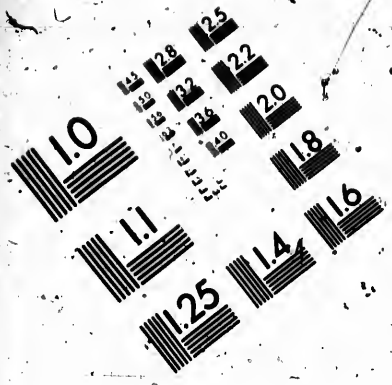

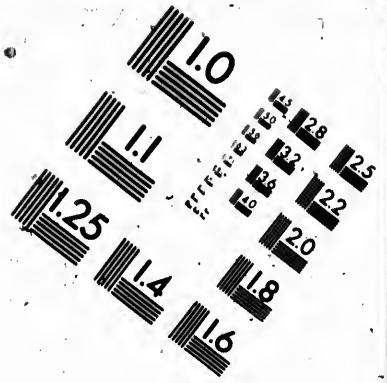

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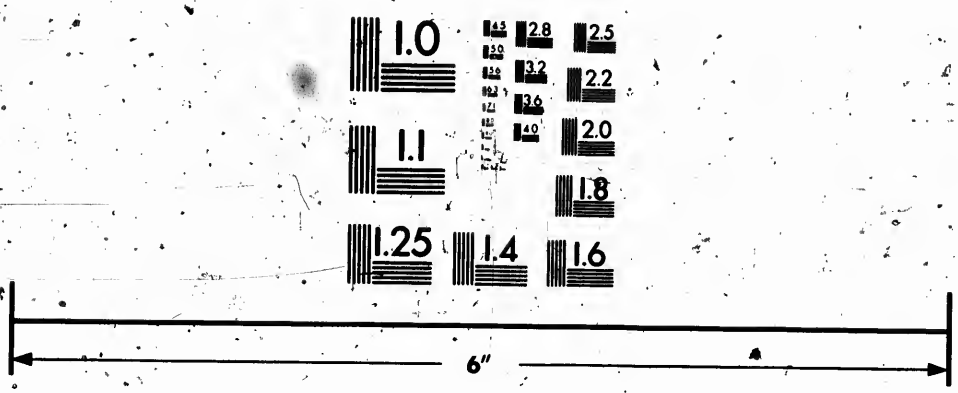

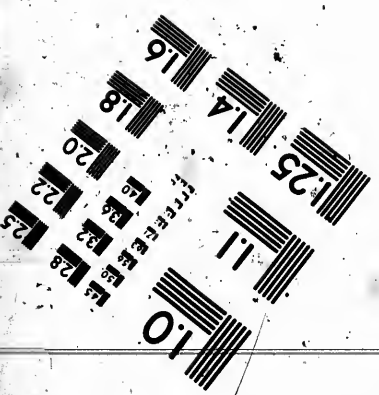

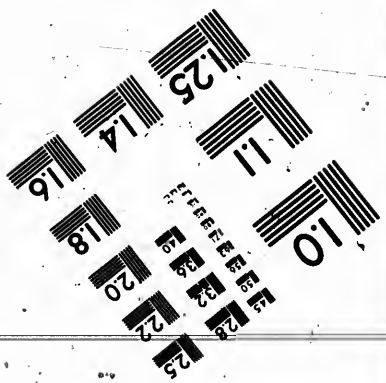

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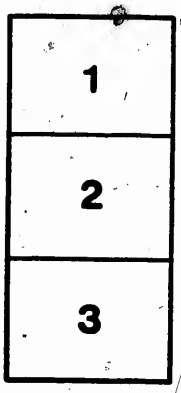

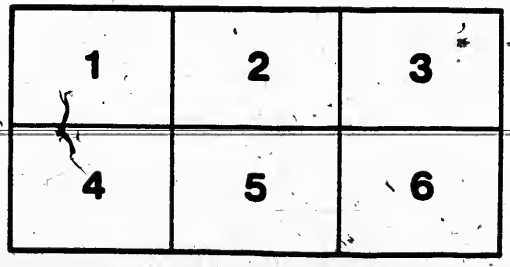

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Jurist.

COLLECTION DE DÉCISIONS

DU

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In the Privy Council, 1861.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

COUNCIL CHAMBER, WHITEHALL, 2nd AUGUST, 1861.

Coram The Right Honorable LORD KINGSDOWN.
" " SIR EDWARD RYAN.
" " THE MASTER OF THE ROLLS.

On Appeal from the Court of Queen's Bench, Lower Canada, between

THE BANK OF MONTREAL,
(Defendant in the Courts below),
APPELLANT;

AND

ELEONORE JANE SIMPSON & *Vir*,
(Plaintiffs in the Courts below),
RESPONDENTS.

HELD:—1st. That Bank Stock is an *immeuble fictif*.
2nd. That a sale of Bank Stock by a tutor to a minor, without the observance of all the formalities required by law in the case of sales of immoveable property is *ipso jure* null and void.

This was an Appeal to Her Majesty in Her Privy Council from a judgment rendered by the Court of Queen's Bench, at Montreal, on the 31st day of May, 1860, of which a full report is given at page 169 *et seq.* of the 5th Vol. of the "Lower Canada Jurist."

Mr. *Roundell Palmer*, Q.C., on behalf of the appellant, argued, in substance, as follows:—

The question involved in the appeal is of general importance. The understanding and practice of the legal and notarial professions in Lower Canada hitherto have been that the dealings by a tutor with the personal property of his minor are valid, and, should the decision of the Canadian Court of Queen's Bench be maintained, the law will be unseated and many past transactions will be impeached.

The issue on the pleadings is whether bank shares are to be considered as "immeubles."

The Judgment of the Superior Court of Lower Canada was founded on the hypothesis that the shares are "immeubles fictifs" or "choses précieuses."

The Court of Appeal decided by a majority of Judges on different grounds.

They held that a tutor has not power of alienating even moveables except "meubles perissables" without the "conseil de famille." But even this majority of judges differed among themselves as to the grounds on which they decided.

The law of Lower Canada is taken from the old law of France which is founded on the Civil Law, and regulated by customs and ordonnances.

The "Coutume de Paris," however, contains no special provisions on this head. The question, therefore, must be determined by reference to the general French law.

The Bank of Montreal vs. Simpson et vir.

It will be convenient to consider first: What was the Civil Law upon the subject. The tutor was "dominus" for purposes of administration, and clothed with a plenary power of alienation, subject to an account which he had to render.

He was originally *bound* to alienate without any formality and without making any distinction between moveables and immoveables. Digest "De Tutelâ." Book 26, Tit. 1, Sect. 1, contains a general account of the tutorship: "Tutela est "ut Servius definit vis ac potestas in capite libero ad tuendum eum qui propter "ætatem suam sponte se defendere nequit, jure civili data, ac permissa; tutores "autem sunt qui eam vim ac potestatem habent: ex quo re ipsâ nomen ceperunt, "itaque appellantur tutores quasi tuitores atque defensores."

From this passage it appears that the office of tutorship was originally contemplated in the light of a personal guardianship.

The tutor was appointed with the object of protecting the person of the minor who by reason of his tender age was held unable to protect himself. The origin of the word proves this theory; Tutor being simply Tuitor or Protector.

In his capacity of personal guardian the tutor naturally became the manager of all the minor's property without exception. He who was the proper person to protect the minor would *primâ facie* be the proper person to superintend his property. In this manner he became the acting master of the property, whether real or personal, armed with all the authority of an absolute proprietor, including full powers of alienation at his own discretion. The only check upon him, if even that existed in early times, was the account of his tutorship which he had to render when the minor came of age.

In the Digest, De Administratione Lib. 26., Tit. 7, sec. 27, we find the passage which became a maxim of the Civilians "Tutor qui tutelam gerit, quantum ad "providentiam pupillarem, domini loco haberi debet."

The tutor, it is also enjoined, must be diligent in securing the property of the minor, and for that end is clothed with plenary powers of sale.

So extensive indeed were these powers that it was settled that not even the special directions of the minor's father could restrict them. For it was seen that circumstances might change, and reasons unforeseen by the father might arise which would render an unfettered power on the tutor's part indispensable for the benefit of the property. Hence the will was treated as merely directory. The Digest, "De Administratione," Book 26, Tit. 7, l. 5, § 9, shows this entire independence.

"Usque adeo autem licet tutoribus patris præceptum negligere, ut si pater "caverit, ne quid rei suæ distraheretur, vel ne mancipia distrahantur, vel ne ves-"tis, vel ne domus, vel ue aliæ res periculo subjectæ, liceat eis contemnere "hanc patris voluntatem."

If the father of the ward could impose no such special limitations as these, it can hardly be supposed that the "conseil de famille" (which had no existence under the Romans) can impose them now.

The fundamental principle of the Civil Law was opposed to any restrictions whatever on the tutor's power to dispose of the property. It was held, and wisely, that unless purchasers could depend on the tutor to make a good title by

himself, the minor would be a sufferer; this spirit breathes strongly in the above passage, but not less in others. The object was to protect the minor solely.

Again in Book 26, Tit. 7, l. 12, § 1.

"Quæ bonâ fide a tutore gesta sunt, rata habentur etiam ex rescriptis Trajani et Hadriani. Et ideo pupillus rem a tutore legitime distractam vindicare non potest, nam et inutile est pupillis, si administratio eorum non servatur, nemine scilicet emente. Nec interest, tutor solvendo fuerit, necne; quum si *bonâ fide* res gesta est, servanda sit; si malâ fide, alienatio non valeat."

The expression *bonâ fide* in this passage refers to the tutor's justification and does not impugn the title of the purchaser.

Mala fides may dissolve any contract, for, where there is fraud, it is the universal policy of the law to make the loss fall on those who commit the fraud.

A purchaser who is *particeps criminis* is liable for the consequences of the fraud, but if a purchaser can come into Court with clean hands he has an equal equity with the vendor and "paribus equitatibus lex prævalebit."

Applying these rules to the present case, no charge of fraud against the Bank can be supported. They stand in the position of bonâ fide purchasers for value. If the minor is a sufferer, her remedy is in the first place against the defaulting tutor; possibly she might follow the property into whatever hands it has passed, but the intermediate purchasers are secure.

Such was the state of the early Civil Law. The tutor's power over *all* property was unlimited and third parties were entitled to treat it as such.

But in course of time it began to be perceived that in the case of real property the loss occasioned to the minor by an imprudent or fraudulent sale was incommensurate with the possible advantages to be derived from a wise and honest one. Land is by nature stable, and its value is not liable to rapid fluctuations such as in the case of personal property requires immediate action to secure the owner; the only danger of loss was from fire, and this was considered of infinitesimal importance compared with the losses frequently sustained by the tutor's anxiety to realize for his own protection even in an unfavorable condition of the market. For it must be borne in mind that, as the tutor had the power of converting and securing the property, he was made responsible for the loss, if any occurred (See Pandects Vol 9, p. 213, edition by Pothier.)

Under these circumstances the written Law interfered, and hence began the grand distinction in the tutor's power between "mobilia" and "immobilia."

The innovation commenced with the Emperor Severus who published an edict (oratio) by which tutors were interdicted from selling the country property in land and houses belonging to their minors; one exception was, however, admitted even to this, viz.: if there should be a debt outstanding, which the rest of the property was insufficient to satisfy. In cases where the minor was associated with some other person in joint-tenancy, this other person was to have notice, and the mortgagee was to be paid off, where there was a mortgage on this very country property. In this exceptional case the tutor must go to the Prætor and obtain an order for sale and then proceed to sell.

This edict of Severus will be found in the Pandects Lib. 27, Tit. 9. (see edit. by Pothier, vol x, p. 232).

The Bank of Montreal vs. Simpson et vir.

The following are the terms of it:—

"Præterea, patres conscripti, interdicam tutoribus et curatoribus, ne *prædia rustica vel suburbana* distrahant, nisi, ut id fieret, parentes testamento vel codicillo caverint. Quod si forte æs alienum tantum erit, ut ex rebus ceteris non possit exsolvi; tunc Prætor urbanus vir clarissimus adeatur, qui pro suâ religione æstimet quæ possint alienari obligarive debeant, manente pupillo actione, si postea potuerit probari obreptum esse prætori. Si communis res erit, et socius ad divisionem provocet; aut si creditor qui pignori agrum à parente pupilli acceperit, jus exsequatur; nihil novandum censeo."

In Pothier's edit. of the Pandects, p. 512 (Lib. 26, Tit. 7) we find these remarks on this edict under the heading "Distractio rerum pupillarium. Quænam distrahi debent."

"Jure Pandectarum, ei qui tutelam administrabat hoc primum incumbebat onus, ut omnes res pupilli mobiles, nec non prædia urbana distraheret."

The tutor had no option about selling what was still within the range of his independent authority. Mobilia and prædia urbana must still be sold or the tutor will be liable for loss accruing to them.

Pothier continues by quoting Ulpian (apparently) to show what was to be understood by "prædia urbana." This passage may be cited as showing that from the first moment when it became important to distinguish between the different denominations of property, *quality* or *nature* was adopted as the test, not value. Thus it stands.—

"Urbana prædia omnia ædificia accipimus non solum ea quæ sunt in oppidis sed et si forte stabula sunt vel alia meritoria in villis et in vicis vel si prætoria voluptati tantum deservientia: quia urbanum prædium non locus facit sed materia. Proindo hortos quoque si qui sunt in ædificiis constituti, dicendum est urbanorum appellatione."

He adds "Plane si plurimum horti in reditu sunt vinearii forte vel etiam olitorii magis hæc non sunt urbana." Not implying by this last sentence that value is the test, but that if the value is clearly very great it may be an element to show what the *nature* of the property is.

After this edict of Severus the tutor was unable to sell the country farms and other landed property of his own power. He might however apply under urgent pressure of circumstances for a special decree of a Judge by which he was authorized to sell and protected from the consequences of what would else have been a breach of the law. This is the situation alluded to by D'Espeisses Des Tut. et Cur. xvi. 5, 10, where, in speaking of the "autorité de Justice" a later amplification of this judge's order, he says:

"Par le droit Romain ils (les tuteurs) eussent faculté de les (meubles périssables) vendre de leur autorité privée *qui ne réquérait cette autorité qu'en l'aliénation des immeubles.*"

The caution with which this alteration was introduced is worthy of notice. The change was at first very slight. "Prædia rustica vel suburbana" were still the only exception to the general rule with which it was evidently thought a bold innovation to interfere at all.

So far, however, the new law appears to have worked well and to have been

and generally beneficial. The natural extension of the exception to all lands and houses followed.

By a decree of Constantine Lib. 10, p. 237, property in the town was put on the same footing with "prædia rustica et suburbana," and here the phraseology introduces a new element. Again referring to the Pandects (Pothier vol. 10, p. 234) Lib. 27, Tit. 9, II, we find:

"Jure Pandectarum ex oratione divi Severi prædia rustica et suburbana prohibentur alienari," and then in the next (IV) we find the change made by *Constantine*.

"Ex constitutione Constantini, et *prædia urbana, et mancipia*, et cetera *mobilia pretiosa*, quorum venditio jure Pandectarum non solum permissa sed imperata erat, similiter prohibentur distrahi: eaquo duntaxat quæ servata perirent, nec non animalia supervacua, alienanda sunt."

After this edict all real property may be assumed to be inalienable by the tutor's independent authority.

The word mancipia included by the last edict with realty signifies slaves *ascripti glebæ*, who might be sold or kept with the property to which they belonged.

To realty and slaves we must now add "cetera mobilia pretiosa," a phrase which appears in the Droit Coutumier as "choses précieuses."

These words must, under the universal laws of interpretation, be applied only to things *ejusdem generis* with real property and slaves *ascripti glebæ*. Thus it might mean farm stock, herds, and wood. This is borne out by the reference to *animalia supervacua* in the last sentence implying that *animalia non supervacua* were classed at least among the cetera mobilia pretiosa."

The progress of the Civil Law is further traced in the same page of the Pandects. (V.)

"Hinc *Valerianus* et *Gallienus*: non solum per venditionem rustica prædia vel suburbana pupilli vel adolescentis alienare prohibentur; sed neque transactionis ratione, neque permutatione, et multo magis donatione, vel alio quoquo modo, transferri sine decreto a dominio suo possunt."

This only applies to the law as established by Severus, but is important as introductory to the *prætor's decree*.

Lastly we have the law of Diocletian preventing the application of the minor's landed property in the country to the payment of his debts. (See Pand. Pothier, as above.)

"Ergo nec in solutum dari res minorum potest. Unde ita Diocl. et Maxim. Si minor viginti quoque annis, *prædium rusticum*, quum aliud deberes, sine decreto in solutum dedisti, dominium a te discedere non permittit senatus consulti autoritas."

In none of these edicts, radical as was the alteration they effected, and careful as their framers must have been to take notice of every important incident, is any mention made of the council of relations. Hence it is fair to assume that, under the Civil Law, the interposition of such a council against the tutor's authority was never contemplated. Moreover, throughout the progress of the restrictions we have mentioned, the greatest precaution is everywhere manifested

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both in spirit and in letter to prevent such a supposition as is put forward in this case, viz., that anything was to be included in such restrictions beyond the immediate subject of them.

Thus it appears clear that, by the Civil Law of Rome, the tutor was enabled of his own authority, so far as third parties were concerned, to sell the incorporeal personal property of the minor at least, which is all that concerns the present case. The next question is, how far, and subject to what modifications, this authority was admitted under the old French Law, or *Droit Coutumier*. The earliest distinct authority we have on this point is to be found in the Edict of Orleans, ordonnance d'Orleans article 102. "Les tuteurs et curateurs des mineurs seront tenus sitôt qu'ils auront fait inventaire des biens appartenans à leurs pupils *faire vendre par autorité de justice les meubles périssables* et employer en rente ou héritages par *avis de parents et amis* les deniers qui en proviendront avec ceux qu'ils auront trouvés comptans à peine de payer en leurs propres noms les profits de tels deniers."

The power of the tutor is stated by Pothier, Traité des Personnes, Partie 1, tit. 6, sect. 4, art. 3, § 2 in these terms: "Le pouvoir du tuteur sur les biens du mineur est tel que tout ce qu'il fait par rapport à leur administration à la même efficacité que si tous ces biens lui appartenait. De la cette maxime de droit: 'Tutor domini loco habetur.'"

This is an entire adoption of the great maxim of the Civil Law.

There is an important passage in Demolombe, Cours de Droit Civil, vol. 7, p. 371, No. 597, respecting the sale of "meubles" by the tutor's authority. He remarks that the Civil Code which enjoined the sale of "meubles corporels" appears not to have considered the tutor's duty with reference to "meubles incorporels," such as stock or debentures, see Art. 452, 457. He draws the conclusion in these words: "La solution la plus juridique est celle qui voyant dans le tuteur le représentant général du patrimoine pupillaire, le regarde comme capable de faire seul et sans formalités, à l'égard des tiers, les actes pour lesquels la loi en effet n'a pas exigé de conditions ni de formalités."

The maxim of the Roman law was "Tutor qui tutelam domini loco habetur," and hence came the principal of French law that the act of the tutor is that of the minor (Pothier, des Personnes part 1, tit. vi., art. iii, § ii); or that the tutor being placed by law in the situation of *dominus* should have as much power as the dominus (Denisart T. iv, vo. Tuteur, No. 75.) So also Meslé asserts that originally the tutors had complete authority for the sale of the minor's property (Des Minorités, part I., ch. viii, No. 17.)

The words of Domat are equally strong: "Le pouvoir et l'authorité du tuteur ont cette effet, que tout ce qu'il gére est considéré comme le fait propre du mineur." Without multiplying authorities on this part of the argument, the general French law is clear that the tutor represented the minor and *in principle* had plenary power of administration over all his property. It may be admitted, however, that, while adopting the principle of the Civil Law the French Jurist adopted also the exceptions as they have been shown. Generally, therefore, the tutor had not authority to alienate "immobilia et cetera pretiosiora" "immenbles et choses précieuses" without the "décret du Juge," which corresponded to the

prætor's decree. Not that his *power* was interfered with on these points but that his proceedings, unsupported by a decree, would be unprotected by his position, so that he would be liable for the consequences. The authority of the tutor is analogous to that of an executor in England. The principles which govern the duty of an executor were drawn from the Civil Law, and especially such portions of it as related to Administration in Tutela.

The duty of an executor is well established. On the death of the testator the personal estate vests wholly in the executor, and, to enable him to execute his office with facility, the law permits him, with or without the concurrence of any co-executor, to sell by actual assignment, with or without a special power of sale, all or any part of the assets, legal or equitable; and, though liable to render an account in the Court of Chancery, he cannot be interrupted in the discharge of his office by any person, whether claiming dehors the will as a creditor, or under it as a legatee. The creditor has merely a demand against the executor personally.

Upon the sale of chattels the purchaser is not concerned to see to the application of his purchase money: it need not even be recited in the conveyance that the money was wanted for the discharge of liabilities. It is sufficient that the purchaser trusts him whom the testator has trusted. If there be any misapplication the remedy is not against the purchaser but the executor. And this is reasonable, for it is impossible for the purchaser to ascertain the necessity of the sale, for this must depend upon the state of accounts, which he has no means of investigating, without powers annexed only to the executorship. Even express notice of the will, and of the bequests contained in it, works the purchaser no prejudice.

Nothing can be clearer than that an executor may go to market with his testator's assets, even with a chattel specifically bequeathed, and the purchaser will not be bound to see to the application of his purchase money.

An agent is accountable to his principal only, and, therefore, if an executor employ a banker to sell out part of the testator's stock, and remit the proceeds to him, the banker, even though he may have reason to believe that a misapplication is intended, is bound to transfer the money, and does not thereby render himself accountable. (See Keane vs. Robarts, 4 Mad. 332.)

In Hope vs. Liddell (21 Beav. 202) where trustees had a power of signing receipts, it was held not to be necessary that the trustees, who sign the receipts, should themselves actually receive the money, provided it be paid to some person by their direction, and the transaction do not on the face of it, imply a breach of trust. Thus, where the purchase money was expressed in the conveyance deed, to be paid to the trustee, and a receipt by the trustee was endorsed, but in fact the money was paid by the direction of the trustee to the tenant for life, it was held that the purchaser was bound to pay the money as the trustee directed and, having done so, was exonerated from the consequences.

If, in the present case, Delisle had been the executor or *legal personal representative*, he would have been bound to get in these shares, and convert them into money, in order to carry out the testator's will. It would have been the duty of the Bank implicitly to obey his directions, and transfer the shares accordingly.

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The executor might have been called to account for the funds he had disposed of, but neither the transferee of the shares, nor the Bank acting bonâ fide, could have been made answerable. The duties of the tutor are analogous to those of an executor, and the same principles, being grounded on reason, justice and even the same law, must be held to apply to the discharge of both offices.

As for the sub-tutor his duty is limited to a mere superintendence of the proceedings of the tutor. If he has reason to suspect dishonesty or infidelity he may move the "conseil de famille" and procure a change of tutor. The property is utterly beyond his disposal, and before the world he is a stranger both to tutor and ward.

The pretentions of the respondents amount to the imposition upon the Bank of the duty of sub-tutor, to watch over the conduct of the tutor. Misconduct is attributed to the Bank in this matter for not checking the proceedings of the tutor. They should have required, it is said, the authority of a "conseil de famille" before transferring these shares. Surely if there is culpability anywhere it lies rather with the "conseil de famille" than with the Bank. It was the "conseil de famille" who gave to Delisle the official character in which he appeared, for it was by their choice and election that he became tutor. Upon the death of the grandmother the paternal uncle took steps to be appointed tutor, but the "conseil de famille" deliberately preferred Delisle, even though at that time he was insolvent. The pecuniary circumstances of Delisle must have been known to the "conseil de famille" but, whether solvent or insolvent, so long as he held the appointment of tutor, parties were bound to deal with him in his official character when acting within the scope of his authority.

It was the duty of the sub-tutor not merely to protest but to take proceedings to set aside the appointment of Delisle, and also in the nature of an injunction to prohibit any alienation of the stock. The protest or notarial notice had no legal effect whatever. There was no evidence to support the assertions contained in the notice; and the most important fact which should have been put forward as a warning to the Bank, the insolvency of Delisle, was not mentioned at all. The sub-tutor, in fact, acquiesced, merely attempting to shield himself against the consequences by an informal protest. Surely the Bank cannot be expected to supply the neglect of the sub-tutor.

On the whole it appears that the tutor must be held, whether under the precepts of the Civil Law or the old French law, or judging by the analogy of an executor in England, to be placed in the position of *dominus* with respect to personal property and to be able to dispose of it accordingly.

Some of the authorities however allude to a formality which must be considered, namely the autorité de justice (see D'Espéisses Vol 1. ed 4to., p. 573.) "Dés que l'inventaire est fait les tuteurs et curateurs doivent vendre d'autorité de justices les meubles perissables de leurs pupilles ou mineurs suivant l'article 102 de l'Ordonnance d'Orléans quoique par le Droit Romain ils eussent faculté de les vendre de leur autorité privée qui ne requérait cette autorité qu'en l'aliénation des immeubles."

What then is this Autorité de Justice, Meslé, "Traité des Minorités des Tutelles et Curatelles" Vol. 1., ch. VIII, page 136, No. 9, says: "Les Articles

des arrêtés expliquent que la vente faite par autorité de justice est celle qui se fait par un sergent."

Again at p. 151, No. 30 : "Faire vendre par autorité de justice, c'est prendre du juge une ordonnance qui assigne le jour de la vente, qui ordonne de la publier et qui commette un sergent pour la faire."

Meslé Tome 2, page 35, speaking of the formalities prescribed for the sale of immeubles adds : "Il en serait de même d'une chose purement mobilière, mais d'une grande valeur et qui formerait pour ainsi dire toute ou la majeure partie de la succession." It is doubtful if this proposition could be supported as it stands ; but there is no evidence in the present case that the 30 shares were even a large part of the minor's inheritance.

Ferrière, referring to the edict of Severus, remarks: "Il y a quelques cas auxquels le décret du juge n'est pas nécessaire pour rendre valable l'aliénation des biens des mineurs, savoir :—

"Lorsqu'il s'agit de choses mobiliéres qui peuvent diminuer de prix par la longueur du temps." Jurisp. du Digeste, Vol. 1, p. 637.

Now shares in a Bank must necessarily be liable to considerable fluctuations in value, possibly to permanent depreciation.

Toullier, Droit Civil Tit. 10, § 3, vol. 2, p. 387, art. 1222, states what acts require the authority of a conseil de famille, referring especially to the sale of immeubles; he does not include the sale of meubles. See also Ibid p. 369, Art. 1199. No exception is made by Toullier even of rentes.

Hence it appears that the autorité de justice does not mean that the Court creates an authority, for that already exists, but merely that it put it in motion.

As to third parties the "autorité" is a nullity : it is simply a direction which will justify the tutor in doing what all along he had the power to do.

Having established the principle that a tutor has power to sell the "meubles perissables" of the minor, and that the "autorité de justice" if necessary at all does not affect third parties, it remains to consider whether these 30 shares of Bank Stock are "meubles périssables" in the sense of this principle. If they are simply "meubles périssables" and not either "immeubles," which will scarcely be argued, or "immeuble fictifs," then the Bank had no option but to transfer them.

The principle of the old law of France was this, "mobile vilis possessio." Thus Marcadé in his Explication du Code Napoléon, Vol. 2, p. 254, No. 263, uses words peculiarly applicable to this case : "Quant aux meubles nous avons vu que pour les meubles corporels, il y a pour le tuteur, non pas seulement faculté, mais obligation, de les vendre, à moins que le conseil de famille n'ait ordonné de les conserver en nature, cas auquel disparaitraient et l'obligation et même la faculté d'aliener. Pour ce qui est des meubles incorporels, savoir, les rentes sur l'Etat ou sur des particuliers, les créances, les actions dans les compagnies de finance, de commerce ou d'industrie, le Code reste muet et le tuteur trouve dans sa qualité de représentant du mineur le droit de les aliéner, sans avoir besoin de demander une autorisation qu'aucun texte n'exige."

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It should be borne in mind that in this case no direct veto on the alienation of the shares was ever put forward by the conseil de famille.

The judgment of the Superior Court treating Bank Stock as "immeubles fictifs" is not supported by the authorities in the old French law.

Loisel, Inst: Coutumieres liv. 3, Tit. 1, No. xi., describes "choses précieuses" as being, "les principales bagues et joyaux reliques et livres dans les maisons des Princes et Hauts Barons."

Brillion (p. 365, Vo: meubles mineurs) gives a similar definition of "choses précieuses."

"Il est des meubles si précieux qu'on en assujetit la vente à certaines formalités, tels que diamans, pierreries."

Thus it was mainly precious stones, gold and silver which came under this definition: articles in fact which might in some sort be regarded as heir-looms. A special value may be attached to these things as in the case of family jewels, and then the restriction against their sale may well be understood.

Possibly "choses precieuses" may also be held to comprise house-furniture which in fact, like fixtures, savours of the realty. Thus Meslé (VI. ch. 8) says: "A l'egard des meubles précieux et des meubles ordinaires etant dans les maisons de campagne, les tuteurs se gouverneront pour leur vente et conservation selon l'avis des parens."

The reason of such a restriction as this also is apparent, for to dismantle a house might often be more fatal to the minor's interest than to sell it. There is no such reason in this case.

The case of "choses précieuses" was an exception to a general principle, and, like all exceptions, must be construed with the utmost strictness. Where the law is express it prevails, where it is not express, the general principle, not the exception, must govern.

It will be urged, however, that the law of 24 March, 1806, and the decree of the 25th Sept., 1813, speaking of rentes sur l'Etat et actions de Banque, assume them to be only transferable under an authorisation by the conseil de famille and according to the formalities prescribed by law.

These laws, however, have no direct authority in Lower Canada as they bear date long after the separation of that colony from France. That they are not declaratory of the previously existing law is shown by Duranton (Cours de Droit Français, note to No. 555) who, referring to the change made in France by the law of 1806, says expressly:—

"Avant cette loi aucune disposition du moins expresse ne limitant le pouvoir du tuteur même pour les rentes au dessus de 50 francs de revenu, le transfert qu'il en aurait fait seul eût peut être été inattaquable."

Cochin (Vol. V., Part 3, page 427) explains the peculiar position of "rentes constituées" thus:—

"Dans le remboursement d'une rente constituée, il (le tuteur) ne dispose d'aucun immeuble: c'est le débiteur de la rente qui en offrant le remboursement, éteint la rente et fait disparaître l'immeuble, c'est lui qui le convertit en deniers, sans le fait, sans la participation, sans le consentement même du tuteur; et le tuteur en recevant ne fait qu'accepter une somme purement mobiliaire."

The result of these authorities is that these 30 shares come under the denomination of "meubles." But should it be held otherwise with regard to the general law of such shares, the Act 4 & 5 Victoria, c. 98, by which the Bank was established by Sect: 20 declares the shares to be personal estate and transmissible; it therefore is impossible to deny the shares the quality of meubles.

They were as such wholly under the control of the tutor and not in the keeping or under the control of the Bank, who, having no right or authority to inquire into and judge of the necessity of a sale and transfer of the shares, could not legally refuse to transfer them at the requisition of their tutor.

Again such shares are commercial commodities, and liable to rise or fall in value according to the circumstances of the market. They are not "immeubles fictifs" or "choses précieuses." Consequently the 30 shares in question were, as part of the *personal estate* of the respondent during her minority, wholly in the keeping and under the control of her tutor for the time being. If there be any question respecting the tutor's right to make such transfers as he did make, it can only be either between him and the respondents, or between them and the transferees. Lastly: The respondents having instituted an action against Delisle "en reddition de compte" of his gestion, and having obtained judgment against him for the *reliquat* or balance thereof, it must be presumed that Delisle in that action duly accounted to the respondents for the proceeds of the sales of the 30 shares. The respondents are estopped from proceeding against the appellants.

Mr. *Wickens* and Mr. *Gadsden*, on behalf of the respondents, argued, in substance, as follows:—

The material facts are not in dispute. The question is purely one of Canadian law, and turns on the powers of the tutor to alienate the property of his minor. English law does not aid, for the analogy of an executor and his duty in England does not hold.

The appellants are obliged to contend that the power of a tutor over property of this description is so absolute as to enable him to alienate it by his sole authority under any circumstances whatever. For if that power is ever limited there could be no stronger case for such limitation than the present. As a precaution against any possible mismanagement of the property by the tutor, a *subrogé tuteur*, or sub-tutor, was appointed, and, when the occasion arose, he took the only means in his power to prevent any misapplication. The notice which he served on the Bank was equivalent to what is known in England as a "distringas." The Bank was in fact warned that any attempt to deal with the shares would be fraudulent.

The exact power and office of the sub-tutor is not very distinctly laid down; but his duty appears to be to watch the tutor and interpose a check when necessary: his power was simply negative; he could initiate nothing. Certainly he has no power to displace the tutor or assume his authority. He is one "qui surveille toujours, et n'administre jamais, aide au besoin le tuteur et ne l'entrave point." But he is clearly the person to whom the minor and the minor's friends look to warn both them and third parties against misconduct on the tutor's part. Thus Ferrière (Dict. de Droit, 1771): "En pays coutumier on ne fait pas de difficulté de donner la tutelle ou la curatelle des mineurs à ceux qui sont leurs

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créanciers ou leurs débiteurs, par la raison que les tuteurs sont obligés de faire un inventaire en présence d'un légitime contradicteur qui est un subrogé tuteur."

But the allegation of insolvency was not necessary. The position of Delisle was notorious, and has been admitted by the Bank throughout. Under these circumstances, even were the tutor's power the same as that of an executor, which it is not, the decision of the Canadian Courts would be right. But the respondents prefer to rest their case on the general law of Canada and the power of the tutor.

The history of the existing Canadian law is important, both to interpret the authorities and to explain the principles. In this history there are three stages—the Civil Law of Rome, the old Law of France, and the modern Law of Canada. The Code Napoléon has no authority, nor even deserves examination, as throwing light on the old French Law. Its examination must be regarded with suspicion, as likely to mislead rather than direct.

The effect of the Code Civil was nothing less than to reverse the former law. Before the Code the general rule was that the tutor *must preserve*, now it is that he *must alienate*. It is necessary on this account to notice whether the writers who examine this question wrote before or after the Code.

In the first place, what is the power of the tutor? Voet, in his dissertation on the Pandects (Lib. 27, Tit. 9,) lays down the law and catalogues the restrictions laid by it on the tutor's power of alienation: "Quamvis autoritas tutorum magna sit, et in multis, imo plerisque casibus, infirmum suppleat pupillorum judicium in negotiis per eos contrahendis, quandoque tamen sufficiens non est: idque potissimum, in rebus pupillorum alienandis usu venit. Nam etsi ante orationem Severi et ad eam secutum senatus consultum solâ tutoris autoritate processerit rerum pupillarium alienatio atque divisio.....postea tamen aliter fieri ut plurimum non potuit, quam si interpositum fuerit magistratus decretum."

Voet goes on to speak of the restrictions imposed by Severus and Constantine on the alienation of landed property, and then proceeds: "Et generaliter rerum omnium immobilium, uteunque sterilium, alienatio interdicta fuit.....uti et mobilium eorum, quæ servando servari possunt, nec tempore pereunt, veluti aurum, argentum, vestes, gemmæ, aliaque mobilia pretiosiora; solâ relictâ tutoribus licentiâ alienandi sine decreto res tales, quæ servando servari non possunt, quales sunt fructus, animalia superflua, vestes attritæ, et alia his affinia."

Farther on he continues on the same subject: (2) "Sub rebus autem pupillaribus alienari prohibitis etiam hic continentur res illæ incorporales, quod immobilibus quantum ad plurimos juris effectus accenseri solent. Ac proinde non sine decreto procedit alienatio emphyteusios aut superficiei.....nec salinarum aut fodinarum metalli, cretæ, arenæ, et similium. Sed nec absque decreto licita ususfructus aut aliarum servitutum tam personalium quam realium remissio. Idemque circa reditus annuos aut census remittendos, vel in alium transferendos statuendum videtur."

Such according to Voet were the limits placed on the tutor's authority even under the civil law; he then remarks on a curious case which had arisen, whether a floating watermill was to be included in these restrictions, inasmuch as it partook of the nature both of "mobili" and "immobilia" his words are as follows, "Et quamvis molendinum natabile non modo res mobilis fit, sed et fortuitis pluri-

bus obnoxia casibus atque periculis ex violentiâ fluminis, multisque insuper ac gravioribus impensis conservanda, sicut a nonnullis in numerum rerum, quæ servando servari nequeunt, et ob id sine decreto distrahi possunt, referatur. Montanus verius tamen, sine decreto molendinum tale alienari non posse; cum utique constet, illud rem mobilem pretiosam esse, atque aptam asservationi, atque sunt vestes pretiosæ, quarum alienatio permissa non est."

Even if the most liberal test be adopted and property may be alienated without a decree, if it comes into the category of things quæ servando servari non possint these shares can hardly be held alienable. But if Voet states the law accurately the restriction is yet more sweeping, for a floating watermill comes within its limits as being a thing of too great value to be submitted to the tutor's sole discretion.

Strictly the law after the time of Constantine appears to have been thus, that the tutor had no power to alienate valuable moveables without a decree authorizing him so to do, any more than he had power to alienate absolute immeubles without such a decree. Whether these shares be moveables or immoveables the tutor had no power to alienate them. His duty was confined to administration and administration is totally distinct from alienation; Heineccius (Recitations V. 1, p. 430, sec. 468, Dupin's edit:) enunciates the same principle "Idem thema paradoxum Justinianus noster demonstrat 2o. exemplo tutoris, qui non est dominus rerum pupillarium, sed nudus administrator, et tamen eas aliquando recte alienare potest: dicimus, cum *aliquando* recte alienare: distinguendum enim est inter bona immobilia et mobilia: hæc modo non sint pretiosa admodum, et servando servari non possint, licite alienantur L. 22 C. de adm. tut. L. ult C. quando dec: non opu. contra, si sint immobilia maximi pretii, alienatio licita non est, nisi accedente magistratus decreto."

The old French Law adopted precautions even more stringent and of yet wider range.

The ordinance of Orleans requires the "autorité de justice" for the sales of all "meubles perissables."

Ferrière (De la minorité et de la tutelle, part. IV, sec. 2, p. 166) especially points out the restrictions on the Civil Law imposed by legislation in France especially under the edict of Orleans; "Nanti des effets du pupille, le tuteur est obligé de mettre son attention à vendre les meubles perissables, et à les vendre, non de son autorité privée comme le lui permet le droit romain mais bien d'autorité du juge ainsi que le tiennent Bourot et Graverol. Doctrine fondée sur la formelle disposition de l'article 102 de l'ordonnance d'Orléans: il y a eu dans des temps postérieurs, de pareil règlements."

The same author says (sec. VII. p. 215):—

"Le tuteur est considéré comme étant le maître. Théoréme qu'il faut entendre relativement à l'autorité qu'a le tuteur d'aministrer les biens pupillaires; car s'il est question de les cbrécher le tuteur n'a en cela aucun pouvoir—nam tutor in re pupilli tunc domini loco habetur cum tutelam administrat, non cum pupillum spoliat."

"Ainsi le tuteur ne peut *donner* les biens du pupille comme le jurisconsulte Paulus le décide (Leg. tutor ad utilitatum 22 et Leg. Lucius Titius Curator 26).

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Décision qui n'a rien de merveilleux dès qu'on fait que nous ne pouvons transporter à autrui ce qui ne nous appartient pas."

The incapability of alienation attaches not merely to real estate or immoveables, but to many descriptions of moveables also; and this is equally the case both under the Civil Law and under the French Law. Both from principal and from authority it is clear that this incapability extended to "précieuses" to "rentes constituées" to "actions de banque" and many things besides which are not immoveables in the ordinary acceptation of the term.

The real test is not the character of the property but their value and capability of preservation. *Meslé* adopts this proposition in his Traité des Minorités des tutelles et curatelles V. 1, ch. 8, page 134, No. 8.

"Dans l'ancien droit, les tuteurs devraient faire vendre les maisons de ville, et tous les meubles; il n'y avait que les biens de campagne, et encore avait-il à les faire valoir que les tuteurs ne pouvaient vendre sans décret du juge. L'empereur Constantin ôta aux tuteurs et aux Curateurs le pouvoir de vendre les maisons de ville, l'argenterie, les habits des prix, *et tous les meubles précieux*: il leur permet seulement la vente des habits qui ne pouvaient se garder et des bestiaux superflus."

In the next page he asserts the authority of "conseil de famille."—

"A l'égard des meubles précieux et des meubles ordinaires étant dans les maisons de campagne les tuteurs se gouverneront pour leur vente et conservation selon l'avis des parens."

In the following pages he quotes the ordinance of Orleans, and observes its effect in these words:

"L'article 102 de l'ordonnance d'Orléans ordonne aux tuteurs de faire vendre par autorité de justice les meubles perissables de leurs mineurs."

This autorité de justice was a solemn authorisation from a competent court, and was put in force with clear formalities, as Meslé describes it.

"C'est prendre du juge une ordonnance qui assigne le jour de la vente, qui ordonne de la publier et qui commette un sergent pour la faire. Il y a des lieux où, outre le sergent le juge commet un notaire ou le greffier pour écrire la vente."

How, then, can it be said that when forms and solemnities like these are prescribed they may be disregarded with impunity?

As to the particular property in question in this case, the principle which governs the whole system of the law as to tutors requires that such property should be inalienable except with [illegible] formalities. Shares, such as these are the surest and simplest means [illegible] personal property; their value varies but slightly, and they are but [illegible] sudden depreciation or destruction. As might be expected the spirit of the authorities is against their alienation. Fréminville asserts distinctly that "rentes" even though declared "meubles" by law are not subject to the tutor's alienation. In his work, De la minorité et de la tutelle, vol. 1, p. 260, Lib. 5, Tit. 1, ch. 1, he says:—

"L'injonction de vendre les meubles est fondée en partie sur ce qu'on veut que les prix qui en provient soit placé et devienne productif d'intérêts. Ce motif même des dispositions de l'art. 452 prouve qu'il ne doit pas s'appliquer aux rentes constituées ou foncières soit sur des particuliers soit sur l'Etat. Les

annuités de ces rentes sont les intérêts des capitaux si l'art. 152 est rédigé en termes généraux qui paraissent embrasser tous les meubles d'une manière absolue, c'est sans doute, parcequ'au moment de son adoption, on ignorait que plus tard les rentes seraient declarées meubles."

In like manner Duranton (vol. 3, No. 543) affirms "Tuteur doit faire vendre les meubles" adding in the note, "Ceci ne s'entend pas des meubles incorporels tels que les rentes, les créances exigibles ou à terme."

The rentes constituées were merely investments of money to produce a certain interest, the rate of which was settled by the agreement of the parties. Investments in Bank Stock, especially such shares as these in question, must come under the law as stated by Fréminville, inasmuch as they are "productifs d'intérêts."

The analogy of an executor in England has been argued from, but no such analogy exists: The argument for the appellants has shown that the tutor's power is far more restricted. But even the power of an executor does not in all cases relieve third persons treating with him from liability. Thus in Keane vs. Robarts (4 Madd:) the Ld. Chancellor said:—

"Every person who acquires personal assets by a breach of trust in the executor is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking he does not become a party to the breach of trust by buying or receiving as a pledge for money advanced to the executor at the time any part of the personal assets, whether specifically given by the will or otherwise, because the sale or pledge is held to be prima facie consistent with the duty of an executor. Generally speaking he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is primâ facie inconsistent with the duty of an executor. If a party dealing with an executor for the personal assets pays his money to the executor, so that it may be applied to the purposes of the will, he is not responsible for the executor's misapplication of it: but if in dealing with the executor he does in truth pay his money for the private purposes of the executor he is equally a party to the breach of trust whether he applies his money to the private debt of the executor or to the private trade of the executor."

This distinction applies to the conduct of the appellants. The transfers were made for the payment of the tutor's private debts, and the Bank was aware of the intention and thereby became participators in the illegality.

Lastly the alienation is "nulle de plein droit," absolutely null and void; and the respondents are entitled to treat it as such and to be put in the same position as if no transfer had ever been made.

On this point Voet is again an authority. Lib. 27, Tit. 9, No. 9.

"Quod si in rebus, non nisi ex decreto alienandis, decreti solennitas non fuerit adhibita, ipso jure nullum plerumque est, quicquid gestum fuerit."

He carries the rule farther than is requisite for the present purpose, asserting that even the prætor's decree, if knowingly and wrongfully given, will work no deprivation on the pupil.

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Ferrière, (Traité des Tutelles, Part IV, page 227), also asserts the nullity of an unauthorized sale.

"J'ajoute que la vente faite par le tuteur sans l'autorité du juge est nulle de plein droit, et tellement, que le mineur n'a pas besoin à cet égard d'être restitué en entier: 'et ad extremum notandum, venditionem factam sine decreto ipso jure nullam esse: idocque minori non opus esse restitutione in integrum.' De là suit que le Pupille devenu adulte peut dans les mêmes cas faire rescinder la vente sans prendre des lettres." And in support of this principlu he cites Bourot and Basnage.

Meslé also (Vol. I, p. 209) says: "Le tuteur qui vend sans cause vérifiée est sans pouvoir de vendre comme serait un procureur qui vendrait sans pouvoir de vendre," (Vol. 2, p. 35.) "La restitution n'est pas nécessaire quand le tuteur excède son pouvoir. Et en ce cas il n'y a pas lieu de prendre des lettres de recision." (Vol. 1, p. 145,) "Quand la formalité nécessaire pour la vente des biens de mineurs n'ont pas été gardées, la vente est nulle, et le mineur revendique son bien, sans qu'il ait besoin de restitution. So also Magnin (Vol. 2, No. 1095), "Les tuteurs, et généralement tous ceux qui sont chargés des intérêts des incapables ne peuvent changer ni restraindre par la novation leurs droits, priviléges ou avantages. Toute novation de leur part des droits de ceux qui sont sous leur puissance est nulle de droit."

Solon, (Vol. 1, p. 42, No. 75,) says that in some cases "la minorité était cause de nullité de conventions." As to the argument that the respondents are estopped by the judgment against Delisle: first, it is not so pleaded; secondly, there is no evidence these shares were included in the account rendered. The respondents had two remedies, and they were entitled to avail themselves of both. The dates, however, show that this suit was commenced before the judgment was given against Delisle, consequently, there could be no estoppel.

Mr. *C. E. Pollock*, in reply:—

The main contention of the respondents that the value of the property, not its nature, is to decide as to the tutor's power of alienation is opposed to principle and unsupported by authority.

The passage in Voet (Lib. 27, Tit. 9,) applies to real property and such as savours of the realty. Where he extends the limitation, he is merely guarding against a narrow misinterpretation of the general principle. He asserts the great distinction made by Severus and Constantine between landed and personal property; and then he admits, rather by way of warning, that the restriction may be held to include some things which, taken by themselves, appear to be personalty, but which may be affected by being closely connected with the realty. Thus, also, the tutor would not be permitted to sell an easement, such as a right of way, over his minor's property. And where Voet suggests that gold, silver, gems, hangings or valuable property, may be included in the law forbidding alienation of real property, it is because they may be, and often are, annexed to the realty.

The instance of the floating mill does not assist the respondent's argument, for the principle which makes such a mill inalienable is not its value, but its nature, which partakes of realty. The same remarks apply to the passage in

Heineccius, who after saying "Distinguendum est inter bona immobilia et mobilia," appears to carry the limitation further when he speaks of "mobilia maximi pretii," as distinguished from "mobilia." But this extension can only embrace "choses précieuses," which is a mere translation of "mobilia maximi pretii." The doctrine concerning "choses précieuses" was very confined, and applied only to articles of the greatest value, which might be regarded as heir-looms, having a fictitious nature of their own, and not to such property as the shares in question.

A close examination of the language of Ferrière in the first passage quoted, (Part IV, Sec. 2, p. 166) shows that the "autorité de justice" he speaks of is not a restriction, so that the sales made without it would be void, but merely a mode which the tutor is directed to adopt. His sentence opens by asserting that the tutor is bound to sell the *meubles périssables*, that is, he must sell them under *all* circumstances, for no qualification is mentioned, and then Ferrière shows how he is to sell them. The latter part of the passage, therefore, concerns the tutor, but not third parties. Indeed the conclusion to be drawn from this passage is, that if the tutor could not procure the authority, still he is bound to sell even without it.

The next passage from the same writer (Sec. 7, p. 215,) applies only to "immeubles," that is the "prædia rustica et suburbana" of the edict of Severus: for it is founded on the maxim, "Tutor domini loco habetur" of the civil law, which was universally referable to landed property. The word "dominus" would not be applicable to personalty.

Fréminville was cited to prove that "rentes constituées" may not be alienated without a special authority. (See Vol. I, p. 260, Lib. 5, Tit. 1.) But Fréminville classes "rentes constituées" and "foncières" together, and impliedly his argument rests on this classification. "Foncières" is equivalent to "ground-rent;" and if "rentes constituées" can be placed in the same category the reasoning is sound, inasmuch as they may be said to savour of the realty. But bank stock is not "rentes constituées" much less "foncières," and does not in any way savour of the realty.

Even if "rentes" are inalienable as "choses précieuses," which may be the meaning of Fréminville, it does not follow that shares in a private corporation are such; for the security is evidently established on a weaker basis.

The *value* not the *character* of the property is the true test. Ferrière (Jurisp. Vol. I, p. 637) supports this view, where he gives as the exception to cases in which the judge's decree is necessary:

"Lorsqu'il s'agit de choses mobilières qui peuvent diminuer de prix par la longueur du temps." That is to say the possibility of depreciation appertaining to the apparent quality of the property, not its pre-existing value or quantity, is to guide the tutor.

If the property had consisted of a single share, it would have been equally inalienable according to this rule, had it been of such a nature as not to be susceptible of depreciation. But these shares are particularly liable to such depreciation, for the Bank Charter expires in 1862. Length of time, therefore, would not only diminish but annihilate the value of the property.

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As to the passage cited from Voet Lib. 27, Tit. 9, it is confined to things "non nisi ex decreto alienabilis," i. e., to immoveables, which these shares are not.

The same answer applies to the passages quoted from Ferrière and Meslé. That it was landed property to which the authors were alluding in these passages concerning the nullity of sales, may be inferred from the references given by Meslé after asserting (p. 145). "Quand les formalités nécessaires pour la vente des biens do mineur n'ont pas été gardées la vente est nulle et le mineur revendique son bien sans qu'il ait besoin de restitution."

He refers to a passage in the code entitled, "De prœdiis et rebus eorum," and a similar reference appears immediately afterwards.

The word "biens" which Meslé here uses is noticeable, being invariably applied by the jurists to landed property.

This use of the word is casually illustrated by Pothier (Pandects, Vol. 10, p. 251).

"Pour que la vente des *biens* d'un mineur, soit valide, on requiert le concours de quatre choses." The first three requisites refer to the decree of the magistrate, and he then continues 4o. "qu'en vendant ce *fonds de terre* le tuteur ou curateur," &c.

By "biens" Pothier obviously meant "fonds de terre" or landed property.

This restricted use of a common word as meaning landed property appears:

1st. In the Roman law and Latin language, where "res" constantly signifies land.

2nd. In French, in the word "biens."

3rd. In English we find "goods" with a similar meaning in Comyn's Digest, Title "Biens."

These shares then are declared personal property by the appellants' Charter of Incorporation.

They are not "rentes," nor do they stand in the same position as rentes; and they were liable to depreciation on account of the approaching termination of the Charter in 1862.

Under these circumstances the tutor was the proper person to require a transfer, and the Bank could not decline to transfer at his requisition: the judgment of the Canadian Court of Q. B. should therefore be reversed.

Their Lordships, after taking time to consider, pronounced the following OPINION:

The Appeal in this case involves a question of considerable importance as to the extent of the authority of a tutor over the property of his ward according to the Law of Lower Canada, which is the old French law. The respondent, Dame Eleonore Simson, is the only child and sole heiress of her father, John Simson, who died in March, 1835; she was a posthumous child born in the month of August after the death of her father. On the 9th October, 1835, her mother was appointed her tutrix, and a gentleman of the name of John Fisher was appointed sub-tutor. On the 19th July, 1843, the mother of the respondent married Charles Michel De Lisle, and they were in October following appointed joint tutor and tutrix of the respondent. In November following the mother of the respondent died, whereupon in December, 1844, the maternal grandmother was

appointed tutrix. On the death of the grandmother, which took place in May, 1846, Robert Simson, an uncle, was appointed sub-tutor, and Charles Michel De Lisle, the step-father, was appointed tutor of the respondent. This appointment was made on the 27th May, 1846, and in such a manner as not to interfere with or abrogate the appointment previously made of Robert Simson as sub-tutor.

Part of the property of the infant, derived from her father, consisted of thirty shares in the Bank of Montreal. Robert Simson on the 29th September, 1846, in his character of sub-tutor, gave a notice in writing to the Bank, through its cashier, informing them that C. Michel De Lisle had no power nor authority to sell these shares. Notwithstanding this notification C. Michel De Lisle sold six of the shares in December, 1848; two more in January, 1849; ten more in June following; and the remaining twelve in the following month of September, 1849. In all these cases the Bank of Montreal made the transfer of these shares in the books of the Bank, as required by De Lisle, out of the name of the father of the respondent, in whose name they were standing, into the name of the various purchasers to whom De Lisle had sold them. The question in this appeal is the validity of these transfers.

The respondent in 1855 married her present husband, Mr. Turner, who is also a respondent. In September, 1857, about a year after she attained her majority, and being by her marriage contract solely entitled to the property derived from her father she instituted original proceedings against the Bank of Montreal in the Superior Court of Lower Canada, claiming the dividends which had accrued due on the thirty shares from the time of their sale in December, 1848, and in January, June, and September, 1849. The sole question in the cause was whether the transfer of the shares was valid and effectual. The case was fully argued before the Superior Court of Montreal on the 30th of November, 1859, when the Court pronounced a judgment in favor of respondent, holding that the power of the tutor did not extend to the sale of the shares, and that the transfer of them by the tutor was null and void.

The Bank of Montreal appealed from this judgment in 1860 to the Court of Queen's Bench in Canada, and the case was argued in March, 1860, and judgment given on the 31st May, 1860, by a majority of the judges affirming the decision of the Court below, and dismissing the appeal with costs. The correctness of this decision is the question before us.

The facts are not in dispute, and the question to be determined is the extent of the authority of a tutor over the property of his ward; whether that authority extended to selling the Bank shares in question; and, if it did not so extend, whether the act can be considered as void in itself or only voidable. For the purpose of determining the question it is necessary to ascertain what the law of France was in this respect prior to the great French Revolution, which is the law which now obtains in Lower Canada. This law is the old Civil Law as applicable to this subject, regulated, nevertheless, by Article 102 of the Ordonnance of Orleans, promulgated in January, 1560, during the reign of Charles IX and which modified to some extent in this respect the Civil Law which had previously prevailed on this subject.

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The general power of the tutor over the ward and his property was that of a parent—"domini loco habetur," he could get in the property of the minor and give a discharge for payment of debts due to him; in all matters relating to the tutelage, the act of the tutor bound the minor. The power of the tutor to dispose of the property of the minor was originally by the Civil Law unlimited, unless accompanied by fraud; and in some cases he was compulsorily required to realize by sale all property that might by possibility suffer by being kept, such as houses, lest they should be burnt.

This general power was limited, first by the Law of Alexander Severus, which forbade the sale of "prædia" belonging to the ward, and afterwards by the Edict of Constantine, which prohibited the sale not merely of "prædia" without judicial authority, but even the sale of any other property of the minor, unless such as was liable to perish by use, and also the superfluous animals. And this was the law obtaining in France in the earlier part of the sixteenth century, when it was further regulated by the Ordonnance of Orleans in January, 1560, by which, in Article 102, it is enacted that tutors and curators should be bound, as soon as they had made an inventory of the property of their wards, to sell "par autorité de justice" the perishable moveables, and to lay out the produce under the advice of relations and friends, in the purchase of "rentes ou heritages," that is, in the purchase of property producing a permanent income. It is to be observed, therefore, that the Ordonnance of Orleans recognizes the law then subsisting in France in this matter to be regulated by the Edict of Constantine, which prohibits the sale of any property of the minor except those moveables which perish by use and the superfluous animals; and then, in order to extend the power of sale of the tutor not merely over such moveables as are within the class specified by the Edict of Constantine, but also over those which are liable to decay or risk from other causes, enacts that the tutor shall have power to sell all "meubles périssables," but these only under the authority of the law ("par autorité de justice").

By "meubles périssables," as distinguished from moveables which perish by use, we understand to be meant all property which is liable to deteriorate from permanent causes. It is obvious that an Ordonnance which declares that, for the sale of perishable property of a moveable character, the sanction of a Court of Justice shall be required, infers that moveable property which is of a permanent character and producing a permanent income, cannot be disposed of without such authority. The effect and extent of the Ordonnance of Orleans on the power of the tutor over the property of his ward has been the subject of much discussion by the writers and jurists versed in French law, and has also been the subject of many judicial decisions, several of which have been cited and commented upon in their works. After carefully examining the various authorities and the writers on this subject prior to the enactment of the French Codes, and testing their opinion by the decided cases cited in their works, we are of opinion, though various passage may be found dispersed through their writings on which arguments may reasonably be founded leading to opposite conclusions, that no considerable or irreconcileable diversity of opinion appears to exist between them, and that

the result of the law so far as it is applicable to the case before us may be thus stated :—

The tutor's duty is to make an inventory of all the property of his ward, and to take an administrative care in the protection and management of it ; but without the sanction of a Court of Justice having been previously obtained his power does not extend to selling any portion of the immoveable property of his ward, or any portion of that property which is of mixed character ; and further that his power is also restricted from selling any portion of the moveable property of the ward without intervention and previous sanction of a Court of Justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion also as being of a perishable character will necessarily either cease to exist or will from permanent causes become deteriorated in value at the period of time when the ward shall attain his majority ; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heir-looms, as to which an hereditary " pretium affectionis" is attached. Although this is an incomplete statement of the law, it is, we think, accurate and sufficiently comprehensive for the purposes of this case.

It has been contended on behalf of the appellant, that as in the Civil Law the original principle was that the tutor stood in the place of the father, and was dominus of the property of the ward and, as such, had power to dispose of all his property the case must be considered as one in which the burthen of proof lies on the respondent to establish that the property in question falls within the range of the various classes of property which, by regulations made subsequent to the original law, should be excepted from the general rule which gave the tutor complete control : these exceptions, it is said, were of three sorts : first, immoveable property, and next, *quasi* immoveable property, which was called " immeubles fictifs ;" and, thirdly, moveable property of a peculiar value as possessing a " pretium affectionis," and being in the nature of heir-looms : that these were only three classes of property excepted from the control of the tutor. That all property not falling within one of these three classes is still subject to the general control of the tutor, and that bank-shares do not fall within the description of any one of these classes of property, and, consequently, that the power of the tutor over them was absolute and the right of the respondent to recover them gone.

But this is not the view we take of this case : we think that the Edict of Constantine changed the law on this subject, and exempted all property of the ward from the saleable control of the tutor, with the exception of the property there mentioned, and that, if the matter had remained as fixed by that Edict, such must be considered to have been the law of France prior to the year 1560. And we also think the Ordonnance of Orleans has only altered the law in this respect by extending the power of sale by the tutor over the moveable property of the ward there specified, and this only with the previously obtained sanction of a Court of Justice.

Although the various authorities cited to us are susceptible of various meanings and without some qualification of the generality of their terms are not entirely

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reconcileable, yet this is, we think, the general effect of them; and this view is confirmed by the cases cited and commented upon in such authorities; as an instance of which one case which was cited before us may be referred to, where an office belonging to the ward, which had during the vacancy caused by the death of her father lapsed to the profit of the State, had been disposed of by the widow as the guardian of her daughter, the sale was annulled on the ground that the office was in the nature of "immeuble fictif."

But the case proceeds to say:—"Il en serait de même s'il s'agissait d'une chose purement mobiliaire, mais d'une grande valeur, et qui formerait, pour ainsi dire, toute ou la majeure partie de la succession."

If this be the correct view of the case, the burden of the proof falls on the appellant to show that the Bank shares fell within the property which De Lisle, as tutor, was entitled to dispose of without the sanction of a Court of Justice.

It is always to be borne in mind that, as the wants and exigencies of society increase, new denominations of property will come into existence, to which the observations made and rules laid down in previous cases do not precisely apply, but we entertain no doubt upon a full review of this subject, that the Bank shares in question do not fall within any class of property which the tutor has power to dispose of without the sanction of a Court of Justice. It was not, in our opinion, open to the tutor to speculate upon, or to decide for himself or for his ward, whether such shares as these were likely to raise or fall in value. We think that no distinction can be taken in this respect, and so far as the power of the tutor is concerned between the shares in the Montreal Bank and shares in the Company of the Bank of England, and stock in the English or foreign funds, and that the sale and realization of such property requires the interposition and sanction of a Court of Justice, and the re-investment of the proceeds in property producing a permanent income according to the terms of the Ordonnance of Orleans.

It has also been argued before us that the power of the tutor is by all the authorities held to include administration, and that administration necessarily includes sale. But we dissent from that argument; we think that the supposition that the administration of the affairs of a ward necessarily involves the sale of any portion of his property, is one derived from the ideas which in England attach to the word "administration," which in its technical sense applies only to a legal personal representative; but this is, in our opinion, wholly distinct from the functions of a tutor, and which, in order to avoid confusion, it is essential to keep distinct. Administration, as applicable to a tutor, includes management, but does not include sale, unless to the limited and qualified extent already pointed out.

It is partly for this reason that we have not thought it necessary or desirable to comment on the authorities cited from the decisions of the English tribunals, and the arguments deduced from them: they have not, in our opinion, any relevancy to the matter to be decided in this case.

Neither have we thought it of any moment to consider the Articles in the present French Code, or the discussions in the Conferences which took place when that Code was framed, except so far as these Conferences illustrate any ambiguous point in the earlier law which up to the time obtained in the King-

dom of France. So far as these latter have any bearing on the subject, they concur in bringing us to the conclusion already stated, that by the law of France prior to that period, and which is that now in force in the Province of Lower Canada, it was not in the power of the tutor to sell the Bank shares without the assistance and sanction of a Court of Justice.

The next question to be considered is the effect of the sale which has actually taken place, and the transfer of these shares to persons who are strangers to the record.

It is argued by the Counsel for the appellant, even on the assumption that the tutor exceeded his authority, still that the sale was good; and that, assuming that the transfer ought not to have been made, still that being made, it is valid, and that the act can only be treated as a voidable transaction, and not as one actually void, and that, if it be only voidable, the persons who bought the shares, and in whose names they now stand, ought to have been brought before the Court to answer to a matter in which they were so materially interested.

We are of opinion, however, that the act of the tutor, exceeding the limits of his power and the scope of his authority is actually void. The authorities on this subject, amongst the authors cited to us, are conclusive on this head. It is not necessary to refer to them in detail, but it may be useful to refer to one passage, where the principle which governs them and the reasons for it appear to us to be well and lucidly stated by Pothier, in his "Traité de Personnes," Part I, Titre VI, Article III, Section 2.

After stating in this passage that a minor can, after his minority is over, reclaim immoveable property sold by the tutor, Pothier observes that he can do so without having "besoin pour cela de lettres de rescission; car on n'a besoin de ces lettres que pour revenir contre son propre fait. Un mineur a besoin de lettres contre le fait de son tuteur, parce que le fait de son tuteur est censé son propre fait: mais cette règle n'a lieu qu'a l'égard des choses renfermées dans le pouvoir d'un tuteur c'est-à-dire, qui concernent l'administration du tuteur. Or, cette vente fait par le tuteur, étant une chose qui excède les bornes du pouvoir du tuteur, n'est pas plus à cet égard le fait du mineur que ne le serait le fait d'un étranger qui serait avisé de vendre cet immeuble. Le mineur n'a donc pas plus besoin de lettres pour revendiquer cet immeuble, que s'il avait été vendu par un étranger sans caractère; et le tuteur lui-même dans les choses qui excèdent son pouvoir, doit être regardé sans caractère."

This passage, besides bearing on the point now considering, is useful also as pointing out that in the sense in which the word "administration" was employed by the French Jurists on this subject, it did not include in it the idea of sale, which is derived from our English notions on this subject. The observations just read are made, it is true, by Pothier with relation to the sale of immoveable property, but the principle is the same with respect to all property sold by the tutor which he had no power to sell, and which the authority of a Court of Justice could alone entitle him to dispose of. When this excess of power is once established, then the sale is in fact the sale of a stranger, and the act here complained of is as if a stranger had sold these shares, and had then, by fraud or forgery, induced the Bank to make the transfer of them in their books. In that

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case they would still remain liable to the rights of the minor, both for the shares themselves and for the dividends which accrued on them.

Though it cannot, in our opinion, affect the ultimate decision of the case, which must rest on the principles already stated, it is not an immaterial circumstance in the consideration of this case, that the sub-tutor, Robert Simson, on the 29th of September, 1846, a year and a-half before the first sale of shares took place, gave regular and formal notice to the Bank that De Lisle, the tutor, had no authority to sell the shares, and that the circumstances of the ward were such that the disposal of them was not required for her benefit. The distressed circumstances of De Lisle seem also to have been notorious, and likely to be known to the Bank, in which case it was probable that any sale by him would be for his own sole advantage.

The functions and duties of the sub-tutor seem to be not very clearly defined; he has no power of actively interfering, but his duty seems to be to watch over the conduct of the tutor, and endeavor to prevent injury being inflicted on the person or property of the ward. Nothing could be more formal or precise than the notice served by him on the Bank in that character, which is set up in p. 26; and as the Bank have thought fit, on their own determination, without even giving notice to the sub-tutor, or to the friends of the minor, of the attempt the tutor was making to sell his ward's property, to allow the transfer in their books of all these shares by the tutor to mere strangers, they must now take the consequences, their Lordships being of opinion that the act of making that transfer was, so far as regards the minor, merely nominal, that it took away no property from her, and that the decision of the Superior Court of Lower Canada and of the Court of Queen's Bench is correct, and must be affirmed, with costs; and they will humbly advise Her Majesty accordingly.

Judgment of Q. B. confirmed.

Mr. Roundell Palmer, Q. C.,
Mr. C. E. Pollock,
For Appellant.

Mr. Wickens,
Mr. Gadsden.
For Respondents.

(S.B.)

SUPERIOR COURT.

MONTREAL, 30TH APRIL, 1861.

Coram BADGLEY, J.

No. 494.

Leduc vs. *Tourigny* dit *Beaudin*. — *Saisie Conservatoire.*

HELD—That the *saisie conservatoire* by the vendor of goods may validly issue without the affidavit required for the issue of the *saisie arrêt simple*.

The plaintiff had sold and delivered the husband of the defendant barrels of flour at a term of three months' credit for $275.90. The day of payment having passed without payment being made, and the purchaser dying insolvent, the plaintiff sued out a writ of saisie conservatoire to attach the flour still in-

tact in the hands of the widow of the purchaser, in order that the flour might be sold and the plaintiff might be paid by privilege on the proceeds of the sale of the flour.

The defendant on the return of the writ, moved that it be quashed, chiefly on the ground that the writ was in fact a *saisie arrêt simple* which could only issue on an affidavit in the terms required by the statute, and the statute had not been followed in the present instance, and that this statute had abrogated the ancient jurisprudence permitting the emanation of a writ of *saisie conservatoire*.

The Court, after hearing and *délibéré*, rejected the motion, citing *Torrance* vs. *Thomas*, 2 L. C. Jurist, 98.

Motion rejected.

Fabre, Lesage & Jetté, for plaintiff.
Carter & Girouard, for defendant.
(F.W.T.)

MONTREAL, 18TH JUNE, 1855.

Coram BOWEN, C. J., VANFELSON, J.

No. 168.

Gillespie et al., v. *Spragg* et al., and *McGill* et al., Garnishees, and *Hutchinson* et al., intervening parties.

No. 353.

Maitland et al. v. The same.

No. 1002.

Jordan et al. v. The same.

HELD :—That an intervening party who claims the payment by the Prothonotary of a sum of money under a judgment in his favour, is bound to give notice to all the parties in the record of his application to the Court for such moneys.

The following is a brief statement of the position of these causes :

The original plaintiffs, Gillespie and others, on the 9th July, 1825, sued out a Writ of Attachment under which a large quantity of effects and monies were seized, as well in the possession of the defendants, John Spragg, and William Hutchinson, as in the possession of James H. Lambe, and of Stewart Spragg, and W. Spragg, and various other Garnishees.

By the Judgment of the Court of Original Jurisdiction, rendered on the 11th February, 1833, the Attachment in the hands of the defendants as co-partners, and of John Spragg individually, and of James H. Lambe, Stewart Spragg, and William Spragg, François X. Desjardins, and Benjamin Ansell, was declared good and valid ; but as to certain goods and moneys seized in the hands of the defendants—in those of Lambe, and Stewart, and W. Spragg, viz. : 1st. Certain goods enumerated in the Judgment ; 2nd. £3450 15s. 3d., being the proceeds of other goods sold by Lambe ; and, 3rd. £236 10s. 6d., received by S. and W. Spragg, it was ordered "that the aforesaid goods, wares, merchandise, and effects, so attached and seized in the hands of the said defendants, and of the said John Spragg, (viz. : those especially enumerated in the Judgment) be delivered up to the said James Hutchinson, and that the said James Henry Lambe do pay over to the said James Hutchinson the said sum of £3450 15s. 3d., and also that the said James Henry Lambe do restore and deliver up to

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the said James Hutchinson the remainder of the said goods, wares, and merchandises, so by him received, and which still remain in his possession unsold, as stated in the declaration made by him as *tiers saisi* in the cause on the 16th day of February, 1826, and in default thereof it is adjudged that the said James Henry Lambe do pay to the said James Hutchinson the sum of £1917 15s. 6d., the invoice value of the said goods so remaining unsold as aforesaid, and it is also adjudged that the said Stewart Spragg and William Spragg, do pay over to the said James Hutchinson, the said sum of £236 10s. 6d., by them declared to be in their hands as aforesaid. And it is further ordered and adjudged that the said James Henry Lambe, François Xavier Desjardins, and Benjamin Ansell do pay into the hands of the Prothonotary of this Court, to await the further order thereof, the moneys by them, the said James Henry Lambe, François Xavier Desjardins, and Benjamin Ansell, declared severally to be in their hands belonging to the said defendants, that is to say, the said James Henry Lambe, the sum of £306 10s. 8½d., the said François Xavier Desjardins, the sum of £281 3s. 4d., and the said Benjamin Ansell, the sum of £33 17s. 10d., for the payment of which said several sums of money as aforesaid, the said James Henry Lambe, Stewart Spragg, and William Spragg, François Xavier Desjardins, and Benjamin Ansell shall be, and they are hereby adjudged to be severally held and bound by all due course of law, and upon payment thereof wholly discharged. And it is ordered that the several other goods, chattels, and effects attached and seized in the hands of the said defendants, and of the said John Spragg, by virtue of the said Writ of Attachment, be delivered up to the Sheriff, to be sold according to law, and the proceeds thereof brought before this Court. And it is adjudged that the said plaintiffs, Robert Gillespie, George Moffatt, William Finlay, William Stephens, John Jamieson, and Alexander Gillespie, junior, do recover their costs on the *Saisie Arrêt*, and Attachment aforesaid, by them made, in the hands of the said James Henry Lambe, François Xavier Desjardins, and Benjamin Ansell, and that the said *Saisie Arrêt* and Attachment made in the hands of the said Peter McGill, William Hutchinson, and Andrew Shaw, as Trustees of the estate of Andrew Porteous, and of James Fencer, of James Ellice Campbell, and John Campbell, be discharged."

From this Judgment, Gillespie and others, the plaintiffs, appealed, and on the 30th July, 1834, the former Judgment was reversed, and the seizure in the hands as well of the defendants, as of Lambe, of Stewart and William Spragg, and of François Xavier Desjardins, and Benjamin Ansell, was declared good and valid, *the whole* of the moneys and effects seized being declared to be the property of the defendants, and the defendants and Garnishees were ordered to deposit the moneys and effects seized with the Prothonotary at Montreal, to the end that such order of distribution should be made as the Court below might direct.

In conformity with this Judgment various orders were given directing that the creditors of Spragg and Hutchinson, who were insolvent, and to whom the Court below had adjudged that a portion of the moneys and effects seized belonged, (the Court of Appeals having extended the like Judgment to the re-

mainder,) should be called in by advertisement in order that a distribution might take place, and a very large number of claims were accordingly filed.

From this Judgment, James Hutchinson brought his appeal to the Privy Council, and by an order of that tribunal of the 15th June, 1836, it was declared that "*the goods*" claimed by Hutchinson were the property of James and William Hutchinson, and that it be referred to Mr. Sergeant Channell, to determine what the interest of William Hutchinson as a partner of James was in them, and that the Attachment of the plaintiffs in respect of such interest might be preserved. On the 25th of May, 1850, Mr. Sergeant Channell reported "that William Hutchinson had no interest in the *said goods so seized*," and on the 13th July, 1850, the Lords of the Privy Council were pleased to report to Her Majesty, as their opinion, "that it appearing by the said Report, that the said William Hutchinson had not at the time of the said seizure any interest in the goods mentioned in the said order, after taking the accounts therein mentioned, it ought to be declared that the Attachment issued against the said goods and notes by the said respondents ought to be discharged, and that the said goods and notes and any monies in the hands or power of the respondents realized or received therefrom ought to be delivered to the said James Hutchinson, and their Lordships further report that the sentence of the Court of Appeals of the Province of Lower Canada, of the 30th July, 1834, ought to be varied, so as to give effect to the foregoing declaration."

"Her Majesty having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that it be and it is declared, that the attachment issued against the said goods and notes by the respondents ought to be discharged, and that the said goods and notes, and any monies in the hands or power of the respondents realized therefrom, ought to be delivered to the said James Hutchinson, the appellant, and that the said sentence of the said Court of Appeals of the 30th July, 1834, be, and the same is hereby varied so as to give effect to the said declaration and report."

On the 10th May, 1855, James Hutchinson moved the Court that the Prothonotaries be held to pay over to him the sum of £5056 18s. 9d. cy., which sum was stated by him to have been deposited in the hands of the said Prothonotaries by the said Lambe.

After hearing, the following judgment was rendered.

PER CURIAM:—"The Court having heard Edmund Barnard, Esquire, Attorney for James Hutchinson, Intervening Party in the above named cases, upon his motion of the 10th day of May last, and Messrs. Rose and Monk, Attorneys for Alfred K. Lavicount, another of the Intervening Parties, whereby he demands on behalf of the said James Hutchinson, that the Prothonotary of this Court do forthwith pay over to him, the said James Hutchinson, for the reasons stated and set forth in the said motion, the sum of £5056 18s. 9d. cy., deposited in the hands of the Prothonotary of this Court by James Henry Lambe, one of the Garnishees in these causes, on the 20th June, 1842; and the Court seeing that the only persons named in these causes upon whom notice of the said motion has been given and made are S. W. Monk, Esquire, one of

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the joint Prothonotaries of this Court; Messrs. Rose and Monk, Attornies for the said Alfred K. Lavicount, and F. Griffin, Esquire, Attorney for Robert Gillespie et al., plaintiffs in one of the said causes under the No. 168, whereas all the parties in the said three causes ought to have had due notice of the said motion; considering also that some of the parties in the said three causes have died pending these suits, and that no "reprise d'instance" has been had for the purpose of representing the said deceased persons as by law ought to have been done; considering further that the rights of the several Intervening Parties and others have not been adjudicated upon, nor issue joined thereon; and that the decisions of Her Majesty in her Privy Council, referred to in the said motion, were made and rendered as between the said James Hutchinson, appellant, and Robert Gillespie et al., respondents, must be considered as but "res inter alios acta" and not binding upon third parties having claims yet undecided before this Court in respect of the said monies so deposited by the said James H. Lambe: the Court now here doth therefore order and adjudge that the said James Hutchinson take nothing by his motion of the 19th May last, and the same is hereby dismissed with costs to the said Messrs. Rose and Monk.

Motion dismissed.

F. Griffin, for plaintiffs, Gillespie et al.
E. Barnard, for Hutchinson.
Rose & Monk, for Lavicount.
(F. W. T.)

MONTREAL, 30TH MARCH, 1861.

Coram BADGLEY, J.

Nos. 168, 353, 1002.

Gillespie et al. vs. *Spragg* et al., and *James Hutchinson*, intervening party.

HELD:—Where an attorney *ad litem* has represented a party in a cause subsequent to judgment, another attorney *ad litem* cannot regularly take proceedings on behalf of such party without a substitution in place of the first attorney, and that the motion of the first attorney as on behalf of such party, that all proceedings of the second attorney in the name of such party be rejected from the record, will be granted.

In this cause, Edmund Barnard, Esq., as attorney for James Hutchinson, on the 18th February, 1861, made the following motion, which sufficiently exhibits the point decided in the case.

"Motion that inasmuch as Messieurs Cross & Bancroft, professing to represent James Hutchinson, one of the Intervening parties in these united causes, have on the twenty-fourth day of December last past, moved this honorable Court for a rule against Samuel Wentworth Monk, Esquire, to shew cause why he should not be held to pay him, the said James Hutchinson, the sum of four thousand seven hundred and fifty pounds eight shillings and one half-penny, currency, now before this Court, deposited by one of the Garnishees in this cause, whereupon a rule has issued against the said Samuel Wentworth Monk, and proceedings have been had on said rule which are still pending, and whereas the undersigned was on the twenty-third day of October, eighteen hundred

and fifty-four, in virtue of a judgment of this honourable Court duly rendered, substituted in due form of law to Messieurs Pelkier & Bourret, who themselves had been duly substituted under a like judgment rendered on the fifth day of October, eighteen hundred and fifty-two, to Philippe Bruneau, Esquire, the Attorney of Record of the said James Hutchinson, at the date of the final judgment in this cause rendered by the late Court of King's Bench, on the eleventh day of February, eighteen hundred and thirty-three, and the undersigned has acted and is still acting in this cause as the attorney of the said James Hutchinson.

"And inasmuch as the said motion of Messieurs Cross & Bancroft was wholly unauthorized, and was made without the knowledge, participation, or consent of the undersigned, who disapproves of said motion.

"That the said motion of the twenty-fourth day of December last, and the rule founded thereon as aforesaid, and all proceedings arising therefrom, be struck from the fyles of this Court and rejected from the record, and all orders entered upon the said motion or rule discharged with costs."

After hearing and deliberé, the Court granted the motion.

Edmund Barnard, for Hutchinson. Motion granted.

Cross & Bancroft, moving in his name.

(F.W.T.)

MONTREAL, 30TH APRIL, 1861.

Coram BADGLEY, J.

Nos. 168, 353 & 1002.

Gillespie et al. vs. *Spragg* and divers intervening parties and *William Mann* et al. moving for *reprise d'instance*.

HELD:—That after a final judgment in a cause wherein are several intervening parties as well as plaintiff and defendant, a motion by parties representing themselves to be the universal legatees of one of the intervening parties deceased, to be allowed to take up the *instance* in place of the deceased, will be rejected as not in accordance with the *procedure* and practice of the Court.

William Mann and others representing themselves to be universal legatees under the last will of the late James Hutchinson, an intervening party in the cause, now deceased, moved the Court to be allowed to take up the *instance* in the place and stead of the said James Hutchinson.

The Court rejected the motion, announcing that the proper course for the applicants was to present a petition on which an issue could be taken.

F. Griffin, Q. C., for plaintiffs. Motion rejected.

Cross & Bancroft, for *Mann* and others.

(F.W.T.)

MONTREAL, 23RD NOVEMBER, 1861.

Coram BERTHELOT, J.

No. 515.

Johnston v. *Whitney*.

HELD:—That a motion for a *Commission Rogatoire* to New York will be granted unsupported by affidavit.

The defendant moved for a *Commission Rogatoire* to New York to examine a witness in proof of an allegation of his plea.

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Macrae, for plaintiff, resisted on the ground that the motion was unsupported by affidavit.

Torrance, in support of motion, cited *Willis* v. *Pierce*, 2 L. C. Jurist, 77.

The Court granted the motion, with the condition annexed that the commission should be returnable on the 5th December, 1861.

G. Macrae, for plaintiff.

Torrance & Morris, for defendant.

Motion granted.

(F.W.T.)

MONTREAL, 18TH SEPTEMBER, 1861.

Coram SMITH, J.

No. 1881.

Whitney v. *Dunning* & al., and *Mulholland* & al., Garnishees.

HELD:—That where a defendant chose to appear without service upon him of the writ and declaration in the cause his appearance will not be rejected on the plaintiff's motion to that effect, inasmuch as the defendants have a right to appear by attorney without having been served.

The plaintiff brought his action agtinst the defendants as co-partners, who were described as doing business and having their partnership domicile in Upper Canada, but as having property within the District of Montreal.

The writ was addressed to the Sheriff ordering him to attach money of the defendants in the hands of Messrs. Mulholland & Baker, merchants, in Montreal. The Sheriff made his return of service of writ upon the Garnishees, but no service upon the defendants.

The defendants upon the return of the action fyled an appearance and an exception *à la forme*, alleging by the latter want of service upon them.

The plaintiff thereupon moved the Court to reject the appearance and exception as prematurely fyled, inasmuch as there had as yet been no signification of the writ upon the defendant, and the plaintiff was still in time to call the defendants into Court as absentees by advertisement.

Abbott, for defendants, resisting the application of the plaintiff, cited in support the case of *McKercher* v. *Simpson*, 6 L.C. Reports 311, ruling in appeal that an attorney *ad litem* had a right to fyle an appearance of record without the defendant having been served with the Writ.

PER CURIAM: The case cited by the defendant is the guide in this matter.

Torrance & Morris, for plaintiff.

Abbott & Dorman, for defendants.

Motion rejected.

(F.W.T.)

MONTREAL, 4 NOVEMBRE, 1861.

Aux Séances d'Enquête.

Coram BADGLEY, J.

No. 767.

Bagg et vir vs. *Wurtele*.

Jugé:—Que dans une action d'assumpsit; le demandeur a le droit d'examiner le Défendeur sur le fait qu'il a souscrit un billet promissoire en sa faveur pour un prêt d'argent; quoique ce billet fut prescrit lors de l'institution de l'action.

Les demandeurs ayant poursuivi le défendeur en recouvrement de la somme de $300 sur divers chefs généraux d'une action d'assumpsit, (money counts) sans chef spéciale; le défendeur plaida une dénégation générale.

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Par leur articulation de faits, les demandeurs restreignirent leur demande à un prêt d'argent; ce qui fut nié par le défendeur.

A l'Enquête, les demandeurs ayant examiné le défendeur comme témoin pour prouver un billet promissoire qui avait été produit par les demandeurs avec leur déclaration; et pour savoir s'il avait souscrit ce billet en leur faveur, lequel billet était prescrit par le laps de cinq ans lors de l'institution de l'action et n'était pas allégué dans la déclaration en aucune manière; une objection fut faite de la part du défendeur. La question posée au défendeur et son objection sont comme suit:

Question.—Look at the plaintiff's exhibit number one, fyled in this cause, and say whether the signature "Jonathan S. C. Wurtele," thereto set and subscribed, is or is not your signature?

Objection.—The defendant objects to this question as being irregular, irrelevant and illegal, as having no relation to the issue raised in this cause, and inasmuch as the plaintiff's action is not based nor founded upon the promissory note which is fyled in this cause as plaintiff's exhibit No. 1, and inasmuch as if the said promissory note had been alleged in the plaintiff's declaration, the said defendant would have had the opportunity of pleading prescription against the said promissory note, and also several other pleas which would have had the effect of extinguishing any right of action arising out of the said promissory note, and inasmuch as the present action is only founded on a loan of money as it appears by the articulation of facts fyled in this cause by the said plaintiffs.

BADGLEY, J.—From the different authorities which I have examined upon the point, I am compelled to allow this examination to be taken *de bene esse*, as the case now stands; without, however, prejudging the merits of the action which is for a loan of money.

I refer to the following authorities:—

So a promissory note is clearly not evidence of money lent, in an action by endorsee against maker. Bently vs. Northouse, Mood, & M. 66, although it might be in action by payee. Storey vs. Atkins, 2 Str. 719, particularly if it appeared on face of it, or otherwise, to have been given for money. A bill of exchange or promissory note seems now to be considered as *prima facie* proof of the money counts in any action between the immediate parties, whether they were original parties or subsequent as indorsees. 2 Greenleaf Ev. § 112. Bayley on bills. 390-3. Young vs. Adams, 6 Mass. 189. Dean vs. Flack, 3 G. & J. 369. Wilde vs. Fisher, 4 Pick. 421. 12 Pick, 126. 5 Wend 490. 11 Pick, 316, 1 Archb. N.P. Note Am. Ed. 315. Eng. Ed. 244. Byles on bills 354. Clark vs. Murten, Lord Raymond 758 per Lord Mansfield in Grant vs. Vaughan, 3 Burr. 1525. 2 Ph. on Ev. 186, 10. Morgan vs. Jones 1 C. & J. 167, and is admissible as a paper writing to prove Defts. receipt of so much money, and that though it has been invalidated, as a note, by alteration. Sutton vs. Turner. 7 B. & C., 416. 1 Man. & R., 125. Tomkins vs. Ashby, 6 B. & C., 541. M. & W. 32 (Sed. p. 253, Am. Decisions.) But bills not properly stamped not admissible in evidence for collateral purposes (though formerly held to be so. 1 B. & A., 663. 4 M. & W., 32). But clearly only as between immediate parties, and later decisions favour this dictum. 1 Camp. 175. M. & W. 66, 324. Bayley 357.

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If statute has run out, the holder of note payable at a day certain has lost his right of action. See 7 Q. B. 864; may be otherwise with note payable on demand.

Objection overruled.

A. & W. Robertson, Attorneys for plaintiffs.
P. R. Lafrenaye, Attorney for defendants.
(P.R.L.)

MONTREAL, 30 OCTOBRE, 1861.

Coram BERTHELOT, J.

No. 1948.

Torrance v. *Chapman et al.*

Held:—1st. That a *mandataire*, who does not execute the *mandat* committed to him, must notify the *mandant* of his inexecution of the trust.
2nd. That in an action of account, by a creditor who was a party to a deed of trust for the benefit of creditors from insolvent debtors to the defendants, the mandataries who plead that they had sold the trust estate to one of the insolvents who had undertaken to pay the creditors, are not thereby absolved from liability to account.
3rd. That the court will order an account, reserving the question of the liability of the defendants for the whole or a part of the creditors' demand till a later stage of the cause.

This was an action brought by the plaintiff, a creditor of the insolvent firm of McIntosh & McLean, against the defendants, who were the trustees appointed by the insolvents, under a deed of Trust, to take possession of the estate, and dispose of it for the benefit of their creditors. The plaintiff was a party to this deed; not having been paid by the assignees the debt due to him by the insolvents, he, by the present action, called upon the defendants to render an account of their gestion of the estate. The proceedings in the cause, and the facts and legal questions involved, will fully appear on reference to the ensuing Report of the remarks of his Honour Mr. Justice BERTHELOT, in rendering judgment, ordering an account and dismissing the Pleas of the defendants with costs.

BERTHELOT, J.—Le demandeur poursuit les défendeurs comme Syndics à la faillite de Neil McIntosh & James McLean. Par sa déclaration il allègue que le 12 de janvier 1858 il était créancier de ces derniers de la somme de £176 2s. 7d.

Que ce jour là même par acte reçu devant M^tre^ Hunter et confrère, Notaires, il y eut cession de biens par ces deux débiteurs aux trois défendeurs, de tout leur fonds de commerce et créances actives pour l'avantage de tous leurs créanciers, à la condition par ces derniers de donner une décharge de leurs créances, ainsi qu'elles se trouvaient mentionnées en la cédule annexée au dit acte, ce qui fut accepté par les dits créanciers et le demandeur en particulier; pour le tout être administré "*upon trust*" par les défendeurs es qualité, avec toute dépêche convenable par vente privé ou encan public à crédit ou pour argent comptant ainsi qu'ils le jugeraient à propos et d'en payer le montant proportionnellement à chacun des dits créanciers selon le montant de sa créance, et que les dits syndics auraient une commission de deux et demi par cent sur le montant réalisé; enfin que moyennant tout ce que dessus les dits créanciers dans et par le dit acte de cession donnèrent quittance et décharge de leurs créances aux dits débiteurs McIntosh & McLean.

Puis, le demandeur allègue qu'en vertu du dit acte de cession, les dits défendeurs ont pris possession de toute la masse des biens des dits débiteurs, en ont réalisé le montant et sont ainsi devenus obligés de rendre compte au demandeur des argents par eux reçus et de lui payer la dite somme de £176 2s. 7d. ou au moins au marc la livre avec les autres créanciers.

Enfin il conclut à ce que comme créancier des dits McIntosh & McLean, pour le montant susdit, au dit jour 12 janvier 1858, les défendeurs soient condamnés conjointement et solidairement à lui rendre compte de leur administration comme Syndics susdits, à ce que les deniers qu'ils peuvent avoir en mains soient distribués pour lui être payé sur et à même ceux de sa dite créance, et qu'à défaut de rendre compte, ils soient conjointement et solidairement condamnés à lui payer la dite somme de £176 2s. 7d. avec intérêt.

Henry Chapman a plaidé séparément des deux autres défendeurs, mais les moyens de défense des trois défendeurs peuvent se résumer comme suit:

1o. Que par le dit acte de cession il fut convenu et stipulé que les dits trois défendeurs auraient le droit de disposer et de vendre la masse des biens cédés à crédit ou pour argent comptant, ainsi qu'ils croiraient être le plus avantageux pour les créanciers.

2o. Qu'ils ne seraient pas tenus des sommes d'argent qu'ils n'auraient pas réellement ou personnellement reçues nonobstant le reçu des trois défendeurs.

3o. Qu'ils ne seront pas responsables des pertes résultant d'insolvabilité durant leur administration.

Puis ils ajoutent que par acte du 19 février 1858, devant Mtre Hunter, notaire, (après avoir offert à vente publique, par avertissement, ce qui composait la masse des biens des dits débiteurs) ils avaient cédé le tout au dit James McLean, à raison de 12s. 6d. dans le louis sur £1686 3s. 1d., montant dû par les dits McIntosh & McLean, ce dernier, le cessionnaire s'obligeant de payer à chacun des dits créanciers, et au demandeur en particulier à raison de 12s. 6d. sur sa créance et ce par paiement à 4, 8, 12 et 16 mois à compter du 17 novembre 1857, ce qu'ils avaient cru être avantageux pour tous les créanciers. Que cet arrangement avait été sanctionné par les créanciers et par le demandeur en particulier qui y avait acquiescé.

Qu'aucune somme ne leur était passée par les mains provenant de la dite cession, et que depuis icelle le dit James McLean était devenu insolvable et n'avait pu payer le demandeur, et que l'action de ce dernier devait être déboutée.

Les réponses du demandeur aux défendeurs consistent à dire que les défendeurs s'étaient chargés d'administrer eux-mêmes en vertu du dit acte du 12 janvier 1858, et qu'en consentant la cession du 19 de février 1858 ils avaient agi illégalement et frauduleusement envers le demandeur et les autres créanciers, l'ayant ainsi consentie à McLean, alors qu'il était encore insolvable, et sans exiger de cautions de sa part; et en contradiction du mandat dont ils s'étaient chargés par l'acte de cession du 12 janvier précédent, et que c'était par leur négligence coupable et par leur faute, si les sommes provenant de la dite cession n'avaient pas été touchées et perçues par eux-mêmes.

Les questions soulevées par cette contestation se présentent comme suit:

1o. Si les défendeurs pouvaient s'affranchir et se libérer de la responsabilité

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du mandat dont ils s'étaient chargés par l'acte de cession du 12 janvier 1858 en consentant l'acte du 19 février 1858 à McLean, et par là se soustraire aux conséquences d'une action en reddition de comptes.

2o. Si dans les circonstances de la cause, ils peuvent se libérer ayant vendu à l'un des faillis, en invoquant les clauses de l'acte du 12 janvier qui portent qu'ils ne seront pas tenus des pertes occasionnées par l'insolvabilité durant leur administration, et ne seront responsables que des deniers qu'ils recevront réellement ou pour faute lourde occasionnée par leur négligence.

Il faut de suite remarquer que par l'acte de cession des défendeurs au failli McLean, ce dernier devait effectuer ses paiements aux défendeurs eux-mêmes, au moyen de billets qu'il leur consentit et délivra, et payables à 4 mois, 8 mois, 12 et 16 mois, et que par conséquent les défendeurs avaient par cet acte réservé à eux seuls le droit de poursuite et recouvrement contre McLean.

A l'enquête, James McLean a été interrogé par le demandeur pour prouver qu'il était la même personne mentionnée aux deux actes de cession du 12 janvier et 19 février, qu'aucun changement n'était survenu pour le mieux dans ses circonstances pécuniaires depuis novembre 1857, sinon qu'il avait eu sa décharge par le premier. Lorsqu'il a été transquestionné par les défendeurs, pour prouver l'acquiescement prétendu du demandeur à l'acte du 19 de février, il s'exprime ainsi :

"I think the plaintiff was aware of the arrangement with me, for he called upon me, I think, in the summer of 1858, to enquire why he was not paid the same as the other creditors."

Certainement qu'il n'y a là rien pour compromettre le demandeur. Il était bien naturel pour lui de s'informer sur ce sujet ; il parait qu'il a été le seul créancier qui n'a pas été payé par les défendeurs ou par McLean, des 12s. 6d. dans le louis que ce dernier s'était obligé de payer. Les défendeurs après avoir stipulé par l'acte du 19 février que McLean ferait les paiements à eux-mêmes par billets qui leur furent alors livrés, veulent maintenant reprocher au demandeur de ne pas s'être fait payé, tandis qu'il n'avait aucun moyen d'exercer des poursuites contre McLean.

Voici quelques autorités que l'on peut citer sur les devoirs des mandataires vis-à-vis de leurs mandants.

Dictionnaire du Digeste ; Vol. 2. Du Mandat, p. 6, No. 11. "On est maître d'accepter ou de refuser le mandat ; mais quand on l'a accepté, on doit le remplir entièrement."

No. 12. "Lorsqu'on a accepté le mandat, on ne peut y renoncer sans juste cause."

No. 13. "Quand le mandataire renonce au mandat *pour juste cause*, il doit en avertir le mandant, sinon il est tenu du mandat."

Dans cette espèce les défendeurs (syndics) peuvent avoir averti verbalement le demandeur qu'ils avaient consenti à James McLean, l'un des dits débiteurs, l'acte du 19 février 1858, mais cela ne tire à aucune conséquence contre le demandeur, les défendeurs s'étant retenus les paiements que McLean devait faire, et par là ils ont retenus le mandat et le demandeur n'avait aucun recours possible, ni contre McIntosh & McLean, ni contre ce dernier seul.

Il n'a de recours possible que contre ses mandataires qui pouvaient retirer ce qu'ils ont laissé perdre par leur négligence, en laissant faire McLean jusqu'à ce qu'il fut devenu incapable de satisfaire aux paiements de l'acte de cession du 19 février.

Sur les devoirs des défendeurs en exécution de ce dont ils s'étaient chargés vis-à-vis du demandeur, l'on peut citer.

Paley, p. 26 et 27: Duties of Agent.

"A factor of common right is to sell for ready money, but if he be a factor in a *sort of dealing or trade*, where the usage is for factors to sell upon credit, there, if he sell to a person of good credit at the time, and he afterwards become insolvent, the factor is discharged, *but otherwise*, if it be to a man notoriously discredited at the time of the sale.—C. J. Holt.

"But, notwithstanding any usage of trade, an agent is not warranted in selling upon credit to a person whom *he knows at the time to be insolvent* unless specially directed to sell to him."

En appliquant cette doctrine aux défendeurs, on peut dire que s'ils n'ont pas agi frauduleusement, ils ont été coupables d'une grande négligence, d'une faute lourde, en mettant aux mains de l'un des deux faillis, toute la masse de leurs biens qui avait fait le sujet de l'acte de cession du 12 janvier, sans aucun consentement du demandeur dont ils étaient les mandataires, et sans exiger de McLean aucune caution, ce qui est au contraire de ce qui se fait, lorsque de pareils actes de cession sont faits au débiteur lui-même.

Sur l'obligation des défendeurs d'administrer avec soin; Duranton s'exprime ainsi, Vol. 18, No. 243:

"Le mandataire n'est pas seulement responsable de son dol, il l'est aussi *des fautes qu'il commet dans sa gestion*.

"A cet égard on peut dire que le mandataire est responsable en général de toutes "les fautes qu'un bon père de famille n'aurait pas commises dans la gestion de ses "propres affaires." C'est surtout le cas lorsque comme dans l'espèce actuelle, les mandataires recevaient un salaire sous la forme d'une commission de deux et demi par cent, et sont quelquefois tenus de la faute légère.

"Sur ce point," continue Duranton, "il faut avouer qu'il est impossible de tracer des règles rigoureusement précises touchant la responsabilité des fautes; on a entendu en cette matière laisser beaucoup à la sagesse et à la prudence du magistrat, qui doit se décider suivant la nature de l'affaire et les circonstances du fait."

Cela étant, peut-on dire que les défendeurs agissaient raisonnablement et prudemment en vendant à l'un des deux faillis tout le fonds de commerce qu'ils s'étaient engagés d'administrer le mois précédent, pour l'avantage de tous les créanciers et du demandeur en particulier. Il est évident que du 12 janvier au 19 février 1858, il n'était rien survenu pour rendre McLean plus solvable qu'il ne l'était au temps de la cession de biens. Nous en avons l'aveu de lui-même, et avons la preuve de son insolvabilité avant les seize mois de délai qui lui ont été accordés par les défendeurs.

Il était du devoir des défendeurs de ne consentir l'acte de cession à McLean qu'en exigeant de lui des cautions pour son accomplissement.

Torrance vs Chapman et al.

Les défendeurs en stipulant que McLean ferait les paiements à eux-mêmes aux échéances convenues de 4, 8, 12 et 16 mois, par billets à leur ordre, ont enlevé par cela même au demandeur le droit ou le pouvoir de s'adresser directement à McLean pour en être payé, et ils veulent maintenant être absous et libérés en se contentant de répondre au demandeur qu'ils ont fait pour le mieux en consentant l'acte de cession du 19 février 1858 ; que les autres créanciers ont été payés par McLean, et voudraient faire croire qu'il n'a dépendu que du demandeur s'il n'a pas été payé. La preuve ne justifie pas cela, l'on a déjà vu que le demandeur n'avait donné aucun acquiescement. Il avait le droit de s'attendre que les défendeurs verraient au moins à lui faire payer sa part de la composition à 12s. 6d., tout comme les autres créanciers paraissent l'avoir été ; ils ne l'ont pas fait, pas plus qu'ils n'ont voulu administrer.

