Cour, et doivent être supportés par l'une ou l'autre des parties, ou divisés entre elles suivant les circonstances ;

" Et considérant qu'il y a erreur dans cette autre partie du jugement dont est appel, qui a condamné le défendeur principal au paiement des frais de l'action et le défendeur en garantie à lui rembourser le montant de cette condamnation ;

"Cette Cour casse et annule le dit jugement, savoir, le jugement rendu par la Cour Supérieure à Montréal le 14 novembre 1889, et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, donne acte aux défendeurs principaux et en garantie de leur déclaration qu'ils sont prêts à borner, et ordonne en conséquence que par deux arpenteurs jurés dont les parties conviendront, sinon d'office par la Cour Supérieure, ou un juge d'icelle, et à défaut par une des parties d'en nommer un, tel arpenteur nommé d'office, ou par un seul arpenteur, dans le cas où les deux parties conviendraient de n'en nommer qu'un seul, parties présentes ou dûment appelées, il sera procédé à la visite des héritages des parties, examen des titres et procédé à vérifier s'il existe une ligne de division entre les dits héritages désignés dans la déclaration, et les défenses ou d'autres travaux indiquant la ligne qui doit diviser les dits héritages, avec pouvoir aux dits arpenteurs d'entendre sous serment et par écrit les témoins des parties et les parties elles-mêmes, et devront les dits arpenteurs faire rapport à la dite Cour Supérieure de leur opération, et l'accompagner d'un plan figuratif des lieux indiqués et de tous leurs procédés indiquant les prétentions des parties relativement à la ligne de séparation, et ils devront aussi faire toutes suggestions qui dans leur opinion pourraient être utiles pour aider à la dite Cour Supérieure à déterminer et à fixer la dite ligne de division ;

" La Cour condamne l'intimé à payer à l'appelant les frais encourus sur l'appel, les dépens en première ins-

tance réservés ; et la Cour ordonne que le dossier soit remis à la Cour Supérieure pour être procédé à l'exécution de ce jugement et pour y être adopté tels procédés que de droit."

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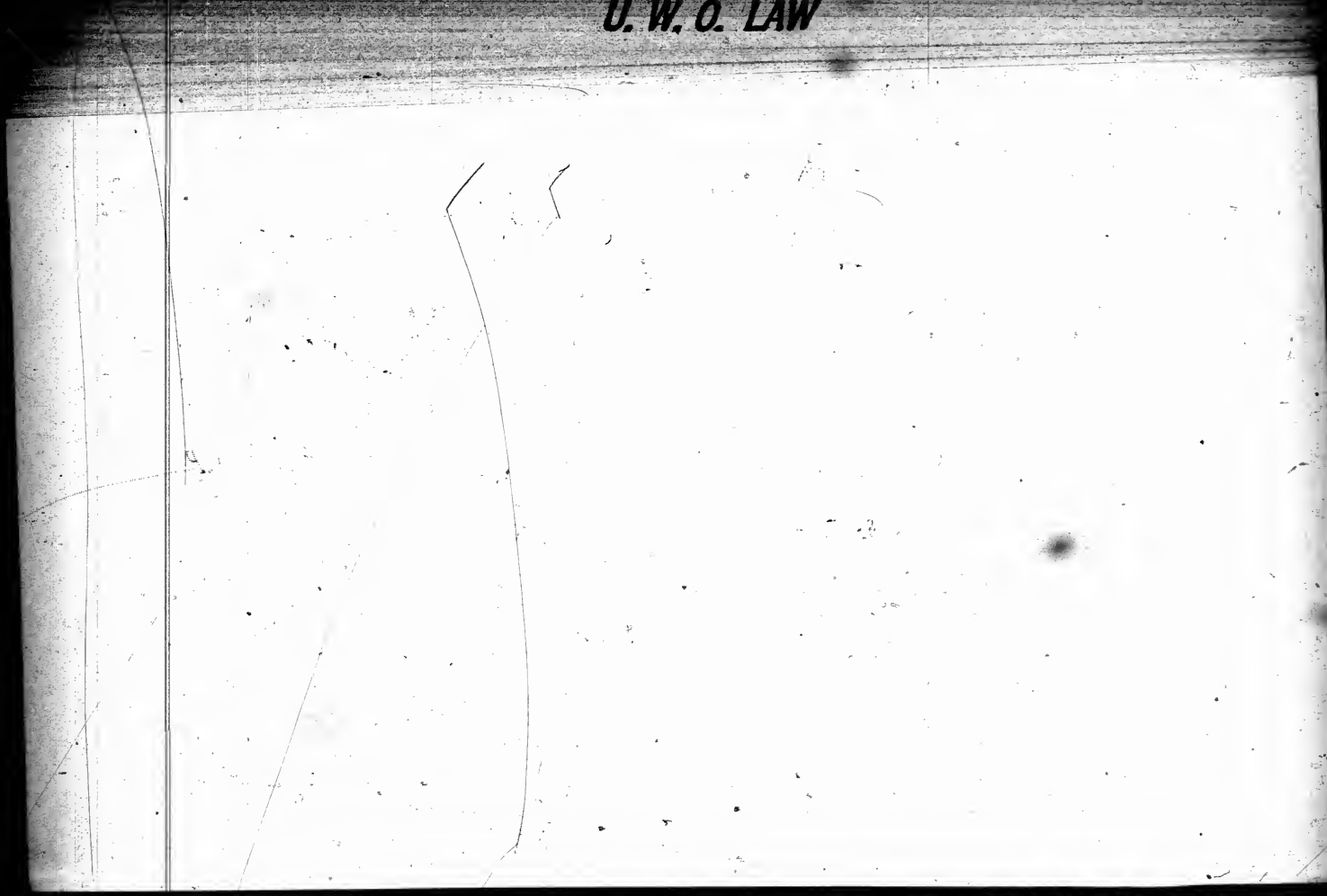
Desvoyeaux dit Laframboise & Tarte dit Larivière.