Ils ont plutôt voulu se soustraire à l'administration des choses cédées, et encore sans prendre aucune garantie pour protéger leur mandant, et sans même l'avertir ainsi qu'ils étaient tenus, s'ils voulaient cesser d'administrer, suivant l'autorité ci-dessus citée : "Quand le mandataire renonce au mandat (pour juste cause) il doit en avertir le mandant, sinon il est tenu du mandat."

On peut aussi appliquer aux défendeurs l'autorité de Pothier. Mandat No. 61.

"De l'obligation que contracte le mandataire par le contrat de mandat, nait l'action *mandata contraria* qu'a le mandant contre le mandataire, aux fins que, dans le cas auquel le mandataire, sans une *juste cause* d'empêchement, aurait manqué d'exécuter le mandat dont il s'est chargé, il soit condamné envers le mandant aux dommages et intérêts résultant de l'inexécution du mandat comme il a été dit en l'article premier ; et que dans le cas où il aurait exécuté le mandat, il soit condamné à en rendre compte au mandant et à lui remettre ce qu'il en retient, suivant qu'il a été dit en l'article précédent."

Dans notre cas, les défendeurs n'offrent pas même au demandeur de lui remettre les billets qu'ils ont reçus ou dû recevoir de McLean par suite de l'acte du 19 février, pour la quote-part du demandeur.

Cependant dans l'état actuel de la procédure la Cour ne doit pas aller pour le moment au-delà d'une simple condamnation à reddition de compte, en déboutant les exceptions et défenses avec dépens.

Il faut donner aux défendeurs l'occasion de faire voir si la cession du 19 de février est ce qu'ils avaient de mieux à faire pour s'acquitter du mandat dont ils se sont chargés.

Ils ont prétendu qu'ils n'avaient pas administré, tandis que cet acte était jusqu'à un certain point un acte d'administration.

Si c'est ce qu'il y avait de mieux à faire, ils seront peut-être encore tenus de l'insolvabilité jusqu'à concurrence de 12s. 6d. pour ne pas avoir exigé des cautions de McLean, ou pour ne pas avoir collecté les billets donnés par ce dernier, en satisfaction des instalments qu'il devait payer en vertu de cette cession.

S'ils ont excédé ce que l'on doit raisonnablement entendre par administrer en pareil cas, ou s'ils se refusent de rendre compte, ils seront peut-être tenus et condamnés au paiement de toute la créance du demandeur, en leur appliquant l'autorité ci-dessus de Pothier No. 61, et en adjugeant une condamnation en

dommages contre eux de même montant que la créance du demandeur qu'ils ont laissé perdre par leur négligence.

Le jugement ne règlera positivement que le premier point, laissant à déterminer plus tard si la dispense de responsabilité résultant d'insolvabilité durant l'administration des défendeurs, doit s'entendre comme il le prétendent, aussi bien que des sommes des deniers qu'ils n'ont pas reçues, mais qu'ils auraient reçues et dû recevoir, sans leur négligence à cet égard.

Ci-suit le jugement.

La Cour après avoir entendu, etc., etc., avoir examiné la preuve et sur le tout mûrement délibéré, considérant que par l'acte de cession du 12 janvier 1858, reçu devant Maître Hunter et confrère, Notaires, récité en la déclaration du demandeur, et intervenu entre Neil McIntosh et James McLean d'une part, les défendeurs en cette cause d'autre part, et enfin certains créanciers y nommés des dits McIntosh et McLean et nommément du demandeur en cette cause, a eu l'effet d'opérer un contrat de mandat entre le demandeur d'une part et les défendeurs d'autre part, par lequel ces derniers sont devenus tenus et obligés de lui rendre compte de la gestion et administration dont il se sont là et alors chargés par le dit acte de cession des biens et choses qui leur étaient alors cédés par les dits McIntosh et McLean pour l'avantage de leurs créanciers et du dit demandeur en particulier en autant qu'il pouvait y être intéressé ; considérant de plus qu'il y a preuve que les dits défendeurs ont de fait assumé la gestion et administration des choses et biens qui ont fait l'objet du dit acte de cession à la charge ainsi qu'ils y étaient tenus en loi d'en rendre compte au dit demandeur, et que par l'acte de cession du 19 février 1858, reçu devant Maître Hunter et confrère, Notaires, intervenu entre les dits défendeurs et le dit James McLean, il ne se sont nullement affranchis ou soustraits à leur responsabilité comme mandataires du demandeur, et à l'obligation de lui rendre compte de leur administration en exécution du dit acte du 12 janvier 1858, et considérant de plus que les exceptions et défenses des dits défendeurs sont mal fondées en droit et en fait, les a déboutées avec dépens, et adjugeant sur la demande, a condamné et condamne les défendeurs conjointement et solidairement à rendre au demandeur sous 30 jours à compter de la signification du présent jugement, un compte juste, fidèle, exact et sous serment de leur administration des biens et choses appartenant aux dits McIntosh et McLean au jour de l'exécution du dit acte de cession du 12 janvier 1858, et qui en ont fait l'objet et dont ils se sont chargés à titre de Syndics, *trustees*, dans et par le dit acte de cession. Le tout avec dépens de l'action et de la contestation contre les dits défendeurs. La Cour réservant à faire droit sur les autres conclusions du demandeur, tel et ainsi qu'il pourra y avoir lieu ci-après.

Torrance & Morris, for plaintiffs.

Abbott & Dorman, for defendant Chapman.

J. Popham, for defendants Sinclair and McLennan.

(A. M.)

Shaw et vir vs. Cooper.

MONTREAL, 30TH DECEMBER, 1861.

Coram MONK, A. J.

No. 487.

Shaw et vir vs. *Cooper*.

HELD:—That a defendant who in the inventory of the effects of a succession has omitted to include two debts he owed to the estate, will be condemned to add the same to the inventory, but will not be condemned to forfeit his interest therein in the absence of proof of fraud.

This was an action, brought by the plaintiff as one of the heirs of the late Patrick W. Cooper, against a co-heir, whereby the plaintiff represented, that the defendant had committed a *recel* of two several mortgages of £700 and £400, which he had granted in favor of the deceased, but which he had omitted to disclose at the making of the inventory of the estate, and prayed that he be condemned to add these as well as certain other moveables to the inventory, and but also to forfeit his interest in the same.

The defendant pleaded, that the hypotheques were made without consideration, and that he had forgotten their existence, but that he had, after the making of the inventory, offered to include one of them as an addition to the inventory, accompanied by a declaration that he did not owe the same.

After the adduction of evidence, and the hearing of counsel, when the plaintiff's counsel cited the authorities to be found in the foot note. The case having been confined to the hypotheques,* judgment was rendered by the Court, whereby it was considered that, it not having been proved that the omission had been fraudulently made, the Court therefore refused to condemn the defendant in the penalty of forfeiture of his share of the said hypotheques, but adjudged him to include the said two hypotheques and interest in the inventory, and ordered him to cause the same to be added thereto, and condemned him in the costs of the action.

Torrance & Morris, for plaintiffs.

B. Devlin, for defendant.

(A. M.)

MONTREAL, 20TH & 28TH FEBRUARY, 1854.

Coram DAY, J., SMITH, J., MONDELET, J.

No. 2469.

Arcand v. *The Montreal and New York Railroad Company*.

HELD:—Under the 64th rule of practice of the Superior Court requiring option of trial by jury to be made by declaration, plea, or motion within four days after issue joined, that when issue has been joined on the 24th January and notice of motion of option has been given to the opposite attorney on the 28th January, and motion has been accordingly made on the 17th February following, being the nearest day when a motion could be made, that the party moving had substantially complied with the requirements of said rule of practice.

This was an action of damages by a widow and legal representative of the late James Hughes against this Railroad Company for causing the death of her husband, by their alleged neglect.

Issue was joined on the 24th January, 1854, whereupon the plaintiff on the

* Guyot's Repertoire, *Recéls*, p. 473. Pothier, Comm: vol. 3, pages 806, 807, 808, and the case of Evé vs. Evé, Perrault's Extracts, page 58.

28th January, 1854, in compliance with the requirements of the 64th rule of practice, which is in the following words: "That in every cause therein a trial "by jury may by law be had, the party desiring such trial shall declare his option, "either by his declaration or plea, or by motion to be made within four days "after the issue is perfected; and after the said four days, either party may "move for the appointment of a day for trial and the issuing of a *Venire* "*facias*," gave the defendant notice that on the 17th February next she would make a motion by which she declared her option of trial by jury. The motion was in the following words: "The plaintiff in this cause hereby declaring her option to have a trial by jury in this cause, inasmuch as such trial may by law be had in this cause, moves that the issues perfected in this cause may be tried by a jury to be hereafter summoned and struck according to law and the rules of practice of the said Court, unless cause to the contrary be shewn on the twentieth day of February next."

Arcand vs. The Montreal and New York Railroad Company.

Cross, for defendant, resisted the motion on the ground that it came too late, not being made within 4 days after issue joined as required by the rules of practice.

DAY, J., giving the judgment of the Court said that the plaintiff had taken all the necessary steps to secure a trial by jury, and that the motion made by her must be granted.

Motion granted and rule made absolute.

Fleet & Dorman, for plaintiff.

Cross & Bancroft, for defendant.

(F.W.T.)

MONTREAL, 22ND NOVEMBER, 1861.

Coram BERTHELOT, J.

No. 515.

Johnston v. *Whitney*.

HELD:—That under the rule of practice, number 64, requiring the party desiring a trial by jury to make his option either by his declaration, or plea, or by motion within four days after issue perfected, a motion by defendant for *acte* of such option made on the first day of the term of the Court, after notice of such motion given on the day issue was joined, will not be granted so as to secure the defendant such trial by jury.

In this case the issue was joined on the 7th November, and on the same day the defendant gave the plaintiff notice that on the first day of term he would move the Court for *acte* of the option he made of a trial by jury.

On the 17th November, the first day of term, *Torrance* for defendant made the motion, which *Macrae* for the plaintiff resisted on the ground that the motion came too late, not being made within four days after issue joined.

Torrance, contra, cited the case of *Arcand* vs. *The Montreal and New York Railroad Company*, 6 L. C. Jurist, p. 38.

The Court adopted the view of the plaintiff's counsel and rejected the motion.

G. Macrae, for plaintiff.

Torrance & Morris, for defendant.

Motion rejected.*

(F.W.T.)

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* Besides the case cited at the argument, *vide Secretan* v. *Foote & al.*, 11 L. C. Reports, p. 497, deciding that such motion is in time.

Powers vs. Whitney.

MONTREAL, 19TH JUNE, 1861.

Coram BERTHELOT, J.

No. 1350.

Powers v. *Whitney.*

SECURITY FOR COSTS.

HELD:—That the offer of the obligation of one person as security for costs is insufficient.

The plaintiff having been ordered to give security for costs as residing without the limits of Lower Canada, made a motion before the Court to be permitted to give the personal undertaking of one Stephen Jones Lyman as such security.

Torrance, for the defendant, resisted the motion on the ground that the personal undertaking of one surety was insufficient by law, and cited the case of *Donald* vs. *Becket*, 4 L. C. Jurist, 127. (MONK, *Judice.*)

The Court maintained the objection. Motion rejected.

A. & W. Robertson, for plaintiff.

Torrance & Morris, for defendant.

(F.W.T.)

MONTREAL, 30TH APRIL, 1861.

Coram SMITH, J.

No. 1094.

Morrill vs. *McDonald* & al., and *Ross* & al., *Opposants.*

SECURITY FOR COSTS BY PLAINTIFF TO OPPOSANTS.

HELD:—That a non-resident plaintiff who has contested the opposition of an opposant, is not bound to give this opposant security for the costs of his contestation.

The plaintiff, whose domicile was in New York, United States, contested the opposition of the opposants Ross and others, by a contestation fyled on the 26th February, 1861.

On the 18th March following, the opposants Ross and others moved the Court that the plaintiff be ordered to give security for the costs of his contestation, inasmuch as he had no domicile in Lower Canada, but resided in New York.

After hearing, the matter was taken *en délibéré* by the Court, which decided on the last day of the following month of April that the plaintiff was not bound to give such security to an opposant.

Motion dismissed.

A. & W. Robertson, for plaintiff.

C. J. Dunlop, for opposants.

(F.W.T.)

MONTRÉAL, 30 SEPTEMBRE 1861.

Coram SMITH, J.

No. 2254.

Joseph vs. *Ostell.*

Jugé:—Que la déclaration faite par des Arbitres dans leur rapport, qu'ils ont été assermentés, ne suffit pas pour prouver qu'ils ont réellement été assermentés, et que leur rapport sera rejeté, s'ils ne produisent, au soutien de leur rapport, le certificat des personnes devant qui tel serment a été prêté.

La contestation en cette cause ayant été, du consentement des parties, référée

à des arbitres avec instruction de se faire assermenter avant d'opérer, les arbitres procédèrent et firent un rapport défavorable au demandeur.

Dans leur rapport les arbitres déclarent qu'ils ont été assermentés conformément à l'ordre de la cour, mais ne produisirent aucun certificat à cet effet.

Le défendeur ayant fait motion pour homologuer le rapport des arbitres, le demandeur s'y opposa et fit de son côté une motion pour le rejeter, attendu qu'un des arbitres n'avait pas prêté le serment requis par le jugement interlocutoire, avant d'opérer, et prétendit que c'était aux arbitres à prouver qu'ils avaient été régulièrement assermentés devant une personne compétente, et que la déclaration contenue dans leur rapport ne suffisait pas pour satisfaire la cour, lorsqu'elle était mise en question par l'une des parties.

Le défendeur prétendait qu'en l'absence de preuve contraire, la déclaration des arbitres suffisait.

La cour adopta les prétentions du demandeur, et ordonna que le rapport fut renvoyé aux arbitres, enfin de leur donner l'occasion de produire la preuve qu'ils s'étaient conformés aux exigences du jugement qui leur référait la cause.

Les arbitres n'ayant pu produire la preuve qu'ils avaient tous été assermentés, leur rapport fut rejeté avec dépens sur motion du demandeur, faite le 19 octobre 1861, devant l'honorable Juge Berthelot.

Cherrier, Dorion & Dorion, avocats du demandeur.

Mackay & Austin, avocats du défendeur.

(V.P.W.B.)

COUR DE CIRCUIT.

L'ASSOMPTION, 21 NOVEMBRE 1861.

Coram BRUNEAU, J.

No. 397.

Souligny vs. *Vézina.*

Jugé:—Qu'un conseiller municipal ne peut être condamné à une pénalité en vertu de la 16e clause et de la 62e clause de l'acte municipal de 1760, en conséquence d'un vote par lui donné, à une assemblée du conseil.

Le demandeur et certains autres propriétaires de la paroisse de St. Roch, avaient été, il y a dix ans, attachés à un chemin qui se trouvait alors leur seule route pour se rendre à leur église, à la ville, etc.

Plus tard l'autorité municipale ouvrit un nouveau chemin, plus commode pour ces mêmes propriétaires et à l'entretien duquel ils furent aussi obligés.

Le 25 juin 1860, le conseil municipal de St. Roch, voulant faire un nouveau procès-verbal pour le premier chemin, nomma un surintendant spécial qui, après visite des lieux, exonérait par son rapport le demandeur et les autres propriétaires intéressés, de l'entretien de ce premier chemin comme leur étant inutile.

Ce rapport, soumis au conseil le 13 août 1860, fut homologué, après avoir été amendé de manière à obliger de nouveau les mêmes personnes à l'entretien du chemin.

Le demandeur et les autres intéressés se croyant lésés par ce procès-verbal, en appelèrent au conseil du comté, siégeant à l'Assomption, mais soit refus d'agir, soit négligence de l'officier principal du conseil de comté, il n'y eut pas

Sculigny vs. Vézina.

de session spéciale du conseil au jour où la dite requête en appel devait être prise en considération, et le procès-verbal du conseil de St. Roch, se trouva homologué par la loi.

Le 31 octobre 1860, le demandeur et quelques autres intéressés présentèrent une requête au conseil de St. Roch, dont le défendeur fait partie comme conseiller, exposant les faits ci-dessus, demandant à être détachés du chemin en question qui ne leur était plus utile, et concluant à ce qu'il " fut immédiatement nommé un surintendant spécial pour faire rapport sur la dite requête."

Le conseil ayant pris cette requête en considération le défendeur fit motion :

" Que pour les mêmes raisons, motifs et considérations par lui donnés et énumérés dans une motion qu'il a faite et qui a été adoptée devant ce conseil, à " la session spéciale du 1er d'octobre 1860 (courant), relativement au même " chemin et requête dans le même sens que celle présentée, et que de plus pour " les raisons et considérations pour lesquelles le rapport ou procès-verbal, main- " tenant existant, relativement à ce chemin, a été amendé, et approuvé tel " qu'amendé par ce conseil à sa session spéciale du 13 août 1860 ; le même " procès-verbal tel qu'homologué par ce conseil, et de l'homologation duquel " il y a eu appel devant le conseil de comté est devenu par la loi en pleine " force. Qu'en conséquence il ne soit et ne peut être fait droit à la requête dont " il s'agit," et cette motion fut adoptée.

La déclaration en cette cause après avoir relaté les faits, alléguait :

" Que sur la présentation de la dite requête au conseil de la paroisse de St. " Roch, il devenait, par la loi, et spécialement en vertu de l'acte municipal du " Bas-Canada de 1860, du devoir du dit conseil municipal, et de chacun des " membres ou conseillers du dit conseil, et du défendeur en particulier, comme " étant l'un des conseillers du dit conseil, de nommer de suite par une résolution, " un surintendant spécial pour faire rapport sur la dite requête."

Que c'est en contravention de la loi que le défendeur a proposé la motion sur laquelle a été renvoyée la requête du demandeur, et que le conseil et tous les membres du conseil, et nommément le défendeur, en refusant et négligeant injustement et illégalement de nommer un surintendant spécial pour faire un rapport sur la dite requête, a agi en contravention à la loi et encouru une pénalité n'excédant pas $20 et de pas moins de $4.

Le défendeur plaida par quatre exceptions.

Par la première, il prétendait ne pas être tenu de répondre à cette action, réclamant le privilège d'un mois d'avis avant toute poursuite, accordé par la 14 & 15 Vic., c. 54, à toute personne remplissant un devoir public.

Par la seconde, le défendeur prétendait que la 45e clause de l'acte municipal de 1860, conçue comme suit : " Lorsqu'il sera représenté à un conseil de " comté ou à un conseil local, par une requête à lui adressée, par toute personne " intéressée, ou lorsqu'il aura été passé une résolution par un conseil de comté " ou par un conseil local, à l'effet qu'il devrait être fait des dispositions pour " l'ouverture, la construction, l'élargissement ou l'entretien d'un chemin, ou " pour tout ouvrage public dans les limites de ce comté ou de cette municipa- " lité locale, ou partie dans et partie hors, de ces limites, tel conseil nommera de " suite un surintendant spécial pour faire rapport sur tel requête," et la sec. 3

de la clause 62 du même acte, imposant une pénalité de $20 à $4 à tout membre d'un conseil refusant ou négligeant de remplir un devoir de sa charge ; sur lesquelles clauses le demandeur avait bâsé son action, ne pouvaient s'appliquer au cas présent, où le demandeur et les autres requérants ne demandaient qu'à être détachés de l'entretien d'un chemin, auquel ils étaient obligés par un procès-verbal régulier et ayant pleine force de loi.

Par sa troisième exception :

Qu'en supposant que la 45e clause de l'acte municipal s'appliquerait au cas relaté ci-haut, le refus du conseil de s'occuper de la dite requête, ne pouvait donner lieu à une telle action contre le défendeur.

Qu'en admettant même que le conseil eut manqué à ses devoirs en ne nommant pas un surintendant spécial pour faire rapport sur la dite requête, cela ne pourrait entraîner une condamnation individuelle contre le défendeur pour un acte collectif du conseil.

Qu'en imposant une pénalité aux conseillers qui négligeraient ou refuseraient de remplir quelque devoir de leur charge la loi n'a pas eu en vue les votes des conseillers aux séances du conseil.

Enfin, par sa quatrième exception :

Que d'après la déclaration même, le conseil de St. Roch avait déjà le 13 août 1860 pris en considération les travaux à faire pour l'entretien du dit chemin et avait homologué avec amendement le rapport du surintendant spécial nommé pour visiter ce chemin.

Que la requête du demandeur et des autres intéressés demandant absolument la même chose que ce qui avait été refusé par le dit conseil, lors de l'homologation du rapport susdit, le conseil avait parfaitement le droit de renvoyer cette requête, son opinion étant la même sur l'inopportunité des changemens réclamés par les requérants.

Que le conseil en consentant à nommer de nouveau un surintendant spécial, n'aurait fait qu'autoriser une dépense inutile, puisque le résultat serait le même.

Les faits allégués de part et d'autre étaient admis.

Le demandeur cita à l'appui de sa cause, l'Acte Municipal, sec. 45 et 62, § 3, et prétendit que l'acte 14 et 15 Vic., c 54, ne s'appliquait pas à cette action par laquelle on demandait l'application d'une pénalité imposée pour négligence dans l'accomplissement d'un devoir, et non des dommages résultant d'un acte du défendeur dans l'exercice de ses fonctions.

Le défendeur cita : l'Acte 14 et 15 Vic, c. 54, sec. 2, et l'Acte Municipal de 1860, clause 45e.

BRUNEAU J.—Le demandeur s'est trompé en demandant à ce tribunal de punir un conseiller, pour un vote par lui donné, à une séance du conseil dont il fait partie. Condamner le défendeur à une telle pénalité, ce serait priver le conseil de toute liberté et faire aux conseillers une position impossible en les privant de tout libre arbitre, et en les astreignant à faire des actes que leur raison et leur jugement leur démontreraient être inutiles et mauvais. La loi municipale en imposant en certains cas, aux conseillers, des devoirs rigoureusement définis, n'a pas été jusqu'à leur ôter toute liberté, et le conseil ayant décidé de ne pas acquiescer à la requête du demandeur, pour des raisons qui me parais-

Souligny vs Vézina.

sent excellentes, je ne vois pas qu'il soit possible de blâmer les conseillers en particulier, pour cet acte collectif du conseil. Action déboutée.

F. B. Godin, pour le demandeur.

Fabre, Lesage & Jetté, pour le défendeur.

(L. A. J.)

EN VACANCE.

MONTREAL, 21 AOUT 1861.

Coram, BADGLEY J.

No. 931.

Barbier vs. *Verner*.

Jugé :—Que, sous le statut des Locateurs et Locataires, ce n'est pas le montant des dommages réclamés qui détermine la juridiction de la Cour, mais le loyer annuel de la propriété.

Le demandeur, qui est locataire du défendeur porta devant la Cour de Circuit pour le district de Montréal, une action en vertu du statut des Locateurs et Locataires, chap. 40 des Statuts Consolidés du Bas-Canada, demandant l'exécution de certaines grosses réparations et le paiement de la somme de deux cent-cinquante piastres, par forme de dommages résultant de la non-exécution des obligations du propriétaire.

Le défendeur rencontra cette action par une exception déclinatoire, prétendant que le montant réclamé excédait la juridiction du tribunal.

A l'audition, *M. Girouard*, dit que l'action du demandeur avait été portée en vertu du statut des Locateurs et Locataires, et qu'il ne pouvait pas l'instituer autrement ; que ce statut avait été passé pour régler les rapports des Locateurs et des Locataires, et que dans une simple poursuite en dommages, provenant de la non-exécution des obligations imposées par la loi sur le propriétaire, le locataire pouvait se pourvoir en vertu de cette loi ; qu'elle en avait une disposition formelle dans la clause 1re par. 5e ; que de plus cette action avait pour but l'exécution de certaines réparations nécessaires, dont la loi charge les propriétaires et que c'était là encore une autre cause de procéder en vertu du statut des Locateurs et des Locataires ; que la même section 1re par. 4e avait également une disposition formelle ; qu'en conséquence, le demandeur avait droit d'adopter la procédure extraordinaire indiquée par le statut ; qu'alors la Cour avait une juridiction exceptionnelle et différente de celle que lui confère le statut qui l'établit ; que la Cour de Circuit peut seule exercer cette juridiction dans les causes où le loyer annuel est de £50 ou au-dessous, quelque soit d'ailleurs le montant des dommages réclamés, fussent-ils mêmes de £10,000 et que la Cour Supérieure n'était saisie que des causes où le loyer annuel excédait £50 ; que la clause 4e conçue en ces termes : " Les actions en vertu du présent acte " seront intentées en la manière ordinaire dans la Cour Supérieure ou de Cir- " cuit ; et la valeur annuelle ou loyer de la propriété louée déterminera la juri- " diction de la Cour, quelque soit d'ailleurs le montant des dommages et du " loyer réclamés," était expresse et que les mots " *intentées en la manière ordinaire*," ne peuvent seuls laisser aucun doute sur la question, mais veulent tout simplement dire qu'on procédera dans les actions prises en vertu du statut des Locateurs et des Locataires comme dans toute autre action, quant à l'exploit d'assignation, la déclaration, la signification, la contestation, la preuve et l'audi-

tion, à l'exception des délais et de la juridiction que le statut veut être exceptionnels et extraordinaires. Barbie vs. Vernet.

M. J. BATES.—Soutint au contraire que la juridiction exceptionnelle créée par le statut des locateurs n'avait pas lieu dans ce cas-ci, mais seulement dans le cas du demandeur en résiliation du bail; que cette poursuite, telle qu'intentée entrait dans la juridiction ordinaire, et que ce n'avait jamais été l'intention de la législature d'amener devant la Cour de Circuit des demandes qui excéderaient £50, et pourraient même comprendre une somme d'argent considérable, qu'en fin cette action aurait dû être prise dans la Cour Supérieure.

M. BEDWELL:—Conseil pour le défendeur, argua dans le même sens.

Le jour suivant Son Honneur M. le Juge Badgley rendit jugement, et dit que le point soulevé avait déjà été décidé contre le défendeur dans une cause de Bédard vs. Dorion, rapportée dans le 3e vol. du *Jurist*, page 253, et qu'il s'en tenait à cette décision.*

Exception déclinatoire déboutée.

Carter et Girouard, pour le demandeur.

J. & W. A. Bates, pour le défendeur.

Bedwell, conseil pour le défendeur.

(D.G.)

MONTREAL, 30TH DECEMBER, 1861.

Coram BERTHELOT, J.

No. 1245.

McLaren et al., vs. *Hutcheson & Fraser, T. S.*

HELD:—That a *saisie-arret* after judgment must be served on the defendant within the same delay as an ordinary writ of summons.

This was a *saisie arrêt* after judgment which had been served on the defendant only two days before the return day of the writ. The defendant made default, and judgment was claimed by the plaintiffs, on the authority of Mettayer et al., vs. McGarvey and Mettayer et al., T.S., 6 L. C. Law Reports, p. 148; and Jones vs. Saumur dit Mars Leroux, T. S., 2d L. C. Jurist, p. 60.

Per Curiam:—Admitting to the fullest extent even the doctrine that an attachment after judgment is a proceeding in the nature of an execution, it does not at all follow that the mode of procedure is similar to that under an ordinary *saisie-exécution*. A reference to the form of the writ will suffice to establish that it is not. In the case of the *saisie-arrêt* the defendant is summoned to appear and answer in all respects as under an ordinary writ of summons; the writ being in that particular a writ of summons. The delays enacted by statute therefore, for the summoning of parties must be observed in the one case as well as in the other. I have merely to add that I have consulted all the judges on

* Une décision semblable a été rendue par Son Honneur M. le Juge Guy, à St. Jean en mars 1859, dans une cause de Mussen vs. Robinson.—*Note du Rapporteur.*

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the point, and they concur in my view. The *délibéré* must therefore be discharged.*

Délibéré discharged.

Bethune & Dunkin, for plaintiffs.

(S.B.)

MONTREAL, 7 SEPTEMBRE 1861.

EN APPEL

De la Cour de Circuit—District de Montréal.

Coram SIR L. H. LAFONTAINE, Bart. J. C., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

AMBROISE SENECAL,

(*Demandeur en Cour Inférieure.*)

APPELANT;

ET

ONESIME CHENEVERT,

(*Défendeur en Cour Inférieure.*)

INTIMÉ.

JUGE :—Que lorsqu'un défendeur est assigné dans un district autre que celui de sa résidence sous prétexte que la cause d'action a originé dans ce district, il faut que *toute* la cause d'action y ait originé.

L'appelant, demandeur en Cour Inférieure poursuivait le défendeur pour la pénalité de £50, pour n'avoir pas fait enrégistrer l'acte de société de la Compagnie de Navigation des Trois Rivières, dont il était un des actionnaires. Il alléguait l'acte de société fait à Trois Rivières; que la société avait fait des affaires dans le district de Montréal, et qu'elle était en conséquence tenue d'enrégistrer son acte de société au bureau du protonotaire de la Cour Supérieure dans le district de Montréal et au bureau d'enrégistrement du comté de Montréal, ce qui n'avait pas été fait.

Assigné pour répondre à cette action devant la Cour de Circuit du district de Montréal, l'intimé y répondit par une exception déclinatoire fondée sur deux raisons :

1o. Parceque la Société de Navigation des Trois Rivières ayant été contractée aux Trois Rivières où elle avait le siége principal de ses affaires, n'était pas obligée d'enrégistrer son acte de société dans le district de Montréal;

2o. Parcequ'en supposant même que le défendeur fut tenu de faire enrégistrer l'acte de société dans le district de Montréal, la cause d'action n'était pas originée dans ce district.

La Cour de Circuit maintient l'exception déclinatoire sur le premier motif. (†)

En appel le jugement fut confirmé sur le principe que la cause d'action n'avait pas pris naissance dans le district de Montréal.

L'appelant dans son factum exposait ainsi sa cause :

Les termes du statut sont comme suit : "That all persons associated in partnership for trading purposes in Lower Canada, shall cause to be delivered to the

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* As this judgment was plainly at variance with the former jurisprudence of the Court, the plaintiffs were allowed, on special application to that end, to rule the defendant to appear and answer the writ within five days from the service of the Rule.

(†) Vide L. C. Jurist—Tome 4, p. 239.

Prothonotary of the Court of civil jurisdiction IN EACH DISTRICT and to the Registrar of EACH COUNTY, in which they and all carry on business, a declaration in writing, signed by the several members of the said co-partnership, etc., etc.," 12 Vic. ch. 45, sec. 1.

Par les dépositions imprimées, il est évident que cette Compagnie faisait beaucoup plus d'affaires à Montréal qu'à Trois Rivières et qu'elle n'a jamais eu aucun bureau d'affaires à Trois Rivières, en sorte que le siége de ses affaires n'a jamais été à Trois Rivières.

La loi du pays exige l'enrégistrement de cette déclaration dans chaque district et aussi dans chaque comté, dans les limites desquels une société commerciale fait des affaires (in which they shall carry on business) ; et en cela elle diffère des dispositions de l'article 42 du Code de Commerce qui n'exige cette publication que dans les divers arrondissements où la société a plusieurs *maisons de commerce*. Delangle, 2 vol. p. 162, No. 529, observe avec beaucoup de raison que :

" L'article 42 du Code de Commerce, en se servant de ces mots. *La Maison* " *de Commerce Social* a désigné le siége de la société, c'est-à-dire, le domicile de " l'être collectif, l'établissement où les intérêts sociaux se centralisent, où comme " tout autre négociant, il exerce ses droits, et répond aux actions dirigées contre lui.

" On ne peut pas entendre, *par une maison de commerce*, le lieu ou les travaux s'exploitent.

" Il est sans doute important que des publications clandestines ne deviennent pas un moyen de fraude, c'est pour ce motif que l'article 42, étendant à toutes " les *maisons de commerce* qui appartiennent à la société, l'accomplissement des " formalités de publicité, exige que là où existe un centre d'affaires communes, " les tiers soient avertis."

Goujet et Merger, Dictionnaire de Droit Commercial. No : Société § 4, Siége de la Société. No. 167, page 579.

" Si une société a plusieurs établissements d'une égale importance, son domicile se détermine par les circonstances. Ainsi, une société commerciale peut, encore bien qu'elle possède une maison, dite maison de la compagnie, être assignée au domicile de son régisseur lorsqu'il est constant qu'elle a établi ses bureaux dans la maison de ce dernier, qu'elle y a placé son enseigne et qu'elle y fait toutes ses opérations.

" Il a même été jugé que, quoique l'acte de société indique un siége social, si en réalité, la société n'y est point établie, ou si elle n'y a pas le centre de ses opérations, ce n'est point là que les actions qui l'intéressent doivent être portées."

Ainsi le défaut de l'enrégistrement de cette déclaration à Montréal, où cette compagnie faisait le plus d'affaires, a donné un droit d'action au demandeur qui a pris naissance dans les limites de chaque district et même de chaque comté où cette déclaration devait être enrégistrée.

MEREDITH, J. The clause of our statute. (Consolidated Statutes of L. C., cap. 82, sect. 26), declaring that " any action, suit, or proceeding may be commenced " at the place where the terms of the Superior Court or Circuit Court are held " in any District or Circuit, provided the *cause of such action*, suit, or proceed-

Seneeal vs. Chenevert.

"ing respectively arose within such district or circuit," is in effect the same as the provision of the English County Court Act (9th and 10th Vict. cap. 95, sect. 60), which enacts that the summons to "the defendant may issue in any "district in which the defendant, or one of the defendants, shall dwell or carry "on his business, the time of the action brought, or, &c.—" or in which the cause of action arose: "under this provision of law it has been held by the Court of Queen's Bench, Exchequer, and Common Pleas, in England, that by the words "cause of action" are meant the whole cause of action; and according in Borthwick v. Walton (15 Com. Bench 503, 80, E. C. L. p. 499) where goods were ordered at Oxford, and delivered at Manchester, it was held that the county court judge at Manchester had not jurisdiction—and Chief Justice Jervis in disposing of that case observed:

"It has been decided over and over again that 'the cause of action' in the "9th and 10th Vict. c. 95, sec. 60, means the whole cause of action; I therefore "think the county court judge was wrong in assuming jurisdiction. The whole "cause of action clearly did not arise in Manchester. The mere delivery of the "goods at the Railway station there was not enough. The plaintiffs were bound "further to prove the order; and that was given and received at Oxford. The "appeal therefore (said the learned Chief Justice) must be allowed." Judge Manule used nearly the same words in concurring in the judgment, and added: "every thing that is requisite to show the action to be maintainable is part of "the cause of action."

Applying the doctrine thus laid down, which (I may be permitted to say) appears to me to be perfectly reasonable, to the present case, and admitting for the purpose of the present discussion, that the defendant was bound to register a declaration of co-partnership, as contended by the plaintiff, in the district of Montreal; still it is proved that the association, of which the defendant is a member, was formed or organized in the district of Three Rivers:—a part of the cause of action therefore, namely the organization of the company, did not arise in the district of Montreal; and therefore (without expressing any opinion as to whether a declaration of the alleged co-partnership ought or ought not to have been enregistered in the district of Montreal) it seems to me to be plain that the declinatory exception was properly maintained; as the whole of the cause of action did not arise in the district in which the action was brought.

MONDELET, J.—L'intimé, défendeur en la Cour de Circuit de Montréal, et que le demandeur allègue être un des associés d'une société commerciale non-incorporée, et demeurant aux Trois Rivières est poursuivi, pour le paiement d'une pénalité de £50 encourue par le fait qu'il n'y a pas eu à Montréal un enrégistrement au greffe de la Cour Supérieure et au bureau du Régistrateur de la dite société et ce en contravention à la 12 Vict. 45, §1. Il a été assigné de comparaître à la Cour de Circuit à Montréal, et a plaidé par une exception déclinatoire.

Le mérite est mêlé avec cette exception.

Le jugement commet la même irrégularité.

Il fallait au préalable statuer sur la question de juridiction. Je suis d'avis distinctement que la Cour de Circuit a bien jugé en déclarant qu'elle n'a pas de

juridiction, mais en confirmant ce jugement je retrancherais des motivés la partie qui statue sur la question au mérite, c'est-à-dire sur la non-obligation de la société d'enrégistrer à Montréal.

Il est évident que le défendeur demeurant aux Trois Rivières ne peut être assigné à Montréal qu'autant que la cause d'action a originé à Montréal, cette pénalité n'est pas ce que l'on appelle une cause d'action résultant d'un contrat d'une obligation, d'un assumpsit etc., ce que signifie la loi.

Au reste comme il n'est aucunement établi que le siège des affaires de cette société fut à Montréal; qu'au contraire il est à Trois Rivières, ou tout que plus à bord du vapeur *Ottawa*, il s'ensuit que l'assignation n'a pu se faire légalement pour la compérution du défendeur à la Cour de Circuit de Montréal.

Lorsqu'une société a un bureau d'affaires, on fait la signification à ce bureau d'affaires; si on a à assigner individuellement un de ces associés, on le doit faire pour le contraindre de comparaître dans la juridiction ou il demeure, devant ses juges naturels, à moins que la loi n'en ait décidé autrement.

Ainsi, dans le cas même où le défendeur aurait encouru la pénalité pour le recouvrement de laquelle l'action est intentée il n'en est pas moins vrai, qu'il ait dû être assigné à comparaître à Trois Rivières où il demeure,

D'après ces raisons, j'opine pour la confirmation de la Cour de première instance.

Jugement confirmé.

LaFrenaye & Papin, pour l'appelant.

E. Carter, conseil.

Dorion, Dorion & Séncal, pour l'intimé.

(V.P.W.D.)

MONTREAL, 7TH DECEMBER, 1860.

Coram The Hon. SIR L. H. LAFONTAINE, Bart., Ch. J., AYLWIN, J., DUVAL, J., BADGLEY, J. *ad hoc*, BRUNEAU, J. *ad hoc*.

No. 20.

RAVARY & al.,

(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(*Defendants in the Court below,*)
RESPONDENTS.

HELD:—In an action of damages arising from a railway accident, which resulted in the death of a party and the destruction of the horse and waggon in which he was drawn, that without specific proof of the pecuniary value of the party's life, damages may be assessed by the Jury and be recovered, beyond the mere value of the horse and waggon, as a *solatium* to the widow and next of kin for their bereavement.

This was an appeal from a judgment rendered by the Superior Court at Montreal, on the 30th day of September, 1857, granting the defendant's motion for a new trial, a full report of which is to be found in the 1st vol. of the *L. C. Jurist*, page 280 *et seq.*

AYLWIN, J. The statute of which the Canadian act was a copy had in England given rise to great difficulty, and no less an authority than Lord Chief Baron

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Pollock thought the right of action depended upon some pecuniary damage as the only element upon which the Jury could make up a verdict. But, in considering the weight which was to be attached to the opinion of this learned Judge, it was necessary to consider the peculiarity of his views, and when it was remembered that he has also decided that in an ordinary action for injuries done by negligence there could be no damages given to compensate for the bodily sufferings of the plaintiff, because, as he said, suffering is the common lot of humanity, it must be admitted that his views were peculiar indeed. He thought that suffering is so much the common lot of humanity, that no matter by what gross negligence of a Railway Company it might be caused, the sufferer had no right to recover any compensation for his pains. That was one ruling of Chief Baron Pollock. Then the statute from which ours was copied came up to be expounded before the Court of Queen's Bench, in Blake vs. The Midland Counties R.R. It is easily understood why great difficulty was found in dealing with that case in an English Court. It was because the English Common Law proceeded altogether on precedents. If there be no form of action known to the Law there can be no remedy, and, therefore, they were embarrassed when they had to do with a new kind of action. The counsel for the plaintiffs, however, took up the legal points as they ought to be taken up—that was in view of the evil which had existed and of the remedy which the statute proposed to give—which was to create for injuries resulting from the death of a party by negligence the same kind of action as already existed for injuries which did not result in death—in short to make death the subject of civil action instead of the cause for levying a deodand, which was the old mode of punishing the negligent person. The English Statute did not extend to Scotland for this reason, that the law of Scotland, identical with that of the Lower Canada, already provided a remedy. It would have been as well to limit our Canadian statute to Upper Canada, where alone it was wanted. The statute was based upon the rule of the civil law, and to interpret it we must, therefore, look at the civil law—for instance, at the law of Scotland. There, when damage were sought for the death of a father or a near relative, the Court did not look merely at pecuniary loss suffered. An award of money was made as a "*solatium*" for wounded feelings. The "*assizement for homicide*" included a "*solatium*" as well as an indemnity. The action belonged, moreover, to the wife and children; the division of damages being made in the same way as the division of goods belonging to the community. There was a case in 1542, where, upon the negligent killing of one David Forest, the Court ordered an "*assizement*," and gave portions, though not portions equal to those awarded to the other children, to the deceased's illegitimate children. The reason for fixing the amount at a large sum was, moreover, stated to be because David Forest was a good, honest, substantial man, and the other party a rich man. The Scotch law was the proper quarter to look to for elucidation for this statute. English law afforded none. Yet the ruling in Blake vs. the M. C. R. Co. was applied in Lower Canada, and the Jury was told that they could not take anything but pecuniary loss into account, and must reject any idea of a *solatium* for mental suffering. That was English law; but the

rules of right and wrong were not confined to England. They might be appreciated in every civilized country, and an appeal might frequently be made to the decisions of the United States, where their system of law was essentially English, not without benefit, when peculiar circumstances had to be regarded. Now, in that country, it would be found that the Courts of Massachusetts, where the judiciary were entitled to the highest respect, had considered this question; and in the case of Tanny v. Williams in Cushing's reports had set aside the English rulings. It must be observed that under the Civil Law—as in Lower Canada—decisions might be correctly arrived at, wholly different from those which had been, perhaps, very properly given on the very same statute in Courts where the common law of England was administered—as in those of Upper Canada. In order to interpret a Statute, it was always necessary to look at the Common Law as it existed before the Statute, for a Statute could only be properly expounded by reference to that. Now, the common law of France, which was also the law of Lower Canada, was as old as the hills, founded on the Civil Law—not incident to any modern improvements; but settled by the wisdom of ages, and a better book on that law was not to be found than *Poullain du Parc's Instituts du Droit Français*. At vol. 8, p. 184, he says that in cases of negligent homicide, the Courts will award "*reparation*"—the same word as is in the Scotch books—to the widow and heirs, and this even though they may have renounced the community and successions. *The Repertoire de Jurisprudence* under the title homicide, and the French books generally, are to the same effect and purport. The action lay, in fact, in favour of all the parties, whom Mr. Justice Coleridge in one of his decisions, enumerated as being supposed at English common law to have no action, the only restriction in French law being that the action brought by the nearer relation excluded the more distant. This being the state of the law before the Statute, what was the effect of that enactment? The act was admitted on all hands to be remedial—that is to say, intended to confer larger rights than existed at common law. It must therefore be construed largely and beneficially, and more largely in Lower Canada than in Upper Canada, or England, because in Lower Canada, even if this act were struck from the Statute book, the action would still belong to the same parties to whom that Statute gave it. It would certainly not be argued that, under guise of extending the right of persons injured by railway accidents, the remedy which those parties had beforehand, was wholly done away with, or so circumscribed as perhaps to amount to no remedy at all. The learned Council in Blake's case laid great stress on the circumstance that the English act did not extend to Scotland. Why? because the Scotch had already a good remedy at common law.—They had only to go on as they had done for centuries past. In construing the Statute for the first time in Lower Canada, the Court would be glad to look for instruction to the English and Upper Canadian decisions, if they at all squared with the principles of the Lower Canadian law; but they had to make that law and the Statute stand together. That being so, could the Lower Canadian Courts take that merely £. s. d. view of the subject for which the English Judge contended. Was human life to be so estimated, as to say that the family of a dissipated or bankrupt father should receive

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nothing while a large sum must be granted to the family of a man of different habits or position? That could not be so under the system of France or Lower Canada. Sourdat, Lebrun and others state expressly that the damages are to be *pour le deuil des parents—ex jure sanguinis*, and *ex vindicta*. The estimation was to be left to the *arbitrage* of the Judge in France; but why should not the same facts be estimated by a jury here when the whole matter is left to their decision? It had been said that the verdict in the present case was bad because there had been no appointment of damages as between the plaintiffs. But this was no objection in the mouth of the defendant, to whom the division was a matter of no consequence at all. Besides even this pretext was taken away, since the parties themselves had waived the bill of particulars which the statute gave them a right to have—nay, more, both had consented to the questions to be propounded to the jury. Suppose the judgment of the Court below were confirmed and a new trial were granted, the same objection would still occur after a new verdict. There was another difficulty about this course arising from the system which prevailed here. Though no form of action was required here, the law was rigorous as to the form of the conclusions. The plaintiff was bound and could not recover beyond them. Now here the plaintiffs, by asking for a round sum, had bound themselves to the partition, which must be at common law, and, therefore *a capite*. That was so well known that in some of the *coutumes* there were articles directing the mode in which the division should take place. In conclusion, to show how careful the Scotch Legislators had been to secure to the survivors of a person killed by negligence a compensation from the slayer, it would be sufficient to mention that the Parliament of James 4th provided that, in the case the judge did not do justice in this particular, he should himself be made to pay a sum of money to the next of kin. The Court below had fallen into the capital error of thinking that there was no common law remedy for this case, but the Court here now, believing that the verdict had done substantial justice; that the jury were the proper arbiters of the amount of damages; and that they had arrived at about the same decision as to the amount which the Court would have arrived at, and of which the defendant certainly had no reason to complain, would direct the order for a new trial to be reversed, and judgment to be given on the verdict. It was proper to mention with regard to the question that Chief Justice Robinson in Upper Canada had stated that ringing a bell, sounding a whistle, &c., did not exempt a Railway Company from liability. Those were things that they were bound to do, but the doing them was not enough to disprove the charge of negligence.

The respondents, when they object to the supposed failure on the part of the jury to apportion the damages between the appellants, forget that this is to *exciper le droit d'autrui*, which is forbidden in our law. What is it to the Company how the damages are apportioned, if all the parties interested and competent to sue are before this Court, and there is an award of damages to them, covering the whole of their claim and demand.

BADGLEY, *J., dissentiens*.—This is the first case which has presented itself under the Statute 5th Victoria before this Court, and it will, therefore, be proper to enter a little more largely than usual into the merits of it.

The action has been instituted by the widow and the children, nine in number, of the late Thomas Wilson, who was killed and his horse and cart destroyed, on the Railway track, not far from his residence, at Coteau du Lac, by the defendants' Railway engine, and for which £10,000 are claimed as damages. The plaintiffs' declaration alleges, that the death of their late husband and father, respectively, was caused by the gross carelessness and negligence of the defendant's servants, in conducting their engine, when the loss occurred; this is specially denied by the defendants, who affirm that the imprudence and want of care of the deceased himself were the sole causes of the injury. The plaintiffs' evidence is confined to the fact of Wilson's death, the destruction of his vehicle and the circumstances of the event, the time and place of its occurrence, being the evening of the 29th day of November, 1856, on the Railway track, near the Coteau, by the upward train from Montreal, the want of the usual precautions and signals by the conductors of the train, the age of the deceased between 50 and 60 years, the value of the horse and cart, his position as a farmer, *un bon habitant vivant sur sa terre;* that Elizabeth Ravary, the widow, had been Wilson's wife, and was tutrix to four of the children minors, two sons of the respective ages of 13 and 20, and two daughters of 16 and 18 years; that of the other five children, two were sons above full age and were merchants trading and residing at Montreal, and three daughters, of whom two were married to merchants, also living at Montreal: this is the sum of the plaintiff's testimony. That of the defendants was applied to rebut the charge of negligence imputed, it proved the fault and imprudence of the defendant in pushing across the Railway track with his horse and cart at the time of the near approach of the engine, and which occasioned his loss of life and the destruction of his property. The judge at the trial charged the jury that by law aforesaid, proof of the special damage suffered was required to support a verdict for the loss of life, and that no verdict could be given on that head, as the requisite legal testimony had not been adduced; that the fact of negligence on either side and of the value of the horse and cart were within their province. The jury rendered a verdict contrary to the judge's charge, finding three hundred and nineteen pounds against the defendants, namely, three hundred pounds for the loss of life, and nineteen pounds for the destruction of the property, and judgment was subsequently rendered by the court in *Banco* by which a new trial was granted, and the verdict set aside upon the ground of the legal correctness of the judge's charge: from this judgment this appeal has arisen. In the argument at the Bar, the plaintiffs rely upon the common law of the Province, the defendants upon the statute 5 Vict.; the investigation and examination of the case will necessarily require therefore a scrutiny of both laws, and not only the extent of their applicability to and connection with this case, but also the extent of their concurrence with, and difference from each other. It is proper to commence with the common law, which constrains every person to repair the injury he may have caused to another; hence *délits*, or *quasi délits* technically so called, cast upon the persons who commit them, not only the necessity but the obligation to repair the injury. "Le quasi délit produit contre son auteur l'obligation de réparer le "mal qui en résulte: c'est là une faute d'où les lois font dériver une obligation de

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"faire réparation du mal fait."—"Quand nous parlons des obligations qui nais-"sent de cas fortuits, [which are ranked as *quasi délits*] nous n'entendons point "que ces événements soient proprement la cause des obligations, ils en sont seule-"ment l'occasion; ainsi c'est la loi faite pour les cas de nécessité, qui est la véri-"table cause de l'obligation." Nouveau Denisart, Verbo Délit.

Thus this obligation always rested upon the *délit*, or the act in the nature of a *délit*, and for its enforcement, French jurisprudence and practice accorded a criminal proceeding uniting two several accusations, the one penal and public, the other civil, in damages and personal "l'une est seulement pour un délit qui n'in-"téresse point le ministère public, et quoiqu'on la poursuive par la voie crimi-"nelle, elle ne tend cependant qu'à une réparation soit d'honneur, soit pécuniaire: "ainsi la personne offensée est obligée d'en faire elle-même la poursuite." Poullain du Parc, p. 173, and at pages 102 et seq. in the same volume the author observes: "l'action de dommages et intérêts résultant du délit est distincte de "l'action pénale et en diffère etc.: l'action pénale a pour objet la punition du délit "et l'action en dommages-intérêts ne concerne que le dédommagement de celui "contre lequel le crime est commis, de ses parents, ou de sa veuve: par. 8. Quoi-"qu'il y ait de la différence entre la réparation civile ou l'intérêt civil et les "dommages-intérêts; cependant on confond le tout lorsqu'il ne s'agit que d'un "objet pécuniaire, etc. Sans m'arrêter à cette question de nom, il est certain "en général que l'action de dommages ou en réparation pécuniaire, qui est à "l'arbitrage de justice, doit être toujours *proportionnée à la nature du délit, et "au préjudice qu'il a causé au demandeur, soit dans sa fortune, soit dans sa "santé ou dans son honneur.*" Then at par. 10 he thus proceeds: "l'homicide "donne lieu à une réparation pécuniaire considérable au profit des enfants et "des héritiers présomptifs, la veuve ou le veuf de la personne tuée, est également "en droit de la demander. Elle se règle à l'arbitrage de la justice et elle doit "être beaucoup plus forte pour une veuve et pour des enfants, parceque leur "perte peut être beaucoup plus grande. *Un père de famille donne un état et "les moyens de subsister à sa femme, il donne l'éducation à ses enfants et sa "mort violente leur ôte souvent toutes les ressources qu'ils avaient et les réduit "dans l'indigence ou dans une situation gênée. Ainsi l'on ne doit pas s'étonner "de ce que par le droit commun du Royaume, la réparation civile est accordée à "la veuve et aux enfants, nonobstant leur renonciation à la communauté et à "la succession.*" So to the same effect, Nouv. Denisart, says: "La mesure de "cette réparation dépend trop des circonstances pour être déterminée; on est "porté d'abord à *la raison égale à la perte*, et cela doit être ainsi partout où il "y a une faute évidente et inexcusable dans l'auteur de l'accident." Again in the first vol. Dict. des arrêts vo. Blessé, p. 94: "Quand il est question d'adjuger "l'intérêt [dommages et intérêts] d'un homme tué, l'on considère l'art, l'indus-"trie, l'instruction envers les enfants *quia fit æstimatio ejus quod interest et "quanti interest non esse occisum.*" Bouvot, vo. Blessé, Quest. 2. A number of adjudged cases in France show that the damages were *à l'arbitrage de la justice*, founded, however, upon the special proof of facts above mentioned, for the guidance of the Courts, which divided the amount amongst the sufferers according to the injury suffered by each. In a case, 2 Dict. des arrêts, treize août mil

cix cent soixante et dix, arrêt de Bordeaux vo. Dommages p. 733. Dommages et intérêts adjugés pour raison de l'homicide du père doivent être partagés par moitié entre la mère et le fils. Lapeyrère Lett. D. N. 174. In a case, 3 Journal des Audiences, p. 985, arrêt, 3 avril 1685, the widow and the five children of one Denis, four of whom were minors and one married, prosecuted the survivor of two persons called Chrestien, for the homicide of Sieur Denis, their heretofore husband and father; in the argument of the case, the following remarks occur and were not contradicted: "Il est vrai que nous recevons les personnes "intéressées à déférer à la justice, et à se rendre instigateurs et à fournir les "preuves nécessaires à la personne publique pour convaincre les accusateurs, et "par conséquent à se dire partie contr'eux; mais ce n'est point pour leur donner "la liberté de conclure à la peine que mérite le crime, ce n'est que pour conclure "au paiement du dommage que l'accusé a causé par son crime à celui qui se "plaint;" two striking differences in practice between the French and civil law is then shown: 1o. the former having two *parties*, one in the interest of the public, the other in that of the individual, who suffers from the crime, whilst by the latter law there was but one accusing *partie* who might be without any interest. 2o. "par le droit Romain l'on n'adjugeait la restitution où dédom-"magement contre l'accusé qu'en de certains cas, au lieu que par notre "pratique, on adjuge des dommages et intérêts en tous les cas indirecte-"ment, à la partie intéressée. Ce n'est pas que nous ayons mis prix "à la vie des hommes ni aux autres choses que les Romains tenaient inestima-"bles; mais nous estimons le dommage que l'on souffre par la perte de ces "choses. Par exemple, il n'y a personne qui doute que les enfants ne souffrent "beaucoup dans leur fortune par la perte de leur père, et c'est ce dommage que "l'on estime; et puisque l'on condamne celui qui fait quelques dommages dans "les biens d'un autre, à réparer la perte, l'on peut bien condamner celui qui "cause une perte aussi considérable que celle d'un père ou d'un mari, à réparer "le dommage de ceux qui font la perte." In this cited case the damages were laid at fifteen thousand livres, and upon the conclusions of the *Procureur-Général* Talon, three thousand livres were adjudged against Chrestien, "savoir, le "tiers à la dite Dame Marreau (la veuve du dit Denis) et les deux autres tiers "aux enfants mineurs du dit défunt son mari, et d'elle," cutting out altogether the married daughter. Other cases and other authors might be cited, sustaining the same principles and jurisprudence, which moreover appear to be continued down even to the present time in the Courts of France, as may be seen in a recent judgment for damages, reported in the *Journal des Débats*, 11th April, 1860. "On se rappelle le déplorable accident l'année dernière à la gare "de Dancey près de Dijon. Le capitaine Testut a trouvé la mort dans cet "accident. Il laisse une veuve sans fortune et quatre enfants mineurs. Madame "veuve Testut a formé contre la compagnie des chemins de fer de Paris à Lyon "tant en son nom qu'au nom de ses enfants, une demande en paiement d'une "somme de cent cinquante mille francs. Le tribunal après avoir entendu M. "Dufouve, au nom de la compagnie, qui n'a pas contesté le principe de la res-"ponsabilité, a condamné la compagnie à payer à Madame Testut la somme de "soixante-dix mille francs, qui sera repartie de la manière suivante, vingt mille

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"francs lui sont attribués personnellement, sur les cinquante mille francs restant, "vingt mille francs sont attribués à la jeune fille et dix mille francs à chacun "des trois fils; ces cinquante mille francs seront placés en rentes inaliénables, "jusqu'à la majorité de chacun de ces enfants et immatriculés au nom "de chacun d'eux dans la proportion ci-dessus." The reasons and principles of these decisions cannot be doubtful, when it is remembered that this right to *dommages-intérêts, réparation civile*, is a personal right in the wife, husband and children of the deceased "*réparation pécuniaire proportionnée au préjudice que le délit a causé au demandeur soit dans sa fortune, soit dans sa santé.* The *estimation* must be *à la raison égale à la perte.* Why? because *un père de famille donne un état et les moyens de subsister à sa femme, il donne l'éducation à ses enfants, et sa mort violente leur ôte souvent toutes les ressources qu'ils avaient, et les réduit dans l'indigence ou dans une situation gênée.* From all the foregoing it must be unquestionable that such proof must be adduced as will enable courts of justice to ascertain the facts and assess damages suffered in consequence of the injury, and hence it is manifest that what we technically call special proof, was required to be adduced in such cases in France, and that in settling the *perte soufferte* by the homicide, "l'on considère l'art, l'industrie, "l'instruction envers les enfants," *quia fit æstimatio ejus quod interest et quanti interest non esse occisum.* 2o. That the division of the amount estimated was made by the Court by their judgments amongst the *demandeur*, in proportion to their respective losses, and could not be left to the parties themselves, because each was in his own personal right, and the *réparation pécuniaire* was neither *biens de communauté* nor *de succession*: on the contrary, it was allowed to the several surviving parent and children simply as such, and notwithstanding their renunciation of both *communauté* and *succession*, and furthermore was granted in despite of an absolute compromise and settlement between the deceased and the *auteur de l'accident*; and, 3o. That this pecuniary reparation so given did not derive from or rest upon the civil law, or was it in any way connected with the *solatium* of the Scotch law, or was estimated by the injured feelings of the *demandeurs*, but plainly and obviously rested upon the privation of some advantage actually suffered or reasonably expected to be suffered, from the homicide, and which was compensated by a sum of money adjudged in lieu thereof. By old arrêts in France, two fines were imposed upon the accused, one for *la partie intéressée*, l'autre pour le fisc: Imbert lib. 3, ch. 1, No. 10, [arrêt de 1306,] "mais depuis l'ordonnance de 1539, l'on a toujours adjugé à "la partie intéressée des dommages et intérêts civils, parceque cette ordonnance "porte en l'article 88, *qu'en toutes matières civiles et criminelles il y aura adju-* "*dication de dommages et intérêts*, en l'art. 148, *en matière criminelle la partie* "*privée baillera ses conclusions pour y répondre par l'accusé par forme d'atté-* "*nuation.*" So much for the Common Law.

The statute 5 Vict. was made operative in both Upper and Lower Canada, and was copied from the Imperial Statute *in pari materiâ*, with verbal alterations to suit it to our local jurisprudence. The preamble declares that a person who may have caused death of another by his wrongful act, neglect or default, shall be answerable in damages. It then provides, 1o. The same right of action for

damages is given in case of death as for bodily injury sustained without death. 2o. The restriction of the benefit from the action brought to the wife, husband, parent and child, grand and step parents and children. 3o. The allowance of only one action for the same subject matter of complaint. 4o. Its absolute limitation within a year from the death. 5o. The *assessment of damages* by a jury *in proportion to the injury suffered by the wife*, etc., from the death of the deceased. 6o. The *division* by the jury of the amount assessed, amongst the above beneficiaries under the action in such shares as the jury shall find and divide. Taking this statute in its own terms and provisions, independent of the common law, it does not accord damages to be assessed according to the necessities of the parties damnified and to be benefited, but according to the loss they have severally and personally sustained. Now, in this case, the parties to be benefited are the widow and the nine children, each in proportion to his or her loss suffered, or expected to be suffered, from the injury, and for this proportion each plaintiff in his own personal right. What then is the share of each as the case stands on this record? How can the proportioned assessment, and its subsequent [illegible] division among these ten plaintiffs, be effected, and the due share of [illegible] pecuniary reparation, be ascertained without special proof of the loss sustained by each. The statute plainly implies the obligation to adduce such special proof, because the actual advantage and anticipated benefit to each, from the continuance of deceased's life were the subject matter of assessment, the *æstimatio ejus quod interest et quanti interest non esse occisum*. Here four of the children were provided for and independent of their father and four others of a self-supporting age; from these circumstances the verdict was a mere guess. In actions for merely bodily injuries, special proof is required the injured feelings of the sufferer are not taken into estimate, and yet precisely the same action allowed in such a case as that is given by the statute in this case; moreover, should the damages formed by the jury be exaggerated and outrageous, it is impossible for the Court, without the use of arbitrary judiciary power, to bring the verdict within the possibility of reduction to a reasonable amount; the jury having had no special evidence before them for their estimate, the Court would be in exactly the same position, and must also go by guess, and in that case why should the [illegible] opinion of twelve jurors be set aside by that of three or four judges, [illegible] evidence. It is clear neither the suffering of the deceased, nor the grief of his representatives can be taken as one measure of damage; because the damage to be assessed having to be in proportion to the injury suffered by the persons to be benefited by the action, necessarily do not rest upon mere feelings, but upon the privation of some advantage, to be ascertained by a reasonable calculation in money. The death of a parent might in some cases be, in a pecuniary point of view, a blessing, when for instance he was dissipated, or so poor that it was necessary for his children to contribute to his support. A child might be supporting his parent instead of depending on him, and yet by this judgment that child would be entitled to his action as much as the infant whose support was entirely dependent on the life of the father who had been destroyed. Conclusive reasons in abundance might be adduced in support of the settled jurisprudence

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of the tribunals in England and in Upper Canada upon the terms and provisions of the statute, which hold that the damage is to be estimated by the loss really sustained, that the injury assumed as the ground of damage must be specially proved as being one presently suffered or reasonably expected to be so, and it must be of a pecuniary nature. Without that proof there can be no legal verdict. The judicial unanimity is perfect on these rulings, with the exception of the obiter of Sir John Coleridge, who, in the case of Blake vs. the Great Northern R. R. Co., wished to add to the statutory requirements the *solatium* of the Scotch law, as an additional means of assisting juries to assess damages in such cases. The stream of judicial and legal decision down to the present time has been opposed to the opinion expressed by Mr. Justice Coleridge, but as he sits in our Court of Appeal in the last resort, this case if sent to England may, notwithstanding, find support in his peculiar view of the Statute.

The examination of our common law and the Statute as above exhibit a marvelous coincidence between them; both concur in giving the same right of action, to the same parties, for the same matter of complaint; both require the *demande* to be established by the same special proof, and both require expressly the distribution of the damages found to be made by the tribunal, that heard and appreciated the evidence adduced; our own jurisprudence and the parallel decision in England have brought our common law and the Statute together without reference to the Scotch *solatium*, which has no connection with either or with this case, or with observations of American jurists which have no application If the statute be considered as a modification of our common law, it must follow that where its provisions are positive and need no judicial interpretation they *must be followed and submitted to*. The statute has in several particulars modified the common law and introduced new law; the chief of which are that only one action can be brought, that it should be brought in the name of the personal representative of the deceased, that it shall be submitted to the jury who shall assess the damages proportioned to the injury suffered by the jury amongst those several parties in such shares as the jury may find and direct. The jury have in this case found damages for the loss of life without legal proof, and they have neglected to carry out the positive provision of the Statute, and to divide the damages so found amongst the plaintiffs according to the due and estimated share of each of them; the verdict is therefore decidedly bad, nor can it be amended or corrected by this court, which, though it may strike out in a special finding a part of it, if it be beyond the issue, cannot perfect a defective verdict nor substitute its own judicial discretion and powers for those specially directed to be performed by the jury. By this Statute all the parties beneficially interested are united within the record of one action, no doubt to prevent an accumulation of costs, but each of them is, in fact, a separate and independent plaintiff in his own separate right, compelled by the statute to unite together in one action, but seeking his own personal share of that pecuniary reparation which the finding and verdict of the jury should award. Expressing my own conviction upon the merits of this cause, and as a juror, it would not have been possible for me to have muloted the defendants in any damages, as, from the evidence adduced, the deceased imprudently placed himself in the way

of the engine and undoubtedly by his carelessness and negligence occasioned his own death. However that may be, I think the verdict should not stand under either law or both combined, because, 1o. it was found without special proof; and, 2o. because the statutory division was not made. I think, therefore, that the judgment of the Superior Court was perfectly legal and correct, and should be supported.

DUVAL, J., *dissentiens*, concurred with Mr. Justice Badgley and called especial attention to the 5th sec. of the statute, which obliges the plaintiff to give the defendant a bill of particulars of the damages claimed as sustaining the opinion that the damages of the verdict could only be for subetantive loss.

BRUNEAU, J.—In England and Upper Canada he believed it would be necessary to prove special damages; but in Lower Canada another rule of jurisprudence prevailed. There were here obligations which arose without conventions and from the mere effect of circumstances which might be either *délits* or *quasi délits* resulting in loss or injury. Upon this principle the action was taken by the widow and children of the deceased, and the only question was whether there was enough evidence of the facts essential to such an action to justify the verdict of the jury. The number of the family deceased was proved, and it was plain that necessarily such a family must suffer loss from the death of the father by whose exertions they were maintained. That was what the jury had thought when they gave a verdict for £300. He thought the amount was purely a question for them. As to the mode of apportionment that might be a question for the plaintiffs; but it was not a matter with which the defendant had anything to do, and therefore could not be used by him to upset the verdict. The judgment of the court would reverse the order for a new trial and give judgment on the verdict.

The following is the judgment rendered by the Court of Appeals:—

"The Court * * * Seeing that at common law an action lies, at the suit of the widow and next of kin of a party killed by accident, to recover pecuniary damages from the parties by whose act or default the death has been caused. Seeing that the common law right is founded upon natural love and affection, and the ties of blood between the party killed and his widow, and next of kin respectively, and that the action to enforce such right is *jure sanguinis and ex vindicta*. Seeing that the damages which the party complaining is entitled to recover are not at common law confined to injuries of which a mere pecuniary estimate can be made, but comprehend a *solatium* to the widow and next of kin for their bereavement, *qui s'accorde au deuil des parents*, to be determined *à l'arbitrage du juge*.

Seeing that the Provincial Statutes of the 10th and 11th years of Victoria, chapter six, intituled, "An Act respecting compensation to the families of parties killed by accidents and in duels," purports to be a remedial act, and is to be liberally and beneficially construed and consistently with the common law which it does not toll.

Seeing that the amount of damages in this cause fell especially within the province of the jury, and that the finding in this respect is sufficiently sustained by the evidence adduced and is not excessive.

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Seeing that the appellants by their conclusions or aid prayer in their declaration in the Court below have made their own apportionment among themselves of the damages which they seek to recover, and that their remedy is limited by such *conclusions* in manner and form, as by them taken, in their said declaration, and that the verdict of the jury in their favour is to be construed relatively to the said *conclusions* in the apportionment of the damages.

Seeing that no sufficient cause has been shewn by the respondent, by reason whereof the verdict of the jury as recorded in the Court below ought to be disturbed, and that therefore in the judgment of the said Court, whereby the said verdict hath been set aside and a new trial granted, there is error. It is considered and adjudged by the Court now here, that the same, to wit, the judgment rendered in the Superior Court at Montreal, on the thirtieth day of September, one thousand eight hundred and fifty-seven, be and the same is hereby reversed, set aside and annulled, and proceeding to render the judgment which the Court below ought to have rendered, and seeing the motion in the Court below made by the appellant for judgment, it is considered and adjudged, pursuant to the said verdict, that the respondents do pay to the appellants the sum of three hundred and nineteen pounds current money of this Province, as and for damages by them sustained by reason of the accidental killing of the late Thomas Wilson, as complained of in the said declaration, and as found and as assessed by the said verdict, together with interest thereon from the said 30th day of September, 1857, till actual payment, and costs of suit as well in the Court below as in the Court here, and lastly it is ordered that the record be remitted.

Dissentientibus, The Honourable Mr. Justice Duval and the Honourable Mr. Justice Badgley."

Judgment of the S. C. reversed.

Loranger & Frères, for appellants.
Curtier & Pominville, for respondent.
(S. B.)

NOTE.—His Honour Judge Badgley has since furnished us with a very recent decision in England upon the Statute: it is taken from the London Times Law Report of 25th December, 1860, and is as follows:—Holt Adm. *vs.* Lancashire and Yorkshire R. C. Action for death of plaintiff's son, in consequence of alleged negligence on the part of the defendants. Evidence was given from which it appeared that the deceased acted as manager of plaintiff's cotton mill, and that the plaintiff sustained actual damage by reason of his death. Mr. Justice Blackburn in summing up explained to the jury that it was incumbent upon the plaintiff to prove some actual damages or the action would not lie, and that however unfeeling it might appear, they must consider the value of the deceased to the plaintiff in the same light that they would consider the value of a horse: they were not at liberty to take into consideration the feelings of the plaintiff for the purpose of assessing the damages. The questions for them to decide were, whether or not any actual pecuniary damage had been sustained, and if so how much. The jury found for the plaintiff, damages £250.

COUR DU BANC DE LA REINE.

EN APPEL.

De la Cour de Circuit pour le District de Richelieu.

MONTREAL 1er. JUIN 1861.

Coram SIR L. H. LAFONTAINE, BART., J. C., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

BELANGER,

Défendeur et Opposant en Cour Inférieure.

APPELANT.

ET

MOGÉ,

Demandeur en Cour Inférieure.

INTIMÉ.

JUGE:—Que le défaut de production d'une articulation de faits par l'une ou l'autre des parties, n'a pas l'effet d'empecher la cause d'être instruite et jugée.

Par sa requête en appel, l'appelant se plaignoit entre autres griefs de ce que son opposition produite devant la cour inférieure, "n'était pas lors du jugement "en état d'être jugée vu que l'articulation de faits prescrite par la loi n'avait et "n'a jamais été produite de la part d'aucune des parties en la dite cause."

Devant la cour inférieure dans le cours de l'instruction de cette opposition, le Demandeur ayant produit une articulation *générale* et le Défendeur opposant ne'en ayant produit aucune, ce dernier fit motion que, "l'inscription faite dans la "cause (l'opposition) sur le *Rôle d'Enquête* et le *Rôle de Droit* pour la preuve "en icelle et l'audition au *mérite* en même temps, fut *déchargée*, en autant qu'au-"cune *articulation de faits* n'avait été produite par aucune des parties en cette "cause;—que la prétendue *articulation de faits*, filée de la part du Demandeur, "n'en était pas une, vu qu'elle *n'articulait* aucun fait d'une *manière spéciale*, "qu'elle n'était en aucune manière conforme ni à l'esprit ni à la lettre du statut, "et que partant elle devait être considérée comme nulle et non-avenue."

La Cour inférieure par son jugement final, rendu le 17 de Février 1860 tant sur cette motion que sur le mérite de l'opposition rejeta la première partie de la dite motion qui tendait à faire radier l'inscription et accorda la dernière partie d'icelle, et, en conséquence, mit de côté l'articulation de faits et débouta l'Appelant de son opposition avec dépens pour les motifs qui sont énoncés au long dans let dit Jugement comme suit: "Considérant que le dit opposant (Défendeur dans la cause) n'avait que la voie d'appel ou tout au plus celle de requête civile pour faire reviser et annuller, si le cas y échéait, le Jugement prononcé en cette cause le sept février dernier, et non la voie de l'opposition afin d'annuller, a débouté et déboute la dite opposition afin d'annuller produite en cette cause par le Défendeur et opposant le treize Juillet dernier avec dépens."

Lafrenaye pour l'Intimé.—Il n'existe dans la loi aucune disposition pour obliger aucune des parties à filer une articulation de faits; il s'ensuit d'après les prétentions de l'Appelant qui soutient que son opposition n'était pas en état d'être jugée vu le défaut ou le manque d'articulation de faits;—que le créancier

Belanger vs. Mogé.

Demandeur seralt toujours à la merci d'un débiteur de mauvaise foi qui s'abstiendrait de produire une articulation de faits.

Vide.—Statuts Refondus du Bas-Canada—ch. 83, Sec. 89 et 90.

La seule penalité qu'encourt la partie qui neglige de produire son articulation de faits dans le cas ou elle désire ensuite faire une enquête est celle imposée à tout plaideur téméraire; le paiement des frais. La cause d'Archambault et Archambault a déjà été décidée par cette Cour sans aucune articulation de faits de la part de l'une des parties. 10 L. C. Reports, page 422.

Le jugement de la cour d'appel en confirmant le jugement de la Cour de Circuit a déclaré qu'il n'y avait pas mal jugé.

E. U. Piché, avocat de l'appelant.

Lafrenaye & Bruneau, avocats de l'Intimé.

(P.R.L.)

Jugement confirmé.

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM SUPERIOR COURT, DISTRICT OF BEDFORD.

MONTREAL, 5TH SEPTEMBER, 1861.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

ANTOINE MERIZZI,
(*Plaintiff in the Court below.*)
APPELLANT,

AND

PETER COWAN,
(*Defendant in the Court below.*)
RESPONDENT.

Held.—1st. That money tendered and paid into Court with Defendant's plea, and not accepted by Plaintiff, cannot be recovered from the Clerk of said Court by direct action against him as for money had and received.

2nd. That the proper mode of proceeding in such case is by rule upon the clerk, ordering him to pay over said money.

Action of Rice against Merizzi in the Circuit Court for a sum exceeding £28. Defendant tendered with his plea and consigned into the hands of Peter Cowan, then clerk of said Circuit Court, £28. Rice refused to accept tender, proceeded with his action, and recovered judgment for a larger sum than the amount tendered. In the meantime Cowan ceased to be clerk of said Circuit Court, which was abolished by act 20 Vic., cap. 44, and Mr. Hall thereupon became clerk of the new Circuit Court for the District of Bedford. Rice's judgment remaining unsatisfied, he issued execution against Merizzi for the full amount, without reference to the £28 deposited. Merizzi paid into the hands of Mr. Hall a sum sufficient, together with the said £28, which he assumed was available to pay up the judgment, and Mr. Hall never having received the £28 from Cowan, was called upon by Rice for an execution which was issued, and Merizzi obliged to pay the £28 over again.

Upon this Merizzi instituted an action against Cowan for the £28 and damages, alleging that execution had issued by the default and negligence of Cowan

in not paying over the said £28 to Hall, his successor in office; to which action Cowan pleaded that he was not liable by direct action, and that he was only amenable to a rule of the Court, and that he would not even return the £28 to Merizzi, except in obedience to an order of the Court ordering and authorizing him so to do, that he was merely the officer of the Court, and had no authority to pay over to any one, of his own motion, a sum of money tendered into Court, and constituting for the time being, part and parcel of the record in which it had been paid.

The Superior Court (J. S. McCord, J.) dismissed the Plaintiff's action; hence the present appeal.

The majority of the Court of Appeals maintained the position taken by the Respondent as above; Chief Justice Lafontaine, Aylwin, J., dissenting, and the appeal was dismissed.

Meredith, J.—It seems more than probable that all the equities of the case are in favour of the Plaintiff; but, still, I cannot say that the judgment of the Court below, which is in favour of the Defendant, is, in law, wrong. When a sum of money is deposited in the course of a suit, in the hands of a clerk of a court, he, it appears to me, holds such sum of money subject exclusively to the orders of the Court of which he is an officer. For instance, if, in the progress of an appeal before us, a sum of money were deposited in the hands of the clerk of this Court, it would appear to me contrary alike to law and justice, that that officer should be summoned either before the Superior Court, or the Circuit Court, to hear in what manner he should pay over the sum of money so deposited in his hands.

It is very probable that, in the present case, the Defendant might, without any risk, have paid over the money in his hands without an order of the Court in which it was deposited; but as a general rule, it would not be safe for the clerk of a court to adopt that course, and I do not see that he ought, in any case, to be compelled to do so. If a prothonotary, or clerk of a court, pay over the money in his hands in obedience to an order of Court, he is free from responsibility, whether the order be legal or illegal; but if he make the payment, without such an order, he would of course do so on his own responsibility; and I do not think he ought to be compelled to assume such responsibility; because, according to my view, money deposited in the hands of a prothonotary, or other such officer, must be considered as having been received subject to the implied condition, that in paying it away he should not be subject to any responsibility beyond that of obeying the order of the Court of which he is an officer.

The judgment of the Court below is in accordance with this view, and I therefore think it ought to be confirmed.

Mondelet, J.—L'Appelant avait poursuivi l'Intimé dans la Cour Supérieure du district de Bedford, pour le recouvrement de £28 qu'il avait déposé entre les mains de l'Intimé alors greffier de la dite Cour, comme *consignation* accompagnée de son plaidoyer contenant offres, etc., dans une cause à la poursuite de Charles D. A. Rice contre lui l'Appelant, et ce, le 26 Mai 1857. Rice ayant refusé ces offres, obtint jugement contre l'Appelant, à la Cour de Circuit du district de Bedford, pour un montant excedant ces £28.

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Le 25 Octobre ensuivant, l'Appelant [illegible] montant du jugement moins les £28 dont il avait fait le dépôt comme susdit.

L'Intimé n'ayant pas payé ni à Rice ni à Hall, qui lui a succédé comme greffier, Rice fit émaner une exécution contre l'Appelant qui [illegible] payer ces £28 et en sus de ces £28 qu'il réclamait [illegible] £25 de dommages.

La prétention de l'Intimé, tout en admettant le dépôt, est que durant l'instance dans la poursuite de Rice contre l'Intimé, la Cour de Circuit pour Missisquoi, cessa d'exister, et qu'en cessant d'être greffier de cette Cour, il devenait responsable envers son successeur à qui il devait transmettre les records, argents, etc. Que l'on avait à tort lancé un bref d'exécution contre l'Appelant, en faveur et au profit du quel, l'on aurait dû opérer sur le montant du jugement de Rice de £28 que Merizzi avait consigné.

La preuve établit tous les faits à l'exception des dommages.

OBSERVATIONS.

Il est evident qui l'Intimé est en défaut, et est la cause première de ce qui est resulté à l'Appelant, de l'émanation de l'exécution pour le montant entier du jugement à la poursuite de Rice. Cependant est-il bien certain que l'Appelant a par l'action *telle qu'intentée* contre l'Intimé le recours qu'il pretend exercer? L'Intimé n'est plus le greffier de la Cour, son obligation etait et est encore de remettre à Hall qui a été nommé greffier de la *nouvelle* cour, après l'abolition de la *précédente* le montant de la consignation et ne serait-ce pas plutôt le greffier de la présente Cour qui aurait dû se faire remettre ce dépôt, à qui on eut dû s'en prendre? Si la réponse à cette objection était sa solution dans la négative, ne pourrait-on pas dire que l'action aurait dû être contre l'Intimé pour n'avoir pas payé les £28 à Hall, lui donnant l'alternative, ou de faire bon de cette somme soit à Hall soit à Rice, ou à produire une décharge de ce dernier?

Ceci n'est pas sans difficulté et merite qu'on en discute.

Having since conferred with the Chief Justice, it might be said that Cowan having the money which he has neither passed to Hall nor paid to Plaintiff, he should be held for it.

Upon again going over this case, I come to the conclusion that Cowan should have been called upon by a rule of Court, to account for the money, and deposit it in the hands of the present prothonotary, to whom by law he was and is bound to deliver up all records and moneys he has in his possession, as having been clerk or prothonotary of the Court. But I deny to Merizzi a direct action of his own accord against Cowan.

The Chief Justice LAFONTAINE and Mr. Justice AYLWIN, dissenting from the judgment, stated in effect that they were of opinion to reverse the judgment in accordance with the judgment rendered by the Court of Appeals in *Irwin* vs. *Boston*, 5 L. C. Reports, 397, from which they considered the present judgment to be a departure.

Judgment confirmed.

Laflamme, Laflamme & Daly, for Appellant.
M. Doherty, for Respondent.
(F. W. T. & M. D.)

EN APPEL DE LA COUR SUPERIEURE, DISTRICT DE BEAUHARNOIS.

MONTREAL, 4 MARS 1862.

Coram SIR L. H. LAFONTAINE, Bart. J. C.; AYLWIN, J.; DUVAL, J., MEREDITH, J.; C. MONDELET, J.

No.

DAME RACHEL BOUDRIA ET VIR.,
(*Demandeurs en Cour Supérieure.*)
APPELANTS.

ET

MATHEW McLEAN,
(*Défendeur en Cour Inférieure.*)
INTIMÉ.

Jugé:—1o. Que la 4ème Vict. ch. 30, sect. 36, statuant que "Nulle femme mariée ne pourra se porter caution, ni encourir de responsabilité en aucune autre qualité que comme commune en biens avec son mari, pour les dettes, obligations ou engagements contractés par le mari avant leur mariage, ou pendant la durée du mariage, et tous engagements et obligations contractés par une femme mariée, en violation de cette disposition, seront absolument nuls et de nul effet;"—tout en rendant nuls les engagements de la femme, pour son mari, au point de la soustraire à toute action résultant de tels engagements, ne l'empêche pas néanmoins de renoncer à l'exercice de ses droits hypothécaires, pour reprises matrimoniales, sur les biens aliénés par son mari.

2o. Que la renonciation de la femme à l'exercice de tels droits n'a pas besoin d'être stipulée, et qu'elle peut être inférée du fait qu'elle ratifie et garantit l'aliénation faite par son mari.

Il s'agit en cette cause d'une demande en déclaration d'hypothèque fondée sur les allégués suivants:

Que le 27 Juillet 1841, les Appelants avaient contracté mariage, sous le régime de la communauté, par contrat passé devant Bastien, N. P., et enrégistré le 31 octobre 1844.

Que le 29 Avril 1854, l'Appelante avait obtenu une séparation judiciaire, suivie de renonciation à la communauté et d'un jugement du 31 mai 1854, fondé sur un rapport de praticien, établissant les reprises matrimoniales de l'Appelante à la somme de £915 15s. 9d., lequel jugement de séparation avait été duement exécuté.

Que l'Intimé était en possession d'un immeuble (désigné dans la déclaration) hypothéqué aux reprises matrimoniales de l'Appelante,—lequel immeuble avait été vendu à l'un des auteurs de l'Intimé, par le mari de l'Appelante, le 18 décembre 1848,—c'est-à-dire durant l'existence de la communauté entre les Appelants.

A cette action l'Intimé plaida:

1o. Que le jugement en séparation était *res inter alia* et n'était pas chose jugée pour des tiers; que le prix de vente par Ant. Couillard à John McLean avait été complètement payé; que par acte passé devant Pelletier, N. P., le 31 oct. 1849, la dite Rachel Boudria avait confirmé et ratifié l'acte du 18 déc. 1848, par Ant. Couillard au dit John McLean, et avait assumé toutes garanties conjointes et solidaires stipulées au dit acte avec son mari,—lequel acte de vente contenait toutes garanties contre tous troubles, dettes, dons, douaires et hypothèques de toute nature quelconque; que par suite de l'obligation ainsi contractée par la dite Rachel Boudria, son action ne pouvait se maintenir.

La Cour d'appel ayant confirmé purement et simplement le jugement de pre-

Boudria et vir. mière instance, il devient important d'avoir ici le texte de ce jugement, rendu
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McLean. par Son Honneur, le Juge Polette, le 7 février 1861.

"La Cour etc., considérant que par acte de ratification passé à Ste. Philomène devant deux notaires, dont l'un Mtre. Pelletier, en a gardé minute, en date du 31 oct. 1849, la Demanderesse a, entr'autres choses, confirmé et ratifié en tout son contenu et suivant sa forme et teneur, la vente faite par son mari Antoine Couillard à John McLean, l'un des auteurs du Défendeur, et l'acte qui en a été passé au même lieu, devant deux notaires, dont le dit Mtre. Pelletier, l'un d'eux, en a gardé minute, en date du 18 décembre 1848, pour ses reprises matrimoniales, dans le temps que le dit John McLean devait encore une notable partie du prix d'acquisition de cette terre, qui était conquêt aliéné de la communauté d'entre la Demanderesse et son mari, et que cette ratification est une renonciation à l'hypothèque qu'elle avait sur icelle terre pour ses dites reprises, laquelle ratification elle a pu faire valablement, y étant autorisée par son mari, avec lequel elle était encore commune en biens, que d'ailleurs, en agissant ainsi, elle ne s'est pas portée caution, ni responsable et n'a pas encouru de responsabilité pour dette, engagement ou obligation contracté par son mari,—qu'ainsi et n'ayant plus d'hypothèque sur la dite terre, elle ne peut soutenir ni obtenir les conclusions de sa déclaration qui sont hypothécaires contre cette même terre,—déboute la dite Demanderesse de son action et la condamne aux dépens envers le Défendeur, lesquels dépens sont accordés par distraction à Mtres A. & W. Robertson, procureurs du Défendeur."

Les Appelants exposent leurs prétentions, comme suit, dans leur *factum:*

1o. L'hypothèque de l'Appelante est implicitement reconnue par le jugement de la Cour Inférieure, mais on a trouvé dans l'acte du 31 octobre 1849 (pièce No. 19) la renonciation à cette hypothèque dans les mots suivants: "La dite Dame Rachel Boudria, après communication d'un certain acte de vente consenti par le dit A. Couillard, Ecr., à Sieur John Macline, en date du 18 Décembre 1848, a eu la dite vente pour agréable, l'approuve, confirme et ratifie en tout son contenu suivant sa forme et teneur, et par les présentes s'oblige conjointement et solidairement avec le dit Ant. Couillard, son époux, à la garantie stipulée au susdit acte, comme si elle eut été présente à la passation d'icelui."

La première question consiste donc à savoir, si ces termes contiennent une renonciation de la part de l'Appelante aux droits personnels que lui assurait son contrat de mariage.

2o. Sous le régime de l'ordonnance d'enrégistrement, (4 Vict. ch. 30) les engagements contractés par la femme, commune en biens, si ce n'est ceux qui concernent son douaire, peuvent-ils la lier, après la séparation de biens, suivie de la renonciation à la communauté?

Comme on le voit, tout est résumé dans cette dernière question; car la première ne pourrait donner lieu à discussion que dans le cas où l'ordonnance d'enrégistrement n'aurait pas d'existence.

La Section 55 du ch. 37 des Statuts Ref. du Bas-Canada, reproduisant la Sect. 36 de la 4 Vict. ch. 30, dit:

"Nulle femme mariée ne pourra se porter caution, ni encourir de responsabilité en aucune autre qualité que comme commune en biens avec son mari, pour

les dettes, obligations ou engagements contractés par le mari avant leur mariage, ou pendant la durée du mariage, et tous engagements et obligations contractés par une femme mariée, en violation de cette disposition, seront absolument nuls et de nul effet."

Notre législation, sur cette matière, s'écarte du droit romain comme du droit coutumier de la France. Là où l'on croirait au premier abord trouver des points de rapprochement, soit avec l'ancien droit écrit ou le droit coutumier, soit avec le code, on s'aperçoit bientôt qu'il n'y a rien de commun entre ces différents systèmes et le nôtre.

L'inaliénabilité des biens dotaux prononcée par le code (Art. 1554) est limitée aux immeubles,—et la femme peut déroger à l'inaliénabilité par son contrat de mariage et sans même déroger contractuellement, elle peut le faire durant le mariage, pour établir les enfants qu'elle a d'un précédent mariage. Et s'il s'agissait, en cette cause, uniquement d'un droit réel qu'elle aurait perdu, durant la communauté, on pourrait, en assimilant ce qu'elle aurait ainsi perdu à la dot immobilière, citer avec apropos:

TOULLIER, T. 14, No. 174: "L'inaliénabilité du fonds dotal s'étend en un mot, non seulement à toute aliénation directe, mais encore à tous actes dont l'effet pourrait être de porter indirectement atteinte à cette inaliénabilité. Ainsi, une femme, mariée sous le régime dotal et qui s'est constitué des immeubles en dot, ne peut pas renoncer valablement à son hypothèque légale, ou la restreindre en garantissant la vente faite par son mari, ou en s'obligeant solidairement avec lui. La renonciation à l'hypothèque, la cession expresse ou tacite qu'elle ferait faire cette femme, est frappée de nullité, en ce qu'elle constitue une aliénation indirecte, éventuelle, des fonds dotaux; car il est indifférent que la femme les aliène ou qu'elle consente à la privation de ses garanties. Dans l'un comme dans l'autre cas, elle sacrifie des droits que la loi avait déclarés inaliénables."

Mais toutes les autorités que l'on pourrait extraire des commentateurs de l'ancien et du nouveau droit Français n'auraient d'autre utilité que celle de rappeler certains principes généraux, comme celui qui interdit à l'incapable de faire indirectement ce que la loi ne lui permet pas de faire directement.

Notre article (Sect. 36, suscité) pose un principe absolu, qui ne souffre aucune distinction quant aux différents genres de propriété,—savoir, s'ils sont meubles ou immeubles, propres, conquêts, dotaux ou autres. Il déclare nuls, tous engagements et obligations contractés par une femme mariée, en aucune autre qualité que comme commune, pour les dettes, obligations ou engagements du mari, avant ou pendant le mariage.

L'ordonnance d'enrégistrement a été passée le 9 février 1841;—mais par la section 57, son opération était suspendue jusqu'à ce que le gouverneur eut, par proclamation, fixé le jour où elle entrerait en force. Cette proclamation a été donnée, sous la date du 18 Décembre 1841, et l'entrée en opération de la loi a été fixée au 31 décembre 1841.

La section 4 (reproduite, avec amendements, par la Sect. 3 du ch. 37 des Statuts Ref. du B. C.) déclare: "que toute obligation notariée, contrat, instrument par écrit, etc., etc., qui était en force le 31 déc., 1841, et en vertu duquel tout immeuble était hypothéqué, grevé ou affecté, etc.,—a pu être enrégistré en

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aucun tems le ou avant le premier jour de Novembre 1844.—et l'enrégistrement [illegible] en et aura l'effet de conserver tels hypothèques, etc., etc., *de la même manière que si l'ord. d'enrégistrement, 4 Vict. ch. 30 n'eut jamais été passée.*"

Le contrat de mariage de l'Appelante porte la date du 27 juillet 1841 (avant la mise en force de l'ord.) et a été enrégistré le 31 octobre 1844; (dans les délais voulus par la loi.)

L'Appelante se trouvait donc en possession d'un droit d'hypothèque aussi étendu que le conférait notre ancien droit à tout porteur d'acte notarié; elle se trouvait en [illegible] par la section 36, dans l'impossibilité de se dénantir de cette hypothèque, pour aucune dette, obligation ou engagement contracté par son mari, avant ou pendant le mariage.

Or jamais obligation de la femme ne peut être plus évidemment contractée pour son mari que dans le cas actuel. L'immeuble vendu à l'Intimé par son mari était un conquêt de communauté, que le mari pouvait vendre, sans le concours de sa femme. Le droit de vendre était tout entier au mari, puisque depuis l'ord. la femme ne pouvant contracter que comme commune elle ne pouvait ajouter plus de valeur aux actes de son mari. L'acte de ratification de la part de la femme, en lui donnant l'effet que lui a attribué la Cour Inférieure, ajoutait donc la garantie de la femme à celle du mari.

Le jugement affirme qu'en ratifiant l'acte de son mari, *elle a renoncé à son hypothèque;* et qu'en agissant ainsi, *elle ne s'est pas mise en position de devenir responsable et n'a pas encouru de responsibilité pour dette, engagement ou obligation contracté par son mari!*

Le choc de deux antithèses aussi manifestes ne pouvait opérer une fusion conforme à la logique. Si la femme eut été partie à l'acte de vente,—(ce qui ne changeait pas la position qu'elle prenait dans son action) on pourrait peut-être se demander si dans le for intérieur, elle n'avait pas autant d'intérêt que son mari à vendre,—et on pourrait exprimer le doute de savoir, si, dans cete vente, la femme agissait pour elle-même ou pour son mari. Mais tout contribue pour ne laisser place au plus léger doute là-dessus. Qu'est-ce que la femme recevait en souscrivant cet acte de ratification,—quelle affaire, à elle, la conduisait chez le notaire? Elle ne recevait rien comme considération de sa prétendue renonciation,—et elle n'avait personellement aucun intérêt à la donner. A quoi pouvait-elle renoncer au reste? Comme commune, elle n'avait, dans le moment, aucune propriété sur l'immeuble en question. Elle pouvait disposer par testament de sa part éventuelle dans ces immeuble,—mais le mari restait maître de frustrer ses dispositions testamentaires en le vendant avant la mort de sa femme.

L'Appelante ne souscrivait cet acte que sous l'inspiration d'une erreur légale dans laquelle se trouvaient alors toutes les parties intéressées. On était encore rapproché de l'époque où la signature de la femme, à la vente d'un conquêt, avait une grande importance. Sous l'ancien régime, la femme en signant cette ratification devenait garante de tous troubles, même après la dissolution de la communauté et sa renonciation à la communauté. Pour retrouver ses reprises matrimoniales elle ne pouvait généralement s'adresser qu'à une succession insolvable, dont elle avait, par prudence, répudié la moitié.

C'est précisément là le mal auquel la 36ème section de l'ord. d'enrégistrement

a voulu porter remède. Cette loi a placé la femme sous une protection qui lui manquait presque totalement avant cela. A l'exception de son douaire, auquel elle peut renoncer, elle ne peut maintenant se dénantir de rien, dans l'intérêt de son mari, si ce n'est comme commune. Dès qu'elle perd cette qualité, elle rentre dans l'intégrité de tous ses droits, et sa signature à tous les actes antérieurs à sa renonciation, devient absolument sans valeur. Telle est, croyons-nous, la vraie doctrine.

Le jugement de la Cour Inférieure aurait pour effet de détruire virtuellement la moitié au moins des conquêts de la femme, consacrés dans cette 36ème section. A l'avenir les prohibitions qu'elle contient ne recevraient plus d'application qu'aux engagements souscrits par la femme *après* la séparation judiciaire. Tout ce qu'elle aurait fait *avant* cette séparation lui serait opposé, comme fin de non-recevoir.

Une interprétation différente a prévalu universellement depuis 1844, et l'Appelante espère que cette Cour la fera participer dans les bienfaits de la loi, sainement administrée.

Doutre, pour Appelants, arguait de plus, que par la 36ème section de l'Ord. d'enrégistrement, la femme qui a été partie à un acte, avec son mari, et qui ensuite renonce à la communauté, est placée dans la position qu'elle occupait avant l'ord., lorsqu'elle n'avait pas été partie à l'acte, et qu'en conséquence la question pourrait prendre le caractère suivant: La femme, avant l'ord., avait elle hypothèque sur les conquêts aliénés durant la communauté, sans son concours?

L'affirmative n'est pas douteuse. Voir:

LeBrun, Communauté, Edition de 1733, Liv. 3, ch. 2, sect. 2, Dist, V. Nos. 85, 88, 89. Solution de LeBrun No. 90, pp. 501, 502, 503.
Bacquet, Droits de Justice, T. 1, p. 181, ch. 15, No. 42.
Ferrière, Gr. Cout. T. 3, p. 728, No. 9.
Renusson, Communauté, pp. 361, 362. 2nde partie, ch. 3, Nos. 42, 43, 44.
Pothier, Communauté T. 3, p. 838, No. 757.

Au reste, la question ramenée sous l'opération pratique de l'ordonnance d'enrégistrement parait avoir uniformément été résolue dans un sens opposé au jugement de première instance, ainsi qu'on peut le voir en consultant les décisions suivantes:

3 Revue de Jurisprudence, pp. 134 et suiv. Cause No. 2106, [illegible] Lansonnault vs. Brosseau et Ste. Marie, Opposante.
3 Décisions des Tribunaux, p. 189.
2 Jurist, p. 205.
3 " p. 324.

A. Robertson, pour l'Intimé, s'appuyait des vues exprimées par Mr. Lacoste, Notaire, dans un article de la Revue de Jurisprudence (T.: 3, p. 121) où l'on fait une distinction entre l'incapacité de la femme, pour s'engager *à garantir*, et sa capacité, pour s'engager *à ne pas exercer ses droits*; argument qui peut se définir ainsi: la femme ne peut fournir des armes pour être frappée, mais elle peut se dénantir des armes avec lesquelles elle pourrait frapper. A l'appui de ses prétentions il citait:—

1 Revue de Jurisp. p. 333.
3 " p. 121.

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4 Revue de Jurisp. p. 250.
1 Toullier, p. 87, No. 101.
2 Domat "*Gage*," tit. 1, sec. 7, No. 12.
3 Troplong, *Vente*. No. 599, p. 471, No. 600, No. 603, No. 605.
2 do *Hypothèques*, No. 436.
3 do do No. 738 bis.
4 Pothier, *Vente*, pt. 2, chap. 1, sect. 2, p. 505.
3 Solon, p. 38, No. 6.
2 do pp. 96, 99, 100, No. 111.
2 Despeisses, pt. 1, 4, tit. 11, sec. 6.
9 Dalloz, *Hypothèques*, p. 133-4.
1 Grenier, do Nos. 248, 249, 256-258, p. 351.

MONDELET (C.) J., *Dissentiente*.—L'Appelante séparée de biens de son mari et ayant renoncé à la communauté, s'obligé à la garantie d'un acte de vente que fait son mari, d'un conquêt de la Communauté, sur lequel elle a une hypothèque pour ses reprises matrimoniales, pour le recouvrement desquelles, elle a poursuivi, hypothècairement, l'Intimé, défendeur en Cour de 1ere. instance, qui est en possession de ce conquêt de Communauté.

Question.—La femme a-t-elle, par là même, renoncé à son droit d'hypothèque sur ce conquêt qui est affecté à ses reprises matrimoniales, ou bien la garantie qu'elle a contractée, comme il est dit plus haut, laquelle est, il va sans dire, absolument nulle, aux termes de l'ord: 4 Vict. c: 30 s. 36, justifie-t-elle l'induction de la renonciation par la femme non commune, et qui ne s'est pas obligée comme commune, à son droit d'hypothèque pour ses reprises matrimoniales?

Il me semble qu'à part de l'énorme injustice envers la femme non commune que l'on commettrait, en induisant à son encontre, une telle renonciation qui n'a jamais de fait eu lieu, l'on se rendrait coupable d'une manifeste absurdité, ce ne serait rien moins que de faire produire un effet à une nullité, ou en d'autres mots, avouer que l'acte de garantie est nul, et en même temps, prétendre qu'il a produit une renonciation de la part de la femme non commune, à un droit d'hypothèque; ce serait de plus dire, vous vous êtes engagée à la garantie de l'aliénation d'un conquêt qui est hypothéqué à vos reprises matrimoniales, cet acte de garantie est nul, aux termes de l'ordonnance, eh bien, nous allons en pressurer, en soutirer, bon gré, mal gré, une renonciation de votre part, à votre hypothèque, que vous ayiez ou non, eu l'intention de renoncer. Il me semble qu'à moins de fermer les yeux à la lumière, l'on doit apercevoir l'injustice d'une telle prétention.

En vain, tout en concédant, ce qu'on ne peut nier, c'est-a-dire que la garantie est une nullité, me dira-t-on, que le consentement à l'autorisation, est valable, et qu'on doit séparer ces deux stipulation. La réponse est, que les deux font partie d'un même tout, sont inséparables, et doivent tellement être regardées comme telles, que de cet acte, non plus que d'aucune partie qui s'y rencontre, on ne peut, au préjudice de la femme non commune, *inférer* une renonciation à l'hypothèque pour ses reprises, sur le conquêt de la communauté, aliéné par son mari. La règle posée par Solon et autres, quant à la divisibilité des différentes parties d'un acte, exige que ces parties soient indépendantes les unes des autres: la raison de cette condition, est tellement évidente qu'un moment de réflexion la fait

de suite apercevoir. (Solen, théorie de la nullité, T. 1. p. 30, No. 6). On ne peut qu'en rafinant de sophismes, prétendre qu'il s'agit, ici, de deux parties *indépendantes* de l'acte: c'est tout le contraire, c'est une seule et même partie, c'est la même phrase, c'est le motivé, c'est l'explication, la qualification de la garantie. C'est si bien le cas, que si la femme n'eût pas ajouté à la garantie, cette autre stipulation, je veux dire, le consentement, l'autorisation à l'aliénation, très probablement, l'acquéreur qui se présentait, n'eût pas acheté. Cette simple réflexion fait bien voir l'unité de cet acte, son indivisibilité, et que cette autorisation, ce consentement de la femme, inséparables de la garantie, laquelle est frappée de nullité par la loi, subissent le même anéantissement. Je le demande maintenant, comment peut-on, par un tour forcé, par une contorsion, pour ainsi dire, qu'on imprime à la phrase, *qui n'est qu'une*, lui attribuer un caractère de dualité qu'elle n'a pas?

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Et cela, pour en induire une renonciation de la part de la femme, à ses droits de reprises sur un conquêt de la communauté, après qu'elle a renoncé à cette communauté! J'ai lu, avec attention, au 3ème vol. de la Revue de Législation, l'article écrit avec talent, par un jeune Notaire, dont la mort prématurée, est un sujet de regret. Tout en rendant hommage à l'habileté de cet écrivain, je ne puis me laisser aveugler par les sophismes dont fourmille cet écrit. L'auteur affecte d'appliquer des règles de droit qui sont, ici, sans portée. La première, c'est que ces deux prétendues parties de l'acte, sont indépendantes l'une de l'autre. Le contraire a été plus haut démontré: c'est une seule partie, une seule obligation, une seule stipulation, une seule phrase, dont toutes les parties constituent un tout, un seul tout.

La seconde, quant à la prétendue divisibilité, l'auteur appuie son opinion par une observation assez singulière, c'est qu'il existe des ventes sans garantie. Personne, assurément, ne s'aviserait de nier cela; mais nombre d'autres seraient à se demander ce que prouve cette observation futile de l'auteur. Enfin la 3ème est la divisibilité par la loi. L'auteur épuisé, finit par convenir que cette règle qu'il avait d'abord citée, n'a aucune application à la question. En sorte que tout l'échafaudage de ce bizarre système pour le soutien duquel, l'auteur s'est tant alambiqué l'esprit, croule de lui même, et la critique si peu judicieuse qu'il s'est permise du jugement de l'ancienne Cour du Banc de la Reine, dans la cause de Ste Marie, du 11 janvier 1847, se résout en un tissu de sophismes qui ne peuvent pas soutenir une discussion sérieuse.

Je dirai en passant, que bien que je n'aie pas l'habitude de juger les causes ou les questions de droit, par des arrêts, néanmoins comme je pense que les décisions qui ont déjà été rendues en pareille matière, ou du moins dans des espèces analogues, sont fondées en loi, je me permettrai de référer aux.

3ème vol. Déc. des Tribunaux B. C. p. 189.
2. Jurist do p. 205.
3 do do p. 324.

Il a été plusieurs fois décidé, et la Cour d'appel, entr'autres, a distinctement consacré le principe, que ce que la femme ne peut faire directement, elle ne le peut faire indirectement, lorsqu'en le faisant, elle viole l'ordonnance 4 Vict. c. 30, S. 36.

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La femme mariée aura donc les mains liées, dira-t-on, et elle ne pourra jamais s'obliger. Cette conclusion est mal fondée; on sait fort bien le contraire, et il est des circonstances où elle le peut faire; mais non pas comme dans l'espèce, s'obliger non comme commune avec et pour son mari, l'aidant à faire et accomplir ce qu'il n'aurait pas pu effectuer, si elle n'eût pas autorisé la vente: c'était pour l'avantage du mari et au préjudice de la femme, qui, dans le système de ceux qui prétendent qu'elle l'a pu faire, a renoncé à ses reprises, à son hypothèque pour ses reprises, et cela pour l'avantage de son mari avec lequel elle s'est obligée non comme commune en biens, en contravention manifeste de l'ordonnance dont l'objet n'est pas de détruire, mais de conserver les droits des parties. Il y a plus: la femme ici, a si bien contracté une obligation, c'est que si elle n'accomplissait pas sa renonciation, supposant qu'elle eût renoncé, comme on le prétend, je veux dire, si elle refusait d'y donner suite, elle serait passible d'une action personnelle de la part de l'acheteur de son mari, vis-à-vis duquel, dans l'intérêt de son mari, elle a ainsi renoncé, si toutefois elle a renoncé.

Je n'ai plus qu'un mot à dire et je termine; je suis d'avis, et cela sans aucun doute, que le jugement dont est appel, devrait être infirmé, et que cette Cour devrait déclarer, par son jugement, que la terre dont l'Intimé est détenteur, et à l'occasion de laquelle, il est poursuivi par l'Appelante, est hypothéquée à ses reprises matrimoniales.

MEREDITH, J:—After giving to this case, which is certainly one of great importance, the best consideration in my power, I am of opinion not only that the judgment of Mr. Justice Polette is right, but that the reasons assigned by that learned judge in support of his judgment, have not been, and cannot be answered.

The agreement in question declares, that the Appellant, after having taken communication of the deed of sale of the 18th December 1848, made by her husband, "a eu la dite vente pour agréable, l'approuve, confirme et ratifie en tout son "contenu suivant sa forme et teneur."

Thus far the agreement is unobjectionable; because it does not subject the Appellant, as a married woman to "any liability" for any debt or obligation entered into by her husband, (*) and that the covenant above recited does not subject the Appellant to any such liability, seems to me to be plain, from the considerations that no action against the Appellant could be based upon that covenant.

The agreement impugned, thus continued as follows: "et par les présentes "elle s'oblige conjointement et solidairement avec le dit Antoine Couillard, Ecu-"ier, son espoux à la garantie stipulée au dit acte, comme si elle eut été pré-"sente à la passation d'icelui."

This part of the agreement is plainly null, as being in direct contravention of the provision of the registry ordonnance already referred to; but no attempt is made in this cause, to enforce this part of the deed.

It is however said that it is absurd to suppose that an obligation can result from a deed that is null. That observation is quite true, not to say, self-evident—but it is as inapplicable in this cause, as it is true; because the deed before us is good in part, and bad in part; and the judgment of the Court below rests upon that part of the deed which is valid, and not upon that portion of it which is null.

* 4 Ed. c. 30, S. 36.

It is also said that what a married woman cannot do directly, she ought not to be allowed to do indirectly. No one can be more willing than I am, to admit that rule, and act upon it; but it does not follow, that because a statute of an exceptional nature prohibits married women from entering into a convention of a particular nature, that therefore they are to be prevented from entering into conventions of a wholly different kind.

As to the case before us, the statute prohibits married women from contracting *certain liabilities*. By that part of the deed, in question, which we are disposed to enforce, the Appellant renounced certain rights, without however subjecting herself to "*any liability*," such as the law prohibits. And as in my opinion there is a plain difference between the contracting of a liability and the renunciation of a right, (*) I think that the provision of law, relied on by the Appellant, is inapplicable to the present cause.

The interpretation put upon the clause in question by the Court below seems to me to be in accordance, not only with the letters, but also with the spirit of the law of which it forms a part.

The Legislature in order to facilitate the alienation of real estate, have, by the registry ordinance abolished general hypothecs, restricted the number of privileges, and made many other changes of the same kind; and, by the clause which immediately precedes that under consideration, the Legislature have given married women a power of an extraordinary character, and one certainly liable to some objections; namely, that of barring their dower not only for themselves but for their children. And it cannot be supposed that the Legislature, at the same time that they conferred this new and extraordinary power upon married women, intended to deprive them of a right of a much less dangerous character, which they enjoyed under the common law; and the continuation of which was quite as necessary for the object the Legislature had in view, as was the granting of the new, and, in some respects, objectionable power, which is expressly given.

To say that the Legislature by one clause of the registry ordinance gave married women the power of barring their dower, for themselves and for their children, and that by the next clause of the same law, married women have been deprived of the common law right of waiving their claims for *reprises*, seems to me to involve a charge of grave inconsistency against the framers of the law.

Moreover the construction contended for by the learned judges who differ from the majority of the Court, would lead to this most unreasonable result, that a married woman would have, as she unquestionably has, the power of alienating her own *propres* to pay the debt of her husband, and yet she would not be able to consent to her husband selling his own property for the same purpose. To me the intention of the Legislature seems as plain as it is reasonable. We all know, the dangerous consequences of the contract of surety-ship. And a wife, when asked to become the surety of her husband, is placed in a position of a peculiar difficulty. How can she doubt the honesty of her husband? And she is only too ready to believe the assurance that when the debt matures—there

* 2 Troplong, Priv. et Hyp. No. 596 Pandectes de Justinien, Vol. 6, p. 251.

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will be ample means to meet it without troubling her. I have no doubt that there are some, if not many, women who would have sufficient determination to refuse to alienate their own property, and who yet might be induced to become security for the debts of their husbands; indeed I think there are not a few husbands who would be glad to extend their credit by the use of the names of their wives, and who yet would not ask their wives to bind themselves, or their property in a more direct manner. The object of the ordinance seems to me to have been to guard married women against the danger to which I have adverted. Having for the public good, deprived married women and their minor children, of certain rights which tended to obstruct the alienation of real estate, the Legislature has deemed it just to extend to them a safe-guard of a different kind, and one having no tendency to interfere with the object of the registry ordinance. That law has therefore declared in effect that married women shall not become "security or incur any liabilty, otherwise than as *communes en biens* for debts or obligations" entered into by their husbands; leaving at the same time the rights and powers of married women in other respects unimpaired.

Some cases have been referred to as being opposed to the judgment which we are now about to render; but I may observe that one of the judgments cited, namely that in Mercile *vs.* Fournier has no bearing upon the present case.

The case of Jodoin and Dufresne * is perhaps not in accordance with my views as above expressed; but at the same time I may add that that case is not at all in principle the same as the case before us. The other two cases † are certainly in favour of the appellants. But called upon as this court now is, for the first time I believe, to choose between the two conflicting opinions which have been entertained, and acted upon by different branches of the Court below, I feel it my duty to give the preference to that one by which Mr. Justice Polette seems to have been guided in framing the judgment appealed from; and therefore am of opinion that the judgment ought to be confirmed.

Regarding this case as I do, as one of great public interest, I would have endeavoured to devote more time to the explanations of my views in relation to it, were it not that all the questions which it presents will be found fully and ably discussed in Mr. Lacoste's valuable dissertation printed in 3rd Vol. of the Rev. de Leg. (pp. 133 to 142.)

Jugement confirmé.

M. Branchaud, pour Appellants.
Doutre & Daoust, Conseils.
A. & W. Robertson, pour Intimé.
(J.D.)

* 2 Jurist, p. 20, 3 L. C. R. p. 189.
† Russel and Fournier, 3 Jurist, p. 324. St. Marie and Brosseau, 3 Rev. de Leg. p. 134.

IN APPEAL FROM THE SUPERIOR COURT.

MONTREAL, 5TH MARCH, 1862.

Coram SIR L. H. LAFONTAINE, Bart. Ch. J., AYLWIN, J., DUVAL, J., and MONDELET, J.

WILLIAM MANN *et al.*
Plaintiffs in the Court below,
AND
APPELLANTS.

WILLIAM B. LAMBE,
Defendant in the Court below.
RESPONDENT.

HELD:—1st. That the Court will reject a motion for a rule to obtain a writ of appeal from an interlocutory judgment if the Court be against the moving party on the merits of his application.
2nd. That where two causes of action are combined in one suit, the one commercial and the other non-commercial, the action is not susceptible of trial by Jury.
3rd. That an action *en reddition de compte* is not referable to a Jury.

The Appellants as Plaintiffs in the Court below in their respective capacities of executors and universal legatees under the will of the late James Hutchinson, merchant, brought their action against the Defendant, whereby they prayed that the Defendant as heir at law and universal legatee of the late James H. Lambe of Montreal, merchant, be condemned to render an account of all goods, wares, and merchandises received by the late James Henry Lambe from the firm of Spragge & Hutchinson on the 21st day of June, 1825, and an account of all other monies received by the said Lambe as agent of the said Hutchinson from 1826 to 1848.

The declaration set forth the qualities of the parties and contained two distinct *chefs*. The 1st. alleged, that the late James Hutchinson was in co-partnership with one William Hutchinson from 1812 to 1825, and that the co-partnership consigned to Spragge and Hutchinson, goods of the value of £51 000 for sale on their account.

That the co-partnership was dissolved on the 1st of January, 1825. That on the 21st of June, 1825, Spragge and Hutchinson, had goods of the value of £5246. 7cy. still unsold. That the accounts between the two firms were settled by arbitration, and certain goods specified in the award were assigned to James Hutchinson in charge of the indebtedness of Spragge & Hutchinson. That a writ of *sasisie arrêt* was issued at the suit of Robert Gillespie and other creditors of Spragge & Hutchinson, into the hands of J. H. Lambe, and that he declared that he had goods of the value of £5300, which he had received for sale from Spragge & Hutchinson. That a long litigation ensued the steps of which were recited, and eventually by a decree of the Privy Council these goods were declared to be the property of James Hutchinson* and that Lambe had promised to account to James Hutchinson for these goods apart from such legal proceedings. The declaration secondly alleged, that during the pendency of said contestation, Lambe had acted in Canada as the agent of the said James Hutchinson, not only in all matters relating to the said contestation, but also in all the other business of said Hutchinson in Canada, and had received monies from 1826 to 1848, for which he had promised to account.

* Vide Revue de Législation, vol. 427, page 3, for Report of Decision.

Mann et al., vs. Lambe.

The pleas were prescription, and already accounted, and also that a sum of £5000 had been deposited in Court by the said J. H. Lambe, as *Tiers Saisi*, by order of the Court; being the proceeds of said goods, and that the Plaintiff by moving to obtain the same and otherwise, had acquiesced in such deposit.

In the Superior Court the Plaintiffs moved for *acte* of their option of a trial by jury, but their motion was rejected by Mr. Justice *Berthelot*, and a motion to revise the judgment was also rejected by Mr. Justice *Badgley*, L. C. Jurist, vol. V., page 330.

The Plaintiffs, having moved under the 26th section of the act of the Consolidated Statutes of Lower Canada, chapter 77, for a rule upon the Defendants, to shew cause why a writ of appeal should not be granted from these interlocutory judgments, the motion was rejected by the Court, and the rule refused, Mr. Justice *Aylwin* dissenting.

Mr. Justice AYLWIN said in substance, there were two reasons why he thought the Plaintiffs ought to have succeeded. 1st. They could only obtain a remedy by appealing from the Interlocutory Judgments, and the Court ought to grant the motion and permit the appeal, thereby testing the question of right. The question was simply this, did the judgment fall within the three classes specified in the 26th section of the act cap. 77 of the Consolidated Statutes of Lower Canada. But secondly, the case unquestionably fell within the class of cases triable by a jury, and the declaration manifestly disclosed a *demande* of a commercial nature. (The learned judge here read the conclusions of the declaration.) The pleas of the Defendants were moreover applicable to a commercial cause. But it would be said that there was an inconvenience in referring an action of account to a jury. But in questions of jurisdiction, the argument *ab inconvenienti* was not one that could be entertained. He was of the opinion that the rule should be granted.

Mr. Justice MONDELET, said in substance, the application for a trial by jury in this cause, was an anomalous proceeding, inasmuch as two distinct chefs or causes of action were commingled—the one of a mercantile character, and the other of a non-commercial character. Should the latter part of the cause go to the jury? Certainly not. But should the other part of the action be referred to a jury? Yes, if it had stood by itself, but not as now presented to the Court. A similar decision had already been given in the Superior Court, in a case where an action *en declaration de paternité*, and in damages were combined, and the trial was properly refused. *Clarke* vs. *McGrath*, 1 Jurist, page 5. A part of the case could not be sent to a jury. His honor, the dissenting judge, says, that at all events, the appeal should be allowed. But of what benefit would that be? It would be, to grant the writ, with the intention of dismissing the appeal hereafter. The rule must be refused.

DUVAL, J., said in substance, it was the invariable practice to deny the appeal, if the Court was against the application on the merits. It had already been so decided in the case of Gugy vs. Stevenson. With regard to the case in question, the action was one of account, and he had never heard of such an action being brought before a jury in Lower Canada, nor did he see how it could be. In England the action of account at common law was obsolete, owing to its

inconveniences. The first judgment in such a cause was there, that of *quod computet*. With reference to the English action of account, the learned Judge referred to Archer vs. Pritchard, 3 Dow. & R. 506, and 2 Chitty's Reports, page 10, Smith vs. Smith. Was it pretended that two juries were to be impannelled in this cause, the first to ascertain if an account was due, and another after the *debats and soutenements were fyled?* The fact was, that the party who sought to bring such an action before a jury, would be thought likely to have a very bad case. Moreover the objection taken by Judge *Mondelet* was quite conclusive, as part of an action could not be referred to a jury.

Motion dismissed and appeal refused.

Cross & Bancroft for Appellants.
Torrance & Morris for Respondents.
(A. M.)

IN APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF MONTREAL.

MONTREAL, 1ST JUNE, 1861.

Coram SIR L. H. LAFONTAINE, Bart., Ch. J. AYLWIN, J., DUVAL, J., MEREDITH J., MONDELET (C) A.J.

SARAH JOHNSON, et al.,
(*Plaintiffs par reprise d'instance in the Court below*)
vs.
APPELLANTS.

GERHARD LOMER,
(*Defendant in the Court below,*)
RESPONDENT.

Held,—1st. That the proprietor of goods cannot claim them by revendication as his property, while they are in the hands of a party having a *lien* upon them for advances made to a third party from whom the party in possession had received them.

2nd. That a *lien* for advances is good as against the owner of goods under the Statute 10 and 11 Vict., c. 10, s. 4, when made for the pledgor's own private purposes, or to carry out a contract between pledgor and pledgee, although the pledgee knows of the ownership not being in the pledgor, so long as the pledgor has not notice from the owner that the pledgor has no authority to pledge.

3rd. That under 10 and 11 Vict., c. 10, s. 4, knowledge by the pledgee that the pledgor was not the owner, does not make him *mala fide* as regards the owner in advances made on the goods by pledgee to pledgor for private purposes of the pledgor, or to carry out a contract between pledgee and pledgor, so long as the pledgee is without notice that the pledgor had no authority from the owner to pledge the goods.

4th. That the *lien* is not extinguished by the pledgee transferring to a third party for value, negociable notes which he had taken for the advances, if the notes came back again into the pledgee's hands in consequence of not being paid at maturity.

This was an appeal from a judgment of the Superior Court at Montreal. The facts of the original case will be found reported 4 L. C. Jurist, p. 36. The judgment of the Court below was affirmed with costs. In rendering Judgment the Chief Justice remarked:

Le demandeur a fait émaner une *saisie revendication* à l'effet de revendiquer une certaine quantité de gants et de mitaines qui lui appartenaient, mais qui se trouvaient en la possession du défendeur. Ils avaient été donnés en gage à ce dernier par le nommé Erastus Thrall, l'agent ou facteur du demandeur, et ce pour des avances de deniers que le défendeur avait faites à cet agent.

Le demandeur est prouvé être le propriétaire. Mais Thrall pouvait-il valablement donner ces marchandises en gage comme il l'a fait, et le défendeur a-t-il le droit de les retenir? C'est là la question.

Johnson et al. vs. Lomer.

Le Juge de première instance a décidé la question au profit du défendeur, en se fondant sur notre Statut de 1847, ch. 10. Je concours dans l'interpretation que l'Honorable Juge Badgley a donnée au Statut, non pas parceque cette nouvelle loi ayant été en quelque sorte empruntée à des Statuts Anglais, elle doive être determinée d'après des arrêts de tribunaux Anglais, mais bien parceque les règles d'interprétation du Droit Français qui est celui du Bas-Canada, permettent de donner à notre Statut Provincial le sens que M. le Juge Badgley lui a donné dans la Cour de première instance.—(*Lower Canada Jurist*, Vol. 4, p. 31.)

Le demandeur a prétendu que le défendeur avait été coupable de mauvaise foi, et que par conséquent il n'était pas protégé par le Statut. Les faits prouvés au dossier ne justifie pas, à mon avis, cette prétention. Le reproche de mauvaise foi, pouvait peut-être s'addresser à Thrall, mais non pas au défendeur.

Judgment confirmed.

Torrance and Morris, for Appellants.
Day and Day, for Respondent.
(R.J.P.)

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF OTTAWA.

MONTREAL, 5TH SEPTEMBER, 1861.

Coram The Hon. Sir L. H. LaFontaine, Bart. Ch. J., Aylwin, J., Duval, J., Meredith, J.; Mondelet (C.), A.J.

No. 54.

THOMAS GIBSON,
Defendant in the Court below,
Appellant,

AND

DANIEL WEAR,
Plaintiff in the Court below,
Respondent.

Held.—1. That a plaintiff in a petitory action cannot recover under a conveyance, as against a person in possession at the date of such conveyance, without its being established that the person granting the conveyance, had a right in the property conveyed.

2nd. That a plaintiff in a petitory action cannot succeed upon a title which he had not pleaded and which the defendant had no opportunity of answering in pleading.

This was a petitory action brought by the Respondent in the Court below, to obtain the possession of the south half of lot No. 9, in the 6th range of the Township of Eardley, in the District of Ottawa, containing 100 acres of land, with the members and appurtenances thereto belonging, the property of the Respondent, which the Appellant was in possession of.

The Respondent by his declaration alleges:—

That by deed of sale, passed before James Smith and colleague, Public Notaries at Montreal, the 9th September, 1858, the Respondent purchased from Grace Russell, of Scotland, spinster, represented by her attorney, John Gordon Mackenzie, of Montreal, the aforesaid half lot of land.

That the Appellant well knowing the premises, had entered upon and had been in possession of the said half lot of land ever since the date of the purchase

of the same by the Respondent, without his permission and against his will, and persisted in refusing to give him up the same.

The Respondent besides the ordinary conclusions of a petitory action; demanded the sum of £200 cy., for the rent and profits of the said lot, from the time of the Appellant's unjust detention of the same.

The Respondent with his declaration, fyled a copy of his deed from the said Grace Russell, duly registered, and subsequently, at *enquête*, a registered copy of a deed of sale of the said half lot of land, from the Sheriff of Montreal, to the said Grace Russell, dated 20th July, 1841.

The Appellant for contestation, pleaded, first and secondly; prescription of thirty years by himself and his *auteurs*. Thirdly; General Denegation—and fourthly; claimed £300 for improvement, should the Respondent be declared the proprietor of the said half lot.

The case was inscribed for the adduction of evidence and final hearing on the merits at the same time, and on the 27th June, 1860, the Court gave Judgment in favor of the Plaintiff, dismissing the Defendant's exceptions and granting the conclusions of the Plaintiff's declaration.

From this Judgment the present appeal was instituted resulting in its reversal.

MEREDITH, J.—The Plaintiff, in this case, seeks to obtain possession of the lot No. 9 in the tenth range of the Township of Eardley, under a deed of sale from one Grace Russell, bearing date the 9th day of September, 1858; that being the only conveyance, or title deed mentioned in any of the Plaintiff's pleadings.

It is proved that at the date of the said deed, and for several years previously, the Defendant was in possession of the said lot of land.

The Plaintiff himself has proved that the Defendant has lived on that lot ever since the year 1854.

It seems however very probable that the possession of the Defendant, and of his alleged predecessors may have been that of mere squatters; but, on the other hand, it does not appear that the Plaintiff or his *auteurs* ever had any possession of any kind of the lot in dispute.

It seems to me obvious that, under these circumstances, the Defendant could not be ejected merely under the deed of 1858, alleged in the Plaintiff's declaration; and the Plaintiff being probably aware of this, produced at *enquête*, a deed of sale from the Sheriff of the District of Montreal, bearing date the 20th July, 1841, in favor of Grace Russell, the *auteur* of the Plaintiff; but unfortunately for the Plaintiff, the deed thus produced is not recited, or even in any way, referred to in the pleadings, and thereof the Plaintiff cannot derive any benefit from it. A deed not pleaded, may be produced at *enquête* for the purpose of characterising possession, but a deed not pleaded, cannot be produced at *enquête*, as part of a chain of titles.

In the case of Osgood and Kellam, one of the main grounds of complaint on the part of the Appellant, was that the learned Judge in the Court below, had allowed a Plaintiff to set up, in a special answer, a title not alleged in his declaration; and even in this Court, it was doubted whether a Plaintiff could be allowed to strengthen his case, by alleging in any subsequent pleading, a title

Gibson vs. Wear.

of which he might have availed himself in his declaration; but be this as it may, I have never known it, to be even contended that a Plaintiff, in a petitory action, could succeed upon a title, which the Defendant had no opportunity of answering in pleading.*

Assuming then, as I think we must do, that the Plaintiff cannot derive any advantage from the Sheriff's deed of 1841, produced but not pleaded; then, as there is nothing to show that Grace Russell, the Plaintiff's *auteur*, was ever in possession of the lot in dispute, or ever had any right to it, it requires no argument to prove, that the Plaintiff cannot, merely under a deed from her, recover the land in dispute from the Defendant, who was living upon it, as owner, four years before the date of that deed. To maintain the present action under such circumstances, would be to say in effect, that, if A knows B to be in the occupation of land without title; A, although equally without title to such land, may make a conveyance to C, which, of itself, would enable C to recover the land from B.

I would not deem myself justified in dwelling on a point, which appears to me to be so perfectly plain, were it not that this is by no means the first occasion, upon which it has been contended, in effect, that a Plaintiff in a petitory action, may recover under a conveyance, even as against a person in possession at the date of such conveyance, without its being established, that the person granting the conveyance had any right whatever in the property conveyed.

In the present case the Plaintiff has alleged a title, upon which he cannot recover; and has failed to allege a title, upon which he probably could have recovered; and, therefore, although the Defendant has failed to prove his exception of prescription, the Plaintiff's action ought to have been dismissed, *quant à present*, and consequently I would reverse the Judgment of the Court below.

MONDELET, (C.), A.J.—The Judgment appealed from, was rendered at Aylmer, in the Superior Court, (A. Lafontaine, J.) on the 27th June, 1860, in a petitory action condemning Defendant, &c.

The action rests upon a title deed from Grace Russell to Plaintiff, Respondent, of 9th September, 1858.

Plaintiff in his declaration, alleges that Defendant took possession, on or about the said 9th September, 1858.

Defendant evidently proves that his possession was much anterior to the date of this title.

Plaintiff to fortify his position, fyles at *enquête*, (that is too late, of course, his action being founded and alleged to be founded on his title deed of 9th September, 1858,) a Sheriff's title of (Mr. Boston, Sheriff,) 29th July, 1841. The copy of that deed is not certified by the proper authority, but merely by the Registrar who says:

"I certify that the foregoing is a true copy of a Record made at this office the eighth day of November, 1841, in book 4, page 182, No. 126.

J. F. TAYLOR,
Registrar."

Aylmer, Ottawa, 8th May, 1860.

* *Vide* 12 L. C. Repts. 27, case of *Bibaud* v. *Lefrançois* in appeal.

What can mean and prove such a certificate in this case? Nothing more than the registration. Gibson vs. Wear.

The action should simply have been, and by the Judgment of this Court should be dismissed.

The Judgment of the Superior Court should, therefore, be reversed.

The Judgment of the Court of Appeals was *motived* as follows:—

"The Court, &c., * * * * * seeing that the only title deed alledged in the declaration fyled by the Respondent, in the Court below, is a title deed bearing date the 9th day of September, 1858, by which one Grace Russell sold to the Respondent the lot of land described in the Respondent's said declaration; seeing also that the said Grace Russell was not at the date of the said deed of sale, or at any time previously, in possession of the said lot of land; and on the contrary, that the said lot of land was, at the date of said deed of sale, and for a long time previously in the occupation of the Appellant; and considering, therefore, the Respondent is not entitled to recover possession of the said lot of land under and by virtue of the said title deed alone; and considering also that the said Respondent cannot derive any advantage in this cause, from the deed of sale from the Sheriff of the District of Montreal, bearing date the 20th day of July, 1841, in favour of the said Grace Russell, in as much as the said deed has not been pleaded by the Respondent so as to afford the Appellant an opportunity of answering the same; and considering therefore that in the Judgment of the Court below maintaining the action of the said Respondent there is error;

Doth in consequence reverse the said Judgment, to wit, the Judgment of the Superior Court rendered at Aylmer, on the twenty-seventh day of June, one thousand eight hundred and sixty, and proceeding to render the Judgment which the Superior Court ought to have rendered in the premises, doth dismiss the said action of the said Respondent *quant à présent*, and doth condemn the Respondent to pay to the Appellant his costs as well in this Court as in the Court below."

— Judgment reversed.

Fleming, J. R., for Appellant.

Delisle, John, for Respondent.

(F. W. T. & R. J. P.)

SUPERIOR COURT.

MONTREAL, 28TH FEBRUARY, 1862.

Coram BADGLEY, J.

No. 1211.

Cholet vs. *Duplessis et vir.*

Held,—That a promissory note made by a wife, separated as to property from her husband, in favor of her husband, and endorsed by him, for groceries and other necessaries of family use purchased by her, is valid.

This action was brought upon a promissory note for £52 17s. 8d. made by the Defendant, Dame Marie E. R. Duplessis, Madame Martin, in favor of her husband, Louis S. Martin, the other Defendant, from whom she was separated as to property, and by him endorsed to a third party. The declaration alleged that the maker was at the [illegible] the note indebted to one Edouard Biron,

Charles Grosser, in the amount thereof, for groceries, &c., supplied to her for family use,
vs.
Duplessis et vir, and that she made the note as mentioned, which her husband endorsed to Biron, who endorsed to the Plaintiff [illegible]e was also a special allegation that the note was given for and represented the family necessaries furnished by Biron.

The Defendant, Madame Martin, fyled a peremptory exception, denying the validity of the note for want of authorization by her husband.

The Plaintiff answered specially, repeating that the note was given for provisions, groceries and necessaries supplied to Madame Martin and used in the maintenance and support of her husband and family; and adding that the purchase of these goods from Biron was with the knowledge and authority of her husband.

To this pleading the Defendant answered in law, affirming that the validity of the note could not be determined by any of the facts alleged in the Plaintiff's answer, and that the point in issue had no reference to a sale of groceries, but to the validity or non-validity of the note, resulting from the authorization or non-authorization of the Defendant by her husband.

The hearing on law was reserved till the final argument.

BADGLEY, J., after stating the facts:—Two precedents have been cited by the Counsel for the Defendant, in which under apparently similar circumstances the demand was dismissed, viz.: the cases of *Badeau* vs. *Brault* (I Jurist, page 171) and of *Benjamin* vs. *Clarke* (III Jurist, p. 121). In the former, a joint note signed by the husband and wife, for goods sold to her, was held valueless for want of authorization by the husband; there was however no proof that the goods purchased were necessaries either to herself or her family. In the latter case, an action on a shop account for goods sold to a wife, was dismissed for the same reason. On the other hand, there is a case reported in the Jurist, Vol. I, p. 172, *Rivet* vs. *Lenard*, which resembles this so closely that I shall follow the judgment there rendered. In that instance, the action was upon a note made by the wife, and a demurrer was fyled on the ground that authorization by the husband was not alleged, and the note, *primâ facie*, had no connection with the administration of her own property. This demurrer was dismissed by the Court, composed of Chief Justice Rolland and Justice Day and Smith, Mr. Justice Day dissenting. A peremptory exception to the same effect having been fyled by the Defendants, the Plaintiffs answered specially that the note had been made by the wife for necessaries furnished to her family. The fact having been proved, judgment went for the Plaintiffs, by the Court composed of the same judges and without dissent of any. In the present case, the nature of the consideration, which is the same as in the case last referred to, is alleged fully in the declaration as well as in the special answer, and being established, the action must be maintained. The law gives recourse against the wife upon her contract of purchase of necessaries furnished to her; surely her written acknowledgment of indebtedness for that purchase should subject her to the same recourse.

The judgment is *motivé* as follows:

"La Cour, après avoir entendu les parties, par leurs avocats, sur l'exception "péremptoire plaidée par la dite Dame Marie R. R. Duplessis, l'une des Défen- "deurs en cette cause et sur le mérite; examiné la procédure, pièces produites, "et preuve et avoir sur le tout délibéré; sans égard à l'exception pé- "remptoire plaidée par la dite Défenderesse à la demande du Demandeur, con- "damne la dite Défenderesse à payer au dit Demandeur la somme de £52 17s. "8d., cours actuel de cette [illegible] montant du billet promissoire daté à Mon- "tréal, 4 septembre 1[illegible] la dite Défenderesse payable à "36 mois de sa date, à [illegible], Ecuier, son mari, au bureau de "la Banque du Peuple à [illegible] valeur reçue avec intérêt, laquelle va- "leur était pour des pro[illegible]fournies par Edouard Biron à la "dite Défenderesse pour [illegible] sa famille, et le dit billet promis- "soire par le dit L. S. Martin [illegible] livré au dit Edouard Biron et par le "dit Edouard Biron endossé et [illegible] dit Demandeur avec intérêt sur la dite "somme de £52 17s. 8d. à compter du dit 4 septembre 1855, jusqu'au paie- "ment et aux dépens distraits en faveur de Messrs. R. & G. Laflamme, avocats "du Demandeur." Action maintained.

Chaloé vs. Duplessis et vir.

R. & G. Laflamme, for Plaintiff.

Leblanc & Cassidy, for Defendants.

(W. F. G.)

MONTREAL, 25th FEBRUARY, 1862.

Coram MONK, J.

No. 2675.

Mackenzie vs. *Taylor*, Curator.

PRIVILEGED COMMUNICATIONS.

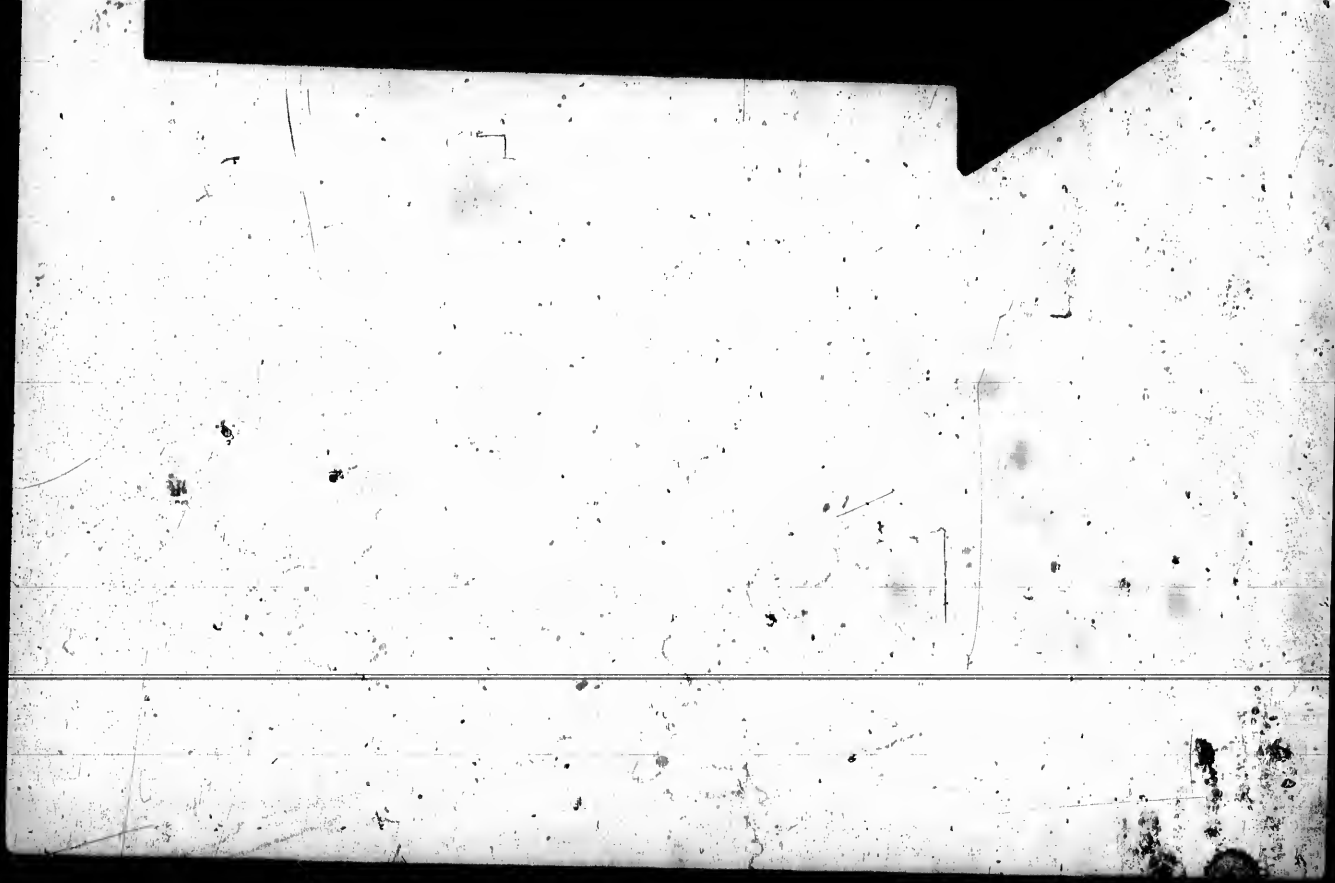
Held:—That the private account of a party in the cause at a Banker's may be shewn, where it is established that money at issue in the cause has been lodged by the party at the Banker's to the credit of his private account.

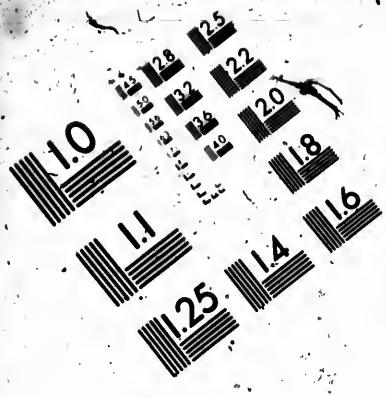
The plaintiff sued the defendant for an account of a sum of £3517 11s. 5d. currency, alleged by her to have been received from the Sheriff of Montreal, on the 15th February, 1848, by him in his capacity of curator to a substitution under the will of the late Alexander Mackenzie, the father of the plaintiff. The plaintiff had a usufructuary interest in this sum under the will.

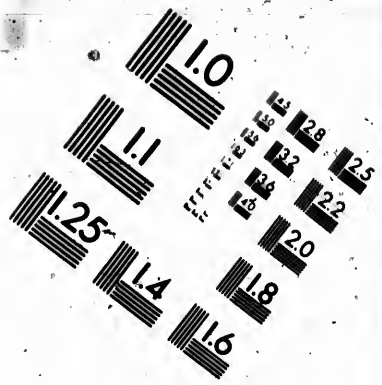
The defendant, among other things, pleaded that, as curator, he was entitled to six months to make an investment from the time of the receipt of the money in question, and accordingly produced an account, crediting the plaintiff with interest on the sum from the 15th August, 1848, but allowing her no interest from the 15th February to the 15th August, 1848.

The plaintiff, with regard to the six months, pleaded that during this period the defendant had converted the money to his own personal use, and therefore owed interest on it.

At Enquête, the plaintiff produced John Porteous, a witness, from the Bank of Montreal, where it was admitted that the defendant had lodged £3517 of the money to the credit of his private account, and the following question was put to the witness:







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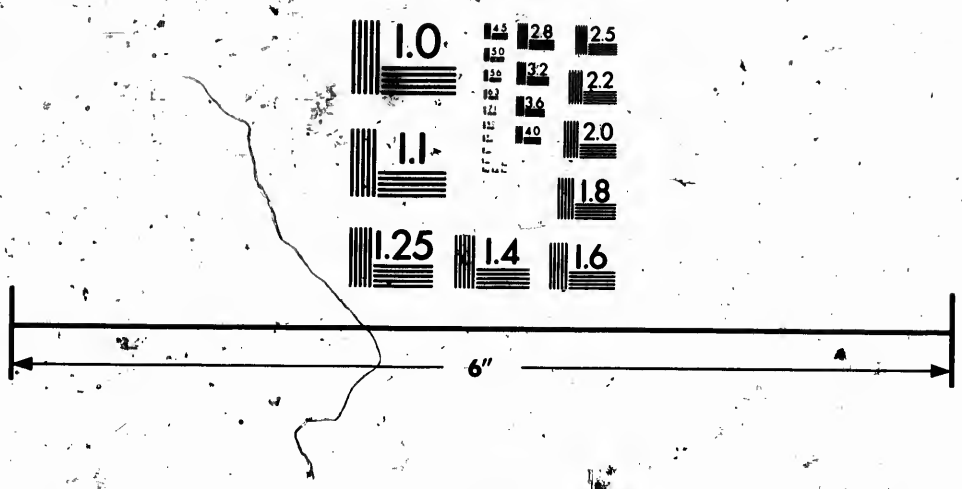

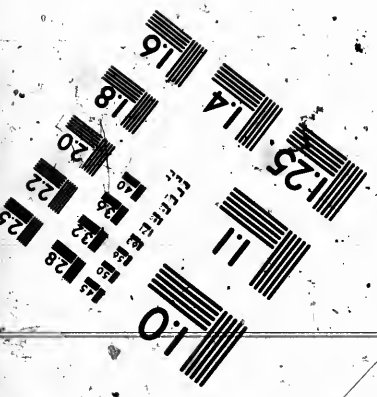

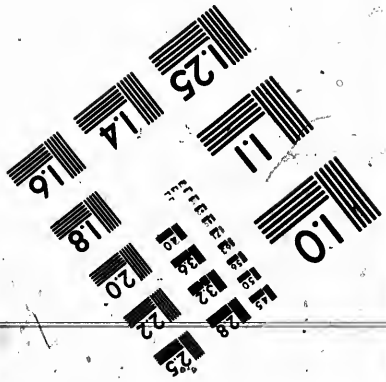

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Mackenzie vs. Taylor.

"Between the 15th February, 1848, and the 15th August of the same year, was any and what portion of the said sum of £3517 withdrawn from the said Bank by the said Hugh Taylor?"

This question was objected to by the defendant as illegal, impertinent, and not in issue in this cause, and the objection overruled at Enquête, and subsequently a motion was made by the defendant, on the 20th February, before the Court in term, to revise the ruling at Enquête.

The Court (the same Judge sitting who ruled at Enquête) held the question to be admissible.

Motion dismissed.

Torrance & Morris, for Plaintiff.
H. Stuart, for Defendant.
(F. W. T.)

Authorities cited by Plaintiff in support of pretension that the amount at Bankers may be shewn.

1. That a Banker must reveal the state of the accounts of his customers and amount deposited by him.

1 Greenleaf on Evid., § 248.
1 Taylor " p. 755.
Case of Lloyd vs. Freshfield, 2 C. § P., 325.

2. That a *mandataire* is liable to pay interest on a sum in his hands when he has used it.

Dig. B. 17, T. 1, l. 10, § 3.
Troplong, Mandat. N. 417, 418, 498, 499, 500. 3. Comm. Art. c. c. 1996.

Interest due if money used.

Pothier, Mandat, No. 56.
6 Toull. p. 281, 2.
11 Toull. p. 56, No. 44.
Gridley vs. Connor, 2 L. A. 91.
C. C. L. Art. 2984.

Also same of Attorney-at-Law.

Dwight vs. Simon, 4 L. A. 497.

An executor is considered to employ the money in trade if he lodge it at his banker's and place it in his own name, and is therefore called upon to pay interest at 5 per cent. A merchant must generally keep a balance at his bankers, and this answers the purpose of his credit as much as if the money were his own.

Lewin on Trust, p. 328.
2 Williams' Executors, 1132.

In the case of a deposit of money, so long as the amount in the "caisse" is greater than the amount due, interest is not due by the mandataire.

Troplong, Mandat. p. 476, 7, No. 503.

3. The tutor is not entitled to six months delay when he uses the money of the miner.

2 Toull. 384, N. 1215.

4. The tutor using his ward's money owes interest.

Meslé, p. 159.

5. The tutor owes interest on his ward's money in his hands without investment after six months.

Guyot vol. Intérêts, p. 641.
Idem of Curator, p. 624.

MONTREAL, 31ST MAY, 1861.

Coram MONK, J.

Roy vs. *Beaudry*, and *Lafrenière* dit *Gagnon* mis en cause.

SUBPŒNA.—CONTEMPT.

HELD:—That in proceedings for a contrainte the party proceeded against, should have notice from the beginning.

In this cause, Prospère Lafrenière dit Gagnon, a witness, having made default to appear in obedience to a *subpœna*, the party summoning him applied to the Judge presiding at the Enquête sittings, by motion without notice, for a rule for a contempt and *contrainte* against the witness, which was granted, the 8th May, 1861.

The rule was served upon the witness, returnable on the 27th May, 1861. It was duly returned into Court and the witness made default.

The Court, after *délibéré*, discharged the rule, on the ground that the party proceeded against must have notice from the beginning, which had not been done in the present case.

Ernest Bruneau, for party moving. Rule discharged.

(F. W. T.)

IN THE PRIVY COUNCIL.

10th FEBRUARY, 1862.

Coram LORD CHELMSFORD.
LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

On Appeal from the Court of Queen's Bench, Appeal Side, Lower Canada, between

LOUIS MAROIS,
Defendant in the Court below.
APPELLANT.

AND

ETIENNE ALLAIRE,
Plaintiff in the Court below.
RESPONDENT.

RIGHT OF APPEAL TO THE PRIVY COUNCIL.

HELD:—That notwithstanding the 34 Geo. III c. 6, s. 30, and the 12 Vic. c. 37, s. 19, the judgment of the Court of Queen's Bench is not final in all cases, where the matter in dispute does not exceed the sum or value of five hundred pounds sterling, and does not relate to any fee of Office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents, or such like matters or things, where the rights in future might be bound, and that the Privy Council can in its discretion allow appeal in such cases.

That the case of Cuvillier vs. Aylwin, (2 Knapp 72) did not receive that full and deliberate consideration, which its great importance demanded.

That the case of Cuvillier vs. Aylwin is overruled.

The action before the Superior Court in Quebec, was one directed against four Defendants, who were sought thereby to be condemned jointly and severally, to

Marios vs. Allaire.

pay to Allaire, the Plaintiff, the sum of £165 3s. 7d., with interest at 4½ per cent., for a few weeks previous to the institution of the action, borrowed by them (as Plaintiff pretended), trading as bankers in partnership, under the name of "La Caisse d'Economie de St. Roch," from him the Plaintiff.

It was pretended in the Superior Court, that all the Defendants were officers of La Caisse d'Economie de St. Roch, a charitable institution founded under the auspices of La Société de St. Vincent de Paul, and that by the constitution and by-laws of that Caisse, none of its officers were to receive any compensation for their services; that the Defendants, instead of properly discharging their duties, traded for their own benefit with the monies of the Caisse, the consequences of which were its bankruptcy, and the non-payment to the Plaintiff of the amount of his deposit.

The Superior Court condemned the four Defendants, jointly and severally, to pay to the said Plaintiff, the said sum of £165 3s. 7d., with interest at 4½ per cent., from 13th April, 1855, and costs.

An appeal was instituted by Marois from that judgment, but it was confirmed, the motives only being changed.

On the 10th February, 1862, the following judgment was pronounced by the Lords of the Judicial Committee of the Privy Council on Marois' petition for leave to appeal.

This Petition for leave to appeal depends upon the same Act of the Province of Lower Canada as the case of *Macfarlane* vs. *Leclaire* from the Court of Queen's Bench at Montreal, which their Lordships have just disposed of (34 Geo. III, cap. 6), but the questions raised in the two cases are entirely different. Upon the present Petition it is not denied that the matter in dispute is not of the value of £500 sterling, but the Petitioner prays that he may have leave to appeal granted to him upon the special circum[illegible] of his case. The sum actually recovered in the action against the Petitioner is only £165 3s. 7d. with interest at 4½ per cent., but he states that in consequence of his having been held to be liable to the Plaintiff in that action as a member of an incorporated society, carrying on a banking business for a loan or deposit made by the Plaintiff to or with the Banking Company, other depositors in the Bank have brought numerous actions against him, by which he is sought to be rendered liable to claims amounting to upwards of £4,000. It was argued, but not very strongly pressed, that the existence of these actions following upon the Judgment might possibly bring the case within the class of exceptions in the 30th section of the Act, and so entitle the Petitioner to appeal, although the immediate sum or value in dispute is less than £500. It would be difficult, however, without straining the words of the Act to make the exceptions apply to the Petitioner's case. But the Petitioner contends, that although he is precluded from an appeal in consequence of the insufficient value of the matter in dispute, and is unable to bring himself within the exceptions, that it is still open to him to apply to Her Majesty in Council for leave to appeal, and that the peculiar circumstances of his case justify the application.

He maintains that the jurisdiction by way of appeal from all Colonial Courts is a prerogative of the Crown, which cannot be taken away except by the ex-

press words of an Act of the Legislature to which the Crown has given its assent; and that in the Colonial Act in question, not only are there no words to take away the prerogative, but that it is expressly reserved by the 40th section, in which it is declared that nothing in the Act contained shall be construed in any manner to derogate from certain specified rights of the Crown, "or from any other right or prerogative of the Crown whatsoever." But here the Petitioner is met by the case of Cuvillier *v.* Aylwin (2 Knapp, 72), in which the very point which he raises was decided in the Privy Council against him. If the question is to be considered as concluded by this decision his Petition must be at once dismissed; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the Judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 40th section of the Act on the prerogative of the Crown.

Their Lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves. The Petitioner must understand that the prayer of his Petition will be granted, but at the risk of a Petition being hereafter presented from the opposite party, upon which his Appeal may be dismissed as incompetent.

Their Lordships will, therefore, humbly report to Her Majesty that leave ought to be granted to the Petitioner to enter and prosecute his Appeal upon lodging a deposit of £300 in the Registry of the Privy Council as security for the costs of the Respondent.

(W. K.) Petition granted.

APPEALS TO THE PRIVY COUNCIL.

For the information of the profession we have been permitted by ROBERT MACKAY, Esq., to publish the following extract of a letter he recently received from the Registrar of the Privy Council:—

COUNCIL OFFICE, WHITEHALL,

November 25, 1861.

* * * * In answer to your question I beg to inform you that the Bar of the Privy Council is an open bar for all advocates duly qualified in the colonies and dependencies from which appeals lie to the Queen in Council, and consequently any Canadian advocate would be heard by their Lordships in Canadian appeals.

(Signed,) HENRY REEVE,
Reg. C. P.

CIRCUIT COURT.

MONTREAL, 15TH MAY, 1860.

Coram MONK, J.

No. 1572.

Dechantal vs. Pominville.

Held.—That in default cases interest runs on notes payable on demand from date.

This was an action for £25 15s., amount of a promissory note payable on demand, made by the defendant in favor of the plaintiff. The defendant made default, and the only question was whether the plaintiff was entitled to claim interest from the *date* of the note.

His Honor took the case *en délibéré* on this point, and afterwards, in rendering judgment for the interest as demanded, remarked that he did so because he found the point had been so ruled by his predecessors, and he thought it expedient to recognize the authority of their decisions, so long as they were not reversed by the Court of Appeals.

Leblanc & Cassidy, for Plaintiff.

(A. H. L.)

MONTREAL, 15 OCTOBRE 1861.

No. 714.

Coram MONK, A. J.

Birs dit Desmarteau vs. *Aubertain.*

Jugé:—Que la signification du bref de sommation faite par un huissier, parent uu demandeur, est nulle.

Dans cette cause l'assignation avait été faite par le fils du demandeur.

Le défendeur produisit une exception à la forme, et prétendit que l'assignation était nulle, parce qu'un huissier ne pouvait instrumenter pour son parent.

Rodier, *Questions sur l'ordonnance* de 1667, P. 45.

Le demandeur admettait cette doctrine avant la passation du Statut 23 Vict. ch. 57, sec. 51, mais prétendait que cette prohibition n'existait plus depuis qu'il était permis aux parents à quelque degré qu'ils fussent, d'être entendus comme témoins.

Le défendeur repondit qu'on ne pourrait étendre l'application du Statut d'un cas à un autre, et qu'on devait le restreindre à l'objet pour lequel il avait été passé.

Exception à la forme maintenue.

J. Jodoin, pour le demandeur.

Dorion, Dorion & Séncal, pour le défendeur.

(V.P.W.D.)

MONTREAL, 12TH AND 14TH OCTOBER, 1861.

Before Justice MONK and a Special Jury.

AND 30TH DECEMBER, 1861.

Coram BERTHELOT, J., *in Banco.*

No. 1374.

Racine vs. *The Equitable Insurance Company of London.*

Held:—That the furnishing of a certificate as required by the condition of a Policy of Insurance of 3 respectable persons that they believed that the loss had not occurred by fraud is a condition precedent, without compliance with which the assured cannot recover.

This was an action brought by the Plaintiff against the Equitable Insurance Company of London whereby he claimed from them $1500, the amount of a Policy of Insurance effected with the Defendants upon a house and outbuilding belonging to the Plaintiff at Pike River, C. E., which had been destroyed by fire.

The Defendants met the action by pleading that the Plaintiff had misrepresented the value of the property in stating it to be worth £600 when it was only worth $1200: 2ndly. That the Plaintiff had not as required by the condition of the Policy given notice of his loss and furnished a statement of loss and a certificate of three respectable parties in the neighbourhood, certifying that the loss had not occurred fraudulently, and 3rdly. That the Plaintiff had connnived at the burning.

The Plaintiff denied the allegations of the Defendants' pleas.

The issues of fact to be submitted to the Jury were defined as follows by Mr. Justice Smith:—

1st. Did the Defendants by themselves on or about the 24th September, 1859, execute and deliver to the Plaintiff the Policy of Insurance in the Plaintiff's declaration mentioned whereby the buildings and premises therein described were declared to be insured for $1500 for one year from the 21st July 1859 to the 21st July 1860, and was the said Policy subject to the conditions endorsed thereon?

2nd. Was the cash value stated in the application referred to in the said Policy, a true value of the said premises insured, or were the said premises overvalued, and if so was the said overvaluation made with any fraudulent intention?

3rd. What do you find was the cash value of said property, buildings and premises applied to be insured at the time of the insurance? Was it $2400 or $600, or what was it?

4th. Were the said buildings and premises on or about the 19th day of February 1860, destroyed by fire?

5th. Did the said Louis Racine sustain damage by the said fire to the extent of $1500, or to what extent?

6th. Did the said Plaintiff after the said fire comply with the conditions endorsed on the said Policy or not, and particularly with the condition No. 10 endorsed thereon, and did the Plaintiff procure and exhibit to the Defendant the certificate required by the said condition, and without delay after the said fire, give notice of his loss to the agents of the Defendants and did he furnish before the expiration of a month after said fire, as exact and detailed a description of said

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loss and damage as the nature of the circumstances would permit as required by said condition No. 10?

7th. Do you find that the fire alleged by the Plaintiff in his said declaration was caused by the Plaintiff's act, or that it was connived at by him?

The Plaintiff proved the effecting of the insurance through one Bizaillon with Hickey, the then agent of the Defendants at Chambly, the fire and the loss. The value of the property was variously estimated at from £600 to £500. It was also proved by Hickey, a witness summoned by the Plaintiff, the agent who effected the Policy but who had ceased to be the agent of the company, that he effected the insurance on the representation of Bizaillon that the property was worth $2400 and more. The insurance sought was $1800 but the Head Office at Montreal would only take a risk of $1500 as they thought $1800 too much for the property. He would only insure two-thirds of the value of the property.

The witnesses of the Defendants estimated the value of the buildings destroyed at from $700 to $1000. Connivance at the fire was not proved.

His Honor Mr. Justice Monk charged the Jury that it was sufficiently proved that Bizaillon was the agent of the Plaintiff, and intimated to the Jury that he was of opinion that there had been misrepresentation as to the value. There was no satisfactory proof that the burning was the act of the Plaintiff. And lastly that notice of the fire had been given to the Defendants but that no certificate that the loss had not occurred fraudulently had been furnished.

The Jury retired and after deliberation returned with the following answers:—

To the 1st.—Yes.

" 2nd.—To the second part, 9 of the Jury say "no." The other 3 say "yes." To the first part "no," not the true value.—Yes.

" 3rd.—Nine of the Jury decide $1200; two $1500, and one $1600.

" 4th.—Yes.

" 5th.—$1200.

" 6th.—We find that he gave due notice of the total loss of his property insured but furnished no certificate or description of the property so destroyed.

" 7th.—No.

The cause, having been inscribed for hearing on the merits, *Loranger*, Q. C. for Plaintiff moved for Judgment on the verdict and *Morris* for Defendants moved likewise for Judgment on the verdict and also for Judgment *non obstante veredicto*.

The Plaintiff's counsel contended that there had been a waiver of the condition of the production of the certificates by the Defendants, citing in support of that view, Ellis, p. 132 American Edition and that upon the verdict, the Plaintiff was entitled to Judgment.

The Defendants' counsel argued:—1st. That misrepresentation of the value having been proved and found by the Jury, the contract was null and void and that whether the misrepresentation was fraudulent or not. 2nd. That the Court had a right to appreciate the testimony and disregard that part of the second finding which declared the overvaluation to be without fraudulent intent. And 3rdly. That the absence of the certificate required by the 10th condition of the

Policy was a condition precedent without which the Plaintiff could not recover and that it was in fact a fatal defect to the maintaining of the action.*

After deliberation, Mr. Justice BERTHELOT, in rendering Judgment, said:—

Le Demandeur poursuit la Défenderesse pour la perte qu'il a soufferte par l'incendie de sa propriété le 19 février 1860, assurée en vertu d'une police d'assurance datée du 24 septembre 1859.

La 10e condition au dos de la police exigeait qu'au cas d'incendie l'assuré aurait à donner l'avis ordinaire de l'incendie et sans délai. Que sous un mois après il présenterait en détail, compte de sa perte et en outre un certificat signé par trois personnes respectables (non interressées dans la perte), déclarant qu'ils connaissent l'assuré et qu'ils croient que la perte est accidentelle, etc., etc.

Le montant de la perte ne devant être payé qu'autant que la déclaration de l'incendie, le compte de la perte et le certificat auront été présentés et que les dits renseignements auront été fournis.

Le Demandeur allègue dans sa déclaration qu'il avait donné avis de l'incendie à l'agent de la Défenderesse par l'entremise duquel l'assurance avait été effectuée, et qu'il avait rempli les conditions nécessaires et voulues par la loi pour lui donner le droit de retirer le montant de sa perte, et sur le refus de la compagnie, conclut au paiement du montant de son assurance £375 0s. 0d.

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* Defendants' Counsel (cited amongst others) the following authorities at the trial and *in banco*.

1st. That misrepresentation as to value would avoid the Policy.

Angell on Insurance, §152, page 204.

2nd. That actual fraud was not necessary to make the misrepresentation avoid the Policy.

Arnould, p. 494, §187.
Angell, §175.
Bell's Commentaries, 1—617.
Pothier, Assurance, No. 197.
Boudousquié, No. 112, p. 141 and No. 117, p. 146.
Grün et Joliat, No. 210.

3rd. That a knowing exaggeration of the value of the objects insured is a fraud.

Boudousquié, p. 178, No. 144.
Pothier, Assur., No. 76, 77.
Grün et Joliat, No. 213.

4th. That a breach of warranty would avoid the contract and that the conditions of the Policy were express warranties.

Ellis, p. 81, No. 29.
Arnould, Vol. 1, p. 577, 581, 583.
Ellis, p. 82, note.
6 Wendell, 488.
Boudousquié, p. 235.

5th. That the assured must comply with the condition to produce a certificate and that such condition is a condition precedent.

Scott et al. vs. The Phœnix Insurance Company. Stuart's Reports, p. 534.
Marshall, Vol. 2, p. 809, 811, 813.
Ellis, p. 133 and 136.
2 Phillips on Evid., p. 489, Nos. 1807-9-10.
Greenleaf, Vol. 2, p. 305 and 406.

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Par ses exceptions, la Défenderesse a prétendu :

1o. Qu'il y avait eu fausse représentation de la part de l'assuré lorsqu'il avait fait application pour s'assurer, en représentant sa propriété comme valant £600, tandis qu'elle ne valait alors que £150 et qu'il y avait là dol et fraude de sa part ce qui rendait la police nulle et sans effet à son profit.

2o. Que les conditions au dos de la Police faisaient partie du contrat d'assurance, et qu'il ne s'était pas conformé à la 10e des dites conditions, celle ci-dessus mentionnée quant à l'avis à donner sans délai, le compte à présenter et le certificat de trois personnes, et qu'il ne devait pas être payé de sa perte sans s'y être au préalable conformé.

3o. Enfin que l'incendie avait eu lieu par le fait et la connivance du Demandeur.

Ce dernier a répondu généralement à ces plaidoyers.

La contestation ainsi liée a été référée à un Jury, sur articulation de faits particuliers et définis à répondre.

Par leur réponse au second des faits articulés, ils ont dit: 1o. que la valeur de la propriété représentée par l'assuré au temps de l'assurance comme étant de £600 était une valeur exagérée ; 2o. Que cette exagération de valeur avait été faite sans l'intention frauduleuse et ce par neuf contre trois.

Par leur réponse au 6e ils ont affirmé qu'il y avait eu avis suffisant donné à l'assurance, mais que le Demandeur n'avait pas donné et produit le certificat et l'état de sa perte tel que requis par la 10e condition susdite.

Par leur réponse au 7e ils ont dit que l'incendie n'avait pas eu lieu par le fait et la connivance du Demandeur.

Par d'autres réponses la valeur de la propriété a été fixée comme ayant été de £300 au temps de l'incendie.

Dans cet état de la procédure, le Demandeur a présenté une motion pour jugement suivant le verdict pour £300, et la Défenderesse a présenté deux motions, la première pour jugement en sa faveur sur le verdict, et la seconde pour jugement nonobstant le verdict.

Les raisons au soutien des deux motions sont à peu près communes à l'une et à l'autre et peuvent se réduire aux deux propositions suivantes :—1o. Qu'il y a eu exagération de la valeur de l'immeuble par le Demandeur à l'époque de l'assurance, et 2o. Que le Demandeur n'avait pas exécuté et ne s'était pas conformé à ce qui était exigé de lui par la 10e condition de la police.

Quant aux premiers moyens, l'on peut de suite répondre que la question se trouve tranchée et enlevée même à l'appréciation de la Cour, par la question soumise au Jury et par la réponse qu'il y a faite. C'est une question de fait qui a été laissée à l'appréciation du Jury par le jugement de cette Cour du 30 de septembre 1861, qu'il s'agit d'exécuter. Or à quoi bon soumettre cette question au Jury si elle ne devait pas être suivie par les parties et la Cour.

Si l'appréciation de la conduite et des intentions du Demandeur au temps du contrat eussent été laissées à l'appréciation de la Cour, il en aurait peut-être été autrement en faisant application des autorités citées par le Défendeur en son factum et des suivantes :

Pothier, V. , No. 198–199.
Pereil, V. , No. 208–209–211.
Duer, V. 2, Représentations, §34.
Pothier, Contrat d'assurance :

No. 199. " L'obligation que la bonne foi impose aux parties de ne rien dissi-
" muler de ce qu'elles savent sur les choses qui sont de l'essence du contrat, ne
" concerne ordinairement que le for intérieur.

" Il en est autrement de l'obligation de ne pas induire l'autre en erreur par
" de fausses déclarations sur les choses qui sont de la substance du contrat ;
" celle-ci concerne le for extérieur.

" Cela a lieu quand même l'assuré aurait fait, *sans mauvaise foi*, cette fausse
" déclaration, étant lui-même *en erreur*.

" Car il y a cette différence dans tous les contrats intéressés, entre le cas au-
" quel une partie ne dit pas ce qui est, et le cas auquel elle dit ce qui *n'est*
" *pas*.

" Dans le premier cas elle n'est pas tenue de ne l'avoir pas dit, si elle ne le
" savait pas, et si elle ne l'a pas malicieusement dissimulé ; mais dans le *second*
" *cas*, elle est tenue, si ce qu'elle a dit ne se trouve pas véritable, et a induit
" l'autre partie en erreur."

Il semble résulter de ces autorités que lorsque la fausse représentation porte sur la substance du contrat les assureurs peuvent en demander la nullité.

Quenault, No. 299.

" Les lois sur les assurances répriment tout excès dans l'évaluation des objets
" assurés, soit qu'il y ait eu dol et fraude dans l'évaluation, *soit même qu'il n'y*
" *ait eu ni dol ni fraude*. Si dans ce dernier cas la loi ne déclare pas le con-
" trat d'assurance nul, *comme dans le premier*, elle veut au moins que l'assurance
" soit réduite jusqu'à concurrence de la valeur réelle des objets assurés."

No. 300. " Mais suffit-il de la plus légère différence entre la valeur réelle des
" objets assurés, et l'estimation porté dans la Police pour autoriser les assureurs
" à s'en plaindre et à requérir une nouvelle estimation ? Nous ne le pensons
" pas, et nous pensons encore invoquer sur ce point l'opinion généralement ad-
" mise en matière d'assurance maritime." Conformément à cette règle, *Valéri* observe que la fraude sera manifeste si l'estimation excède du $\frac{1}{4}$, du $\frac{1}{3}$ et à plus forte raison de la $\frac{1}{2}$ la véritable valeur de la chose.

Grün et *Joliat*, 1er Vol., No. 254.

" La réduction de l'assurance à la juste valeur des choses dont l'assuré re-
" clame le prix, *n'a lieu* qu'autant que l'excès de l'estimation n'est pas le ré-
" sultat d'un calcul frauduleux."

Et plus bas, il dit :—" La fraude ne se présumant jamais, c'est aux assureurs
" à prouver que l'excès de l'évaluation contenue dans la Police, provient de la
" mauvaise foi de l'assuré." " Celui," dit *Pothier*, No. 78, " qui a fait assurer
" ses effets pour une somme au-delà de leur valeur est, dans le doute, présumé
" l'avoir fait de bonne foi et par ignorance. Car la fraude ne se présume pas ;
" c'est aux assureurs lorsqu'ils l'allèguent, et qu'ils demandent en conséquence
" la nullité de l'assurance, à la justifier."

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Ce n'est donc qu'en cas de fraude bien et dûment prouvée que la Police d'assurance peut être annullée.

Dans le cas d'exagération sans fraude, il n'y a donc lieu qu'à réduction de l'assurance.

C'est le cas d'un dol réel comme dit *Quenault* au No. 290. Et ce n'est pas le cas de dol personnel, c'est-à-dire celui par lequel on reproche et prouve la fraude de l'assuré.

Je ne puis donc faire autrement que de suivre ce que le Jury a rapporté par sa réponse au second interrogatoire. C'est la loi pour la Cour et pour les parties. Et la Défenderesse ne pourrait pas réussir sur ces premiers moyens.

Les seconds moyens invoqués par la Défenderesse en ses deux motions sont plus sérieux, ils sont soutenus de la réponse du Jury à la 6e question, affirmant que le Demandeur n'avait pas conformément à la 10e condition de la Police fourni et présenté à l'assurance, 1o. Le compte et état de la perte, et 2o. Le certificat de trois personnes quant à la cause de l'incendie.

Le Demandeur répond victorieusement au défaut de production de l'état de sa perte, en disant que la perte avait été totale, et qu'il n'y avait pas de compte à fournir, et que puisque l'assurance avait envoyé un de ses employés de Montréal pour faire l'estimation de la perte sur les lieux, accompagné de M. Hickey, l'agent, par l'entremise duquel l'assurance avait été effectuée, elle avait par cela même reconnu qu'elle avait eu des informations suffisantes pour arriver à la connaissance du montant que le Demandeur réclamait pour sa perte en vertu de son assurance. Il me semble qu'il y a eu en effet de la part de la Défenderesse renonciation au droit d'exiger du Demandeur un compte en détail de sa perte, ce qui n'était d'ailleurs d'aucune utilité dans les circonstances, puisqu'elle avait été informé par son agent local, et que dans un pareil cas, l'on ne pourrait raisonablement soutenir cette prétention de la Défenderesse en présence de la preuve faite et des circonstances de la cause.

Mais en est-il de même du défaut de certificat ? Le Demandeur regarde cette condition No. 10 de la Police comme une clause comminatoire et qui ne doit pas, à défaut d'exécution, le faire déchoir de son droit de recouvrer ; mais s'il en est ainsi, pourquoi en a-t-il été fait le sujet d'une question particulière et formelle au Jury par le jugement du 30 septembre 1861, auquel le Demandeur s'est soumis puisqu'il n'en a pas appelé, et qu'au contraire il l'a mis en exécution en procédant au procès par Jury.

La nécessité de l'accomplissement de cette condition de la production d'un pareil certificat est regardé comme une condition précédente et nécessaire avant que l'assuré puisse être admis à recouvrer le montant de sa perte, et ce tant par nombre de jugements devant les cours anglaises qui doivent nous servir de guide en cette matière que par divers jugements de nos cours.

Je dois dire de suite qu'en France même, des conditions de Police d'assurance de même caractère que celle qui fait l'objet de la présente difficulté sont regardées comme valables et obligatoires.

Quenault—Assurances terrestres.

No. 252. "Si les assurances ne satisfont point à la demande que l'assuré leur " fait à l'amiable, il doit intenter contre eux l'action en paiement de l'assurance

" avant l'expiration du délai fixé pour la prescription de cette action."

" Ce délai est ordinairement déterminé par une clause de la Police, et nous " ne doutons pas qu'une pareille clause ne soit valable et obligatoire. En effet, " la durée de l'existence d'un droit est susceptible d'être réglée par la même " convention qui lui a donné l'existence."

Plus loin dans sa traduction de l'ouvrage de Marshall au ch. 5 de la preuve du sinistre, p. 377 à 384, il rapporte plusieurs décisions solemnelles des Cours Anglaises qui ne laissent aucun doute sur la nécessité qu'il y a pour l'assuré de faire preuve de la production de son certificat sur la cause du sinistre, avant de pouvoir obtenir jugement, même dans le cas d'un verdict formel en sa faveur.

Ellis rapporte nombre de précédents anglais qui consacrent la même doctrine.

Il est vrai que l'édition américaine, page 132, rapporte qu'aux Etats-Unis, l'on s'est départi en quelques cas de la rigueur des Cours Anglaises sur ce point.

(Note 2.) " Though the strict rule of the English cases cited by Mr. Ellis in this " chapter 4, in regard to the necessity of the precise certificate, and other prelimi- " nary proofs, required by the conditions of Policy has been recognised and approv- " ed in America; its severity has been much mitigated by the now well settled " doctrine, that all objections to the preliminary proofs, are waived, except " those which are taken at the time the proofs are received, and that if the in- " surers accept them without pointing out their deficiencies, or refuse to pay " the loss on some other grounds, they cannot subsequently allege that the " proofs were insufficient, or not rendered within the required time."

Je ne vois pas que même en adoptant cette doctrine, le Demandeur put en retirer tout l'avantage qu'il en réclame, parcequ'il semble que même en ce cas, le Demandeur aurait du prouver que la Compagnie avait renoncé à la demande de la production du certificat, ou bien comme je viens de le dire, il n'aurait pas du se soumettre à l'articulation de fait qui en faisait une question particulière au Jury.

Ce qui me ferait croire que la doctrine américaine dont parle l'éditeur de Ellis n'est pas aussi constante qu'il le dit, c'est que j'en trouve la contradiction dans l'édition récente de Greenleaf on evidence.

V. 2. §406. " The Plaintiff must here also as in other cases show a compliance " with all conditions precedent and warranties. The usual stipulations in these " policies that the insured shall upon any loss fortwith deliver an account of it, " and procure a certificate from the nearest clergyman or magistrate stating his " belief that the loss occurred, and without fraud, &c., &c., &c., is a *condition* " *precedent* the *performance* of which must be particularly *alleged* and *strictly* " *proved*."

Je ne vois donc pas qu'il soit bien certain qu'aux Etats-Unis, l'on se soit généralement départi de la doctrine des Cours Anglaises à laquelle d'ailleurs, nous devons plutôt recourir pour nous guider qu'à celle des Cours Américaines.

Mais indépendamment de ces considérations je trouve que cette doctrine a été reconnue et suivie par la Cour d'Appel de cette Province et par le Conseil Privé, dans la cause de Scott vs. Phœnix Insurance Company rapportée dans Stuart's Reports, p. 354.

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La même doctrine a été admise par la Cour de Québec dans un procès plus récent, celui de Dill vs. l'Assurance de Québec. 1 Rev. de Lég. 117.

Dans cette cause, la Cour rendit jugement en faveur du Demandeur il est vrai, sur le verdict en sa faveur, nonobstant la motion de l'Assurance pour nouveau procès parce qu'il parut à la Cour qu'il ne s'agissait que d'une extension d'un premier délai déjà accordé par l'Assurance, pour par le Demandeur accomplir les formalités qui étaient exigées de lui par les conditions de l'Assurance, pendant qu'une enquête sur la cause du feu s'instruisait.

C'est dans les termes suivants que le Juge Bédard s'exprimait sur la nécessité de l'accomplissement des conditions au droit de la Police—en rendant le jugement de la Cour :

" Observons qu'il n'en est pas du laps de temps comme de l'accomplissement " d'un fait antérieur exigé par la Compagnie, tel que la *production d'un certifi-* " *cat.*

" L'accomplissement d'un fait est une condition *précédente* et *absolue* comme " le prouvent les autorités citées; il faut que le fait s'accomplisse."

" Il n'en est pas de même du simple laps de temps, il est *comminatoire* suivant " les circonstances." *Vide Ellis*, p. 133–136.

Ce jugement fut rendu par les Juges Panet et Bédard.*

Toutes les décisions ci-dessus rapportées ont été rendues dans des cas où il y avait eu un verdict formel en faveur de l'assuré. Avec combien plus de raison, doit-il en être de même dans la présente cause, dans laquelle il n'y a eu qu'un *verdict spécial*, une *enquête* sur tous les faits soumis au Jury par l'articulation de faits spéciaux requise par le jugement du 30 Septembre 1861, laissant à la Cour de faire l'application de la loi et de la jurisprudence, d'après la position que les parties se sont mutuellement faites par le contrat d'assurance et les conditions de ce contrat et la preuve.

J'ajouterai que la Cour d'Appel ainsi que présentement constituée, dans la cause de Atwell vs. Western Insurance Company dont le jugement est rapporté au 2 Jurist, p. 181, a maintenu que les conditions endossées au dos de la Police d'Assurance faisaient partie du contrat, et obligeaint strictement l'assuré jusqu'à preuve par ce dernier que la Compagnie d'Assurance elle-même et non son agent local, avait renoncé à en prendre avantage dans un cas. de non accomplissement de ces conditions. Il s'agissait dans cette dernière cause d'une double assurance qui n'avait pas été notifiée dans le temps prescrit par une des conditions au dos de la Police. L'assuré n'avait pas fait preuve devant le Jury que l'Assurance avait renoncé à ce moyen, lors de l'estimation de la perte.

Je crois devoir rejeter la motion du Demandeur et accorder les motions de la Défenderesse pour les raisons en dernier lieu mentionnées, et jugeant au mérite renvoyer l'action.

Ci suit le jugement :—

La Cour après avoir entendu le Demandeur et la Défenderesse par leurs avocats au mérite, tant sur la motion du Demandeur du 20 Novembre dernier pour

* The Chief Justice did not differ on the question of the certificate, but went much further than his brother judges in the adoption of the strict English rule. Note of Editor.

Jugement en sa faveur pour trois cents louis courant, que sur les motions de la Défenderesse produites en cette cause le vingt-et-un et le vingt-deux Octobre aussi dernier, la première pour Jugement en sa faveur, nonobstant le verdict, et la seconde pour Jugement aussi en sa faveur, que sur le mérite de la cause en général sur l'inscription de la Défenderesse, et après avoir examiné la preuve, et vu les réponses du Jury aux différents faits qui lui ont été soumis par Jugement de cette Cour du trente Septembre dernier et particulièrement ses réponses au deuxième et au sixième des dits faits ou questions qui lui ont été proposés; considérant que par la loi et les conventions et conditions du contrat d'assurance intervenu entre le Demandeur et le Défendeur en date du vingt-et-un Juillet mil huit cent cinquante-neuf et récité et invoqué par le Demandeur en sa Déclaration, ce dernier était tenu avant de pouvoir être reçu à recouvrer de la Défenderesse le montant de la perte par incendie qu'il réclame, de lui présenter le certificat requis par la dixième des clauses et conditions de la Police d'Assurance faite et exécutée, en date du vingt-quatrième jour de Septembre mil huit cent cinquante-neuf; et nommément un certificat par trois personnes désintéressées concernant le caractère du Demandeur et la cause de l'incendie, ou à défaut de ce faire, de prouver que la Défenderesse avait renoncé à l'accomplissement de la part du Demandeur à cette partie de la dite dixième condition de la Police d'Assurance, et ce à peine de déchéance du droit de réclamer en vertu d'icelle: Considérant de plus qu'il n'y a aucune preuve dans la procédure que le Demandeur ait satisfait à cette partie de la dite dixième clause ou condition, ou que la Défenderesse ait renoncé à en prendre avantage. Et en outre vu la réponse du Jury sur ce point à la sixième question de l'articulation de fait qui lui a été soumise, a renvoyé la motion du Demandeur et faisant droit sur les dites deux motions de la Défenderesse et sur le mérite, ayant tel égard que de droit aux dites deux motions, a débouté et déboute l'action du Demandeur avec dépens. Action débontée.

Loranger et Frères, for Plaintiff.
Torrance & Morris, for Defendants.
F. Cassidy, Counsel for "

(A. M.)

SUPERIOR COURT.

MONTREAL, 22ND JANUARY, 1862.

Coram SMITH, J., and a Special Jury.

No. 1616.

Cusack vs. *The Mutual Insurance Company of Buffalo.*

Held.—1. An endorsement upon an open policy of a cargo for insurance, is incomplete if the name of the vessel by which such cargo is shipped is in blank: but it is perfected by a notice to the insurers of the name of the vessel, whether they fill up the blank or not.

2. The provision in a policy that a vessel must not be below "Class B I," without reference to any particular classification, will not render it necessary that such vessel should not be below Class B I in a classification of vessels made on behalf of Lake underwriters and for their information. But it will be construed as meaning that the vessel should not be below the class of vessels recognised by mariners as B I, if there be any such class.

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3. A person who insures as agent for another, cannot sue for indemnity in his own name as principal.

4. And if a consignee sues for indemnity under a policy effected in his own name upon goods belonging to another and consigned to him, he must shew an insurable interest in such goods to entitle him to recover; and can only recover the amount in which he shows himself to be so interested.

5. The possession of the Bill of Lading is *primâ facie* evidence of proprietorship; but it is insufficient to constitute an insurable interest in the consignee, if it be shewn *aliunde* that he is not the proprietor of the goods.

6. To entitle a consignee of goods lost or damaged *in transitu*, to recover under a policy taken out upon them in his own name, he must shew pecuniary and appreciable interest in such goods, arising from a lien upon them; which lien may be for advances in respect of them for a general balance, or otherwise. But however it may be created, it must attach specifically upon the goods covered by the policy.

The case is so fully stated by the learned Judge, that it has been considered unnecessary to prefix any preliminary details to his charge to the Jury, which was as follows:

SMITH, J.—The case now submitted to your consideration, is a case of some importance in matters of insurance; and it will be my duty to lay before you the chief points which have been raised by the issues in this cause, and the evidence on which they are based; and to point out to you the principal points of law connected therewith, to enable you to form a correct view of the case, and to render such a verdict as will meet the justice of the case.

The action is brought on a policy of insurance to recover the value of about 5000 bushels of peas, which had been lost while on board a vessel called the Richmond, wrecked near Amherst Island in the Bay of Quinté, on the night of the 15th—16th May last.

The action is brought for a total loss, and rests on what is called an open policy dated at Buffalo, in March, 1861.

The policy was in favour of the present Plaintiff, and was a contract entered into in favour of the Plaintiff to cover all such cargoes as should be endorsed on the policy. It is the endorsement on the policy, therefore, which in fact, forms the contract.

In the present instance it is one of the conditions of the policy that it should not be held to cover any cargo endorsed on it, until the name of the vessel carrying the cargo to be insured, should have been communicated to the company or their agent.

On the 15th May, a proposal of insurance was handed to the Defendant by the Plaintiff, to cover the cargoes of two vessels then lying at Belleville in Upper Canada, each containing about 5000 bushels of peas, the first named the Bay Queen, and the name of the other then unknown. It is on the last insurance that the present case depends.

The endorsement was made, therefore, on the 15th of May, to cover this cargo, but the name of the vessel was not then communicated to the office. The name of this second vessel was the Richmond, and the name was only communicated to the Defendant on the 16th of May.

On the night of the 14th, after she had sailed on her voyage, the Richmond collided a short distance from Belleville, with another vessel called the Mary Maria, and sustained some damage, and afterwards on the night of the 15th—

16th, was wrecked near Amherst Island. These are the facts in brief as they have been given in evidence.

The Defendants meet the action by setting up three points of defence.

1. That the insurance was not complete under the conditions of the policy, until the name of the vessel carrying the cargo insured had been given in, and endorsed on the policy; and that before this had been done, and thereby a valid contract of insurance completed, the collision spoken of had occurred, thereby rendering the vessel insecure and unseaworthy; and that this fact was known to the Plaintiff, and to the owner of the peas, one McMahon.

That the suppression of this fact was a fraud practised on the underwriter, or it was a most material representation which ought to have been communicated to the Defendants; and that not having been done at the time the name of the Richmond was made known, destroyed the contract.

The second point raised is, that by the conditions of the policy no cargo should be covered, if shipped in a vessel under the rank or class of *B I*, as known to all mariners and skilled persons. That the Richmond was below *B I*, and that she was not seaworthy or sufficiently manned and equipped, and was in fact not such a vessel as a prudent man would have shipped grain in. That this condition of the policy was violated, and for this reason the policy was inoperative.

The third point was that the Plaintiff never had any insurable interest in the cargo insured.

As regards the first point it is to be observed that no insurance could be considered as completed under the conditions of the policy, until the name of the vessel had been communicated to the company. The communication was made on the morning of the 16th May, although it was not endorsed on the policy as it should have been. So soon, therefore, as the fact was made known to the Defendants the contract was complete and binding. But the Defendants pretend that the Plaintiff, as well as McMahon, the owner of the peas, were aware of the collision which had taken place, and that by suppressing their knowledge of the fact a fraud was committed on the Company, as it was a most material fact which ought to have been communicated.

But the evidence clearly shows that neither the Plaintiff nor McMahon was aware of the fact before the same was communicated, and consequently the contract was binding and effectual, and this branch of the defence, therefore, falls to the ground. Had it been proved that such knowledge existed in the Plaintiff, or in McMahon, no doubt the insurance would have been inoperative to charge the Defendants.

The Defendants themselves appear to have adopted these views, and their counsel have declared to you that they do not consider this point as being established in their favour.

On the second point it is to be observed, that by another condition of the policy it is declared that this policy of insurance should in no way cover any cargo shipped in any vessel below class *B I*, and that the Richmond ranked below class *B I*. As regards this condition on the policy, the evidence has been contradictory, but the weight of testimony is in favour of the Plaintiff. As there

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exists no regular classification of vessels, or any register which can be taken as of itself sufficient to settle this question, it must be decided by the general evidence of her being of that class as recognized by mariners, and of her being seaworthy and perfectly adapted to the carrying of grain. As regards the register kept at Buffalo, the Defendants do not rely on that fact as being material, but rest on the general ground that she was in fact a vessel well known to be below class *B I*, and in fact utterly unseaworthy.

The evidence for the Plaintiff shows that she was rebuilt in 1857 by a competent builder. The description of the repairs has been laid before you, and this has been supported by a number of mariners and others, who all testify to the capacity and seaworthiness of the Richmond. On the other hand, the Defendants have examined two principal witnesses, marine inspectors, in the employ of Insurance Companies. The examination of one has described the condition of the Richmond when he inspected her, after she had been rebuilt in 1857, and his evidence goes to contradict the evidence of the Plaintiff in some most important points. But the Plaintiff has clearly shown by evidence in rebuttal, that this witness was in error in two important points; and being shown to be in error in them, it is quite possible that in other points he may also be mistaken. On the whole, the evidence of Plaintiff on this particular, of the Richmond being seaworthy and quite competent to carry grain cargoes, stands unimpeached, and I think you will have no difficulty in coming to the conclusion, that the Richmond was seaworthy and in all respects fit for the carrying of grain cargoes.

This brings us now to the consideration of the third and last objection of the Defendants, and the really important question for your determination.

The object of the contract of insurance is to guard against loss.

The great principle is that it is a contract of indemnity. It is plain, therefore, that if a claimant is not in any way interested in the object or thing insured, he sustains no loss by its destruction, and consequently there can be no claim for indemnity.

The Plaintiff alleges that he was the owner and consignee of the peas injured on board the Richmond. If he was both owner and consignee, then the quality of consignee must merge in the character of owner. If he is not owner but a consignee, his title to claim is different from that of the owner, and he must show an insurable interest in that character.

In this case the policy is in the name of the Plaintiff. He was not bound at the time he effected the insurance to declare the nature of his interest, but he must declare it when he puts in his claim for indemnity. He must be interested either as owner or consignee, and this is what he must establish or he cannot recover. In which of these qualities then has he shown any interest? As regards the ownership of the peas, the record shows abundant evidence of what the parties themselves, I mean the consignor and consignee, thought of the transaction.

The evidence goes conclusively to show that McMahon of Belleville, was the owner of the peas.

The bill of lading shews that the peas were shipped by McMahon and consigned to the Plaintiff; and he in his letter of the 22nd May, written six days after the loss of the Richmond, and sent to the agent of the Defendants at Montreal, expressly declared that Mr. McMahon was the owner, and that he (the Plaintiff) on effecting the insurance, acted altogether as the agent of the owner. This letter is as follows:

MONTREAL, 22nd May, 1861.

THEODORE HART, Esq., Agent Buffalo Mutual Insurance Co.

DEAR SIR,—As I am anxious to avoid all misunderstanding and difficulty with respect to the matter of the insurance in your agency upon the peas on boad the "Richmond," I wish briefly to state the facts of the case. As I have already informed you, I acted in the matter, and still act as the agent of Mr. E. D. McMahon of Belleville, the owner of the peas. With a view then to an amicable settlement of the matter, I would again call your attention to the following facts:

On the morning of the 15th May instant, under my application of the previous day, you, as agent of the Company, insured against the perils of navigation in your usual manner, by an entry on your book as follows:

The Bay Queen, about 5000 bushels peas, *a* 73 cts.

Schooner, name not advised, about 5000, *a* 73 cts.

On the morning of the 16th instant, (between 11 and noon) you were informed that the name of the schooner (of which the name had not previously been given,) was the "Richmond." Later in the day, I sent to your office a telegram from Mr. McMahon inquiring if the Richmond was insured, and the reply received from you was, that she had been insured in the morning. At a subsequent hour of the same day, I made the same inquiry at your office, and received the same answer.

In the evening of the sixteenth I received a telegram, which I shewed to your clerk the following morning, announcing the wreck of the Richmond. Later in the morning of that day (17th) you called on me and stated that your company was not liable on the ground that the Richmond was scow a, unfit to carry grain, and you intimated a suspicion that the sender of the first telegram had at the time it was sent a knowledge of the loss. Upon my calling on you later in the same day, you told me that if the Richmond was not of a lower class than B 2 she was insured.

The only objection then which you made to the insurance arises from the supposed rank of the vessel. The fact that an insurance was effected with you in the usual form, upon peas on board the Richmond you do not, as I understand, deny.

Mr. McMahon will, no doubt, be able to shew that the vessel was seaworthy, and suitable for the carrying of grain, and also to satisfy you that he had no knowledge of the loss.

I wish now most formally to notify your company of the wreck of the vessel, and the probable loss of the peas insured, the whole quantity on board being about 5500 bushels. The particulars of the wreck, &c., have not yet been learned by me. Mr. McMahon has directed every possible effort to be made to save the peas from loss and damage so far as may be.

I will feel obliged if you will let me know what notices, statements, &c., are required by your company in cases of loss or damage of property insured, and

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if you will furnish me with such printed forms as may be used or approved by the company, so that Mr. McMahon may at once comply with all the formalities required by the company.

Awaiting a reply at your earliest convenience,

I am, yours truly,

C. J. CUSACK.

This letter was writtten expressly as a preliminary to the claim which his principal afterwards formally made under the policy. The intention of the principal to make the claim was known to the Plaintiff, for he referred to it in his letter, and intimated that the owner (indicating McMahon as such,) would be ready to afford all the information required by the Defendants in the settlement of the loss. Both the parties, the principal and agent, concur in the statement that the insurance was effected by the agent, the Plaintiff, for the principal, the owner. McMahon made his claim as owner at the time of the loss; acted as owner; endeavoured to save part of the cargo; and dealt with the peas as owner, by selling the damaged peas at Kingston, without the consent of the Plaintiff or Defendants, and without any notice to them; for the notice was only given after he had sent the peas to Kingston, and after a portion of them had been sold. Now the contract of insurance here under these circumstances, must be considered as a contract made by the Defendants with the principal through his agent, the Plaintiff; and if the Plaintiff was simply the consignee and not the owner; and made the contract for his principal, the owner, as consignee or agent, and his act as such agent is ratified and confirmed by the acts of the principal; then the contract sued upon is the contract of McMahon, and the Plaintiff cannot recover under it. From this it must be manifest to you that if the contract of insurance was made to secure the interests of the owner of the peas, and of him alone, then the contract cannot cover the interests of the Plaintiff as consignee, whatever that interest may have been. It cannot be the contract of both. The declaration of both parties at the time of the loss, and at the time the claim for indemnity was made, shews that the interest intended to be insured was the interest of the owner. If you believe this statement, and I see no ground for not giving it full credence, then this contract cannot cover the interest of the Plaintiff in any way as consignee, and if so he can have no claim for indemnity. Phillips, p. 209, No. 380, says, "insurance made by a person in his own name only, without any indication in the policy, that any other is interested, can only be applied to his own proper interest in the subject." In other words, a contract with A cannot be considered to be a contract with B.

Here the contract was made in the name of the Plaintiff, but the policy can cover only the interest which is insured. He insured for his principal the interest of his principal, therefore that alone can be covered under it.

Phillips, p. 211, No. 383, says, "a policy made in the name of a particular person for whom it may concern, will be applied to the interest of the party or parties for whom it is intended by the person who effects it, if such party had authorized its being made beforehand or subsequently adopts it." Here the principal, although it is not shewn that he had given the Plaintiff any authority to insure, adopted the insurance with the consent of the agent.

Leaving this point, to which I trust you will give your best attention, and which constitutes a grave objection to the right of recovery by the Plaintiff under this policy, we pass now to the next point to be considered, namely, what was the insurable interest of Plaintiff as consignee of the peas lost? Before looking to the evidence on this point, I will direct your attention to a few considerations to enable you to apply the evidence more exactly, and first you must keep in view the distinction existing between the consignee's or agent's insurable interest, and his authority to insure for his consignor or principal. It is, I think, clearly proven in this cause, that the Plaintiff was not the owner of the peas, his insurable interest must therefore be that of a consignee.

It cannot be contended, I think, that the Plaintiff can recover the value of the whole cargo lost, unless his interest is commensurate with the amount or value lost, though a consignee, factor, or agent, having a lien on goods in his possession to the amount of his advances, acceptances, and liabilities, in respect to them, stands in this respect precisely in the situation of a mortgagee. A debt is due to him by his principal, for which he holds the property as collateral security, he has therefore an insurable interest to the amount of his *lien*, and whether this lien arises from expenses, or charges on account of the specific goods, or is for a general balance, can make no difference. If the lien exists the right of indemnity attaches. Applying the evidence now to this case, it consists of various documents consisting of warehouse receipts for peas: four of them being for peas received at Wellington, and two for 2000 bushels each received at Belleville by McMahon, purporting to be in favour of Cusack. They are all dated in February, March, and April last. The first could have no relation to the peas in this case, as they had been received at a different port, and had been endorsed over to one Doyle. The other two amounted to less than the cargo of the Bay Queen, and are not proved to have had any connection with the cargo shipped by the Richmond. If these receipts mean anything, they mean that the peas mentioned in them are the property of Cusack.

I have already demonstrated that the peas shipped by the Richmond were the property of McMahon, and these receipts, so far as the evidence is concerned, do not represent any part of the cargo of the Richmond.

They could then only have been produced in connection with the accepted drafts, to show a general form of dealing between the parties; you will give them such credence as you may think them entitled to.

The acceptances produced amount in all to about the sum of $3000. These acceptances are all under protest and have never been paid, the Plaintiff having stopped payment before they became due. No evidence has been offered to show that they were drawn against the cargo of the Richmond, but the contrary rather appears, as they all bear date before the opening of navigation.

They constitute no claim against McMahon, and unless they are proved to be acceptances in the interest of McMahon, they stand *primâ facie* as evidence of indebtedness by the Plaintiff; and even if they had been so proved, they are less in amount than the cargo of the Bay Queen, which arrived safely. Besides as they have never been paid, they could not show any insurable interest in Plaintiff. No evidence has been given to show the existence of a general bal-

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ance in favour of Plaintiff, or any right or lien whatever. The only other document produced is the bill of lading. This cannot be considered as of much weight; as any presumption of ownership in Plaintiff deducible therefrom, is rebutted by the evidence adduced of McMahon being the owner. What interest therefore, has the Plaintiff as a mere consignee? It is not shown that he made any advances; no general balance of debt is proved; no loss of commission is proved; what then can be his interest? Had the cargo come to the possession of the Plaintiff, and had it been in his possession as factor, having a right of sale and disposition over the cargo; then it might have been different, and if such circumstances had been shown to exist, I am not prepared to say that as such he would not have had an insurable interest to the full amount of the cargo. But the question is, what could be the insurable interest of the simple consignee, who has never had the cargo in his possession, under the circumstances laid before you? If you can pass over the declaration of the Plaintiff that McMahon is the owner, and that the insurance was effected solely in his interest; then you will have to determine the amount of the insurable interest of Plaintiff as a simple consignee, who is not shown to have made any advances upon the cargo, nor to have a *lien* on it for any general balance in his favour.

The counsel for the Plaintiff has pushed the right of the consignee very far, by asserting that if he had *any* interest, he could recover the value of the whole cargo. He might *insure* the whole, it is true, but he could not recover more than the amount of his interest. It is quite impossible that it could be otherwise, for suppose a consignee advances £100 on a cargo worth £1000, and insures for the whole and it be lost; would it be pretended that he had sustained any loss for which the £100 would not indemnify him? If it had arrived the payment of the £100 would have freed the cargo from all claim by him. Can its being lost increase his rights? Surely it cannot be pretended that he could appropriate the other £900 to himself. And the owners could have no claim on him, for he could answer that he had not insured for them. In all such cases the difficulty can be easily surmounted. The person effecting the insurance has only to state he does so for "those interested," or "for whom it might concern," and the real parties interested could then recover their indemnity upon the policy.

(The questions to be submitted to the jury were then read and commented upon by the application of the foregoing rules of law to the particular circumstances enquired of.)

Upon the last question as to the quantity of peas lost and destroyed, his HONOR said

There appears to have been about 550 bushels of peas saved from the wreck, without damage, and a very large quantity taken to Kingston and sold by the agent of McMahon, as he states, for their full market value. The sound peas appeared to have been taken by himself at half a cent a bushel more than he had been offered for them, and he swears that the price he allowed for them was their full market value. In this I see nothing improper or deserving of censure. As to the peas damaged, they appear to have been rotten and nearly worthless,

and you will be justified in considering them a total loss, and in answering the question on that subject accordingly.

I have thus shortly stated the distinctions which I consider to exist in this case as to the right of recovery under the policy, and the rights of the Plaintiff as a consignee, as shown by the evidence adduced.

At this late hour I can only refer generally to them in such manner as will not further prolong the case.

I therefore now leave the case in your hands.

The jury found for the Plaintiff on all the questions submitted to them. Upon the question whether the Plaintiff was the owner of the said peas, and if not was he interested in them, and how, and to what amount, the jury answered that

"The Plaintiff being the only person shown by the bill of lading and other evidence, to have control of the cargo, we consider him interested to the whole extent thereof."*

Rose & Ritchie, for Plaintiff.

Abbott & Dorman, for Defendants.

(J. J. C. A.)

*It is understood that the finding of the jury in this respect, has given occasion for a motion by the Defendants for judgment, and in the event of such motion being refused, for a motion for a new trial.—REPORTER'S NOTE.

SUPERIOR COURT.

MONTREAL, 27TH MARCH, 1862.

Coram BERTHELOT, J.

No. 1876.

Jackson vs. *Paige* et al.

Held:—1st. That when partners have fyled a certificate of the formation of a partnership, one partner is liable for debts contracted by the other, after a dissolution by a deed executed before a notary, if no certificate of such dissolution has been fyled in the Registry Office for the county, and in the Prothonotary's office.