Judgment reversed.

Geoffrion, Dorion & Allan for appellant.

J. H. Migneron for respondents.

(J. K.)



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ELECTION LAW, QUEBEC.

Quebec Election Act, 38 *Vict.*, *ch.* 7, *s.* 272—*Mis en cause*—*Quebec Controverted Elections Act*, 38 *Vict.*, *ch.* 8—*Jurisdiction of Court of Review.*] At the trial of the election petition against the return of a member to represent the county of Laprairie, in the Quebec legislative assembly, evidence was given that the appellant had committed acts of bribery and corruption at the election, whereupon he was summoned, under sect. 272 of the Quebec Election Act of 1875, to appear and answer the charges made against him. He appeared, denied the charges, went to evidence, and the case being heard before the Superior Court in Review, as a Court of first instance, under the Controverted Elections Act of 1875, he was found guilty of two cases of corrupt practices, at the election, and condemned to pay a fine of $200 for each offence, with costs and imprisonment in default of payment. *Held:* (Reversing the decision of the Court of Review, M. L. R. 6 S. C. 102.) (1) That the Quebec Election Act of 1875 confers no authority upon the Superior Court sitting in Review to enquire into and determine any charge of corrupt practices against the provisions of the Act; the only authority conferred by the Act to try and determine such charges being conferred on the Superior Court held by one Judge thereof, as provided for by sects. 272, 273, 274 and 292 of the Act. (2) That the jurisdiction of the Superior Court sitting in Review is limited by the Controverted Elections Act of 1875, to the hearing of the parties to an election petition and the determination of the issues raised thereon between the parties to such petition, including charges of corrupt practices against any of the candidates, at the election, who are made parties to the Controverted Election petition. (3) That as the appellant was neither an elector, nor a candidate, nor a returning officer, nor a deputy returning officer, at the election, he could not be, and in fact was not, a party to the election petition, and was not amenable to the jurisdiction of the Court of Review, as a court of original jurisdiction. (4.) That the power conferred by sub-section 4 of section 89 of the Controverted Elections Act, to determine all matters arising out of the election petition, refers to such matters only as are in issue on the election petition between the parties thereto, and does not extend to collateral and independent issues with parties unconnected with the election petition, such as charges of corrupt practices against persons who were not candidates at the election and are not parties to the election petition. (5) That the Superior Court sitting in Review had no jurisdiction to hear and determine, as a Court of first instance and without appeal, the charges of corrupt practices against the appellant; the Superior Court held by one Judge, or a Judge thereof, having sole jurisdiction in the matter, subject to a review before three Judges and to an appeal to this Court, as provided for with regard to judgments rendered by the Superior Court. (6) That an appeal lies to this Court from every judgment rendered by the Superior Court sitting in Review for excess of jurisdiction, and