2nd. That in an attachment under the 177 art. Coutume de Paris when the insolvency of a defendant is alleged, the affidavit of the Plaintiff is sufficient proof of such insolvency, unless it is denied by the Defendant in a special plea.

This was an attachment before judgment obtained on the Plaintiff's affidavit, under the 177 Art. Coutume de Paris.

The seizure was of a quantity of lumber which had been sold with a term of payment. The affidavit, as well as the declaration, set forth the insolvency of the Defendants in the usual manner, and prayed that the lumber seized might be sold in the exercise of the Plaintiff's privilege as vendor, for his benefit and in preference to other creditors.

The sale had been to B. P. Paige & Co., and when the action was instituted reference was had to the book where partnerships are registered in the Prothonotary's office. From that book it appeared that the names of the partners composing the firm of B. P. Paige & Co. were B. P. Paige and H. D. Robinson, the latter of Bradford in the United States, and accordingly the action was taken out against both these parties.

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The Defendant, B. P. Paige, appeared by his counsel, and pleaded, that at all the times mentioned in Plaintiff's declaration he was trading alone under the name of B. P. Paige & Co. and fyled a copy of a deed of dissolution of copartnership before Easton, Notary, of date 28th January, 1854.

He also by his plea admitted that the sale of the lumber had been made to him alone, doing business by the name of B. P. Paige & Co. He specially denied some of the items of Plaintiff's account, and generally all the allegations of his declaration, concluding with a *défense en fait*.

At *enquête* the Plaintiff made no attempt to prove the insolvency of the Defendants. Certificates from the Registry office and from the Prothonotary's office were fyled, which shewed that since the entry of the formation of the copartnership, no change in the firm or dissolution had ever been registered.

At argument *J. L. Morris* for Plaintiff contended that according to the Statute concerning partnerships, the dissolution ought to have been registered.

A mere dissolution before a notary was not sufficient; quoad third persons or the public, partnerships must be considered to exist as first registered, until the formalities required by the law have been complied with and the dissolution registered. Reference was made to the case of Murphy vs. Paige et al. in which the point had been already decided before his honor Mr. Justice Smith, *Vide* Vol. 5. L. C. Jurist, p. 335.

Day for Defendant Paige argued that proof of insolvency was essential to the maintenance of the action.

PER CURIAM.—The law requires the dissolution of copartnership to be registered. It has not been done in this case. The decision of Mr. Justice SMITH in *Murphy* and *Paige* would be adhered to, and both Defendants held liable.

Insolvency has not been denied by Defendants. It has been already held by the Court of Appeals* that the affidavit on which the attachment is obtained, is sufficient proof of insolvency, when there is no special denegation of it.

Judgment against both Defendants for $225.34 and attachment declared good.

The Judgment was motivé as follows:—

La Cour après avoir entendu le Demandeur et le Défendeur Bard P. Paige par leurs avocats, l'autre Défendeur Harrison D. Robinson, étant en défaut, avoir examiné la procédure et la preuve et avoir sur le tout délibéré; considérant qu'il n'est point prouvé qu'il y ait eu aucun enrégistrement tel que requis par la loi de la dissolution de la société entre les Défendeurs et qu'il y a preuve qu'il est dû au Demandeur une balance de $225.34 sur le prix et la valeur des différentes quantités de bois mentionnées et détaillées en la déclaration comme ayant été vendues par lui aux Défendeurs, pour partie de laquelle somme a été consenti le billet mentionné en la déclaration et dans les plaidoyers. Et considérant de plus qu'il y a preuve suffisante de l'identité des effets saisis comme faisant partie de ceux qui ont été vendus par le Demandeur et saisis sur les Défendeurs, condamne les dits Défendeurs à payer au Demandeur la dite somme de $225.34 du cours actuel de cette province, avec intérêt sur icelle depuis le 4 Juillet 1861, jusqu'au paiement et aux dépens, distraits à Messieurs Morris et

* Case of Prefontaine vs. Prevost et al. 1 L. C. Jurist, 104.

Leach, avocats du Demandeur. Et la Cour déclarant bonne et valable la saisie faite en cette cause des effets mentionnés au rapport du Shériff comme suit, savoir: "Two piles containing eleven hundred and eighty-three birch planks, or about nineteen thousand six hundred and twenty feet, and one thousand and forty feet of maple plank," ordonne qu'iceux soient vendus suivant la loi et que sur et à même le produit d'iceux le dit Demandeur soit payé de la dite somme de £225.34 avec intérêt depuis le dit 4 Juillet 1861 suivant son privilége de vendeur au paiement de laquelle dite somme les dits Défendeurs sont condamnés comme dit est.

Judgment for Plaintiff.

Morris & Leach, for Plaintiff.
Day & Day, for Defendant Paige.
(J. L. M.)

COUR SUPERIEURE.

MONTREAL, FEVRIER, 1862.

Coram MONK, J.

No. 170.

Masson vs. *Mullins* et *Le Séminaire de Montréal*, Opposant.

Jugé:—1o. Que le Shériff qui a payé à un Régistrateur le compte des charges faites par ce dernier pour un certificat donné en vertu du ch. 36 des Statuts Refondus du B. C. sec. 26, ne peut être inquiété à raison de ce que les dites charges pourraient être excessives.

2o. Que le Régistrateur agissant en vertu du dit acte ne peut pas être considéré comme un officier de la Cour, et contraint sur une simple règle, à faire taxer son compte devant la Cour.

Dans cette cause le Shériff du District de Montréal avait vendu plusieurs immeubles appartenant au Défendeur en vertu d'un bref de Venditioni Exponas. Il fit son rapport en la manière ordinaire accompagné du certificat du Régistrateur du comté de Montréal, pour lequel il avait payé la somme de £131 6s. suivant le compte acquitté du dit Régistrateur, annexé au certificat.

Les opposants considérant que ce compte était exhorbitant et que le Régistrateur n'avait pas droit aux charges par lui faites, prirent une règle contre le Shériff et le Régistrateur demandant à ce qu'ils eussent à comparaître devant la Cour et que le compte des charges faites par le Régistrateur fut taxé conformément à la loi, et que le Shériff fût contraint de rapporter devant la Cour telle partie de la dite somme de £131 6s. qui serait considérée comme excédant le montant auquel le Régistrateur avait réellement droit.

Lors de l'argument, le Shériff prétendit qu'il n'avait fait qu'exécuter la loi en payant au Régistrateur le montant auquel il certifiait que s'élevaient ses honoraires; que ce certificat était authentique et que lui le Shériff n'avait aucune autorité pour le contester; qu'il n'était en conséquence aucunement responsable de ce qui pouvait avoir été payé de trop au Régistrateur.

Quant au Régistrateur, il répondit qu'il était un officier public responsable à qui de droit, pour les actes commis dans l'exécution de ses devoirs, mais qu'il n'était nullement un officier de la Cour; qu'il ne pouvait être ainsi traduit devant le tribunal sur une simple règle de Cour pour voir taxer ses honoraires;

que si les opposants souffraient quelque préjudice de ce que les charges du Régistrateur étaient excessives, ils pouvaient exercer leurs recours par une action ordinaire, seul mode régulier de le faire.

Les opposants de leur côté soutenaient que la loi en obligeant les Régistrateurs à fournir certains certificats à la Cour, en avaient réellement fait, quant à cette partie de leurs devoirs, des employés judiciaires, soumis au contrôle des tribunaux compétents, et que ce contrôle devait s'exercer sur eux de la même manière que sur les autres employés; que la Cour avait le droit de forcer le Régistrateur au moyen d'une simple régle de livrer et fournir le certificat requis dans le cas où il refuserait de le faire, et à plus forte raison celui de taxer le compte de ses charges; qu'enfin il serait très injuste de forcer les intéressés à recourir à des procès longs et ruineux pour obtenir justice chaque fois qu'un Régistrateur refuserait de se conformer à la loi ou émettrait des prétentions injustes.

Malgré ces raisons la Cour maintint la position prise par le Shériff et le Régistrateur respectivement.

Règle déboutée.

Dorion, Dorion et Sénécal, pour les Opposants.
Leblanc et Cassidy, pour le Shériff.
Mackay et Austin, pour le Régistrateur.
(V. P. W. D.)

IN THE PRIVY COUNCIL, 5TH MARCH 1862.

BOSWELL,
APPELLANT.
vs.
KILBORN & AL.,
RESPONDENTS.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

Held:—That in an action of damages for breach of an executory contract for the sale of hops, payable on delivery, the Defendant having refused to accept [illegible] tendered, the proper measure of damages is the difference between the contract price and the market price, at the time of the refusal to perform the contract.

That in such action, the judgment of the Court of Q[illegible] which the judgment of the Superior Court was reversed, and the performan[illegible] contract ordered, or intended to be ordered, to be carried out, was not adapted to the form of action chosen by the Plaintiffs, and even had it been so adapted to such form would be open to great objection.

That it is not competent for a Court, to convert an action of damages for breach of contract on the refusal of vendee to accept the articles tendered to him, in to a suit to enforce the performance of the contract, and to order that contract to be carried out by their judgment; and that there is no material difference between the English Law and the old French Law with respect to the completion of contracts of sale.

THE CURIAM.—This is an Appeal from the Judgment of the Court of Queen's Bench of Lower Canada, reversing a Judgment of the Superior Court of that Province, given in favour of the Appellants, in an action for not accepting and paying

for a parcel of five tons of hops under the following contract, signed by the respective parties;—

Quebec, March 6, 1855.

Messrs. Kilborn and Morrel sell, and Joseph K. Boswell contracts for delivery with them for the following three years, viz., 1855, 1856, and 1857, five tons weight of hops for every of the said years, the hops to be good and merchantable and of the growth of each respective year, to be paid for at the rate of 1s. Halifax currency per lb. on delivery. Hops to be delivered free in Quebec."

The declaration in the action after stating the terms of the contract, and the amount due to the Plaintiffs for the hops deliverable in 1856, proceeded to aver that the Plaintiffs were ready and willing, and tendered, and offered to deliver five tons weight of good and merchantable hops, the growth of 1856, and requested the Defendant to accept and pay for the same, yet the Defendant refused to accept of or pay for the said hops, whereby the Plaintiffs not only lost the benefit of the sale, but were put to great expense and trouble in carting away and stowing the hops in a warehouse, and in other respects, the whole to their damage of 600*l.* currency, for which sum they prayed Judgment together with interest and costs.

The Defendant pleaded that the hops tendered by the Plaintiffs in fulfilment of the contract were bad and unmerchantable, and unfit to be used in his business; and he also pleaded what is called a defence "au fonds en fait," the effect of which was to put in issue all the material averments in the declaration.

It appeared in evidence that the Plaintiffs having in their possession a quantity of hops of the growth of 1856, sent to the Defendant's brewery a portion of them consisting of eight-two bales, which greatly exceeded the weight of five tons The Defendant desired that the hops should be unloaded from the sleighs in which they were brought, in order that he might inspect them, and the hops were accordingly taken out of the sleighs and placed in the Defendant's brewery, the Plaintiffs agreeing to take the hops away again if the Defendant should not accept them. After the examination of a few of the bales, and a tender of the hops in two separate lots, one containing fifty-three bales and one twenty-nine bales, but without any tender of the specific quantity of five tons, and without anything having been done by the Plaintiffs to distinguish that quantity from the rest of the bales, the defendant refused to accept the hops, and they were conveyed away by the Plaintiffs and deposited by them in a store-house in the town of Quebec. There the hops were examined by persons on behalf of the respective parties for the purpose of ascertaining their quality, and the Plaintiffs again offered to deliver five tons of hops to the Defendant, but down to the time of the commencement of the action they had never weighed or set apart five tons of hops, so as to separate and distinguish them from the larger quantity deposited in the store-house.

A great number of witnesses were called on both sides to prove that the hops were or were not of the quality stipulated for by the contract. But unfortunately, this very long and expensive inquiry has become entirely fruitless from the course which the cause afterwards took. The learned Judge of the Superior Court treated the action as one brought to enforce the performance of the con-

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tract by compelling the Defendant to take to the hops and to pay the price, and as the Plaintiffs did not by their declaration offer to deliver to the Defendant the quantity of hops in pursuance of the agreement, and as the tenders alleged in the declaration were not followed by a request that they might be judicially declared to have been good and valid, he dismissed the action with costs, reserving to the Plaintiffs the right of appeal.

This Judgment, however, was reversed by the Court of Queen's Bench, the Chief Justice dissenting from the reasons on which it was founded, and the other Judges declining to enter into them, considering them as objections which the Judge had no right to raise, the parties themselves having waived them. The Court, therefore, proceeded to pronounce its own Judgment, that the Defendant should, within fifteen days from the service upon him of a copy of the Judgment, pay to the Plaintiffs the sum of 560*l.* currency (being the contract price of the hops), with interest, and that upon payment the Plaintiffs should give to the Defendant a delivery note upon the occupier of the store where the hops were deposited for the delivery the Defendant of five tons weight, to wit, fifty bales, of the hops which had been tendered and stored, and that upon default of payment within fifteen days, and upon leaving with the Prothonotary of the Court the delivery order or duplicate, one for the Defendant and the other to remain of record, execution should issue against the Defendant.

Even if this Judgment were properly adapted to the form of action chosen by the Plaintiffs, it would be open to great objection. By the contract, delivery is to precede payment. By the judgment payment is to be made, not merely before but without any delivery. The Defendant is adjudged to pay within fifteen days after service of a copy of the judgment; if he does not, the Plaintiffs by merely depositing with the officer of the Court the delivery order in duplicate, would be entitled to sue out execution. And supposing the Defendant should pay the money and obtain the delivery order, the Plaintiffs would have discharged themselves of every duty imposed upon them by the Judgment, and yet the Defendant might be unable to obtain the hops in accordance with the contract in consequence of the store-keeper having a lien upon them, or by the loss or deterioration of the hops while they were at the risk of the vendor. But the Appellant contends that looking to the form of action, the Judgment is one which it was not competent to the Court to pronounce. He says that the action is brought, not to compel the performance of the contract, but for damages for breach of the contract by the Defendant in not accepting the hops, and that the proper measure of damages in such an action is the difference between the contract price and the market price, at the time of the refusal to perform the contract. If this question were to be decided by English law, there could be no doubt as to the extent of the Defendant's liability under the circumstances of the case. Where there is a sale by weight or measure, and (to use Lord Ellenborough's language in Bush *v.* Davis, 2 M. and S. 403) "any acts are to be done to regulate the identity and individuality of the thing to be delivered, it is not in a state fit for immediate delivery;" and no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor

(if the circumstances of the case give him a right to complain of a breach of contract) is by an action for non-acceptance. The necessity of separating and distinguishing the article sold from a larger quantity in order to constitute a complete delivery cannot be more strongly exemplified than in the case of Cunliffe and Harrison (6 Exch. 903), which was cited in the course of the argument for the Appellant. But the Respondents contend that whatever may be the law of England on this subject, the case is to be tried by the old French law, in which the principles to be applied are different; and that by that law a vendor in some cases may recover the full price agreed upon, where there has been no complete delivery of the subject according to the terms of the contract. Their Lordships have been referred in support of this view to the Civil Law, and also to the writings of various Jurists, and particularly to the Treatise of Pothier, "Du Contrat de Vente," which contains all the learning upon the subject. A very few passages from this Treatise will show that there is no material difference between the English law and the old French law, with respect to the completion of contracts. Pothier, in his Treatise, partie iv. fol. 309, states, with his usual clearness when a contract is to be regarded as perfect, and when it is imperfect. He says: "Ordinairement le contrat de vente est censé avoir reçu sa perfection aussitôt que les parties sont convenues du prix pour lequel la chose serait vendue. Cette règle a lieu lorsque la vente est d'un corps certain, et qu'elle est pure et simple. Si la vente est de ces choses qui consistent *in quantitate* et qui se vendent au poids, au nombre, ou à la measure, comme si l'on a vendu dix muids de blé de celui qui est dans un tel grenier, dix milliers pesant de sucre, un cent de carpes, &c., la vente n'est point parfait que le blé n'ait été mesuré, le sucre pesé, le carpes comptées, car jusqu'à ce temps *nondum apparet quid venierit.*" So far the law is tolerably clear, but upon the question whether when goods are sold by number, weight, or measure, the property is transferred to the buyer immediately or only after the goods have been counted, weighed, or measured, there is some difference of opinion.

Dallos, in his "Répertoire de Législation de Doctrine et de Jurisprudence," titre "Vente," chapter 3, section 1, ranges the Jurists upon the opposite sides of the question, and suggests a distinction to reconcile the difference between them. He puts a case where the seller says to the buyer, "I agree to sell you so many gallons of wine in such a cellar at so much a gallon;" here (he says) is not only a sale by measure, but also a sale of an indeterminate thing, therefore such a sale does not operate an immediate transfer of the property. And he adds, "Tout le monde est d'accord sur ce point." But where the vendor says, "I agree to sell you all the wine in this cellar at so much a gallon," here the doubt arises. In this latter case the thing is ascertained, and it may be said there is no reason why the property should not pass immediately to the buyer. But even in such a case Dallos states his concurrence with the opinion of Troplong that until the measurement the wine remains at the risk of the seller. It is true (he says) the thing is ascertained, but the price is not; but the price is like the thing itself, an essential element of the sale, and the ascertainment of the price is not less necessary than the identification of the thing to the completion of the contract. The delivery of the thing, and its being at the risk

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of the buyer, appear to be convertible terms, and it seems clear from all the authorities that upon a sale by weight or measure, until the thing is ascertained by weighing or measuring, it remains at the risk of the seller. Pothier in the same section (309), which has been already referred to, says, "It is only after measuring, &c., that the thing sold is at the risk of the buyer;" "car les risques ne peuvent tomber que sur quelque chose de déterminé."

It is difficult to understand how the vendor can have any claim to receive the price of the thing contracted for until he has separated it for the use of the buyer. Until it is ascertained and identified, it may be properly said to have no existence. And yet there is one short passage in Pothier, sec. 309, which is opposed to all his reasoning in the same section upon which the Respondents rely as establishing the propriety of the Judgment in their favour. The passage is this: "Il est vrai que dès avant la mesure, le poids, le compte, et dés l'instant du contrat, les engagements qui en naissent existent. L'acheteur a dès lors action contre le vendeur, pour se faire livrer la chose vendue, comme le vendeur a action pour le paiement du fruit en offrant de *le* livrer." One may fairly ask, To deliver what? The contract does not give the thing existence; it depends upon the vendor himself whether it shall ever exist. When there is a condition precedent to his right to the price unperformed by him, it is difficult to understand how he can recover the price upon a mere offer to perform.

The Chief Justice treats the present case as one where the vendor has executed his contract, and has done all that depends upon him to entitle him to an action *ex vendito* against the vendee, and he goes on to say that from the moment the vendor has offered to deliver the thing sold, and has put the vendee in a position to receive it, the thing is at the risk of the vendee. But how was the vendee in a position to receive the hops in this case? He could not go to the store and help himself out of the bulk to the proper quantity. And as to the hops being at the risk of the vendee, the Chief Justice is here directly opposed to the authority of Pothier, in the passage which has just been mentioned. It must always be borne in mind that, by the terms of the contract, the delivery in this case was to be made by the vendors, and therefore that an actual delivery by them, or acts done by them which were equivalent to a delivery, were a necessary preliminary to their being entitled to the price. This the Court appears to have overlooked, for in their judgment they say that "it was fully in the Appellants' power to have set apart, distinguished and taken away five tons weight of good and merchantable hops from among the said bales," thereby attributing to the Appellant the performance of acts which by the contract belonged to the Respondents.

The Judgment therefore proceeds upon false grounds, even if it was competent to the Court to give a different kind of relief to that which the Plaintiffs claimed in their Declaration. The Plaintiffs demand damages for breach of the contract on the refusal of the Defendant to accept the hops tendered to him. The Court has converted the proceeding into a suit to enforce the performance of the contract, which they order or intend to order by their Judgment to be carried out. This the Respondents contend they had a right to do, and they referred to a passage in 4 Guyot's "Répertoire," *verbo* "Conclusions," p. 351, which the

Court was said to have acted upon in a former case, that "le Juge peut rejeter, accorder, ou modifier les conclusions prises par les parties." Whether the power thus described can be pushed to the extent of enabling the Court to change the nature of the action and to administer relief entirely different from that which is sought by the Plaintiffs, may be extremely questionable. But if such a power exists, it can hardly be exercised with propriety in a case where a party has the choice between two remedies. Assuming that the Plaintiffs might have instituted a suit to enforce the performance of the contract, it cannot be doubted that they were at liberty to waive this form of proceeding, and to bring their action to recover damages for breach of contract. And when they have deliberately preferred the latter remedy, it ought not to be in the power of the Court to force upon them the other, to which they made no claim. Their action is in form and in substance a demand for damages merely for the breach of the contract in not accepting the hops. In such an action it was not disputed that the Plaintiffs could not recover the price of the hops, but only the difference between the contract price and the market price at the time of the breach of the agreement. Their Lordships, therefore are of opinion that the Judgment of the Court of Queen's Bench is erroneous, and ought to be reversed. This if nothing more were said, would have the effect of setting up the Judgment of the Superior Court. But this Judgment cannot be supported. They will, therefore, recommend to Her Majesty that both the Judgment of the Court of Queen's Bench and of the Superior Court should be set aside, and that a new trial should be had between the parties. If under the defence "au fonds en fait" the Plaintiffs will be compelled to prove their averment that they tendered and offered to deliver the hops, and will not be at liberty to show thatthe Defendant waived a perfect tender, their Lordships think that before the next trial the Plaintiffs ought to be permitted to amend their declaration, by averring an offer by them to deliver the hops, and a waiver by the Defendant which it is probable a Jury will have no difficulty in finding in their favour, and this will clear the way to the determination of the real question at issue between the parties, viz., the merchantable quality of the hops. Their Lordships think that the costs of the Appeal ought to be paid by the Respondents, and that the costs of the Rule in the Courts below should abide the event of the new trial.

Simpson, Roberts & Simpson,

Attorneys for Appellant.

(W.H.K.)

COUR DE CIRCUIT.

MONTREAL, 19 FEVRIER, 1862.

Coram BERTHELOT, J.

No. 7406.

Lavoie vs. *Gravel.*

Jugé:—Que sous la section 48e, par. 3e de l'acte des Municipalités, un chemin d'hiver ne peut pas être tracé à travers une terre close de clôtures de pierres brutes, sans le consentement du propriétaire.

Le Demandeur poursuivait le Défendeur, parceque ce dernier avait tracé, sans son consentement, un chemin d'hiver sur toute la longueur de l'une de ses terres, dans la paroisse de St. Martin, voisine de la route appelée "montée St

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Aubin," et qu'il avait percé deux travers de clôture de pierres sur la dite propriété, que le Demandeur prétendait être de nature à ne pouvoir être replacés sans difficultés.

Le Défendeur plaida à cette action qu'il était l'entrepreneur de ce chemin d'hiver, dûment nommé par l'inspecteur de la municipalité de la paroisse de St. Martin et qu'en cette qualité, il avait le droit de percer les dites clôtures, faites, disait-il, de pierres brutes et faciles à être replacées.

A l'enquête, le Demandeur prouva de la manière la plus satisfaisante par trois témoins, les allégués de sa déclaration.

Le Défendeur s'efforça de faire une preuve contraire et établit d'ailleurs que cette clôture était peu coûteuse, et qu'il s'était arrangé avec l'ouvrier même qui avait fait les clôtures pour les rétablir à la fonte des neiges pour la somme de cinq chelins et que ce dernier les remettrait dans le même état; qu'enfin le chemin avait été tracé cette année au même endroit où il avait toujours passé, dans un temps où il n'y avait pas de travers de pierres, et que le Demandeur, après que le Défendeur eût ainsi tracé le chemin, avait donné son consentement à l'inspecteur de le laisser là où il avait été tracé. Lors de l'argument, *M. Girouard* pour le Demandeur, prétendit que la Cour n'avait pas à s'occuper si les travers de pierres pouvaient être replacés à peu de frais; mais seulement s'ils étaient de nature à pouvoir être remis, sans difficultés dans l'état où ils étaient auparavant, et si le Demandeur avait consenti à l'ouverture du chemin; qu'en effet la section 42e, par. 3e de l'Acte des Municipalités de 1860, chap. 24 des Statuts Refondus du Bas-Canada, déclare que les chemins d'hiver "pourront être tracés sur ou à travers tout champ ou enclos, sauf les vergers, jardins au cours ou *autres terrains clos de* haies vives ou *clôtures qui ne peuvent être* abattues ou *replacées sans beaucoup de difficultés* ou de grandes dépenses, *et à travers lesquels les chemins ne seront pas tracés*, SANS LE CONSENTEMENT DE L'OCCUPANT; que la preuve faite permettait au Demandeur d'invoquer la disposition de cette clause de la loi qui a rapport aux terres entourées de clôtures qui ne peuvent être replacées sans beaucoup de difficultés; et qu'enfin le Défendeur, quoique revêtu de l'autorité municipale devait apprendre à respecter les droits des propriétaires et qu'il devait supporter les dommages encourus pour avoir ainsi tracé un chemin d'hiver sur toute la propriété du Demandeur, sans son consentement.

M. Marchand pour le Défendeur, soutenait au contraire que la preuve du Demandeur était insuffisante en ce qu'elle n'établissait pas que la clôture en question était de celles qui ne peuvent être abattues ou replacées sans beaucoup de difficultés ou de grandes dépenses et que dans ce cas l'inspecteur, d'après l'ordre duquel le Défendeur avait agi, avait le droit de tracer le chemin d'hiver sur le terrain en question sans le consentement du propriétaire et à l'appui de cette assertion, il cita le paragraphe 2e de la même clause 42e de l'Acte des Municipalités, conçu en ces termes: "Les chemins d'hiver seront tracés aux "endroits que les inspecteurs fixeront de temps à autre;" il termina en disant que dans le cas présent il n'y aurait lieu à des dommages que si au printemps la clôture n'était pas replacée dans le même état, et qu'ainsi l'action était prématurée.

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M. le Juge Berthelot:—Le paragraphe 3e de la section 42e de l'Acte des Municipalités doit décider de cette cause. Il est suffisamment prouvé que les deux travers de pierres ne peuvent être replacés comme auparavant; et le Défendeur est en faute d'avoir défait cette clôture de pierres telle que faite, sans au préalable avoir obtenu le consentement du Demandeur, ainsi que l'inspecteur lui avait donné instruction de le faire. Il importe peu que ce ne soit pas coûteux pour fermer ces barrières pratiquées. La loi en effet protège le propriétaire qui a fait des clôtures qui ne peuvent être replacées sans beaucoup de difficultés, quand bien même elles pourraient l'être à peu de frais, comme elle protège aussi celles qui ne peuvent être replacées sans de grandes dépenses, quoique sans difficultés. Dans ces derniers cas, c'est l'exception, et le paragraphe 2e n'a plus d'application; le chemin d'hiver ne peut plus être tracé à l'endroit que l'inspecteur indiquera, mais à celui dont il conviendra avec le propriétaire, s'il le veut; car il faut alors son consentement pour l'ouverture du chemin à travers ces espèces particulières de clôtures. Telle est en effet la disposition formelle du paragraphe 3e de la clause 42e. Le Défendeur, comme entrepreneur de la montée, aurait donc du d'abord obtenir l'assentiment du Demandeur, avant de défaire ces clôtures. En conséquence il est condamné à dix chelins de dommages pour reconnaître le droit du Demandeur, et aux dépens.

M. D. Girouard, pour le Demandeur.

Messieurs Morin et Marchand, pour le Défendeur.

(D. G.)

MONTREAL, 30TH NOVEMBER, 1861.

Coram BERTHELOT, J.

No. 1727.

Lovell vs. *Campbell et al.*

Held:—1o. That a motion made on the first day of term for *acte* of the declaration which the Plaintiff made of his option of a trial by jury, more than four days after issue joined, will not be granted as coming too late under the 64th Rule of Practice, although notice of the motion was given on the day after joinder of issue.

2o. That issues in an action by a printer in matters relating to his business are triable by jury.

In this case issue was joined on the 4th November, 1861, and on the following day, the Plaintiff gave notice that on the first day of the next term, he would move that *acte* be granted him of the declaration he made, that he made option of a trial by jury.

Laflamme for *Campbell*, one of the Defendants, resisted the motion on the ground that the Plaintiff was not a trader in the terms of the Statute (p. 712 of Consol. Stat. of Lower Canada) permitting a jury trial in certain cases.

PER CURIAM.—I am of opinion that the issues are triable by jury, although the action is brought by a printer, but I am also of opinion to refuse to grant the motion as being made after the four days limited by the 64th rule of practice.

Torrance & Morris, for Plaintiff.

Laflamme & Laflamme, for Defendant *Campbell*.

Motion rejected.*

(F.W.T.)

* *Vide* Similar ruling, in case of *Johnston* v. *Whitney*, 6 L. C. Jurist, 39.

IN APPEAL:

(*From the Superior Court, District of Montreal.*)

MONTREAL, 9TH DECEMBER, 1861.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

THE SAME CAUSE.

The Court of appeals will grant a Writ of appeal from the judgment reported above.

The Plaintiff having moved the Court in Appeal, to be allowed to appeal from the judgment reported above, the motion was granted, the parties heard, and a rule ordered to issue returnable on the first day of the following term.

AYLWIN, J.—In giving judgment, remarked that it was to be hoped that the parties would agree as to this case as the granting of the motion almost necessarily implied what the judgment on the appeal, if prosecuted, would be.

(F.W.T.)

Motion granted.

COUR DE CIRCUIT, DISTRICT DE MONTREAL.

MONTREAL, 27 MARS 1862.

Coram SMITH, J.

No.

Ricard vs. *Leduc*, père, *do.* vs. *Leduc*, fils, *do.* vs. *E. Leduc*, *do.* vs. *Rochon*, *do.* vs. *Brabant*, *do.* vs. *Fillion*.

Jugé:—Que dans le cás de marchandises achetées dans un district et livrées dans un autre, l'acheteur ne peut être assigné dans le district où l'achat a été fait s'il n'y a pas son domicile, ou si la sommation ne lui a pas été signifiée personnellement dans ce district.

Qu'il faut que toute la cause d'action soit née dans le même district pour donner juridiction à la Cour, et que dans le cas actuel il aurait fallu le concours de la vente et de la livraison dans le même district.

Dans ces causes le Demandeur poursuivait pour le prix d'un certain nombre d'arbres fruitiers qu'il avait vendus aux Défendeurs. Il alléguait que la convention avait été faite dans le district de Montréal, mais que les arbres devaient être livrés et plantés par le Demandeur, comme de fait ils l'avaient été, à L'Orignal dans le Haut-Canada, où demeuraient les Défendeurs. Les Défendeurs ayant été assignés à leurs domiciles respectifs pour comparaître à Montréal, déclinèrent la juridiction de la Cour.

A l'appui de leur prétention les Défendeurs citèrent la cause de Sénécal et, Chenevert, L. C. Jurist, vol. vi. p. 46.

SMITH, J.—D'après la doctrine qui a prévalu dans la cause citée, et qui est conforme aux autorités sur la matière, il faut que tous les faits nécessaires pour donner le droit d'action se soient passés dans la juridiction dans laquelle on veut assigner le Défendeur. Les actions du Demandeur doivent être déboutées.

Actions déboutées avec dépens.

Louis Ricard, pour le Demandeur.

Dorion, Dorion et Sénécal, pour les Défendeurs.

(V. P. W. D.)

MONTREAL, 30TH NOVEMBER, 1861.

Coram BADGLEY, J.

Nos. 168, 353, and 1002.

Gillespie et al. vs. *Spragg* et al. and divers intervening parties, and *William Mann* et al., petitioners for *reprise d'instance*.

Held:—That a petitioner praying to be allowed to appear and take up the *instance par reprise* in place of a deceased person will be allowed in the first stage simply to appear in the cause and fyle his petition.

The petitioners, Mann et al., presented their petition whereby they prayed to be permitted to appear in the cause, and take up the instance in the place of the late James Hutchinson, deceased, a party to the cause.

The Court granted the petition so far as to allow the parties to appear in the cause, but did not pronounce on the other conclusions of the petition, and referred to the case of *McKillop* et al. vs. *Kauntz* et al., 1 Rev. de Leg., p. 152, as the proper guide in the present cause. Petition to appear granted.

Cross & Bancroft, for petitioners.

(F.W.T.)

COUR DE CIRCUIT.

MONTREAL, 30 DECEMBRE, 1861.

No. 1413.

Nye vs. *Isaacson*.

CAUTION—FRAIS.

Jugé:—Que la caution n'est pas tenue au payement des dépens d'une première condamnation prononcée contre le débiteur principal n'ayant pas été notifié de la poursuite

Dans cette cause le demandeur alléguait un bail à loyer, reçu le 2 Juin 1852 pardevant Maître Weston et son confrère, notaire, qu'il avait consenti à un nommé John S. Saunders, pour une année, à compter du 1er Mai 1852, d'une certaine propriété y décrite moyennant un loyer annuel de £20 10s. et en vertu duquel bail, Saunders lui étant endetté en une balance de £13 2s. 6d., il avait obtenu un jugement contre lui pour cette balance avec dépens, taxés à £4 10s. 6d. Le demandeur alléguait aussi que les frais du bref d'exécution émané contre les biens-meubles de Saunders s'élevaient à 8s. 4d. Par ce bail, le défendeur s'étant porté caution sans le bénéfice de division discussion ou fidé-jussion; le demandeur réclamait de lui le montant de son jugement en principal, intérêts et frais, formant en tout £20 16s. 4d.

Le défendeur contesta cette demande sur le principe que le défendeur n'avait pas usé de diligence dans le recouvrement de son loyer, et qu'il n'était pas obligé à tout évènement de payer les frais encourus sur ce jugement.

Per curiam:—La caution en cette cause n'ayant pas été notifiée de la poursuite contre le débiteur principal, n'est pas tenue au paiement des frais qui ont été faits par le demandeur pour obtenir un jugement contre Saunders, son débiteur principal; c'est la doctrine reconnue par les auteurs sur l'étendue des obligations de la caution. Rogue, juris. consultaire, p. 134, No. 10. Anc. Dén., 4e vol., vo. caution, p. 321.

Ouellet vs. Fournier.

En conséquence de ces autorités, le jugement n'est que pour £14 10s. et les dépens de cette action.

James Armstrong pour le demandeur.

A. & W. Robertson pour le défendeur.

(P. B. L.)

MONTREAL, 27 MARS, 1862.

Coram BERTHELOT, J.

No. 282.

Ouellet vs. *Fournier dit Préfontaine.*

JUGE :—Que le commis qui a été congédié sans cause suffisante, peutpoursuivre le marchand qui l'a engagé à l'année, pour salaire accru durant le temps qu'il a été sans emploi, au lieu de le poursuivre en dommages-intérêts.

L'action du demandeur était portée pour le recouvrement de la somme de £16 13s. 4d. pour deux mois de salaire dus et échus le 1er Janvier 1862. à raison de £1000 par année, et payables par termes mensuels à l'expiration de chaque mois.

Le demandeur alléguait par sa déclaration son engagement avec la défenderesse, marchande publique, comme commis pour une année à commencer du 1er Mai 1861, à raison de £100 et payables mensuellement, et que le 1er Novembre 1861, il avait été congédié sans raison suffisante.

Le demandeur alléguait de plus qu'il avait toujours été prêt et s'était offert journellement à continuer son engagement depuis le 1er Novembre 1860 à venir au jour de l'institution de son action.

La défenderesse contesta cette action par deux exceptions. Par la prmière, elle alléguait l'inconduite du demandeur dans son magasin et son incapacité telle, qu'il génait l'ordre et la marche du magasin.

Par la seconde, elle prétendait que les services du demandeur ne valaient pas plus de £40 et qu'il en avait été plus que payé.

Per curiam :—La seule question qui puisse préoccuper la Cour en cette cause est de savoir si l'action n'aurait pas dû être pour les dommages-intérêts et non pour salaire. C'est bien l'opinion de MM. Gouget et Merger, vo. Commis, Vol. 2 p. 137, No. 18, Dict. du Droit Commercial. Suivant eux, ce doit être une indemnité plutôt qu'un salaire pour l'espace de temps que le demandeur est resté sans emploi. Mais l'opinion de Pothier* est contraire à celle de Gouet et Merger.

Dans l'espèce actuelle, le défendeur n'a pas soulevé cette difficulté par ses défenses.

Le premier des précédents qui ont été cités, est celui de Desnoyers vs. Bruneau, No. 932, Montréal, c'était une action par laquelle le demandeur au lieu de demander l'exécution de son marché comme commis, avait poursuivi en dommages. Le jugement fut rendu par les Juges Rolland, Gale et Day pour £30 dommages.

* Traité du contrat de louage, Nos. 173 et 174.

Le second établit une jurisprudence contraire; c'est la cause de Delorme vs. Desnoyers, No. 1440, les Honorables Juges Rolland, Smith et Day ont rendu jugement le 16 Octobre, 1848, en faveur du commis pour le salaire qu'il réclamait depuis qu'il avait été congédié. D'autres jugements ont été rendus conformément à celui de Delorme vs. Desnoyers dans deux causes de Franche vs. Fournier en 1861.

Dans la cause de Reynolds vs. Kinnear, le demandeur réclamait un salaire, mais à titre de dommages, et la défense en droit qui fut faite à l'encontre de cette demande fut renvoyée.

Le jugement peut donc être rendu en conformité à cette doctrine que le commis a le droit d'être payé de son salaire lorsqu'il a été renvoyé sans cause suffisante; vû qu'une action formulée en ce sens est reconnue par Pothier et la jurisprudence, et que d'ailleurs le défendeur n'a pas plaidé spécialement quant à la formule de la demande.

Jugement pour £16 13s. 4d.

Cartier, Pominville et Bétournay, pour le demandeur.

L. W. Sicotte, pour le défendeur.

(P. R. L.)

AUTORITÉS DU DEMANDEUR.

Pardessus, Droit Commercial, Vol. 1, No. 38.
Duranton, Vol. 17, No. 227.
Duvergier, du Louage, T. 4, No. 327.
Troplong, Louage, Vol. 3, p. 841-848-849.
De Villeneuve, Dictionnaire du Contentieux Commercial, p. 167.
Pothier, Vol. 2, Louage, Nos. 254-255.
Merlin, T. 4, Verbo Domestique, p. 4.
Merlin, T. 12, Verbe Salaire, p. 343.
Nouveau Dénizart, Verbo Gages, Vol. 9, p. 139.
Dallos, Vol. 3, Louage, p. 310, No. 32.

SUPERIOR COURT.

MONTREAL, 27TH MARCH, 1862.

Coram BADGLEY, J.

No. 2681.

Marchand vs. *Renaud.*

HELD:—That in the absence of an express agreement, no demurrage can be claimed by the master of a vessel detained beyond a proper time for loading and unloading;

2nd. That in such a case, damages for detention for more than the proper time for loading, &c., could be claimed;

3rd. That such damages should be specially proved;

4th. That the consignee is not bound to discharge the cargo of a sailing vessel, if such cargo consists of grain according to the provisions of the ch. 100 of the Consolidated Statutes of L.C., at a *greater* rate than two thousand minots *per diem*.

This was an action by the master of a sailing vessel to recover from the consignee the sum of $449.18 for freight and for damages as and for demurrage or detention of his vessel beyond the proper time in loading the same at Kingston and in unloading the same at Montreal.

The defendant contested the action as far as demurrage was claimed, but tendered the amount of the freight, less the costs of the action.

Marchand vs. Renaud.

PER CURIAM.—This action cannot be for demurrage, which is a sum agreed under an express understanding to that effect; but for the detention for more than the proper time allowed to the consignee for loading and unloading the vessel, the plaintiff claims for seven days' detention at £5 per day. As there was no express agreement, the plaintiff was bound to prove specially what were the damages he actually suffered. Chitty on Carriers, p. 113 and 212.

By the proof adduced it does not appear to me that there was an improper detention in loading at Kingston, and as to the unloading at the port of Montreal, the consignee conformed himself to the statutory law, 22 Vic., ch. 55, sec. 5, under whose provisions he was not bound to unload more than two thousand minots daily of the grain with which the vessel was loaded, and by the proof on record he unloaded four thousand minots daily by means of elevators. The claim for damages is rejected, and the judgment goes for freight only, and as the tender is not sufficient, it is declared bad, and the defendant is to pay costs.

Judgment for plaintiff with costs.

Lafrenaye & Armstrong, for plaintiff.
Ryan & De Bellefeuille, for defendant.
(P. R. L.)

MONTREAL, 27TH MARCH, 1862.

Coram BADGLEY, J.

No. 559.

The Molsons Bank vs. *Falkner et al.*, and *Falkner et al.*, *opposants*.

HELD:—That a general articulation of facts will be rejected from the record as contrary to the law which requires such articulation to be clear and distinct.

The defendants fyled an opposition *à fin d'annuller* to the judgment entered up by the Prothonotary *ex parte*.

The plaintiff contested the opposition by a contestation which specially set up certain facts in support thereof.

After joining issue on the contestation, the plaintiff fyled an articulation of facts, consisting of the following question:

"Are not all the matters, allegations, and facts contained in said contestation "in this cause fyled true and well founded in fact?"

Thereupon the defendant moved the Court, on the 21st March last, that such articulation be rejected from the record, as being illegal, irregular, and null, being too vague, and made contrary to the law, which requires that each fact which the party intends to prove be articulated separately and in a clear and distinct manner.

After hearing the parties, the Court (BADGLEY, J.) granted the motion, subject to the plaintiffs amending their articulations and correcting the same, in conformity with the law, within 48 hours, with costs of motion to the opposants, taxed at 11s. 8d.

Motion granted.

Abbott & Dorman, for plaintiff.
J. A. Foisy, for opposant.
(F. W. T.)

MONTREAL, 27TH MARCH, 1862.

Coram MONK, J.

No. 1640.

Castongué vs. *Masson* et al.

HELD:—That in default of a plaintiff giving security for costs as ordered by the Court, his action will be dismissed on the defendant's motion to that effect.

The plaintiff, as resident out of Lower Canada, was ordered on the 30th December last to give security for costs. The order not having been complied with, the defendant moved the Court in the February term that for this reason the action be dismissed with costs.

MONK, J.—I am individually of opinion that the Court has no power to dismiss the action, because security for costs has not been given; but as the decision of the Court have been the other way, I will follow the precedent established in *Adams* vs. *Sutherland*, 2 Lower Canada Jurist, 109.

Motion granted.

S. D. Rivard, for Plaintiff.
J. Duhamel, for Defendants.
(F. W. T.)

MONTREAL, 27TH MARCH, 1862.

Coram BADGLEY, J.

No. 2049.

Ownes vs. *Dubuc Campbell*, opposant.

HELD:—That where a party in a cause has caused to be examined another party in the cause as a witness, and has not at the close of his *Enquête* or at any other time, declared his intention to avail himself of such evidence, such evidence is not available to him in the contestation. 2nd. That where a party in a cause has made default to answer the articulation of facts fyled by his adversary, the articulation of facts articulated by the adversary is declared to be admitted by the party, making such default.

Under a writ of execution *de terris*, the plaintiff took in execution certain land which the opposant, Dame *Catherine Campbell*, claimed as her property, and in her possession at the time of the seizure under a deed of sale from the defendant.

The plaintiff contested the opposition on various grounds, which need not be more particularly mentioned.

After issue joined, the opposant fyled her articulation of facts on the 27th January last. This articulation was not answered by the plaintiff.

The plaintiff also examined the opposant as a witness in support of his contestation, but did not before the close of his *Enquête*, or at any other time, declare his intention to avail himself of the evidence resulting from such examination. Vide Consol Stat. of L. C., p. 698, § 15.

Other evidence was taken in the cause, and after hearing the parties the Court dismissed the contestation for reasons which fully appear in the judgment.

BADGLEY, J.—"The Court * * * considering that the plaintiff and contestant in support of his contestation of the opposition *à fin d'annuller*, fyled in this cause by the opposant, hath caused to be examined the said defendant and the said opposant, and hath not, as required by law, at the close of his *Enquête*, or at any

David vs. Girard.

other time, declared his intention to avail himself of such evidence, whereby such evidence is not available to him in this contestation; and considering that the said plaintiff and contestant hath made default to answer the articulation of facts fyled by the opposant in this contestation, and to fyle and serve upon the said opposant an answer to the said articulation of facts of the said opposant, whereby the said facts so by her articulated are by law declared to be admitted by the said plaintiff and contestant; and considering that the said facts so articulated and admitted, and also the opposant's evidence by her adduced herein, are sufficient to sustain the said opposition *à fin d'annuller* fyled by the said opposant, and that the evidence adduced and available to the plaintiff, contestant, is sufficient to maintain his said contestation of the said opposition *à fin d'annuller* doth maintain the said opposition *à fin d'annuller* fyled by the opposant, and doth dismiss the contestation of the said plaintiff and contestant, &c."

Contestation dismissed.

Mackay & Austin, for plaintiff.
M. E. Charpentier, for opposant.
(R. J. P.)

MONTREAL, 30 NOVEMBRE, 1861.

Coram BERTHELOT, J.

No. 1805.

David vs. *Girard* et uxor et al.

Juge:—Qu'un vendeur qui se présente à l'ordre sur une demande en ratification de titre, ne perd pas par là son action en résiliation du contrat de vente faute de paiement du prix.

Le Demandeur poursuivit en résiliation de vente faute de paiement du prix.

Il alléguait dans son action intentée le 23 Août, 1859, avoir vendu un certain lopin de terre aux dits Eustache Girard et son épouse par acte du 22 Juin, 1857, Mtre. Hurteau et confrère, notaires. Que plus tard, savoir: le 11 Août, 1858, par acte devant Mtre. Girard et confrère, notaires, Girard et son épouse avaient vendu deux immeubles à Louis Choquet, l'autre défendeur, et que le lopin de terre vendu en premier lieu faisait partie de l'un de ces deux immeubles Que le prix de vente porté en son contrat, savoir: celui du 22 Juin, 1857, était de dix-neuf cents livres ancien cours, à compte duquel il avait reçu une somme de sept cents livres. Par ses conclusions le demandeur (David) offrait de rembourser ce dernier montant et demandait la résiliation, 1. de l'acte de vente par lui consenti à Girard *et uxor;* 2. de celui consenti par ces derniers à Choquet en autant seulement que ce dernier contrat concernait ou affectait le lot de terre qui faisait l'objet du premier, laissant aux défendeurs l'alternative de payer la balance du prix de vente réclamnée sous un délai à être fixé par la Cour.

Le défendeur Choquet a plaidé seul à cette action, Girard *et uxor;* faisant défaut:—et, admettant les faits ci-dessus énoncés, il a prétendu néanmoins que l'action devait être renvoyée pour les raisons suivantes:—

1. Parceque lui, Choquet, avait déposé le 4 Novembre, 1858, son titre d'acquisition de Girard *et uxor* au greffe, dans le but d'obtenir une sentence de ratification.

2. Que le demandeur, David, s'était porté opposant à cette demande en ratification de titre et avait réclamé par son opposition, le paiement de la balance restée dûe sur le prix porté en l'acte de vente du 22 juin, 1857.

3. Que ce dernier acte n'avait pas été enregistré, tandis que le sien l'avait été régulièrement, et qu'ainsi David perdait son droit d'hypothèque et son privilège de bailleur de fonds à l'encontre de lui, Choquet.

4. Que dans son titre d'acquisition toutes les créances hypothécaires enregistrées étaient énumérées, que celle de ce nouveau n'était pas enregistrée, ne se trouvait pas au nombre de ces créances, et que lui Choquet ne pouvait en avoir eu aucune connaissance.

5. Que lui, Choquet, avait déposé au greffe son prix d'acquisition, (le 21 Novembre, 1859,) et que ce prix se trouvant absorbé par les créances hypothécaires enregistrées, il souffrait une perte réelle si le demandeur réussissait dans son action.

6. Que le demandeur en faisant son opposition à sa demande en ratification dans le but d'être payé de la balance du prix de vente réclamé par cette action, avait renoncé tacitement à son droit d'action en résiliation.

Le demandeur a répliqué généralement, disant que le fait du défaut d'enregistrement de son titre de créances et de l'enregistrement du Contrat de Choque, ni le fait de sa présentation à l'ordre avec les autres créanciers des dits Girard *et uxor*, n'altéraient un rien son droit d'action en résiliation.

Lors de l'audition le défendeur s'est appuyé sur l'autorité de Troplong, qui, en son contrat de vente, 2e Vol. No. 659, p. 132, exprime l'opinion que le vendeur qui s'est présenté à l'ordre pour être payé de son prix de vente, perd son droit de poursuite en résiliation faute de paiement. Trolong cite, au soutien de son opinion, un arrêt de la Cour de Cassation du 24 août, 1831.

Le demandeur a prétendu, 1o. qu'en équité et en raison le fait qu'un vendeur a cherché à retirer sa créance par la voie la plus douce et la plus favorable au tiers-détenteur, ne doit pas le priver, en cas d'insuccès par cette voie, de recourir à une autre que la loi lui accorde; 2o. que cette doctrine est celle de la grande majorité des auteurs dont quelques-uns, entr'autres Merlin, réfutent avec force l'opinion de Troplong et repoussent la décision de la Cour de Cassation, que les arrêts contraires à cette décision ont été si nombreux en France et que la jurisprudence de ce pays était si bien établie sur ce point en 1841, qu'elle a servi de base à l'art. 717 de la loi du 2 juin de cette année qui est conçu comme il sera dit ci-après. L'argumentation du demandeur a été appuyée des nombreuses autorités suivantes :—

AUTORITÉS CITÉES PAR LE DEMANDEUR.

Rapports Jud., T. 7, p. 66. Pattenaude et Lérigé.
Merlin, Questions de droit, Vo. Option, §1, Art. 6, Art. 10, pp. 625-631 du Tome 6. Ed. de la Bibliothèque des Avocats.
Merlin, Répert, Vo. Résolution, T. 15, p. 631, même Ed., Arrêt 2 Déc. 1811.
Toullier, T. 10, p. 263, No. 263, No. 193.
Duranton, T. 16, p. 403-677, No. 378.
Delvincourt, T. 3, p. 156 des notes.
Dollos, R. A., Vo. Vente, T. 12, p. 896, Nos. 15 et 16, p. 897, Note 2, Bellaton v. L'Hospice de Mâcon, Cassation, 27 Mai, 1824.

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Dalloz, R. A., Vo. Obligations, p, 518, Note 2.
Rouen, Letellier c. Durvuble, 4 Juillet, 1815.
Sirey, 1817,—2—1.
Paris, Bellard c. Roinville, 11 Mars, 1816.
Duranton, Vol. 16, p. 403.
Dalloz, R. P., 1827—1—211.
Cassation, Lafaige c. de Suze, 30 Avril, 1827.
Dalloz, R. P., 1828—2—209.
Montpellier, De Soins c. Mas, 29 Mai, 1827.
Dalloz, R. P., 1829—2—180.
Bourges, Charles c. Morlé, 24 Janvier, 1828.
Dalloz, R. P., 1820—2—58.
Montpellier, Reynes c. Malaterre, 1 Juillet, 1828.
Dalloz, R. P., 1828—1—194.
Cassation, Hondaille c. Bouvallet, 26 Mars, 1828.
Dalloz, R. P., 1833—2—98.
Agen, Fécal et Lamartres, 22 Mai, 1832.
Le même, 1834—1—454.
Langier c. Icard, 30 Juillet, 1834.
Dalloz, R. P., 1836—2—34.
Brandham c. Besse, 29 Mai, 1835.
Le même, 1837—1—50.
Cassation, Rondeau c. Louvier, 16 Nov., 1836.
Le même, 1835—5—250.
Bordeaux, Brandham c. Besse, 29 Mai, 1835.

Cette cause est rapportée dans deux volumes différents.

Le 1er rapport commence par ces mots :—" La jurisprudence s'est malgré quelques " hésitations prononcée dans ce sens."

Le second commence ainsi:—" La jurisprudence se prononce de plus en plus dans ce " sens avec raison."

Dalloz, R. P., 1837—1—241.
Cassation, Legenvre c. Gaillard, Arrêt 10 Août, 1835 ; 31 Janvier, 1837, confirmé.

Le rapport de cette cause contient le passage suivant :—" Le pouvoir en cassation " etait dirigé contre un Arrêt de la Cour de Caen du 10 Août, 1835, qui avait admis " l'action résolutoire, nonobstant la production du vendeur à l'ordre ouvert sur la re- " vente faite par l'acquéreur du fonds qu'il avait vendu à ce dernier et dont il n'avait " reçu que partie du prix." L'Arrêt a été confirmé.

Dalloz, R. P., 1840—1—157.
Cassation, Satizellé c. Thony, 16 Mars, 1840.
Le même, 1841—2—13.
Rouen, Fleury c. Lambert, 1 Mars, 1840.
Dalloz, Journal des Audiences, 1823—2—141.
Rouen, Debordeaux c. Binet, 3 Février, 1823.

Les arrêts du 3 Février 1823, du 4 Juillet 1815, du 27 Mai 1824, du 30 Avril 1827, du 1er Juillet 1828, du 24 Janvier 1828, du 22 Mai 1832, du 30 Juillet 1834, du 29 Mai 1835, du 10 Août 1835, du 31 Janvier, 1837 et du 1er Juin 1840 sont précis et décident la même question ou du moins le même principe que celui invoqué en cette cause. Les autres arrêts la décident implicitement. Celui du 11 Mars 1816 est important. La jurisprudence s'est si bien établie sur ce point qu'en 1841, le droit du vendeur non-payé de demander la résolution de la vente a été restreint par l'art. 717 de la loi du 2 Juin 1841 qui est ainsi conçu.

" L'adjudication ne transmet à l'adjudicataire d'autres droits à la propriété que ceux " appartenant au saisi. Néanmoins l'adjudicataire ne pourra être troublé dans sa pro-

"priété par aucune demande en résolution fondée sur le défaut de payement du prix "des anciennes alliénations, à moins qu'avant l'adjudication la demande n'ait été noti- "fiée au greffe du tribunal ou se poursuit la vente."

Ici l'action en résolution à défaut de paiement du prix de vente demeure ce qu'elle était en France la loi de 1841.

Dalloz, Dict. Général, Vo. Action, Nos. 99, et 100.

M. le Juge Berthelot, après de savants commentaires sur les prétentions respectives des parties, a rendu le jugement dont suit la substance :

"*La Cour* après avoir, etc., etc.

"*Considérant* que par la loi du pays l'action en résolution de la vente "faute de paiement du prix appartient au vendeur ; que le défaut d'enregistre- "ment de cet acte (par David à Girard *et uxor*) n'a pu préjudicier à l'exercice "de ce droit par le demandeur, et qu'il n'a aucunement diminué, renoncé, ou "détruit son droit à l'exercice de l'action résolutoire pour s'être porté opposant "à la demande en ratification faite par le dit Louis Choquet de son acquisition "du 11 août 1858, *déclare* résolus à tout fins que de droit :—1o. Le dit acte "de vente du 22 Juin 1857, par lui consenti aux dits Eustache Girard et Zoé "Bissonnet son épouse, devant le dit Mtre. Hurteau et confrères, notaires ; "2o. celui du 11 août 1858, reçu devant Mtre Hurteau et confrères notaires, "consenti par les dits Eustache Girard et Zoé Bissonnet au dit Louis Choquet "en autant seulement qu'il concerne et affecte le dit immeuble en premier lieu "désigné et ce à défaut du paiement de la somme de $215 due comme susdit "au demandeur pour balance du dit prix de vente, et que le demandeur soit "réintégré dans la propriété et possession du dit immeuble, et ordonne que le "dit demandeur soit réintégré dans la propriété et la possession du dit im- "meuble de même qui si la vente n'eût jamais eu lieu.

"Et condamne le dit Louis Choquet à abandonner sous six semaines de ce "jour la possession du dit lot de terre en premier lieu décrit, savoir : cette par- "tie, etc., etc.

"Si mieux n'aiment les dits défendeurs payer au demandeur sous le délai "susdit, la susdite somme de $215 avec intéret, etc., et dans tous les cas les dé- "pens de cette action distraits à M. Mag. Lanctot, avocat du demandeur.

"Et en outre la Cour déclare que faute par les dits défendeur de payer cette "dite somme en capital et intérêt, et au cas où le demandeur procéderait (sur "le défaut de ce faire après le délai de six semaines) pour se faire réintégrer dans "la possession de la dite partie du dit immeuble, il ne sera admis à le faire qu'a- "près dépot au greffe de cette Cour de la somme de 700 livres, ancien cours, "qu'il a reçue à compte du dit prix de vente, avec intérêts, etc."

Mag. Lanctot, avocat du demandeur.

A.A. Dorion, Conseil du demandeur.

Ouimet et Morin, Avocats du défendeur.

(M.L.)

SUPERIOR COURT.

MONTREAL, 31st MARCH, 1856.

Coram DAY, J., SMITH, J., MONDELET (C), J.

No. 2428.

Brown et al. vs. *Smith* et al.

AWARD OF ARBITERS.

HELD :—That in a report of Arbitrators appointed by the Court it is not sufficient for the arbitrators to return in the terms of the rule, that they had "examined the proceedings of record in this cause, examined the witnesses of the parties under oath and deliberated," but such report must allege that the parties received due notice of the meetings of the arbitrators or were heard in support of their allegations, and a Report omitting to allege such notice or hearing will be annulled and set aside on motion to that effect.

A rule for referring this case to arbitrators was issued from the Superior Court at Montreal in the following terms:

"It is ordered on motion by the plaintiffs by consent of the defendants that the facts determined and defined by this Honourable Court as the facts respecting which the special Jury ordered to be empannelled to try the issues of fact in this cause were to make inquiry, be referred and submitted to the final arbitrament and decision of three arbitrators to be chosen by the parties, that such arbitrators shall have the power to examine the parties and their witnesses under oath, and if they should see fit to visit and examine the leather in the plaintiffs' declaration mentioned, or any portion thereof, and that they the said arbitrators or a majority of them shall make their award to this Honourable Court upon each of the facts so submitted to them on or before the thirtieth day of July next, which award as to each of the said facts shall be final and binding upon the parties hereto; and further that James Court, on behalf of the plaintiff, Edwin Atwater on behalf of the defendants, and James B. Greenshields, agreed upon by both, be the arbitrators in the premises."

On the 18th September, 1855, the return day, the rule having been extended, the arbitrators made their report in writing, as follows:

James Court, of the City of Montreal, accountant, on behalf of the plaintiffs, Edwin Atwater, of the same place, merchant, on behalf of the defendants, and James B. Greenshields, of the same place, merchant, agreed upon by both, being the arbitrators appointed under a rule of this Court, of date the 18th day of June, 1855, by which rule it was ordered that the facts determined and defined by the said Court as the facts respecting which the special Jury ordered to be empannelled to try the issues of fact in this cause were to make inquiry, be referred and submitted to the final arbitrament and decision of three arbitrators to be named by the parties, to wit the arbitrators, aforesaid; that such arbitrators should have the power to examine the parties and their witnesses under oath, and if they should see fit to visit and examine the leather in the plaintiffs' declaration mentioned, or any portion thereof, and they, the said arbitrators, or a majority of them, should make their award to the said Court upon each of the facts so submitted to them on or before the thirtieth day of July, then next, to wit, July now last past; and whereas by another rule of said Honourable Court, of date the twenty-seventh day of June last past, it was ordered that the delay fixed for the report of the arbitrators appointed in this cause, to wit, the arbitrators above named, be extended to the twenty-seventh day of September then next, to wit, Septembe

now instant. Now the said arbitrators do report to the said Honourable Court that they, the said arbitrators, having examined the proceedings of record in this cause, having examined the witnesses of the parties under oath, and having deliberated thereon, do make their award to the said Honourable Court upon each of the facts so submitted to them, as follows, to wit:

Firstly. Did the plaintiffs on the 22nd day of March, 1853, purchase of the defendants 1200 sides of midds Glasgow sole leather, at one shilling per pound and 580 sides heavy Glasgow sole leather at eleven pence per pound?

To the first, the said arbitrators say "yes."

Second. Did the plaintiffs on the thirty-first day of March, 1853, purchase of the defendants 552 sides of heavy Glasgow sole leather at elevenpence per pound?

To the second, the said arbitrators say "yes."

Third. Did the defendants at the time of the said sales respectively represent the said 1200 sides to weigh 20420½ pounds, the said 580 sides to weigh 13144¼ pounds, and the said 552 sides to weigh 12892 pounds?

To the third, the said arbitrators say "yes."

Fourth. Was there a guarantee express or implied on the part of the defendants that the said leather was of the weights mentioned in the Bills of Sale thereof fyled in this cause as plaintiff's exhibits, numbers one and two?

To the fourth, the said arbitrators say "no."

Fifth. Did the plaintiffs pay the defendants for the said leather at the rates and according to the weights aforesaid, the sum of £2214 7s. 1d. cy?

To the fifth, the said arbitrators say "yes."

Sixth. Did the said midds Glasgow sole leather at the time of the delivery thereof weigh 20420½ pounds as represented by defendants?

To the sixth, the said arbitrators say "yes."

Seventh. Did the said heavy Glasgow sole leather weigh in all at the time of the delivery thereof 13144¼ pounds as represented by the said defendants?

To the seventh, the said arbitrators say "yes."

Eighth. Did the said several lots of leather, or either of them, and which, sustain any loss or diminution in the aggregate weight thereof after the delivery thereof to the plaintiffs, and to what cause is such loss or diminution attributable?

To the eighth, the said arbitrators say the said several lots of leather sustained loss and diminution in the aggregate weight thereof after the delivery thereof to the plaintiffs, and such loss and diminution is attributable to atmospheric causes.

Ninth. Are the defendants indebted to the plaintiffs in any and what sum for such deficiency in weight?

To the ninth, the said arbitrators say "no."

Tenth. Do you find for the plaintiffs or defendants, and if for the plaintiffs to what amount?

To the tenth, the said arbitrators say: We find for the defendant,

Dated at Montreal this 18th day of September, 1855.

JAMES COURT.
EDWIN ATWATER.
JAS. B. GREENSHIELDS.

Cuthbert vs. Cuthbert.

On the twenty-second March following the plaintiffs moved that the said report be declared and held to be irregular, insufficient and illegal, and be annulled and set aside with costs for the following among other reasons:

1st. Because the said award and the different findings and answers therein contained are incompatible and contradictory of each other, and are vague and ambiguous.

2nd. Because the said award does not fully and completely or sufficiently answer the questions which by the said rule the said arbitrators were required to answer.

3rd. Because it does not appear in and by the said award that the said parties or any or either of them were heard on the matters submitted to the said arbitrators, or received any notice whatever of the meetings of the said arbitrators or of any of their proceedings or intended proceedings, or were present at any such meetings or proceedings.

4th. Because the said award is in every respect illegal, informal, null and void.

PER CURIAM.—We are compelled to reject the award in this cause, as it does not appear that any notice was given to the parties. We think this an absolute nullity. The report itself is in every respect good, but the want of notice to the parties is fatal, and we are obliged to reject it.

The Judgment of the Court was motivé as follows:

The Court, having heard the parties by their counsel, as well upon the motion of the defendants of the twenty-second March instant, to homologate the award of the arbitrators appointed under a rule of this Court, dated the 18th June last past, as upon the motion of the plaintiffs of the said 22nd day of March instant to set aside the said award, * * * considering that it doth not appear that the parties were heard before the said arbitrators, or that any notice was given to them to appear before the said arbitrators, doth reject the motion to homologate the said award, and doth grant the motion to reject the said award with costs, in consequence doth set aside and reject the said award.

Award annulled.

Badgley & Abbot, for plaintiffs.
John J. Day, for defendants.
(R.J.P.)

MONTREAL, 30th SEPTEMBER, 1861.

Coram BADGLEY, J.

No. 1130.

Cuthbert vs. *Cuthbert.*

DROIT D'AINESSE, PARTAGE, ETC.

HELD:—1. That the *droit d'ainesse* being a proprietary right, cannot be claimed under a will; by the eldest son of the testator as usufructuary legatee, but only as *héritier ab intestat.*
2. That a *partage provisionnel* can be ordered at any time between usufructuary legatees.

Per Curiam.—The late Honorable James Cuthbert, the grandfather of the parties, by his last will executed in 1798, substituted or entailed his real property for 150 years, then to belong to such his descendants to whom it was spe-

cially limited by the will. In the interval he gave to his children the enjoyment of the revenues of his seigniories respectively during their natural lives and their children's after them. The parties in this cause are his two surviving grandchildren, and the children of his son James, to whom the enjoyment of the revenues and profits of the seigniories of Berthier were limited.

They are the survivors of four children, one of whom died in October, 1849, and the other in August, 1855, both without descendants, and amongst whom the seigniorial revenues had been divided in shares until their deaths. From the death of the last of these two, the two survivors, the parties in this cause, have each enjoyed the seigniory of Berthier; but the defendent, as the eldest, has retained exclusive possession of the manor and its dependencies, upon the grounds of the *droit d'ainesse*.

The plaintiff does not wish to remain *indivis* any longer, and claims an immediate provisional partition of the seigniory of Berthier and its dependencies in the usual manner, including therein the manor-house, &c., &c., and he further claims from the defendant £500 for the rents, revenues of the manor, &c., up to the institution of the action. The defendant, the eldest grandchild, pleads his exclusive right to the enjoyment of the manor, &c., *par droit d'ainesse*, inasmuch as the property is *un bien noble*, and moreover two-thirds parts in the *partage* and further a set-off of £1000 against any sum that might be found due to plaintiff under the partition, for improvements and ameliorations in and upon the manor houses, &c.

Issue has been joined upon these pretensions, and the cause has been submitted by the parties.

As to the *droit d'ainesse*, as the parties take as legatees under the will, and not as *héritiers ab intesta*, no *droit d'ainesse* can enure to the defendant whereby he has the exclusive enjoyment of the manor and two-thirds of the enjoyment of the seigniory: on the contrary, both parties are on equal rights in the enjoyment of the entire seigniory, *manoir and all*, and therefore the defendant's pleas and pretention in that respect must be rejected as it now is for the following reasons:—1o. The parties respectively claim their rights as usufructuary legatees, not as *héritiers*, the *droit d'ainesse* is a proprietary right, the right of the parties is only usufructuary of the property, and moreover this point has been settled in the case of DeBellefeuile vs. DeBellefeuille, 3 L. C. Reports, p. 161. 2o. Where the testator, as in this case, has not specified the portions of the several usufructuaries, the right of enjoyment shall be equal amongst them. "Si le testateur a légué à plusieurs l'usufruit d'un objet, conjointement, sans régler les portions de chacun, les usufruitiers partageront entr'eux. Le testateur est le maître de faire lui-même le partage ou de ne pas le faire, *usufructus et ab initio pro parte indivisâ nel divisâ constitu.* S'il a réglé les portions, chaque individu participera aux fruits dans la porportion fixée; en cas de non fixation de sa part et que les usufruitiers ne puissent pas s'accorder, la loi *si cujus rei*, §13, *sed si*, 3 D. *de usuf. et quemadm*, leur rappelle le moyen usité en pareilles circonstances, savoir: le recours à la justice. *Salviat*, de l'usufruit p. 55, *si non fuerit portio adjecta dimidia pard sebetur.* 3o. The right to a partition of the enjoyment belongs to the usufructuary as well as to the join-

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proprietor, as "*nul n'est tenu d'entrer en communion contre son gré,*" so "nul "ne peut être contraint à demeurer dans l'indivision et supporter les inconvé- "nients d'une jouissance commune," says Proudhon; and this rule is of such strong application that "pacte de ne jamais demander partage est inutile," Lacombe, p. 47, 2e partie *vo.* partage. "On peut demander partage quoique "la chose ait été indivise par quelque temps que ce soit, bien qu'on ait joui sé- "parément fort longtemps. Even if the testator should have prohibited it; "de même la défense par le testateur est inutile." 4o. The will in this case does not extend the substitution or entail to 150 years, but does not prohibit and prevent these partition of the enjoyment amongst those entitled to it.

Under the circumstances the plaintiff's action is well founded, and the *partage provisionnel* is ordered to be had and ascertained by *Experts*.

Dorion, Dorion & Séuécal, for plaintiff.

Stuart for defendant.

(P.R.L.)

COUR SUPERIEURE.

MONTREAL 28 AVRIL, 1862.

Coram BERTHELOT, J.

No. 1105.

McCarthy et al. vs. *Barthe.*

Juge:—Que le défendeur en plaidant à l'encontre d'un billet dans l'espèce actuelle qu'il ne l'a consenti que par surprise est sans valeur suffisante et effective; mais qui ne nie par sa signature; n'est pas tenu de produire un affidavit en conformité à la section 86 du chapitre 83 des Status Refondus du Bas-Canada.

Les demandeurs ayant poursuivi le défendeur pour le recouvrement de le balance de son billet promissoire; savoir: £92 7s. 10½d. le défendeur plaida l'exception suivante:—

Qu'il n'a pas consenti aux démandeurs le billet qui fait la bâse de cette action; mais tout simplement à l'époque de la date du dit billet, les dits demandeurs agissant par l'entremise de l'un d'eux, savoir: par le dit David McCarthy, réprésentant au dit défendeur qu'ils étaient en grand besoin d'argent, pressèrent et sollicitèrent ce dernier de vouloir bien leur souscrire un blanc de billet que là et alors ils lui présentèrent, en lui disant qu'ils le rempliraient eux-mêmes, ajoutant qu'il ne s'élèverait pas à plus de soixante-quinze dollars à quatre-vingt dollars; qu'ils, les dits demandeurs dirent alors au défendeur être le plus que ce dernier pouvait leur redevoir sur les ouvrages faits à son bateau—*schooner*—, que se confiant aux représentations des dits demandeurs, le dits défendeur accéda alors à leur demande; en leur souscrivant le blanc de billet en question qui fut rempli plus tard par les dits demandeurs en y insérant le montant réclamé par cette action.

Que le billet dont le montant est reclamé par cette action est le même que celui que le dit défendeur souscrivit en blanc.

Le dit défendeur allègue et met en fait; que de fait à l'époque à laquelle il souscrivit le blanc de billet en question sous les fausses représentations des dits demandeurs il ne devait tout au plus à ces derniers qu'une somme de soixante à soixante-quinze dollars courant comme il sera expliqué ci-après:—

Qu'à l'époque en question, savoir : lors de la souscription du dit blanc de billet, le dit défendeur ne devait aux dits demandeurs que pour une balance d'ouvrages faits par eux au bateau (*shooner*) du dit défendeur.

Que les dits demandeurs avaient entrepris et s'étaient obligés de faire et parfaire tous les susdits ouvrages en question au dit bateau (*schooner*) du dit défendeur à l'exception du *halage et calfatage* qui devaient être payés *extra* pour la somme de trente louis courant, suivant qu'il appert à un écrit sous seing privé de la teneur suivante, savoir : " Capt. Barthe, Sir, to shealth and caulk your schooner will cost thirty pounds ; hauling out and caulking old work extra not included ; D. & J. McCarthy & Co." et lequel écrit sous seing privé est produit au soutien des présentes.

Que les ouvrages pour la confection desquels le prix est stipulé au susdit écrit sous seing privé sont identiquement les mêmes que ceux que les demandeurs ont faits au susdit *schooner* du dit défendeur, et pour lesquels ils réclament cent sept louis, dix sept chelins et dix deniers et demi courant suivant qu'il appert à leur compte fourni au dit défendeur depuis la souscription du dit blanc du billet produit au soutien des présentes.

Que les dits demandeurs ne firent au *schooner* du dit défendeur que ce qu'ils s'étaient obligés de faire pour trente louis par le dit écrit sous seing privé.

Que les dits demandeurs chargent de plus pour ce qu'en vertu du dit écrit, ils avaient le droit de charger sous forme d'*extra*, une somme de quinze louis courant.

Qu'en supposant que cet item de quinze louis courant serait un prix raisonnable, les dits demandeurs n'avaient pas le droit, à tout évènement d'exiger du dit défendeur pour les ouvrages en question plus qu'une somme de quarante-cinq louis courant.

Qu'immédiatement après la confection des dits ouvrages et de l'aveu même des dits demandeurs, le dit défendeur leur aurait payé à compte, une somme de trente louis courant, ce qui laissait avant la souscription du dit blanc du billet, une balance de quinze louis courant en faveur des dits demandeurs.

Que depuis la souscription du dit blanc du billet, le dit défendeur aurait payé aux dits demandeurs la somme de douze louis courant en faveur des dits demandeurs.

Qu'à tout évènement la confection des ouvrages en question ne valait pas plus que quarante à cinquante louis courant y compris l'*extra*.

Que néanmoins pour éviter toute difficulté, le défendeur aurait offert aux dits demandeurs avant l'institution de la présente action, une somme de soixante louis dit cours, laquelle dite somme, il, le dit défendeur a toujours été et est encore prêt à payer aux dits demandeurs, si ces derniers veulent l'accepter, et pour laquelle il offre de confesser jugement avec intérêt à compter du vingt-deux avril, mil huit cent soixante-un ; jour d'échéance du billet qui fait la base de cette action avec dépens d'une action de cette classe.

Pourquoi le dit défendeur demande acte de l'offre de confession de jugement qu'il faut par les présentes et conclut à ce que le jugement à être rendu en cette cause ne le soit que pour la dite somme de soixante louis courant avec intérêt sur icelle à compter du vingt-deux avril mil huit cent soixante-un ; le tout avec

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dépens de contestation contre les demandeurs, dans le cas où ils n'accepteraient pas l'offre de confession de jugement contenue en ces présentes.

Le 25 avril, 1862, les demandeurs firent motion à ce que l'exception péremptoire produite en cette cause par le dit défendeur à l'encontre de leur action soit déclarée irrégulière et soit rejetée de la procédure en cette cause et mise de côté comme non avenue: en autant que par la dite exception, le dit défendeur *nie la vérité* du billet promissoire qui fait la base de cette action et une partie importante d'icelui et ce sans avoir produit un affidavit en conformité à la loi, à l'effet que *tel billet n'est pas vrai et qu'une partie importante d'icelui n'est pas vrai*, le tout avec dépens.

Lors de l'audition de cette motion:

Lafrenaye pour les demandeurs prétendit: que quoique le défendeur ne niait pas sa signature par sa défense, néanmoins il attaquait et niait la vérité du billet et que valeur n'avait pas été reçu par lui.

Archambault pour le défendeur, répondit, que n'ayant pas plaidé une dénégation générale et ayant simplement allégué certains faits qui étaient de nature à repousser la demande des demandeurs; le défendeur n'était pas tenu de produire un affidavit et que tout plaidoyer alléguant accommodation ou paiement ne nécessitait pas la production d'un affidavit.

Per Curiam:—Les faits allégués par le défendeur ne nécessitent pas la production d'un affidavit tel que requis par la session 86 du chapitre 83 des Statuts Refondu du Bas-Canada.

La défense n'est pas une dénégation générale et ne tombe pas dans la catégorie des plaidoyers qui au désir de cette session doivent être soutenus par un affidavit. En conséquence la motion est rejetée avec dépens.

Lafrenaye et Armstrong, avocats des demandeurs.

Archambault, avocat du défendeur.

(P. R. L.)

SUPERIOR COURT.

MONTREAL, 26TH MARSH, 1862.

Coram SMITH, J.

No. 825.

Ford vs. *Butler*.

HELD:—That in an action for money lent, admissions made by a Defendant in his answers to interrogatories *sur faits et articles*, that he received the amount for a debt due him, without however having pleaded specially such debt, are sufficient *commencement de preuve par écrit*, to justify the adduction of parole evidence.

This was an action brought by the plaintiff in his quality of universal legatee to one Dame Elizabeth Wilson, for the recovery of $400 and interest, lent by the latter to the defendant in the month of June, 1858. The defendant denied any indebtedness, and averred that the plaintiff was indebted to him.

Interrogatories *sur faits et articles* having been submitted to the defendant, in answer to the fifth, viz: "Did the said Elizabeth Wilson ever deliver to you in her lifetime, and say when, the sum of $400 or any other sum, and say which sum," he replied, "To the best of my knowledge it was in the month of June, 1858, that the said Elizabeth Wilson paid me $400 which she owned me."

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admissions to the same effect were made in answer to the 7th, 13th and 14th interrogatories, and to the 15th interrogatory defendant answered, "The said Elizabeth Wilson paid me the said sum of $400 for a debt which she knew was justly due to me for board, lodging, washing, and entertainments during sickness on several occasions, which commenced in the year 1846, and continued so until the time of her death, say about 14 days before she died."

The parties went to *enquête* in November, 1860. Parol evidence was adduced on the part of the plaintiff, and objected to by defendant, whose objections were overruled by Mr. Justice BADGLEY, the Judge presiding at enquête. On the 26th November, 1860, a motion was made by the defendant's counsel, "that the ruling of his Honor Mr. Justice Badgley, the presiding Judge at *enquête* on the 7th November, 1860, overruling the objection of defendant to the examination of Louis Alfred D'Amour, a witness examined, be revised and reversed, and the evidence of said witness be declared illegal, and rejected from the record, as no *commencement de preuve par écrit* was made by the plaintiff, to justify the adduction of parol evidence such as offered by the plaintiff, and given by said witness, and inasmuch as the issue in this cause, to wit, a loan of money as between parties not traders, cannot be proved by parol evidence."

On the 30th November, 1860, before Mr. Asst. Justice Monk, judgment was given on the defendant's motion of 27th November, maintaining the ruling of Judge Badgley. To this judgment defendant's counsel filed an exception."

On the 20th March, 1862, another motion was made by M. Doherty, counsel for defendant, to maintain his objections to the parol evidence adduced by the plaintiff, and to reject the said evidence, inasmuch as there was no *commencement de preuve par écirt* of a contract *de prêt de consommation*, the alleged cause of action, to justify the introduction of such parol evidence.

On the 27th March, Mr. Justice Smith gave judgment in the cause which was thus *motivé*:

"The Court having heard the parties by their counsel, upon the merits of this cause, and upon the motion of plaintiff of the 20th March instant, that the objection by him made at Enquête at the examination of the witnesses, George Carter and Thomas Sexton, be declared good and valid, and that depositions of said witnesses be declared illegal and be set aside with costs, and also upon the motion of defendant of the 20th March instant, to revise and adjudicate upon the objections made by the defendant to the parol evidence adduced in this cause and reserved, that the said objection be maintained and the said parol evidence so adduced and given by the witnesses in this cause by the plaintiff be rejected with costs, examined the proceedings and evidence of record, and having upon the whole duly deliberated, considering that the said plaintiff hath fully proved the material allegations of his said action, and that the said defendant borrowed from the late Elizabeth Wilson, widow of Ennis McMullins, the sum of $400 under the terms and limitations set forth in the declaration, and that the said defendant hath altogether failed to shew that he is not indebted in manner and form as declared on. And further considering that the said defendant hath admitted in his answers *sur faits et articles*, that he did receive the said sum of

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$400 of and from the said late Dame McMullins, and hath failed to show the existence of any account against the said Dame McMullins, or any indebtedness on the part of the said Dame McMullins by reason of which it can be declared or presumed that the said sum of $400 was received by the said defendant otherwise than as a loan. The Court doth condemn the said defendant to pay to the said plaintiff, as universal legatee of the said Dame McMullins, the said sum of $400, with interest thereon from the 9th day of December, 1859, date of service of process in this cause, and costs of suit distrait to Messieurs Lafrenaye and Papin, the plaintiff's atttorneys.

"And the Court doth further reject the motion of the said defendants, dated 20th March, 1862, to revise the interlocutory judgment complained of in the said motion.

"And the Court doth also reject the said motion of the plaintiff, of date the 20th March instant."

Judgment for plaintiff.

Lafrenaye & Papin, for plaintiff.
M. Doherty, for defendant.
(J. L. M.)

COUR SUPERIEURE.

MONTREAL, 31st MARS, 1861.

Coram SMITH, J.

No. 129.

Beaudry vs. *Laflamme et Davis*, Intervenant.

JUGE:—1o. Qu'un société de commerce doit être prouvée par écrit et non par témoins quant aux associés entr'eux.

2. Que les ventes de facteurs doivent même sous le statut 10 et 11 Vic., c 10, être faites suivant le cours ordinaire de leur commerce.

3o. Que les ventes de facteur doivent être faites argent comptant, si l'usage de leur commerce ne justifie pas le crédit.

Le demandeur alléguait dans sa déclaration que le 4 avril 1859, à Montréal, il était propriétaire et en possession de quatre chevaux, et que là et alors le defendeur, dans le but d'en disposer sans son consentement ni autorite, les avaient enlevés illégalement.

A cette action, le défendeur plaida qu'il était commerçant de chevaux en société avec le demandeur, retirant la moitié des profits et supportant la moitié des pertes; que ces chevaux appartenaient à la société et qu'après en avoir vendu plusieurs autres, il avait vendu ceux-là à Mr. Augustus G. Davis, pour la somme de $575.

Puis intervient M. Davis, et prenant fait et cause avec le défendeur, il réclama la propriété des chevaux saisis, avançant qu'il les avait achetés du défendeur le 4 avril 1859 pour $575, dont $475 avaient été payée, laissant une balance de $100 encore due; qu'il en avait obtenu la livraison et que lors de la saisie, le 5 avril, il en était en possession; qu'il les avait achetés à marché ouvert et de bonne foi et enfin que le défendeur était un commerçant de chevaux et que les chevaux en question qui avaient été livrés et consignés pour être ven-

dus au compte du demandeur. Puis il invoque le statut des facteurs 10 et 11 Vic., c. 10.

Par un autre plaidoyer il soutint de plus que le défendeur était l'associé du demandeur pour le commerce des chevaux, que ces quatre chevaux saisis appartenaient à la société, et que c'est pendant que cette société durait qu'il avait ainsi transigé de bonne foi avec le défendeur.

A ces différentes défenses le demandeur répondit généralement et spécialement que le défendeur n'était pas commerçant de chevaux, ni son agent, aux termes du statut des facteurs; mais qu'au contraire il n'était que son serviteur et homme de cour, chargé du soin de ces chevaux; que, si aucune vente avait eu lieu, elle était irrégulière et nulle.

Tels sont les différents points qui furent soulevés dans les contestations et sur lesquels les parties allèrent à l'enquête.

A l'audition, M. *Girouard* pour le demandeur, dit qu'en jetant un coup d'œil sur les dispositions de la loi des facteurs, l'intervenant ne pouvait prétendre aucun droit de propriété sur les chevaux saisis; que dans l'espèce présente, il s'agissait d'un agent fondé sur un pouvoir général que lui confère le commerce particulier auquel il se livre publiquement et à l'exclusion de tout autre commerce ou besogne; que cet agent, suivant la doctrine des auteurs, et français et anglais, oblige son principal par tous les contrats et actes qu'il fait avec des tiers de bonne foi dans le cours ordinaire de son commerce; que le facteur est un agent de cette classe; que comme tel, il a la possession des marchandises qui lui sont confiées pour être vendues; qu'aux yeux du public, il a toute la couleur et l'apparence de propriétaire, et que pour cette raison, il peut en disposer en son propre nom; mais que cependant, de droit commun, le facteur ne peut pas disposer des marchandises qui lui ont été consignées autrement que suivant le cours ordinaire du commerce, et que tous ses actes, non justifiables par la coutume générale des facteurs, sont irréguliers et nuls; qu'en conséquence, de droit commun encore, les ventes des facteurs doivent être pour argent comptant, à moins que l'usage de leur commerce justifie le crédit et que tel usage soit prouvé (Story, on Agency, p. 122, §110; p. 77, §60. Dunlop's Paley, p. 27, à la note); que les lois statutaires introduites en Angleterre et adoptées par notre législature canadienne, n'ont apporté aucun changement à ces règles du droit commun sur la qualité des facteurs et leur mode de vendre et de disposer des effets de leurs commettants (Dunlop's Paley, on Agency, p. 224).

Que l'intervenant ne se présentait pas dans les circonstances prévues par la loi et qu'il ne pouvait invoquer ni le statut des facteurs, ni la prétendue société; que la preuve faite par le demandeur montrait clairement: 1o. Qu'il a acheté les chevaux en question aux Etats-Unis et que la propriété ne pouvait pas lui être disputée; 2o. Qu'il a payé pour le transport et le fret des chevaux; 3o. Qu'il en a été en possession depuis le jour qu'il les a achetés, depuis le commencement de février 1859 jusqu'au 4 avril suivant; 4o. Que durant ce temps là, Laflamme n'était que l'engagé et l'homme de cour du demandeur, chargé uniquement du soin de ces chevaux; 5o. Qu'il était reconnu et pris comme tel devant le public et non pas commerçant de chevaux; 6o. Qu'il l'avait lui-même avoué et confessé à plusieurs personnes; 7o. Que durant ce même

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temps; le demandeur pourvoyait à la nourriture des chevaux; qu'il achetait lui-même le foin, l'avoine et autres choses nécessaires à leur entretien et que, lorsque le défendeur les achetait, c'était toujours avec l'argent du demandeur et comme son engagé; 8o. Que la vente avait été irrégulière et incomplète, en autant qu'elle n'avait pas été suivie d'aucune livraison; 9o. Qu'une partie considérable du prix de vente, $275, avait été payée après que les huissiers chargés de la saisie fussent sur les lieux et après la saisie; 10o. Qu'un crédit avait été donné à l'intervenant et que ce dernier reconnait lui-même dans son intervention devoir encore la somme de $100; 11o. Que le défendeur et l'intervenant était de mauvaises foi et agissaient de concert dans le but de frauder le demandeur de sa propriété et que plus particulièrement M. Davis savait lors et avant la vente que les chevaux appartenaient à M. Beaudry et que Laflamme n'avait pas le droit de les vendre.

M. *Torrance* pour l'Intervenant, soutint au contraire que la preuve faite, faisait suffisamment voir que Laflamme avait été et était encore durant l'hiver de 1859 commerçant de chevaux; qu'il tenait des écuries comme tel dans la Grande rue St. Laurent, écuries connues sous le nom de " Ecuries de Berland "; qu'il avait loué des écuries et qu'il y tenait différents chevaux et entr'autres ceux saisis en cette cause; qu'il payait lui-même pour leur entretien et nourriture, tel que foin, avoine, son, et ferrage, etc.; qu'il les sortait souvent et les amenait sur le marché des chevaux, dans la rue St. Henri, où il les offrait en vente à différents acheteurs; qu'il a vendu durant l'hiver de 1859 quatre chevaux, un à un nommé Morris et un autre à un nommé Vanhorn, et deux autres à l'Intervenant; que le demandeur a approuvé la vente des chevaux en question par sa remarque à Clarke " That's a nice pair of horses Laflamme has there "; et que Laflamme avait même vendu ces chevaux dans les écuries de Berland; que les chevaux saisis ont été vendus dans ces mêmes écuries le 5 avril 1859 à marché ouvert et de bonne foi; qu'il en avait payé le prix et qu'ils lui avaient été livrés le même jour chez Henry Irish; qu'enfin le jour où il était aller acheter les chevaux en question, il a vu différents commerçants de chevaux les marchander et qu'aux yeux du public Laflamme passait pour en être le propriétaire, ayant pouvoir de les vendre.

M. *Cassidy* pour le défendeur, soutint que la preuve de société était complète; que le défendeur avait fait le commerce de chevaux avec le demandeur et qu'ils ont acheté les chevaux en question ensemble; qu'il a payé pour le fret des chevaux et leur entretien et qu'enfin le demandeur lui-même avait reconnu qu'il était en société avec le défendeur pour le commerce de chevaux; qu'il était vrai que le demandeur avait payé pour ces chevaux; mais que le défendeur mettait ses services dans la Société et qu'en un mot c'était rien autre chose qu'une société en commandite, laquelle société peut se prouver par témoin.

M. *Carter* en réplique, dit que les écuries de Berland, dont le demandeur était propriétaire et qu'il avait loué à ce nommé Berland, avaient été sous-louées par ce dernier au demandeur, qu'il en payait le loyer et qu'il possédait un reçu à cet effet: que les deux chevaux vendus par Laflamme durant l'hiver de 1859 appartenaient au demandeur, mais qu'il les avait vendus au défendeur comme

étant trop incommodes ; que quant au cheval vendu à Vanhorn, il appartenait aussi au demandeur et avait été vendu avec les quatre chevaux saisis en cette cause, et que le demandeur n'avait pu le retrouver ; que quant le défendeur sortait les chevaux, c'était pour les exercer, comme l'engagé du demandeur ; que la preuve de société était insuffisante, en autant qu'elle n'était pas par écrit et ne définissait pas les parts des profits et pertes ; qu'enfin soit que le défendeur fut associé, soit qu'il fut simplement agent, l'intervenant aurait dû offrir avec sa demande en intervention la balance du prix, $100, et ne pas vouloir retenir ainsi et les chevaux et une partie du prix de vente.

Beaudry vs. Laflamme.

Smith, J.—Les seules questions qui sont soulevées dans cette cause sont : 1o. Le défendeur était-il l'associé du demandeur dans le commerce de chevaux ? 2o. Ou bien était-il l'agent du demandeur, de manière à autoriser l'intervenant à les acheter de lui ? La question de société doit être considérée sous deux faces différentes, suivant qu'il s'agit du défendeur ou de l'intervenant. Par rapport au premier aucune preuve légale de société n'a été faite ; car c'est un principe certain de droit que les associés ne peuvent pas entr'eux prouver leur société autrement que par écrit ; et aucun acte ou écrit de société n'est allégué dans les plaidoyers, ni produit dans la cause. En conséquence les défenses du défendeur doivent être déboutées.

Quand à l'intervenant il est dans la position d'un tiers et il peut comme tel prouver cette société par témoins. Maintenant donc, Davis a-t-il fait aucune preuve verbale de société entre Beaudry et Laflamme ? Il n'y a rien dans la preuve sur ce point, si ce n'est les aveux du défendeur, qui répétait à tout le monde qu'il était l'associé de M. Beaudry ; mais ce n'est pas sur ces aveux du défendeur que la Cour peut s'appuyer. Voici les faits : Le demandeur, qui est un riche propriétaire de cette ville, ayant besoin de plusieurs chevaux, partit pour les Etats-Unis, accompagné du défendeur. Rien n'était plus naturel, puisque Laflamme, comme connaisseur de chevaux, ne pouvait que lui être utile dans ses achats. C'est en effet M. Beaudry qui achète les chevaux avec d'autres animaux ; c'est lui qui en paie le prix, le frêt et tout le coût du transport ; mais comme aurait fait tout serviteur, c'est le défendeur qui mène et a le soin des chevaux pendant le trajet à Montréal, tandis que le demandeur revient à Montréal par terre dans sa voiture privée ; les chevaux sont conduits aux écuries du demandeur, entre la rue St. Dominique et la rue du Faubourg St. Laurent, où ils ont tenus jusqu'au temps de la vente, la veille de la saisie ; et c'est là que le défendeur les soignait. Pendant tout cet intervalle, c'est le demandeur qui pourvoit à la nourriture des chevaux ; c'est lui qui achète le foin et l'avoine et les autres choses nécessaires à leur entretien ; en un mot le plaidoyer de société de l'intervenant doit être renvoyé.

Maintenant Laflamme était-il l'agent du demandeur de manière à autoriser M. Davis à transiger avec lui ? Il ne paraît pas que Laflamme fut le facteur de M. Beaudry, jouissant de la possession des chevaux et du pouvoir de les vendre. Au contraire, il est établi par plusieurs témoins que le défendeur n'était que le serviteur et l'homme de cour du demandeur, chargé du soin de ces chevaux et il le disait lui-même. Il est vrai que pendant ce temps là, Laflamme sortait les chevaux et les exposait en vente sur la place publique ; mais

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il n'y a rien dans ces faits qui indique que M. Beaudry ait voulu un seul instant se départir de la possession de ses chevaux, et l'on n'a pas même montré que ces choses se passaient à sa connaissance. D'ailleurs dans quelles circonstances la vente a-t-elle eu lieu? Davis, accompagné du frère du défendeur, se rend aux écuries de Berland, et sans s'informer aucunement sur la qualité de Laflamme, sans s'assurer de l'étendue de ses pouvoirs, marchande les chevaux et complète ensuite le marché dans la barre de Irish pour $575; et cela même après avoir entendu de la bouche même du défendeur, du moins c'est ce que rapporte le témoin Paquette, que ces chevaux ne lui appartenaient pas, qu'ils appartenaient à M. Beaudry, et que pour les acheter il fallait aller le voir. Il paie le soir même $275, et le lendemain matin paie encore $275. Mais c'est après que les huissiers fussent sur les lieux de leur exécution, que ce dernier paiement a été fait, alors que l'intervenant était aussi ouvertement averti du défaut d'autorisation du défendeur. Je dois avouer, cependant, qu'il y a des contradictions dans la preuve, et je dois m'arrêter à un autre point admis par toutes les parties et qui doit décider en faveur du demandeur. Un crédit de $100 a été donné à l'intervenant; ce fait n'est pas contesté mais est confessé. Or c'est une règle de droit que les ventes d'agent, ayant la possession de marchandises qui leur sont confiées pour être vendues, ne doivent pas être faites à crédit; mais qu'au contraire, dans tous les cas, ces ventes doivent être argent comptant, à moins que l'usage de leur commerce ne justifie le contraire; et non-seulement on n'a apporté aucune preuve de coutume ou usage à cet effet, mais même le demandeur a prouvé que les commerçants de chevaux, pour le compte des autres, vendaient toujours argent comptant. Enfin la balance de $100 aurait dû être offerte avec l'intervention.

Jugement pour le demandeur.

Carter & Girouard, pour le demandeur.
Leblanc & Cassidy, pour le défendeur.
Torrance & Morris, pour l'intervenant.
(D.G.

COUR DU BANC DE LA REINE.

EN APPEL.

DE LA COUR SUPERIEURE, DISTRICT DE MONTREAL.

MONTREAL, DECEMBRE 1861.

Coram SIR L. H. LAFONTAINE, Bart., J. C., LES HON. AYLWIN, DUVAL, MEREDITH ET MONDELET.

No. 2236.

Le Séminaire de Québec vs. *Vinet et al.*

Jugé:—Que pour appeler d'un jugement interlocutoire, application doit faire dans le terme le plus prochain après tel jugement rendu.

Dans cette cause un jugement interlocutoire fut rendu par la Cour Supérieure à Montréal le 31 mars 1861, ordonnant à un notaire, partie dans cause, de produire la minute d'un certain acte au bureau du Protonotaire. Les autres

Défendeurs, mécontents du jugement, firent motion dans le terme de Septembre 1861, de la Cour du Banc de la Reine, pour permission d'en appeler.

Appel refusé attendu que les défendeurs n'avaient pas fait diligence. Ils auraient dû faire leur application dans le terme de Juin.

Dorion, Dorion et Sénécal, pour les demandeurs.

Loranger et frères, pour les défendeurs.

(V. P. W. D.)

COURT OF QUEEN'S BENCH, 1861.

MONTREAL, 6TH SEPTEMBER, 1861.

Coram Hon. Sir L. H. LA FONTAINE, Bart., Ch. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, (C.) A. J.

No. 44.

FAWCETT et al.,

(*Plaintiffs in Court below,*)

APPELLANT;

AND

THOMSON et al.,

(*Defendants in Court below,*)

RESPONDENTS.

HELD:—That possession of moveables presumes title or right of property therein, and therefore (except in cases of theft, violence, and perhaps accidental loss) that the purchaser of moveables, *bonâ fide*, in the usual course of trade, acquires a right of property in them, although they may have been sold by one who was not the owner thereof.

This was an Appeal from the judgment of the Superior Court, rendered at Montreal, on the 30th of November, 1859, a full report of which is to be found in the 4th L. C. Jurist, pages 234 and *seq*.

MONDELET, J. (*dissentiens*):—The appellants, plaintiffs in the Court below, had brought against defendants (respondents) an action in revendication, whereby they claimed 3657 hides of hemlock sole leather as their property, and which they alleged had been stolen, taken and carried away from them who are carrying on business in the State of New York, and had been brought into Canada, and had come into the unlawful possession of the defendants, who are leather dealers in Montreal.

The defendants have set up in their defence, that they had bought the leather, together with a much larger quantity, from divers persons in possession thereof, acting as owners and proprietors of the same, who had a right to sell it in Montreal, where they imported it according to the usual custom of trade. The defendants further pretended that they had purchased and paid for the leather in the usual course of business, in good faith, and without knowledge that plaintiffs had any right to or claim on the said leather. And, further, that plaintiffs, having allowed the leather to be imported into this Province by parties who had the possession thereof, were debarred of all recourse against the defendants, who had purchased it in good faith, for good and valuable consideration in the usual course of business, and the plaintiffs' recourse was only against the party so intrusted with the leather.

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The plaintiffs have in answer denied the whole of the above, and made affirmative allegations, meeting on all points the pretensions of the defendants.

I have carefully gone over the evidence, and have, without much difficulty, come to the conclusion, that the Court below (SMITH, J.) erred in its judgment whereby plaintiffs' action was dismissed.

It seems to me that the Court below misapprehended the relative positions of the plaintiffs and the Stevens, and considered them as co-partners. There was no such thing. The hides belonged to the plaintiffs, they were sent and delivered to the Stevens to be tanned, they were to have been returned to the plaintiffs by the Stevens: the plaintiffs were the sole owners and proprietors of the leather when tanned, and the Stevens, who had no share or rights whatever in that leather, were merely to get some profits out of the sale of the leather when disposed of. Consequently it is manifest that Fawcett & Co., independent of the question of *vol fraud and escroquerie* on the part of the Stevens, had at the time of the bringing of the action, full right to claim the leather at the hands of the Stevens, and to seize and revendicate it in whomsoever's possession they found it.

But going farther into the case, the defendants had more than sufficient under their eyes to suspect that all was not right. They are not as guilty as the Stevens of course; the latter have been nothing short of swindlers, the evidence leaves no doubt on that point. Still the defendants, who pretend that they have purchased the leather *in good faith*, and *for good and valuable consideration* from the *owners in the usual course of trade*, have done no such thing. There could be no good faith, they saw how the leather was, the state in which they saw it, chiefly loose, instead of being rolled, should have, as probably it did, excited their suspicions. No mark of inspection, that alone shews that the leather was not brought here in the usual mode and usual course of business. As to the ownership of the men who brought the leather in Montreal, the evidence has made that point clear enough in itself, they were swindlers or thieves, and it was for the defendants to make out this important part of their defence; they have not done so.

How have the defendants established their purchase to have been a good and valuable consideration? The very reverse is the case. The leather was scarce both in the New York and Montreal market, and still they got the leather at a very low price.

As to the idea that Fawcett & Co. have allowed the leather to be brought into Montreal, and have thereby lost their recourse against defendants, it is simply ridiculous: how could they prevent what they neither knew nor suspected? When, where, and in what manner have they ever consented to be swindled and robbed in that audacious way?

The identity of the leather is well made out.

It may as well be remarked that the conduct of the defendants at the time the leather was seized does not entitle them to much commiseration at the hands of the Court.

Upon the whole, I am of opinion that the judgment of the Superior Court ought to be reversed.

Fawcett et al. vs. Thompson.

MEREDITH, J.:—In this case, which is one of considerable interest to all persons engaged in trade, we have to consider first, whether the agreement of the 7th August, 1855, between Messrs. W. H. and F. Stevens and the plaintiffs created a partnership; and, secondly, whether the defendants can be considered to have purchased the leather in question in good faith in the ordinary course of trade; and if so whether the sale so made to them is effectual as against the plaintiffs.

I agree with the other Judges of this Court in thinking that the agreement of the 7th August, 1855, did not create a co-partnership. Under that agreement Messrs. W. H. and F. Stevens, as men of skill and art, acted as the agents of the plaintiffs, in tanning leather which the plaintiffs had purchased in their own names and with their own funds; and whilst the leather was being tanned in the possession of the tanners, their possession was the possession of the plaintiffs as owners.

On the first question, therefore, I am with the plaintiffs; but the second question must, I think, be answered in accordance with the pretensions of the defendants.

The facts relied on as showing that the defendants were not in good faith are, that leather from New York is generally brought to Montreal inspected and in rolls, whereas the leather in question came in, in sides, without having been inspected; secondly and mainly, the low price at which the defendants made the purchase.

It appears that according to the usual course of trade, up to the present time, although a considerable quantity of leather from the States adjacent to Canada, is required for the Canadian markets, yet that the whole, or almost the whole, of the American leather which is required by Canadians, is taken to New York, and inspected there; and this although such leather may have been tanned to the North or Canada side of New York.

The sellers of the leather in question, in effect proposed to change this mode of dealing; and if this could have been done honestly, neither the Montreal trader nor the Canadian public would have any reason to complain.

It is proved that Fletcher Stevens called upon the defendants at their place of business in Montreal, in the month of August, 1856; that being about two months before the first of the sales in question, and after some conversation with respect to the price of leather at Montreal, he mentioned "that he would like to open a trade in Canada for his leather which he had usually sent to Philadelphia, New York, or Boston," and before leaving the premises of the defendants, he pointed out a lot of leather to Mr. Thompson, one of the defendants, who told him that for a similar lot laid down at Montreal he would pay him at the rate of 27 cents per pound.

The proposal made by Stevens was not, it appears to me, calculated to create suspicion.

Assuming that the leather in question was required for the Montreal market, the tendency of the proposed arrangement was to save the carriage of the leather from Roundout, on the Hudson River, to New York, and from New York

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back to Roundout, also the charges for cartage, storage and inspection at New York, to which may be added the profits of the New York merchant.

It is not, therefore, surprising that a wholesale dealer in leather at Montreal should have been willing to enter into the arrangement proposed by Stevens; under which of course the leather would not have come in as usual, in rolls, and bearing the New York inspection mark; but, on the contrary, uninspected, and loose or in sides; it being obvious that leather cannot be inspected and stamped while in rolls.

In the following month of October, Stevens, as he had proposed, returned with a large lot of leather, and after it had been seen by a number of dealers in that commodity, and after different offers had been made for parts of it, he sold the whole lot to the defendants at the price which in the previous month of August they said they would be willing to give.

Now, although under ordinary circumstances, the defendant might have expected to have seen such a lot of American leather, in rolls and bearing the New York inspection mark; yet it appears to me, that after the negotiation which had taken place between Stevens and the defendants, about two months before, that the latter would have had reason to have felt surprised if the leather had been taken to New York and inspected there, preparatory to its being brought into the Montreal market, where Stevens said he wished to open a trade.

I therefore think that there was nothing in the state in which the leather was brought into this market, to excite the suspicions of the respondents.

The other circumstances which is thought to justify doubt as to the defendants having been purchasers in good faith is the lowness of the price paid by them. On this point the evidence is conflicting. It is plain, however, that the leather could not have been purchased in the New York market, and sold in the Montreal market at any thing like the price paid by the defendants. But it is to be recollected that the leather in question had come direct from the Tannery to the Montreal market, and as by this means the New York charges and the profit of the New York merchants had been saved, it could, even without dishonesty, have been sold much cheaper in Montreal than if it had been in the first instance sent to New York.

But even after taking these circumstances into consideration there is still a very great difference between the evidence on the part of the plaintiffs and the evidence on the part of the defendants.

The plaintiffs have proved that prime sole-leather was worth at the time of the first sale in this market about 30 cents per pound, and at the time of the second sale about 35 cents per pound, whereas the first sale was made at 27 cents and the second at 28 cents; but the witnesses who give these prices do not speak with reference to the particular lot of leather in question; and, on the other hand, several leather dealers, among others, Camarant, Fitzimmons, Harris, Delorme and Childs, prove that the leather in question was not of the best description, and the same witnesses, excepting Childs, who does not speak as to the point, prove that the defendants paid the full market value for the leather

In addition to this we have the important fact that during the interval of about two months which intervened between the first purchase and the seizure of the leather, the defendants sold large quantities of it; and we find that the prices at which they sold it were not such as to yield them more than a fair profit on their purchase.

It is also to be recollected that the sale of this very large quantity of leather —above 4000 sides—was made without any precipitation and in the most public way. A very great number of persons must have seen the leather between the time it left the Tannery and the time of the sale; many of these have been examined in this cause: not one of them says he suspected the perpetration of a fraud; and, on the contrary, all those who have been examined as to the point, say, that when they saw the leather, in this market, they would have purchased it, had it suited them; without any, even the slightest, hesitation. Under these circumstances it appears to me, that it would be most unjust to blame the defendants, and to cause them to lose the price of the leather, for not acting upon a suspicion, which does not appear to have been entertained by them, or by any other person.

For these reasons I think the learned Judge in the Superior Court was right in saying that the defendants acted in this matter in good faith.

The third point raised in this cause is as to whether the sale made under the circumstances just mentioned ought to be held effectual, as regards the plaintiffs, who were really the owners of the goods sold.

Although the abstract question involved in this point, is one of great importance, and was at one time much debated, I do not propose to attempt to discuss it in the present case; not only because it would be out of my power to add anything to what has already been repeatedly said on the subject: but also because all the Judges of this Court are agreed in saying, as the learned Judge in the Court below has, in effect, already said, that according to our law possession presumes property in moveables, "*en fait de meubles possession vaut titre*," and therefore (excepting cases of theft and violence and perhaps accidental loss), the general rule is, that the purchaser of moveables *bonâ fide*, in the usual course of trade, acquires a right to them, although they may have been sold by one who was not the owner.

It is true that that rule is opposed to authorities of great weight and that it may in many cases be found at variance with the maxim of the Civil Law, "*Nemo plus juris ad alium transferre potest quam ipsè habet.*"

But as Mr. Bell observes in his valuable commentaries on the principles of mercantile jurisprudence,* "an abstract rule laid down in law books sometimes "does not square with the actual business of life; and in favour of commerce a "relaxation of the above rule was introduced to the effect of allowing the pos- "session of moveables, and those otherwise in the apparent right of commodi- "ties not to sell but to pledge them."

Mr. Bell adds that in an inquiry ordered by parliament, concerning this matter it was found by the Committee named by the House of Commons, after

* Bell's Com., Vol. 1, p. 485-6-7.

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many extensive investigations into the law and practice of trade, both at home and abroad, that in foreign countries, namely France, Portugal, Spain, Sardinia, Italy, Austria, Holland, the Hanse Towns, Prussia, Denmark, Sweden and Russia, the rule of law as applied to moveable property is, that possession constitutes title, "and that persons making advances of money upon such property "are not required to enquire to whom it belongs, and are fully protected for "the advances they make."

The authorities cited by the learned Counsel for respondents † although, as I have already observed, opposed to other authorities of great weight, suffice, I think, to show that such was the rule of our law even before the passing of the 10 and 11 Vic. c. 10; but since the passing of that statute, I think there cannot be any doubt on that point.

Being, therefore, as I am, of opinion, that the defendants purchased the leather in question in good faith in the ordinary course of trade, and also that the sale so made was effectual even against the plaintiffs as the owners of it, I think the Judgment of the Court below must be confirmed.

The rest of the Court expressed their concurrence in the view expressed by the Hon. Mr. Justice Meredith, and the judgment of the Superior Court was therefore confirmed.

Judgment of Court below confirmed.

Bethune & Duncan, for appellants.
Henry Stewart, Counsel.
A. & W. Robertson, for respondents.
(S.B.)

† See particularly first Bourjon, pp. 458, 459, Marcadé, de la prescription on art of Code 2280, pp. 246-7-8-9, Troplong, prescription, No 1055.

EN APPEL DE LA COUR SUPERIEURE, DISTRICT DE MONTREAL.

MONTREAL, 1re MARS 1862.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET (C) A. J.

No. 81.

GLOBENSKY, ET UXOR,

(*Défendeurs en Cour Inférieure,*)

APPELANTS;

ET

LUKIN et al.,

(*Demandeurs en Cour Inférieure,*)

INTIMÉS.

Jugé:—Que le propriétaire d'un moulin qui a pratiqué ou fait pratiquer au moyens de bacs ou chalands des voies de passages et traverse dans les limites du privilège d'un pont de péage; pour y traverser les gens à son moulin gratuitement; mais dans la vue de se procurer des gains par la monture de leurs grains, est passible de dommages-intérêts envers le propriétaire de ce pont à raison de la perte de ses profits, qui lui lont ainsi enlevés indirectement.

Cette demande étant de la même nature que celle déjà rapportée à la page 310 du 3e Volume du L. C. Jurist, il est iputile d'en exposer ici les circonstances. Il suffit d'observer que par leur conclusions, les Intimés néanmoins ne demandaient pas à ce que défense fut faite aux Appelants de recevoir ou de tenir aucune voiture d'eau pour, au moyen d'icelle, pratiquer pour leur profit et d'une manière indirecte aucune voie de passage ou traverse des personnes, bestiaux et voitures dans les limites du privilège des Intimés, ces derniers ayant simplement conclu aux dommages-intérêts.

Cet action fut contestée par une dénégation générale.

Sur la preuve faite de part et d'autre, la Cour Supérieure à Montréal ayant condamné les appelants à payer £35 de dommages intérêts; ils interjettèrent appel et par leur factum ils ont ainsi exposé leur cause:

Le jugement de la Cour Inférieure condamne les Appelants à payer aux Intimés la somme de trente-cinq livres du cour actuel pour dommages qu'ils réclamèrent pour avoir garder ou fait garder un bac ou chaland pour leur profit, pour traverser des personnes, bestiaux et voitures sur la rivière Jésus, et aussi en ayant pratiqué ou fait pratiquer pour leur profit, illégalement, des voies de passage pour le transport des personnes, bestiaux et voitures à travers la dite rivière au mépris du Statut Provincial 10 et 11 Vic. ch. 99, qui établit un privilège pour la construction d'un pont en excluant toute concurrence dans les termes suivants:—

Sec. IX. "*And if any person or persons shall at any time for hire or gain "pass or convey any person or persons, cattle or carriages, across the said river "within the limits aforesaid, such offender or offenders shall, for each carriage "or person or animal so carried across, forfeit and pay a sum not exceeding "forty shillings currency:*"

Sec. XIII du même Statut déclare ce qui suit:—

"*And be it enacted, that the penalties hereby inflicted shall upon proof of the "offence, respectively before any one or more Justices of the Peace for the said "District of Montreal, either by the confession of the offender or by the oath of "one or more credible witness or witnesses (which oath such Justice is hereby*

Globensky and Lukin et al.

"empowered and required to administer), be levied by distress and sale of the "goods and chattels of such offender, by warrant signed by such Justice or Justi- "ces of the Peace, and one half of such penalties, respectively, when paid and "levied shall belong to Her Majesty and the other half to the person suing for "the same."

Le statut conférant le privilège aux Intimés ne contient aucune autre disposition relativement à la violation du privilège.

L'action des Intimés était une simple action de dommage pour la perte à eux occasionnée par les Appelants, de 1853 à 1859, par l'emploi d'un bac pour traverser les individus qui apportaient du grain à leur moulin seigneurial, situé à plus d'un mille au-dessus du pont.

Une première action avait été intentée en 1853 pour faire constater le droit des Demandeurs, et par les conclusions les Intimés demandaient que défense fut faite aux Appelants de traverser. Le droit des Intimés fut reconnu par le Jugement qui fut rendu en 1859. Voir 3 Jurist. p. 310. Depuis cette époque les Appelants ont cessé de traverser. Les Intimés néanmoins non contents de la condamnation nominale qu'ils avaient obtenue (quarante chelins) ont jugé à propos d'intenter une action pour réclamer les dommages qu'ils prétendaient avoir soufferts durant l'instance, et c'est sur cette action qu'est intervenu le jugement dont est appel.

Les Appelants s'appuient principalement sur l'absence de toute prohibition réclamée dans les conclusions de la présente action, question déjà déterminée par le premier jugement; celle dont il s'agit est une simple action en dommage.

La Cour Inférieure, lors de la première cause, renvoya une défense en droit que les Appelants avaient alors formulée, en alléguant que le Statut n'indiquait qu'un seul remède, une pénalité recouvrable devant les Juges de Paix, et que toute autre action n'était pas recevable.

On conçoit que la Cour Inférieure devait rejeter cette défence en droit, attendu qu'il y avait plus qu'une action en dommages; c'était plutôt une action négatoire tendant à faire affirmer un privilège à l'exclusion des Défendeurs.

Aucun de ces caractères ne se rencontre dans la présente demande des Intimés et leur remède ne peut être autre que celui indiqué par le Statut, la pénalité poursuivie devant le Juge de Paix.

Ces chartes ou privilèges octroyés par Statut doivent être strictement interprétés. Si la législature n'a jugé à propos de les garantir que par des amendes lorsqu'on empiéteraient sur leur limites, on ne peut pas invoquer d'autres remèdes. Car sans la lettre du Statut pour la restreindre, la liberté qu'a tout homme de se servir de la rivière navigable comme d'un grand chemin subsiste toujours. La seule garantie de ce privilège, la seul condition attachée à sa violation est l'amende.

Il y a cependant dans cette cause quelque chose de plus favorable encore aux Appelants. Il est établi par la preuve que, dès que le premier jugement fut prononcé ils ont cessé de traverser. Il n'y a aucune malice, aucun *trespass*, c'était de bonne foi, pensant exercer leur droit. Et c'est durant le litige seulement qu'ils ont continué la traverse.

Le seul motif qui aurait pu justifier aucune demande de la part des Intimés

et la seule cause légale admissible pour leur permettre d'intenter une action contre les appelants, est la perte réelle et certaine qu'ils auraient pu éprouver. Or il est évident d'après la preuve qu'ils n'en ont subi aucune, tous les témoins produits par les Intimés déclarent qu'aucun de ceux qui traversaient au moulin des appelants n'aurait passé sur le pont des Intimés, qu'ainsi, ces derniers n'ont effectivement rien perdu, ce qui d'ailleurs appert par le premier jugement; car ce fut le motif qui détermina la Cour Supérieure à n'accorder que quarante chelins de dommages lors du premier jugement.

Les appelants invoquent ce premier jugement comme un précédent, découlant du principe que pour réclamer des dommages il faut justifier d'une perte. Il n'y a aucune preuve dans le dossier pour constater que les appelants aient enlevé aucun profit aux Intimés et par suite ceux-ci n'ont pu éprouver aucune perte. Les conditions voulues pour leur faire obtenir une condamnation en réparation manquent. "Les dommages et intérêts ne doivent représenter que le préjudice qui est la suite immédiate et directe du fait. En matière de délits comme lorsqu'il s'agit de l'inexécution des obligations contractuelles les dommages et intérêts ne peuvent être que la représentation du préjudice éprouvé et du gain dont on a été privé, *lucrum cessans et damnum emergens.*"

Dans l'absence d'une preuve directe de préjudice souffert, la Cour Inférieure ne pouvait prononcer aucune condamnation contre les appelants.

Si la loi avait été violée sans perte de profit pour les Intimés, ils pouvaient exercer la pénalité, et c'était dans les circonstances le seul remède que la loi leur accordait.

Les Intimés par leur factum ont exposé leur cause comme suit:

Le jugement dont est appel a été rendu le 29 septembre 1860, par la Cour Supérieure siégeant à Montréal, en faveur des Intimés pour la somme de £35 courant.

Les Intimés en leur qualité d'exécuteurs testamentaires de feu Edouard Martial Leprohon réclamaient des dommages des défendeurs qui tenaient un bac ou un chaland durant la saison de la navigation depuis l'année 1853 à l'année 1859, sur la Rivière Jésus dans les limites du privilège accordé à feu E. M. Leprohon et son cédant L'Hon. Joseph A. Berthelot par le Statut 10 & 11 Vic. ch. 99— pour l'érection d'un pont de péage sur la Rivière Jésus entre St. Eustache et Ste. Rose et au moyen duquel bac les appelants, dans la vue de se procurer des gains et des profits et en particulier les gains et les profits de mouture des grains des censitaires de la Seigneurie de l'Ile Jésus et autres lieux; avaient établi par leurs meuniers et leurs serviteurs une voie de passage ou traverse pour traverser et transporter à travers la Rivière Jésus dans les limites du susdit privilège, tous ceux qui voulaient se servir de cette voie de passage pour aller porter leurs grains moudre aux moulins des appelants et pour leur gain et leur profit réel et au préjudice du privilège des Intimés.

Les appelants ont plaidé une dénégation générale.

Les Intimés ont prouvé des dommages excédant de beaucoup le montant accordé par le jugement dont est appel, et pour établir leur droit d'action; ils réfèrent aux autorités suivantes:

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16 Louisana Reports, Fenner *vs.* Wakins,
6 B. & Cr. p. 703.
7 Pickering's Reports, 344.
5 Peters 428.
6 Vol. of the Am. Jurist. p. 86
Lachapelle *vs.* Lessort, April 1832.
3 Vol. L. C. Jurist. page 310—Leprohon *vs.* Globensky.

A l'argumentation de la cause en appel, *Ly Frenaye* pour les Intimés prétendit que nonobstant l'absence de toute prohibition réclamée dans les conclusions de l'action, les Intimés n'étaient aucunement astreints à n'exercer qu'un seul remède ; celui indiqué par le Statut ; savoir : une action recevable devant les Juges de Paix, et que la loi commune, qui leur donnait droit d'action pour dommages-intérêts, n'avait pas été abrogée. Que cette dernière action était constamment pratiquée en Angleterre dans des cas analogues, comme l'on peut s'en convaincre par les remarques judicieuses faites par les Honorables Juges qui avaient renvoyé la défense en droit en la première action ; sur un tout autre principe que celui que leur a attribué les appelants dans leur factum.*

Que les appelants en traversant leurs censitaires et autres personnes gratuitement, mais dans le but évident de se procurer un *gain* indirectement au préjudice des Intimés ; ont évidemment privé ces derniers des profits que la loi du pays leur a garantis, et ont violé les dispositions du Statut qui contemple non

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* *Leprohon vs. Globensky.*

No. 1812—SUPERIOR COURT.

Montreal, 28 *June*, 1854.

Coram DAY, J., SMITH, J., MONDELET, J.

Per Curiam : Day, J. This was an action involving a point of some interest. The plaintiff was the proprietor of an old bridge, across the River Jésus, the privilege of building which had been granted him by act of Parliament. The defendant had been in the habit of ferrying people across the river near the bridge, to convey them to a mill owned by him on the other side. The plaintiff's action substantially set out that the ferry was within the limits over which the law gave him the exclusive right of levying tolls, and asked for damages, in consequence of defendant's invasion of the privilege. The defendant pleaded a *défense en droit*, setting up that there was no such action in law accompanying the privilege : that they created a special prohibition and a remedy for its infringement, and that where the Statute itself provided a remedy for its violation, no action at common law could lie. This general proposition was true, where a specific remedy was given, one must abide by it ; the books were full upon this subject and it was needless to waste time upon it. There was something, however, in this case which took it out of the general rule. The 10 and 11 Vic., c. 99, under which the bridge was constructed, after giving the authority to build the bridge, in the ninth section, contained prohibitory enacments, by the terms of which, after the completion of the bridge, no person or persons were to use any ferry for the carriage of any person, cattle or carriage whatsoever for hire across the said River Jésus at a distance of one league above the bridge and below the same, and that if any such should offend against these, for each carriage, person or animal so carried across, a forfeit not exceding 40s. should be paid. By a following clause, a provision was made for the recovery of the penalty before a justice of the Peace for the District of Montreal, and one half of the penalty when paid was to belong to the Queen, and the other half to the person suing for the same. We are of opinion that the remedy by action at law lies notwithstanding. The remedy here given is not in favor of the party in whose favor the privilege was erected ; by it he has no means of indemnification. The penalty is to the informant and the Queen. The distinction in the English law is thus given :—Where the penalty is a specific remedy given to the injured party, there is no action at common law ; but if it

seulement le cas ou une traverse illicite est pratiquée *for hire* mais encore *for gain* en façon quelconque.

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Que les circonstances de cette cause sont bien différentes de celle de Mots, appelant, et Rouleau, Intimé; où il s'agissait d'un pont libre, *free bridge;* au moyen duquel Rouleau avait pratiqué une traverse dans les limites du privilège du Pont de Mots; mais non pas dans le but de se procurer aucun gain même indirectement. †

AYLWIN, J.—The respondent is the proprietor of a bridge over the Rivière des Prairies, and as such has a privilege, in virtue of which no other bridge can be built within a certain distance of him; nor can passengers be ferried over within the like distance for hire or gain. The appellant is proprietor of a grist mill on one bank of the river within the limits through which the respondent's privilege extends, and he has been in the habit of conveying to his mills, but free from any charge for ferrying, or extra charge for grinding, any persons who came to the other bank for the purpose of having their grain ground, with the grain he conveyed such person and their flour back upon the same conditions. The respondent, by his action, sought to recover damages for the losses which he alleged that he sustained by such illegal ferrying. The Act by which the privilege is granted imposes a penalty of 40s. on each contravention of the prohibition. In the Court below, judgment in this case had been given for the

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be merely to any informant, there is an action to the party that suffers. In the case of Bedford vs. Hunt, cited in Tyrrwhitt's Reports, an action brought by an author for the infringement of his copyright, the point was settled as above—there being no remedy to him individually, it was decided that he had an action at common law. The *défense en droit* is dismissed with costs. The other point raised was a minor one.

Mr. Justice Smith.—Even if the clause of the statute had given the penalty to the proprietor, the latter would have had an action at common law for any injury he might have received. In this case, however, the reason was stronger.

Mr. Justice Mondelet.—Would go even further than his learned confrères. He would give him not an action at common law, for there was none such; but by a certain rule of justice would grant him his demand to the extent of the injury received *d'après la mesure de son droit.* The penalty was not indemnification.

† *Mots, Appellant & Rouleau, Respondent.*

10th November, 1848.

Coram ROLLAND, C. J., MONDELET, J., DAY, J., GAIRDNER, J., SMITH, J.

The Appeal in this cause was from a judgment rendered in the Court below dismissing an action of damages brought, for having built a temporary bridge within the limits pointed out by the Statute 58 Geo. 3, under which a toll bridge had been erected by the plaintiff. The Statute contains no penalty for building a bridge within the limits, the question therefore was whether parties could build a *free bridge* or not.

His Honor the Chief Justice Rolland in giving the decision of the majority of the Court stated that the party who brought this action must shew that the public had no right to pass the river between the limits pointed out. There was nothing in the Act obliging the inhabitants to go by the plaintiff's bridge. The case of Lachapelle's bridge had been quoted. He found he had concurred in that judgment; but chiefly on the ground that damages had been done to the bridge by the ice bridge made there. Had the inhabitants only followed out the old customs of the country in forming ice bridges, and done no damage by the ice bridge, he would have hesitated to concur. Judgment for defendant in the Court below confirmed.

Judges Gairdner and Smith dissenting.

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plaintiff, and the defendant appealed from that judgment. His Honour, who dissented, now said that it had been urged that the 40s. of the penalty was the only remedy which the plaintiff had, if the law had been contravened. He thought on that point, however, it was clear that, besides the penalty, there was a good claim for damage on the part of the owner of the privilege, if the privilege had been trespassed on. There had been a preceding action to obtain a kind of inhibition against this ferry, and on that also the respondents had obtained a judgment: but though he should, had it been appealed against, have been disposed to reverse that judgment, the Court then had nothing to do with it. The object of the Legislature in granting this privilege was to enable travellers to cross the river and reach the high road with more facility, and the persons who were to build the bridge were, moreover, and for the same purpose, authorized to obtain a piece of land to connect the bridge and the road, and then the statute declared that after the bridge and works should be finished, no other bridge or ferry should be permitted to be used for hire or gain within a league of the bridge—providing, however, that nothing in the Act should prevent persons from using the fords of the river, or passing in canoes or other boats without hire or gain. It might be remarked that the terms of the statute applied particularly to persons and animals, and said nothing about grain. Another clause of the statute reserved the rights of the Crown and of all other persons, except in so far as they were expressly infringed on by the Act—that is to say, so far as concerned the right to ferry for hire or gain. The privilege thus accorded was the case of a contract between the grantee and the Legislature. The former was to make and keep up the bridge, and the latter gave him the exclusive right to receive tolls from persons who crossed. But the owner of the bridge had no right to tolls or damages from a person who chose to ferry himself and family on his way to church or market, and the claim which the respondent now sought to enforce was one oppressive in the extreme. He said in short that a man who found himself on the bank opposite this mill would have to go around to his bridge, pay toll, and then go up the other bank, and return the same way, when he might go directly across. The Legislature never intended that. The bridge owner might as well pretend to claim damages from people who crossed on the ice. Authorities from the decisions in Louisiana had been cited, where tavernkeepers had been held for damages when they had ferried passengers to and from their houses without charge, within the limits of a bridge-owner's privilege. He could not admit the correctness of such decisions, and thought that this action could only succeed in the event of the plaintiff establishing that by the Act complained of he has been deprived of tolls which he otherwise would necessarily have received from people who must have traversed his bridge, if they had not left it on one side to go over the ferry. There was a case at Quebec of Mota *vs.* Rouleau which he thought threw some light on this case, though it involved so many collateral points, which might have influenced the Court, that he would not cite it as an authority. Another case, however, had been mentioned, which was that of the rival bridges at Boston, a case which did honour to the American Judiciary, and the report of which contained more learning respecting ferries and bridges than

all the English books put together. Reference to that case would show that the principle universally conceded was, that to sustain such an action as this it was necessary to make out that a fraud was perpetrated upon the owner of the bridge by depriving him of tolls which he would otherwise have inevitably received. He must make out this allegation: "You convey parties across the "river to get their grain ground, who, if not thus ferried over, must have pass-"ed by the way of my bridge." The judgment below would have the effect, now that the right of *banalité* had been abolished, of reaffirming it, in the most odious shape in favour of Mr. Viger's Mill, where they might charge what they pleased for grinding, unless people chose to pay the toll for crossing the bridge to reach the other mill. He would have been disposed to dismiss the action on demurrer, and was now in favour of reversing the judgment below.

MONDELET, J.—Gave the judgment of the Court, affirming the one rendered below.* All he need say was that the law did not permit that to be done indirectly which could not be done directly, and the appellants, therefore, could not be allowed to make a charge for carrying, though the price was included in the charge for grinding.

Judgment of the Court below confirmed.

Laflamme, Laflamme & Doherty, for appellants.

LaFrenaye, for respondents.

(P.R.L.)

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 7TH MARCH, 1861.

Coram SIR L. H. LAFONTAINE, BART., Ch. J., AYLWIN, J., DUVAL, J., MEREDITH, J., BRUNEAU, J., *ad hoc*.

JOSEPH NEVEU et al.,
(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

The Hon. C. C. L. DE BLEURY,
(*Defendant in the Court below,*)
RESPONDENT.

RECEIPT SIGNED BY MARK—EVIDENCE.

HELD:—That the payment of a sum of money may be proved by the attesting witness to a receipt signed with a mark made by the party receiving the money.

This was an appeal from a Judgment of the Superior Court of Montreal, rendered on the 28th September, 1858. The facts of the case will be found at 3 L. C. Jurist, 87-8.

MEREDITH, J.—In this case the principal question to be determined is, as to whether a receipt signed by the making of a cross in the presence of two witnesses is valid.

If this question, which is one of very great importance, and by no means free from difficulty, had to be decided by French authorities of modern date, there

* 3 L. C. Jurist, p. 310.

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can be but little, if indeed any doubt, that the answer ought to be in the negative.*

I believe, however, that early in the history of this colony, and owing, probably, in some degree to the peculiar circumstances in which the first settlers in a new country are placed, the practice became very general for persons who could not write to sign papers by means of a mark or cross in the presence of two witnesses. This practice has continued down to our time; and is now, as we all know, very generally observed. Two of the learned Judges of this Court, who were familiar with the practice in the Inferior Term of the late Court of Queen's Bench for this District, have assured me that in that Court, whilst they were at the bar, a signature made by a cross in the presence of two witnesses was invariably held valid.

The learned Judge who acts in this case in the place of Mr. Justice Mondelet also recollects that during his time such was the practice; and every one who has had occasion to transact business in Lower Canada must be aware that probably nine-tenths of the vouchers for payments, given by illiterate persons, are executed by the making of a mark in the presence of witnesses.

This very ancient and very general practice received, I think, an important sanction from our Legislature in a provision contained in our old promissory note act.

The last section of that Statute (the 34th Geo. III, c. 2), after declaring that notes not subscribed in the handwriting of the maker should not be negotiable, contains this further provision: "which notes, not subscribed, although bearing "the *ordinary mark*, shall not be provcable but by two witnesses, and no other "action or decision shall lie thereupon but such as *are established* by the laws, "customs, and usages in force in this Province."

This enactment, it is to be observed, refers to promissory notes generally, and not merely to promissory notes given in the course of trade; and it establishes that at the time of the passing of the statute, and therefore independently of it, such promissory notes could legally be signed by a mark in the presence of witnesses; and if the signing by a mark previously to the passing of the statute, and therefore independently of it, was a good signature to a promissory note, there is no reason that I can discover for saying that it was not equally a good signature to any other instrument.

The modern Jurists of France, writing under a system of law which, as to the point under consideration, is in effect the same as the ordinance of 1667, treat as invalid a signature made by a mark. Our Legislature, knowing the ordinance of 1667 to be a part of our law, and having in view promissory notes signed by a mark, have treated such notes as being valid, and as giving the

* See Toullier, vol. 8, p. 509, and 3 arrêts there cited. Merlin Rep., vol. 31, p. 162, verbo signature S. I., No. 8. Massé, Droit Com., vol. 6, p. 28, No. 34. The three arrêts referred to by Toullier were, it is to be observed, all rendered in the present century, and although the custom of signing by a mark is of much earlier date than even the ordinance of 1677. (Merlin Rep. vol. 31, p. 163.) I cannot find that it was ever decided in the Parlement de Paris, or indeed in any of the older French courts, that a signature by the making of a mark was invalid.

payee a right of action; thus in effect adopting the English doctrine, as to what constitutes a signature. And now that the Courts here are called upon to determine as to the validity of the same description of signature to another class of instruments, I think it is our duty to follow the doctrine acted upon by our own Legislature, rather than that laid down by the modern French Courts and Jurists; however willing we should have been, under other circumstances, to take them as our guides.

And here is to be observed that there are a great number of instruments, besides promissory notes, with respect to which the Courts in England have held, and with respect to which the Courts in this country it is plain *must hold*, that a signature by the making of a mark is a good signature.

Thus the statute of frauds requires that "all devises and bequests of any lands "and tenements" "shall be *in writing*, and *signed* by the party so devising the "same, or by some other person, in his presence and by his express directions," and according to the decisions of the Courts in England, it is incontrovertible that a testator may *sign* such a devise by the making of his mark.*

The same statute requires that devises of lands and tenements such as already mentioned, shall not only be *signed* by the testator, but also "shall be attested "and *subscribed* in the presence of the devisee by three or four credible witnesses, "*or else they shall be utterly void and of no effect.*"

The word "*subscribed*" is perhaps even stronger than "*signed*," but the decisions of the Courts in England with respect to the two words, "*signed* and *subscribed*," are the same, it being quite certain, according to the English decisions, that *marksmen* † may be the *subscribing* witnesses to a will.

Taylor (No. 974) says, "Under the new will act, as under the statute of "frauds, the testator may *sign* by his *mark* only, though his name does not ap"pear in the body of the will, and the attesting witnesses, whether they can "write or not, may also *sign*" as marksmen; and Greenleaf says (No. 673): "The highest degree of solemnity which is required in the formal execution of "wills, is that which is required in a will of lands, by the statute of frauds; and "this chiefly respects the *signature* and *attestation* by witnesses.....and first as "to the *signature of the testator*. A signature consists both of the *act of writ*"*ing* the parties' name, and thereby finally authenticating the instrument.

"It is not necessary that the testator should write his entire name, his *mark* "is now held sufficient even though he was able to write," and at No. 677, the same author says, "The will must also be attested and *subscribed* by three wit"nesses. And here also, as in the case of the testator, *a mark* made by the "witness *as his signature* is a sufficient attestation."

The 4th section of the same statute, the statute of frauds, declares "that "no action shall be brought whereby to charge the defendant upon any "special promise to answer for the debt, default or miscarriage of another per"son—or upon any agreement that is not to be performed within the space of "one year from the making thereof, unless the agreement upon which such

* 2d Greenleaf, No. 674, and cases there cited. 2d Taylor, No. 962.

† See particularly 4 E. & B., 461. Roberts and Philips, 3 Ad. and El. N. S. p. 117, Harrison v. Elvin.

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"action shall be brought, or some memorandum or note thereof *shall be in* "*writing* and *signed* by the party to be charged therewith."

And the seventeenth section contains a like provision with respect to sales of goods, wares and merchandizes, for the price of £10, or upwards. And the decisions under these clauses * have been in principle, the same as those already referred to, with respect to the signing of a will by the testator, and the attesting of a will by the subscribing witnesses.

Now the several provisions of the statute of frauds, and of the English modern statute of wills, are quite as stringent as to the necessity of proof in writing as the ordinance of 1667, or the ordinance of Moulins; and there is nothing more in the English statutes than in the French ordinances to enable a Court to say, that a signature by the affixing of a mark is a valid signature. And if we say, as under the authorities unquestionably *we must*, that a man may, by a will signed with his mark, dispose of the whole of his estate, real and personal, and that he may (whether he be a trader or not) contract obligations either as principal or surety to an indefinite extent, by papers signed by a mark, it would hardly be possible for us to say that a receipt for a sum exceeding £4 3s. 4d., executed by the making of a mark, is utterly null.

We have before us an English law and a French law; each, in effect, requiring certain classes of instruments to be signed by the party to be charged thereby. According to the English doctrine a signature by a mark is valid; according, I believe, to the French doctrine, such a signature is invalid. We have no text of law as to what constitutes a valid signature; and we cannot under two provisions of law, in principle the same, declare, under one of them that a signature by mark is *valid*, simply because the Judges in England have said so; and under the other, that a signature by mark is *void*, merely because the Judges in France have said so. We must therefore choose between the two doctrines; and as our Legislature have acted upon the English doctrine by treating as valid promissory notes signed by a mark, I think, as has been already said, that we also may adopt the same doctrine, as appears to have been done by the Court below, and I have the less hesitation in doing so, as the English doctrine has already been adopted by the people generally, with the sanction of several of our Courts.

I by no means overlook the danger of fraud, which may be supposed to be incident to the confirmation of the doctrine upon which the judgment of the Court below is based; but I am inclined to think that that danger is more apparent than real. And in this respect it is satisfactory for us to know that no inconvenience appears to have been felt in England, or in the United States, from the system which allows a man to sign his name either as a principal, or as an attesting witness, by the making of his mark.

In this country also, it is beyond doubt that for more than three quarters of a century marksmen have been able, irrespective of any usage, to execute several descriptions of important instruments, and I believe but very few attempts have been made to commit frauds by instruments purporting to be signed by mark.

* See Chitty on Contracts, p. 71, Ed. of 1844, and cases there cited.

Moreover, if considerations of equity and convenience were to be taken into account, we could not fail to bear in mind that a decision reversing the judgment of the Court below, and declaring a signature to a receipt, made by a mark in the presence of two witnesses, utterly null, would place in jeopardy the interests of probably *thousands of persons*, whose rights depend upon instruments executed in the same way as the paper now under our consideration. Neveu and De Bleury.

Upon the whole, although the case is one which, I freely admit, has presented very grave difficulties to my mind, yet, after giving it my best attention, I think it my duty to concur with the majority of the Court in supporting by our judgment a usage which I believe has been very generally acted upon in the colony almost from its establishment; which has been sanctioned, at least indirectly, by our Legislature, and directly by our Courts; and which is in accordance with the English decisions on several statutory enactments, in principle the same as our own law on this subject.

DUVAL, J.—Who dissented from the majority, said that it was unnecessary to cite authorities in this case, because he found them all one way—that was to say, that the mark was not equivalent to a signature. It was, however, alleged that there was a custom in the district of Montreal, which justified this mode of signature being accepted as valid. But judges from all parts of the Province could not be expected to be aware of local customs, and when any special custom was relied upon, it was necessary that it should be uniform, permanent, and proved by particular circumstances. He had taken some pains to ascertain what had been the jurisprudence in Quebec, and from the record of important cases which occurred during the chief justiceship of Mr. Sewell, he ascertained that there had been no case decided in a manner favorable to the present pretension of the defendant. He learned the same from Mr. Justice Caron, who thought there had been a decision; but on enquiry, he [Mr. Justice Duval] learned that that was an error. The judgment must, therefore, be in conformity with the French law, and he must say with Mr. Dalloz, that if there were any custom to the contrary, it was an abuse which ought to be rectified.

MR. JUSTICE AYLWIN said that, fortunately for him, it was thirty-four years since he had been called to the bar in Quebec, and he had a tolerably accurate remembrance of all the important decisions since that time. Previous to the very able treatise of Mr. Toullier being circulated in this country, there never had been any question about the validity of the cross as a signature. But upon Mr. Panet coming to the bench, he took occasion to cite from Toullier his argument to show that the cross was not even a *commencement de preuve par écrit*. *Toullier* was certainly a weighty authority; but it must be remembered that, after all, the modern French law had never been introduced into Canada, and that here there was a jurisprudence. The practice at Quebec had undoubtedly been to give judgment on these marks; but he confessed that Mr. Justice Panet's decision was a good deal applauded, he thought chiefly because Toullier's book was then something new. In the present case the defendant was in possession of a document which was at least *primâ facie* evidence of his case, and the sincerity of which there had been no attempt to impeach. It would be absurd to give

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judgment against him under such circumstances. The defendant was at least bound to deny the authenticity of the alleged receipt, if he did not wish to be bound by it.

Mr. JUSTICE BRUNEAU said, that a long experience in Montreal authorised him to say that the mark attested by witnesses had always been regarded in that district as a valid signature, and that he thought the greatest inconvenience would arise from declaring that the thousands of acknowledgments of payment attested in that manner were to be considered as null.

Judgment confirmed.

Loranger & Frères, for appellants.
H. Stuart, for respondent.
(R.J.P.)

COURT OF QUEEN'S BENCH, 1861.

MONTREAL, 1st JUNE, 1861.

Coram HON. SIR L. H. LAFONTAINE, BART., Ch. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET (C.), A. J.

No. 73.

RENKIN,
(*Plaintiff in the Court below,*)
APPELLANT;

AND

FOLEY,
(*Defendant in the Court below,*)
RESPONDENT.

No. 36.

HELD:—That an agreement that a certain rate of commission shall be *del credere* may be inferred from the fact that, according to the usage of trade, the rate charged is such as is usually charged as a guarantee or *del credere* commission.

This was an appeal from a judgment rendered in the Superior Court at Montreal, on the 30th day of November, 1859.

The action in the Court below was brought to recover the sum of £268 0s. 4d. cy. and interest from the 1st day of March, 1859, and the claim is thus set up in the appellant's (Renkin) declaration: "That at all and every the times and periods hereinafter mentioned the said plaintiff was such manufacturer of fire-arms, carrying on trade and commerce as such at Liège aforesaid, under the name or firm of Renkin Frères, and at the same times and periods the said defendant was such merchant as aforesaid.

That, on or about the ninth day of March, eighteen hundred and fifty-seven, at Liège aforesaid, it was agreed between the plaintiff and defendant that the former should consign to the latter such guns and pistols as the plaintiff might wish to have sold in the Canada market, to be sold by the defendant, the latter to be allowed a guarantee commission of seven and a half per cent. on such sales, and in consequence thereof, that he, the said defendant, should, and he thereby agreed to guarantee the due payment of all such sales at the several periods when they should respectively fall due, and to remit the proceeds of such sales,

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after deduction of all charges and commission in due course to the plaintiff by Bill or Draft for the same payable at a Banker's in London in England.

That in accordance with such agreement the said plaintiff from time to time consigned to the said defendant large quantities of guns and pistols, which he, the said defendant, sold.

That by the account-sales rendered by the said defendant to the said plaintiff respecting such sales, and by the account current also rendered by the defendant to the plaintiff, which are all herewith produced and fyled, and to which the plaintiff particularly refers as forming part hereof, it would appear, as the fact was and is, that he, the said defendant, was indebted to the said plaintiff on the twenty-seventh day of March, eighteen hundred and fifty-eight, in the sum of sixty-nine pounds, seventeen shillings and eightpence, sterling money of Great Britain; on the fifteenth day of May, eighteen hundred and fifty-eight, in the sum of one hundred and thirty pounds thirteen shillings and eightpence sterling money aforesaid, and on the tenth day of June, eighteen hundred and fifty-eight, in the sum of one hundred and sixty-two pounds seven shillings, sterling money aforesaid, and on the tenth day of August, eighteen hundred and fifty-eight, in the sum of ninety-one pounds, six shillings and tenpence sterling money aforesaid, and this after deduction of the defendant's commission, and of all charges whatsoever fairly chargeable on such consignments.

That the only remittances or payments made by the said defendant on account of his said indebtedness, are one Bill or Draft on Sheffield in England for sixty-nine pounds, nineteen shillings and eightpence sterling, and another Draft or Bill on Messrs. Cross & Sons, England, for one hundred and eighty-six pounds fourteen shillings and fivepence sterling. And after giving credit for these amounts the said defendant is presently indebted to the plaintiff for the causes aforesaid, and for balance of interest on such sales aforesaid after due, in the sum of two hundred and nineteen pounds, five shillings and ninepence sterling, and interest thereon since the first day of March instant, as shewn more fully by the account current herewith fyled, which said amount last mentioned, at the current rate of exchange between this city and England aforesaid (which the plaintiff avers to have averaged and to be presently one per cent. premium or advance) is equivalent to two hundred and sixty-eight pounds and fourpence currency."

Then followed the general *indebitatus assumpsit* Counts.

The following is the Plea set up by the respondent, Foley:—

"The defendant for plea to the plaintiff's action, saith, that under and by virtue of an agreement made at Liège in the plaintiff's declaration mentioned on the ninth March, eighteen hundred and fifty-seven, between the defendant and the plaintiff, it was understood and agreed that the plaintiff was to consign to the defendant, all the guns, &c., for the Canada Market or trade, the defendant agreeing to render an account-sales monthly of the guns sold, and also, if the amount should be sufficiently large, to send the plaintiff a Bill or Draft for the amount payable at a Banker's in London; that in conformity with the said agreement the plaintiff consigned at divers times, subsequent to that date, to the defendant large quantities of guns and pistols for sale for the plaintiff on consignment in Canada, upon which the defendant paid and disbursed large sums of

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money for duties payable and other charges, to wit, the sum of two hundred pounds currency; that by the said agreement the said defendant was to receive a reasonable commission for the sale of the said goods, and for all accidental trouble, and was and is entitled thereto, to wit, the sum of sixty pounds, but the said defendant saith that the said agreement did not contemplate nor did the defendant at any time agree to warrant the sales nor to make such commission a guarantee commission, and the defendant saith that the said defendant sold certain of the said goods and furnished account-sales thereof, and remitted large sums of money, to wit the various sums credited in the exhibits of the said plaintiff fyled in this cause; that the plaintiff's exhibits one (1) two (2) three (3) and (4) contain the said account-sales; that afterwards sales divers of said guns and goods were returned and thrown back into the possession of the said defendant, which were not paid for and were moreover in bad condition and order, and never have been realized for by the said defendant, and the same are still on hand unsold and unsaleable amounting in all to the value of [illegible] hundred and ninety-seven pounds, thirteen shillings and one penny [illegible] as per list herewith fyled, which said goods the defendant [illegible] to return to the plaintiff, and hath always been and still is ready to return and give up the same, and hereby offers to deliver the same to the plaintiff or to his agent in that behalf, that in fact the said defendant rendered the said account-sales to the plaintiff and remitted him the full value of the goods sold and realized by defendant, and the said defendant is not now indebted to him, the said plaintiff, in the sum of money demanded by this action, or any part thereof, but has the said goods ready to be delivered to his order, of all which the plaintiff was duly notified; that, save and except as hereinbefore mentioned, all, each and every the allegations, matters and things in the plaintiff's declaration set forth and contained are untrue.

Wherefore the said defendant prays *acte* of his readiness, and offers to deliver and restore the said goods so on hand to the plaintiff or his agent, and prays the dismissal of plaintiff's action with costs of which *distraits* to the undersigned attorneys."

The appellant answered, "that true it is (as stated in said plea) that the defendant agreed to render an account-sales monthly of the guns sold, and also, if the amount would be sufficiently large, to send the plaintiff a Bill or Draft for the amount, payable at a Banker's in London, but, with that exception, and except also in so far as the allegations of the said plea exactly correspond with the allegations in the plaintiff's declaration contained, all and every the allegations, matters and things in the said plea set forth and contained are false, untrue and unfounded in fact, and the said plaintiff hereby expressly denies the same and each and every thereof, and the same are, moreover, insufficient in law."

The following is the judgment which was rendered [illegible] Superior Court, BADGLEY, J.:

"The Court having heard the parties by their [illegible] upon the merits of this cause, having examined the proceedings, proof [illegible] and the admissions made and given by the defendant, and having deliberated; considering that the defendant is liable and accountable to the plaintiff [illegible] balance of the said

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consignments of goods made by the plaintiff to the defendant for sale on plaintiff's account, and by the defendant therefor received, and considering that the defendant is not liable to the plaintiff to guarantee his said sales of the said goods, and that no such guarantee was agreed between them or has been established against defendant; considering that previous to the institution of this action, to wit, on the sixteenth of December, one thousand eight hundred and fifty-eight, the defendant held to the order of the plaintiff a quantity of the said goods, amounting to the sum of two hundred and sixty-one pounds, three shillings and one penny currency as set out in defendant's statement by him fyled in this cause as his exhibit number four (No. 4) as follows, to wit:—(here follows the statement.)

Considering that the defendant hath acknowledged to have received since the date of the said statement in plaintiff's account of the said goods in the said statement mentioned the sum of forty pounds and five pence, from the sale of part of the said goods so held as aforesaid—leaving in defendant's hands of the said goods a balance amounting to the sum of two hundred and twenty-one pounds, three shillings and one penny; and considering that it is admitted by the pleadings and established of Record that the said defendant is indebted to the said plaintiff in the further sum of sixty pounds currency, forming together with the said sum of forty pounds the gross sum of one hundred pounds, wherefrom deducting the commission in the account set out in the said statement there actually was due in cash to the plaintiff at the institution of this action the sum of eighty pounds, eight shillings and three pence, besides the goods in hand as aforesaid: doth adjudge and condemn the defendant to pay to the said plaintiff the sum of eighty pounds, eighteen shillings and three pence, together with the said sum of two hundred and twenty-one pounds, three shillings and one penny, amounting together to three hundred and one pounds, eleven shillings and four pence, with interest on the said several sums from the fifth day of March, one thousand eight hundred and fifty-nine, date of the service of this action, unless the defendants do, within eight days from the service of this judgment upon him, deliver up to the plaintiff the balance of the said goods in the said statement mentioned, less those for which the said sum of forty pounds have been by him received, whereupon the said defendant shall only be held to pay to the plaintiff the said sum of eighty pounds, eighteen shillings and three pence with interest as aforesaid, the whole with costs to be taxed as in a contested action of first class."

Bethune, for appellant, contended:—That the commission charged in the account sales and account current rendered by the respondent was a commission of 7½ per cent, which the appellant established, by the evidence of three competent witnesses examined by himself, and by the cross-examination of Mr. Leeming, who was examined by the respondent, to be a guarantee or *del credere* commission, as understood by the trade in Montreal, and as authorized and recognized by the Tariff of the Montreal Board of Trade, in the absence of any agreement to the contrary. In addition to which, according to the respondent's own showing, he was bound to make monthly remittances of his sales to the appellant, by "Bill or Draft for the amount payable at a Banker's in London," if the

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amounts of the sales should be sufficiently large, no reservation or restriction whatever being stipulated for by respondent, in case of non-collection of his sales. Moreover, the account sales were rendered unreservedly, and in all cases brought down the net amount of sales as an amount *due* to the appellant, at the dates therein indicated. The liability of the respondent was also clearly admitted by him in his letter of the 13th September, 1858 (Paper 29 of the Record). Besides all which there was no sufficient proof that the respondent had on hand the guns and pistols referred to, much less that they were ever sold and returned to him for the causes in his said plea stated.

Under the circumstances, the appellant was clearly entitled to a simple condemnation against the respondent for the full amount of his demand.

Robertson, for respondent:—The appellant certainly brought proof to shew that by the custom of the trade in Montreal, and by the rates of commission "recommended and allowed" by the Montreal Board of Trade (of which a printed copy is produced), the charge of seven and a-half per cent. commission implied a guarantee or *del credere* commission, but no attempt was made to prove the *agreement* to guarantee as alleged.

The evidence adduced by respondent shews that no such custom of trade exists, and fully sustains the appellant's plea.

The item of £137 2s. 1d. for charges and disbursements was rendered to the appellant with the account sales fyled as his exhibit No. 4 (No. 6 of the record), and was by him allowed and adopted.

The items of £69 19s. 8d. and £186 14. 5d. are proved to have been remitted, and are moreover credited in the declaration, and the remaining item as to the amount of goods on hand is proved by the evidence of Record to have been in respondent's possession at the date of the institution of the action, and is in fact considered as proved in the judgment appealed from.

These comprise the whole of the sums claimed by appellant as the value of the consignments made to respondent, less £21 12s. 8d. claimed as interest accrued after the respective dates of said account sales.

The judgment rendered on the 30th November, 1859, was against the pretension of appellant that respondent was bound to guarantee the sales of the goods, and affirmed respondent's right to return the amount unsold.

It is evident that in the Judgment it is assumed that the sums of £40 and £60 therein referred to, and mentioned in respondent's letter of date 13th September, 1858, are proved and admitted to have been due, and to have been received, after the rendering of the statement of amount of goods on hand, dated 16th December, 1858, while, in fact, the letter was written nearly three months before, and before the last remittance of £186 14s. 5d.

By the Judgment the respondent is condemned to pay £301 11s. 4d. with interest thereon from 5th March, 1859, or to return to appellant goods to the amount of £221 3s. 1d. and pay £80 8s. 3d. currency.

The appellant, by his action, only demands £628 0s. 4d. currency.

The respondent considers that it is established of Record, that at the date of the institution of the action he had paid to appellant the full amount realized from the sale of said goods after deduction of the charges and disbursements

therein, and that the goods on hand and held to the order of appellant were the only part of said consignments unaccounted for.

And he submits that the rates of commission to be charged on the sale of goods "allowed and recommended" by the Montreal Board of Trade, and which are relied on by the appellant to establish a guarantee commission against the respondent, are not binding on him; in short, that the Montreal Board of Trade have no legislative power.

That even under a guarantee commission the respondent could only be liable to account for the proceeds of the goods sold, and could not be held to warrant their quality, or be compelled to keep and account for damaged and unsaleable articles.

That the judgment appealed from, in so far as it affirms respondent's right to return to the appellant the goods unsold, and those on hand returned after sale, is right in principle, and to that extent should be maintained; but the respondent contends that the judgment, by condemning him to pay to the appellant the amount mentioned therein, and to return the goods on hand, is contrary to law and the evidence of record, and in that respect should be reformed; and he submits that by the Judgment appealed from, *acte* should have been granted him of his offer to return the said goods, and that the appellant's action should have been dismissed.

LAFONTAINE, CH. J.:—Les deux parties, mécontentes du jugement rendu en cette cause, en ont interjeté appel.

Le demandeur, armurier à Liége en Belgique, convient avec le défendeur de lui envoyer des effets de son commerce pour les vendre à commission en Canada. Cette convention est reconnue par une lettre adressée par le défendeur au demandeur, datée à Liége le 9 Mars 1857, et produite par le demandeur au soutien de son action. Une quantité de fusils et d'autres armes à feu fut en conséquence expédiée de Liége au défendeur à Montréal. Celui-ci les a d'abord tous vendus, mais il prétend qu'il a été obligé d'en reprendre une partie assez considérable, à raison des défectuosités dans leur confection, ou de l'insolvabilité des acheteurs.

Le demandeur allègue dans sa déclaration que le défendeur devait avoir une commission *del credere* de 7½ par cent, s'obligeant par là de garantir au demandeur le prix des ventes qu'il aurait effectuées. Il n'était pas fait mention de cette commission dans la lettre du 9 Mars 1857, aussi le défendeur a-t-il refusé de reconnaître l'existence de cette garantie.

Le défendeur a rendu au demandeur plusieurs comptes de ses ventes, lesquels comptes sont invoqués dans la déclaration. D'après ces comptes, il dit que le défendeur lui devait, au 27 Mars 1858, la somme de £69 19s. 8d. sterling, au 15 Mai de la même année celle de £130 13s. 8d. sterling, au 10 Juin même année celle de £162 7s. sterling, et au 10 Août même année celle de £91 6s. 10d. sterling, et cela après déduction de sa commission et toutes charges payées: que les seules remises qui lui furent faites par le défendeur consistent en deux sommes de [illegible], l'une de £69 19s. 8d. sterling par une lettre de change sur Sheffield en Angleterre, et l'autre de £186 14s. 5d. sterling, par une autre lettre de change sur la maison *Cross and Sons* en Angleterre; que la déduction faite

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de ces deux remises, le défendeur lui devait encore, y comprise une balance d'intérêts, la somme de £219 5s. 9d. sterling avec intérêt sur icelle à compter du 1er Mars 1859, ainsi qu'il appert par le compte courant produit au dossier et fourni au demandeur par le défendeur, laquelle susdite somme, en y ajoutant le change [redacted]368 0. 4 courant, et c'est là le montant reclamé par les conclusions [redacted].

Les comptes détaillés que le défendeur a rendus de ses ventes, et son compte courant, forment-les productions du demandeur Nos. 1, 2, 3, 4 et 5.

Il était que le défendeur a fourni des effets qu'il a été obligé de reprendre après les avoir vendus, et qu'il offre par ses défenses de remettre au demandeur, formé sa production No. 4. Le prix de la valeur en est fixé à £213 13s. 4d., et déduisant la commission de 7½ par cent que charge le défendeur, il reste £197 13s. 1d. sterling qui est la somme mentionnée dans ses défenses, qu'il dit n'avoir pas touchée, et par conséquent n'être pas tenu de payer.

Le commissionnaire Foley a, dans ses comptes rendus à son commettant, Renkin, retenu une commission de 7½ par cent. D'après la preuve faite par Renkin, je suis porté à dire que c'est une commission *del credere* selon l'usage de Montréal, où Foley a vendu les effets en question, et que par conséquent il est garant du recouvrement du prix de vente. A ce point de vue, je suis d'avis qu'il y a eu mal-jugé, et que le jugement dont est appel devrait être infirmé. Les parties ayant admis à l'audience que si la commission était considérée comme une commission *del credere*, les conclusions de la demande devaient être accordées, jugement devait être donné au demandeur pour la somme de £20[redacted] 0. 4d. courant, demandée par les dites conclusions, avec intérêt et les dépens.

The following is the judgment rendered by the said Court of Queen's Bench:—

"The Court *** considering that the said Dominique D. Renkin did consign to the said James Foley, at the times and periods mentioned in the declaration of the said Dominique D. Renkin, filed in the Court below, divers large quantities of guns and pistols to be sold by the said James Foley as a commission merchant for the said Dominique D. Renkin; and that the said guns and pistols were sold by the said James Foley as such commission merchant, for the said Dominique D. Renkin; and that the balance remaining due by the said James Foley to the said Dominique D. Renkin, on account of the sales of the said guns and pistols, is two hundred and nineteen pounds five shillings and nine pence sterling, equal to the sum of two hundred and sixty-eight pounds and four pence currency, as appears by the account sales rendered by the said James Foley to the said Dominique D. Renkin. And considering further, that it appears by the evidence, as well documentary as parol, adduced in this cause, that the said guns and pistols were so sold by the said James Foley for the said Dominique D. Renkin, on a *del credere* commission, and that the said James Foley is liable to the said Dominique D. Renkin to guarantee the sales of the said guns and pistols so made by him, the said James Foley; and considering also, that it does not appear, by the evidence adduced in this cause, that the said James Foley was obliged, as he alleges, to take back any part of the said guns and pistols so sold by him for the said Dominique D. Renkin, in consequence of the said guns and pistols being of bad quality, or in bad order, and considering therefore that

in the judgment of the Court below declaring that the said James Foley was not bound to guarantee the said sales so made by him, there is error, the Court doth in consequence reverse and set aside the said judgment, to wit, the judgment rendered by the Superior Court at Montreal, on the thirtieth day of November, one thousand eight hundred and fifty-nine, in this cause; and this Court, proceeding to render that judgment which the said Superior Court ought to have rendered in the premises, doth condemn the said James Foley to pay to the said Dominique D. Renkin the said sum of two hundred and sixty-eight pounds and four-pence currency, with interest from the first day of March, one thousand eight hundred and fifty-nine, until paid, and costs as well in the Court below as on both the appeals in this cause in this Court."

Judgment of Court below reversed.

Bethune & Dunkin, for appellant and respondent *Renkin*.

A. & W. Robertson, for respondent and appellant *Foley*.

(S.B.)

COURT OF QUEEN'S BENCH, 1862.

IN APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF MONTREAL.
MONTREAL, 2ND DECEMBER, 1861.

Coram SIR L. H. LAFONTAINE, Bart., Ch. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET J.

AUGUSTUS G. DAVIS,
(*Intervening party in the Court below,*)
AND
APPELLANT;

FRANCOIS X. BEAUDRY,
(*Plaintiff in the Court below,*)
RESPONDENT.

HELD:—That if an attachment be issued to seize property in the hands of A, and under the writ the sheriff attaches property in the hands of B, the seizure is null.

That an agent (a horse dealer), in possession of horses, gives a good title to a purchaser in good faith as against his principal, the proprietor, under the consolidated Statutes of Canada, c. 59.

This was an appeal from a judgment (reported 6 L. C. Jurist, p. 134) maintaining the pretensions of the respondent to be regarded as the owner of 4 certain horses, which the appellant had purchased from the defendant.

The respondent on the 6th April, 1859, sued out a writ of *saisie revendication* of 4 dark brown mares against the defendant, one F[illegible] alias Francis Laflamme, of Montreal, trader, alleging that the defendant had illegally taken those horses out of the possession of the plaintiff to the stables of one Henry Irish, with the intention of disposing of them for his own profit.

The horses were seized on the 6th April, 1859, but the appellant maintained that he had purchased them on the previous day, and then got delivery of them, and paid a portion of their price, and that at the time of the seizure they were in his possession.

The appellant fyled an intervention in the cause, which was allowed in the ordinary course. By his intervention the appellant alleged that he had bought the horses on the 5th April, from Laflamme, for $575, of which he had paid

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3575. That the horses were at the time of the seizure in his, the appellant's, possession. That he had bought them in good faith in open market, and if the plaintiff were the owner, of which he was ignorant before his purchase, Laflamme was the authorized agent of the respondent in buying and selling horses, and gave the appellant a good title thereto.

The appellant further pleaded to the action of the respondent: 1stly. That Laflamme had been entrusted with the possession of the horses by the respondent, and that the purchase was protected by the Factors' Act 10 and 11 Vict., ch. 10, s. 1; that in fact Laflamme was the agent of the respondent, authorized to sell, and the appellant purchased in good faith from him. 2ndly. That the respondent and Laflamme were co-partners, and that the sale by one of the co-partners was good.

The respondent, on the other hand, maintained that Laflamme was a mere servant and had no authority to sell.

From this statement it will be seen that the principal issue raised in the case, was whether Laflamme had, either as partner, servant, or agent of the respondent, authority to sell the horses in question to the appellant, or whether the respondent was bound by the acts of Laflamme. In order to arrive at a solution of the question it will be necessary to refer to certain points established by the testimony of the appellant.

A preliminary legal point, however, presented itself, and the appellant submitted that the judgment must be reversed, inasmuch as the seizure was null, *propter defectum auctoritatis*. The seizure was directed against Laflamme to seize horses in his possession, but the horses seized were in the possession of the appellant when seized, having been delivered to him by Laflamme. The elementary principle that the action of revendication ought to be directed against the possessor of the thing (Guyot, Revendication, p. 619) had been affirmed by the old Court of Queen's Bench, which held "that if an attachment be issued to seize property in the hands of A, and under the writ the sheriff attaches property in the hands of B, the seizure is null, and the Court will restore the property to B without inquiring into his right to it. (Lee vs. Taylor, Stuart's Reports, page 538, note.) On this ground, then, the appellant *in limine*, contended that he was entitled to a reversal of the judgment and a restoration of his property.

The case of the respondent is fully set out in the report of the judgment in the Court below, p. 134 of 6 L. C. Jurist.

PER CURIAM.—The Court of our Lady the Queen, now here, having heard the appellant and respondent by their counsel respectively, examined as well the record and proceedings had in the Court below, as the reasons of appeal fyled by the appellant and the answers thereto, and mature deliberation on the whole being had: Seeing that on the sixth day of April, one thousand eight hundred and fifty-nine, when, under the process of revendication sued out by the respondent, the attachment of the four brown mares in question in this cause was effected, the same were not in the custody, power or possession of François alias Francis Laflamme, trader, the defendant in the cause against whom the respondent brought suit.

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Seeing that on the day previous, to wit, the fifth day of April, one thousand eight hundred and fifty-nine, the said four brown mares had been sold to the appellant by the said Laflamme and delivered, and had been removed, from the stables of the said Laflamme, where previously they had been kept and stabled, by the appellant to the stables of one Henry Irish, where they were in livery and keeping at the costs and expense of the said appellant, as being his property and in his actual possession.

Seeing that the said Laflamme had long before the said sale by him made to the appellant, been entrusted by the respondent with the custody and possession of the said mares, and that the said Laflamme was his agent and was authorized to offer them for sale and to make sale thereof.

Seeing that the said appellant purchased the same in good faith from the said Laflamme, who was well known to be a dealer in horses, and accustomed to buy and sell them.

Seeing that the appellant paid to the said Laflamme the price of the said horses in good faith, that is to say, in money at the time of the sale, the sum of four hundred and seventy-five dollars; and that the said Laflamme, by reason of the transaction having been completed after banking hours, consented to wait till the next day for the payment of the sum of one hundred dollars remaining due upon the price, to wit, the sum of five hundred and seventy-five dollars.

Seeing that under the provisions of the statute in this behalf, to wit, the 10 and 11 Viet., ch. 10, Consolidated Statutes of Canada, ch. 59, the said respondent was bound by the sale so made by his agent and factor the said Laflamme, and the appellant in making such purchase was and is fully protected.

Seeing the appellant hath fully established in evidence the allegations contained in his intervention and that the respondent hath wholly failed to make proof his contestation thereof, and to show that the said Laflamme was a mere groom, hostler or stable servant, and not an agent authorized to sell.

Seeing therefore that in the award of judgment in favor of the said respondent, as plaintiff in revendication of the said four brown mares, and the dismissal of the appellant's intervention in the court below, there is error; It is considered and adjudged that the same, to wit, the judgment rendered in the Superior Court at Montreal, on the 30th day March last, be and it is hereby reversed, annulled and, set aside, and, proceeding to render the judgment which the court below ought to have given, it is considered and adjudged that the said attachment effected of the said four brown mares, be and the same hereby is set aside and vacated, the said contestation and plea of the said respondent, to the said intervention of the said appellant is overruled and dismissed, and *main levée* of the said attachment granted in favor of the appellant, the said respondent is further condemned to restore and deliver up the said mares to the appellant within three days from the service upon him of a copy of the present judgment; and further to pay to the said appellant all the costs by him incurred in this behalf as well on his pleas to the respondent's action as upon the intervention in the Court below, together with the costs here in appeal; and, lastly, it is ordered that the record be remitted.

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Dissentiente the Hon. Sir Louis Hypolite Lafontaine, Baronet, the Chief Justice.

Judgment reversed.

Torrance & Morris, for appellant.
Carter & Girouard, for respondent.
(F.W.T.)

EN APPEL DE LA COUR SUPERIEURE, DISTRICT DE MONTREAL.

MONTREAL, 1ER JUIN 1861.

Coram SIR L. H. LAFONTAINE, Bart., Ch. J., AYLWIN, J., DUVAL, J., MEREDITH, J., C. MONDELET, J.

No. 3257.

DE BEAUJEU,
(*Défendeur en Cour Supérieure,*)
APPELANT;

ET

GROULX,
(*Demandeur en Cour Inférieure,*)
INTIMÉ.

JUGE:—1o. Que lorsqu'un propriétaire qui a été notifié de faire des travaux exigés de lui par un procès-verbal n'est pas en retard par des circonstances particulières, le sous-voyer n'est pas justifiable d'entreprendre ces travaux pour lui.

2o. Que d'ailleurs il n'est pas permis par la loi municipale au sous-voyer où à l'inspecteur de faire lui-même cet ouvrage.

Sir L. H. LAFONTAINE, Juge en Chef, s'est exprimé comme suit:

Un procès-verbal homologué en 1858 par le conseil municipal du township de Newton, avait prescrit l'ouverture d'un chemin à travers les 4e et 5e rangs de ce township, entre les 3e et 4e lots, et assujéti les propriétaires à sa confection et à son entretien, dans certaines proportions déterminées, selon la valeur de leur propriétés, telle qu'établie par le rôle d'évaluation.

Le demandeur, sousvoyer du 4e rang, a prétendu qu'après avoir mis le défendeur en demeure de faire faire sa part du chemin il avait été obligé lui-même de la faire; qu'il avait pour cet objet dépensé une somme de £27 7s. 3d., qui, avec une commission de vingt par cent que le statut lui donnait sur cette somme, formait £32 16s 8d., qu'il réclamait par son action.

Il avait déjà poursuivi le défendeur devant un juge de paix, et avait ou renoncé à cette poursuite, ou en avait été débouté, exposant par là le défendeur à des frais assez considérables.

Le défendeur a contesté la demande, a fait entendre plusieurs témoins, et a été condamné à payer une somme de trente piastres seulement, avec intérêt de jour de l'assignation, et des dépens de l'action.*

Le défendeur n'a fait aucune preuve; il s'est reposé uniquement sur son propre *affidavit* que la loi permet de faire en pareil cas (Statut de 1855, c. 100, sec. 60, s.s. 3), laquelle section est comme suit:

"L'affidavit du sousvoyer assermenté devant un juge de paix, constatant que "les formalités de la loi ont été suivies et que les travaux ont été accomplis ou "les matériaux fournis, que la somme demandée en est la valeur véritable et "que le défendeur est la personne qui est tenue de la payer suivant la loi, et le "certificat donné par l'inspecteur qu'au meilleur de sa connaissance et croyance

* Monk, J. (14 May, 1860.)

"les faits exposés dans l'affidavit sont conformes à la vérité, seront une preuve "*prima facie* de ces faits, et s'ils ne sont pas réfutés, ils suffiront pour maintenir "la réclamation et la demande de la municipalité ou du sous-voyer."

Le montant de la condamnation est peu considérable en lui-même, à part des dépens, et à première vue on serait tenté de blâmer le défendeur d'en avoir appelé; d'un autre côté, il est seul juge de ce qu'il lui convient mieux de faire pour son propre intérêt et pour ne pas subir ce qu'il appelle un mauvais traitement et un acte d'oppression; à ce point de vue, on ne saurait trouver à redire à sa conduite.

Il m'est inutile d'entrer dans les questions d'irrégularités ou de nullités que le défendeur a jugé à propos de soulever. Qu'il me suffise de dire que, d'après la preuve, le demandeur ne me paraît pas recevable dans son action.

Dès le mois de mai 1859, le défendeur envoya des hommes sous la conduite d'un nommé Biron, travailler à sa part du chemin. Le sous-voyer ou l'inspecteur du 5e rang les engagea à suspendre leurs travaux jusqu'à ce que le temps des semences fut écoulé. Ces mêmes hommes reprirent leurs travaux sur le chemin dans le mois de juin, et voyant que vers ce temps là le demandeur avec l'inspecteur et plusieurs autres personnes avaient commencé à travailler sur la part du chemin qu'il incombait au défendeur de faire, ils allèrent de la part de ce dernier faire défense au demandeur d'entreprendre et de continuer ce travail; qu'il était prêt et avait le droit de le faire faire lui-même. En conséquence de ces défenses le défendeur cessa son travail. Mais cela ne l'empêcha pas de réclamer du défendeur le prix de ces prétendus services et déboursés de même que s'il avait fait pour lui toute sa part du chemin. La preuve constate que le défendeur n'a pas été en retard, et que, par conséquent, le demandeur n'était pas justifiable d'entreprendre la confection du chemin pour lui. Le demandeur lui-même avait à faire pour son propre compte une part du dit chemin, et il ne l'avait pas encore faite; et s'il l'a faite, ce n'est qu'après que le défendeur a eu lui-même complété ses travaux. Il est également constaté que des parts du même chemin appartenant à d'autres parties n'avaient pas encore été faites lorsque le demandeur commença ses poursuites. Il n'avait pas mis le même empressement à leur rendre le service qu'il avait voulu avoir le mérite de rendre au défendeur. Du reste, lorsqu'une partie est en demeure, la loi n'a pas permis que ce fut le sous-voyer ou l'inspecteur qui fit lui-même l'ouvrage de cette partie; elle a voulu que ce fut une *autre* personne et cela sans doute pour éviter les abus qui pouvaient résulter de l'intérêt personnel que l'officier public aurait à faire les travaux lui-même.

"Le sous-voyer des chemins pourra faire faire ces travaux ou fournir ces ma-"tériaux par quelque autre personne, (sect. 60, s.s. 1)." La commission de vingt pour cent est la seule indemnité à laquelle il puisse avoir droit.

Il me semble que le demandeur s'est trop hâté de faire les travaux pour lesquels il veut maintenant se faire payer, qu'il ne les a ainsi entrepris que dans un esprit de spéculation. Lorsque M. Biron a fait la défense en question au sous-voyer, disent des témoins, il reçut pour réponse: "Si vous avez de l'argent pour payer mon ouvrage, je suis prêt à lâcher, sinon je continuerai de travailler." Ensuite M. Biron leur dit: "je n'ai pas d'argent à vous donner, mais

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j'ai des hommes pour travailler et faire pour M. DeBeaujeu les parts." Le sous-voyer (c'est-à-dire le demandeur) lui a dit qu'il allait cesser là, et qu'il avait une autre place dans les parts de M. DeBeaujeu et qu'ils y *gagneraient plus d'argent*. Le sous-voyer et ses hommes sont partis ensuite, la même journée, et n'ont pas continué leurs travaux. En discontinuant ainsi l'ouvrage, c'était de la part du demandeur admettre qu'il n'avait pas eu le droit de le commencer. Le fait que le demandeur n'avait pas encore lui-même travaillé à sa propre part du chemin; qu'il en était de même de plusieurs personnes qu'il avait employé à ces travaux; qu'il y a pris part lui-même avec ses parents et l'inspecteur, prouve qu'il a commis un abus dans l'exercice de sa charge de sous-voyer. Le défendeur qui évidemment à raison de l'évaluation un peu trop enflée de ses propriétés se trouve avoir été taxé beaucoup plus que les autres propriétaires intéressés dans le chemin, a un juste sujet, à mon avis, de se plaindre de la manière dont il a été traité, et de se récrier contre la conduite du demandeur. Ce serait, ce me semble, autoriser en quelque sorte, dans des cas semblables l'abus dont le demandeur s'est rendu coupable, que de lui accorder la somme de $25, bien que cette somme puisse être la valeur des travaux qu'il a faits sur la part du chemin du défendeur. Je serais donc disposé à infirmer le jugement dont est appel et à débouter le demandeur de son action.

Le jugement de la Cour est motivé comme suit:

La Cour * * * * considérant que le défendeur appelant n'était pas en demeure de faire ou faire faire sa part du chemin en question, et que le demandeur intimé n'avait pas le droit et n'était pas justifiable dans le circonstances de faire ou faire faire pour le dit défendeur la dite part de chemin ou aucune partie d'icelle, et que le juge en première instance a fait une appréciation inexacte de la preuve et que partant il y a eu mal-jugé par le jugement dont est appel, a infirmé et infirme..... Jugement Infirmé.

Laflamme, Laflamme & Daly, pour l'appelant.

Doutre & Daoust, pour l'Intimé.

(P.R.L.)

COUR DE CIRCUIT, 1862.

STE. SCHOLASTIQUE, 16 MAI 1862.

Coram BADGLEY, J.

Biroleau dit *Lafleur* vs. *J. G. LeBel.*

JUGE:—Que le défendeur a droit de contester la validité d'un affidavit et d'une saisie-arrêt avant jugement émané sur tel affidavit alléguant que le défendeur est sur le point de cacher et recéler et cache et recèle ses biens, dettes, effets dans la vue de frauder ses créanciers, par une exception à la forme et que dans l'espèce l'exception à la forme sera maintenue, vû que le défendeur a établi qu'il n'avait ni caché ni recélé ses effets.

L'action est portée en recouvrement d'un billet promissoire de $72—signé par le défendeur en faveur de Dosithé Dupras et endossé par ce dernier en faveur du demandeur, et dû depuis longtemps. Le demandeur a donné son affidavit alléguant que le défendeur était sur le point de cacher ses biens, dettes et effets et qu'il les cachait et récelait dans la vue de frauder ses créanciers en général et le demandeur en particulier, et demandait l'émanation d'une saisie-arrêt avant jugement, en conséquence.

Le défendeur répondit à l'affidavit et à la saisie, par une Exception à la forme, alléguant que les alléguéa contenus en l'affidavit étaient faux et mal fondés, qu'il n'avait jamais caché ni recélé ses biens, dettes et effets, mais qu'au contraire il avait fait des acquisitions nouvelles et qu'il avait en mains des valeurs pour un montant considérable.

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Le demandeur prétendit que la voie ordinaire pour attaquer un affidavit était par motion et la saisie arrêt avant jugement par action en recouvrement de dommages. Le défendeur soutint que la décision de la Cour d'Appel dans la cause de Molson's Bank vs. Leslie, validait le procédé de l'Exception à la forme.

BADGLEY, J.—J'ai toujours entretenu l'opinion que l'affidavit et la saisie arrêt avant jugement devaient être attaqués par l'exception à la forme, mais la jurisprudence suivie jusqu'à la décision qui a été invoquée, m'obligeait de suivre une pratique contraire. Je vois que dans une cause de Filion vs. Pacquet portée dans le Terme, Son Honneur le Juge Berthelot a maintenu l'Exception à la forme sous les mêmes circonstances, en sorte que je suis d'avis que l'Exception à la forme a été valablement présentée. Au mérite, le défendeur ayant fait preuve de ses allégués, et le fait de la déconfiture du défendeur n'étaient pas suffisant pour justifier l'émanation d'une telle saisie, en la supposant prouvée. L'Exception à la forme est maintenue avec dépens distraits aux avocats et jugement pour le demandeur pour le montant de son billet.

Chs. Marcil, pour le demandeur.

Ouimet, Chapleau & Mathieu, pour le défendeur.

(C. C.)

SUPERIOR COURT.

MONTREAL, 31st MAY, 1861.

No. 1720.

Exparte *James Gamble*, Pet. for Confirmation of Title.

Coram MONK, J.

HELD :—That a judgment registered against the *auteur* of a party who at the time of the rendering and registering of such judgment is in open and public possession of property, as proprietor under a title does not create a *hypothèque* upon the property, although the title of such party, so in possession, be not registered.

In this case the Registrar's Certificate disclosed a number of judgments registered against the one of the *auteurs* of the petitioner. By a pleading in answer to the Registrar's Certificate, the petitioner alleged that the defendants mentioned in those judgments were not at the time of the rendering or registering of the same seized or possessed of the property, but that the same was at all such times in the [illegible] and public possession of one Drolet (a subsequent *auteur* of the petitioner) as proprietor under good and sufficient titles. The petitioner, having been permitted by the Court to adduce evidence in answer to the Registrar's Certificate, established in Evidence the facts alleged by him. The deed to Drolet, under which he held the land as proprietor, had never been registered.

The Court maintained the pretension of the petitioner that the judgments did not constitute *hypothèques* upon the land, the same having been previous to

Ex parte Gamble.

the dates of such judgments sold to Drolet and being in his open possession as proprietor; and set aside that portion of the Registrar's Certificate which disclosed such judgments as being *hypothèques* upon the property. (Consol. Stat. L. C. Cap. 37, Sec 5., Sub Sec. 2, also Sec. 47.)

Rose & Ritchie, for petitioner.

(T. W. R.)

IN THE PRIVY COUNCIL.

COUNCIL CHAMBER, WHITEHALL, 10TH FEBRUARY, 1862.

Coram LORD CHELMSFORD, LORD KINGSDOWN, SIR J. L. KNIGHT BRUCE, L.J., SIR G. J. TURNER, L.J., SIR EDWARD RYAN AND SIR JOHN TAYLOR COLERIDGE.

MACFARLANE ET AL.

(*Tiers-Saisis and Respondents in the Courts below*),

APPELLANTS;

AND

LECLAIRE ET AL.,

(*Plaintiffs and Appellants in the Courts below*,)

RESPONDENTS.

APPEAL—PRIVY COUNCIL—JURISDICTION.

HELD:—1st. Her Majesty in Council is not precluded from entertaining a petition to rescind leave to appeal, by the fact that leave to appeal was granted by a colonial court under the authority of a colonial Statute.

2nd. In determining the question of the value of the matter in dispute, upon which the right of appeal depends, the correct course is to look at the judgment as it effects the interest of the party who is prejudiced by it, and who seeks to relieve himself from it by an appeal.

3rd. The matter in dispute upon which this appeal was founded exceeded in value £500.

This was a petition to rescind leave to appeal granted by the Court of Queen's Bench. The respondents brought an action in the Superior Court at Montreal against one Delesderniers to recover the amount of certain promissory notes and interest, amounting in the whole to the sum of £417 0s. 8d. cy. The respondents in their declaration claimed a writ of "*saisie-arrêt*," or attachment before Judgment against the goods, merchandise, chattels, monies, credits and effects of Delesderniers, which were alleged to be in the hands of the Appellants, and prayed that they might be summoned as *tiers-saisis*. The defendant suffered Judgment by default, and was condemned to pay to the respondents the sum of £417 0s. 8d. cy. Upon the writ of *saisie-arrêt* being issued the Appellants made their declaration, denying that they had any goods, merchandise, chattels, credits, or effects of Delesderniers in their possession, and stating that the goods, merchandise, and chattels, &c., alleged to be the property of Delesderniers had been purchased by the appellants from one Prevost for the sum of £1642 14s. 5d. The respondents contested this declaration, alleging that the transfer of the goods, merchandise, chattels, &c., by the said Prevost to the appellants was fraudulent and void as against the creditors of the defendant and *nommément* as against themselves. The Superior Court dismissed the contestation on the ground that they could not declare the transfer of the property to the *tiers saisis* by Prevost to be fraudulent and void, Prevost not being a party to these proceedings. From this judgment an appeal was taken to the Court of Queen's Bench when the judgment of the Superior Court was reversed but leave was given to the appellants to appeal against this judgment.

Macfarlane and Leclaire.

The Solicitor General (*Sir R. Palmer, Q. C.*) and *Charles Pollock*, for the petitioners, cited D'Orliac vs. D'Orliac (4 Moo. P. C. 374); Coutumes de Paris, arts. 177, 178, 179; Cuvilier vs. Aylwin (2 Knapp, 72); and referred to the 31 Geo. III. c. 31.

Sir Hugh Cairns, Q. C., and *Wickens* for the appellants.

LORD CHELMSFORD delivered the judgment of their Lordships. The question upon this petition to dismiss the appeal for want of jurisdiction turns entirely upon that part of the 30th section of the Act of the Province of Lower Canada passed in the 34 Geo. III, c. 6 (*Vide* Consol. Stat. L. C. cap. 77, s. 52), which enacts that the judgment of the Court of Appeals of the Province shall be final in all cases where the matter in dispute shall not exceed the sum or value of £500. The learned counsel for the appellants have raised a preliminary objection to the reception of the petition, which must first be disposed of. When the judgment appealed from was pronounced, the Court, upon the application of the appellants, made an order granting them leave to appeal; and it is contended that until this order, proceeding from a colonial court, construing a colonial act, is set aside, the right to appeal which it confers cannot be questioned. But there is no ground for this objection. If the appellants had a right to appeal notwithstanding the Act, an application for the leave of the Court was unnecessary; and if an appeal was excluded by the Act, the order was an excess of jurisdiction, and must be regarded as a nullity. At all events the petition to dismiss the appeal on the ground of want of jurisdiction having been referred by Her Majesty in Council to the Judicial Committee, the order of the Court below cannot be allowed to stand in the way as an impediment to their Lordships determining the competency of the appeal. In order to ascertain the value of the matter in dispute it is necessary to advert to the nature of the proceedings. The petitioners brought their action in the Superior Court of Montreal against one Delesderniers to recover the amount of certain promissory notes and interest, amounting in the whole to a sum of much less than £500 sterling, viz: the sum of £417 0s. 8d. Canadian currency. By a proceeding analogous to the process of foreign attachment in the city of London, the petitioners, with their declaration, claimed a writ of *saisie arrêt*, or attachment before judgment, against certain goods of the debtor, which they alleged to be in the possession of the appellants, and prayed that they might be summoned as *tiers saisis* or garnishees. The debtor Delesderniers suffered judgment by default in the action, and was condemned by the Court to pay the £417 0s. 8d., the sum demanded. Upon the writ of *saisie arret* being issued against the appellants, they made a declaration denying that they had in their possession any goods of the debtor, and alleged that the goods claimed by the petitioners to have been the property of the debtor were purchased by the appellants from one Prévost for the sum of £1642 14s. 5d. Canadian currency. The petitioners, in reply, alleged facts to shew that the transfer of the property was fraudulent and void as against the creditors of Delesderniers, and particularly (*nommément*) as against themselves. The Superior Court dismissed the contestation—that is, the proceedings against the appellants as garnishees—on the ground that they could not declare the assignment of the property to be void without Pré-

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vost being made a party to the action. But, upon appeal, the Court of Queen's Bench reversed the judgment of the Superior Court, and ordered the appellants to make a further declaration upon oath of the goods comprised in the alleged transfer which were unsold at the date of the *saisie arrêt* or attachment. The effect of this judgment of the Queen's Bench was to render all the goods contained in the assignment from Prévost, which were in possession of the appellants at the time of the attachment, liable to the claims of the creditors of the original defendant; the petitioners, by issuing their attachment, securing to themselves priority of satisfaction unless the debtor was insolvent, in which case they would only be entitled *pari passu* with the rest of the creditors. The course of proceeding under such a judgment is to give notice to the creditors to come in and prove their debts by a particular day, after which a final distribution of the property is made amongst them. In determining the question of the value of the matter in dispute, upon which the right to appeal depends, their Lordships consider the correct course to adopt is to look at the judgment as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by an appeal. If his liability upon the judgment is of an amount sufficient to entitle him to an appeal, he cannot be deprived of his right because the matter in dispute happens not to be of equal value to both parties; and therefore, if the judgment had been in his favour, his adversary might possibly have had no power to question it by an appeal. In this case, the effect of the judgment was to place in jeopardy the whole of the goods contained in the assignment from Prévost, for which a sum of £1642 currency had been paid. This property became immediately liable to satisfy the claims of creditors of the original defendant to an uncertain and indefinite amount. It may turn out in the result, that the petitioners are the sole creditors of Delesderniers, and therefore that the goods in the possession of the appellants may have to bear no greater liability than the amount of the debt due to the petitioners. But all this was contingent at the time of the judgment; and it is the immediate effect of the judgment which must be regarded, as the right to appeal arises as soon as it is pronounced. The petitioners, however, contend that the judgment is interlocutory merely, and therefore that an appeal against it is premature. But although the judgment is interlocutory in form, it is final in its effects upon the rights of the appellants. The goods which they claimed as their own are finally and conclusively fixed by the judgment to be the property of the original debtor, and must be applied in satisfaction of his debt; and there is no mode by which the appellants can be relieved from it except by an appeal. Their Lordships are of opinion that, under the circumstances, the matter in dispute upon which the appeal is founded exceeds the value of £500, and that the petition to dismiss the appeal must, therefore, itself be dismissed, with costs.

Petition dismissed.

Sir R. Palmer, Q.C., Sol. Gen., and *Charles Pollock*, for Petitioners.

Sir Hugh Cairns, Q.C., and *Wickens*, for appellants.

(R.J.P.)

COURT OF QUEEN'S BENCH, 1860.

G.T. Railway Company vs. Mountain and Huston.

MONTREAL, 31ST MAY, 1860.

Coram HON. SIR L. H. LAFONTAINE, BART. CH. J., AYLWIN, J., DUVAL, J., MONDELET, (C.) A. J., BADGLEY, J., *ad hoc*.

Nos. 83 & 93.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
(Defendant in Court below,)
APPELLANT,

AND

MOUNTAIN & HUSTON,
(Plaintiffs in Court below,)
RESPONDENTS.

HELD:—That a common carrier, in the case of goods placed in his custody and destroyed by a fire which could not be accounted for otherwise than by the presumption that it was the result of spontaneous combustion, caused by waste kept by the carrier in the building where he temporarily stored the goods, is liable for the loss, although he may have previously notified the public that he would not be responsible "for damages occasioned by delays from storms, accidents, or unavoidable causes, or from damages from fire, heat, &c."

This was an Appeal from the Judgment rendered by the Superior Court at Montreal, of which a full report is to be found in the 3rd L. C. Jurist, at pages 269 *et seq*.

BADGLEY, J., *dissentiens*:—Both these actions arose from claims upon the Grand Trunk Company for goods, which, while in the warehouses of that Company at Point Levi, were destroyed by fire. I do not differ from the rest of the Court with respect to the liability of common carriers; but there were exceptions which diminished the liability, when the goods were carried in accordance with a special contract. That was the defence of the company in this case—that the goods were destroyed by *force majeure* and that they were accepted by the Company under a special contract. At the time of the fire the Railway Company was only running trains twice a week. The goods were intended to go by the Friday train, but were too late and were therefore kept over to go by the Tuesday train, but unfortunately on Monday night the station took fire and the merchandise was burned. It was in evidence the Company had previously to this notified the public that they would not be responsible for losses by fire, and that this was communicated to the public by advertisement, and by papers stuck up in the various stations. It was only necessary to add on that head that the knowledge of such notice having been given was satisfactorily brought home in both cases; in Huston's case it being proved that he had actually read the notice. Under these circumstances the case turned chiefly on the question of negligence—whether the Company, not being liable in all the responsibilities of common carriers, were yet liable for all negligence to take the proper precautions to secure the goods committed to their charge. Now, the authorities showed that different degrees of diligence were required under different circumstances. When a thing is delivered for the benefit of the *bailee* alone the utmost degree of precaution is required; and when for the advantage of the *bailor* only a small degree of care is requisite; when for the advantage of both, as in the case of goods to be carried for a profit—then so much care

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as a prudent man would take of his own goods. [His Honour quoted several authors to show that this rule with respect to negligence, was the law not only of England but of Europe.] As to the responsibility of common carriers, I admit that it extended in England to everything but the act of God and the King's enemies. But the civil law excepted robberies and in general *force majeure* so that steamboat proprietors in Louisiana had not been held liable for loss by fire when proper precautions had been used. In our own Courts it had been held that the carrier was responsible for loss by fire if caused by any human act. However, the point here was that the goods were accepted under special contract—the carrier undertaking to convey the goods at less than the ordinary rates, and the other party agreeing to accept a less amount of liability on the part of the carrier. According to Story such contracts might be implied, and might be made by public notice duly given by carriers, of their terms and liabilities; and when the knowledge of such notice was brought home to the *bailors*, it was deemed proof of the contract, and converted the general law into a special liability. [His Honour here quoted several English cases, to show that the same view of the law prevailed there.] I think, therefore, that here the liability was nothing more than to use that degree of precaution, which a provident man takes of his own property; and then what were the facts? The Station Master, at a late hour of the night of the fire, went round the premises and into the room adjacent, to that where the fire originated, looked through a glass window and saw nothing wrong, and then returned to bed.—But the Company also kept a night watchman, who examined the premises at two or three o'clock in the morning, when everything appeared to be right. The only evidence as to the origin of the fire was that of two witnesses who thought it occurred from the spontaneous combustion of cotton waste used for wiping the oil off the machinery. But there was nothing to show neglect in that case. The Company had themselves lost all their buildings, and they had taken every precaution that could be required. It might indeed be said that they ought to have taken precautions against this spontaneous combustion of the waste. But there was no proof that the fire had really arisen from that cause. I think, therefore, the Company ought not to be held liable, and that the judgment of the Court below should be reversed.

LaFontaine, Ch. J.—Dans sa déclaration, le Demandeur (Mountain) allègue que, le 12 Dec. 1856, il a confié aux soins de la compagnie défenderesse, à la Station du chemin de fer à la Pointe Lévy, certaines marchandises pour être par elle transportées de là à Montréal où elles devaient être délivrées au nommé Alexander McKenzie Forbes, les dites marchandises valant £73 14s. Que, par le manque de soins et la négligence de la Compagnie, les marchandises n'ont pas été ainsi transportées, mais qu'au contraires elles ont été perdues.

Conclusions à ce que la Compagnie soit condamnée à payer au Demandeur la valeur, c.-à-d. £73 14s. avec intérêt et dépens.

Par ses exceptions péremptoires, la Compagnie reconnait d'abord que, le 12 Dec. elle a reçu du Demandeur les susdites marchandises pour les transmettre et délivrer à Forbes à Montréal, sur ses chars employés spécialement au transport du fret, ce qui était connu du Demandeur; elle ajoute qu'il n'y avait alors que trois départs ou trains par semaine, savoir les Lundi, Mercredi et Vendredi,

et ce à la connaissance du Demandeurs et de tous les commercants faisant des affaires avec la Compagnie; que les marchandises ayant été déposées un Vendredi entre les mains de la Compagnie, à la Pointe Lévy, elles ne pouvaient, dans l'ordre ordinaire, et d'après les arrangements susdits, partir et être transportées de la Pointe Lévy à Longueuil que par les trains du Lundi 15 Décembre 1856; que le Lundi matin, 15 Décembre, et la nuit précédente, il y eut une chûte de neige si considérable et un mauvais temps si grand que la Défenderesse ne put pas faire partir de la Pointe Lévy le train pour le fret, que, par suite de ce retard, occasionné par le mauvais temps, les marchandises restèrent dans les hangards et bâtisses de la Défenderesse à la Pointe Lévy, dans les chars, jusque durant la nuit de Lundi au Mardi, c'est-à-dire du 15 au 16 Déc. 1856; que, durant cette nuit, un incendie détruisit toutes les bâtisses de la Compagnie à la Pointe Lévy, et, par conséquent, les marchandises du Demandeur, et celles de plusieurs autres personnes; que la Compagnie elle-même perdit tous ses livres et papiers, et souffrit une perte d'au moins £20,000; que l'incendie a été purement accidentel, et est équivalent à un accident occasionné par cas fortuit, ou force majeure, et duquel la Défenderesse ne peut aucunement être responsable; qu'immédiatement après l'incendie, il y eut une enquête, et qu'il a été impossible d'en découvrir la cause ou l'origine. Puis, par *amendement* ajouté à ses exceptions, la Compagnie allègue que, durant toute l'année 1856, elle avait publié et tenait affichées les conditions auxquelles elle faisait le commerce de transport d'effets, depuis la Pointe Lévy à Longueuil, aux Stations intermédiaires, et, entre autres choses, aurait fait connaître publiquement à tout le monde, et au dit Demandeur en particulier (qui avait lui-même auparavant fait transporter des effets sur le dit chemin de fer de la Défenderesse aux mêmes conditions), qu'elle n'était pas responsable et ne serait pas responsable des accidents qui surviendraient ou arriveraient par suite de délais occasionnés par le mauvais temps, le feu, la chaleur, le froid, ou autres choses de même nature, ou de force majeure, et en dehors de la prévision humaine.

Les exceptions péremptoires sont suivies d'une défense au fonds en fait.

La réponse aux exceptions est générale. A l'Enquête, la Défenderesse a admis par écrit le reçu (Exhibit. du Demandeur No. 1.) de plus la réception, par la Compagnie, des marchandises du Demandeur, le 12 Déc. 1856, pour être transportées à Montréal, ainsi que porté dans le dit reçu et enfin la valeur des dites marchandises, laquelle était de £73 14s. De son côté, le Demandeur a admis par écrit que les marchandises en question avaient été détruites par le feu dans la nuit du 15 au 16 Déc. 1856, dans la Station de la Compagnie, à la Pointe Lévy, la quelle Station avait aussi été entièrement détruite par le même feu.

Cinq témoins ont été entendues de la part de la Défenderesse:

Le premier est le nommé Symmons, employé au service de la Défenderesse. Lors de l'incendie, il restait dans le hangard de la Station. "The goods referred to were actually packed in freight car for shipment, and would have been sent off on Monday, the day before the fire, but for a storm of snow, a pretty smart storm. We ran no freight train that day. We thought we could not do it. It was very cold also that day. It was not an extraordinary stormy day, though very sharp, the snow was drifting a good deal. . . . . "Before going to bed on the night of the fire, I did what was my invariable practice, namely, walk

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round the building, just to see that all was safe. I saw no fires or lights lying negligently about any where. I passed by the lamp room, which had a half glass door, and saw no spark of light in that lamp [illegible]. I was suddenly awakened out of my sleep on the night of the fire by the alarm of fire, and I discovered the Station was on fire, and the flames were proceeding from the upper part of the lamp room, and the fire proceeded irresistibly".....Parlant de ce qui avait pu être la cause de l'incendie, le témoin dit: "It was the combustion of oily waste used for cleaning lamps, in my opinion.....In the lamp room are kept such waste, also oil for the lamps, and lamps and wicks, turpentine and other lamp apparatus. Such stuff as that waste would be liable to spontaneous combustion. Of course I did not see the fire actually commence, but I cannot attribute it to anything else but that. I think it was an accidental fire."

Le 2e témoin, est le nommé Carroll, aussi au service de la Compagnie: "I was night watchman that night.....walked round at a late hour.....saw no light in the lamp room.....afterwards saw fire in the lamp-room. I was so confused at the moment that I did not give an immediate alarm. I forced in the lamp-room door. The greatest body of the fire was in a corner of the room where I saw the waste on fire....."

Ce témoin avait aussi dit: "I do not know that on the day before the fire occurred, there was a snow storm, but it was a cold night, and there was snow on the ground then....."

Le 3e témoin est le nommé Webster, surintendant du Grand Trunk, lors de l'incendie; il restait alors dans l'Hotel Victoria, près de la Station à la Pointe L[illegible]. "The cause of the fire could never be explained. It was supposed to be [illegible]neous combustion by waste, at any rate accidental....." En conséquence de la chute de neige de Lundi, 15 Déc. le témoin empêcha le train de [illegible] partir, et ne fit partir que celui des passagers avec deux machines à [illegible]. "I believe there were not more than two engines at the Point Levy Station, available on that morning."

Le 4e témoin, est le nommé Pennington, aussi au service de la Compagnie ".....I made examination in the causes of the fire.....and I could find nothing to indicate it to be other than spontaneous combustion; all other cause for it is unknown.....*Waste such as necessarily must be kept in such a lamp room has been known to ignite spontaneously, particularly if oiled.*"

Le 5e et dernier témoin est le nommé James Meagher, au service de la Compagnie jusqu'au mois de Juin 1856: "I have seen as much as fifty pounds of waste in the lamp-room at Pointe Levy, and I have seen as little as ten pounds. The latter quantity was too little."

Il n'est pas prouvé, dans cette cause, que le Demandeur ait eu avis du placard contenant les conditions que la Compagnie avait cru devoir établir d'elle-même pour se soustraire à toute responsabilité, cela a été admis lors de la plaidoirie à l'audience. Ainsi, on ne pourrait pas même inférer que, dans cette occasion, il se soit soumis à ces conditions.

Il est prouvé que l'édifice en question était tout de bois, que la chambre aux lampes en faisait partie; et qu'elle n'était séparée du reste de l'édifice que par une cloison de bois. La seule cause de l'incendie n'a pu être, au dire des témoins de la Défenderesse, que la combustion des rebuts de coton (waste), qui

a du avoir lieu dans cette chambre aux lampes, lesquels rebuts étaient plus ou moins imprégnés d'huile. Il y avait aussi là de l'huile et d'autres matières inflammables. Ce témoignage, surtout celui de Pennington, est la condamnation de la Compagnie. Toutes ces choses inflammables d'elles-mêmes n'auraient pas du être laissées dans ce grand édifice en bois. Elles auraient du être placées dans un édifice séparé, assez éloigné du premier pour qu'en cas de combustion, le feu ne pût se communiquer d'un [illegible]. Il y a, dans ce fait, une imprévoyance injustifiable de la [illegible] une négligence coupable dont elle doit, ce me semble, [illegible]. L'incendie n'a pas été le résultat d'un *cas fortuit*, d'un [illegible] c'est un accident, c'est un accident que la Compagnie aur[illegible]aste such as necessarily must be kept in such a lamp-room," [illegible]nington, "has been known to ignite spontaneously, particularly if oiled [illegible].