LESSOR AND LESSEE—*Continued.*

—— *Arts.* 1612, 1614, 1618, *C. C.—Disturbance of lessee's use—Claim for reduction of rent—Trespass—Judicial disturbance.*] Affirming the judgment of Wurtele, J., M. L. R., 6 S. C. 74. (1) Until a judicial disturbance has arisen, and a partial eviction has been the consequence thereof, no claim by a lessee for a reduction of rent can be maintained. A judicial disturbance may arise either by an action of a third person setting up a claim of right to the detriment of the lessee, or by an exception setting up a claim of right, in answer to an action of damages brought by the lessee against a trespasser. (2) A lessee who is disturbed in his possession by the material act of a third party, whatever may be the assertion of right made by such third party at the time of the commission of the act, should treat such disturbance as a mere trespass, and should bring suit against the trespasser for the recovery of the damages which he has suffered by reason of such trespass, and to prohibit the trespasser from further disturbing him in his enjoyment. If the trespasser by his pleas raises a claim of right, the lessee should notify the lessor of the disturbance, and can then bring an action in warranty against the lessor for the purpose of obtaining a reduction of rent, and damages.—*Per* Dorion, C. J.:—On the merits the action should be dismissed, the appellants by the agreement in question having assumed all risk of diminished income in the working of the telegraph lines transferred by respondents, and having entered into this agreement after the Canadian Pacific Railway Company had obtained authority from Parliament to establish telegraph lines for the transmission of messages for the public. *G.N.W. Telegraph Co. & Montreal Telegraph Co.*, 257.

—— *Art.* 1624, *C. C.—Art.* 887, *C. C. P.—Jurisdiction.*] (1) An action under Art. 1624, C. C., to recover possession of the premises leased, where the lessee continues in possession after the expiration of the lease, may be brought by the lessor under the provisions of Arts. 887 *et seq.* regulating suits between lessors and lessees. (2) Where to an action to recover possession of the premises a demand is joined for the value of the use and occupation since the expiration of the lease, the action must be brought in the Superior or Circuit Court according to the amount claimed. *McBean & Blachford*, 273.

LIBEL AND SLANDER.

Libel in pleadings—Justification—Probable cause—Counsel's opinion.] Affirming the judgment of Taschereau, J., M. L. R., 4 S. C. 219, (1) Libels in pleadings are actionable, when the allegations complained of are false, or made without probable cause. (2) Malice is inferred by law from the nature and the falsity of such accusations. (3) An unproved plea of justification constitutes an aggravation of the libel. (4) Executors are personally liable for libels published by them in their said quality. (5) The mere fact of having taken counsel's opinion, apart from any other circum-

RAILWAY—*Continued.*

—— *Expropriation—2 R. S. C., ch. 109, s. 8, s. s. 33, 36, 37—Interest.*] Affirming the judgment of Tait, J., M.L.R., 5 S.C. 211, Where a railway company obtains possession of land on making a deposit, and the arbitrators subsequently make an award of a sum of money for the value of the land, and "in full payment and satis- "faction of all damages resulting from the taking and using of "the said piece of land for the purposes of the said railway," the company is liable for interest on the amount of the award only from the date thereof—and not from the date when the company obtained possession of the land. It will be presumed that the arbitrators included in their award compensation for the company's occupation of the land prior to the date of the award. *Reburn & Ontario and Quebec R. Co.*, 381.

—— *Expropriation under Railway Act, R.S.C. cap. 109—Requirements of arbitrators' award—Inadequate compensation amounting to fraud—Objections to arbitrators.*] Affirming the judgment of Wurtele, J., M.L.R., 5 S.C. 136, (1) The Railway Act (cap. 109, R.S.C.) only requires that the award in arbitration proceedings should state clearly the sum awarded and the property for which such sum is to be the compensation. It does not require that the award should mention the person to whom the award is to be paid, nor what amount is to be paid for land, and what amount for buildings to be taken, nor what amount has been deducted for increased value to be given to the remnant of the property. (2). The Act in question does not require that the award should show on its face that a day had been fixed, on or before which the award had to be made, or that it was made within the time so fixed; it is sufficient that it should be proved that as a matter of fact such time was fixed, and that the award was made within the delay. (3.) When the arbitrators in the record of their proceedings make a minute of the sum to be awarded as compensation, and agree that the sum shall be in notarial form, and such award is afterwards drawn by a notary and signed by all three arbitrators, and duly served on the parties, such notarial award is the true award and is valid. (4.) The party expropriated cannot object to the arbitrator named by the company, on the ground of his relationship to the surveyor whose certificate accompanies the offer made by the company, nor on the ground of alleged inexperience, especially when these facts were known to the proprietors before the appointment of the third arbitrator. (5.) The fact that the third arbitrator in the expropriation proceedings has since the award, represented the company in other similar proceedings, forms no legal ground of objection to such third arbitrator. (6.) When all the requirements of the law have been observed, the award made by the arbitrators, or any two of them, is final and conclusive; and the compensation awarded is entirely within the discretion of the arbitrators in the absence of fraud on their part, and is not in such case subject to review by the courts. (7). Inadequacy in the sum awarded may be

SALE OF IMMOVABLE.

Action by purchaser to enforce sale—Putting vendor in default.] Where by a contract for the sale of real estate the buyer is to pay part of the price in cash within a fixed delay, in order to put the vendor legally in default to execute a deed the buyer must tender the cash payment within the delay, and in a suit to enforce the sale, and asking that the judgment be equivalent to title, he must renew the tender and pay the money into Court. *Foster & Fraser*, 405.