Il me semble que la jugement dans la cause de Mountain dont est appel devrait être confirmé.

L'autre action, celle de Huston, est semblable à celle intentée par Mountain. L'enquête est la même, excepté en ceci. Lay, le 5e témoin en la présente cause, dit que depuis Mars 1855 à Mai 57, il était l'agent de la Compagnie à la Station de Stanfold où demeurait Huston, le Demandeur, que durant ce temps là il lui a souvent délivré des notes d'avis (advice notes) semblables aux Blancs, marqué B, produit en cette cause, que le Demandeur a du lire les conditions imprimées au dos de ces lettres, parmi lesquelles conditions se trouve celle de non responsabilité. Il dit aussi que le tarif des marchandises, marqué A, produit en cette cause, avait été affiché dans toutes les Stations, entr'autres, dans celle de Stanfold, et que tout individu pouvait le lire, et que le Demandeur a du le lire.

J'en vins à la même conclusion que dans la cause de Mountain.

AYLWIN, J.—Said that he concurred in the views expressed by His Honor the Chief Justice, but he objected to the words "common law liability of a common carrier" which were to be found in the judgment of the Court below.

Judgment of the Court below confirmed.

Cartier & Pominville, for Appellant.
Robert McKay, Counsel.
Bethune & Dunkin, for Respondents.
(S. B.)

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 3RD JUNE, 1862.

Coram LAFONTAINE, C.J., DUVAL, J., MEREDITH, J., C. MONDELET, J.

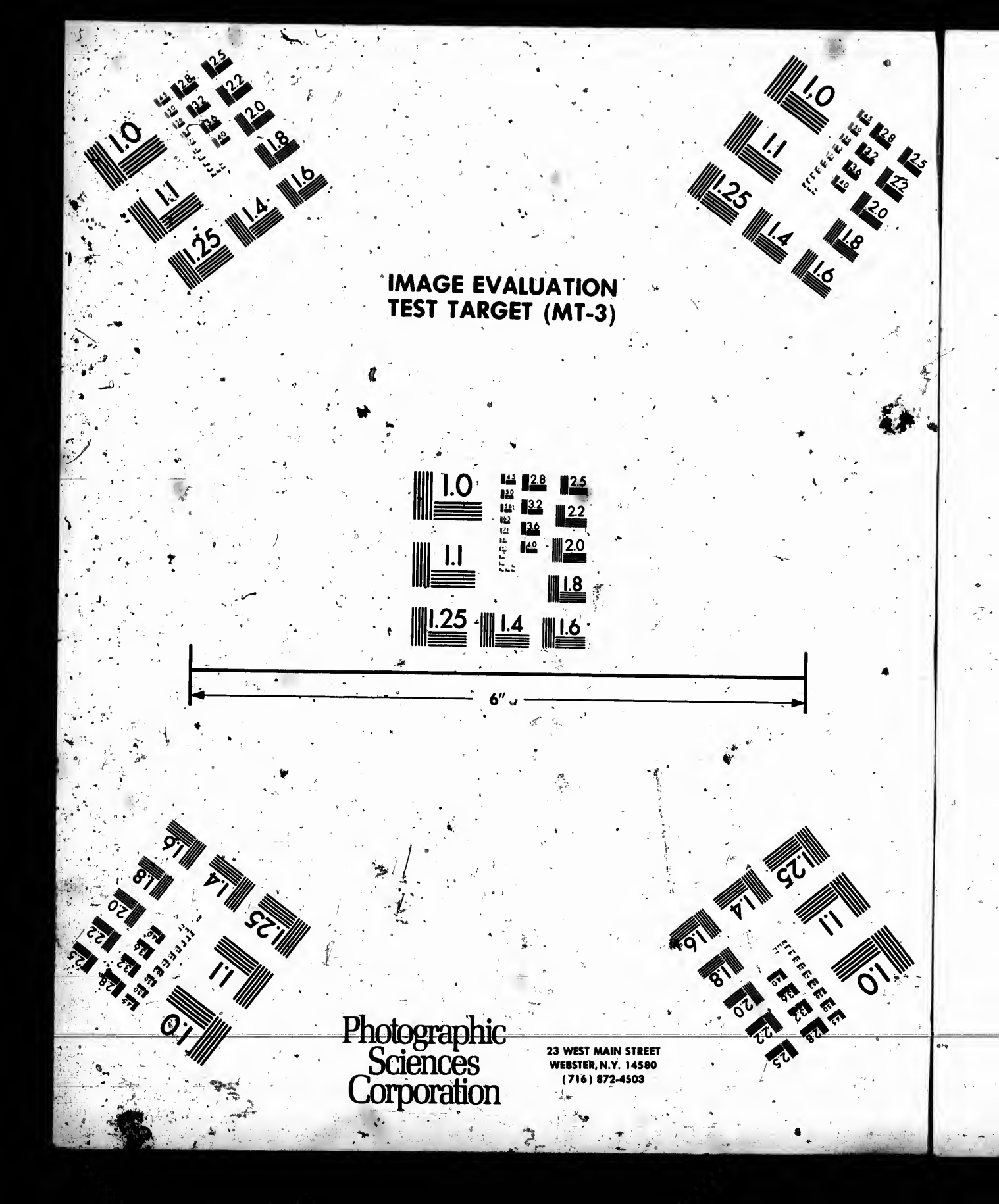
DAME JOSEPHTE VIGER,
(*Plaintiff in the Court below.*)
APPELLANT.

AND

JOSEPH BELIVEAU,
(*Defendant in the Court below.*)
RESPONDENT.

Held.—That a writ of appeal will be quashed and annulled, which does not bear the signature of the attorney suing it.

The attorney suing out the writ of appeal in this case omitted to sign it as required by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23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

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On the first day of the June term, 1862, *Girouard*, for the Respondent, moved the Court to quash the writ because it did not bear the signature of the attorney suing it out.

On the same day, *V. P. W. Dorion*, for the Appellant, moved the Court to be permitted to amend the writ by putting the signature of the attorneys of the Appellant to the writ.

The motion of the Appellant was granted, and the motion of the Respondent was rejected, but with the costs of the two motions to the Respondent, inasmuch as his motion was well founded.

Dorion, Dorion & Senécal, for Appellant.

D. Girouard, for Respondent.

(F. W. T.)

MONTREAL, 1ST JUNE, 1861.

Coram HON. SIR L. H. LAFONTAINE, Bart. Ch. J., AYLWIN, J., DUVAL, J., J. MEREDITH, J., and MONDELET, (C.) A.J.

No. 95.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
(*Defendant in Court below*,)
APPELLANT,

AND

WEBSTER,
(*Plaintiff in Court below*,)
RESPONDENT.

Held.—That in an action for damages against a Railway Company for unduly refusing to register a transfer of shares during several months, the true measure of damage is the difference between the price of the stock at the time of such refusal and its price at the time of the subsequent registration of the transfer.

This was an Appeal from a judgment rendered by the Superior Court at Montreal, on the 31st of March, 1860, condemning the Appellant to pay to the Respondent the sum of £1382 8s. 9d. cy., and interest and costs.

The action in the Court below was brought for the recovery of damages alleged to have been incurred by reason of the refusal of the Appellant to register certain transfers of stock by the Respondent during several months. A full report of the pleadings will be found in the 2d L. C. Jurist, pages 221 *et seq.*, and in the 3rd L. C. Jurist, pages 148, *et seq.*

The following is the Judgment which was so rendered in the Superior Court:—

The Court....considering that the Defendant hath not sustained the special demurrer by the said Defendant fyled in this cause to a part of the declaration and demande and that this special demurrer is unfounded in law doth dismiss the same; considering further that the Defendant hath not established in evidence the material allegations of the plea to the Plaintiff's action; considering that the Defendant was not justified in the refusal to register the transfers of the shares of stock, mentioned and set forth in Plaintiff's declaration, when required to make such enregistration by the transfers of said shares of stock, and seeing moreover that such refusal was contrary to law; considering that it appears by the evidence produced by the said Plaintiff in this cause that in consequence of such refusal by and on the part of the said Defendant the Plain-

tiff hath sustained loss and damage on the said two hundred and sixty-eight shares of stock so transferred by him to the amount of one thousand three hundred and eighty-two pounds eight shillings and nine pence currency, by reason of the depreciation in the value of the same, to wit, on fifty-eight shares transferred to Messrs. Lemesurier Routh and Company between the twenty-fourth day of December eighteen hundred and fifty-three, date of the notarial demand made on Defendant to enregister the same, and on the fourth day of April one thousand eight hundred and fifty-four, date of registration, and after the rate of 15 pounds per centum, also depreciation on two hundred and ten shares transferred to the Montreal City and District Savings Bank between the ninth day of December eighteen hundred and fifty-three and thirteenth day of May, one thousand eight hundred and fifty-four, at and after the rate of seventeen pounds and a half per centum, and for which loss and damage the Defendant is liable to the said Plaintiff, doth adjudge and condemn the said Company Defendant to pay and satisfy to the said Plaintiff the said sum of one thousand three hundred and eighty-two pounds eight shillings and nine pence currency with interest thereon from this day until actual payment and costs as well upon the said special demurrer as upon the said action."

The above judgment was so rendered by Assistant Justice MONK, who after stating the pleadings, in effect remarked:—Without pausing to examine the various points of law thus settled and disposed of by the Court of Appeals, it is sufficient for the Court now adjudging, to express the opinion that the only questions left for its determination are, 1st. Was the refusal of the Defendants to register the transfer of Plaintiff's stock justifiable; 2nd. If not, has the Plaintiff suffered any damage in consequence of that refusal, and

3rd. If damage has been sustained, what is the amount of that damage?

In order to attain a clear view of the pretensions of the Defendants, it becomes necessary to continue the analysis of his defence resting on facts urged in support of that defence—but before doing so it is necessary to dispose of a plea in the nature of a special demurrer, in regard to which the Court is now called upon to pronounce an opinion. This demurrer is to that portion of the declaration which alleges a transfer to the Savings Bank, the Defendants contending that the Bank had no authority or right in law to take such transfer or to hold the stock in question. In view of the circumstances of this case, the Court is clearly of opinion that this is no legal ground of defence on the part of the Defendants. Firstly, because they never assigned this as a reason, and secondly, because they subsequently but when too late for the Plaintiff's interest, did actually transfer the stock to the Savings Bank—and thirdly, because in so far as the Defendants were concerned, and in so far as their interest could be involved in this transfer, they had the name of Mr. Larocque on their books, and by accepting the transfer as he did, he became liable personally for all obligations as a shareholder in the same manner as the Plaintiff was and would have been. The Court therefore overrules this plea, with costs. We come now to the Defendant's plea to the merits. The grounds of defence taken in this plea are similar to those urged in the demurrer and special demurrer above disposed of, except in two particulars:

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1st. That there were unsettled accounts and litigation between the Plaintiff and Defendants at the time of the transfers mentioned in Plaintiff's declaration. It appears to the Court strange that this style of defence should have been adopted in a case like the present, but to this I shall have occasion more particularly to refer hereafter.—The next point untouched by the demurrer is thus stated—"That the alleged depreciation in the said stock was not occasioned by "the Defendants nor are the Defendants, liable therefor, nor for the incidental losses or damage sought to be recovered, and the same were not caused by "them the said Defendants, but in great part from the neglect of the Plaintiff, and the transferees who did not sell shares in their reasonable time, but on "the contrary delayed sale for many months and until the shares had greatly depreciated, and in fact sold the same in accordance with their own views "and discretion, that is two hundred and ten shares in May 1855, and that in "fact the Plaintiff suffered no damage." To the parties familiar with the facts of this case the extraordinary nature of this defence must be at once apparent and will be more striking when we come to consider the facts of this case. There was also produced a *défense en fait*, as it is called, but inasmuch as it is novel in its form, it may be well to refer to it--because to the mind of the Court it is by no means clear, that this can be regarded as a denial of the facts such as the statute requires; it is there stated that "all, each, and every the allegations in Plaintiff's declaration contained are untrue and insufficient in law." This plea is not only informal, but viewing it strictly, a grave doubt would arise whether it is sufficiently express in its denegation to meet the requirements of the law; but, the Court is enabled to dispose of the case without formally adjudicating upon this point. Issue having been joined without the disclosure of new facts, the parties proceeded to proof.

The two transfers to Lemesurier Routh and Co.; and to the Savings Bank, the one dated 1st October, 1853, and the other 25th November, 1853, are proved.

Mr. Routh and Mr. Larocque both proved the circumstances under which these transfers were made and Webster's indebtedness as alleged in the declaration they also prove that they made repeated applications to Mr. Holmes to cause these transfers to be recorded in the books of the Company—Mr. Routh says "he called several times at the office of the Company"—Mr. Larocque says "immediately after the transfer I called at the Defendant's office to have transfer recorded"—this was refused, and that he called two or three times afterwards. On each of these occasions Mr. Holmes the Vice-President refused to allow the transfers to be recorded, and this was the strange but only reason he assigned for this refusal—"that Mr. Webster was indebted to the Company and until that debt was arranged the Company could not entertain the transfer" —these gentlemen remonstrated with Mr. Holmes, but to no effect,—the Company persisted in its refusal.

And on the ninth December, 1853, Mr. Larocque served a notarial demand, calling upon the Company to register transfer, and on the 24th December, 1853. Lemesurier Routh and Co., took the same step. To both these demands Mr. Holmes, the Vice-President, makes his usual reply—"The Company," these are his own words, "will not recognise Mr. Webster's right to transfer the said

"shares till Mr. Webster settles up his account;" and here it may be proper to observe that the only evidence of record to justify this answer, if in law it could be regarded as justification, which in the opinion of the Court it is not, are two judgments of this Court, one of the present Defendants, against the present Plaintiff dated 20th March, 1857, for £346, and the other of the present Plaintiff against the present Defendants, dated the same day, condemning Defendants to pay Webster £200. I am therefore of opinion both in view of the law and the facts of this case that this pretension of the Defendants as expressed through their Vice-President is completely without foundation, and, further, as they assigned no other reason for this refusal till after the action was instituted, and inasmuch as those urged by their plea are equally groundless, the Court is forced to the conclusion that the refusal of the Defendants was wholly unjustifiable and that there was no ground in law or in fact for the extraordinary and illegal course taken by Defendants; this disposes of the first point, and I have to consider:—

2dly. Whether Plaintiff has sustained damage by this refusal,—and in considering this point it may be proper to remark that it does not appear nor is it pretended that Lemesurier Routh and Co., or the Savings Bank sustained damage; this particular security was diminished in value, and instead of there being a surplus from the proceeds at the plaintiff's disposal there existed in both cases a considerable deficiency and the Plaintiff must make good that deficiency, this is all we can say about the matter, or at least this is all the record will justify us in holding. It would be idle to waste discussion on a question so obvious.—If there be a loss, the Plaintiff and the Plaintiff alone, so far as the facts of this case enable the Court to judge, is the loser, he and he alone is the party damnified by the illegal refusal of the Defendants to register the stock in question. We come then to consider what that loss is and what amount the Court can award him, and this is the point in this case which has caused the most embarrassment. Examine first the loss on the fifty-eight shares transferred to Lemesurier Routh and Co. It is in evidence that the transfer was made on the first October, 1853, and that the Defendants persisted in their refusal to register the stock until the 13th May, 1854, thirty shares of this were sold on the 18th May, 1854, at 37½ per cent. discount, the twenty-eight remaining shares were sold on the 30th October, 1854, at 45 per cent. discount.

It is proved by three brokers of this city that the value of this stock in the market here ranged from 20 to 37½ per cent. discount, between the 15th December, 1853, and the 18th May, 1854, twenty-three sales amounting to four hundred and ninety-six shares are proved in support of this. On the 15th December, sales were made at 20 per cent. discount, on the 19th December at 19½ discount, on the 21st December at 20 per cent. discount, and it is proved that the stock fell gradually but regularly to 37½ discount. On the 8th, 12th, and 18th May, 1854, sales were made at 37½.—Routh's transfer was made on the 1st October, 1853, and the Notarial demand was made on the 24th December; one sale was made on the 18th May, 1854, at 37½, the other on the 30th October at 45 discount. But holding it to be proved that the stock was worth 20 discount on the 24th December, date of Notarial demand, and 35 at the time of the enregistration of the stock, 4th April, 1854, which would be the nearest estimate

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of it value to be made from the evidence, the Defendants will be condemned to pay the difference, which on 58 shares would be £217 10s. od. sterling. This estimate proceeds from the proved difference in value between the time of the Notarial demand and the date of the enregistration.

In regard to the Savings Bank shares the Court adopts the same mode of adjusting the loss to Plaintiff; but as the Notarial demand was made on the 9th December, 1853, and the registration of this stock was made only on the 13th May, 1854, the depreciation will be greater. In the month of May, 1854, all the sales seem to have been at 37½ discount, the loss therefore instead of 15 per cent. was 17½, and this loss the Defendants are condemned to pay. This loss amounts to £918 15s. od. sterling, the two sums making together £1136 17s od. stg. equal to £1382 8s. 9d. cy., estimating the pound sterling at 24s. 4d. as regulated by the Statute, for which judgment will be entered up with costs.

The Court of Queen's Bench confirmed the judgment so rendered by the Superior Court, and, in doing so, AYLWIN, J., stated, that it was unnecessary to enter fully into an explanation of the case owing to the two excellent reports, of what had already been adjudged therein both in this Court and in the Court below, to be found in the 2nd and 3rd volumes of the L. C. Jurist. The case, as now presented, is reduced to the consideration of one single point,—is the judgment of the Court below excessive? The pretension of the Appellant that the Respondent, having failed to prove the precise value of the stock on the very day that the transfer was demanded and refused, and again on the very day that the registration was subsequently effected, is ingenious, but, in the opinion of the Court, untenable. It is to be borne in mind that the Appellant had the best opportunity of knowing the precise value of its own stock on any given day, but carefully abstained from adducing any evidence whatever as to its value. The Respondent, on the other hand, has done all he could do. He has brought up a number of stock brokers who attest to all the transactions in regard to the Appellant's stock which came under their cognizance during the period embraced between the period of refusal and that of registration. It happens that these transactions do not fit precisely with the actual dates in question, but they cover them, and, in the absence of proof to the contrary, the Court will presume the value of the stock on the precise days in question, to have been the same as is disclosed by the transactions sworn to. Under the circumstances the Court considers the award of the Court below correct and the judgment is accordingly confirmed.

Judgment of Court below confirmed.

Cartier & Pominville, for Appellant.
Robert McKay, Counsel,
Bethune & Dunkin, for Respondent.
(S. B.)

IN APPEAL
FROM THE SUPERIOR COURT DISTRICT OF QUEBEC.
QUEBEC, 14TH JUNE, 1858.

Coram SIR L. H. LAFONTAINE, Bart., C.J., AYLWIN, J., CARON, J., DUVAL, J.

CHARLES E. LEVEY,
(*Defendant in the Court below,*)
APPELLANT.

AND

PAUL SPONZA,
(*Plaintiff in the Court below,*)
RESPONDENT.

1. The answers of parties to interrogatories on *faits et articles* or their refusal to answer such interrogatories, supply, in commercial cases, the place of the memorandum in writing required by Statute of Fraud.

2. A clerical error in the judgment of the Superior Court, by which the Defendant was condemned to pay £54 4s. in lieu of £50 4s., will be corrected by the Court of Queen's Bench; and the judgment will be affirmed, with costs, against the Appellant, if, on the other reasons of Appeal, the Court is against his pretentions.

In June, 1857, Sponza instituted an action against Levey, to recover £60 currency grounded on the following facts:—

In 1851, by deed passed before Notaries, at Quebec, on the 24th November, Levey agreed to advance E. P. Lee, £5 a ton on a certain ship then being built by him at Quebec.

On the 18th June, 1852, Defendant agreed with E. P. Lee, to pay him another sum of ten shillings per ton on the said ship, the said sum of ten shillings payable to the parties having claims on the ship, as confirmed by Lee, and signed a memorandum of such agreement, and delivered it to Lee.

On the 16th July, 1852, Lee was indebted to the Plaintiff in the sum of £50 4s. for rigging, masting, &c., the said ship, and then and there confirmed his account, and required the Defendant to pay the same.

On the 3rd July, 1857, the Defendant promised to pay the Plaintiff his claim against the said ship, to wit, the said sum of £50 4s.,—"which the said Defendant has often acknowledged to owe, and promised to pay."

The Defendant, pleaded, by *exception péremptoire*,—

1. That on the 18th June, 1852, he had paid to E. P. Lee a sum of money exceeding ten shillings per ton on measurement of such ship, to wit, £545 5s., which sum was paid by him to parties having claims against the said ship as confirmed by Mr. Lee, and according to his express orders.

2. That long previous to the institution of the action, and previous to the 16th July, 1852, he had paid to Lee the full amount agreed to be paid, under the memorandum of the 18th June, 1852.

3. That no claim of the Plaintiff in respect of the said ship, against, and confirmed by Lee, was ever presented to, or accepted by, Defendant. The fourth and fifth *moyens* of the exception are included in those already given. He also filed a *défense au fonds en fait.*

A Campbell, Esq., Notary, was examined by the Plaintiff, and deposed that the Defendant, previous to the putting to sea of the ship built by Lee as aforesaid, on the representation made to him by witness, that if Plaintiff's account, amounting to £50 4s., were not paid, the ship would be seized, (Plaintiff having

C. E. Levey vs. Paul Sponza.

informed witness that his intention was to seize.) Defendant said he would pay it. That witness then turned to Plaintiff, who was in Defendant's office, and in Defendant's presence, said—"Sponza, you are perfectly safe; Mr. Levey will pay you." The Plaintiff thereupon, being satisfied, left, and the ship was not seized by him.

Lee was also examined, and testified to the fact, that Defendant had often expressed himself to him, relative to Plaintiff's account, under the promise in writing, and said that he would pay it; he also proved its confirmation.

The work done by the Plaintiff was proved to be worth £50 4s.

To the questions put to Campbell and Lee, by which it was sought to prove a promise to pay Plaintiff, objections were made by Defendant, on the ground that it was intended thereby to prove, by parol testimony, a promise by the Defendant to pay the debt of a third person, without the proof of any memorandum in writing, signed by the Defendant, containing such promise; the promise in writing, referred to in the said question, not containing the name of the said Paul Sponza, as creditor of the said E. P. Lee, or as having any claim against the said ship.

The objections so taken were argued at *enquête* sittings, before Bowen, C.J., on the 10th September, 1857, and were overruled by him.

On the 2nd October, 1857, the Defendant moved to revise the rulings of the Chief Justice so made. On the 13th October, 1857, the Superior Court (Morin, J., and Chabot, J.) refused to reject the questions so put.

The Plaintiff submitted interrogatories upon *faits et articles*, to the Defendant, of which Nos. 2 and 3 were couched in the following words:—

2. Did you ever acknowledge to owe, and promise to pay, to the Plaintiff any sum of money for his work and labour done and performed on board the "Derry Castle?" Did you ever promise to pay to the said Plaintiff, or to Archibald Campbell, Esq., Notary Public, on his behalf, the amount sought to be recovered by the present action, or any amount or account of in full of the said work and labour done, as in the Plaintiff's declaration alleged, on board of or to the said ship or vessel called the "Derry Castle?" If so, state what amount you promised to pay.

3. Are you aware that the vessel called "Derry Castle" would have been seized, had it not been for your promise made to, or in presence of, the said Archibald Campbell, to pay the amount of the said Plaintiff's claim?

To the second question he answered: "Having been advised that I am not legally bound to answer this question, I refuse so to do." To the third—"the same answer as the last."

The Plaintiff moved that the *facts* stated in the said second and third questions be taken "*pro confessis*."

At the hearing before Morin, J., on the 25th November, 1857, it was contended by the Plaintiff, that the promise was not one falling within the provisions of the Statute of Frauds—Because it was made, not to Sponza but to Lee, that he, the Defendant, would discharge Lee's debt to the Plaintiff.—Hargreaves vs. Parsons, 13 M. & W. 561; Eastwood vs. Kenyon, 11 Ad. & El. 438; Barker vs. Bucklin, 2 Denio 45.

2. That Sponza had a lien, claim or privilege upon the ship, with a right of seizure, for the amount of his account, which right he abandoned on the faith of the Defendant's promise to pay him, and that consequently that promise was not within the Statute.—Williams vs. Leper, 3 Burr. 1886; Houlditch vs. Milne, 3 Esp. 86.

He moreover contended, that, even supposing that it did fall within the provisions of the Statute, the memorandum in writing of the 18th June, 1852, could be explained by parol evidence, and that it would be valid though it did not specify amount of the debt or the creditor's name.—Taylor on Evid. §§936, 937, 938, 939, 997, 1052.

That the refusal of the Defendant to answer the questions on *faits et articles* established conclusively the promise made by him to pay the debt sued for.

On the part of the Defendant, it was contended that the promise was one falling within the provisions of the Statute of Frauds. That no memorandum in writing having been drawn up by which he had promised to pay the Plaintiff the debt due by Lee, he was not bound. That the memorandum of the 18th June, 1852, was incomplete and insufficient. That he had, moreover, paid £545 5s. under it, which was more than he had agreed to advance (as was fully established by the proof.) That the want of the memorandum in writing could not be supplied either by the answers of the Defendant, or by his refusal to answer the questions propounded.

On the 9th January, 1858, Morin, J., considering the case as one falling within the Statute, delivered the following judgment:—

"The Court having examined, &c.

"Considering that, by the laws of this country, and the practice followed, the judical answers of the parties to interrogatories on *faits et articles*, or their refusal to answer, are tantamount in their effect on such actions to admissions in writing of the agreements or facts acknowledged, in such answers or affirmatively propounded in the questions unanswered; considering, also, that the right of interrogating parties on *faits et articles* has not been abolished by the introduction of any portion of the Statute of Frauds, but that, on the contrary, the said right has been, by the Act of the 12th year of Her Majesty's reign chapter 38, declared to obtain in actions of a commercial nature—any law touching the rules of evidence to be observed in such cases to the contrary notwithstanding; that the Defendant has refused to answer to the second and third interrogatories put to him, and to which an affirmative answer would have been, in the present case, a sufficient proof of the agreement or promise mentioned in the declaration;—doth declare the said interrogatories *confessés et avérés*, and doth condemn the Defendant to pay to the Plaintiff, for the causes set forth in the said declaration, the sum of £54 4s. currency, without interest, &c."

The Defendant appealed therefrom, and the judgment of the Court of Queen's Bench is couched in the following terms:—

The Court, &c.

"Seeing that the Appellant was bound to answer all, each and every the interrogatories propounded to him by the Respondent, and that upon his refusal

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to answer the second and third of the interrogatories, the same were duly and properly taken and held *pro confesso*, [*sic*] and as an admission, on the record, of the promise relied upon by the said Respondent—superseding all other proof in writing of the debt claimed, and in no wise conflicting with any of the rules of evidence of the law of England in that behalf,—and that, therefore, in the award of judgment made by the Court below, in favour of the Respondent, there is no error. But seeing that, in entering up judgment against the Appellant, the sum of £54 4s. has been, by a clerical mistake, inserted as being the amount in capital of the sum awarded to the Respondent, in the stead and place of £50 4s. stated in the declaration and particulars as being the amount of the debt claimed by the Respondent, and the promise of the Appellant relied upon, —it is considered and adjudged, by the Court now here, that the said judgment, to wit, the last judgment rendered in the Superior Court, at Quebec, on the 9th day of January last, be, and the same is hereby, affirmed; and the Court here, to the end that the said clerical mistake be corrected, doth hereby order that the sum of £54 4s., inserted in the said judgment, be altered to the sum of £50 4s. And it is further considered and adjudged, that the said Appellant do pay to the said Respondent, for the causes stated in the said declaration, the said last-mentioned sum of £50 4s., with interest, from, &c., and costs of suit, as well in the Court below as in the Court here, &c."

Judgment confirmed.

Kerr & Lemoine, for Respondent.
Primrose, for Appellant.
(W. H. K.)

IN APPEAL.

MONTREAL, 7TH JUNE, 1862.

Coram SIR L. H. LAFONTAINE, Bart., Ch. J., DUVAL, J., MEREDITH, J., MONDELET, J.

L. M. COUTLÉE,
(*Defdt. and Oppt. in Court below,*)
APPELLANT;

AND

HON. JOHN ROSE,
(*Plaintiff in Court below,*)
RESPONDENT.

Held:—That an opposant appealing from a judgment dismissing his opposition, must give security to answer the condemnation of the principal judgment in the case.

The Appellant had unsuccessfully tendered before the Hon. Mr. Justice Smith, (J. S. C.,) and the Hon. Mr. Justice Berthelot, (J. S. C.,) security for costs alone, and now sought, by petition, to have the security offered declared sufficient.

It was established, in support of the petition, that the principal judgment had not been appealed from; that landed property, worth ten times the amount of that judgment, had been seized under a writ of *fieri facias*, and still remained under seizure, and that, from the nature of the judgment, the Plaintiff had moreover a *bailleur de fonds* privilege upon the property seized.

L. M. Courtée vs. John Rose.

McCord, for Appellant:—The proviso of the 23rd sec. of chap. 77 Con. Stat. L. C., requiring an Appellant to give security that he will "answer the condemnation" must be construed as meaning the condemnation of the judgment appealed from, which in this case is for costs alone; and, the principal judgment not being appealed from, no security need be given to answer its condemnation; but even if the word "condemnation" were to be interpreted to mean the original condemnation in the suit, the appellant would still be exempt, under the subsequent provisions of the above section, from giving any heavier security than for costs alone, upon his declaring that he did not object to the judgment given against him being carried into effect according to law, a declaration which, in this case, it would be unnecessary and absurd to require, in view of the facts that the Appellant *could not* object to the judgment, (the principal judgment of course) the delay to appeal having long ago elapsed, and that the said judgment was actually being carried into effect under a writ of execution, by virtue of which, property, worth ten times the amount of the condemnation, had been seized and still remained under seizure. Had the Appellant appealed from the principal judgment, giving security for costs alone, and a written consent to the execution of the judgment, and subsequently filed an opposition, he would surely not be required, in an appeal from an adverse judgment upon his opposition to give security to answer the principal condemnation, else he would be giving greater security to appeal from the incidental than from the principal judgment in the suit; well, in the present case, he claimed to be virtually in the same position.

The decision in Lampson and Wurtele was probably based upon circumstances different from those of this case, and, as reported, can form no safe guide, because neither the circumstances of the case nor the reasons of the decision are given.

Laflamme; *R.*, for the Respondent, argued:—That if Opposants were allowed to appeal upon such easy terms as giving security for costs alone, every Defendant would become an Opposant and then an Appellant for the sake of indefinite delay, and the ends of justice would be frustrated; that the effect of the appeal was to retard the execution of the principal judgment, and therefore the security should cover the amount of the principal condemnation; that this point, moreover, had already been decided, in 1847, by the then Court of Appeals, in the case of Lampson and Wurtele reported in the *Revue de Législation*, vol. iii. p. 107, and this decision ought not to be disturbed.

MONDELET, J., *Dissentiens*.—The Appellant does not call in question the principal judgment rendered in this cause, and I can see neither the reason nor the law requiring him to give security to answer the condemnation of that judgment. My respect for decisions does not go so far as to make me adopt them when they appear to be evidently erroneous.

DUVAL, J.—The Defendant in this case stays the execution of the principal judgment just as effectually by an appeal from the judgment upon his opposition, as he would have done by an appeal from the principal judgment itself, and should therefore be obliged in either case to give the same security.

MEREDITH, J.—There might be cases in which security, such as that tendered

Lussier vs. McVeigh.

in this instance would be considered sufficient, but this does not appear to be a case of that description, nor do I think that the decision already given in Lampson and Wurtele should be disturbed by the contrary judgment of a mere majority of this Court. Petition rejected.

T. McCord, for Appellant.

Laflamme & Laflamme, for Respondent.

(T. McC.)

MONTREAL, 27TH MARCH, 1862.

Coram SMITH, J.

No. 272.

Lussier vs. *McVeigh*.

Held.—If five lots of land have been sold in *one lot, en bloc*, and for *one price*, and the purchaser has only obtained possession of four of them, the said purchaser being sued for the balance of purchase money, is not well founded in pleading that the lot he failed to obtain possession of, is worth a larger sum than the rest of the lots, and that therefore he is entitled to have the value of such lot deducted from the original *prix de vente* of the five lots. But he is entitled to a diminution of one-fifth of the purchase money of the whole five lots, under the action *quanto minoris*.

The declaration in this case alleged that the Defendant had bought from the Plaintiff five lots of land, containing 934 acres, for the sum of £140, on account of which the sum of £70 had been paid, leaving a balance of £66 for which the action was brought.

The Defendant admitted the sale of the land, but alleged that he had never been put in possession of one the lots, No. 22, containing 200 acres. That the said lot was worth £120, and that he had a right to have said sum deducted from the sum sued for, and to have the sum by the deed of sale, promised to be paid by Defendant, reduced to the extent of the value of said lot of which Defendant did not obtain possession.

Proof of the facts was made by the parties

PER CURIAM:—This is an action for the balance of the purchase money of five lots of land. The five lots were bought *en bloc*, in one lot of 930 acres, and for the sum of £140, on account of which the Defendant paid £70; the Defendant only got possession of four of the lots. Plaintiff sued him for the price remaining unpaid, and he pleaded that the lot he did not obtain possession of was the only valuable one, and worth all the rest together.

But the Court is of opinion, that as all the lots were sold as *one lot*, and for *one price*, it must be considered that the whole five lots were purchased as being of equal value. The Defendant is therefore only entitled to a diminution of one-fifth of the original price, or the value of the lot he failed to obtain possession of.

The action was the old one *quanto minoris*.

Judgment for sum sued for, less one-fifth of £140.

Judgment was motivé as follows:—

The Court having heard, &c., &c.

Considering that the said plaintiff hath fully proved that he did on the 12th day of July, 1852, sell and make over to the said Defendant, accepting thereof by Francis Xavier Bastian, his legally constituted attorney for that purpose, all these certain lots of land described in the deed of sale, as all and singular the

certain lots of land being composed of lots number 13, 27, 28, in the 1st range, and lot No. 22 in the 3rd range, and lot No. 20 in the 4th range, all these lots situated in the Township of Litchfield, in the said County of Ottawa, and District of Montreal, containing 934 acres of land, and usual allowance for highways, with all and every the members and appurtenances thereunto belonging, at and for the price and sum of £140 in the whole, and on account of which the said Plaintiff in and by the said act acknowledged to have received the sum of £70 0. 0., and that there now remains due on the said sale by the said Defendant a balance of $70 0 0 with interest thereon from the 12th day of July, 1853, according to the terms and conditions of the said sale.

And further, considering that the said Defendant hath fully established that he the said Defendant, hath never been put in possession, by the said Plaintiff, of the lot 22 in the 3rd range of Litchfield, consisting of about 200 acres more or less, so sold and conveyed as aforesaid, by the said deed of sale, and that by reason thereof and by law, the said Defendant hath a right to demand a corresponding reduction in the price of sale according to the terms of the said contract of sale. And further, considering that said sale of land was made of five lots of land, *en bloc*, without any reference to the superficial contents of the said four lots, or without any deduction in the value thereof, and for a quantity of land supposed to contain 930 acres in all, and for a single price stated as the price and value of the whole five lots of ground. And that by reason of the non-delivery of the said 5 lots, the said Defendant is entitled to claim a diminution of one-fifth of the whole price thereof and no more, to wit, the sum of £28 0 0. And further, considering that the said Defendant hath failed to shew in law, or by reason of anything alleged in the peremptory exception, pleaded by the said Defendant, any right to claim any damages beyond the diminution of the price of sale from the said Plaintiff, or to have and attain the conclusions by him taken in the said exception.

The Court doth overrule the said exception of the said Defendant with costs, and doth condemn the said Defendant to pay to the said Plaintiff the sum of £42 0 0, being the balance due to the said Plaintiff on the said sale, with interest thereon from the 12th day of July, 1853, and the costs of suit. And the Court proceeding to adjudge upon the merits of the incidental demand made and filed by the said Defendant, doth also for the reasons assigned above, and by reason of the absence of all proof in support of the said incidental demand, dismiss the said incidental demand with costs.

Ouimet & Morin for Plaintiff.

A. & W. Robertson for Defendant.

(J. L. M.)

STE. SCHOLASTIQUE.

Coram BADGLEY, J.

No. 7.

Fisher et al., vs. *Vachon.*

Jugé:—Que le montant annuel du loyer n'excédant pas $200, donne juridiction à la Cour Supérieure d'entendre une cause portée pour arrérages de sept années de loyer, à raison de $100 de loyer par année, lorsque l'action est portée sur le droit commun.

Les Demandeurs comme héritiers de feu Samuel Liscum, réclament du Défendeur sept années de loyer, à raison de $100 par année, pour loyer, usage et

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occupation d'une terre ci-devant appartenant au dit Liscum, et louée au Défendeur par lui; et demandant aussi que vû le défaut de paiement de trois termes de loyer, le Défendeur soit évincé. Les Demandeurs ont aussi fait émaner une saisie-gagerie en la manière ordinaire.

Les Défendeurs ont produit une exception déclinatoire par laquelle ils prétendent que la Cour Supérieure n'a pas jurisdiction, vu que le montant annuel du loyer réclamé étant de $100 per année, la Cour de Circuit avait seule jurisdiction pour entendre telle cause, quand le montant du bail ou loyer annuel n'excède pas $200. A l'appui de cette prétention le Défendeur a cité:

Chap. 40, Statuts refondus du Bas-Canada. Acte concernant les locateurs et locataires, Sect. 4. "Les actions intentées en vertu du présent acte seront in-"tentées en la manière ordinaire dans la Cour Supérieure ou de Circuit; et la "valeur annuelle ou loyer de la propriété louée déterminera la jurisdiction de "la Cour, quelque soit d'ailleurs le montant des dommages et du loyer récla-"més."

Aussi la cause de *Bédard* vs. *Dorion*, 3e Jurist. pp. 253, et 6e Jurist, *Barbier* vs. *Verner*, pp. 44, Nos. 1 et 2.

Les Demandeurs soutiennent que l'action est intentée en vertu d'un droit commun et non sur l'acte des locateurs et locataires.

Per Curiam.—Les procédés en cette cause ont eu lieu, en vertu du droit commun: l'acte des locateurs et locataires détermine la procédure à adopter si l'on veut se prévaloir de l'acte, mais dans l'espèce l'action a été rapportée que longtemps après avoir été intentée, le Défendeur a plaidé longtemps après retour fait, tous les procédés ont eu lieu comme dans les causes portés devant cette Cour, le montant réclamé est de $700, conséquemment donne jurisdiction à la Cour. Si l'action était en recouvrement de dommages pour les cas indiqués au statut, résultant de l'inexécution du bail, c'eût été différent. D'ailleurs il a été décidé que c'était le montant réclamé qui déterminait la jurisdiction de la cour.

Exception déclinatoire déboutée avec dépens.

Ouimet, Chapleau et Mathieu, pour Demandeur.

Chs. Marcil, pour Défendeur.

(G.O.)

SUPERIOR COURT.

MONTREAL, 30TH OCTOBER, 1861.

Coram BERTHELOT, J.

No. 1523.

Torrance et al., vs. *Allan.*

Held:—1st. That a common carrier can limit his liability by conditions inserted in the Bill of Lading.

2nd. That a common carrier, who receives goods on board his lighter, is not liable for loss arising from a delay in transhipment, owing to a short shipment of the goods, when the Bill of Lading contained a clause that, if from any cause the goods did not go forward on the ship, the same should be forwarded by the next steamer of the same line.

This was an action brought by the Plaintiffs against one of the owners of the steamer, *Anglo-Saxon*, claiming £183 7s. 11d. currency, damages for the loss

sustained by the detention of 472 barrels of flour, out of 495 barrels delivered to the agents of the steamer, Messrs. Edmonstone, Allan & Co., at Montreal, for conveyance to Liverpool by that steamer in October 1857. The flour was delivered to the agents of the steamer on board of lighters provided by them at Montreal, and a bill of lading was granted in the usual form, as shipped on board of the *Anglo-Saxon*. That vessel however only carried 23 barrels of the flour to Liverpool, and left the remainder at Quebec, where it was stored in the warehouses of the steamer until the next steamer of the Canadian Ocean Line, the *North American*, left a fortnight afterwards, and no notification of the detention was given to the shippers.

The 23 barrels arrived at Liverpool and were sold at 36s. sterling per barrel, the then market price, at which rate moreover the whole quantity had been agreed to be sold by the agents of the shippers, but which sale they were unable to complete owing to the non-arrival of the flour. The residue of the flour was subsequently sold on its arrival for lower rates, realizing a loss as stated above.

The Defendants relied upon a certain contract which they set up in the pleas, between Edmonstone, Allan & Co., and the firm of Routh & Co., to provide freight by the *Anglo-Saxon* to sail from Quebec on 10th October, of 20,000 bushels of wheat and 1000 barrels of flour provided the steamer had room, the said wheat and flour to be delivered on board the lighters of the steamer at Montreal on the demand of the agents, and they further alleged that Routh & Co. had sold to the Plaintiffs freight by the said steamer for 500 barrels of said flour subject to the same conditions. The Defendants further set up a clause in the bill of lading of the following tenor:

"In case the whole or any part of the goods shipped herein be prevented by any cause from going on said steamer, the owners of the steamer are only bound to forward them by the succeeding steamer of the Line." They further alleged, that the said 495 barrels of flour were lightered to Quebec with all due despatch and such portion thereof as the steamer had room for was taken on board, and that only such portion as she could not take on board was left behind, and afterwards sent forward by the succeeding steamer of the Line.

At enquete the loss was clearly established, and proof was adduced by the Defendants to show that she had not room for the whole quantity of the flour, owing to other freight being engaged and put on board.

At the argument the Plaintiff's counsel contended that the previous contract was merged in the bill of lading, but that according to its terms, the flour was to be delivered at Montreal only on the demand of the agents of the ship, and that that demand implied on their part a declaration of their ability to carry. They also maintained that the liability of the carrier and his obligation to carry with due despatch commenced with the delivery to him of the flour on board his lighter at Montreal, and that the bill of lading being granted by the *Anglo-Saxon*, her owners were bound to carry the flour by her on that voyage, and that with regard to the special clause in the bill of lading, even assuming that the carrier could so restrict his liability as to avoid responsibility for his own negligence, the words "any cause" must receive a reasonable interpretation,

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and could only be held to mean "any cause" apart from the act, will or control of the owners, and that the mere filling up of the vessel by them with other freight could not after receipt of the goods be held to be such a cause.

The Defendants contended that the fact that the vessel was filled with other freight previously engaged, was a sufficient justification, and that the special clause in the bill of lading exonerated the owners from liability under the circumstances. After consideration the Court rendered judgment, dismissing the action, except as to a sum of £9 10s. for lighterage which had been paid by the Plaintiffs on account of the Defendants, and which the latter tendered with the plea. The opinion of Mr. Justice Berthelot on rendering judgment will be found beneath, and enters fully into the facts of the case, which is novel and interesting in its character.

BERTHELOT, J.—La question soulevée par la contestation en cette cause est celle de la responsabilité du commissionaire ou *common carrier* pour ne pas avoir transporté de Montréal à Liverpool, aussitôt qu'il aurait dû ou pû le faire (suivant le Demandeur), une certaine quantité de grains qu'il s'était obligé de transporter par *bill of lading* du 7 octobre 1857. Et en second lieu jusqu'à quel point le commissionnaire peut limiter son obligation principale *de transporter* en insérant dans le connaissement des restrictions ou limitations à cette obligation.

L'action est dirigée contre le Défendeur seul comme *common carrier and trader*, propriétaire avec certaines autres personnes inconnues au Demandeur, d'un certain steamer, l'*Anglo-Saxon*, employé par eux à faire leur commerce de *common carriers* entre Montréal, Québec et Liverpool.

Les Demandeurs par leur action réclament du Défendeur £188 7s. 11d. pour dommages à eux occasionnés par la négligence du Défendeur de transporter par le steamer *Anglo-Saxon* 495 quarts de fleur, que par connaissement *bill of lading* du 7 octobre 1857, signé par la compagnie Edmonstone, Allan & Co., agents de la compagnie propriétaire du dit steamer, dont il était membre, s'était obligée de transporter de Montréal à Liverpool, par le voyage alors prochain du dit steamer, qui devait laisser le port le 10 octobre 1857.

Le connaissement contenait la restriction suivante: "In case the whole or "any part of the goods specified therein be prevented by *any cause* from going "in said steamer, the owners of said steamer are only bound to forward them "by the succeeding steamer of the Line."

L'*Anglo-Saxon* laissa le port de Québec le 10 octobre en ne prenant à son bord que 23 des dits quarts laissant 472 des dits quarts pour le steamer suivant de la même ligne devant partir 15 jours plus tard.

Cette dernière quantité n'étant arrivée à Liverpool que vers le commencement de novembre 1857, alors que le prix de la fleur avait baissé, les Demandeurs réclament comme dommages la différence entre les prix de la fin d'octobre et du commencement de novembre 1857.

A cette demande le Défendeur a plaidé que la compagnie propriétaire du steamer, par ses agents, Edmonstone Allan & Cie., avait contracté le 24 septembre 1857 avec la société de Routh & Cie., pour le fret de 20,000 minots de bled et 1000 quarts de fleur par l'*Anglo-Saxon*, *provided she has room*, pourvu

qu'il y eut place à bord pour cette quantité. Les dites quantités devant être livrées à bord des *lighters* du steamer au port de Montréal.

Que le 2 octobre 1857, suivant les usages du commerce, Routh & Cie. avait transporté aux Demandeurs leur droit au fret susdit, jusqu'à concurrence de 500 quarts, et aux conditions susdites.

Que le 7 octobre 1857, les Demandeurs par suite de ce que dessus, avaient délivré à MM. Edmonstone, Allan & Cie. 495 quarts de fleur, et que ces derniers avaient signé le connaissement (*bill of lading*) qui avait été préparé par les Demandeurs eux-mêmes ou leurs agents, et contenant l'exception susmentionnée, et que cette quantité de 495 quarts fut envoyée à Québec pour être mise à bord de l'*Anglo-Saxon* qui ne put en prendre que 23 quarts, et que les autres 472 quarts restèrent à Québec pour être envoyés par le steamer suivant *North American*, et que sous ces circonstances les Demandeurs ne pouvaient avoir plus de droit que MM. Routh & Cie. aux droits de qui ils étaient, et qui n'avaient eu droit de charger 1000 quarts à bord de l'*Anglo-Saxon* que conditionellement et sous les restrictions et exceptions auxquelles ils avaient consenti lors du contrat du 24 septembre.

Les Demandeurs ont répondu généralement, et ont prétendu que le Défendeur était responsable des dommages qui leur étaient résultés par suite du retardement du transport des dits 472 quarts de fleur, tout comme il aurait été responsable de leur perte pendant qu'ils étaient sous sa garde et en sa possession.

La preuve testimoniale constate les faits suivants:

Que le contrat de fret intervenu le 24 Septembre 1857, entre Edmondstone Allan & Co., d'une part et Mr. Mitchell, *broker*, pour Routh & Co., n'avait eu lieu qu'à la condition de l'Anglo Saxon aurait de la place à son bord.

Que le transport de partie du contrat de fret par Routh & Co. aux Demandeurs, ainsi que fait par l'entremise de M. Esdaile, *broker*, avait eu lieu suivant les usages du commerce à Montréal et que c'était une transaction de tous les jours. Il est aussi prouvé par M. Routh qu'en chargeant M. Esdaile de faire cette transaction pour lui il avait dû l'avertir des conditions auquelles il avait obtenu le contrat du Septembre, 1857, de Edmondstone, Allan & Co.

M. Scott, l'agent de la compagnie des Steamers à Québec, d'où ils devaient partir, s'exprime ainsi dans sa déposition:

"The reason why the flour of the Plaintiffs was not all sent by Anglo Saxon "was that she was fully laden with other freight engaged previously. All the "flour of the Plaintiff that the Anglo Saxon could take was shipped by her, "the remainder was shipped by the North American Steamer, the next steamer "of the line."

"When I say that the reason why the flour of Plaintiff was not all sent by "the Anglo Saxon, was that she was fully laden with other freights engaged "previously, I mean to say that other cargo had arrived and been laden on "board the Anglo Saxon in order of arrival and *in connection with the memo-*"*randum of the engagements for shipment received from Edmonstone, Allan* "*Co.*, the agents of the line in Montreal, where the full cargo for the ship was "engaged."

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Nous avons ainsi la preuve qu'aucune négligence ne peut être imputée au Défendeur ou à ses agents. Il était bien compris par toutes les personnes qui ont été parties aux contrats du 24 Septembre et du 10 Octobre 1857, que l'Anglo Saxon ne prendrait que ce qu'il pourrait prendre du fret retenu ou engagé pour son voyage, que la livraison s'en ferait aux agents du Steamer à Montréal pour par eux être transporté à Québec pour y être mis à bord de ce steamer ou du steamer suivant de la même ligne.

Il est également prouvé que les arrangements de la ligne étaient tels, qu'il fallait alors décharger et charger un steamer en trois ou quatre jours, et que on n'était qu'à la veille du départ qu'il pouvait être exactement connu combien le steamer pouvait prendre de la charge, lorsque le nombre des passagers était connu et certain.

D'ailleurs M. David Torrance, un des Demandeurs, a écrit ou rempli lui-même le *bill of lading*, et il s'exprime ainsi dans sa déposition :—"The whole "flour was lightered to Quebec with due despatch *so far as I know*."

Il n'y aurait donc eu ni surprise quant aux conditions du *bill of lading*, ni négligence à Montréal de la part de Edmonstone, Allan & Co. ou de leurs préposés à Québec.

Si la fleur n'a pas été expédiée par l'Anglo Saxon le 10 Octobre, c'est uniquement et simplement, parceque conformément à ce qui avait été stipulé et prévu dès le 24 Septembre 1857, la charge de ce steamer était complète lorsque la fleur du Demandeur est arrivée à Québec le 9 ou le 10 après n'avoir été livrée à Montréal que le 7, à Edmonstone, Allan & Co., ce qui ne laissait que 2 ou 3 jours pour le rendre à Québec et le charger.

Il n'y a rien dans tout cela pour constituer le Défendeur ou les propriétaires du Steamer en négligence.

La condition insérée dans le *bill of lading* n'est pas en contradiction de ce qui est de l'essence du contrat de frêt. Il est vrai que dans ce contrat celui qui s'oblige à transporter est responsable de la chose qui lui est confiée, il doit en prendre tout le soin possible et il est responsable de la perte par sa négligence ou par accident autre que celui de force majeure.

Il ne pourrait pas dans un pareil contrat insérer valablement une condition qui l'affranchirait de la perte de la chose résultant par exemple de *leakage* ou *breakage* parceque ce serait en contradiction de l'essence même du contrat qui l'oblige comme je viens de le dire à prendre soin de la chose et l'en font responsable vis-à-vis du propriétaire, mais il peut bien dire je transporterai la chose dans ce steamer ou dans un autre qui m'appartient, cette semaine ou la semaine prochaine suivant que je pourrai prendre la charge.

Les Demandeurs ont cité comme venant à leur secours le jugement rendu dans une cause de Harris vs. Edmonstone, mais il n'y a aucune analogie avec le cas actuel, dans ce cas là, les Défendeurs voulaient s'affranchir de leur responsabilité de la perte de la chose qui était arrivée *cassée*, en disant tout simplement qu'il y avait une condition du *bill of lading*, qui les exemptait au cas de *breakage*, c'était une contradiction manifeste de leur obligation principale, et une pareille condition est nulle et illégale, Pardessus, vol. 2, p. 542, puis ils ne se donnèrent pas même la peine d'expliquer comment l'accident était arrivé,

et comment l'objet transporté avait pu être cassé, c'était un cas bien différent de celui-ci.

Dans la cause de Huston vs. Le Grand Tronc également cité par les Demandeurs, il s'y agissait de la perte de la chose à transporter par incendie pendant qu'elle avait été laissée dans les hangards de la compagnie. Cette dernière plaidait qu'elle n'était pas responsable parceque l'incendie était un accident de force majeure, ce qu'elle ne put justifier à son enquête, il apparaissait au contraire qu'une quantité de coton saturée d'huile laissée dans un coin assez longtemps pour s'enflammer avait dû être la cause du feu, ce qui étaite un acte de négligence dont la compagnie étaite responsable.

La présente cause ne présente pas un cas de négligence que l'on puisse imputer au commissionnaire. Il s'est seulement réservé par une clause particulière de son contrat de transporter la chose dans un autre vapeur, un peu plus tard, suivant qu'il lui serait possible en suivant les arrangement de sa ligne de steamers, ainsi qu'il était alors d'usage, je ne vois rien dans toute la preuve et dans les circonstances de la cause qui puisse rendre le Défendeur pour cause de négligence ou autrement, responsable des dommages que le Demandeur réclame.

Quand à la somme de £9 10s. 6d. payée par les Demandeurs au Steamer Napoléon pour fret de Montréal à Québec, dont le Défendeur leur a fait offre avec 35s. de frais, ces deux sommes devront leur être payées, pour les rembourser de se que le Défendeur aurait dû payer lui-même. Il n'y a pas de difficulté là-dessus, mais l'action devra être déboutée quant aux dommages.

Le jugement contient les motifs comme suit :—

La Cour, etc., etc., etc., considérant que le contrat intervenu entre les Demandeurs et la société commerciale propriétaire du Steamer Anglo Saxon dont le Défendeur est un des associés au moyen du connaissement *bill of lading* en date du 7 Octobre 1857 mentionné en la déclaration et aux plaidoyers, pour le transport de 495 quarts de fleur, de Montréal à Liverpool par le Steamer Anglo Saxon, sous les restrictions et conditions mentionnées au dit connoissement *bill of lading*, n'a été ainsi fait de part et d'autre que par suite et comme suite du contrat intervenu le 22 Septembre 1857, entre la dite compagnie propriétaire du Steamer Anglo Saxon et la société de commerce de H. Routh et Cie. pour le transport pour ces derniers de la quantité de 20,000 minots de bled et 1000 quarts de fleur de Montréal à Liverpool par le Steamer Anglo Saxon, à la condition toutefois qu'il y eut place à bord d'icelui lors de son voyage alors prochain, la dite société de Routh et Cie. ayant depuis, savour le deux Octobre 1857, vendu et cédé aux Demandeurs ses droits au dit contrat en dernier lieu cité du 22 September 1857, pour le transport de 500 quarts de fleur de Montréal à Liverpool sous les restrictions et conditions de ce dernier contrat. Considérant de plus que ce n'est par aucune négligence qui puisse être imputée au Défendeur, si toute la dite quantité de 495 quarts de fleur n'a pu être transportée à Liverpool par le dit Steamer Anglo Saxon, mais bien par suite d'empêchements prévus et des réserves stipulées lors des contrats ci-dessus mentionnés du 22 de Septembre et 7 Octobre 1857, ce qui n'était pas contraire à la loi, ni à ce qui est de l'essence de pareils contrats, et par conséquent que le Défendeur ne

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saurait être responsable des dommages que les Demandeurs réclament par leur action pour la diminution dans le prix et la valeur des 472 quarts de fleur lors de leur arrivée à Liverpool où ils ne furent transportés que 15 jours après par le Steamer North American.

A débouté et déboute l'action des Demandeurs quant à cette partie avec dépens.

Et adjugeant sur la partie de l'action par laquelle les Demandeurs réclament du Défendeur la somme de £9 10s. 5d. Et considérant que le Défendeur en a fait et consigné les offres devant cette Cour avec £1 15s. de frais a adjugé et adjuge que les dites sommes ainsi déposées soient payées au Demandeurs.

Action dismissed.

Torrance & Morris for Plaintiffs.
Rose & Ritchie for Defendant.
(A. M.)

MONTREAL, 30TH OCTOBER, 1861.

Coram BERTHELOT, J.

Nos. 2435 & 2591.

Clapin vs. *Nagle* and *McGinnis*, Opposant, and *Clapin*, Contestant.

HELD:—That a builder is without privilege on the proceeds of real estate, who has not complied with the formalities prescribed by 4 Vict. C. 30, S. S. 31, 32, Consolidated Stat. L. C. pp. 352, 3, requiring a *proces verbal* to be made before the work is begun to be made, establishing the state of the premises in regard of the work about to be made, requiring also a second *proces verbal* to be made within six months after the completion of the work establishing the increased value of the premises, requiring also that the second *proces verbal* establishing the acceptance of the work, be registered within 30 days from the date of such second *proces verbal*, in order to secure such privilege.

The Plaintiff in virtue of two judgments against the Defendant Nagle, caused a certain immoveable property situated at St. Hyacinthe, to be seized and sold at Sheriff's sale, the proceeds of which were returned to this Court and the Opposant fyled his opposition *à fin de conserver*, for £166 5s. 10d., as a privileged and hypothecary creditor. By the judgment of distribution prepared by the prothonotary, the opposant was collocated by the 5th collocation for £88 9s. 8d., for builders privilege.

The Plaintiff, a *Bailleur du fonds* creditor of the Defendant, contested the collocation of opposant.

The opposant claimed £166 5s. 10d. as the price and value of certain plaster work done to the house constructed on the property in question, and therein he set forth that he had done such through verbal agreement made with McLarkin in November, 1858, but with the consent of the Defendant Nagle, and that then Larkin represented himself to be the proprietor of the property.

The opposant invoked in support of his pretention:

1st. The judicial nomination on the 6th November, 1856, of J. B. Tison as expert in accordance with the 31st and 32nd sections of the 4th Victoria Ch. 30—to estimate the work done or to be done on the house in question.

2nd. The Report of the said expert Tison, dated the 8th Nov. 1856, establishing that the approximate value of the house then was £1000—the plastering to be done being to complete the interior of the house.

3rd. The judicial nomination of said Tison dated the 7th January, 1857, again to estimate certain plastering work done and to be done by McGinnis to the same house (this must be an error as he then could only act to estimate the work done and finished.)

4th. The Report of Tison in January 1857, showing the approximative value of the house as being then about £1250, and declaring that the work was well done.

These two Reports were only enregistered at the Registry Office at St. Hyacinthe on the 24th February 1857.

There was also fyled an account which was proved by Tison as a witness, and which fixed at £185 5s. 10d. the different plaster works done by opposant.

On these different documents and particularly the two Reports of the Expert, opposant was collocated by the Collocation No. 5 of the judgment of distribution, because thework of the opposant had ameliorated and augmented the property a fifth in value, namely the difference between £1000 and £1250., amounts valued in the two reports, and McGinnis was collocated in consequence for the above amount being the one-fifth the part of the adjudication after deducting the privileged claims.

By his contestation Plaintiff set forth:

1st. That Larkin never was proprietor of the immoveable in question and could not hypothecate it, but that the Defendant Nagle never had ceased to be proprietor in possession thereof up to the time of its sale.

2nd. That his title of *Bailleur de fonds*, his sale to Nagle was enregistered long before the enregistration of the two Reports of the Expert, namely the 24th February 1857.

3rd. That Larkin never was in possession of the property, and that even supposing he had been, the formalities required by law had not been observed by the opposant, for the latter to acquire any privilege, and that his enregistration was late.

PER CURIAM.—The Plaintiff's proof establishes that, in fact, the plastering work in question was commenced about the 15th September, 1856, and that in November 1856, at the date of the first report, they were far advanced. It is true that the opposant when asked *on faits et articles*, awears positively that they were so, only after the report; but his answer cannot avail him, and besides it is difficult to believe that he is not mistaken, as Tison in his evidence proves that he made his admeasurement of the work the 3rd December, 1856, which would only leave from the 8th November, date of his first report less than four weeks, for work which, of necessity, took more time to be done, chiefly at that season. And here, it must be remembered, the irregularity again occurs in the Expert, Tison making his second examination of the work the 3rd December, 1856, whilst he was only named and chosen as Expert for that purpose in January, 1857. The formalities which the opposant should have followed to acquire a privileged claim, are prescribed 31st and 32nd Sections of the 4th Victoria, cap. 30, Registration Act. By the 31st section—To acquire a privileged claim, workmen and contractor should have a proces verbal made previous by the expert judicially named to certify the condition of the place relative to the

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work to be done, and cause the work to be received in the six months after being finished. But the amount of the privilege cannot exceed the value certified by the second proces verbal, and is reduced to the greatest value existing at the date of the alienation of the immoveable and resulting from the work done.

It is evident that in this case there was no estimation made before or at the commencing of the work; or, if there was, it was not accompanied by the required proces verbal of the work to be done. The first report only states the valuation of the houses, deduction made of the plastering already done, and to be done, and nothing more.

The opposant pretends, however that these irregularities are corrected by the second proces verbal, which states that the work was well done, and that the value was £1250, instead of £1,000, at the date of the first. But this report is in contradiction with the admeasurement of Tison, made the 3rd December, 1856, stating that the amount of plaster work was only £166 5s 3od, which is in evidence in his deposition as a witness; and further the opposant does not claim more by his opposition; and nevertheless, the collocation gives him a fifth of the price, which is far more than the proportion to which he would be entitled or the latter amount would justify

By the 32nd section—It is held that workmen will conserve their privileges at the date of the registration of the first *proces verbal* which sets for the state of the place, should the second *proces verbal*, which contains the reception of the work, being registered within thirty days, counting from the date of such second *proces verbal*. In this case over forty days passed between the *proces verbal* of the second report and its enregistration, the 24th February, 1857.

The opposant, therefore, had not followed the law, to retain his privileged *hypotheque*, nor followed what was pointed out to ascertain the amount of his claim. But the opposant answered that the enregistration required by this section of the ordonance is only required concerning posterior creditors and to rank before them. That such enregistration only applies to creditors who might enregister after the finishing of the work and within the delays allowed to workmen. That the interior creditors suffer nothing by the deferred enregistration of the privilege of the builder, and that, therefore, they cannot complain thereof. He cites Troplong, 1st vol. of Privileges and Hopotheques.

P. 504. No. 322. Mais il faut faire attention qu'en ce qui concerne les créanciers antérieurs aux travaux, l'inscription de l'architecte suffit pour que la cause de ce dernier soit préférable à la leur. Le privilége produit donc ici un de ces grands effets, qui est de primer les hypothèques antérieures. Ce n'est que pour les créanciers postérieurs aux travaux, qu'on se réfèrera aux dates des inscriptions."

It is certain that Troplong, in this passage and the preceding one, intends to speak only of the anterior ordinary creditors, or those with simple mortgage, and not of privileged anterior creditors, as the vendor, the copartageant, or the workman.

Besides, in this passage, he (Troplong) pre-supposes an enregistration in good time and within the delay required by law and the argument drawn therefrom by the opposant does not apply. And having only enregistered his claim subsequently,

which, claim by enregistration within the delay would have become a claim privileged or of equal privilege with another privileged claim, he now only has a claim which gives him only an ordinary hypotheque, to count from the date of its enregistration, without retroactive effect, above all as against a privileged creditor who has duly enregistered. On this point he refers to Troplong, same volume.

P. 585. No. 383. Les priviléges soumis à l'inscription sont seuls exposés à descendre dans la classe des hypothèques: et c'est le sort qui les attend si l'on n'observe pas les formalités indiquées pour leur conservation.

No. 384. J'ai fait connaître plus haut (No. 27) pour quels motifs le privilége etant éliminé, laisse subsister après lui un droit d'hypothèque.

"P. 24. No. 27. J'ai vu des esprits positifs s'étonner que la qualité seule d'une "créance suffise pour lui donner la vertu d'être préférée à une créance hypo- "thécaire, qui par stipulation expresse, affecte la personne et les biens.

"Mais, en y réfléchissant, on voit que cet effet important né s'opère que par- "ce que la loi donne aux priviléges sur les immeubles une hypothèque tacite. ..... Si les formalités nécessaires pour conserver le privilége n'ont pas été remplies, il reste toujours une créance hypothécaire. Donc toute créance déclarée par la loi privilégiée sur les immeubles se compose de deux élémens, savoir, d'un privilége personnel attaché à la faveur de la cause, et d'un droit réel résultant d'une hypothèque tacite.

Applying this doctrine to the case in point, it follows that the opposant has no privilege on the property sold in this cause, by reason of his deferred enregistration, he is only an ordinary creditor *par hypotheque tacite*, but he cannot rank before an anterior privileged hypothecary creditor any more than he can partake in the distribution of the monies concurrently with him.

The contestation of the plaintiff is therefore maintained and the collocation of the opposant set aside by the following judgment:—

"La Cour, &c., &c.

Considérant que l'opposant n'a pas observé les formalités nécessaires et prescrites par les sections 31 et 32 du chapitre 30 de la 4e Victoria pour faire constater et établir sa créance privilégiée comme constructeur et ouvrier en ne faisant pas précéder du procès verbal voulu par la loi, la confection des ouvrages dont il réclame le prix et la valeur, et que l'enrégistrement par lui pris le 24 de février 1857, plus de 30 jours après le second rapport de l'architecte Tison, n'a pu conserver à sa créance la préférence et le privilège qui y seraient attachés s'il avait enrégistré dans le temps voulu par la dite 32e section du dit Statut, et que par là, sa créance comme constructeur et ouvrier se trouve réduite au rang de simple créancier hypothécaire sans qui'l y soit attaché aucun privilège, a maintenu et maintient la contestation faite par le dit demandeur de la dite collocation No. 5. et ordonne que la dite collocation soit mise de côté et qu'il soit préparé un nouveau projet de jugement de distribution, conformément à la loi, et à ce que dessus, le tout avec dépens de la dite contestation en faveur du dit demandeur, &c."

Contestation maintained.

Mackay & Austin, for Plaintiff.
M. Doherty, for McGinnis.
(R. J. P.)

STE. SCHOLASTIQUE, 13 MAI 1862.

Coram BERTHELOT, J.

Dion vs. *Morris.*

Jugé:—Que l'Inspecteur d'une municipalité locale n'a pas droit de poursuivre en son nom, en recouvrement de la pénalité encourue par un habitant de la municipalité négligeant d'entretenir son chemin de front, et ce, en vertu du chap. 24 des Status Refondus du Bas-Canada, sec. 48, par. 6, telle poursuite devant être portée par l'Inspecteur, au nom de la municipalité; et qu'en conséquence l'action doit être déboutée avec dépens.

Action déboutée.

Fillion pour le Demandeur.

Prevost pour le Défendeur.

(G. O.)

STE. SCHOLASTIQUE, 13 MAI 1862.

Coram, BERTHELOT, J.

Exparte Lefort, pour Certiorari.

Jugé:—Que les Fabriques ont un nom collectif comme Corporation dont elles doivent faire usage sans quoi elles ne peuvent ester en jugement.

L'action était portée devant la Cour des Commissaires de la Paroisse Ste. Anne des Plaines, contre Lefort, pour £1 3s. 4d., valeur d'une année de rente de son banc dans l'église de la dite paroisse. L'action était intentée par "la "Fabrique de Ste. Anne des Plaines agissant par son Procureur Racine, Mar-"guillier en charge."— La Cour des Commissaires, nonobstant l'exception à la forme de Lefort qui faisait valoir que la fabrique n'était pas suffisamment désignée et qu'elle ne pouvait agir par Procureur, a condamné le Défendeur au paiement de la somme demandée.

Lefort a demandé un writ de certiorari et sur la motion *to quash*, Ouimet pour la fabrique a prétendu que la Cour des Commissaires était dans les limites de sa juridiction, puisqu'elle n'avait pas adjugé au-delà de $25, ni dans aucun des cas d'exception indiqués par le statut, et que la Cour des Commissaires avait, jusqu'au montant de $25 la même juridiction que la Cour de Circuit; qu'il pouvait y avoir mal jugé, mais que le mal jugé n'était pas un excès de juridiction, et que la Cour devait renvoyer la motion.

Prevost *Contrà.*—La Cour des Commissaires ne peut avoir de juridiction que quand il y a des parties devant elle, que la fabrique a un nom collectif comme corporation qu'elle doit adopter, et sous lequel elle doit poursuivre, qu'elle ne pouvait poursuivre par Procureur, n'y ayant que Sa Majesté qui pouvait le faire, et que dans l'espèce il n'y avait pas de partie demanderesse.

BERTHELOT, J.—Dans cette cause, il n'y a pas de corporation telle que la loi la reconnaît, savoir: "Les curé et marguillers de l'œuvre, etc., qui ait poursuivi, la Cour ne peut reconnaître que le titre de la Demanderesse soit suffisant, la Cour des Commissaires n'avait pas de cause devant elle et ainsi elle n'avait pas de juridiction. Le jugement de la Cour des Commissaires est donc nul et de nul effet, mais la Cour ne peut accorder de dépens vû qu'il n'y a pas de Demanderesse dans la cause.

Jugement cassé sans frais.

Prevost pour Lefort.

Ouimet pour la fabrique.

(G. O.)

Vide jugement du 16 Déc., 1852, 3e vol. Lower Canada Reports, page 111, & celui du 30 Avril, 1856, 3e vol. Lower Canada Reports, page 476, *Exparte* Goodman. (G. O.)

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 5TH JUNE, 1862.

Coram LAFONTAINE, C.J., DUVAL, J., MEREDITH, J., MONDELET, J.

DAME AMELIA RICE ET AL,
(Plaintiffs in the Court below,)
APPELLANTS;

AND

HENRY AHERN,
(Defendant in the Court below,)
RESPONDENT.

CONSTRUCTION OF CONTRACT—WHETHER INTEREST DUE—IMPUTATION.

HELD:—That an obligation containing an undertaking to pay sums of money "and without interest from date till the payments become due," implies an undertaking to pay interest on the sums due from the day the payments become due.

That where payments of money are made, and both principal and interest are due, the imputations should be first on the interest.

This was an appeal from a judgment of the Superior Court of Montreal, SMITH, J., (30th April, 1860,) in the following terms:—

"La Cour après avoir entendu les parties par leurs avocats sur le mérite de cette cause, examiné la procédure, et pièces produites et avoir délibéré, maintient la première exception plaidée par le défendeur à cette action. En conséquence condamne le défendeur à payer aux demandeurs la somme de £25 du cours actuel de la Province du Canada, balance de l'obligation passée devant Mtre. J. O. Bastien et son confrère, notaires, le 19 juillet 1839, et consentie par le défendeur en faveur du dit feu Pierre François Christin Delesderniers, avec intérêt sur la dite somme de £25 à compter du 30 novembre 1859, jour de l'assignation en cette cause jusqu'au paiement, et aux dépens d'une action de £25 distraction desquels dépens est accordée à MM. Loranger, avocats des demandeurs.

"Et la Cour déboute le surplus de la demande des dits demandeurs avec dépens de la contestation."

The judgment was reversed.

The facts of the case fully appear from the remarks of the Court of Appeal.

LAFONTAINE, C.J. Le 19 juillet 1839, (Bastien, notaire), le défendeur a consenti au profit de M. Delesderniers dont les demandeurs sont aujourd'hui les représentants, une obligation au montant de £50, avec promesse de "rendre, bailler et payer au dit sieur créancier en sa demeure ou au porteur, etc., *en cinq paiements* de chacun dix livres dit cours, le 18 de juillet de chacune des années 1840, 41, 42, 43 et 44, termes préfix, à peine, etc., et *sans intérêts, d'ici à l'échéance des paiements.*"

Le 21 mars 1843, le défendeur ayant payé £25 à M. Delesderniers, celui-ci lui en donna un reçu, "On account of the *payments* due on a certain obligation, dated 19th July, 1839, J. O. Bastien, notary." Signé, "P. F. C. Delesderniers."

Ce reçu est produit par le défendeur à l'appui de ces exceptions, et le de-

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demandeur avait déjà admis, dans sa déclaration, "que le défendeur n'avait payé en déduction de la susdite somme (c-à-d. en déduction de la somme de £50 montant en principal de la dite obligation) que celle de £25, le 21 de mars 1843; de sorte que la balance restée due, est de £25 et les intérêts."

Lors du paiement des £25, trois termes étaient échus, savoir 1840, '41 et '42 faisant £30.

Le demandeur réclame par son action, capital et intérêts, lesquels intérêts il calcule comme suit: 1o. sur £50, depuis le 19 juillet 1839 jusqu'au 21 mars 1843, s'élevant, dit-il, à la somme de £11; 2o. sur £25, depuis le dit jour 21 mars 1843, jusqu'à ce jour (c-à-d. jusqu'au jour de l'introduction de l'action), de s'élevant à la somme de £2 5 0s. 8d., lesquelles dites deux sommes jointes à celles de £25, balance due sur l'obligation, formant la somme de £61 0s. 8d. non *huit chelins* comme le porte l'addition erronée faite dans cette partie de la déclaration. Enfin le demandeur conclut au paiement de cette dite somme de £61 0s. 8d., "avec intérêt et dépens, desquels dépens, ses avocats demandent distraction."

A cette action, le défendeur a opposé deux exceptions péremptoires, la première par laquelle il prétend qu'il n'a jamais promis de payer l'intérêt, et que l'obligation ne contient pas de stipulation à cette effet; qu'ayant payé un à-compte de £25, il ne reste dû qu'une balance de £25, pour laquelle il offre de confesser jugement, avec les frais d'une action de cette classe; et la deuxième dans laquelle il dit qu'en supposant qu'il serait tenu de payer les intérêts qui ont pu s'accroître après l'échéance de tous les paiements, ou après l'échéance respective de chacun de ces paiements, tel que mentionnés dans l'obligation, les demandeurs sont, même dans ce cas, mal fondés dans leurs conclusions; qu'ayant payé, le 21 mars 1843, un à-compte de £25 sur le principal, il ne devrait plus qu'une balance de £25, avec £25 0s. 8d. d'intérêts, en tout £50 0s. 8d., (c-à-dire que, dans ce cas, les intérêts ne doivent commencer à courir que du 21 mars 1843). Vient ensuite une défense au fonds en fait.

Le jugement dont est appel, rendu le 30 avril 1860, en maintenant la première exception du défendeur, lui donne gain de cause, le condamne seulement à payer au demandeur la somme de £25, balance de l'obligation, avec intérêt du jour de l'assignation, et avec les dépens d'une action de £25.

La clause de l'obligation, rapportée plus haut, contient-elle une stipulation d'intérêts? Et si elle la contient, de quel temps doivent courir ces intérêts? Le créancier, en recevant, le 21 mars 1843, un à-compte de £25, et en l'imputant, comme il l'a fait, sur le principal, sans faire aucune mention des intérêts, est-il par cela même censé avoir renoncé à ces intérêts et en avoir fait remise, ou même est-il censé les avoir reçus en même temps que l'à-compte de £25?

C'est cette question d'intérêts qui nous est soumise. L'obligation dont il s'agit a été contractée sous l'empire de notre ordonnance, 17 Geo. 3, chap. 3, qui porte: "Du jour et après la passation de cette ordonnance, il sera permis de passer *directement ou indirectement* dans tous contrats pour emprunts d'argent, de marchandises [illegible] quelconques, une demeure de six par cent sur cent livres audes[illegible]; la dite demeure sera accordée ou perçue dans tous les cas où [illegible] conviendra de les payer.

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En matière de conventions, il faut d'abord rechercher l'intention des parties. Dans l'espèce, la somme était remboursable en cinq paiements, avec stipulation " sans intérêts, d'ici à l'échéance des paiements." Si les intérêts ne doivent pas courir après chaque échéance, les mots cités deviennent inutiles, même un non-sens. Cependant par l'insertion de ces mots dans l'obligation, les parties ont dû vouloir quelque chose. Or, qu'est-ce que cela peut être, si ce n'est une stipulation d'intérêts qui devaient courir après une certaine époque, au profit du créancier. " Sans intérêts d'ici, à l'échéance des paiements," c'est bien exempter, il est vrai, le débiteur de payer des intérêts jusqu'à cette époque; mais, d'un autre côté, c'est montrer clairement que l'intention des parties a été que l'intérêt courrait depuis cette époque. La stipulation, à mon avis est expresse, *directe;* ne le fût-elle pas, il faudrait admettre que la stipulation est au moins *indirecte;* et pour être *indirecte*, elle n'en fait pas moins connaître quelle a été l'intention des parties en faisant la stipulation. Or, notre ordonnance reconnaissait la validité et l'efficacité de la stipulation faite sous l'une ou sous l'autre des deux formes, pourvu, bien entendu, qu'il n'y eût pas de doute sur l'intention des parties. L'arrêt de la Cour de Bourges, du 11 juin 1825, rapporté dans *Dalloz*, pour 1826, 2e. partie, p. 26, est tout-à-fait applicable à cette cause. Là, il paraît que la stipulation avait été que " le paiement des 50,000 francs, échererait et serait exigible le 18 avril 1808, et sans intérêts, jusque-là seulement, à peine de toutes pertes, dommages et intérêts."

" Attendu, était-il dit, dans l'arrêt, que non-seulement l'intention, dans les clauses obscures, doit être consultée, mais que la stipulation elle-même est claire; que dans son acte, le Sieur Délatte a formellement renoncé à exiger des intérêts jusqu'au 18 avril 1808, et que les Sieur et Dame Lebœuf se sont formellement obligés à les payer, s'ils ne se libéraient pas aux termes qu'ils avaient demandés; que les obligations respectivement consenties doivent être littérulement observées, et qu'une partie ne peut rien ajouter à celles sous lesquelles son adversaire a traité....."

On trouve, dans l'ancien Denisart, au mot " intérêt, t. 3. p. 25, No. 76, que dans un testament où un legs se trouvait ainsi: " Je donne et légue aux pauvres de la paroisse de Baby, la somme de 4000 livres, pour en faire un fonds au profit des dits pauvres, laquelle somme de 4000 livres sera payée *dans un an*, à compter du jour de mon décès, sans intérêts *jusqu'à ce*," il s'est agi de savoir si les intérêts étaient dûs après l'année révolue, ou seulement du jour de la demande; et que par arrêt du 15 avril 1768, il a été jugé, conformément aux conclusions de M. Joly de Fleury, avocat-général, qu'ils avaient commencé à courir après l'année révolue."

Les demandeurs ont néanmoins demandé les intérêts sur tout le principal de l'obligation, à compter du jour même de sa confection. Ils n'ont pas tenu compte de la renonciation que leur auteur, Delesderniers, avait faite aux intérêts jusqu'à l'échéance des termes qu'il avait accordés au défendeur. Cette partie de leur demande est insoutenable. Elle ne peut pas même souffrir la discussion.

Le créancier, on recevant l'à-compte de £25, en a fait l'imputation sur le principal, sans réserve des intérêts accrus sur cette somme de £25. Tout le principal n'était pas alors échu, mais seulement trois termes de paiement, au

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mant £30. S'il eût reçu tout le principal, sans réserve des intérêts, nul doute que les intérêts n'eussent été éteints. Mais qui peut empêcher le créancier de morceler sa créance, s'il le juge à propos. Il l'avait déjà fait par l'obligation, du consentement du défendeur, en accordant à celui-ci cinq termes du paiement. Si dix mois après l'échéance du premier terme, le débiteur eut payé dix louis au créancier, et que celui-ci lui en eût donné une quittance sans réserve des intérêts, bien que ces intérêts eussent couru pendant ces dix mois, le créancier serait censé avoir été payé de ces dix mois d'intérêts, ou en avoir fait la remise. Dans tous les cas, ils seraient éteints. Il me semble qu'en recevant l'à-compte de £25 et en lui donnant, de son consentement, une quittance avec imputation sur le principal, il y a la même raison de décider dans un cas comme dans l'autre, en ce qui regarde l'effet que la quittance doit avoir sur les intérêts.

On lit dans le Traité des intérêts de Le Camus d'Houlouve, p. 267 : "Quand le créancier, auquel il est dû une somme qui produit des intérêts, reçoit cette somme, et en donne quittance pure et simple, et sans aucune réserve des intérêts qu'il pouvait exiger, il est présumé avoir été satisfait de ces intérêts, ou en avoir fait la remise, il n'est plus recevable à les demander. Alors les intérêts sont éteints aussi bien que le principal. Cette règle a lieu pour toute sorte d'intérêts, soit légaux, soit judiciaire, soit conventionnels." Voir, aussi Rep. de Jurisprudence, de Guyot, t. 9, au mot "intérêt," p. 472. Si le paiement du principal en entier, sans réserve des intérêts, produit cet effet, pourquoi le paiement d'une partie du principal, sans la même réserve, ne produirait-il pas le même effet ? La présomption de paiement ou de remise des intérêts me semble naître uniquement du fait que le créancier consent à recevoir le principal sans faire réserve des intérêts. Or, dans un cas, comme dans l'autre, c'est toujours le principal qu'il reçoit, que le débiteur le lui paie en partie, ou le lui paie en entier.

Je suis donc d'avis d'infirmer le jugement.

MEREDITH, J. All the Judges of this Court agree in saying that the obligation of the respondent imports an undertaking to pay interest on each payment, from the date at which it became due.

The point, as I understand it, respecting which the Judges differ, is as to the legal effect of the receipt of the 21st of March, 1843, which is in the following words :—

"Received, Vaudreuil, March 21, 1843, from Ahern, Esq., twenty-five "pounds currency, on account of the payments due on a certain obligation dated "July 19, 1839. Bastien, N. P."

According to the opinion of all the Judges, at the date of the receipt in question, payments of interest were due as well as payments of capital; and the majority of the Judges are of opinion that that receipt cannot be considered an express imputation on account of capital, rather than on account of interest; and that in default of such express imputation, the payment of £25 ought to be imputed, first on account of interest and then on account of capital.

Such was the rule laid down by the Court of Bankruptcy after full argument in the case of Jean Bte. Dumouchelle, Bankrupt, and Hon. George Moffat, Opposant, and J. J. Girouard, also Opposant.

That judgment having been appealed from was confirmed by a majority of

the Judges of the Court of Queen's Bench at Montreal in 1845. 2 Rev. de Lég. p. 258.

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About ten years afterwards, the Superior Court at Montreal, in the case of Moreau vs. McGuire, and Butler et al., opposants, held that where "a creditor "received a sum of money less than the full amount of the principal and interest, the ordinary rule of imputation must prevail, which imputes the payment "first to the liquidation of the interest, and the balance toward the principal "unless it be otherwise expressly stipulated." (Taken from the Report in *Montreal Herald.*)

The rule laid down in the cases above cited seems to me perfectly reasonable, and has I believe generally been acted upon both in Quebec and Montreal, since the decision in *Exparte* Dumouchelle (1845); and I therefore think that we ought to be guided by it upon the present occasion. As to the principal point in this case upon which all the Judges are agreed, I think it quite needless to attempt to add anything to the observations in relation to it which have been made by the Chief Justice, in which I fully concur.

The *motifs* of the judgment in appeal were as follows:—

"La Cour, &c., &c.

"Considérant que l'action est fondée sur une obligation du 19 juillet 1839, (Bastien, notaire,) consentie par le défendeur au profit de M. Delesderniers dont les demandeurs sont les représentants et par laquelle le dit défendeur reconnait devoir la somme de £50 courant et promet la payer "en cinq paiements de chacun £10 dit cours le 18 juillet de chacune des années 1840, '41, '42, '43 et 1844, termes préfix, à peine, etc., et sans intérêts d'ici à l'échéance des paiements."

Considérant que d'après la stipulation portée en la dite obligation, l'intérêt courait sur chaque paiement à compter de son échéance.

Considérant que le 21 mars 1843, il a été fait à compte de la dite dette, un paiement de £25.

Considérant que la balance due par le défendeur en lui donnant crédit pour le susdit paiement de £25 était à la date de l'institution de la présente action de £55 1s. 2d.

Considérant que par conséquent dans le jugement de la cour de première instance, qui condamne le défendeur à payer aux appelants £25 avec intérêt du 30 novembre 1859 seulement, il y a mal jugé:

Infirme le susdit jugement, savoir: le jugement rendu par la Cour Supérieure à Montréal le 30 Avril 1860, et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, condamne le défendeur à payer aux appelants la somme de £55 1s. 2d. avec intérêt du 30 novembre 1859, jour de l'assignation en cette cause jusqu'au paiement, le tout avec dépens, tant en cette cour qu'en la cour de première instance et ordonne remise du dossier à la Cour Supérieure siégeant à Montréal.

L'Honorable Sir Louis Hypolite LaFontaine, Bt., Juge en Chef, *dissentiente* quant à l'imputation sur les intérêts)."

Loranger & Frères, for appellants.

Denis & Desnoyers, for respondent.

(P.W.T.)

MONTREAL, 4TH MARCH, 1862.

Coram HON. SIR L. H. LAFONTAINE, Bart., Ch. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET (C.) A.J.

No. 29.

THOMAS PECK,
(*Defendant in Court below,*)
APPELLANT;

AND

JOHN HARRIS,
(*Plaintiff in Court below,*)
RESPONDENT.

HELD:—1o. That no damages can be recovered on account of inconvenience and loss suffered by the taking down and rebuilding of a *mitoyen* wall, when such inconvenience and loss are the necessary consequence of the taking down and rebuilding of the wall, and when all proper precautions have been observed and no unnecessary delay or neglect has taken place.

2o.—That, altho' the *mitoyen* wall may be sufficient for the existing buildings, yet, if it be insufficient to support a new edifice which one of the two neighbouring proprietors wishes to build, the party so wishing to build has a right to demolish such *mitoyen* wall and rebuild the same, on observing the formalities in that behalf by law required.

Semble.—3o. That the tenant of the building, the wall of which is so demolished, is entitled to a diminution in the rent payable by him, in proportion to the duration and extent of the encroachment on his possession.

This was an Appeal from a judgment rendered by the Superior Court at Montreal, on the 31st of May, 1861, condemning the appellant to pay to the respondent £150 damages and costs.

The demand of the respondent was thus set out in his declaration in the Court below:—

That heretofore, to wit: at the said City of Montreal, on the 12th day of February, 1858, by deed of lease then and there made and executed before Maitre James Smith and his Colleague, Notaries Public, the defendant, Thomas Peck, did let and lease and promised to procure peaceable enjoyment unto the plaintiff in this cause party thereto, accepting for the period of three years, to be computed from the first day of May then next, the property and premises in the said deed of lease executed as follows: "That certain three-story cut-stone "house situate, lying and being in McGill Street, in the City of Montreal, "distinguished as No. 72, with the shed and premises to the said house belong- "ing and right in common with the yard of passage, with the tenant of the ad- "joining premises, the premises hereby let and leased being bounded in front "by McGill Street, in rear by Longueuil Lane, on one side by property of "lessor, occupied by Mr. Scott, and on the other side by the property of the "representatives of the late John E. Mills, being the premises now occupied "by Messieurs Dresser & Robinson."

That the said lease was made subject to the clauses and conditions therein mentioned, and likewise for and in consideration of a rental of £140 currency per annum, as also such taxes and assessments as the said premises should be subject to during the continuance of said lease, an authentic copy of which is herewith fyled.

That on or about the 1st day of May, 1858, the said plaintiff entered upon and took possession of the said leased premises under the said lease, as tenant of the said defendant, and from that time up to this date faithfully paid said

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rent as it became due, and complied with all the requirements on him binding by law, and under and by virtue of the said lease and therein until the committing of the grievances hereinafter mentioned did without interruption or molestation carry on a large and profitable business as a wholesale and retail manufacturer and dealer in boots and shoes and other articles appertaining to his trade, making use of the front or ground room as a shop, and occupying the second or office story and portion of the said premises with his family as a dwelling.

And the said plaintiff further alleges that notwithstanding he faithfully fulfilled the conditions of the said lease in so far as he was and is by law bound to do, he, the defendant, had nevertheless utterly failed to comply with the requirements and obligations on him binding by law and the stipulations of the said lease, and altogether failed to give and continue quiet and full and peaceable possession of said house and premises, and to keep the said house in repair and in habitable condition and water tight.

And the plaintiff also alleges that on or about the first day of July last past, the said plaintiff was disturbed and deprived of the full, quiet and peaceable possession of the said house and premises, and that on or about the last mentioned day and year the defendant in this cause, in violation of the terms of his said lease, illegally and unlawfully did cause to be pulled down and demolished the division wall or gable of the said house or premises, which division wall or gable separated the said leased house and premises from the adjoining property belonging to the heirs Mills in the said lease mentioned, also the roof of the said house and of the outbuildings, together with the chimney thereon erected, and all of this was done and consented to by the defendant, without there being any occasion or necessity for so doing, thereby occasioning to the said plaintiff serious inconvenience to himself and family by depriving him for a long space of time thereafter, to wit for the period of 5 months, of the peaceable and uninterrupted enjoyment and possession of the said house and premises, and likewise causing to the said plaintiff, during the said space of time, very heavy loss and damage to him in his trade and business by preventing him from carrying on his trade and business and the manufacture of the articles of his trade, apart from the actual damage done and occasioned thereby to his stock and trade as herewith mentioned.

That the said division wall and gable so pulled down and demolished was a thick stone wall, having one chimney thereon for the use of the occupants of said house, and in the removal and pulling down of the same, and of the roof of the said house, the said defendant in this matter then and there acting, as well by himself as by his servants and agents, rendered the workshop and dwelling apartments of the said house and premises uninhabitable and unfit for the purpose of carrying on his trade and business, and moreover in the removing and pulling down of the said wall, roof and chimneys caused the same to be done in so unskilful a manner that the stock in trade of the said plaintiff, of great value, to wit, the value of £2000, currency, was greatly injured and damaged, and part of it, being at least of the value of £100, was rendered entirely unserviceable and unsaleable, and the furniture and other effects belonging to the plaintiff in the dwelling apartments was very much damaged and impaired.

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That moreover the defendant in this cause in the performance of the said works did not adopt or cause to be adopted sufficient precautionary measures to protect the said plaintiff from the rain, wind and weather, and suffered and allowed the said plaintiff and his family to remain during the whole of the period aforesaid, to wit, during five months from or about said first of July, exposed to the rain, wind and bad weather, insomuch that the plaintiff and his family were subjected to great exposure and serious inconvenience; and moreover for want of such proper and precautionary measures the dirt and filth occasioned by the demolition of the said wall spread about the said shop, workshop and dwelling apartments so as to damage and injure the contents thereof, and to render the said premises unfit for occupation or for carrying on any business, and the plaintiff fyles herewith a statement of part of the damage by him suffered in consequence thereof, and avers that he notified the said defendant and protested against him on several occasions during the continuance of said grievances, as will more fully appear by the several protests herewith fyled to form part of these presents.

That by means of the said several premises, the said plaintiff has suffered and sustained damage and loss, to wit, in the sum of $3000, for which conclusions are taken."

The appellant pleaded as follows:—

"The defendant without admitting, but, on the contrary, specially and expressly denying all and every of the allegations of the plaintiff's declaration, save in so far only and in manner and form hereinafter expressly admitted for plea to the present action, alleges that it is true that on the 12th day of February, 1858, he made the lease referred to in the plaintiff's declaration, executed before Smith and his Colleague, Notaries, and he saith that he hath always strictly conformed to said lease, and in so far as depended upon him the premises thereby leased have been upheld and kept in good and proper order, state and condition.

That he, the defendant, had nothing whatever to do with the pulling down and demolition of the division or gable wall between the premises thereby leased and the adjoining property of the heirs Mills, nor of the roof nor chimneys of said property so thereby leased.

That said wall was a *mitoyen* wall between that so leased and the property of the heirs Mills, who pulled down and demolished the same for the purpose of building stores on their said property, and when their works for that purpose were about to be undertaken, and so soon as he, the defendant, himself became aware of it, he notified the plaintiff thereof, to wit, among other things by a certain notarial notification and protest, executed by James Smith and his Colleague, Notaries, the 2nd day of June, 1859, and also therein and thereby notified the plaintiff of the precautions proposed and undertaken, to be observed and taken by the said heirs Mills for the protection of him, the plaintiff, on the occasion of the demolition and re-construction of said wall.

That the defendant is ignorant of what damages, if any, the plaintiff may have suffered, but if such there were, they were wholly caused by the said heirs Mills in pulling down and demolishing said *mitoyen* wall, and by the plaintiff

himself; that he, the plaintiff, persisted in preventing the heirs Mills from enclosing said so leased premises with a partition, as is customary in such cases, and refused to allow them to adopt any precautions for the protection of himself or of the said premises, and if he suffered any damage whatever it was due to his own fault, negligence and misconduct, and he, the defendent, is in no case liable for any such pretended damage.

And the defendant saith that the pulling down and re-construction of said wall did not occupy more than six weeks.

And, notwithstanding the opposition of said plaintiff, the said heirs Mills finally succeeded in adopting the necessary precautions customary in such cases for the protection of him, the said plaintiff, in the enjoyment of said premises."

The appellant also pleaded the general issue.

The following is the judgment which was rendered by the Superior Court:

"The Court having heard the parties by their Counsel upon the merits of this cause, examined the proceedings, proof of record, and deliberated; considering that the plaintiff hath established the material averments of his declaration, and that an appreciable damage hath been caused to him in his trade and business in the goods and effects of his trade by the careless manner in which the *mitoyen* wall of the premises occupied by him at the times of his occupation of the said premises as in the pleadings mentioned was demolished and removed, and reconstructed, as well as by unskillful and inefficient protection afforded and given to the plaintiff against injury and damage to his said goods and effects of his trade, and against interruption to his business; and considering that the said defendant hath not protected and secured the said plaintiff from such loss and damage as by law he was bound to do, doth condemn the said defendant to pay to the said plaintiff the sum of one hundred and fifty pounds current money of this Province of Canada, for his damages aforesaid, with interest upon the said sum of one hundred and fifty pounds from this day until actual payment and costs of suit, *distraits* in favour of B. Devlin, Esquire, the Attorney of the said plaintiff.

MEREDITH, J. The appellant in this cause and the heirs of the late Mr. John E. Mills are respectively the proprietors of two contiguous emplacements situate in McGill street in this city. In the spring of eighteen hundred and fifty-seven the heirs Mills notified the appellant that they were about to erect new warehouses on their property; and that for that purpose it would be necessary to take down and rebuild a part of the then existing *mitoyen* wall between the two properties.

The respondent, the tenant of the appellant, having objected to the taking down of the wall, the heirs Mills after the usual notices and other formalities caused the wall to be examined by experts regularly named, and the experts agreed in reporting that the wall, as it then stood, was sufficient to support the then existing buildings, but that it was insufficient to support the new warehouses about to be erected (and which since that time have been erected) by the heirs Mills. Thereupon, and in pursuance of the right given to them by the 204th article of the Custom, and after due notice to their neighbour, the heirs Mills proceeded to take down and rebuild the part of the *mitoyen* wall so de-

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cl ired insufficient for their new building; the performance of this work necessarily subjected the respondent as tenant of the appellant to considerable inconvenience and doubtless to some loss; and the question I propose to consider first in this cause is, as to whether the heirs Mills are either directly or indirectly liable to indemnify the respondent, or the appellant as the landlord of the respondent, for the inconvenience and loss to which the respondent was *necessarily* subjected by the taking down and rebuilding of a considerable part of the gable wall of the premises in his occupation.

At first sight, it would seem reasonable to say, that as the heirs Mills, for their own profit, subjected their neighbour to loss and inconvenience, that they ought to indemnify him for the loss and inconvenience so caused, and this view has been adopted by some of the commentators of our custom.

Ferrière says: "En troisième lieu celui qui a démoli doit faire refaire "incessamment le rétablissement, et au cas que par la démolition le voisin en "reçoive quelque préjudice, comme si les locataires de l'autre voisin ont été "contraints de sortir de la maison, il est tenu de l'en dédommager, n'étant pas "juste que l'un des voisins fasse rien pour sa commodité et utilité au préjudice "de l'autre." *

Goupi (whose views, however, as to the 204th article of the Custom do not agree with those of Desgodets) concurs with Ferrière in saying that in a case such as that before us it would not be just to refuse to the party injured an indemnity. †

Pothier having the conflicting views of Desgodets and of his annotator Goupi before him, throws the great weight of his own opinion into the scale against that of Goupi.

Pothier ‡ says: "Lorsque le mur commun qui est bon pour mur de clôture "ou même pour le soutien des bâtiments qui sont des deux côtés, n'est pas suf- "fisant pour soutenir l'exhaussement que je veux faire et les nouveaux bâti- "ments que je veux élever, la Coutume de Paris, art. 196, me permet de démo- "lir et en construire à mes dépens un autre qui soit suffisant en prenant sur "mon terrain de mon côté ce qu'il faudra pour lui donner une plus grande "épaisseur que celle qu'il avait (et en ce cas je ne devrai pas les charges ayant "reconstruit et fortifié à mes dépens le mur commun).

"Si le voisin avait des bâtiments de son côté, qu'il ait fallu pour cela étayer, "j'en dois pareillement supporter les frais, car ils font partie des frais de la "reconstruction.

"Si le voisin était un maitre paumier qui eût de mon côté contre le mur "commun un jeu de paume, dois-je aussi le dédommager des profits de son jeu "de paume dont il a été privé pendant le temps nécessaire pour la démolition "et reconstruction du mur pendant lequel *il n'a pu faire usage de son jeu de "paume.* Desgodets décide que je ne suis pas obligé, et *quoiqu'il soit en cela "repris* par Goupi, qui prétend que j'y suis obligé, je trouve l'avis de Desgo-

* Ferrière, 2nd Vol., Grande Coutume, art. 204, p. 1694.

† Desgodets, Ed. of 1787, p. 283. See also Fournel, du Voisinage 2, p. 323, who, as already mentioned, agrees with Ferrière.

‡ Pothier, Traité de la Société, No. 215.

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" dets régulier ; *car je ne fais qu'user de mon droit* que me donne la loi et la " communauté au mur. La loi en me donnant le pouvoir de démolir et de " reconstruire le mur commun pour soutenir l'exhaussement que je veux faire, " ne m'oblige qu'à payer tous les frais de cette démolition et reconstruction, *on* " *ne peut pas m'obliger à autre chose* qu'à ce à quoi la loi m'oblige. L'état de " maître paumier qu'à mon voisin ne doit pas me rendre plus onéreux mon " droit de communauté au mur. La privation du profit de son jeu de paume, " qu'il souffre pendant le temps nécessaire, n'est point un tort que je lui cause, " car ce n'est pas faire tort à quelqu'un que d'user de son droit."

The framers of the Code Civil do not seem to have made any substantial change in the old law on this subject, as will be seen on reference to the 658th and 659th articles of the Code.

And Duranton in reference to these articles observes: " Le sentiment de " Goupi qui pensait que dans tous les cas ou les changements n'étaient opérés " par l'un des co-propriétaires que dans son intérêt particulier le tort qu'il " causait à l'autre devait être réparé était peut-être plus conforme à l'équité, " mais il est bien certain qu'il n'était pas aussi parfaitemenf en harmonie avec " les princi;es de Pothier, et qu'il n'a point été adopté par le code puisque le " code n'oblige celui qui fait les changements autorisés qu'à supporter seul les " frais faits *propter rem ipsam*, et non à indemniser le voisin pour la privation " de jouissance de certaines parties de son bâtiment pendant le temps nécessaire " à l'opération."*

This view seems to have been adopted by the most esteemed commentators upon the Code Civil.

Demolombe, Servitudes, Vol. 1, No. 405, p. 466, says: " Maintenant il " s'agit de savoir si le co-propriétaire qui reconstruit le mur dans son seul inté- " rêt, mais sans avoir commis aucune faute, et en usant au contraire du droit " que la loi lui confère, si, disons-nous, ce co-propriétaire est responsable envers " son co-propriétaire du dommage que la reconstruction peut lui causer.

" L'affirmative est généralement reconnue, et nous paraît en effet très certaine, " en ce qui concerne ceux de ces dommages, qui doivent être considérés comme " faisant partie des frais de la reconstruction, car l'article 659 met ces frais en " entier à la charge de celui qui reconstruit.

" Tels sont les frais d'expertise et autres qu'il aura fallu faire pour détermi- " ner l'alignement du mur, les frais nécessaires pour étayer le batiment du voisin " et pour déplacer, s'il y a lieu, comme c'est l'ordinaire, une partie du toit qui " les couvre, ce qui nécessitera le rétablissement des arbres, treillages, berceaux " pavillons, hangards, cabinets, etc., que le voisin aurait pu, dans le libre exer- " cice de son droit de mitoyenneté, appliquer ou adosser contre le mur.

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" Mais que décider relativement aux autres incommodités et dommages que " le voisin peut éprouver et qui ne font profit partie des frais de la reconstruction."

" Goupi (sur Desgodets, art. 196 de la Coutume de Paris) pensait, autrefois,

* Duranton, Des Servitudes, 5 Vol., p. 372, No. 331.

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"que le co-propriétaire qui reconstruit le mur dans son intérêt, quelquefois "même pour son seul agrément, doit indemniser l'autre de tous les dommages "sans aucune exception, qui peuvent en résulter pour lui, et telle est encore "sous notre code la doctrine de plusieurs jurisconsultes." (Delvincourt T. 1, p. "161, Note 6. Toullier 6, p. 391, voir aussi les autres citations *infra*.)

"Mais cette doctrine nous paraît contraire:

1°. "Au texte même de la loi, qui dans l'article 659 impose uniquement au "co-propriétaire qui reconstruit, l'obligation de reconstruire uniquement à ses "frais, et de prendre de son côté l'excédant d'épaisseur, c'est-à-dire qui ne "l'oblige qu'à payer les dépenses directement relatives à la reconstruction elle-"même *propter rem ipsam*.

2°. "Aux principes généraux du droit d'après lesquels nul n'est responsable "du préjudice qui peut résulter pour autrui de l'exercice d'un droit légitime et "qui n'attachent la responsabilité qu'à la faute, à la négligence, ou à l'impru-"dence. (Art. 1382, 1383.)

3°. "Aux principes particuliers de la mitoyenneté, qui constitue à la charge "de chacun des voisins une servitude légale et qui d'ailleurs aussi confère égale-"ment à chacun d'eux un droit égal et réciproque.

"Notre conclusion est donc que le voisin qui fait reconstruire ne doit aucune "indemnité à son voisin, pour raison des dommages qui ne font point partie des "frais de reconstruction; nous exceptons, bien entendu, le cas où il aurait com-"mis soit en laissant traîner la construction en longueur, soit en n'employant "pas toutes les précautions convenables, quelque faute qui le rendrait responsa-"ble d'après le droit commun." (Art. 1382 et 1383.)*

Demolombe, it will be recollected, refers to Delvincourt and Toullier as holding that a proprietor rebuilding a wall in his own interest "doit indemniser "l'autre de tous les dommages sans aucune exception qui peuvent en résulter "pour lui."

Delvincourt speaking of a proprietor who for his own profit rebuilds a *mitoyen* wall, says,—"Il est tenu d'indemniser le voisin des dommages qu'ont "pu lui causer la démolition et la reconstruction de la partie mitoyenne,"† without, however, entering into any details as to the damages for which an indemnity is to be given. I have not been able to see the work of Mr. Fowler, indeed, I am not aware that there is a copy of it either in Quebec or Montreal, but, whatever may be the views of that learned writer, I think it may be safely asserted that the preponderance of authority is beyond any doubt in favour of the opinion, that the proprietor who for his own profit takes down and rebuilds a *mitoyen* wall, as allowed by the 204 article of the Custom, is not obliged to indemnify his neighbour for the loss and inconvenience to which he is necessarily subjected in the use of his own premises by the taking down and rebuilding of such wall, provided, of course, the work be done with due care and diligence.

* See also 7 Toullier, No. 210. Pardessus, Traité des Servitudes, Edition of 1810, pp. 328, 329, No. 176. Lalaure, Traité des Servitudes, Edition de 1827, p. 174. Lepage, Lois des Batiments, Edition de 1847, Vol. 1, p. 62, 304, 5, 407. See also Duplessis, Vol. 1, p. 125.

† Delvincourt, Vol. 1, p. 404, Edition of 1824.

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And, although the doctrine may at first appear unreasonable, yet I think it is not really so.

The law as to the *mitoyenneté* of wall is established for the benefit not only of the proprietors of houses, but of the public generally. It is beneficial to persons owning buildings, because, in effect, it gives a man two gables to his house at the cost of one, and it is beneficial to the public, because, by economizing space, it decreases, in about the proportion that the thickness of a gable wall bears to the whole of the front of a house, the cost of the excavation and underground work necessary for the drainage of the city and for supplying it with gas and water.

For the same reason and nearly in the same proportion does the law as to the *mitoyenneté* of walls tend to decrease the watering and cleaning the city and other expenses of the same kind. The advantages thus secured to the parties more directly interested and to the public generally, are doubtless attended with some inconvenience, one of the chief of which is the annoyance and loss to which a person is exposed when his neighbour rebuilds his house; but these inconveniences are more than compensated by the advantages by which they are accompanied, and, therefore, may reasonably be thrown upon those who are exposed to them without giving a right to further indemnity.

It may be added that a rule of law requiring a person rebuilding his house, as allowed by the Custom, to indemnify for any damage to which they may thereby be subjected, would be thereby greatly increasing the cost of building, retard materially the improvement and extension of our cities, and would also be a fertile source of unreasonable demands such as were urged by the respondent against the heirs Mills when they commenced the building in question.

The following is the judgment rendered by the Court of Appeals:—

"The Court * * * considering that the division wall, or gable described in the pleading in this cause fyled, as separating the premises leased from the appellant by the respondent, from the adjoining property belonging to the heirs of the late John E. Mills, Esq., was a *mitoyen* wall; considering, also, that it was established in due course of law before the demolition of the said *mitoyen* wall; that although the said wall, as it then stood, was sufficient to support the then existing buildings, yet that it was insufficient to support the new warehouses then about to be erected, and which, since that time, have been erected, by the said heirs Mills, upon their said property; considering also that the said heirs Mills observed all proper precautions in and about the taking down and rebuilding of the said *mitoyen* wall; and that no delay or neglect of any kind is attributable to them in the premises; and that the said heirs Mills in so taking down and rebuilding the said *mitoyen* wall exercised a legal right, in a legal manner, and, therefore, that neither of the parties in this cause can have any claim for damages against them, by reason of their having so exercised their said right; considering that, although the respondent is entitled to a diminution in the rent payable by him, to the appellant, in proportion to the duration and extent of the encroachment by reason of the causes aforesaid, upon his enjoyment of the said premises so leased to him; yet that the respondent hath not demanded any such diminution in his rent in and by the present action;

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and considering also that, although the respondent was subjected to inconvenience and loss by the taking down and rebuilding of the said *mitoyen* wall, yet that he hath no claim for damages against the appellant, on account of the said inconvenience and loss, in so far as the same were the necessary consequences of the taking down and rebuilding of the said *mitoyen* wall; and considering that the inconvenience and loss to which the respondent was subjected by the taking down and rebuilding of the said *mitoyen* wall, in so far as the same were not the necessary consequences of the said work, are attributable to the improper conduct, and more particularly to the unjustifiable demands and illegal threats of the respondent, when the said heirs Mills began to take down the said *mitoyen* wall; seeing, therefore, that, in the judgment of the Court below which condemns the appellant to pay to the respondent the sum of one hundred and fifty pounds currency for damages, as mentioned in the said judgment, there is error; doth in consequence reverse the said judgment, to wit, the judgment rendered in this cause by the Superior Court at Montreal, on the thirty-first day of May, one thousand eight hundred and sixty-one, and, proceeding to render the judgment which the Court below ought to have rendered in the premises, doth dismiss the action of the respondent against the appellant, with costs against the respondent and in favour of the appellant, and this Court doth also condemn the respondent to pay to the appellant his costs in this Court."

Judgment of the Court below reversed.

Cross & Bancroft, for appellant.
B. Devlin, for respondent.
(S.B.)

MONTREAL, 5TH MARCH, 1863.

Coram HON. SIR L.H. LAFONTAINE, Bart., Ch. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, (C.) J.

No. 80.

HANNAH LYMAN ET AL.,
(*Defendants in Court below,*)
APPELLANTS;
AND
THOMAS PECK,
(*Plaintiff in Court below,*
RESPONDENTS.

HELD:—1. That where a tenant sues his landlord for damages alleged to have been suffered by the pulling down and re-erection *by the landlord* of a *mitoyen* wall forming the gable end of the house leased, the landlord cannot sue *en garantie* the owner of the adjoining property as the party who in fact committed the act complained of.

2. That no damages can be recovered on account of inconvenience and loss suffered by the taking down and rebuilding of a *mitoyen* wall, when such inconvenience and loss are the necessary consequence of the taking down and rebuilding of the wall, and when all proper precautions have been observed and no unnecessary delay or neglect has taken place.

3. That, although the *mitoyen* wall may be sufficient for the existing buildings, yet, if it be insufficient to support a new edifice which one of the two neighbouring proprietors wishes to build, the party so wishing to build has a right to demolish such *mitoyen* wall and rebuild the same, on observing the formalities in that behalf by law required.

This was an appeal from a judgment of the Superior Court at Montreal, rendered on the 31st day of May, 1861.

The action in the Court below was *en garantie*, and was instituted by the respondent, who was the appellant in the case above reported, on the ground that the damages claimed in that case were in fact caused by the appellants in the present case.

In his declaration in the Court below the respondent alleged:—

"For that whereas for more than ten years now last past the plaintiff has been and still is proprietor in possession of a lot of ground lying and situate in the said City of Montreal joining in front McGill street, in the rear Longueuil Lane, on the South East side by Jacob Dewitt or representatives, and on the North West side by property of the defendants which the said late John Easton Mills acquired from one Abner Bagg, which said lot of ground has a three-story stone house and other buildings thereon erected.

That a mitoyen wall has existed for more than ten years now last past, dividing the said lot of ground from another lot of ground belonging to the defendants, Dame Hannah Lyman, as well in her own name as in her said quality, Dame Hannah Jane Mills and Mary Elizabeth Mills, fronting on McGill street aforesaid, bounded in rear by Longueuil Lane, on one side by Joseph McKay, and on the other side to the South East by the above described property of the plaintiff.

That in the rear of the stone house on the said property of the plaintiff, and extending from thence to Longueuil Lane, a distance of about eighty-six feet, there has existed for the ten years last past up to the time of its demolition by the defendants as hereinafter mentioned, a mitoyen wall of a height varying from seventeen feet to about one hundred and thirty-three feet, forming the rear of a back shop, kitchen and shed, on the said property of the plaintiff, and having a chimney constructed thereon with a back shop, kitchen and shed, abutting on said mitoyen wall on the property of the plaintiff.

That by lease executed before Smith and his Colleague, Notaries, the twelfth of February, one thousand eight hundred and fifty-eight, the plaintiff let and leased and promised to procure peaceable enjoyment of part of the above described lot of ground and premises by the description following, viz.:

That certain three-story cut stone house, situate, lying and being in McGill street, in the City of Montreal, distinguished as number seventy-two, with the shed and premises to the said house belonging, and the right in common in the yard or passage with the tenants of adjoining premises, the premises directly let and rented being bounded in front by McGill street, in rear by Longueuil Lane, on one side by the property of Lessor, occupied by Mr. Scott, and on the other side by the property of the representatives of the late John E. Mills, being the premises then occupied by Messieurs Dresser and Robinson, unto John Harris of the said City and district of Montreal, boot and shoe maker, for the term of three years to be reckoned from the first of May, one thousand eight hundred and fifty-eight, and which will expire on the first day of May, one thousand eight hundred and sixty-one, said lease being made for and in consideration of one hundred and forty pounds currency, per annum, payable quarterly, all which will more fully appear by reference to said lease, copy whereof is herewith produced.

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That said John Harris entered into possession of said so leased premises on the first day of May, one thousand eight hundred and fifty-eight, and has ever since continued to occupy the same for his business as a boot and shoe maker, dealing in boots and shoes by wholesale and retail, as well as other articles pertaining to his trade.

That about the first day of July last past the defendants caused to be demolished the said mitoyen wall dividing the plaintiff's said lot of ground from that of the defendants, and forming the rear of the said back shop, kitchen and shed of the plaintiff, being part of the premises by him so leased to the said John Harris, together with the chimney in said wall and the roofs of the buildings, to wit, that portion of said wall extending from the rear of the North West gable wall of the dwelling house to Longueuil Lane, as well as the chimney therein and the roof of the buildings whereof said wall formed the rear on said lot of ground or property of the plaintiff, leaving said back shop, kitchen and shed without any rear wall, with the contents exposed and rendering them unserviceable to the said John Harris, and causing him considerable damage, which the said John Harris pretends and alleges amounts to three thousand dollars currency, and claims that amount from the now plaintiff for said damages.

That at the time of the demolition of said mitoyen wall it was sound and strong, and in good condition, and sufficient and abundantly able to support and serve for the then existing building whereof it formed part, and was demolished by the defendants because they pretended that it was unsuited to the uses and insufficient for a building of great and unusual size and proportions, which they were about to erect and which they have since constructed on the said property.

That at the time, and after the defendants had demolished said wall, the defendants did not enclose that portion of said buildings of the plaintiff, to wit, the said back shop, kitchen, and shed that he had opened by the taking down of said wall, but kept and allowed them to remain open for several months, so that the wind, rain and dust, entered continually in said buildings to the great detriment, hurt and damage of the said John Harris, the tenant of the plaintiff."

He then set out at length the declaration in the action so brought against him, and prayed that the appellants should be condemned in all respects to guarrantee, indemnify, and hold him harmless.

The appellants pleaded specially as follows:

"The defendants, for plea to the declaration and action of the said plaintiffs, say, that true it is the said defendants in the early part of July, 1859, demolished the *mitoyen* wall, then existing between the plaintiff's and defendants' property referred to in the said declaration, but the said defendants aver that they entirely deny the allegations in the said declaration contained as to such demolition and that the said wall was so demolished for the causes, under the circumstances, and in the manner following: On the twenty-eighth day of May, 1859, through the ministry of Isaacson and Colleague, Notaries Public, the defendants formally notified the said plaintiff as the fact was, that the said *mitoyen* wall was insufficient to support certain buildings, which the defendants were then erecting on their said property, and that in consequence thereof, the said defendants would require to demolish such *mitoyen* wall and rebuild the same of sufficient strength

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and stability to support such buildings. On the 10th day of June, 1859, through the ministry of said Isaacson and his Colleague, Notaries Public, the defendants formally notified the plaintiff that, in order to prevent any misunderstanding and disputes and to adopt all necessary precautions, they would cause the said *mitoyen* wall to be surveyed and examined at the hour of two of the clock in the afternoon on the 14th day of June then instant, by Augustin Laberge, of the City of Montreal, contractor and builder, and did also formally notify the plaintiff to name and appoint some fit and competent person on his behalf to be present at the time aforesaid to survey and examine the said wall with the said Augustin Laberge. The said plaintiff thereupon nominated David Perrault of the City of Montreal, contractor and builder, and they, the said Augustin Laberge and David Perrault, on the 18th day of June, 1859, made their report in writing in the premises in the presence of said Isaacson and his Colleague, Notaries Public, whereby they in effect declared that the said *mitoyen* wall was insufficient for the purposes of the said buildings so being erected by the said defendants. On the said 18th day of June, 1859, by the ministry of said Isaacson and his Colleague, Notaries Public, the said defendants formally notified the said plaintiff of the making of the said report. On the 27th day of June, 1859, through the ministry of said Isaacson and his Colleague, Notaries Public, the defendants formally notified the said plaintiff as the fact was, that they were ready and prepared, and had offered to erect and set up proper enclosures to protect the property of the tenant or tenants of the said plaintiff occupying his said property and also to erect and set up all necessary supports to support the floorings and roof of the buildings of the said plaintiff, and also to demolish and take down the said *mitoyen* wall, but that the tenant of the said plaintiff had refused to allow them, the said defendants, to enter on the premises occupied by him and to accomplish such purposes, and that, in consequence, the said defendants were under the necessity of formally notifying the said plaintiff as they thereby did, that on Wednesday, the 29th day of June then instant, at the hour of eleven of the clock in the forenoon, they, the said defendants, would commence to demolish and take down the said *mitoyen* wall, and did also formally notify the said plaintiff to remove or cause to be removed, all shelving or other property or effects attached to the said *mitoyen* wall and all moveable effects immediately adjoining such wall so as to enable the said defendants to rebuild the same with as little inconvenience, loss or damage as might be to the occupant or occupants of the premises of the said plaintiff, and to suffer the said defendants to enter upon the premises of the said plaintiff for the purpose of erecting the proper enclosures and supports aforesaid; as the whole will more fully appear by reference to authentic copies of the said several notarial documents herewith produced and fyled, and to which the said defendants particularly refer as forming part of these presents.

And the said defendants further aver that the said plaintiff and his said tenant, notwithstanding the premises aforesaid, still persisted in refusing permission to the defendants to enter the plaintiff's premises aforesaid and put up the said supports and provide the necessary protection aforesaid to the plaintiff's said tenant during the demolition of the said wall, and also refused to remove the

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said shelving and moveable effects to prevent damage thereto; and thereupon the said defendants, on the 4th of July, 1859, after having verbally offered to the said tenant to remove such shelving and moveable effects, and on his refusal to permit them so to do, commenced the demolition of the said wall, and on or about the 6th or 7th of July, 1859, (having then for the first time received permission from the plaintiff and his said tenant so to do) commenced to board up and with all due despatch continued to board up in a substantial and workmanlike manner the space where the said wall was so demolished, as the demolition of the said wall progressed, and did remove the said shelving before so demolishing the said wall.

And the said defendants further say that the re-erection of the said wall was prosecuted with all possible despatch, and that the said wall was entirely re-erected and the said shelving was also re-erected and the portion of the new wall next to the plaintiff's property was plastered and completed within about six weeks from the time the defendants so commenced to demolish the said wall, and that in the demolition of the old wall and the erection of the new one as aforesaid, and in all matters and things incident thereto, the said defendants took every care not only to prevent actual damage to the plaintiff and his said tenant but also to cause them as little inconvenience as possible.

And the said defendants lastly say, that all and every the allegations, matters and things in the said declaration set forth and contained, except in so far as the same are hereinbefore expressly admitted to be true, are false, untrue, and unfounded in fact, and the said defendants hereby expressly deny the same, and each and every thereof."

The appellants also pleaded the general issue.

The following is the judgment which was so rendered by the Superior Court:—

"The Court, having heard the parties by their counsel upon the merits of the present action *en Garantie*, examined the proceedings, proof and record, and seen and examined the judgment rendered in this court this day, in a cause bearing the No. 910, and wherein one John Harris of the city of Montreal, boot and shoe maker, was plaintiff and the plaintiff in this cause was defendant, and deliberated; considering that it appears by the judgment rendered in the said cause No. 910, that the said John Harris, the plaintiff therein, had established to the satisfaction of the court the material averments of his declaration in that cause fyled, and that an appreciable damage had been caused to him, the said Harris, in his trade and business, and in the goods and stock of his trade by the careless manner in which the *mitoyen* wall of the premises occupied by him at the time of his occupation of the said premises as in the pleadings mentioned was demolished and removed and reconstructed as well as by the unskilful and insufficient protection afforded and given to him the said John Harris against injury and damage to his said goods and effects of his trade, and against interruption to his business; and the court in the said cause, No. 910, considering that the said defendant in that cause, to wit, the said Thomas Peck, the plaintiff in this cause had not protected and secured the said John Harris from such loss and damage as by law he was bound to do, did condemn and adjudge the said Thomas Peck to pay to the said John Harris the sum of £150 current

money of this Province of Canada as and for such damages, with interest thereon and costs of suit, and the Court now here and adjudicating upon the present action and *demande en garantie* of the said Thomas Peck against the said defendants *en garantie*, and considering that the said plaintiff, Thomas Peck, hath sufficiently established the material allegations of his declaration, and that the said defendants *en garantie* are bound in law to warrant and indemnify the said plaintiff *en garantie*, Thomas Peck, against the said condemnation pronounced against him in favour of the said John Harris in the said cause No. 910; the Court doth adjudge and condemn the said Dame Hannah Lyman as well in her own name as in her quality, and the said Dame Hannah Jane Mills and Mary Elizabeth Mills, jointly and severally to warrant, *garantir*, and indemnify the said plaintiff, Thomas Peck, from the condemnation pronounced against him in principal, interest and costs, in the said cause No. 910 in favour of the said John Harris, and doth condemn the said Dame Hannah Lyman as well in her quality, the said Dame Hannah Jane Mills and Mary Elizabeth Mills, jointly and severally, to pay and satisfy to the said Thomas Peck the said sum of £150, with interest thereon from this day until actual payment and costs of the said action No. 910, as well in demanding as in defending. And the Court doth condemn the said defendants *en garantie* in their said names and qualities jointly and severally to pay the costs of this action or *demande en garantie*, of which costs *distraction* is granted to Messrs. Cross & Bancroft, the Attorneys of the said plaintiff *en garantie*."

AYLWIN, J. (*dissentiens*), was of opinion, that the action *en garantie* was well brought, and that it was the duty of the appellants to have intervened in the original suit and defended the respondent. He would therefore reverse the judgment of the Court below for the reason stated in the case of Peck and Harris, but would allow the respondent his costs in the Superior Court.

MEREDITH, J., explained on behalf of the Court, that all the judges were of opinion to reverse the judgment of the Superior Court, and that the only difficulty was with respect to the action *en garantie*. The majority of the judges held that the *motivé* adopted by the Court in rendering judgment in the case of Peck & Harris was a complete answer to anything that might be urged in favour of such an action being brought, and that the action could not under the circumstances be sustained. The Court therefore were distinctly of opinion that Peck had no recourse *en garantie* against the heirs Mills, and would consequently reverse the judgment of the Superior Court with costs against the respondent in both Courts.

The following is the judgment which was rendered by the Court of Appeals:—

The Court * * * considering that the alleged wrongs, complained of by one John Harris in his demand and action against the respondent mentioned in the declaration of the respondent in this cause fyled, are alleged by the said declaration of the said John Harris to have been committed by the said respondent himself; and therefore, that whether the allegations of the said John Harris in his said declaration were true or untrue, the respondent had not a right to call upon the appellants to warrant and indemnify him against the said action and demand of the said John Harris, so based upon wrongs alleged to

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have been committed by the respondent himself, as the said respondent hath done in and by his declaration in this cause fyled.

And considering that it appears by the evidence adduced in this cause, that the division wall, or gable described in the said action of the said John Harris, and in the pleadings in this cause fyled as separating the premises leased from the respondent by the said John Harris from the adjoining property belonging to the said appellants was a mitoyen wall; considering also that it was established in due course of law, before the demolition of the said *mitoyen* wall, that although the said wall, as it then stood, was sufficient to support the then existing buildings, yet that it was insufficient to support the new warehouses, then about to be erected, and which since that time have been erected by the said appellants upon their said property; considering also that the said appellants took all proper precautions, and used due care and diligence in and about the taking down and rebuilding of the said *mitoyen* wall; considering that the said appellants in so taking down and rebuilding the said *mitoyen* wall exercised a legal right in a legal manner, and, therefore, that the respondent could not have, either in his own right or in the right of his tenant, the said John Harris, any claim against the appellants, by reason of their having so exercised their said right; and considering therefore that in the judgment of the Court below, which maintains the said action of the respondent against the appellants and condemns them to the payment of a sum of one hundred and fifty pounds, for the causes mentioned in the said judgment, there is error, doth in consequence reverse the said judgment, to wit, the judgment rendered in this cause by the Superior Court of Montreal, on the thirty-first day of May, one thousand eight hundred and sixty-one, and proceeding to render the judgment which the said Superior Court ought to have rendered in the premises, doth dismiss the said action of the said respondent against the said appellants with costs in favour of the appellants and against the respondent. And this Court doth also condemn the respondent to pay to the appellants their costs in this Court.

Judgment of Court below reversed.

Bethune & Dunkin, for appellants.
Cross & Bancroft, for respondent.
(S.B.)

MONTREAL, 3rd JUNE, 1862.

Coram HON. SIR L. H. LAFONTAINE, Bart., Ch. J., DUVAL, J., MEREDITH, J., MONDELET (C.), A. J.

No. 19.

Wardle, appellant, and *Bethune*, respondent.

HELD:—That a judgment which determines all the matters in litigation between the parties, with the exception of the amount claimed under a plea of compensation, and orders, *avant faire droit* on such plea, that the amount of compensation be settled by *experts*, and reserves the question of costs, is not a definitive judgment entitling the party aggrieved to sue out a writ of appeal *de plano*, and that a writ so sued out will be set aside on motion.

This was a motion by the respondent to set aside a writ of appeal sued out by the appellant, on the ground that the judgment appealed from was not a definitive judgment, and that the writ which had been sued out *de plano*, with

out previous application to and permission of the Court of Queen's Bench, had consequently issued irregularly.

The judgment of the Court below was rendered by the Superior Court at Montreal, on the 24th of February, 1862, and disposed of all the issues between the parties, except that raised by the plea of compensation fyled by respondent, and ordered, *avant faire droit* on such plea, that the amount claimed thereby should be settled by *experts*, and reserved to pronounce thereafter on the question of costs.

DUVAL, J.—There can be no doubt that the judgment of the Superior Court was a mere interlocutory one, inasmuch as the matters in contest between the parties were, in terms of the statute, only in part decided. The motion to dismiss the writ of appeal which was sued out *de plano* as from a definitive judgment must therefore be granted, and the writ of appeal is consequently set aside with costs.

Motion to quash writ of appeal granted.

A. & W. Robertson, for appellant.

Bethune & Dunkin, for respondent.

(S.B.)

MONTREAL, 9TH JUNE, 1862.

Coram SIR L. H. LAFONTAINE, Bart., Ch. J., DUVAL, J., MEREDITH, J., MONDELET (C.), A. J.

Wardle, Appellant, and *Bethune*, Respondent.

HELD :—That an application to be permitted to appeal from an interlocutory judgment, which is not made during the term immediately subsequent to the rendering of the judgment, is not too late when the applicant had previously sued out a writ of appeal *de plano*, which was set aside as having issued irregularly.

This was a motion to be permitted to appeal from an interlocutory judgment rendered by the Superior Court at Montreal, on the 24th of February, 1862; the applicant having previously sued out a writ of appeal *de plano*, which was set aside as having issued irregularly.

Bethune, showing cause against the motion, contended that the motion ought to have been made in the term immediately subsequent to the date of the judgment complained of, and was consequently too late, and relied on the ruling of this Court in the case of the Seminary of Quebec, appellant, and Vinet et al., respondents, reported in the 6 L. C. Jurist, 138.

PER CURIAM :—We are not disposed to hold the mover, under the peculiar circumstances presented here, to the strict rule laid down in the case of the Seminary of Quebec and Vinet, particularly as we are assured by the Counsel for the applicant that the appeal will virtually determine all the material points at issue between the parties. The motion is therefore granted.

Motion for permission to appeal granted.

A. & W. Robertson, for Wardle.

Bethune & Dunkin, for Bethune.

(S.B.)

SUPERIOR COURT.

MONTREAL, 28TH APRIL, 1862.

Coram BERTHELOT, J.

No. 2179.

McNevin vs. *The Board of Arts and Manufactures for Lower Canada.*

CLAUSE COMMINATOIRE.

HELD:—That a clause in an obligation stipulating "that in case the debtor should make default in "the payment of the interest to accrue and become due on a principal sum for the space "of thirty days after the interest payments should become due and payable, then and in "that case the whole of the principal sum, with all interest then due, should immediately "become due and exigible," is not a covenant which will be regarded as a *clause comminatoire*, but which will be enforced.

The declaration of the plaintiff set up an obligation of the defendants, dated the 25th January, 1861, in favour of the plaintiff for $11,000, payable in two years with interest, meanwhile payable semi-annually, the first payment of the interest to be made on the 25th June, 1861.

The obligation contained the following clause, which caused the litigation: "In case the Board, &c., shall make default in the payment of the said interest to accrue and become due on the said principal sum of $11,000 as aforesaid, for the space of thirty days after the said interest payments shall become due and payable as hereinbefore stipulated and provided, then and in that case the whole of the said debt, with all interest then due, shall immediately be and become due and exigible."

The defendants pleaded among other things that on the 25th August, 1861, at Montreal aforesaid, the defendants, therein acting by J. S. Hunter and his Colleague, notaries public, did tender and offer to the said plaintiff in legal gold current coin of this Province *à bourse délée et derniers decouvers* the said sum of three hundred and eighty-five dollars, being for six months interest on the said principal sum of eleven thousand dollars at seven per cent. per annum, and due as aforesaid on the twenty-fifth day of July then last past, and at the same time requiring the said plaintiff to accept the same, which the plaintiff refused to do, as the whole will more fully appear by reference to an authentic copy of the said tender herewith produced and fyled to form part hereof.

That no *demande* was ever made by the plaintiff on the defendants for the payment of the said sum of three hundred and eighty-five dollars before the institution of the present action, nor were they ever placed *en demeure* to pay the same.

That both the said offers hereinbefore referred to were made before the institution of the present action, and as the defendants expressly aver, long before any service upon them of the writ and declaration in this cause, and also long before the issuing of the present writ of summons calling on the defendants to appear on the twenty-fifth of October last.

That in fact and in law the defendants have by such offer and tender fulfilled all their obligations to the plaintiff, who is not now entitled to ask or demand from them the payment of the said principal sum of eleven thousand dollars, or any part thereof, nevertheless the said defendants do now renew their said offer of the twenty-seventh day of August last, and do now consign

before this Honorable Court the said sum of three hundred and eighty-five dollars, together with costs on the said amount so tendered by them, namely the sum of twenty-six dollars and forty-five cents currency for said costs, making in all the sum of four hundred and eleven dollars and forty-five cents currency.

And the defendants say that the said condition in the said deed of the twenty-fifth day of January, eighteen hundred and sixty-one, stipulating that in case the defendants should make default in the payment of the said interest to accrue on the said principal sum of eleven thousand dollars, for the space of thirty days after the said interest, payment should become due and payable as in the said deed then stipulated, then the whole of the said debt and interest should immediately become due and exigible, cannot be executed *de rigueur*, and was and is comminatory, and ought so to be held and construed.

Torrance for the defendants cited *Homier* vs. *Demers*, 1 L. C. Jur. 12: *Bouthillier* vs. *Turcot*, 3 L. C. Jur. 50; Guyot, vo. Comminatoire, p. 79, Nouv. Den. vo. Clause Comminatoire, p. 567; 2 Argou, p. 305, Lib. 3, cap. 35. Pothier, Obligations, No. 672.

PER CURIAM.—I think that the clause in question should be interpreted according to its letter and spirit, and that the defendants have consequently forfeited their right to the delay of two years accorded by the contract. I refer to the cases of *Beaudry* vs. *Bareille*, 1 Rev. de Leg., p. 33; *Richard* vs. *Le Curé, &c., de l'Œuvre et Fabrique de Quebec*, 5 L. C. Reports, p. 1.

The judgment was *motivé* as follows:

La Cour, * * * Et considérant que par l'obligation du 25 de janvier 1861, revue devant Messrs. J. S. Hunter et confrère notaires, par laquelle le défendeur, (The Board of Arts and Manufactures for Lower Canada,) s'est obligé de payer au demandeur $11,000 le montant d'icelle dans deux ans à compter de la date d'icelle, avec intérêt à raison de sept par cent par année, payable semi-annuellement de six mois en six mois à compter du dit jour 25 janvier 1861, il a été convenu et stipulé expressément entre les dites parties à icelle que dans le cas où le dit débiteur le défendeur serait en défaut de payer le dit intérêt stipulé payable de six mois en six mois, pendant trente jours après que les dits paiements pour intérêts seront échus, que dans ce cas toute la dette principale et l'intérêt alors dû sur icelle deviendrait alors dû exigible.

Considérant de plus que le dit défendeur, (The Board of Arts and Manufactures for Lower Canada), a failli de payer au dit demandeur dans les trente jours qui ont suivi l'échéance du paiement pour intérêts devenus dus depuis le 25 janvier 1861, au 25 de juillet 1861, savoir la somme de $385, ce qui a donné droit au demandeur de réclamer immédiatement le paiement de la dite somme de $11,000 à compter de l'expiration des dits 30 jours, à compter du 25 juillet 1861. Considérant enfin que les exceptions plaidées par le défendeur sont mal fondées et que les offres par lui faites en cette cause sont insuffisantes et ont été faites trop tard, a condamné et condamne le dit défendeur, (sous le nom, &c. "The Board of Arts and Manufactures for Lower Canada"), à payer au demandeur la somme de $11,385 du cours actuel de la Province du Canada, savoir $11,000 dit cours pour le montant en capital de la dite obligation au 25 janvier 1861, avec intérêt de sept par cent sur icelle à compter du 25 juillet

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1861, et celle de $385 dit cours, pour intérêts échus sur la dite somme capitale depuis le 26 janvier au 25 de juillet 1861. Le tout avec dépens, &c.

John Monk, for plaintiff.

Torrance & Morris, for defendants.

(F.W.T.)

IN THE PRIVY COUNCIL, 1862.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, COUNCIL CHAMBER, WHITEHALL, 5TH JULY, 1862.

Coram:

THE RIGHT HONORABLE LORD KINGSDOWN.
" " " JUDGE OF THE ADMIRALTY COURT.
" " " SIR EDWARD RYAN.

On Appeal from the Court of Queen's Bench, Lower Canada, between

BENJAMIN GRANT,
(*Plaintiff in the Court below,*)
APPELLANT;

AND

THE ÆTNA INSURANCE COMPANY,
(*Defendants in the Court, below,*)
RESPONDENTS.

HELD:—1st. That if the words used in a Policy of Insurance upon a vessel, imported an agreement that the vessel shall navigate, then they must be considered as a warranty, and the engagement not having been performed, whether material or immaterial, the insurers are discharged.

2nd. That in the present case the words used contained no contract to navigate, but merely indicated an intention, and therefore did not amount to a warranty.

3rd. *Semble.* That while in England a defendant cannot move for judgment *non obstante veredicto*, yet in Lower Canada he can, the practice in Jury Trials there differing in many and important respects from that prevailing in England, and the Privy Council being indisposed to interfere with the judgment of a Colonial Court on a question of its form and practice.

This was an appeal to Her Majesty in Her Privy Council from a judgment rendered by the Court of Queen's Bench at Montreal, on the 3rd of June, 1861, of which a full report is given at page 285 et seq. of the 5th volume of the Lower Canada Jurist.

Their Lordships after deliberation pronounced the following judgment:

On the 30th July, 1858, the appellant effected an insurance with the Respondents on the steamboat "Malakoff," by which the Company engaged to assure the appellant against loss by fire to the steamboat for twelve months to the extent of £1000.

The policy of insurance described the "Malakoff" "as now lying in Tate's Dock, Montreal, *and intended to navigate* the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for winter in a place approved by the Company, who will not be liable for explosion either by steam or gunpowder."

The steamboat never left Tate's wharf, and was burnt there on the 25th June, 1859.

An action was brought by the appellant in the Superior Court of Lower

Canada, to recover damages upon the policy. The case was tried by a jury, and a verdict found for the plaintiff.

An application by way of motion was made to the Court by the defendants on the 20th February, 1860, that judgment *non obstante veredicto* might be entered for the defendants, and that the plaintiff's action might be dismissed with costs.

On the 31st March, 1860, the Superior Court made an order to this effect.

The plaintiff appealed against this order to the Court of Queen's Bench in Canada, when it was affirmed, the Chief Justice dissenting from the majority of the Judges.

The case now comes before us on appeal to Her Majesty in Council from these several orders. The judgments in the Courts below proceeded on the ground that the words which we have read from the policy contained a warranty that the steamboat should navigate the St. Lawrence and the lakes in the manner there described; and that, as in fact, she never left Tate's Dock, the policy became void.

It was contended before us, in a very able argument, that the words referred to contained no warranty; but that if they did the warranty extended only to this—that an intention to employ the ship in the manner described was *bonâ fide* entertained by the insured when the policy was effected.

It was argued that this would be the meaning of the words if they were merely representations, according to several authorities cited; and it was argued that though the effect of a warranty was very different from that of a representation, the meaning of the words used must be the same, whether they were found in or out of the policy.

Their Lordships are of opinion that the question depends entirely on the meaning to be attached to these words. If they import an agreement that the ship shall navigate in the manner described in the policy—then being an engagement contained in the policy—they must be considered as a warranty, and the engagement not having been performed, whether the engagement was material or not material, the insurers are discharged.

But their Lordships think that this is not the true meaning of the words used. They consider the clause in question amounts only to this: The assured says, my ship is now lying in Tate's Dock; I mean to remove her for the purpose of navigation in the manner described, and if I do the policy shall still be in force; but in that case I engage to lay her up in winter in a place to be approved by the Company.

This construction, which implies no contract to navigate, seems to their Lordships the natural meaning of the words used, and imputes a reasonable intention to the parties to the policy.

Their Lordships, must, therefore, advise Her Majesty to reverse the judgments complained of, and to direct that the defendant's motion be dismissed, and that the appellant's costs of the motion in the Superior Court, and of the appeal to the Queen's Bench, and of the appeal to Her Majesty in Council, be paid to him by the respondents.

It is unnecessary to pronounce any decision on a point raised in the argu-

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ment, viz.: that it is not competent in a defendant in a suit to make a motion for judgment *non obstante veredicto*. Such appears to be the rule in England, but the practice in jury trials in Lower Canada differs in many and important respects from that which prevails in this country. Their Lordships are always indisposed to interfere with the judgment of a Colonial Court on a question of its forms and practice.

It appears that, besides the motion of which we are now disposing, two other motions were made by the respondents in the Superior Court, one in arrest of judgment, and the other for a new trial. Neither of those motions is before us, and we do not express any opinion upon them, or intend to affect the rights either of the appellant or respondents in respect of them. They will stand in the same situation as if the Queen's Bench had made the order upon this motion, which we think that it ought to have made. To prevent any misconstruction upon this point, which, however, we do not think likely, we shall advise Her Majesty to add to the order which we have already suggested, a declaration "that this order is not intended in any manner to prejudice the rights either of the appellant or respondents with respect to any other proceedings which have taken place, or may take place in the cause."

Judgment of Queen's Bench reversed.

Henry Matthews,
R. Mackay,
for appellant.
Montague Smith,
G. Shaw Lefevre,
for respondents.

(A M.)

COUR DE CIRCUIT.

MONTREAL, 23 JUIN 1862.

Coram MONK, J. A.

No. 2616.

Les Syndics de Lachine vs. *Joseph Laflamme*.

JUGE;—Qu'un catholique, qui s'est fait protestant, ne peut être cotisé pour la construction d'une église catholique, quoiqu'il ait fait des actes que les catholiques seuls pouvaient faire et qu'il ait demandé la construction de l'église en question.

FAITS.—Les demandeurs, Syndics nommés pour surveiller et diriger la construction d'une église, sacristie et presbytère catholique à Lachine, réclamaient du défendeur la somme de $35.21, étant le premier paiement échu sur la somme de $422.52, imposée sur les propriétés du défendeur.

Le défendeur plaida que depuis 30 ans et plus il avait toujours professé la religion protestante et n'avait pas appartenu à l'église catholique; qu'il avait été marié suivant les rites de l'église épiscopalienne le 7 mars 1812, et que tous les enfants nés de son mariage avaient été élevés et instruits d'après les doctrines de l'église presbytérienne; qu'il avait contribué aux charges nécessaires pour le soutien de cette dernière église, et qu'il ne pouvait être forcé à contri-

buer au soutien d'aucune autre religion; que par le ministère de Mtre Wright et son confrère, notaires, le défendeur avait, le 16 novembre 1861, (époque où il apprit pour la première fois que les demandeurs entendaient juger de lui ce qu'ils réclament par cette action) notifié légalement le curé de la paroisse de Lachine qu'il avait abandonné la religion catholique depuis l'année 1827.

Les demandeurs répondirent qu'il était faux que depuis 30 ans et plus le défendeur ait appartenu à une dénomination religieuse quelconque séparée de l'église de Rome, qu'il était notoire que durant la période susdite le défendeur s'était représenté comme catholique romain et avait contribué au soutien du culte catholique; que notamment, lorsqu'il s'était agi de faire construire une nouvelle église dans la dite paroisse de Lachine, le dit défendeur avait signé les requêtes originaires et nécessaires tant à l'autorité ecclésiastique qu'à l'autorité civile et avait pris part aux premiers procédés exigés par la loi en pareille circonstance, sans faire aucune réclamation; que durant cette période de temps le défendeur avait déclaré ouvertement et à plusieurs reprises, qu'il n'avait jamais abandonné la religion catholique et qu'il entendait agir et être considéré comme catholique, que le défendeur avait été inscrit de son consentement parmi les catholiques de la dite paroisse lors du dernier recensement de la Province; que quoiqu'il existe des écoles dissidentes à Lachine, le défendeur avait toujours contribué au soutien des écoles catholiques; que tous les ans le défendeur souscrivait et payait une somme de vingt chelins pour le soutien du curé, vu l'insuffisance des dîmes, ce qu'il a fait jusqu'à l'année courante; que l'acte de répartition produit en cette cause avait été basé sur le nombre et les moyens des propriétaires catholiques; que le protet ou notification d'abjuration invoqué par le défendeur était d'une date postérieure à l'homologation de cet acte de réparation et ne pouvait effacer le privilège que la loi donne aux demandeurs sur les terres de tous ceux qui se trouvent portés dans la répartition.

La preuve des demandeurs, outre les faits énoncés dans la réponse ci-dessus, établit que lors du dernier recensement, l'officier recenseur ayant inscrit le défendeur comme catholique, la fille du défendeur alors présente lui fit l'observation qu'il ne devait pas se laisser donner la dénomination de catholique, ce à quoi il répondit "ce qui est là est bien, mêle-toi de tes affaires." Il est aussi en preuve que le défendeur ayant signé les requêtes originaires demandant la construction de l'église en question et des débats s'étant élevés pour savoir si ceux qui demandaient cette église constituaient la majorité des catholiques, quelqu'un dit au demandeur, dans une assemblée publique, qui avait lieu pour constater de quel côté était cette majorité:—"Vous n'êtes pas catholique, M. Laflamme, et votre nom ne devrait pas être là," ce à quoi le défendeur répondit: "Je suis aussi catholique que les autres qui ont signé et je veux que mon nom reste là."

La preuve du défendeur consiste principalment en deux documents, dont l'un en date de 1820, est une liste de souscription portant la signature du défendeur et intitulé comme suit: "Subscription of the Protestant inhabitants of "the Parish of Lachine for the annual support of a Presbyterian Clergyman, "commencing on the 1st day of October, 1820, to be paid quarterly in advance "in the hands of a treasurer appointed for that purpose." Le second, en date

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du 21 décembre 1843, et portant aussi la signature du défendeur, contient dans les termes suivants la demande d'un pasteur fixe à Lachine: "We, the members of the Presbyterian congregation of Lachine, &c."

Interrogé sous serment, le défendeur dit qu'il a été baptisé à l'église catholique, qu'il y a communié et y a été confirmé, mais que depuis plus de 30 ans il s'était aggrégé à l'église Presbytérienne et y avait communié une fois, dans le temps de son changement de religion.

Daoust, pour les demandeurs, observe que la preuve faite de part et d'autre ne pouvait manquer de laisser de grands doutes sur la dénomination religieuse dans laquelle il faudrait ranger le défendeur. Que les croyances réelles du défendeur étaient une matière où le tribunal n'avait pas le droit de pénétrer. Nous ne pouvons tenir compte que des apparences sous lesquelles se présentent les individus. D'après la conduite du défendeur, il peut s'être exposé à subir les obligations civiles qui incombent aux catholiques et aux protestants, mais lui seul en est la cause. Des démarches sont adoptées par les catholique de Lachine pour l'érection d'une église catholique, et parmi ces catholiques nous trouvons le défendeur, qui revendique publiquement la qualité de catholique, qui signe comme tel les requêtes adressées aux autorités ecclésiastiques et civiles, et qui se fait compter parmi ceux qui demandent l'église et qui ont besoin de constituer une majorité de catholiques. A la suite de ces requêtes, qui sont le fait du défendeur et de ses co-signataires, un acte de répartition est dressé, cet acte est déposé pour homologation et est enfin homologué, sans aucune protestation de la part du défendeur, qui ne pouvait pas ignorer ces procédés, puisqu'il y avait activement contribué. Du moment que cet acte de répartition a été homologué, les demandeurs ont acquis un privilège sur toutes les propriétés imposées (Statuts Refondus du Bas-Canada, c. 18, s. 32). Il est bien vrai que cett loi (s. 23) dit que les propriétés des protestants ne seront pas sujettes à cotisation pour l'érection d'une église catholique, mais le défendeur au lieu de se prévaloir de cette exemption en temps utile, avait tout fait pour s'en dépouiller.

Monk, pour le défendeur, répond que la Cour n'a à s'enquérir que d'un seul fait, c'est de savoir si le défendeur est catholique ou protestant. Malgré tous les doutes que la conduite du défendeur est de nature à créer, l'évidence résulte de l'affirmation, faite sous serment par le défendeur, en présence de la Cour, qu'il était, lors de l'homologation de l'acte de répartition et qu'il est encore un protestant presbytérien.

MONK, J. Toute la question consiste en effet à savoir si le défendeur est catholique ou protestant. Or nous voyons que toute la famille du défendeur est protestante, et que le dernier acte religieux du défendeur (la communion) quoiqu'il ait été accompli il y a 30 ans passés, a eu lieu à l'église presbytérienne. Il est venu ici affirmer qu'il était protestant et la Cour doit attacher plus de poids à cette déclaration solennelle qu'aux incidents résultant de la preuve. En conséquence l'action doit être déboutée, mais sans frais.

Action déboutée.

Doutre & Daoust, pour les demandeurs.
John Monk, pour le défendeur.
(J.D.)

COUR SUPERIEURE.

STE. SCHOLASTIQUE, 13 MAI 1862.

Coram BADGLEY, J.

No. 213.

Cheval dit *St. Jacques* vs. *John Morrin.*

JUGE :—Que la prestation suivante portée dans un acte de donation entrevifs de père à fils, " que si le donataire venait à vendre, échanger ou donner ledit terrain à des étrangers ou à faire quelqu'autre acte équipollent à vente, il sera tenu et obligé tel qu'il le promet en ces présentes, de bailler et payer aux dits donateurs seulement la somme de deux milles livres ancien cours, le jour de la passation soit des actes de vente, échange, donation et autres actes équipollents à vente," n'est pas comminatoire, mais qu'elle est réputée être une charge de la donation, exigible sitôt que la terre a été vendue au défendeur, un étranger.

Le 17 octobre 1846, Thomas Cheval dit St. Jacques et Justine Mallette sa femme, firent donation entrevifs à Camille Cheval dit St. Jacques, leur fils, d'un terrain décrit au dit acte, et entr'autres clauses, conditions et réserves, il a été strictement arrêté entre les parties que si le donataire venait à vendre, changer ou donner le dit terrain à des étrangers ou à faire quelqu'autre acte équipollente à vente, il serait tenu et obligé, tel qu'il le promet par le dit acte, de payer aux dits donateurs seulement (c'est-à-dire de leur vivant) la somme de deux mille livres ancien cours, le jour de la passation soit des actes de vente, échange, donation ou autres actes équipollents à vente, à peine de tous dépens dommages et intérêts.

Enrégistrement de cet acte le 20 octobre 1846. Qu'en vertu du privilége de bailleur de fonds, la terre donnée est devenue affectée et hypothéquée en faveur des donateurs au paiement de cette somme 2000 livres. Que malgré la convention expresse contenue au dit acte de donation, et les défenses du donateur, la terre a été vendue à un étranger, par acte du 12 avril 1858, du vivant des donateurs, qui le sont encore, et qu'ainsi le jour de la vente les donateurs sont devenus en droit de réclamer les 2000 livres, avec les intérêts à compter du 12 avril 1858. Le 2 avril 1861 le donateur, Thomas Cheval, a transporté à son fils Damien (le demandeur), cette somme de 2000 livres pour bonne et valable considération, laquelle il déclare lui être due par Eugène Cheval dit St. Jacques, tuteur à l'enfant mineur de Camille Cheval, décédé, et hypothécairement par le défendeur, subrogeant le demandeur en tous ses droits, noms, raisons et actions lui résultant, et Eugène Cheval accepta le transport le 4 avril 1861, et ce transport fut ensuite signifié au tuteur et au défendeur, l'ayant acquise à la charge de payer aux donateurs la dite somme de 2000 livres si ces derniers avaient le droit de le réclamer.

Que le défendeur comme actuel détenteur de la terre donnée est tenu hypothécairement au paiement de la dite somme de 2000 livres, avec intérêt du 12 avril 1858. Conclusions hypothécaires à cet effet.

Le défendeur a plaidé :—1o. Que la clause de l'acte de donation sur laquelle repose l'action est conditionnelle, non expresse, vague et insuffisante pour empêcher la vente de l'immeuble en question ; que la défense d'aliéner n'était pas obligatoire de la part de Camille Cheval ; que Camille Cheval n'a pas vendu l'immeuble ; que si l'intention des donateurs eût été de conserver le bien dans

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la famille, ils auraient déclaré que ce bien serait propre au donataire, à lui et aux siens de son estoc ligne.

2o. Qu'aux termes de l'acte la somme de 2000 livres est payable aux donateurs seulement, et Thomas Cheval, le donateur, n'en pouvait faire le transport au demandeur ; qu'en supposant que les donateurs auraient eu le droit de transporter cette somme, cette clause de la donation spécifiant que si le donataire vendait ce bien, il paierait aux donateurs seulement les 2000 livres, à peine de tous dépens, dommages et intérêts, donne à entendre que si la somme n'est pas payée, le donataire ne serait tenu qu'à des dommages et intérêts ; que les donateurs n'ont souffert aucuns dommages, et le demandeur, à leurs droits, n'en allègue aucun, et aucun n'a été souffert ; que le transport est nul, la clause sans effet, et le donateur n'a eu aucune valeur pour le transport.

3o. Le 10 mars 1845, par acte à cet effet, Thomas Cheval dit St. Jacques et sa femme, donnèrent quittance à Camille Cheval, de la rente et pension viagère, ainsi que de la moitié des grains, foins et autres choses, tant du passé qu'à l'avenir, à eux dûs par l'acte de donation du 17 octobre 1846, lui donnant aussi quittance et décharge de toutes les réserves créées en leur faveur par cet acte, excepté 1o. d'enlever sous deux ans la moitié d'une maison ; 2o. de deux places dans l'étable, et deux dans l'écurie pendant deux ans, et 3o. de passer tant à pied qu'en voiture sur la dite terre ; et à raison de cette transaction, les dits Camille Cheval dit St. Jacques et uxor, se sont trouvés et sont de fait déchargés de toutes demandes, droits, prétentions que les dits Thomas Cheval dit St. Jacques et sa femme pouvaient ou avaient droit d'exiger à raison de la défense d'aliéner portée au dit acte.

4o. Qu'après le décès de Camille Cheval, arrivé le 29 mars 1855, laissant une enfant mineure, Asilda Cheval, il fut procédé à l'inventaire des biens de succession, et il fût constaté qu'elle devait une somme de 11,990 livres 16 sous. Que la succession ne pouvait payer, et les créanciers pressant le paiement de leurs dettes, et pour empêcher la vente forcée, et à grand sacrifice de l'immeuble en question, le seul appartenant à la dite succession, et principalement pour payer aux dits Thomas Cheval dit St. Jacques et son épouse, une rente annuelle et viagère créée en leur faveur par Camille Cheval dit St. Jacques, leur fils, par son testament du 9 mai 1855, Eugène Cheval, comme tuteur, convoqua une assemblée de parents de la mineure, à laquelle le dit Thomas Cheval fut requis d'assister, et fût autorisé à vendre l'immeuble pour les fins susdites, et le tuteur ne voulant prendre aucune responsabilité par rapport à ces 2000 livres, fit ajouter comme condition de vente, que l'acquéreur de l'immeuble paierait les 2000 livres aux dits Thomas Cheval dit St. Jacques et son épouse, s'ils y avaient droit ; qu'il était entendu lors de l'adjudication qu'il n'y avait que la rente de 200 livres payable, que cette somme de 2000 livres ne devait pas l'être, et que d'ailleurs le défendeur a payé un prix des plus élevés non compris les 2000 livres ; que Thomas Cheval et sa femme, comme représentant leur fils, étant ainsi créanciers et débiteurs de la succession, n'ont pu et ne pouvaient par leur fait, en forçant la vente de ce bien, pour se faire payer leur rente viagère, obtenir le paiement de ces 2000 livres, et d'ailleurs ils auraient dû renoncer à leur legs, une des causes principales de la vente de l'immeuble en question.

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M. Prévost, pour le demandeur, en réponse a prétendu: Que la condition de ne point aliéner n'était contraire ni aux lois ni aux bonnes mœurs; que l'obligation à laquelle s'était soumis Camille Cheval, n'était pas pure et simple, mais qu'une peine avait été ajoutée à l'infraction de cette obligation de ne pas faire; que cette peine ne peut être une peine comminatoire, mais bien une charge de la donation, qui devient exigible aussitôt l'avènement de la condition; d'ailleurs les donateurs n'avaient pas défendu au donataire d'aliéner le fonds donné, mais ils y mettent une condition: "Si vous l'aliénez, vous nous paierez une somme de deux mille francs le jour même de la passation de l'acte d'aliénation;" ce ne peut donc être une peine comminatoire, puisqu'ils ne défendent pas d'aliéner, il est permis au donataire de vendre, mais à une condition, celle de payer une somme de deux mille francs, qui ne peut être autre chose qu'une charge de la donation. C'est là la doctrine de Toullier, qui, au Vol. III., Edition Belge, Titre III., Des Contrats, No. 488, *in medio*, p. 508, dit:

Pour qu'une peine soit réputée comminatoire, il faut que l'obligation à laquelle elle est attachée, puisse encore être remplie, et on se libère de la peine en accomplissant l'obligation; mais une peine attachée à une obligation de ne pas faire, ne peut jamais être comminatoire, car du moment que vous avez fait ce que vous avez promis ne pas faire, vous ne pouvez plus ne pas le faire, partant, aussitôt que vous l'avez fait, la peine est due de plein droit.

Dans le cas actuel, c'est encore bien moins une peine comminatoire, car le donataire, Camille Cheval, ne s'est pas obligé à faire ou à ne pas faire, il s'est obligé de payer une somme de deux mille francs, s'il vendait à des étrangers. C'est bien là ce qui prouve que cette obligation est une charge de la donation conditionnelle il est vrai, mais du moment que la condition est arrivée, cette charge de la donation doit être remplie.

Autorités citées par le demandeur:

Guyot, Rép. Jur., Verbo Condition, pp. 393, 394, 395.
" " " Comminatoire, p. 78, 2e colonne, 8e aliéna.
" " " Aliénation, p. 306, 1e colonne, 6e "
" " " Clause Pénale, p. 554, 1e col., 2e et 3e "
Toullier, Edit. Belge, Vol. III, pp. 508—507, No. 488.
" " " pp. 616—628, No. 834.
" " " p. 105, No. 281, p. 617, No. 804—805—806.
Pothier, Traité des Obligations, pp. 88—89, No. 347—348.
Merlin, Verbo, Peine contractuelle, Vol. 9, pp. 213—217.
Argou, Tome 1, Livre 2, ch. 12, p. 307.

En preuve il est établi que la terre a été adjugée au défendeur pour le plus haut prix, et aussi le demandeur admet en réponse aux interrogations sur faits et articles, qu'il n'a payé que £25, pour valeur et considération du transport du 2 avril 1861.

Badgley, J.—La disposition exprimée à l'acte est expresse et spéciale. Il n'y a pas défense d'aliéner, il n'y a peine comminatoire. La propriété a été donnée à Camille, leur enfant, par ses père et mère; de même ils auraient pu l'avoir donnée à un étranger, Camille leur enfant, ne pouvait empêcher les donateurs de donner leur propriété à qui ils voulaient. La donation était faite

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sujette à des charges et droits onéreux, moins onéreux envers Camille pour sa jouissance de la propriété que par un étranger; mais en même temps en pleine propriété, car Camille pouvait vendre, mais en vendant la condition devenait exigible. La donation est un acte équipollent à vente, et les donateurs ont considéré que les autres charges de la donation et la somme de 2000 livres formaient le prix et valeur de la terre donnée, et le père en stipulant la condition est présumé ne pas avoir voulu imposer à son fils le paiement de ces 2000 livres, excepté si la terre était vendue.

Donors may attach to their donations such conditions as they may think proper, if they are possible and legal, the modalities of donations are restricted within these limits; in this case the condition is neither impossible nor illegal and necessarily falls under the following rule:—"Les effets des conditions possibles ou licites attachées à une donation entrevifs se déterminent d'après les principes généraux qui règlent les obligations conditionnelles." Hence the application to this case of the following citation from *Toullier Des Contrats*: "Mais si la condition ou défense d'aliéner n'est pas pure et simple, si par exemple on y avait ajouté une peine en cas d'infraction, si j'avais stipulé que vous me donneriez 600 francs à moi ou à Titius, si vous aliénez le fond cornélien que je vous ai vendu ou donné, la peine serait encourue de plein droit par l'aliénation que vous auriez faite, et cette peine ne pourrait être modérée par les juges." The defendant has not been taken by surprise, the notices of the sale publicly announced the existence of the condition of the claim for 2000 francs, and charged the purchaser to pay it if payable by law, the purchase was made subject to the charge.

Le défendeur en achetant la propriété n'a pas été trompé ni surpris; les annonces de la vente déclaraient publiquement, à lui et à tous autres, l'existence de la condition de la réclamation pour les 2000 francs, et la charge à l'acheteur de payer ce montant si la somme était exigible en loi. L'achat fut fait sujet à cette charge de vente.

6e Toullier, p. 488, Contrats innommés.

Voici le jugement de la cour:

La Cour, * * * * considérant que par l'acte de donation entrevifs passé le 17 octobre 1846, devant Mtre. Rochon et son confrère, notaires, le dit Thomas Cheval dit St. Jacques et son épouse y mentionnés, auraient donné à Camille Cheval dit St. Jacques, pour lui, ses hoirs et ayant causes, un terrain, etc., et ce pour les considérations et sous les conditions stipulées au dit acte; considérant qu'entr'autres conditions y stipulées, est la suivante:—"Que si le donataire ve-
" nait à vendre, échanger ou donner le dit terrain à des étrangers, ou à faire
" quelqu'autre acte équipollent à vente, il sera tenu et obligé tel qu'il le promet
" en ces présentes, de bailler et payer aux dits donateurs seulement, la somme
" de deux mille livres ancien cours, le jour de la passation soit des actes de
" vente, échange, donation et autres actes équipollents à vente;" considérant que le dit terrain était par l'effet du dit acte de donation chargé et hypothéqué envers les dits donateurs au paiement de la dite somme de deux mille francs, la dite condition échéant et arrivant; considérant que le dit Camille Cheval dit St. Jacques, le donataire susdit, est mort avant l'institution de cette action et a-

laissé une enfant à laquelle le dit Eugène Cheval dit St. Jacques a été duement nommé tuteur; considérant que par la vente du dit terrain pendant la vie des dits donateurs, et ce à un étranger, savoir: au dit défendeur par acte de vente devant Mtre. Prévost et son confrère, notaires, le 12 avril 1858, mentionné en la déclaration du demandeur, par le dit Eugène Cheval dit St. Jacques en sa qualité de tuteur à l'enfant mineur du dit feu Camille Cheval dit St. Jacques, la dite condition serait devenue ouverte et exigible en faveur des dits donateurs, suivant la dite stipulation au dit acte de donation; considérant que par acte passé devant Mtre. Bernard et son confrère, notaires, le 2 avril 1861, et filé en cette cause, le dit Thomas Cheval dit St. Jacques céda au dit demandeur, la dite somme de deux mille livres ancien cours, avec les intérêts échus à lui personnellement, tel que mentionné au dit acte de transport, et hypothéquairement contre le dit défendeur, avec subrogation en tous les droits, noms, actions, privilèges et hypothèques résultant au dit Thomas Cheval dit St. Jacques des actes susdits, lequel transport a été duement notifié et signifié par le dit demandeur au dit Eugène Cheval dit St. Jacques, en sa dite qualité, le 4 avril 1861; considérant que par l'acte de vente du 12 avril 1858, consenti par le dit Eugène Cheval dit St. Jacques en sa dite qualité au dit défendeur, ce dernier a convenu de bailler et payer à première demande, si droit il avait, au dit Thomas Cheval dit St. Jacques, la dite somme de deux mille francs, suivant le dit acte de donation entrevifs, dans le cas que ce dernier aurait le droit de réclamer la dite somme du dit Eugène Cheval dit St. Jacques en sa qualité de tuteur comme dit est, ou de lui dit acquéreur (savoir le dit défendeur,) hypothécairement, le dit défendeur se portant fort et répondant vis-à-vis le dit tuteur, et considérant que la dite somme est due hypothécairement et exigible suivant la dite condition par et sur le dite terrain, en faveur du dit demandeur, déclare le dit terrain hypothéqué, etc.

Jugement pour le demandeur.

W. Prévost, pour le demandeur.
Moreau, Ouimet et Morin, pour le défendeur.
(G.G.)

MONTREAL, 30TH DECEMBER, 1862.

Coram BADGLEY J.

No. 200.

McDougall vs. *Allan et al.*

MERCHANT SHIPPING ACT—LIABILITY OF OWNERS FOR LOSS OF PASSENGER'S JEWELLERY, &C.

HELD:—In an action against the owners of a sea-going ship for loss of jewellery forming part of the luggage of a passenger, a plea (based upon the 503rd clause of the Merchant Shipping Act) alleging that the articles lost were "Gold, Silver, Diamonds, &c., &c.;" that the loss happened without the privity or fault of the owner, and by reason of robbery, embezzlement, &c., and that the passenger not having inserted in a Bill of Lading, or otherwise disclosed in writing, the true nature and value of such articles, &c., the owners were not liable for the loss, will not be dismissed upon demurrer.

PER CURIAM.—The action is brought by a passenger in one of defendants' vessels from Glasgow to Montreal, for loss and non-delivery, on arrival, of part of her luggage, consisting of jewellery, watches, etc., to the value of £120. The

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declaration is in the common form of actions against common carriers in such cases. The defendants by their plea admit their quality of common carriers, that the plaintiff was such passenger with her luggage, but they allege their ignorance of the happening of the loss of the articles referred to, which consisted of gold, silver, diamonds, watches, jewels or precious stones; that the loss was without their actual privity or fault, and by reason of robbery, embezzlement, making away with or secreting the articles lost, and that when plaintiff put her luggage on board the vessel she omitted to insert in a Bill of Lading, or otherwise to declare in writing to the owners or master of the vessel, the true nature and value of those articles. The essential grounds of the plea rest upon the provisions of the Merchant Shipping Act of 1854, and to this plea the plaintiff has demurred, urging their common law liability as carriers, and denying the applicability in defendant's favour of the limitation of responsibility under that Act as regards her, a passenger with her luggage, amongst which were the lost articles which she had a right to have with her, and were covered by her fare, and which the defendants were bound to deliver to her at Montreal. The hearing is upon the demurrer.

The clauses of the Merchant Shipping Act of 1854, having reference to this case, and to the limitation of the ship-owner's responsibility, are as follows: "503. No owner of any sea-going ship or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity, of or to any of the following things, that is to say,

1. Of or to any goods, merchandise, or other things taken in or put on board any such ship, by reason of any fire happening on board such ship.

2. Of or to any gold, silver, diamonds, watches, jewels or precious stones, taken in or put on board any such ship, by reason of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has at the time of shipping the same inserted in his Bill of Lading, or otherwise disclosed in writing to the master or owner of such ship, the true nature and value of such articles "to any extent whatever."

Before proceeding further it may be proper to observe that the Act relieves the ship-owner alone, not the master: that the relief extends in the most general terms, namely, to any extent whatever: that it applies to every loss or damage that may happen, without the owner's actual privity or fault, to either *goods, merchandise* or *other things* generally, or to the special effects, *gold, silver*, etc.: that it applies generally to all of them in both categories, when the loss or damage happens by fire on board of the carrying vessel, and that it applies to the *gold, silver*, etc., particularly, when the loss happens by robbery, etc., unless the owner or shipper of the goods put on board shall have made the owner or master aware of their true nature and value, by an act in writing at the time of the shipment. The first sub-section affords general relief against loss or damage by fire to goods and things generally, and must necessarily include a passenger's luggage, changing in this particular the common law responsibility, which made the carrier liable for the loss of goods by fire, though the fire was not occasioned by any actual negligence of the carrier, and did not

arise upon his premises, the carrier being considered as an insurer, and liable for all losses and in all events, except by the act of God and the Queen's enemies. Chitty, Carriers, p. 39.

The second sub-section affords relief against loss by robbery, &c., to things within the descriptive enumeration, unless the limitation be neutralized and destroyed by the owner or shipper making the written declaration in the Bill of Lading or otherwise, at the time of the shipping of the articles. In this case there was no such declaration, and therefore the Statute would of course have its operation of relief for loss occasioned by robbery, &c. The general enumeration of gold, silver, jewels, &c., covers special articles of the general description. This statutory designation or enumeration would appear to have been made as a particular protection, because the effects enumerated being of great value in small bulk, the facility to rob and make away with them is far greater than of goods of less value but greater bulk. This protection against loss by robbery, &c., was not accorded to the carrier by the common law. On the contrary he was liable for all such losses upon grounds of public policy, because such a mode of loss might by consent and combination be carried on in such a manner that no proof could be had of it. Chitty, Carriers, p. 41.

Moreover the want of actual privity or fault by the ship-owners in the loss, is of itself made a general limitation of responsibility under the Statute. No ship-owner shall be liable to make good any loss or damage that may happen without his actual privity or consent, to any extent whatever, instead of their previous liability to the extent of the value of the ship and freight.

The plaintiff rested her demurrer upon the common law altogether, irrespective of the Shipping Act, namely, upon the carrier's responsibility to safely carry such luggage of passengers as was usual for them to travel with, whether that luggage was of necessity or for convenience, or of mere personal adornment, and what is deemed to be included in the passage fare she objects against the application of the Shipping Act to her case, that by its terms and intendment it was confined to merchandize, and to owners and shippers of merchandize on freight, and she supported her pretension by reference to reported cases, and by analogy, to the British Carriers' Act, 1 V. 4, ch. 86, whose terms and provisions were to some extent similar to those of the Shipping Act.

It may be observed *in limine* that the analogy attempted to be derived from the Carriers' Act does not hold. It is not in force in this province, whilst the Shipping Act is; several of the provisions of both Acts are exorbitant of, and opposed to the common law responsibility of the carrier. The Carriers' Act applies to carriers by land, the other to carriers by sea. Their intents are not in common. The object of the former was two-fold: 1st, to apprize the receiver of the goods of the nature of the article delivered to him, in order that he might give it a proportionate degree of attention and care. This in principle applies also to the Shipping Act; and, 2nd, to give the carrier an increased compensation, fixed by the carrier in his tariff of rates, for the additional risk and danger incurred by him. This is not in the Shipping Act. Both acts contain some common provisions, chiefly the requirement of the notice of the nature and value of the effects shipped or delivered to be carried, and the *onus* imposed

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upon the deliverer and shipper to give that notice. They differ in several essentials: 1st. The great extent of the enumerated particular articles in the Carriers' Act; the few articles specified in the Shipping Act. 2nd. The former addresses itself to effects contained in any parcel or package to be carried for hire, or to accompany the person of the passenger in any public conveyance; the latter only refers to the particular effects taken or put on board of the sea-going vessel by their owner or shipper. 3rd. The former requires the carrier to affix in his receiving office a notice of the increased rate of charge to be paid to him, and also requires him to give a receipt in writing for the goods delivered to him; the latter Act requires none of these. 4th. The former gives no protection against the loss of effects by the felonious acts of the carriers' servants; the latter does protect the owner, not the master, against such loss so happening without his actual privity or fault. 5th. The mere oral declaration of notice by the deliverer to the carrier of the nature and value of the effects will satisfy the former Act in this particular, but the latter Act requires the insertion to be in the Bill of Lading, or in some other written declaration, given to the ship-owner or master, by the owner or shipper. 6th. The Carriers' Act limits the responsibility for loss to £10; the Shipping Act relieves *to any extent whatever*. The difference between the two Acts is so very marked that an argument upon their analogy cannot apply, nor could it be made to rest upon reported cases resting mainly on the Carriers' Act. The Plaintiff's pretension that the Shipping Act is a merchandize or freight Act is founded upon this, that it is merely a consolidation of the 26 Geo. III. ch. 86, and of the subsequent enactments *in pari materia*, which it is said were of that description, and did not excuse or relieve the ship-owner from his common law responsibility for the loss of passengers' luggage. This necessarily involves the chief point of the demurrer. Chitty says, p. 282, that so soon as a person has become a passenger, the carrier is bound to receive with him in the absence of any contract or custom to the contrary a reasonable quantity of personal luggage or baggage, and that with respect to such luggage the duties or responsibilities of a common carrier attach to him, and that the luggage is to be carried without extra charge, the carrying of it being accessory to the principal contract to carry the passengers. This liability for loss is restricted to the *personal* luggage of a passenger; under this term Parke, B., "comprises clothing and every thing required for the passengers' personal convenience, and *perhaps even a* small present, had he such with him, or *a book* on the journey *might be also* included in that term." Pollock, Ch. B., says, the charter of the G. W. R. Co. specifies *articles of clothing*, which ought to include all things necessary to the toilet, and Chitty, p. 286, remarks "it would appear reasonable that *all articles with which it is usual for a person to travel*, whether they be articles of necessity, convenience, or amusement, should be included in the term luggage, and *perhaps* a reasonable sum of money for the purposes of travelling."

Formerly the received doctrine was that carriers by land or water were not liable for the baggage of passengers, unless a distinct price was paid. It was placed on the ground that the carrier is liable only in respect to his reward, and that the compensation should be in proportion to his risk. But now by com-

mon usage sanctioned by the Courts, a reasonable amount of luggage is deemed to be included in the fare of the passenger. The Courts will, however, not allow this custom to be abused, and under pretence of baggage permit articles to be included not within the scope of the terms or intent of the law. They will not permit the carrier to be defrauded of his just compensation, nor subjected to unknown hazard. Hence when a trunk containing valuable merchandize was taken on board of a steamboat and deposited with baggage, and lost, it was held that the carrier was not liable. "The ordinary baggage trunk of the traveller, containing the *usual general conveniences belonging to him as a traveller*, fall within the customary form, and to be stowed away in the place where such articles are mostly deposited. Otherwise the carrier is doubly wronged; 1st, he is deprived of his just reward for carrying the goods, and 2nd, he is prevented from exercising proper precaution against the dangers to which the property may be exposed. Thus the carrier is exempt when the baggage consists of an ordinary travelling trunk in which there is a large sum of money, such money is not considered as included under the term of baggage. But money taken *bonâ fide* for travelling expenses and personal use may properly be regarded as forming part of a traveller's baggage, but to such reasonable amount only as a prudent man might deem necessary and proper for such purposes." Upon the whole it may be gathered that the luggage of the passenger must be reasonable luggage, that is, "usual conveniences belonging to a traveller," "which it is usual for him to travel with," and "which are contained in the ordinary traveller's trunk." Tested by these limitations what is the statement of the loss specified in the plaintiff's declaration? "Certain articles of personal adornment and jewellery to her belonging, to wit: one gold necklace, one coral necklace, one silver thistle pin, one pair cut coral bracelets, one thick gold chain, one soft gold chain, one jet shawl pin and chain, one jet necklace, one brilliant and emerald shawl pin in form of a wreath, one coral pin, one pure yellow stone, one large brilliant cross, gold back, the centre stone being out, one large enamelled mourning ring with engraving, the date of death of William Whiteman, one gold ring, blue stones opened with hand, one ring set in pearls, two plain gold rings, one locket with portrait in military costume, on the back a tombstone inlaid in pearls, one large oval brooch, three shades of light hair set in pearls, five small gold lockets, one large gold band bracelet with stones, turquoise." This is the list of articles which the declaration owns "to have *belonged to the plaintiff, and part of which were family jewels, and therefore highly prized by her as such, apart from its intrinsic value; the whole of the value of* £120," and which amongst other goods and effects were contained in a certain large trunk, the said trunk part of her baggage. This description and enumeration by no means appear to be of "the usual general conveniences of a traveller," or "what is usual for him to travel with, and are usually contained in the ordinary traveller's trunk," or "articles of clothing which include all things necessary to the toilet," or "clothing and every thing required for the passenger's personal convenience." They are very much more than these, and do not seem to fall within that description of luggage protected by the common law responsibility of the carrier as passenger's luggage. But if they

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were actually luggage to be carried with her, the question remains, does the Shipping Act relieve the ship-owner in such cases as this?

It is conformable to the principle of the common law that responsibility of a carrier may under it be abridged by the special terms of the acceptance of the goods. Exemptions which leave the common law rule in force as to all besides, and it being the business of the carrier to bring his case distinctly within them, they are to be strictly interpreted. If the goods are lost or damaged whilst in the custody or control of the master, the *onus probandi* is upon him to prove that the loss was occasioned by some cause for which the law will excuse him; *prima facie* the obligation of safety is upon him. The common law is thus well put by Molloy, B., "The master is answerable if any of the goods are lost or purloined, or sustain any damage, hurt or loss, whether in the haven or just before or upon the seas when she is on her voyage." See Plander's notes. "If there be any exception as to this responsibility at sea, it proceeds from the special provisions in the charter party or Bill of Lading, and not from any suspension of the rule; such exemption is strong evidence of the acknowledged law which rendered them necessary. In short it must be regarded as a settled point in English law that the masters and owners of vessels are liable in port and at sea, and abroad, to the whole extent of inland carriers, except so far as they are exempted by the exemption in the contract, charter party, or Bill of Lading, *or by Statute.*" Both the modern and ancient writers admit the possible abridgment of the common law responsibility of carriers by sea and land, either in contracts implied or understood between the parties, or by the operation of Statute laws. The common carrier has two distinct liabilities, the one for losses by accidents or mistakes where he is liable as an insurer, the other by default or negligence where he is answerable as an ordinary bailee: he may restrict his liabilities as insurer, and protect himself against misfortune, but by the public policy of the common law he cannot do so for negligence. The carrier's restriction by express or special contract rests upon the common law, and is productive of no evil consequences. So if the Statute makes the restriction, that is the contract between them; there is no implication or inference in this Act which is specific and certain as a contract, there can be no controversy between the parties. It is manifest that the Shipping Act has intervened betwixt the ship-owner and the common law, and has to a certain extent made a restrictive contract in his favour. What is the construction to be put upon its provisions? There are but very few reported cases upon this Act, but the language is so precise, and at the same time so general, that difficulty of construction need not arise. No owner of a sea-going ship shall be liable to any extent whatever for loss or damage that may happen without his actual privity or fault, or to any of the following things, gold, silver, diamonds, watches, jewels or precious stones, taken on board. The object of the Act, observed Lord Ch. B. Adinger in Gillis vs. Potter, 10 M. & W., p. 72, was to impose upon the shipper the *onus* of giving notice to the ship-owner of the nature of the goods intrusted to him to carry, and Alderson, B., there can be no doubt that under this Statute parties are required to state in their Bill of Lading, &c., the true nature and value of the goods which they carry, provided these consist of silver, gold,

watches, jewels, &c., and further Martin, B., remarked, otherwise we should put a most refined and artificial construction on very plain words. "What the Legislature pointed out there was that the ship-owner was to have full notice of what was the value that the other party put upon this property. By the Carriers' Act the carrier is to be made acquainted with the estimated value of the article, in order that he may, charging the increased rate, protect himself. At all events the Statute requires the party to state the nature and value, &c., it is impossible but that we ought to give every statute, as far as we can, a construction consistent with the obvious sense of its language. The Legislature has pointed out two things to be stated, &c." It has been already observed that the Carriers' Act restricted the responsibility without notice to £10 of value; the Shipping Act gives the full relief from *any extent whatever*. The preamble of the limiting responsibility section employs the general words, "the following things." By the first clause of the section, the owner's limitation of responsibility is given for goods, merchandize, or other things lost by fire on board; this is as general as possible, and the passenger's luggage is not excepted. By the second clause of the section, the same limitation of responsibility is extended to him for particular effects, set out in terms as general, gold, watches, jewels, &c. Effects of these descriptions are *goods*, *merchandise*, and *things*, as well as articles of personal use, and yet there is no exception in favour of passengers losing them. This limitation is strengthened by the requirement upon the *owner* or *shipper* to insert the nature and value, not alone in the Bill of Lading, a purely mercantile document, but in some written declaration made by the owner or shipper. The effect of the statement in the Bill of Lading or in the written declaration is to deprive the ship-owner of the excuse or relief from responsibility, to keep the effects safely at all events; the failure or omission of the passenger to make the statement, on the other hand, presumes him to have taken the risk upon himself, so far as the ship-owner is concerned. As remarked above, by the common law, *prima facie*, the obligation of safety is upon the carrier, but, where the Statute gives him the exemption, the common law to that extent is controlled and done away. Upon full consideration of this matter, the demurrer cannot be sustained, and must be rejected; the case rests upon facts the proof of which may or may not support the declaration, the plea cannot be rejected as bad in law.

Demurrer dismissed.

Torrance & Morris, for plaintiff.
Rose & Ritchie, for defendants.
(T. W. B.)

Giroux vs. Gauthier.

MONTREAL, 27 JUIN 1862.

Coram BERTHELOT, J.

No. 1568.

Giroux, demandeur; vs. *Gauthier*, défendeur, et *Giroux*, opposant, et *Mongenais*, cont.

Jugé :—Que les cessionnaires de différentes parties d'une même créance doivent venir par concurrence entre eux, sans avoir égard à l'antériorité de chaque cession.

Les opposants Giroux et Mongenais étant tous deux cessionaires de partie du prix de vente du 25 mars 1856, par acte de ce jour là par Gatien Beauchamp et son épouse au défendeur, Mtre Charlebois, N. P.; le dit Giroux, par acte de cession et transport à lui consenti par le dit Gatien Beauchamp le 6 de novembre 1858 pour $500 sous la garantie de droits et de payer faute de paiement, et le dit J. Bte. Mongenais par acte de cession et transport à lui consenti par le dit Gatien Beauchamp avec garantie de fournir et faire valoir, le 23 mai 1856, Mtre Ruizenne, N. P.; pour 1500 livres ancien cours, produisirent chacun une opposition afin de conserver sur les deniers provenant de la terre en question.

L'opposant Léon Giroux fût seul colloqué par le projet de jugement de distribution au préjudice de l'opposant Mongenais qui, en conséquence contesta la collocation du dit Giroux, en alléguant qu'il aurait dû être colloqué en concurrence avec le dit Léon Giroux et ce au marc la livre, vû que leur créance repose sur un même titre et que le dit Léon Giroux n'avait aucune préférence pour sa créance sur celle de Mongenais, les priviléges ne s'exerçant pas suivant et d'après le temps, mais leurs causes.

L'opposant Giroux ayant répondu à cette contestation que son cédant s'était porté garant du paiement de la somme cédée, lui l'opposant se trouvait subrogé aux droits du dit Gatien Beauchamp; les parties furent entendues au mérite.

Per Curiam.—La question soulevée par la contestation de l'opposant Mongenais est de savoir si aucun des cessionnaires de partie d'une même créance peut primer les autres à raison de l'antériorité de sa cession. Toutes les autorités établissent une égalité de droits entre les différents cessionnaires de diverses portions d'une même créance et font voir que c'est la nature de la créance et non pas son antériorité qui indique la préférence à observer entre eux. Le jugement de la cour est motivé comme suit:

La Cour * * * * Considérant que par la loi, les cessionaires de différentes parties d'une même créance doivent venir par concurrence entre eux à l'ordre de distribution à raison du montant de la cession faite à chacun, sans avoir égard à l'antériorité de chaque cession, à moins que le cédant n'eût par les termes des cessions établi une préférence entre les parties de la créance cédée ou réservée; considérant qu'il ne résulte pas des termes de la cession du 6 novembre 1858, faite au dit Léon Giroux, que le dit Gatien Beauchamp ait voulu établir aucune préférence entre les parties de la créance cédée ou réservée quant aux cessionnaires postérieurs pour ce qui pouvait lui rester dû à la date du [illegible] 1858, dans le dit prix de vente du 25 mars 1856, et que par conséquent [illegible] opposant Jean-Bte. Mongenais a droit de venir à l'ordre de distribution pour le montant de sa cession par concurrence avec le dit Léon Giroux, a ordonné et ordonne que la dite huitième collocation soit réformée de manière à

distribuer par concurrence entre les dits deux opposants Léon Giroux et Jean-Bte. Mongenais, le montant d'icelle à raison du montant de la cession et transport faits à chacun d'eux par le dit Gatien Beauchamp par les dits actes de transport avec dépens de la contestation contre le dit Léon Giroux.

Moreau, Ouimet et Chapleau, avocats de Mongenais.

Bondy et Fauteux, avocats de Giroux.

(P. R. L.)

Perras vs. Beaudin.

MONTREAL, 28 AVRIL 1862.

Coram BERTHELOT, J.

No. 1238.

Perras vs. *Beaudin.*

Jugé :—1o. Que l'acte d'offres réelles doit spécifier l'énumération des diverses pièces de monnaie qui sont offertes ;

2o. Que le défaut d'énonciation du cours des espèces offertes entraîne la nullité des offres ;

3o. Que lorsqu'il existe des hypothèques sur un bien vendu, il sera sujets à l'exécution du jugement, jusqu'à ce que le vendeur donne caution.*

Le demandeur réclamait du défendeur la somme de £39 11s. 8d. balance d'un prix de vente reçue le 3 février 1858, Mtre Brisset, N.P., avec intérêt *ex naturâ rei* depuis le 4 février 1857.

Par ses exceptions, le défendeur prétendait ne devoir que diverses sommes en capital, interêts et *frais* ne se montant en tout qu'à la somme de 789*l.* ancien cours qu'il lui avait offerte le 10 juin 1876, par le ministère de Mtre. Benoit, N.P., et il réitérait les susdites offres en exigeant du demandeur de lui fournir une bonne et valable décharge de deux hypothèques mentionnées en ses exceptions.

Dans l'acte d'offres réelles fait le 10 juin 1857, à St. Patrice de Sherrington par Mtre. P. Benoit N.P., à la requisition du défendeur, il y est dit et déclaré comme suit: "Nous, dits notaires soussignés avons compté et offert au dit Louis " Perras à bourse déliée et deniers découverts en espèces d'or et d'argent ayant " cours, la somme de 736*l.* a.c. résidu en capital, 2*l.* 15*s.* a.c. pour intérêt, " 3*l.* 8*s.* ancien cours, aussi pour intérêt, 4*l.* 30*s.* ancien cours pour les frais " jusqu'à ce jour, sauf à parfaire s'il y a lieu, ce qui forme en tout la somme de " sept cent quatre-vingt neuf livres, ancien cours, que nous, dits notaires à la " requisition susdite avons comptée et offerte à bourse déliée et deniers découverts " en espèces d'or et d'argent au dit Louis Perras, pour les quatre causes et objets " qui viennent d'être mentionnés et sauf à parfaire s'il y a lieu."

Par le jugement rendu par la Cour Supérieure à Montréal, cet acte d'offre fut déclaré insuffisant sur le principe que le cours des espèces offertes n'y était pas énoncé en aucune manière; en sorte qu'il était impossible à la Cour de pouvoir s'assurer si ces offres étaient valables.†

Le jugment de la cour est motivé comme suit: " Considérant de plus que les " offres faites par le défendeur le 10 juin 1857 n'étaient pas légales, n'y ayant " pas eu dénonciation du cours des espèces offertes, a condamné et condamne le " défendeur, &c. &c., mais avant de pouvoir mettre le présent jugement à exécu-

* 2 24 Bonneau et Robert; C. S., Montréal, Jugement 28 juin 1862.

† Ancien Dem. vo. Offres No. 16 et 17.

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" tion. le demandeur sera tenu de fournir au défendeur bonne et suffisante caution " pour garantir le dit défendeur de toutes pertes et dommages dans le cas où il " serait troublé par suite des dites deux hypothèques, lequel cautionnment sera " pris et reçu au Greffe de cette cour, en la forme ordinaire."

Leblanc et Cassidy, avocats du demandeur.

Cherrier, Dorion et Dorion, avocats du défendeur.

(P. B. L.)

MONTREAL, 27TH JUNE, 1862.

Coram BADGLEY, J.

No. 2383.

Daly et al. vs. *Cunningham*.

ARBITRATORS—SWEARING OF WITNESSES.

HELD:—A report of arbitrators will not be set aside on motion (supported by an affidavit to that effect by the defendant) on the ground that said award is not accompanied by satisfactory evidence that the parties or their witnesses were legally sworn, it appearing that the oath was administered to the parties and their witnesses by one of the arbitrators.

This was an action of damages for non-performance of a contract to accept wheat. The parties having consented to refer the case to arbitrators, and they having made their award in favour of the plaintiffs, the defendant moved "that the paper writing, purporting to be an award of the arbitrators named in this cause, be not homologated, but be set aside by this Honourable Court, on the ground that the said award is not accompanied by any satisfactory evidence that either the parties or their witnesses were sworn, and that it is established by the letter and affidavit herewith fyled, that to none of the parties or their witnesses was there any legal oath administered whatever."

The defendant's affidavit fyled in support of this motion alleged that he was present at all the meetings of the arbitrators at which the parties were allowed to be present; that to none of the parties was there administered any oath, and that the only oath administered to any of the witnesses was administered by the Honourable Luther Hamilton Holton, one of the said arbitrators, which oath, deponent was advised, the said Luther Hamilton Holton had no legal quality to administer.

Bethune, in support, contended that the arbitrators had no power to administer the oath to witnesses.

Torrance, contra, relied on the 84th section of chap. 83 Consol. Stat. L. C., which in express terms gives the arbitrators the power of administering the oath to parties and their witnesses.

PER CURIAM.—The defendant's motion must be dismissed.

Motion dismissed.

Torrance & Morris, for plaintiffs.

Bethune & Dunkin, for defendant.

(R. J. P.)

MONTREAL, 26TH FEBRUARY, 1862.

Coram MONK, J.

Perry vs. Milne.

No. 536.

Perry vs. *Milne* and *The Ontario Bank*, garnishee, and *Milne*, contesting seizure.

HELD:—That a party will not be allowed to inscribe *en faux* against a bailiff's return later than four days after the fyling of the return without cause shewn.

The defendant, to wit, in the February Term, after issue joined, moved the Court to be allowed to inscribe *en faux* against the return of John Bates, the bailiff, who had certified on a copy of judgment that he had served a true copy of judgment upon the defendant, the copy bearing the certificate having been fyled on the 7th November last.

Torrance, for plaintiff, resisted the application, citing the rule of practice of the Superior Court of date 4th Jany., 1854.

The Court dismissed the motion, but remarked that upon cause it would permit the inscription *en faux*. Motion dismissed.

Torrance & Morris, for plaintiff.

Mackay & Austin, for defendant.

(F. W. T.)

MONTREAL, 26TH MARCH, 1862.

Coram MONK, J.

The same cause.

HELD:—That upon cause shewn by affidavit, a party will be allowed to inscribe *en faux* against a bailiff's return after the four days limited by the rules of practice.

The defendant renewed in March Term his application to inscribe *en faux*, which had failed in February Term (*vide* report above), and supported his application by an affidavit of the defendant, to the effect that the only copy of judgment served upon him under the judgment of date the 30th March, 1861, was a copy certified by Messrs. Torrance and Morris, the Attorneys of the plaintiff, to which copy the bailiff's return had reference, said signature of Torrance and Morris being a signature which deponent was not bound to recognize, and not the signature of any person having authority to certify judgments or copies of judgments.

The Court granted the application. Motion granted.

(F. W. T.)

MONTREAL, 22ND MAY, 1862.

Coram BADGLEY, J.

The same cause.

HELD:—1st. That the certificate of the attorneys of one of the parties in a cause upon a copy of judgment, to the effect that the copy of judgment certified by them is a true copy, is not a *faux* so known and recognized by law;

2nd. That the return of the bailiff of service made by him of a true copy of a judgment where such copy was only certified by the attorneys, and not by the clerk of the Court, is not such *faux*;

3rd. That *moyens de faux* filed by a party having reference to a copy of judgment certified by the plaintiff's attorneys, and to the serving bailiff's certificate of the service upon the defendant of such copy of judgment, are irrelevant and inadmissible.

The defendant fyled the following inscription and *moyens de faux*:—

"The said plaintiff *en faux*, John Milne, availing himself of the leave granted

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him to inscribe *en faux* against the return of John Bates, bailiff, hereinafter referred to, of which return plaintiff has declared his intention to avail himself, elects his domicile for the purposes hereof at the office of Mackay & Austin, his attorneys, No. 28 Little St. James Street in Montreal, and declares that he inscribes *en faux* against the return of John Bates, bailiff, dated the eleventh day of April, one thousand eight hundred and sixty-one, written on the copy of judgment fyled by Alfred Perry, the plaintiff in this cause, on the seventh day of November, one thousand eight hundred and sixty-one, and prays that said return be declared false and untrue, and that it be held for naught and be rejected from the record with costs; and for reasons or *moyens de faux* in support hereof he, Milne, says:—

Firstly—That he never was, before the issuing of the *saisie arrêt* in this cause, served by said John Bates with other papers than the one purporting to be a copy of judgment, certified by Torrance & Morris, plaintiff's attorneys, said paper served upon him, Milne, being that fyled by him, Milne, in this cause on the twenty-seventh of February, one thousand eight hundred and sixty-two, which paper (pretended copy of judgment) was and is not a true nor legal formal copy of judgment, but by said John Bates was perhaps considered a copy of judgment, his return refers to it and to nothing else, and his return is untrue in so far as it involves that he did serve a true certified copy upon him, Milne, of the judgment of the thirtieth day of March, one thousand eight hundred and sixty-one, of the Superior Court, Montreal, rendered in this cause No. 536, in which Alfred Perry was plaintiff, versus John Milne, defendant.

Secondly—Because said return of John Bates written on said copy of judgment filed in this cause on the seventh of November, one thousand eight hundred and sixty-one, states that he did on the eleventh day of April, eighteen hundred and sixty-one, personally serve the within or foregoing written copy of judgment on John Milne, the within named defendant, by delivering a true certified copy thereof to himself in person in the City of Montreal, whereas he, John Bates, did not do so.

Thirdly—Because it is false that John Bates served him, John Milne, at any time before the issuing of the *saisie arrêt* in this cause, with a copy of the judgment of the thirtieth day of March, one thousand eight hundred and sixty-one, copy of which judgment is fyled upon this *saisie arrêt* by him, Perry, as his Exhibit No. 1.

Fourthly—Because the said return of John Bates, bailiff, written and appearing upon the copy of said judgment of the thirtieth of March, one thousand eight hundred and sixty-one, fyled in this cause on the seventh of November, one thousand eight hundred and sixty-one, as plaintiff's Exhibit No. 1, is *faux* and null and void, and ought to be declared so and be rejected from the record.

Fifthly—Because the only paper purporting to be the copy of judgment served by John Bates, bailiff, on the defendant Milne, as mentioned in his said return of the eleventh of April, one thousand eight hundred and sixty-one, is the paper writing fyled by defendant Milne on the seventh of February, one thousand eight hundred and sixty-two, and it is not a true and duly certified copy of the judgment of the Superior Court rendered on the thirtieth day of March,

one thousand eight hundred and sixty-one, in said cause, No. 536, Torrance & Morris, by whom it is certified, being persons not in charge of the Original Judgment, and whose signature in such matters faith need not be given to.

Wherefore he, Milne, persists in this inscription *de faux*, and prays that said return of said John Bates, of the eleventh of April, one thousand eight hundred and sixty-one, written and appearing upon the copy of judgment, plaintiff's Perry's Exhibit No. 1, fyled on the seventh of November, one thousand eight hundred and sixty-one, to be declared *faux*, untrue and false, and that it be declared good for nothing, null, and void, and be rejected from the record: The whole with costs against the defendant *en faux*, of which costs the undersigned attorneys pray distraction."

Montreal, 23rd April, 1862.

Mackay & Austin, attorneys for plaintiff *en faux*.

John Milne, plaintiff *en faux*.

The plaintiff *en faux* subsequently in the May Term [illegible] Court to declare the inscription and *moyens de faux* as relevant a[illegible] and the defendant *en faux* made a motion at the same time [illegible] scription and *moyens* declared irrelevant and inadmissible.

The Court rendering judgment after hearing, maintained the motion of the defendant *en faux* and rejected that of the plaintiff in *faux*.

PER CURIAM.—The Court having heard the parties by their Counsel upon the motion of the defendant and plaintiff *en faux*, John Milne, that this Court do declare the *moyens de faux* relevant and the defendant *en faux* ordered to answer thereto, and also the motion of the plaintiff and defendant *en faux*, Alfred Perry, that the *moyens de faux* fyled in this cause by the said John Milne be declared irrelevant and inadmissible, having examined the proceedings and seen and examined the said *moyens de faux* fyled by said John Milne and deliberated; considering that the defendant's *moyens de faux* by him fyled in this cause have reference to the copy of judgment certified by Messrs. Torrance & Morris, the plaintiff's attorneys, by the defendant fyled on the twenty-seventh day of February last, and to the service upon the defendant of the said copy of Judgment.

"Considering that the said copy so served is so certified to be a true copy of the authentic copy of judgment fyled by the plaintiff as his Exhibit No. One on the seventh November, 1861.

"Considering that neither the authentic copy nor the said certified copy was impugned in the said *moyens de faux* as false or falsified.

"Considering that the return of the serving bailiff of the service of the said certified copy, does return and certify that the said bailiff did signify the said authentic copy of judgment upon and to the defendant by delivering a true certified copy thereof to the said defendant in person.

"Considering that the certificate of the plaintiff's attorneys upon and to the said certified copy is not a *faux* so known and recognised by law, and that the said return of service so made by the said bailiff is not such *faux*, doth reject the defendant's motion to declare the said *moyens de faux* pertinent, and doth

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grant the plaintiff's motion, and doth declare the said *moyens de faux* irrelevant and inadmissible with costs."

Mackay & Austin, for plaintiff *en faux*.

Torrance & Morris, for defendant *en faux*.

(P. W. T.)

MONTREAL, 30TH SEPTEMBER, 1861.

Coram BERTHELOT, J.

No. 890.

Benjamin vs. *Wilson*.

HELD:—That where a motion in a cause has been dismissed upon argument, and a subsequent motion to revise the former judgment has also been dismissed, the party moving will not be permitted to make a third motion aiming at the same object as the first motion, but such third motion will be dismissed.

The defendant having been arrested under a *capias ad respondendum* was set at liberty on the usual bond being given by Andrew Elliott and William Brooke, his sureties. Judgment having been rendered in favour of the plaintiff for the amount demanded, and the defendant and his sureties having failed to comply with the terms of the bond, the plaintiff moved on the 19th September, 1851, that the defendant be imprisoned in the Common Gaol of the District, according to law. This motion was dismissed, and a subsequent motion to revise this judgment made in December, 1856, was also dismissed. In June, 1861, the plaintiff again moved that inasmuch as defendant had failed to fyle, within thirty days after the rendering of the judgment, a statement shewing the amount of his property and where situated, and also the number and amount of his creditors, he be imprisoned in the Common Gaol of this District for such a period, not exceeding one year, as the Court might deem reasonable.

Torrance, for defendant, resisted the motion, on the ground that the question had already been decided by the Court, and could not be raised again in the manner.

The motion was dismissed.

"La Cour * * * * considérant que les matières et choses qui font l'objet de la dite motion sont les mêmes que celles qui ont fait l'objet de la motion des demandeurs, en date du 19 Septembre, 1851, rejettée par le jugment de cette Cour, du 20 Octobre 1851, et dont révision a été refusée par jugment de cette Cour, du 30 Décembre, 1856, sur la motion des demandeurs à cet effet en date du 17 Décembre, 1856, et que par conséquent il n'y a pas lieu sous ces circonstances à soumettre la même demande à cette Cour, a rejettée la dite motion avec dépens."

Motion rejected.

Carter & Mondelet, for plaintiff.

W. G. Mack, for defendant and for Andrew Elliot.

(R. J. P.)

MONTREAL, 28TH JUNE, 1862.

Coram SMITH, J.

No. 224.

Bruneau vs. *Robert.*

Held:—1st. That when the purchaser is in danger of being troubled by reason of mortgages, in the possession of a property sold *franc et quitte*, he may retain the payment of the purchase money until such mortgages are removed by the vendor, or unless security be given by the latter; according to the provisions of Chapter 36 of the Consolidated Statutes of Lower Canada,—Section 31.

2nd. That no execution shall issue until either the mortgages are paid or good security given.

3rd. That the plaintiff in such cases is condemned to pay costs.

4th. That since the passing of the Statute, the usual judgment in such cases being given in favour of the plaintiff, but requiring him to give security with costs in his favour unless the money had been tendered, has been superseded by the one above alluded to.