—— *Petitory action—Promise of sale—Commencement of proof.*] (1) Where there has been a sale, or promise of sale, of an immovable accompanied by possession, at a price to be subsequently determined by the parties, and afterwards fixed by a memorandum of the vendor's manager, the vendor is not entitled to bring a petitory action to recover the property, his recourse being an action to compel the purchaser to take a deed. (2) A promise of sale may be proved by verbal evidence where there is a commencement of proof in writing. (3) In the present case, a memorandum of figures in the hand-writing of appellants' manager, with his statements when examined as a witness, constituted a sufficient commencement of proof. *Montreal Loan and Mortgage Co. & Leclair*, 374.

SALE OF MOVABLE.

Latent defect—Redhibitory action—Art. 1530, *C. C.*] (1) Where horses, at the time of their sale, were suffering from glanders, but the disease was not sufficiently developed to be apparent until about twenty days afterwards, and the purchaser then notified the vendor of the fact, and that they would be destroyed if not removed within three days: that a redhibitory action instituted four weeks after the sale and delivery was brought with reasonable diligence. (2). Where evidence is conflicting and evenly balanced (as in this case as to the existence of the disease at the time of the sale), the Court of Appeal will not disturb the decision of the Court below. *Montreal Street Railway Co. & Lindsay*, 125.

—— *Sale of goods by weight—Contract, when perfect—Art.* 1474, *C. C.—Damage to goods before weighing.*] Reversing the judgment of TORRANCE, J. (M. L. R., 2 S. C. 395), TESSIER and BOSSÉ, JJ., dissenting, Where goods and merchandise are sold by weight, the contract of sale is not perfect, and the property of the goods remains in the vendor and they are at his risk, until they are weighed, or until the buyer is in default to have them weighed; and this is so, even where the buyer has made an examination of the goods, and rejected such as were not to his satisfaction. *Hannan & Ross*, 222.

—— *Sale with suspensive condition—Insolvency of purchaser—Collocation—Privilege—Art.* 1998, *C. C.*] Where a movable thing is sold with the stipulation that the title shall remain in the vendor until the price shall be entirely paid, and before payment of the price, but more than fifteen days after the delivery of the thing, the

TRUSTEES—*Continued.*

the company to pay the bonds, or interest thereon for 90 days. It was also provided (by sect. 10) that neither the company nor the trustees should have power to cease running any portion of the road. The respondent furnished supplies necessary for operating the road, after the execution of a trust deed in conformity with the statute above mentioned, but before the trustees took possession of the road for default by the company to pay interest on the bonds. The respondent first sued the company for the amount of his claim, and obtained judgment, and then brought the present action for the same causes against the trustees. *Held*, (1.) Reversing the judgment of Jetté, J., M.L.R., 3 S.C. 238, That the effect of the Act above mentioned, and of the deed executed in conformity therewith, was not to convey the possession of the road to the trustees from the date of such deed, so as to constitute them pledgees; and the trustees were not liable even for supplies necessary for operating the road, furnished before the time they assumed possession. (2.) That although the supplies for which payment was claimed in this case were furnished at a time when the railway company were in default to pay interest on bonds, and when the trustees might have taken possession under the terms of the Act, but neglected to do so, the company was not thereby constituted *negotiorum gestor* of the trustees, so as to render the latter liable for supplies necessary for the operation of the road, obtained by the Company before the trustees took possession. *Farwell & Wallbridge*, 77.

South Eastern Railway Company—43-44 *Vict.* (*Q.*), *ch.* 49—*Cars sold to company before trustees took possession.*] By the Act 43-44 Vict. (Q.) ch. 49, the South Eastern Railway Company were authorized to issue mortgage bonds to a certain amount, and to convey the the railway franchise, rights and interest to trustees, representing the bondholders. The trustees were empowered to take possession of the road in the event of default by the company to pay the bonds, or interest thereon for 90 days. It was also provided (by sect. 10) that neither the company nor the trustees should have power to cease running any portion of the road. The respondents sold cars to the company, after the execution of a trust deed in conformity with the statute above mentioned, but before the trustees took possession of the road for default by the company to pay interest on the bonds. The respondents first sued the company for the amount of their claim, and obtained judgment, and then brought the present action for the same causes against the trustees. *Held*, (1) That the effect of the Act above mentioned, and of the deed executed in conformity therewith, was not to convey the possession of the road to the trustees from the date of such deed, so as to constitute them pledgees; and the trustees were not liable for the price of cars necessary for operating the road, furnished before the time they assumed possession. (2.) That although the cars for which payment was claimed in this case were furnished at a tim when the railway

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C. C.—Procedure.]
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