SMITH, J. The present action is brought for the recovery of an instalment, being a portion of a *prix de vente*. The defendant by his plea pretends that he is not bound to pay, inasmuch as the property was sold to him by the plaintiff with the clause of *franc et quitte*, whereas there are several mortgages against it. The Consolidated Statutes of Lower Canada, chap. 36, sec. 31, provides, "that if the purchaser of any real estate is troubled, or has just cause to fear that he will be troubled....., he shall be entitled to delay the payment of the purchase money until the vendor has removed such trouble, unless the vendor prefers to give security." The plaintiff, although not denying these facts, answers that the pleading is insufficient in law.

Before the passing of the Statute in question it was usual for the Court to give judgment in such cases in favour of the plaintiff, but obliging him, however, to give security for the extinguishment of the mortgages, with costs, in his favour, unless the money had been tendered. But now, by the law as it now stands, it is said that the vendor shall not recover till the mortgages are paid or the security given. The Court, however, is disposed to give judgment for the plaintiff, with an essential condition, that no execution shall issue until either the mortgages shall have been paid or good security given. Mr. Justice Badgley has already given another judgment in a case of the same nature, and since the new law has been in force, which had not been cited at the argument. The judgment in that case was that the defendant should pay the money, less the mortgage, which he was authorized to clear off, inasmuch as the action in that case was for the last instalment, and the amount of the mortgage was less than the amount claimed.

But in this suit the amounts of the mortgages are very large, and if the Court was to order the defendant to pay them off, it would have the effect of expediting his payments, for which a long credit has been stipulated in his behalf by the deed of sale.

The judgment of the Court is therefore *motivé*, as follows:

The Court, considering that the plaintiff hath established that the said defendant is indebted to the said plaintiff in the sum of $260.72, under and by virtue of the *acte de vente*, made and executed between the said plaintiff and the said defendant, before Beauvais and colleague notaries, on the 9th July, 1860; and, further, considering that the said lot of land and premises were sold by the plain-

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tiff to the defendant, *franc et quitte* of all mortgages and incumbrances of all kinds: and further considering that the said defendant hath established that, notwithstanding such clause of *franc et quitte* of all mortgages and incumbrances, the said lots and premises are charged and incumbered with several mortgages set forth in the exceptions pleaded to this action, and which said mortgages and incumbrances were created by the said plaintiff, the vendor, before the sale of the lot and premises aforesaid; and further considering that the said defendant, as the purchaser thereof, is in danger of being troubled by reason of such mortgages and incumbrances, and that by reason thereof, and the force of the Statute in such case made and provided, the said defendant, as such purchaser, may retain the payment of the purchase money now due, and exigible under the contract of sale aforesaid, until the said mortgages and incumbrances are removed by the said plaintiff, as vendor aforesaid, unless the said plaintiff, as such vendor, do give good and sufficient security that the said defendant, as purchaser aforesaid, shall not be troubled by reason thereof; and considering further that no such security has been offered or tendered by the said plaintiff, either in his action or in the special answers fyled by the said plaintiff to the pleas of the said defendant, setting up the existence of the said mortgages and incumbrances, and his right to obtain such security, and that the said mortgages and incumbrances have not been all removed, so as to relieve the said defendant from all danger of trouble aforesaid, the Court doth condemn the said defendant to pay to the said plaintiff the said sum of $260.72 cy., but that the execution of the said judgment, in so far as the sum of $240 and interest thereon is concerned, being for the instalment,.....be stayed until such time as the said plaintiff shall have given good and sufficient security to the said defendant that he, said defendant, shall not be troubled or molested in the possession and enjoyment of the said lots of land and premises by reason of any of the mortgages and incumbrances as shall remain unexpunged from the Registry Office, and unpaid or otherwise discharged; and the Court doth condemn the said plaintiff to pay the cost of this action.

Hubert, Attorney for plaintiff.
Lanctot, Attorney for defendant.
(P. R. L.)

MONTREAL, 27TH MARCH, 1862.

Coram SMITH, J.

No. 1165.

Exparte *The Bank of Montreal*, petitioner, and *Sophia Glen* et al., mis en cause:

Held:—That, in order to take the benefit of the 4th sec. cap. 91, 24 Vic., intituled "An Act to amend the charter of the Bank of Montreal," which allows the Directors of the Bank of Montreal, in case they entertain "reasonable doubts" as to the legality of any claim to any share, dividend or deposit of or in the said Bank, when the legal right of possession to such share, dividend or deposit shall change by any lawful means other than by transfer, to present a declaration and petition to the Superior Court, setting forth the facts, and praying for an order or judgment, adjudicating and awarding the said shares, dividends or deposits to the party or parties legally entitled to the same; it is not sufficient, or within the meaning of the statute, merely to allege that the petitioners entertain "reasonable doubts," but unless the grounds for such "reasonable doubts" are stated and fully declared in the declaration and petition, the Court can have no jurisdiction, and such petition will be rejected with costs.

This petition was fyled and presented under a special statute, viz., 4 sec. cap. 91, 24 Vic., the substance of which is contained in the above holding.

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The Bank of Montreal, petitioners, by the said petition declared that there were then and had been for six months previously to the presenting of said petition, standing in the books of the Bank of Montreal, six shares, of £50 cy. each, in the name of Miss Jane Anna Glen, of Chambly, spinster, and three shares of £50 cy. each, in the name of Lady Catherine Frances Wilson, of the same place, widow of Lieutenant General the late Sir Wiltshire Wilson, Knight.

That by a certain "declaration of transmission," in the form of a petition, addressed and presented to the President and Directors of the said Bank, and bearing date at Montreal, the 24th day of December, 1861, Sophia Southouse Glen, wife of Hilary Dupuy, of Kingston, C.W., Esq., and Charles Wiltshire Edward Glen, of the Parish of Chambly, physician, thereon acting by Henry Stuart, of Montreal, Esq., Advocate, their Attorney, represented and declared as follows, to wit:

"That the late Jane Anna Glen, in her lifetime of the Parish of Chambly, on the third day of August, 1861, made a will by which she bequeathed her stock in the Montreal Bank to the said Sophia Southouse Dupuy and to Lady Catherine F. Wilson, her sisters, in equal shares; that the said Jane Anna Glen died at Chambly on the 9th August, 1861; that the said will was duly proved on the 23rd August, 1861.

That the said Lady Catherine F. Wilson made her last will on the 3rd August, 1851, bequeathing to her sister, the late Jane Anna Glen, the whole of the property she might die possessed of, with the exception of a few trifling legacies; that the said Lady Wilson died at Chambly on the 2nd October, 1861; that the said Lady Wilson survived her said sister, and consequently the said legacy became void; that probate of the said last-mentioned will was granted on the 22nd October, 1861; that the said Lady Wilson held three shares of the stock of the Montreal Bank.

That the said Jane Anna Glen held six shares of the stock of the Montreal Bank; that the said Sophia Southouse Dupuy, as the Legatee of the said late Jane Anna Glen, is entitled to one-half the stock held in her name, to wit, three shares, and the said Sophia Southouse Dupuy and Dr. Glen as sole heirs at law of the late Lady Wilson, are entitled to the other three shares, share and share alike, and are also entitled to the three shares, in the name of Lady Wilson, share and share alike; that the said Sophia Southouse Dupuy is in consequence entitled to six shares held in the names of the said late Jane Anna Glen and Lady Wilson, and Dr. Glen to three shares.

And thereupon the said Sophia Southouse Glen and Charles Wiltshire Edward Glen, by their declaration of transmission in the form of a petition, prayed as follows:

"Wherefore your Petitioners pray that you will be pleased to direct the proper officer to transfer and place in the name of the said Sophia Southouse Dupuy six shares of the stock aforesaid with the arrears of dividends and to the said Dr. Glen three shares of the said stock with the arrears of dividend."

Certain documents were fyled in support of the parties' pretensions.

In the present case, the Bank of Montreal, petitioners, fyled in Court all the

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said documents, declaring that, with the exception of the allegations in said declaration of transmission to the effect that the said Jane Anna Glen held six shares and the said Lady Catherine Frances Wilson held six shares of the capital stock of the Montreal Bank, which they admitted, the matters alleged by the said parties as matters of fact were wholly unknown to them. That they entertained *reasonable doubts* as to the legality of the claim made by the said parties, and therefore, under the before-cited statute, prayed for an order or judgment of the Court, adjudicating and awarding and declaring the transmission to the party or parties legally entitled to the said shares of stock and dividends.

PER CURIAM.—This is a most singular case. It is clear that under the existing laws such a case could not have come up, as it respects the rights of parties who are not before the Court, parties interested not having been publicly advertised. But it was brought under a special Act, 24 Vic. cap 91.

It appeared that two sisters, living at Chambly, owned respectively six shares and three shares of Montreal Bank stock. They each made their wills, by which they agreed that the shares of the one who died first should go to the other. Mrs. Glen, who owned six shares, died before Lady Wilson, and the heirs of the latter now claim all the nine shares. The claimants produce the wills of these ladies. The Bank say they are ignorant of the facts; they are not aware of the wills being genuine, and they fyle the present petition and pray the Court to determine. The Court having examined the statute under which the petition was brought is of opinion that reasonable doubt of the facts not admitted must be shewn. It is not sufficient to say merely, I doubt this or that; but there must be a legal doubt expressed in the petition, involving a statement of facts on which it is based, otherwise the Court can have no jurisdiction. Here no reasonable and legal doubt was made known:

The judgment was *motivé* as follows:

The Court, &c. &c., considering that the said petitioners in the above matter have failed to show or set forth in any form or way any reasonable doubt in law in their said petition by reason of which the claim of the said *mis en cause* can be called in question in law, or have failed to set forth the existence of any fact by reason of which any doubt can exist, or which this Court can in any way adjudicate; and considering that the 24th Victoria, chapter 91, by virtue of which the present petition is submitted to this Court, gives jurisdiction to this Court to enter on the consideration of the matters and things contained in the said petition only in case any reasonable doubt shall exist in the minds of the petitioners as to the legality of any claim made for stock or shares, dividend or deposit, or any right in the Bank to come before this Court by petition as aforesaid under the provisions of the said Act to have and obtain any adjudication or order or judgment whatever, as prayed for; And further considering that no such reasonable doubt in law has been raised in the present case: The Court doth reject the said petition with costs.

Petition rejected with costs.

F. Griffin, for petitioners.
H. Stuart, for *mise en cause*.
(J. L. M.)

MONTREAL, 26th APRIL, 1862.

Coram SMITH, J.

Vanier vs. Falkner.

No. 316.

Browning vs. Gale.

HELD:—That a minor is liable for his board when contracted for as a trader and in the course of his business.

The plaintiff sued the defendant for the sum of £42 9s. for board and lodging at his hotel, known as the "Ottawa Hotel" in Montreal; from the 30th April, 1854, till the 6th July, 1854; and for a portion of which amount the defendant had given him a draft payable at sight.

By his plea the defendant alleged that he was and still is a minor under the full age of twenty-one years, and was not liable to the plaintiff, and could not be sued nor could judgment be rendered against him.

The plaintiff replied specially that for three years upwards the defendant, with the knowledge and consent of his tutor, and the father and mother of the defendant being dead long previous thereto, had left his domicile and had taken up a new domicile and residence at New York, and was carrying on trade and business in his own name and for his own behalf, to wit, the trade and business of an agent of a commercial association in New York, for the manufacture and sale of gold pens, and that in the exercise of his business and for the purpose of selling such pens he visited Montreal and lodged with the plaintiff, and contracted the indebtedness for which he was sued; that the plaintiff was unaware that the defendant was a minor; that the defendant was long past the age of puberty, and that his mode of living and expenditure in the hotel was not expensive or greater than was justified by the rank and station in life of the defendant under the circumstances.

The plaintiff having proved the facts alleged by him in his declaration and special answers, and the parties having been heard upon the merits of the case, judgment was entered up to the plaintiff as follows:—

The Court ..... doth dismiss the plea of minority pleaded by the said defendant, inasmuch as he, the said defendant, was a trader at the time he contracted the debt for the recovery of which this action was brought, and that he, the said defendant, contracted the said debt in the course of his business, doth adjudge and condemn the said defendant to pay to the said plaintiff .....

Abbott, Attorney for plaintiff.

A. & G. Robertson, Attorneys for defendant.

(P. R. L.)

MONTREAL 27 AVRIL 1861.

Coram BADGLEY, J.

No. 1582.

Vanier vs. Falkner.

JUGÉ:—Qu'une partie a le droit d'ouvrir son enquête pour examiner ses parents par suite de ce que sa partie adverse a eu l'avantage de pouvoir examiner ses parents en vertu de la loi 22 Vic. ch. 57, sec. 51, qui est devenue en force durant son enquête.

Cette action est une demande en bornage. Le demandeur ayant clos son enquête, le défendeur durant son enquête examina plusieurs de ses parents pour

C. S. Phillips & and Lyman Sanborn.

établir les allégués [illegible] défense ; en autant que durant son enquête la nouvelle loi qui permet aux parents d'être entendus comme témoins, fut mise en force.

Après la clôture de l'enquête du défendeur, le demandeur fit la motion suivante : " Motion de la part du dit demandeur qu'en autant que depuis la clôture de son enquête en cette cause, la loi ayant permis aux parents de servir de témoins dans les causes au civil, nonobstant le onzième article du titre 22 de l'ordonnance de 1667 ; et le dit défendeur s'étant prévalu des dispositions de la dite loi, savoir, 22 Vic. chap. 57, section 61 ; et ayant durant son enquête examiné ses parents en sa faveur comme ses témoins, il soit en conséquence permis au demandeur d'ouvrir de nouveau son enquête pour examiner des témoins essentiels à la cause, et qui sont ses parents, et qui sont nécessaires pour établir les faits articulés par le dit demandeur."

Motion accordée.

Lafrenaye, Avocat du demandeur.
Leblanc et Dorion, Avocats du défendeur.
(P. R. L.)

COURT OF QUEEN'S BENCH.

APPEAL,

FROM THE CIRCUIT COURT, COUNTY OF STANSTEAD.

MONTREAL, 2ND JUNE, 1862.

Coram SIR L. H. LAFONTAINE, BART., C. J., DUVAL, J., MEREDITH, J. (C.), MONDELET, A. J.

No. 19.

CHARLES S. PHILLIPS
(*Plaintiff in the Court below*),
AND,
APPELLANT;

GEORGE SANBORN
(*Defendant in the Court below*),
RESPONDENT.

Held :—1st. That the sale of real property in a district where the same had been, but at the time of such sale was not situate, is absolutely null, and all subsequent sales founded upon it are null.

2nd. That a sheriff's title to property being obtained by fraud may be attacked in any suit where such title is invoked, although the original parties to the fraud are not parties to the suit.

3rd. That a promissory note given by a *tiers-détenteur* to discharge a mortgage upon his property will be held to have been given without consideration if the mortgage was created by a person having no valid title to the property.

In the Circuit Court, Stanstead, on the 4th September, 1861, the following judgment was pronounced by Mr. Justice Short :

" The Court * * * considering that no valuable consideration was given by the said plaintiff, for the promissory note in question in this cause, but that the same was made and signed by said defendant in favour of said plaintiff, the Agent or Attorney of the Assignees of the bankrupt estate of the late William Phillips, who claimed to have a mortgage on part of the lot No. 5 in 7th Range of Barnston, in the possession of said defendant, in consideration the said plaintiff should and would [illegible] and discharge said mortgage payment by said defendant of the amount of the said promissory note considering that the said plaintiff had no authority to take said pro[illegible]

C. S. Phillips and G. Sanborn.

note, payable to himself, and that said assignees, having not in any way recognized the said act, are not bound thereby, and may, at any time they see fit, enforce the said mortgage against said defendant, notwithstanding a judgment awarding payment by defendant to plaintiff of the amount of said promissory note, and considering also that plaintiff has not released or offered to release the said mortgage, or caused the same to be done, doth dismiss the action of said plaintiff with costs, *distraits* to Messrs. Sanborn & Brooks, defendant's attorneys.

From this judgment an appeal was taken, and in appeal the judgment was confirmed.

The facts of the case fully appear from the judgment of the Chief Justice.

LAFONTAINE, C. J.—"Cette action, intentée à la Cour de Circuit de Stanstead, District de St. François, en octobre 1857, avait pour objet de recouvrer du défendeur intimé la somme de £30 (avec intérêt) montant d'un billet du 17 mars 1855, fait par lui au profit du demandeur personnellement, et causé pour valeur reçue, le dit billet payable dans le mois de janvier 1857.

"Pour repousser cette action, le défendeur a allégué, dans une première exception, qu'il fut induit à consentir ce billet sur les fausses représentations à lui faites par le demandeur que les syndics à la faillite ou banqueroute de feu William Phillips, son père, avaient une hypothèque sur la partie du lot No. 5 dans le 7e rang du township de Barnstown, dont le défendeur était alors propriétaire en possession, et que lui le demandeur avait le pouvoir de le libérer de cette hypothèque, laquelle libération il lui accorderait en par lui consentant le dit billet; que, cependant, il n'existait pas alors une telle hypothèque; que la seule prétendue hypothèque était celle que l'on voulait faire résulter d'un acte de vente (Ritchie, notaire) du 11 janvier 1836, fait par le dit William Phillips à John Sanborn, auteur du défendeur, de 142 acres à prendre du dit lot No. 5, pour le prix de £71, dont le demandeur prétendait qu'il était encore dû une balance lors de la confection du dit billet, que, trompé par ces fausses représentations, et croyant que le demandeur était le procureur légal des représentants du dit William Phillips, il consentit à faire le dit billet; qu'au temps de l'acte de vente du 11 janvier 1836, le dit William Phillips n'était pas propriétaire du terrain; qu'il avait, par fraude et collusion avec James Hastings Kerr, de Québec, fait saisir le terrain dans une cause où ce dernier était demandeur et le dit William Phillips, en sa qualité de curateur à la succession vacante de Thomas Scott, était défendeur, et l'avait fait vendre dans le District de Montréal, avec d'autres terrains de grande valeur appartenant à la dite succession Scott, le ou vers le 15 décembre 1835, par Louis Guay, alors shérif du District de Montréal, que Charles G. Stuart, proche parent du dit William Phillips, agissant par fraude et collusion avec le dit William Phillips, devint l'adjudicataire nominal des terrains ainsi vendus, et qu'il les céda ensuite, sans aucune considération quelconque au dit William Phillips; que le dit terrain en question lors du dit décret, n'était pas dans les limites du District de Montréal, que, par conséquent, le shérif de Montréal n'avait pas le droit de le vendre, et ainsi la vente à Stuart n'était pas valable, de même que la cession faite au dit William Phillips, puis la vente de ce dernier à John Sanborn, ainsi que la prétendue hypothèque qu'on

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a voulu en faire résulter; que le demandeur n'a pas offert, par son action, de libérer la dite hypothèque; qu'au temps de la confection du susdit billet, le demandeur n'était pas autorisé et n'est pas encore autorisé à agir pour les représentants du dit William Phillips; que le dit billet, en ce qui regarde le demandeur, a été donné sans aucune considération, et que le paiement que le défendeur en ferait n'aurait pas l'effet de libérer l'hypothèque en question, en supposant qu'elle eût été valablement contractée.

"Enfin le défendeur conclut à la nullité des ventes faites par le shériff Gugy à Stuart, par Stuart à Phillips, par Phillips à John Sanborn, et à celle du susdit billet.

"Dans une deuxième exception, le défendeur dit que le billet a été donné à la condition de la libération de la dite hypothèque, libération que le demandeur a promis d'obtenir en recevant le dit billet, mais qu'après l'avoir reçu il n'a pas obtenu, même a refusé d'obtenir la dite libération, par conséquent le dit billet doit être déclaré nul."

Tels sont, en substance, les moyens de défense employés dans les deux exceptions, lesquelles sont suivies d'une défense au fonds en fait.

Voici les faits qui me paraissent être établis au dossier, en dehors de ce qui est énoncé dans les actes sous forme authentique.

En répondant à l'articulation de faits du défendeur, le demandeur a admis:

1o. Qu'au temps de la vente par Phillips à John Sanborn, le dit William Phillips était curateur à la succession du dit Thomas Scott.

2o. Que le décrêt en question a eu lieu au bureau du shériff de Montréal, à Montréal même, le 15 décembre 1835, dans la cause de Kerr contre Phillips, curateur.

3o. Que le District de St. François était alors séparé du District de Montréal, et que le terrain en question était situé dans le dit district de St. François.

4o. Que le demandeur est maintenant curateur à la succession vacante du dit Thomas Scott.

Voici ce qui est encore établi au profit du défendeur, et c'est une preuve bien importante en sa faveur:

BARNSTON, 17th March, 1855.

Received this day, from George Sanborn, his note for thirty pounds currency, payable in the month of January, 1857, with interest, in full of all demands against him on fifty acres of lot number five, in the 7th range of the township of Barnston, and I hereby promise to release the mortgage in full against his fifty acres held by the assignees of the estate of the late William Phillips, on the purchase of the same so soon as the note and interest is paid in full, and not before.

(Signed), CHARLES S. PHILLIPS,
Attorney for the assignees of the Bankrupt Estate of the late William Phillips.

Samuel A. Humphrey, } Witnesses.
H. S. Humphrey, }

ADMISSIONS.

The plaintiff admits that the signature to the receipt, defendant's exhibit No. 2, is the handwriting of plaintiff, and that the mortgage referred to in the

said receipt is that, or a portion of that, claimed to be created by deed, defendant's exhibit No. 1 ; that the title of said half lot of land in fee simple was in the late Thomas Scott, and was a part of his succession up to the time of the sheriff's sale thereon made in the case of Kerr & Phillips, curator, on the 15th December, 1835.

(Signed), T. W. RITCHIE,
Attorney for plaintiff.

Stanstead, 3rd November, 1860.

Le défendeur est tiers-détenteur, en autant qu'il s'agit de la susdite hypothèque. Il est prouvé, par deux témoins, que John Sanborn était en possession dès avant le prétendu décret du shériff.

On voit, par le reçu du 17 mars 1855, que le billet en question a été reçu par le demandeur, non en son propre nom, mais comme, "Attorney for the assignees of the Bankrupt Estate of the late William Phillips." Dans ce cas, en admettant même la validité du billet, l'action pour en obtenir le paiement ne compéterait pas au demandeur, mais bien aux syndics Pour cette raison seule, le jugement de première instance, qui le décide ainsi, devrait, à mon avis, être confirmé.

Mais il y a plus, le décret fait par le shériff de Montréal est frappé d'une nullité absolue. Ce fonctionnaire n'avait, dans les circonstances de la cause, aucun pouvoir de vendre, par décret, des terrains situés dans le District de St. François. Il n'a pu donner aucun titre valable à Stuart, le prétendu adjudicataire, et celui-ci n'a pu en donner, non plus au dit William Phillips. Ce dernier, à son tour, n'a pu vendre valablement à John Sanborn, ni par conséquent prendre une hypothèque sur son terrain. La nullité absolue du décret atteint tous les actes subséquents. La vente par décret d'un terrain, dans un autre district que celui où il est situé, suffit par elle-même pour entacher de fraude et la vente et tous les actes de mutation postérieurs, du moins en autant qu'il s'agit d'un tiers-détenteur, placé comme l'est le défendeur. Toutes les parties concernées dans les actes authentiques qui ont été produits, me paraissent avoir participé à la fraude qui a commencé avec la saisie et le décret, principalement le défendeur Phillips en sa qualité de curateur à la succession de Thomas Scott. Il aurait dû s'opposer au décret par une opposition afin d'annuler s'il était étranger à la fraude. Mais la clause d'indemnité à laquelle le dit Phillips s'est soumis envers Stuart, dans l'acte de cession que ce dernier lui a fait, prouve qu'il n'était pas étranger à la fraude, qu'au contraire, il y était participant, ainsi que le dit Stuart lui-même, qui ne faisait que lui prêter son nom.

Judgment confirmed.

Rose & Ritchie for appellants.
Sanborn & Brooks for respondent.
(J. S. S.)

MONTREAL, 28 AVRIL 1862.

Coram BADGLEY, J.

No. 1807.

Howa[illegible]

JUGE:—Qu'une dette, contractée par [illegible] société individuellement, n'est pas due par la société elle-même.

Qu'un associé ne peut offrir en compensation une dette de la société, dont il est membre, &c.*

Les demandeurs MM. Compain et Gianelli, associés comme hôteliers, poursuivaient le défendeur pour $75.20.

Le compte fut admis; mais le défendeur plaida que les demandeurs lui devaient une somme de $694.55, en vertu d'un certain [illegible] composition passé devant Mtre. Griffin et son confrère, notaires, le 1er décembre 1860.

Les demandeurs répondirent que d'après cet acte la somme était due non pas au défendeur, mais à la société de "Stuart et Ryan;" et que d'ailleurs fût-elle due au défendeur, il ne pouvait l'opposer en compensation, attendu qu'ils étaient parties à cet acte individuellement, et avant même l'existence de la société.

Jugement pour le demandeur.

Girouard, avocat du demandeur.

Driscoll, avocat du défendeur.

(D. G.)

MONTRÉAL, 13 JUIN 1861.

Coram MONK, J., Ass.

No. 860.

Courville vs. *Levar & Levar*, T. S.

JUGE:—Que le défendeur qui a fait défaut ne peut obtenir la permission de lever le défaut dans le but de faire périmer l'instance.

Le demandeur avait obtenu jugement contre le défendeur, en 1852. En 1853 il fit émaner une saisie-arrêt après jugement entre mains du tiers-saisi. Celui-ci fit sa déclaration qu'il ne pouvait *quant à présent*, déclarer combien il pouvait devoir. En octobre 1861, le tiers-saisi vint de nouveau faire sa déclaration complétant celle faite en 1853, et déclara devoir.

Le demandeur qui avait fait défaut fit motion qu'il lui fut permis de comparaître, aux fins de faire périmer l'instance, et que l'instance fut périmée, vû le défaut de procéder depuis plus de 3 ans. Le défendeur fila cette motion au greffe, la considérant comme une motion *de course*, et obtint une règle qu'il fit signifier au demandeur.

Per Curiam.—Le défendeur ne pouvait comparaître *de plano*, il lui fallait la permission de la cour. Ce procédé de sa part a eu l'effet d'interrompre la péremption, d'ailleurs la déclaration du tiers-saisi faite en octobre 1861 étant une suite ou le complément de celle par lui déjà faite en 1853, la péremption a été interrompue. Pour ces deux raisons la règle est rejetée et jugement sur la déclaration du tiers-saisi.

Bélanger, pour demandeur.

Bondy, pour défendeur.

Ouimet, conseil du demandeur.

(C. C.)

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* *Vide* Law Reporter, L. C., p. 4, *Batten and Desbarats.*

COUR DE CIRCUIT.

MONTREAL, 27th SEPTEMBER, 1862.

Coram BADGLEY, J.

No. 4094.

McCulloch vs *McNevin.*

Held:—That upon its being established by an affidavit of the Plaintiff, that an award purporting to be made after notice to the parties, was in fact made without such notice, the award will be set aside.

In this cause, which was an action upon an account for £22, the amount of certain plumber work, done for the Defendant by the Plaintiff, the matters in issue were referred to two arbitrators.

The arbitrators made an award before a Notary of a sum of $50 in favour of the Plaintiff. The award alleged that the parties had been duly notified.

At the hearing on the merits the Defendant moved that the award be homologated, and the Plaintiff moved that it be set aside, on the grounds that the parties did not appear by the award to have been present, and that as was shown by his affidavit, he had received no notice of the meeting of the arbitrators, and had had no opportunity of producing evidence or being heard, and that the award was therefore illegal.

At the argument *Morris*, for Plaintiff, cited in support of the motion:

Waters vs. *Verroneau*, L. C. Reports, Vol 6, p. 482.

Ostell vs. *Joseph*, Q. B., L. C. Reports, Vol, 9, p. 440,

Brown et al. vs. *Smith et al.*, L. C. Jurist, Vol, 6, p. 126, and

Watson on Arbitration, p. 256.

Per Curiam.—The motion to set aside the award must be granted, it appearing by the uncontradicted affidavit of the Plaintiff, that no notice was given to him of the meeting of the arbitrators, otherwise the Court would be condemning parties not before it.

Torrance & Morris, for Plaintiff.

John Monk, for Defendant.

(A. M.)

MONTREAL 27 MAI 1862.

Coram SMITH, J.

No. 2083.

Crevier vs. *Sauriole* dit *Sansouci*

Jugé:—Qu'un billet notarié reçu en brevêt est prescriptible par le laps de cinq ans.

Le Demandeur poursuivit pour le recouvrement de la somme de 216 liv., ancien cours, montant d'un billet signé par le Défendeur et reçu en brevêt à St. Martin le deux Avril 1841; Mtres. Filiatrault et Decelles N. P.

Ce billet est ainsi conçu..... "André Sauriole dit Sansouci....," a reconnu "et confessé devoir à Pierre Crevier..... la somme de 216 liv., a. c. pour prêt "de pareille somme fait au dit comparant dès ayant ces présentes, ainsi qu'il le

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"reconnait et confesse et a promis rendre et payer cette somme au dit créancier ou au porteur à première demande, en en payant l'intérêt légal à compter de ce jour."

Le Défendeur plaida la prescription quinquennale et conclut en conséquence au renvoi de l'action.

Per Curiam.—Ce billet étant payable à ordre et pouvant être transporté par endossement,* est conséquemment prescriptible par le laps de cinq ans depuis sa date, attendu qu'il est payable à demande.†

Le simple fait de la passation de ce billet pardevant Notaires ne peut pas affecter le mode de prescription applicable en pareil cas.

Le jugement de la Cour est que ce billet est prescrit et en conséquence l'action est renvoyée.

Loranger & Frères, avocats du Demandeur.

R. & G. Laflamme, avocats du Défendeur.

(P.R.L.)

Vide 9, L. C. Reports p. 418, Lavoie et Crevier—2 Vol.—Duvergier p. 244 à la note.

MONTREAL, 13 JUIN 1862.

Coram MONK, J.

No. 2615.

Les Syndics de la Paroisse de Lachine vs. *Fallon.*

Juré:—1o. Qu'une personne née dans la religion catholique ne peut se soustraire aux obligations civiles que lui impose sa profession religieuse, par le seul fait qu'elle aurait cessé de pratiquer sa religion et aurait suivi les cérémonies du culte dans une église protestante.

2o. Que la partie peut être interrogée sur la nature de sa croyance, et que son refus de répondre doit être interprété comme un aveu qu'elle n'a pas changé de religion.

Les Syndics de Lachine, nommés et agissant en vertu du statut qui pourvoit à l'érection des églises catholiques dans le Bas Canada, avaient poursuivi Fallon pour recouvrer l'un des paiements échus sur le montant auquel sa propriété avait été cotisée pour l'érection d'une nouvelle église dans la paroisse de Lachine. Fallon plaida qu'il n'appartenait pas à l'église catholique, mais à une dénomination protestante; qu'il avait été marié, le 21 août 1850, suivant le rite de l'église presbytérienne d'Ecosse, et que les enfants nés de ce mariage avaient été élevés dans la doctrine de cette église; qu'il avait notifié le curé de Lachine de ces faits par le ministère de M. Wright et son confrère, notaires, par acte du 20 de novembre 1861.

Les syndics répondirent qu'il était faux que Fallon eût professé aucune autre religion que la religion catholique; qu'au contraire, il avait ouvertement professé cette dernière religion, ayant un banc dans l'église jusqu'à assez récemment; qu'il avait signé les requêtes nécessaires pour obtenir l'érection d'une nouvelle église catholique et d'un presbytère dans la paroisse de Lachine, tant auprès des autorités religieuses que des autorités civiles. Que le protêt invoqué dans la défense n'avait été fait qu'après l'homologation de l'acte de cotisation, et lorsque

* 3 L. C. Jurist p. 55 Morrin vs. Legault dit Deslauriers.

† 2 L. C. Reports p. 335 Laroque et al., vs. Andrews et al.

les Demandeurs avaient obtenu, par la loi, un privilége sur les propriétés du Défendeur. Harwood & ux. and Whitlock et al.

A l'enquête, les Syndics prouvèrent que Fallon avait signé les requêtes aux autorités ecclésiastiques et civiles, demandant l'érection d'une nouvelle église; qu'il était né et qu'il avait été élevé dans la religion catholique; qu'il avait, dans des conversations avec le curé de Lachine, avoué qu'il était et avait toujours été catholique; que lors de la confection des deux derniers recensements de la population de cette Province, il s'était fait inscrire comme catholique par l'officier-recenseur, et qu'il avait eu un banc dans l'église catholique jusqu'à il y a deux ou trois ans.

De son côté, Fallon prouva qu'il s'était marié à une protestante, suivant le rite de l'église presbytérienne d'Ecosse; que les enfants nés de son mariage avaient tous été élevés dans la doctrine de cette église, en vertu d'une stipulation expresse à cet effet dans son contrat de mariage; qu'il avait cessé depuis plusieurs années de fréquenter l'église catholique pour suivre les cérémonies du culte dans l'église protestante en question, en compagnie de sa famille.

La seule question à laquelle la cour parut attacher de l'importance fut celle de savoir si Fallon était catholique ou protestant avant l'adoption des premiers procédés pour parvenir à la construction d'une nouvelle église dans la paroisse de Lachine. Les témoignages à cet égard paraissant contradictoires, le juge crut devoir déférer le serment judiciaire à Fallon. Celui-ci, interrogé directement sur la nature de sa croyance, refusa de répondre.

Jugement fut immédiatment rendu pour les Demandeurs.

Doutre & Daoust, pour les Demandeurs.

Lafrenaye & Armstrong, pour le Défendeur.

John Monk, conseil.

(C. P.)

COURT OF QUEEN'S BENCH.

MONTREAL, 5TH JUNE, 1862.

Coram SIR L. H. LAFONTAINE, BART., Ch. J., DUVAL, J., MONDELET, (C.) A. J., BRUNEAU, J., *ad hoc*.

No. 30.

HON. R. U. HARWOOD & UX, (*Plaintiffs in Court below*,) APPELLANTS.

AND

CHARLES F. WHITLOCK & AL, (*Defendants in Court below*,) RESPONDENTS.

Held:—1st. That the *droit de Retrait Féodal* is a legal and not a conventional right, and that a reserve in the original deed of concession of a *fief* of the *droit de retrait féodal* cannot affect the legal character of such right, so as to convert it from a legal to a conventional right.

2nd. That even were such right conventional in its character, an action *en retrait féodal* based thereon and instituted before the passing of the statutes abolishing feudal and seigniorial rights in Lower Canada, could not be affected by anything contained in those statutes.

3rd. That no prescription can begin to run against the exercise of the *droit de retrait féodal*, until after due exhibition of the vassal's title deeds and delivery of copies thereof to the Seigneur.

This was an Appeal from a Judgment rendered by THE HON. MR. JUSTICE BADGLEY, in the Superior Court at Montreal, on the 30th day of December, 1861.

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The action in the Court below was instituted, in the month of April, 1834, by Louise Josephte Chartier De Lotbinière (one of the said appellants) in her quality of Seignioress in possession of the *Fief* and Seigniory of Vaudreuil, and her husband, the Hon. R. U. Harwood (the other of the Appellants) for the purpose of redeeming and taking (*prendre, retenir et avoir par puissance de fief,*) from Charles F. Whitlock and Harriet Whitlock, as universal legatees of the late John Whitlock, a *Fief* situate within the said *Fief* and Seigniory of Vaudreuil and called and known as the *Fief Choisy*.

By her declaration, the female Appellant sets out her title as such Seigniores at length, but, as it was fully admitted in the Court below, as hereafter shown, it is deemed unnecessary here to detail the same.

The declaration alleges, that the *Fief* Choisy was originally conceded *à titre de Fief et Seigneurie*, on the 14th of April, 1768, by the then Seignior of Vaudreuil, subject to fealty and homage and to the *droit de retrait féodal*.

The mode in which the said John Whitlock purchased *Fief* Choisy and transmitted the same to Charles F. and Harriet Whitlock, and the duration of their respective possessions, are also set out at length in the declaration, but, as they were also fully admitted in the Court below, it is deemed unnecessary to repeat them here.

The Defendants fyled 9 pleas. By the first it was contended that Mrs. Harwood's title was defective in a certain particular, and by the second it was alleged that the late John Whitlock had acquired the property in a form different to that set out in the declaration, but as the effect of the admissions signed by the parties was (it is thought) to do away with any objections attempted to be raised by these pleas, it is deemed unnecessary further to allude to them.

The third and fourth pleas set up the prescription of 40 days which are claimed by the former plea to run from the time the sale of Choisy was notified and the contract thereof exhibited, and, by the latter plea, from and after the time at which the appellants became cognizant and possessed of all the deeds, titles and documents appertaining to the sale in question and after due notice thereof to the appellants.

The fifth plea was a general one of *chose jugée*, without specifying in what manner the matters presently in contest had been previously determined by judicial authority.

By the 6th and 7th pleas, it was contended that the appellant's *offres réelles* before action brought were insufficient. Of the question attempted to be raised by these pleas it is enough to say, that in the case of *retrait féodal* no *offre réelle* is necessary, and that the *offres* here made were evidently ample and sufficient, and the point, moreover, was not urged in either court.

The 8th plea was one claiming *impenses et améliorations utiles et nécessaires*. And the ninth plea was the general issue.

Harriet Whitlock died during the pendency of the suit, and the Respondents took up the *instance* in her stead, and, after the passing of the Seigniorial Amendment Act of 1855, they fyled a plea of *puis darrein continuance*, by which they alleged :—"that after the said supposed cause of action in Plaintiff's declaration mentioned accrued to plaintiffs, and since the original Defendants in

"this cause pleaded, the *droit de retrait conventionnel*, claimed to be exercised "by Plaintiffs by this action has been abolished by the Seigniorial Amendment "Act of 1855, to wit a Public Law of this Province, and that if Plaintiffs *de* "*qualités* ever had right of action for the causes in their declaration mentioned "they have none now, but Defendants have become released from Plaintiffs' de- "mand, by the law aforesaid, and all this Defendants will verify."

The facts of the case were settled by the following admissions, which were signed by all the parties:—

The parties severally and respectively admit as follows:

1. The late Messire Michel C. de Lotbinière had been and was Seignior of Vaudreuil, in manner and form and as alleged in Plaintiffs' declaration.

2. The said Michel C. de Lotbinière conceded or granted, by the deed of the fourteenth of April, seventeen hundred and sixty-eight, referred to in Plaintiffs declaration, to Marie L. C. de Lotbinière the land called Choisy as mentioned in said deed, and on the terms therein mentioned which is the same Fief Choisy in the pleadings in this cause referred to; said Marie L. C. de Lotbinière was daughter of the Grantor.

3. In the year eighteen hundred and seventeen Michel E. G. A. C. de Lotbinière was Seignior proprietor and possessor of said Vaudreuil Seigniory and agreed with Samuel Mackay, that he, Mackay, should take possession of said Fief Choisy, the whole as mentioned and on the terms mentioned in the deed of the twenty-first January, eighteen hundred and seventeen referred to in Plaintiffs' declaration.

4. Under the will alleged of M. E. G. A. Chartier de Lotbinière his three daughters mentioned in Plaintiffs' declaration took after his death all his estate and property, to have and to hold according to the terms of said will as legatees.

5. The female Plaintiff has possessed said Seigniory of Vaudreuil as Seignioress during the period stated in Plaintiffs' declaration, and still does, having acquired the same under the said will of her father and the partition of the seventeenth of January, eighteen hundred and twenty-nine, alleged in Plaintiffs' declaration. Plaintiffs before marriage made the marriage contract alleged in their declaration and are *separées de biens* under it. The male Plaintiff however under power of Attorney and as general agent of his wife has since their marriage administered and still does administer the affairs of said Vaudreuil Seigniory.

6. The late John Whitlock possessed as proprietor said Fief Choisy under deeds between him and Samuel Mackay aforesaid, acting by their Attorneys named in said several deeds, said deeds fyled by Plaintiff in this cause, Plaintiffs' Exhibit, number twelve (No. 12,) the genuineness of which is admitted, as also the powers of the parties acting in them are admitted sufficient. (This is the proprietorship referred to in Plaintiffs' declaration at beginning of page twenty thereof.)

7. The Sheriff's sale referred to in Plaintiffs' declaration and in the Sheriff's deed of the first of May, eighteen hundred and twenty-eight, fyled in this cause, was prosecuted by said John Whitlock merely for the purpose of ratification of title and was a *decret volontaire*, object of which was to confirm said John

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Whitlock in his possession under the previous deeds aforesaid, between Mackay and him, and another object of which was to purge hypotheca.

8. Since the death of John Whitlock, Defendants *ès qualités* and Defendants *par reprise d'instance* have possessed as owners thereof said Fief Choisy, and they are now holding it.

9. Exhibits Nos. 8, 13, 14 are true copies of the several original documents of which they purport to be copies, and the originals of Nos. 13 and 14 were made and signed as said copies would indicate.

10. One of the said three daughters of said late M. E. G. A. C. de Lotbinière was under twenty-one years of age at date of the partition alleged in Plaintiffs' declaration.

11. All births, marriages and deaths alleged in Plaintiffs' declaration, or in other pleadings in this cause, are hereby admitted to have taken place as alleged.

12. Exhibits A a B b were written by the male Plaintiff to C. Whitlock, one of the defendants, in eighteen hundred and fifty-six, as in possession of Fief Choisy. (This admission given under reservation of Plaintiffs' right to move to reject them if they have such right.)

13. The Plaintiff R. U. Harwood was present at the Sheriff's sale aforesaid, when John Whitlock bought in the Fief Choisy as aforesaid.

14. The Plaintiffs in this suit are the same persons as were Plaintiffs, and Defendants *ès qualités* represent the same person as was Defendant in the action number two hundred and ninety six (No. 296) *en retrait féodal*, of the declaration in which cause a true copy, is fyled as Defendants' Exhibit C c, and a true copy of the judgment in which cause is fyled as Defendants' Exhibit D d and a true copy of the Plaintiffs' list of Exhibits in that cause is fyled as Defendants' Exhibit E e.

15. That the Fief Choisy in question in this cause and in said cause number two hundred and ninety-six (No. 296) were and are one and the same fief.

Admissions 14 and 15 are given without waiver of the Plaintiffs' right to move to reject the said copies of declaration and judgment, if they think fit so to move, but Defendants reserve to resist such motion on the merits thereof.

The parties consent that for the present the Plaintiffs' right of action be only judged upon; the question meant to be submitted, for the present, being as to whether Plaintiffs have right, under all the circumstances of this case, to exercise or claim the *droit de retrait* of Fief Choisy claimed in this action, and should the judgment be favorable to Plaintiffs it is agreed that the damages and rents, issues and profits claimed by them and the *frais améliorations mises et loyaux conts* claimed by the Defendants be matter for later consideration and to be ascertained in due course of law by an expertise or by other course if the Court see fit, and the rights of the parties in relation thereto determined by a future judgment of this Honorable Court."

The cause was argued in the Court below on the 27th May, 1861, and, on the 30th of September, 1861, THE HONORABLE MR. JUSTICE BADGLEY, before whom the argument had been had, ordered a re-hearing, on the point raised by the plea of *puis darrein continuance*. The parties having been re-heard, accordingly, judgment was rendered on the 30th of December, 1861, dismissing the

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Appellant's action. The following is a copy of the judgment as registered in the registers of the Superior Court:

"The Court having heard the parties by their counsel as well upon the merits of this cause as upon the Plaintiff's motion of the twenty-seventh day of May last for the rejection of certain exhibits therein mentioned from the record of this cause, examined the proceedings and evidence of record, and seen the said motion and deliberated, doth reject the said motion; and considering that the *droit de retrait*, stipulated and agreed between the parties in and by the deed of concession in this cause fyled by the Plaintiffs, bearing date the fourteenth day of April, one thousand seven hundred and sixty-eight, executed before Loupras, Notary, and witnesses, and for the enforcement of the exercise of which said *droit de retrait*, as stipulated and agreed upon, the said Plaintiffs have proceeded by this action, cannot be maintained; also considering *d'abondant*, that since the institution of the said action and pending the same, all Feudal and Seigniorial rights and duties have by the Legislature of this Province been abolished in Lower Canada, and specially that the said *droit de retrait* demanded in and by the Plaintiffs' action hath been abolished and annulled absolutely and without indemnity therefor or reservation *thereof;* and further considering that the said Defendants *par reprise d'instance* have by their plea fyled in this cause on twenty-seventh day of November eighteen hundred and thirty-eight invoked the benefit and advantage of the said remedial legislation so made as aforesaid, doth for the reasons aforesaid dismiss the Plaintiffs' action, and by consent of the Defendant and Defendants *par reprise d'instance* without costs."

When the Honorable Judge pronounced his judgment in open Court he stated that he wished the Counsel present to understand, that his judgment turned solely upon the point raised by the plea of *puis darrein continuance*, and, in his original draft of such judgment the *motif* thereof was limited to this one point.

The following is a copy of such original draft of judgment:—"The Court * * * considering that since the institution of the action and pending the same the Provincial Legislature has by the Seigniorial Amendment Act of 1855 abolished absolutely and without indemnity or reservation of any kind the right of *retrait* claimed and demanded in and by this action, and, considering that the said Charles F. Whitlock and the said William F. Whitlock, in their several and respective qualities, have by their plea in this cause fyled on the 27th day of November, 1858, invoked the benefit and advantage of the said law so made as aforesaid, the Court dismiss this action with costs."

Upon the appeal, *R. Mackay*, for Respondents, argued that Whitlock had acquired not by a sale, but by an exchange, [illegible] and at Lenox, Massachusetts, and £570 had been given for Fief Choisy; that Harwood and wife were incapable now of giving Respondents what J. Whitlock gave for the Fief, and therefore could not *retraire*. Pothier, Fiefs, tom. 2, p. 192, small edition; Guyot, Fiefs, vol. 4, pp. 15 and 25. He also contended that Appellants were wrong in concluding to *retraire* upon the *decret volontaire*, which was *not* Whitlock's acquisition title. 3 Guyot, Fief, p. 241. He also argued that the *droit de retrait* claimed did not exist, because of the original grantor having restricted the right, and stipulated it only as a right personal to himself. It was stipulated to

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be attached to the person of the original Seigneur *concédant* only, and to be exercised only by him during his lifetime. The Deed reads that the *retrait* may be exercised 'par le *dit Seigneur concédant.*' The words have reference to a man in life, acting. In the present case the grantee was daughter, heiress apparent of the grantor. May we not suppose that he meant that she might (after his death,) sell if she pleased? 6 Toullier, No. 412 and also p. 450. He also argued that féodalité having been abolished, this action could not be maintained.

Bethune, for Appellants, contended that although land in Lenox was taken in part payment of the acquisition of the *Fief*, a valuation of such land was nevertheless agreed upon in the deeds of acquisition giving the transaction, therefore, all the characteristics of a sale. He denied that the Appellants concluded to *retraire* on the *decrét*, and argued, on the contrary, that the *decret* was merely declared upon in the declaration as a *décrét volontaire* in its true sense. As to the restrictive character attempted to be put on the reserve which the Seignior made, concerning his right of *retrait*, in the original concession deed, he also argued that such a construction was entirely opposed to the law of Lower Canada. And, as to the question mainly, if not solely, raised by the judgment of the Court below, he submitted that the right of *retrait* sought to be enforced in the present case is not the *retrait conventionel* referred to in the statute, but the *retrait féodal*. In the judgment as recorded, the Honorable Judge alludes to the right as "the *droit de retrait* stipulated and agreed between the parties in and by the deed of concession in this cause fyled by the Paintiffs, bearing date the fourteenth day of April, 1768." This evidently is an error, the right was not the result of any contract and agreement, but (as stated in the appellants' declaration) was such as the Appellants had power to exercise, "by the law of the land;" the reference to such right in the deed of concession of the *Fief* being nothing more than a mere declaration or admission by the parties thereto that it existed, and that the conceded *Fief* should at all times be held subject to such right. But admitting even, for argument's sake, that the right in question was conventional and not purely feudal, he confidently submitted, on the authority of Baron Lafrenière, Appellant, and Cuthbert et al., respondents, decided by this Court on the 2nd March, 1857, and of the ordinary rules governing or interpreting the retroactive effect of statutes, that the legislation relied upon has no legal application whatever to the present case.

LAFONTAINE, CH. J.:—Il s'agit d'une action par laquelle l'Appelante, seigneuresse de Vaudreuil, et séparée de bien d'avec son mari, prétend avoir le droit d'exercer le retrait féodal, sur les Défendeurs originaires, comme légataires universels de feu John Whitlock, représentés, depuis leur décès, par les Défendeurs en reprise d'instance. L'objet de l'action est le retrait de l'arrière fief *Choisy*, situé dans la seigneurie de Vaudreuil. L'introduction de la demande remonte au mois d'Avril, 1834. Ainsi l'action, si elle compète à la Demanderesse, était ouverte longtemps avant la promulgation du statut qui a aboli la tenure seigneuriale, et qui ne date que de 1854.

Plusieurs exceptions à l'action ont été présentées avant la promulgation de ce statut. Mais, depuis cette époque, il en a été ajouté une autre, uniquement

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fondée sur le statut de 1855, qui a amendé celui de 1854. Par cette dernière exception, les Défendeurs prétendent que le *droit de retrait conventionnel*, qui était réclamé par l'action, a été aboli par le statut de 1855, qui est une loi d'ordre public, et que, par conséquent, même en supposant que l'action procédât valablement avant cette époque, l'effet du statut de 1855 a été d'en libérer les Défendeurs.

Après contestation liée entre les parties, celles-ci en sont venues à une admission de faits, à la fin de laquelle elles donnent leur consentement: "That for the present, the Plaintiffs' right of action be only judged upon; the question meant to be submitted, for the present, being as to whether Plaintiffs have right, under all the circumstances of this case, to exercise or claim the *droit de retrait* of Fief Choisy claimed in this action, and should the judgment be favorable to Plaintiffs, it is agreed that the damages and rents, issues and profits, claimed by them and the *frais, améliorations, mises et loyaux coûts* claimed by the Defendants be matter for later consideration, and to be ascertained in due course of law by an expertise or by other course if the Court see fit, and the rights of the parties in relation thereto determined by a future judgment of this Honorable Court."

Le jugement fut rendu le 30 décembre, 1861; il déboute les Demandeurs de leur action: "Considering that the *droit de retrait*, stipulated and agreed between the parties in and by the deed of concession in this cause fyled by the "Plaintiffs, bearing date the fourteenth day of April, one thousand seven hundred and sixty-eight, executed before Soupras, Notary, and witnesses, and for "the enforcement of the exercise of which said *droit de retrait*, as stipulated "and agreed upon, the said Plaintiffs have proceeded by this action, cannot be "maintained; also considering *d'abondant*, that since the institution of the said "action and pending the same, all Feudal and Seignioral rights and duties "have by the Legislature of this Province been abolished in Lower Canada, and "specially that the said *droit de retrait*, demanded in and by the Plaintiff's action hath been abolished and annulled absolutely and without indemnity "therefor or reservation *thereof*, and further considering that the said Defendants *par reprise d'instance* have by their plea fyled in this cause on the twenty-seventh day of November, eighteen hundred and thirty-eight, invoked the "benefit and advantage of the said remedial legislation so made as aforesaid, "doth for the reasons aforesaid, dismiss the Plaintiff's action, and by consent of "the Defendant and Defendants *par reprise d'instance* without costs."

"[illegible] be maintained," dit généralement la première partie du jugement, sans toutefois donner aucune raison à l'appui, à moins que l'honorable juge n'ait voulu renvoyer au motif qui est donné dans la seconde partie. Alors, il aurait débouté les Demandeurs de leur action, uniquement à raison des lois abolitives de la tenure seigneuriale, et partant du retrait *conventionnel*, qui est le seul auquel le jugement fasse allusion. Il aurait donc en cette occasion, donné à ces lois un effet rétroactif. Si le droit de retrait en question doit être regardé comme un droit résultant purement de la convention portée en l'acte de concession du 14 avril, 1768, ainsi que le jugement le donnerait à entendre, alors ce serait un droit de retrait conventionnel; et la question considérée sous

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ce point de vue, a déjà été décidée en faveur du seigneur par le jugement que nous avons rendu, le 2 mars, 1857, dans la cause du Baron Lafrenière, Appelant et Cuthbert et autres, Intimés, confirmatif du jugement de première instance.

Mais le retrait féodal est un droit légal qui est donné en propres termes par le 20e article de la coutume de Paris: "Le Seigneur féodal peut prendre, retenir et avoir par puissance de fief, le fief tenu et mouvant de lui, qui est vendu par son vassal, en payant le prix que l'acquéreur en a baillé et payé, et les loyaux coustemens, dans quarante jours après qu'on lui a notifié la dite vente, et exhibé les contrats, si aucuns y en a par écrit, et d'iceux baillé copie."

Dumoulin à bien dit, quelque part en commentant cet article, que le retrait féodal était *en partie* conventionnel, quand même le titre d'inféodation n'en contiendrait rien. Il admet donc qu'il est, avant tout et principalement, légal. Qu'il soit purement légal, ou en partie légal, et en partie conventionnel, la décision doit être la même. Le droit de l'appelant était ouvert, et son action intentée avant les statuts que l'on invoque. Ces statuts n'ont donc pu l'affecter. Je ne crois pas que ces statuts parlent nommément du retrait féodal. "Le droit de retrait conventionnel (dit celui de 1855, sec. 4), qu'il était permis au seigneur de stipuler uniquement pour lui assurer le paiement des droits de mutations, est aboli par le présent acte." Il est évident qu'il ne s'agit ici que du retrait qui pouvait appartenir au seigneur vis-a-vis de son censitaire, par conséquent du retrait censuel, qui ne pouvait exister qu'en vertu d'une stipulation dans l'acte d'accensement, et non du retrait féodal qui appartenait au seigneur dominant contre son vassal, sans stipulation, mais par l'effet seul de la loi. Si la 4e section du statut de 1855 n'a trait qu'au retrait censuel, il ne peut pas comprendre le retrait féodal, étant l'un et l'autre régis par des règles différentes. Le statut de 1854 dit bien, à la fin du 4e article de la section 5: "Mais le droit de retrait ne sera pas censé être un droit lucratif." Encore ici, bien que le législateur semble au premier abord, employer le mot retrait dans un sens général, il est cependant évident qu'il n'entend parler que du retrait censuel, car il emploit le mot dans une clause où il ne s'agit que des droits qu'un seigneur peut avoir à exercer contre ses censitaires, et non contre ses vassaux, droits dont il prescrit l'évaluation, en vue de l'indemnité qui doit lui être accordée.

Dans l'acte de concession du 14 avril, 1768, le seigneur concédant se réserve bien, il est vrai, le retrait féodal, en cas de vente de tout ou de partie du fief *Choisy*, qu'il concède à sa fille, mais ce n'est pas une stipulation au moyen de laquelle ce droit doit avoir son existence; il l'avait déjà par la loi. C'est une simple réserve, insérée dans l'acte, comme déclaration de la part du concédant qui venait de renoncer, en faveur de sa fille, à l'exercice de plusieurs droits légaux, qu'il ne voulait pas que cette renonciation s'étendit au droit de retrait féodal. De là la prétendue *réserve*, pour mieux expliquer l'intention des parties.

Le fief Choisy a passé, à titre de vente, des mains de Samuel McKay, qui en était alors le propriétaire, sujet au contrat de concession, en celles de John Whitlock. Il y a donc eu ouverture au droit de retrait féodal. Cette vente n'a pas été notifiée au seigneur, et Whitlock ne lui a pas exhibé ses contrats, ni d'iceux baillé copie; la Demanderesse est donc bien fondée à exercer l'action en retrait.

The following is the judgment pronounced by the Court:—" La Cour * * *

1o. Considérant que l'action de la demanderesse, séparée de biens d'avec son mari, et seigneuresse en possession de la seigneurie de Vaudreuil, lorsque la dite action a été intentée est une action en retrait féodal, pour laquelle elle prétend avoir le droit de retraire sur les défendeurs originaires comme légataires universels de défunt John Whitlock, représentés depuis leur décès, par les défendeurs en reprise d'instance, un arrière fief situé dans la dite seigneurie de Vaudreuil, et connu sous le nom de fief *Choisy*, que le dit John Whitlock a acquis, à titre de vente, du nommé Samuel McKay qui en était alors propriétaire, laquelle dite acquisition a été suivie d'une adjudication faite par le shérif du district de Montréal au dit John Whitlock sur décrêt volontaire.

2o. Considérant que dans ce cas, il y a eu ouverture au susdit droit de retrait féodal au profit de la dite seigneuresse; que ce droit est un droit légal, et non conventionnel; qu'il est donné par le 20e article de la Coutume de Paris, que "Le seigneur féodal peut prendre retenir et avoir par puissance de fief, (le fief) "tenu et mouvant de lui, qui est vendu par son vassal, en payant le prix que l'acquéreur en a baillé et payé, et les loyaux coustemens, dans quarante jours "après qu'on lui a notifié la dite vente, et exhibé les contrats, si aucuns y en a "par écrit, et d'iceux baillé copie," qu'il n'est pas prouvé que la vente du dit fief *Choisy* faite par le dit McKay au dit John Whitlock, et dont il y a un contrat par écrit, ait été notifié par la dit Whitlock à la dite demanderesse seigneuresse non plus que le dit titre d'adjudication, qu'il lui ait exhibé les dits contrats ou titres et d'iceux baillé copies; que, par conséquent la dite demanderesse n'a jamais été mise en demeure de lui faire des offres de lui rembourser le prix et les loyaux coûts de sa dite acquisition, et que, lorsqu'elle a intentée la dite action, elle l'a intentée en temps utile.

3o. Considérant que la dite action a été ouverte, et même intentée avant la promulgation des lois abolitives de la tenure seigneuriale, qu'en principe, ces lois n'ont pas d'effet rétroactif; que, de plus elles ne font aucune mention du retrait féodal, mais seulement du retrait censuel ou conventionel.

4o. Considérant que, dans l'acte de concession du 14 Avril, 1768, le seigneur concédant se réserve bien, il est vrai, le retrait féodal, en cas de vente de tout ou de partie du dit fief *Choisy*, qu'il concède à sa fille, mais que cette réserve n'est pas une stipulation au moyen de laquelle ce droit doit avoir son existence, puisqu'il l'avait déjà par la loi; que c'est une simple réserve insérée dans l'acte, comme déclaration de la part du concédant qui venait de renoncer en faveur de sa fille, à l'exercice de plusieurs droits légaux, qu'il ne voulait pas que cette renonciation s'étendit au droit de retrait féodal; delà, l'insertion de cette réserve pour mieux expliquer les intentions des parties à l'acte.

5o. Considérant que, dans ces circonstances, l'action de la dite demanderesse procédait valablement et aurait du être maintenu par la cour de première instance; et que, par conséquent, dans le jugement de la dite cour, qui a débouté la dite demanderesse, de sa dite action, il y a mal jugé.

6o. Considérant que, dans leur admission de faits, les parties ont consenti à ce que, pour le présent, le simple droit d'action de la demanderesse à l'effet d'exercer le dit retrait féodal, dans les circonstances, fût jugé, et que s'il l'était favora-

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blement à la demanderesse, elles sont convenues que les dommages, ventes, profits et revenus par elle reclamés, et les frais, améliorations, mises et loyaux coûts reclamés par les défendeurs, seraient le sujet d'une enquête et d'une adjudication ultérieure, selon le cours de la loi.

Infirmé le susdit jugement dont est appel, savoir le dit jugement rendu, le 30 Décembre, 1861, par la Cour Supérieure siégeant à Montréal; et cette cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, déboute les dits défendeurs de leurs exceptions et défenses, excepté l'exception par laquelle des impenses et améliorations sont reclamées sur la quelle exception il est prononcé ci-après autant que besoin peut être pour le présent, dit que la dite action de la dite demanderesse est bien fondée en conséquence déclare que la dite demanderesse a, pour les causes énoncées dans sa déclaration, le droit de prendre, retenir, et avoir par puissance de fief, le susdit fief *Choisy*, sis et situé dans la dite seignourie de Vaudreuil, dans le susdit district, et tenu et mouvant de la dite demanderesse, lequel dit fief *Choisy* est désigné comme suit dans l'acte de concession du 14 Avril, 1768, ci-haut mentionné, et est compris dans les limites suivantes, savoir: Une terre et concession accordée sous le nom de *Choisy*, située en la seigneurie de Vaudreuil, (le tout en bois debout à l'époque de la concession du dit fief,) de la contenance de quinze arpents de front sur toute la profondeur de la dite Seigneurie; ainsi qu'est ci-après désigné, tenant d'un bout sur le devant à la Grande Rivière ou Rivière Outaouais bornée au nord-ouest quart d'ouest par la concession de Gabriel Constant au moyen d'une ligne allant au sud-ouest quart de sud de la boussolle et bornée au sud-est par la concession de Jacques Bertrand au moyen d'une ligne étant au sud-ouest un degré, quinze minutes au sud de la boussolle, le tout conformément aux piquets plantés il y a environ deux ans par Jean Baptiste Grenier, juré arpenteur, lesquels alignements se conserveront ainsi de part et d'autre jusqu'à la profondeur de vingt arpents, au bout desquels le même front de quinze arpents sera repris et conduit jusqu'à la profondeur totale de la dite seigneurie de Vaudreuil, par une parallèle à la ligne de séparation entre le dit fief et seigneurie, et la concession du dit Gabriel Constant, condamne les dits défendeurs par reprise d'instance à quitter, abandonner et délaisser à la dite demanderesse, sous tel délai qui sera à cet effet fixé par la dite Cour Supérieure, le susdit fief *Choisy* ci-dessus désigné, avec toutes ses dépendances, droits et émoluments honorifiques et lucratifs, ainsi que tous les titres concernant le dit fief, et de lui rendre, payer et délivrer toutes les ventes, revenus et profits du dit fief *Choisy* reçus et perçus par le dit John Whitlock et ses dits successeurs, le tout, en par la dite demanderesse payant aux dits défendeurs par reprise d'instance le prix du dit fief, que le dit John Whitlock à baillé et payé, et les loyaux coustemens, conformément à la loi, et ci-après que le dit prix et les dits loyaux coûtemens auront été constatés par la dite Cour Supérieure, et sous tel délai qu'il plaira à la dite Cour Supérieure de fixer, par son jugement d'adjudication et condamnation d'intervenir; et aux fins ci-dessus, cette cour ordonne que le dossier ou récord soit renvoyé à la dite Cour Supérieure siégeant à Montréal, pour que, suivant le susdit accord intervenu entre les parties et au désir du présent jugement, il soit par elle procédé selon le cours de la loi et la pratique de la dite cour, à constater et

établir le montant des dommages, rentes, profits et revenus reclamés par la dite demanderesse, et le montant du prix du dit fief *Choisy*, qui doit être remboursé ainsi que les frais, améliorations, mises et loyaux coûts qui se sont réclamés par les dits défendeurs, et à prononcer toutes sentences d'adjudication et de condamnation que le cas pourra réquérir à cet égard, ainsi qu'à l'égard des autres conclusions incidentes des parties; le tout de manière à donner au présent jugement son plein et entier effet; et cette cour condamne les dits défendeurs par reprise d'instance, intimés, aux dépens déjà encourus en la dite cour supérieure, et aux dépens sur le présent appel."

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Judgment of Court below reversed.

Bethune & Dunkin, for Appellants.
MacKay & Austin, for Respondents.
(S. B.)

COUR DU BANC DE LA REINE.

EN APPEL.

DE LA COUR DE CIRCUIT, DISTRICT DE MONTREAL.

MONTREAL, 1ER SEPTEMBRE 1862.

Coram SIR L. H. LAFONTAINE, BART., JUGE EN CHEF, J. DUVAL J., MEREDITH, J., MONDELET, J.

F. X. BOUCHER,
(*Demandeur en Cour Inférieure,*)
APPELANT.

ET

LOUIS A. H. LATOUR ET AL.
(*Défendeurs en Cour Inférieure,*)
INTIMÉS.

JUGE.—1o. Que des débiteurs solidaires, assignés par une même action, peuvent permettre à l'un d'eux, qui est insolvable, de faire à leur créancier commun des faux frais, dans cette même action, sans en être responsables eux-mêmes.

2o. Que les endosseurs d'un billet promissoire, poursuivis avec le tireur par une action comparaissant tous, tireur et endosseurs, par le même avocat et plaidant tous aussi (non séparément) par le même avocat, ne sont pas considérés comme ayant une connaissance légale des moyens de défense employés par le tireur, leur co-défendeur, et ne sont pas censés connaître légalement les incidents, procédés, jugements, ni appels intervenus sur les moyens de défense du tireur,—et qu'il faut pour rendre les endosseurs responsables des faux frais occasionnés par le tireur, leur dénoncer les incidents intervenus sur la défense du tireur, et spécialement les appels auxquels cette défense donne lieu.

3o. Que la signification de l'appel interjeté, par le porteur du billet du jugement rendu sur la défense du tireur, quoique faite au procureur commun du tireur et des endosseurs, n'est pas une dénonciation suffisante de l'appel aux endosseurs, pour les rendre responsables des frais encourus sur cette appel.

Les faits et le droit en question dans cette cause ressortent des *factums* des parties et des opinions des juges rapportés ci-dessous.

Factum de l'Appelant.—Le jugement dont est appel a été rendu en la Cour de Circuit pour le District de Montréal, par Son Honneur M. le Juge Berthelot, le onze mars dernier, dans les termes suivants:

"Considérant que le Demandeur n'a pas fait des dénonciations suffisantes et tel que voulu par la loi, aux Défendeurs en cette cause, de l'appel par lui interjeté du jugement rendu contre lui, Demandeur, en une cause mue au terme supérieur de ce District de Montréal sous No. 728 contre P. G. Lemoine, Dé-

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fendeur en la dite cause avec les présents Défendeurs, le dit jugement étant celui rendu en la dite cause le 29 de février 1860—et considérant, de plus qu'il n'y a aucune preuve de concert et collusion ourdis entre les dits Défendeurs actuels dans et par leurs Défenses et plaidoyers en la dite cause sous No. 728 et le dit P. G. Lemoine, qui puissent les faire tenir responsables des suites des plaidoyers du dit P. G. Lemoine en la dite cause, et que pour ces raisons le dit Demandeur n'a pas le droit de se pouvoir contre les dits Défendeurs, pour les faire condamner au paiement des frais qu'il a encourus pour faire casser et infirmer le jugement du 29 février 1860—comme étant des frais accessoires auxquels ils pourraient être tenus comme cautions du Demandeur, pour ce qui a fait l'object de la demande ou action portée contre eux et le dit P. G. Lemoine conjointement et solidairement, par la dite action au Terme Supérieur, sous No. 728, a débouté et déboute l'action du Demandeur avec dépens."

Dans sa Déclaration l'appelant alléguait :

Qu'à Montréal, le 8 août 1859, Pierre G. Lemoine, menuisier, de la Cité de Montréal, avait fait son Billet Promissoire par lequel il promettait payer, à trois mois de date, à son propre ordre au Bureau de la Banque du Peuple, la somme de $300 pour valeur reçue ; que ce Billet, après avoir été endossé par le dit Piere G. Lemoine, l'avait été successivement par Louis A. H. Latour et Jean Jacques Evariste Bibaud, les Intimés, et avait été ainsi transporté, pour valeur reçu, au dit Appelant qui l'avait fait protester à échéance, faute de paiement.

Que le 24 novembre 1859, une action avait été instituée au nom du Demandeur, Appelant, contre les dits Pierre G. Lemoine, Louis A. H. Latour et J. J. E. Bibaud pour le recouvrement du montant des dits Billet et protêt laquelle action avait été rapportée [illegible] Cour Supérieure pour le dit District, le 5 décembre 1859.

Qu'à cette action le dit [illegible] Lemoine avait opposé une Exception à la forme fondée sur ce que lui, le dit Pierre G. Lemoine, avait été erronément désigné comme *menuisier* ; que la dite Cour Supérieure ayant maintenu cette Exception et renvoyé l'action de l'Appelant, ce dernier avait appelé de ce jugement à la Cour du Banc de la Reine, siégeant en Appel et que cette dernière Cour avait renversé le dit jugement, le 8 juin 1860, avec dépens taxés à la somme de £39. 8. 1.

Que des Copies du Bref d'Appel avaient été régulièrement signifiées à Henry Stuart, Ecuier, Avocat et Procureur *ad litem* des dits Louis A. H. Latour et J. J. E. Bibaud ; que les moyens de défense employés par le dit Pierre G. Lemoine dans son Exception à la forme étaient connus des dits Intimés et avaient été ainsi employés à leur vu et su, de leur consentement, par suite de connivence et collusion entre le dit Pierre G. Lemoine et les dits Intimés ; que ces derniers avaient eux mêmes employé les mêmes moyens de Défense dans une Exception par eux plaidée au mérite de l'action en question, alléguant dans leur dite Exception qu'ils n'avaient jamais endossé de Billet fait par Pierre G. Lemoine, *menuisier*.

Que le 6 juillet 1860, l'Appelant avait pris une Exécution contre les biens meubles du dit Pierre G. Lemoine pour le montant du mémoire de frais taxé pour l'Appel du jugement rendu sur l'Exception à la forme, comme susdit, mais

qu'il n'avait pu rien recouvrer, le dit Pierre G. Lemoine étant insolvable; que les frais accrus sur la dite exécution étaient de £2. 16. 5. lesquels, joints au dit mémoire, formaient la somme de £42. 4. 6:—que les dits Intimés, comme garants ou cautions de dit Pierre G. Lemoine, pour le paiement de l'obligation principale contractée au moyen du dit billet, étaient tenus de payer à l'appelant ces frais, qui étaient un accessoire de cette dette, et qui avaient été encourus pour parvenir au recouvrement du montant du dit Billet; que les Intimés étaient conjointement et solidairement tenus, avec le dit Pierre G. Le[illegible] paiement de ces frais, soit comme conséquence de leur cautionnem[illegible] soit comme dommages-intérêts, résultant de leur connivence, col[illegible] spiration avec le dit Pierre G. Lemoine pour occasionner ces frais.

En conséquence l'appelant demandait que les Intimés fussent conjointment et solidairement à lui payer la somme de $168.90 av[illegible] et dépens.

A cette action, les Intimés plaidèrent qu'ils ne pouvaient être responsables des frais reclamés par l'Appelant; qu'il n'était pas en leur pouvoir de faire cesser le dit Appel dont au reste, ils n'avaient pas eu avis légal, et qu'ils n'avaient jamais été mis en demeure de le faire cesser; que la défense par eux faite n'impliquait aucune malice ni aucune faute de leur part, et qu'il n'y avait eu aucune conspiration entre eux et le dit Pierre G. Lemoine au sujet de la dite Exception à la forme.

La contestation étant liée et la preuve faite de part et d'autre, au moyen d'écrits et d'admissions la cause fut arguée au mérite et déboutée pour les motifs exprimés dans le jugement ci haut relaté.

L'Appelant croit que ce jugement est erroné, contraire à l'équité, aux lois qui régissent les matières de la garantie et du cautionnement, et à la logique des faits de la cause.

En effet, il suffit de jeter les yeux sur l'ensemble des circonstances qui ont accompagné et suivi la transaction qui a donné lieu à ces débats pour se convaincre que la position faite à l'Appelant est loin d'être conforme aux règles de la plus commune justice. Voici trois personnes qui, après avoir contracté une obligation solennelle, refusent de la remplir et forcent l'Appelant de leur faire un procès. L'une d'elles, le principal obligé, que la preuve établit être insolvable, dans un but qu'il est facile de comprendre, a recours aux expédients d'une misérable chicane pour se libérer, et oblige l'Appelant d'avoir recours à un tribunal supérieur. Ses cautions et co-obligés emploient le même moyen de défense qui devait leur réussir si la Cour d'Appel ne fut intervenue, et l'Appelant ayant définitivement obtenu contre eux tous une condamnation pour le montant de sa créance, se trouverait à payer des frais encourus dans l'exercice légitime de ses droits et occasionnés par la mauvaise foi de l'un de ses débiteurs, au vu et su des deux autres qui n'auraient pas manqué de recueillir le bénéfice d'un résultat favorable à ses prétentions! Si les tribunaux sanctionnaient de tels procédés, la sécurité des transactions et cette confiance qui est l'âme et la vie du commerce cesseraient bientôt d'exister dans la société. Aucune garantie ne paraîtrait assez forte, aucune caution assez solvable, quand il serait au pouvoir de l'un des débiteurs, qui aurait eu le soin de se mettre à l'abri de toute respon-

IMAGE EVALUATION
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sabilité personnelle, de forcer le créancier à faire des frais quelquefois plus considérables que sa créance, sans espoir de recouvrement.

Mais si l'équité, dans la présente instance, milite en faveur de l'Appelant, la loi ne lui est pas moins favorable.

C'est une maxime constante et indubitable que les endosseurs de billets promissoires et de Lettres de Change sont de véritables garants ou cautions solidaires, et qu'ils sont tenus, non seulement de l'obligation principale, mais encore de tous les accessoires qui en découlent. Les auteurs qui ont traité de ces matières, tant sous l'empire de l'ancien droit que sous l'autorité du nouveau s'accordent à donner ce caractère à la garantie qui résulte de l'endossement; et il est digne de remarque que le motivé du jugement de la Cour Inférieure, sans statuer expressément sur le mérite intrinsèque de la question de droit, implique d'une manière claire que la loi et les auteurs sont du côté de l'Appelant. S'il en eût été autrement, la Cour Inférieure n'aurait pas basé sa décision exclusivement sur l'absence prétendue de la preuve de certains faits. Sous ces circonstances, l'Appelant ne croit pas devoir insister davantage sur la question légale, se contentant de référer aux autorités suivantes:

POTHIER. Oblig. No. 404. Il (celui qui se rend caution en termes généraux) doit aussi être tenu des frais faits contre le principal obligé; car ces frais sont un accessoire de la dette; mais il n'en doit être tenu que du jour que les poursuites lui ont été dénoncées, etc."

Ord. de 1667, Tit. 8, art 14.

Massé, droit commercial. T. 5, No. 34, p. 45. "C'est donc la même obligation imposée à plusieurs de faire ou de payer une même chose, et de la faire ou de la payer *totalement, comme s'il n'y avait qu'un seul obligé*, qui constitue la solidarité passive."

Id. T. 5, No. 86 *in fine*.

Id. T. 6, No. 368. "Dans le silence des parties, le cautionment indéfini d'une obligation principale s'étend à tous les accessoires de la dette, même aux frais de la première demande et *à tous les frais postérieurs à la dénonciation qui en est faite à la caution*.

Code Napoléon, Art. 2016.

Rogron, T. 1er p. 360.

Carré et Chauveau, T. 1, p. 654, Question 553: "Mais il n'en est pas moins vrai que cette nouvelle créance est née à l'occasion de la première, qu'elle est venue la grossir, pour ainsi dire, et il n'est pas juste que les avantages que le créancier s'était primitivement réservés lui soient réfusés à l'égard d'une augmentation occasionnée par ses débiteurs eux mêmes...Nous pensons donc, en définitive, que lorsque la condamnation est solidaire pour le principal, elle doit l'être aussi pour les dépens."

Gouget et Merger, Dict. de droit commercial. T. 3, Vo. Jugement No. 83.

Rodière, solidarité. Nos. 93 et 200

Code Napoléon, Art, 1384: "On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait *des personnes dont on doit répondre*."

Sourdat responsabilité, T. 2, Nos. 751, 755, 760, 761.

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Puisque les faits sont seuls en question, voyons si l'Appelant a allégué suffisamment et a prouvé assez, soit par les admissions des Intimés soit par les documents produits au dossier, pour maintenir la position qu'il a prise et faire pencher en sa faveur la balance de la justice.

L'Appelant avait allégué, entre autres choses, que les Intimés s'étaient concertés avec Lemoine pour opposer à la demande une exception à la forme sous le prétexte frivole que l'on sait; que ce procédé avait été adopté à leur vu et sû, et de leur consentement; que les Intimés avaient eu notification régulière de l'Appel, et qu'il y avait eu conspiration et collusion entre eux et Lemoine pour priver l'Appelant du bénéfice de son action et lui causer du dommage. Or, les faits suivants se trouvent consignés dans la procédure:

1o Les Intimés et Lemoine plaident séparément, mais n'ont qu'un seul et même procureur.

2o Les Intimés produisent comme faisant partie de leurs moyens de défense une exception fondée sur le même motif que l'exception à la forme de Lemoine.

3o Les Intimés ayant été poursuivis avec Lemoine par une seule et même action, ils ont eu dès lors, dénonciation des procédures de l'Appelant et ils étaient mis sur leurs gardes pour tous les dépens futurs.

4o Enfin, le bref d'Appel et l'avis de cautionnement sont signifiés et laissés pour les Intimés entre les mains de leur procureur commun.

Avec un tel concours de circonstances, est-il possible de croire que les Intimés fussent ignorants des moyens employés par Lemoine pour sa propre défense, et qu'ils n'aient pas eu connaissance de l'Appel? Au contraire, n'en vient-on pas forcément à la conclusion que les Intimés n'ont pas pu ignorer ces procédés, et que les connaissant, ils les ont approuvés par leur silence et leur consentement tacite? N'est-il pas dès lors évident qu'il y a eu collusion, conspiration entre eux et Lemoine? La conspiration se prouve par des actes tout aussi bien et plus sûrement que par des paroles; et quand on voit qu'il y a concours et simultanéité d'action on peut dire sans crainte, qu'il y a eu concert, entente préalable. C'est ici le cas d'appliquer ce raisonnement qui s'accorde avec l'expérience de tous les jours.

Au triple point de vue de l'équité, du droit et des faits, l'Appelant devait donc réussir en Cour Inférieure, et il a pleine confiance que cette Cour redressera le jugement qui a été rendu, tant pour lui assurer l'intégrité de ses droits que pour rétablir, dans une matière si importante, l'application des principes légaux.

Autoritiés supplémentaires de l'Appelant.

Code civil, Art. 1135. Les conventions obligent non-seulement à ce qui est exprimé, mais encore de toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation, d'après sa nature.

Effet de l'endossement.

Story, on Bills, 3ème edition, p. 131, No. 108.

Pothier, Change Nos. 79, 80, 81.

Pardessus, Droit Commercial, T. 2, p. 179.

Chitty, on Bills, 11ème Edition Américaine, Nos. 241, 242, 243.

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Factum des Intimés. Le faiseur et les endosseurs d'un billet promissoire ayant été poursuivis par une seule et même action étaient défendus séparément; une exception à la forme produite, par le faiseur seul, fut maintenue par la Cour Inférieure et déboutée par la Cour d'Appel. C'est pour recouvrer des endosseurs les frais encourus sur cet appel que la présente action a été intentée. Elle a été déboutée sur le principe que pour le moins l'Appel aurait du être dénoncé aux endosseurs, ce qui n'avait pas été fait.

L'Intimé soumet, que cette action ne pouvait qu'être déboutée, et pour la raison adoptée par la Cour Inférieure et pour plusieurs autres, et qu'en conséquence l'Appel doit être renvoyé.

La question n'est pas s'il serait plus juste ou plus avantageux que la loi permit à l'Appelant de recouvrer, mais de savoir si dans l'état actuel de notre législation il peut recouvrer.

Il serait inutile de s'enquérir des anciens us et coutumes commerciaux en force en France avant 1673, touchant les billets à ordre et leur endossement. Car ces us et coutumes en supposant qu'ils auraient été introduits en Canada, n'auraient pu affecter que les marchands, or les Intimés ne sont pas marchands, sans compter qu'à aucune époque même entre marchands, les endossements en blanc ont-ils été admis en France? Mais suivant l'ancien droit français les billets des personnes non-marchandes étaient de simples billets et non des billets ayant un caractère commercial. Un acte notarié était nécessaire pour transporter la créance, et le tranport en l'absence d'une stipulation expresse n'impliquait pas d'autre garantie que celle de l'existence de la dette.

Les Intimés sous l'empire des anciennes lois françaises auraient conséquemment pu répondre à l'action de l'Appelant "nous ne sommes pas même responsables du billet, comment le serions-nous des frais."

La 34 Geo. 3, C. 2 qui a été abolie entièrement par la 12e Vic. C. 22, a pour la première fois en ce pays statué sur l'effet des billets faits par des personnes non-marchandes. Mais ce statut qui permettait au propriétaire [redacted] et d'en recouvrer le montant de l'endosseur, ne lui permettait pas [redacted] de cet endosseur les frais faits contre le faiseur ou un autre endosseur.

La 12 Vic. C. 22, (Statuts Cons. du B. C., Ch. 64,) en statuant qu'un endossement en blanc donnerait dans tous les cas au porteur du billet le même droit d'action que si l'endossement était détaillé et spécifique (*in full*) a enlevé bien des privilèges et des garanties aux personnes non-marchandes qui souscrivent des billets. Mais cette loi ne va pas jusqu'à dire qu'un endossement en blanc impliquera non seulement l'obligation de la part de l'endosseur de payer le billet si le faiseur ne le paie pas à son échéance, mais encore l'obligation de le payer avec tous les frais quelconques qui auront pu être encourus à l'occasion de ce billet. La 12e. Vic. C. 22, donne le même droit d'action sur un endossement en blanc que sur un endossement explicite, mais elle ne dit pas quel est ce droit d'action, autrement qu'en référant aux lois anglaises en l'absence d'aucune loi en force sur la matière dans le Bas-Canada.

Or la loi anglaise, et il ne saurait y avoir de doute sous les circonstances ci-haut mentionnées que c'est cette loi qui doit règler les droits des parties sur cet appel, dénie à l'Appelant tout droit d'action contre les endosseurs pour des

frais du genre de ceux qu'il réclame (Dawson & Morgan, 9, Barn & Cress, 618, Roach & Thompson, 4 Car & P. 194,—Stovin & Taylor, 1 Nov. & Man. 230, 251.

En Cour inférieure, à part l'autorité de Pothier sur le cautionnement, l'on a cité pour le Demandeur l'ordonnance de 1673, le Code Civil et le Code de Commerce maintenant en force en France, et les commentateurs de ces codes sur l'effet de l'endossement, de la solidarité et du cautionnement indéfini.

Mais la Cour verra le danger d'introduire de semblables éléments dans la détermination d'une question de droit positif et purement arbitraire. Envisagés comme elles doivent l'être, ces autorités du reste, loin de supporter la cause de l'Appelant, la détruisent.

En France, s'il est marchand, l'endosseur est garant solidaire du paiement intégral du billet et de tous ses accessoires, mais c'est parce que le Code de Commerce est précis à cet effet, et il en serait tout autrement si l'endosseur n'était pas marchand. Rodière, Solidarité, No. 279 et 280.

Sur le cautionnement indéfini, Pothier est d'avis que les frais faits contre le principal obligé sont des accessoires de la dette. C'est là un point qui n'est peut-être pas bien certain puisque le Droit Romain ne le dit pas et qu'il a des principes particuliers touchant la discussion aux frais de la caution des biens du débiteur, et puisqu'en outre Pothier admet à son principe, une exception d'une légalité douteuse à en juger d'après le Code Civil qui sur l'art. 2016 après avoir dit que le cautionnement indéfini s'étend à tous les accessoires, ajoute, *même aux frais de première demande et à la dénonciation qui en sera faite à la caution*, une addition superflue si l'opinion de Pothier est exacte.

Mais si c'était les règles du cautionnement qu'il faudrait appliquer aux intimés, ils ne sauraient être considérés comme des cautions indéfinies, car la somme pour laquelle il se seraient obligés serait la somme déterminée de $300, ni plus ni moins. Et suivant les règles du cautionnement, les accessoires en ce cas ne sont pas à la charge de la caution. Dalloz, Contrat No. 54, Merlin Rep. vo. caution §1. No. 3. Pothier, Oblig. No. 405.

En outre, les intimés, loin d'admettre, nient qu'il s'agisse ici de cautionnment. Si au lieu d'un transport par endossement, le transport eût été fait par acte notarié, sans mention spéciale de garantie, prétendra-t-on qu'il y aurait eu cautionnement ? Or si un semblable transport n'inplique pas cautionnement, comment un simple endossement en blanc alors que l'endosseur ne négocie pas le billet et ne reçoit valeur en aucune manière, l'impliquerait-il ? Pour qu'il y ait cautionnement il faut que quelqu'un s'oblige pour un autre envers le créancier en accédant à l'obligation. D'un endossement en blanc on peut tout au plus induire une intention de la part de l'endosseur de transporter la créance, et ce serait violer toutes les règles que de chercher à en extraire la preuve d'une intention de garantir la dette.

Quand à dire que la responsabilité des Intimés découle de leur solidarité, c'est invoquer une doctrine nouvelle que le Code Civil parait avoir fait naître et qui est vivement controversée. L'erreur de cette doctrine peut provenir de ce que l'on confond des co-obligés solidaires avec des cautions indéfinies qui sont, d'après le Code, responsables de tous les frais encourus à l'occasion de la dette, à compter

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de la dénonciation. Mais de fait l'obligation solidaire n'implique pas plus l'idée de cautionnement, que le cautionnement n'implique l'idée de solidarité. Chaque obligé solidaire au lieu de cautionner pour les autres se lie lui-même pour le total tout de même que plusieurs personnes peuvent être cautions les unes pour les autres sans aucunement être solidaires.

Dans tous les cas si c'est à la loi anglaise qui détermine la responsabilité des endosseurs qu'il faut avoir recours, il ne serait guère logique alors que cette loi ne les tient pas responsables de ces frais en leur qualité d'endosseurs, d'avoir recours à un autre système de loi pour les tenir responsables comme solidaires, et ce en vertu d'un raisonnement plus ou moins hasardé

Bien plus dans l'état actuel de notre législation sur les billets promissoires, si les endosseurs sont solidaires ce n'est qu'en vertu du droit anglais, du même droit qui exempte les endosseurs de toute responsabilité quant aux frais réclamés par l'Appelant.

En conséquence quant à cette partie de la cause, l'Appelant soumet respectueusement comme étant bien fondées en loi la proposition suivante.

1o. Un endossement en blanc n'indique nullement l'intention de l'endosseur ni l'obligation qu'il assume, et une loi positive seule peut déterminer l'effet de cet endossement.

2o. Aucune loi en force en Canada ne porte que le propriétaire d'un billet pourra recouvrer d'un endosseur les frais du genre de ceux présentement réclamés.

3o. Au contraire la jurisprudence anglaise est contraire aux prétentions de l'Appelant, et cette jurisprudence est la loi conformément à laquelle le présent appel doit être décidé.

Quant au autres points soulevés par les Intimés, ils ont prétendu d'abord que la dénonciation de l'Appel était dans tous les cas absolument nécessaire, et que cette dénonciation n'avait pas été faite, ou au moins qu'elle avait été mal faite, et c'est le point de vue adopté par la Cour Inférieure.

En second lieu, qu'en acquiesçant au jugement dans la cause principale par lequel était fixée la part de frais à la charge de chacun des souscripteurs, l'Appelant avait perdu son droit d'action, si tel droit avait jamais existé.

En conclusion les Intimés se contenteront d'ajouter que la Cour Inférieure a trouvé que le reproche de fraude contre les Intimés était sans aucun fondement. En plaidant comme ils l'ont fait, ils se sont sans doute exposés à des frais sur leur défense. Mais c'est être rigoureux à l'extrême que de vouloir qu'ils soient en outre responsables des frais de la défense du faiseur du billet et cela pour nulle autre raison que parce que leur défense et la sienne se ressemblent.

Sir L. H. LAFONTAINE, Juge en Chef, *dissentiens* :

La déclaratien allègue :

1o. Billet du 8 Août 1859. par Pierre G. Lemoine, menuisier, à son propre ordre, pour $300, payable à trois mois, valeur reçue.

2o. Endossement du dit billet, le même jour par Pierre G. Lemoine au dit Louis A. Huguet Latour ; puis endossement, le même jour, par ce dernier, au dit Jean Jacques Evariste Bibaud, et enfin endossement par celui-ci, le même jour, au Demandeur.

3o. Billet protesté le 11 novembre 1859.

4o. Action intentée par le Demandeur, le 24 novembre 1859, contre Lemoine, Latour et Bibaud, à la Cour Supérieure, siégeant à Montréal, pour le recouvrement du montant du dit billet, et rapportable le 5 décembre suivant.

5o. A cette action exception à la forme opposée par Lemoine, fondée sur ce que lui Lemoine aurait été erronément désigné comme menuisier, tandis qu'il aurait dû l'être de contracteur et commerçant.

6o. Cette dite exception à la forme, maintenu par le dite Cour Supérieure; appel à ce jugement; infirmation d'icelui par jugement de cette cour le 8 juin 1860, et ce avec dépens, dont distraction fut accordée à M. Léon Doutre, avocat du Demandeur, tant en Cour Supérieure qu'en Cour d'Appel.

7o. Frais sur le dit appel, taxés à £39 8s.

8o. Copies du bref d'appel, émané comme susdit, ont été, régulièrement et en temps utile, signifiées à M. Henry Stuart, avocat et procureur *ad litem* des dits Latour et Bibaud; les moyens de défense employés par le dit Lemoine dans sa dite exception à la forme, étaient connus des deux Défendeurs en cette cause, et ont été ainsi employés à leur vu et sû, de leur consentement, par suite de connivence et collusion entre les dits Lemoine, Latour et Bibaud; les présents Défendeurs eux-mêmes ont, dans une exception opposée à la susdite action, employé les mêmes moyens de défense qui faisaient la bâse de l'exception à la forme du dit Lemoine en disant qu'ils n'avaient pas endossé un billet fait par Lemoine, *menuisier*, mais bien un billet fait par Lemoine, *contracteur et commerçant*.

9o. Exécution émanée, le 6 juillet 1860, contre les meubles de Lemoine pour les frais taxés contre lui sur le dit appel, mais la vente n'en a pas eu lieu en conséquence d'une opposition faite par Elizabeth Lacroix, réclamant la plus grande partie des dits meubles. Frais encourus par le Demandeur sur cette exécution sont de £2 16s. 5d., formant avec les dépens taxés en appel, £42 4s. 6d., équivalent à $168 et 90 centins.

10o. Les Défendeurs, garants ou cautions du dit Lemoine, pour le paiement de l'obligation principale, sont tenus de tous les accessoires de cette obligation et obligés de rembourser le Demandeur de tous les frais qu'il a encourus légitimement dans le cours de l'instance pour parvenir au recouvrement du montant du dit billet.

11o. La conduite des Défendeurs, en cette occasion, constitue un délit, à la réparation duquel le dit Lemoine et les deux présents Défendeurs sont tenus conjointement et solidairement sous forme de dommages-intérêts.

12o. Le dit M. Léon Doutre a, par acte notarié du 24 octobre 1861, renoncé en faveur du Demandeur, au privilège de la distraction de frais.

13o. Enfin, le Demandeur conclut au paiement de la dite somme de $168.90 centins par les Défendeurs *conjointement et solidairement*, avec intérêt et les dépens, desquels dépens ses procureurs demandent distraction.

Telle est la substance des moyens employés dans la déclaration du Demandeur.

Les deux Défendeurs, Latour et Bibaud, comparaissant par M. Barnard, ont plaidé séparément à la présente action, mais leurs moyens de défense sont iden-

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tiquement les mêmes, et plusieurs de ces moyens n'auraient pas dû être présentés car ils étaient repoussés par la chose jugée.

Les deux seules questions que nous avons à décider sont celles de savoir: 1o. Si, dans l'espèce, les deux endosseurs sont tenus de rembourser au Demandeur les frais qu'il a encourus, en appel, sur son exception à la forme à la première action; 2o. S'il était nécessaire, pour avoir ce recours contre eux, que cet appel leur fut notifié.

Celui qui se rend caution en termes généraux, dit *Pothier*, obligation No. 404, "doit aussi être tenu des frais faits contre le principal obligé, car ces frais sont un *accessoire* de la dette; mais il n'en doit être tenu que du jour que les poursuites lui ont été dénoncées, etc."

Chauveau sur Carré combattant l'opinion de *Boncenne*, de *Boitard* et de *Bériat St. Prix*, dit, tome 1er, question 533, p. 654: "Il n'en est pas moins vrai que cette nouvelle créance (les dépens) est née à l'occasion de la première (la créance principale), qu'elle est venue la grossir, pour ainsi dire, et il n'est pas juste que les avantages que le créancier s'était primitivement réservés, lui soient refusés à l'égard d'une augmentation occasionnée par ses débiteurs eux-mêmes. Nous pensons donc, en définitive, que, lorsque la condamnation est solidaire pour le principal, elle doit l'être aussi pour les dépens."

Rodière, de la *solidarité*, No. 93: "Le créancier est souvent obligé d'exposer des frais avant d'obtenir son paiement. On se demande alors si les frais exposés contre l'un des débiteurs peuvent être répétés contre les autres. Nous pensons qu'il faut appliquer à ce cas par analogie la disposition de l'article 2016 du Code Civil, ainsi conçu: "Le cautionnement indéfini d'une obligation principale s'étend à tous les accessoires de la dette, même aux frais de la première demande et à tous ceux postérieurs à la dénonciation qui en a été faite à la caution."

"Les co-débiteurs solidaires non-actionnés doivent être tenus des frais de la première demande, parce que ces frais comme les intérêts moratoires peuvent être facilement prévus et calculés, et qu'il dépend de chacun des débiteurs de les prévenir en faisant des offres réelles au créancier. Mais les frais postérieurs à la première demande pouvant s'élever à des sommes fort considérables, les co-débiteurs, suivant nous, ne doivent en être tenus, qu'autant qu'ils ont été directement avertis et mis en demeure par la dénonciation qui leur en a été faite."

Ce principe avait été déjà consacré, pour ainsi dire, par l'ordre de 1667, tit. 8, art. 14: "Les garants qui succomberont, seront condamnés aux dépens de la cause principale *du jour de la sommation* seulement, et non de ceux faits auparavant, sinon de l'exploit de demande originaire;" et *Jousse*, dans son commentaire sur cet article, ajoute: "C'est-à-dire, non seulement aux dépens faits entre eux et le garanti, mais encore en ceux faits entre le garanti et le Demandeur originaire."

C'était en quelque sorte établir que les dépens étaient l'accessoire du principal. En matière de privilége sur les immeubles, les dépens encourus pour le recouvrement d'une créance sont mis en ordre avec le principal de la créance. Nouvelle preuve de l'existence du principe que l'on invoque.

Que l'obligation de débiteurs soit le résultat d'un cautionnement pur et

simple, entraînant solidarité vis-à-vis du créancier, ou qu'elle soit le résultat de la garantie d'une cession, transport, ou endossement d'un billet à ordre, entraînant nécessairement solidarité vis-à-vis du porteur du billet, il y a lieu d'appliquer le principe dans un cas comme dans l'autre, et encore avec bien plus de raison dans le cas de garantie, que dans le cas de cautionnement. Dans le cas de cautionnement, la solidarité se divise de plein droit. Il n'en est pas de même entre endosseurs. Celui qui a désintéressé le porteur a son recours contre les endosseurs qui le précèdent et le tireur pour le remboursement intégral de la créance.

"Les motifs de cette différence sont aisés à saisir, dit *M. Lorieux*, dont l'opinion est en note dans Chauveau sur Carré, t. 2. p. 67. Les divers endosseurs d'un effet de commerce ne sont point engagés en vertu d'une obligation commune, mais par suite d'une garantie successive. Il s'agit moins entre eux de solidarité que de garantie réciproque. Cette garantie est de droit commun et le code de commerce se borne, pour ainsi dire, à développer à cet égard les principes ordinaires du droit civil."

Le porteur peut choisir, entre plusieurs endosseurs, celui qu'il veut poursuivre, ou il peut les poursuivre tous par la même action (Stat. Prov. 34 Geo. 3, c. 2). Vis-à-vis de lui, ils sont tous obligés solidairement, car, envers lui, chacun est obligé pour le total du billet.

L'action, originairement intentée, l'a été contre le faiseur, et les deux endosseurs, les présents Défendeurs. La poursuite a donc été dénoncée à ces derniers. De plus, faiseurs et endosseurs ont tous comparu par le même procureur. Impossible de prétendre que les endosseurs n'ont pas eu connaissance de l'exception à la forme plaidée par le débiteur principal. Impossible de prétendre de même qu'elle n'a pas été faite de leur consentement, puisqu'ils ont eux-mêmes employé le même moyen dans une de leurs exceptions. Du reste, il leur était libre de mettre à profit la dénonciation qui leur avait été faite de la demande; ils pouvaient empêcher la présentation de l'exception à la forme; ils pouvaient désintéresser le créancier en le remboursant, ainsi qu'il était de leur devoir de le faire; la bonne foi devait les y porter, mais la mauvaise foi l'a emporté. Le créancier, en contestant cette exception à la forme, a été obligé de le faire. En appelant du jugement de première instance, qui avait maintenu cette exception, il n'a fait que ce qu'il devait faire, puisqu'il a eu gain de cause en appel. Impossible de dire que les endosseurs n'ont pas eu connaissance de l'appel, puisqu'ils étaient dans la cause. De plus, le bref d'appel a été signifié au procureur des Défendeurs. Cette signification était suffisante pour donner à Lemoine connaissance de l'appel de manière à l'obliger à comparaître, ou à mettre le créancier en état de procéder valablement sur l'appel; elle devait donc être suffisante pour donner aux deux autres Défendeurs la même connaissance. Cette signification leur fournissait l'occasion d'arrêter l'appel, et partant les frais sur cet appel. Ils n'ont pas jugé à propos de le faire. Ils doivent donc en subir les conséquences.

A mon avis, les dépens exposés par le demandeur l'ont été de bonne foi et par suite de la nécessité dans laquelle la conduite des défendeurs l'avait placé.

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Si, pour avoir son recours, il devait y avoir dénonciation, cette dénonciation a eu lieu.

Il y a eu concert et collusion de la part des trois défendeurs dans la présentation de l'exception à la forme. Les deux endosseurs y ont participé dans le but de réussir, par ce moyen à faire tomber l'action du demandeur. A ce point de vue, celui-ci a raison de dire qu'ils se sont rendus coupables de délit.

Le jugement attaqué affirme deux propositions, la première que le demandeur aurait dû dénoncer aux défendeurs (les endosseurs,) l'appel par lui interjeté, la deuxième qu'en cas de concert et collusion ourdis entre eux et le dit Lemoine, ils auraient été tenus responsables des suites des plaidoyers du dit Lemoine. N'ayant pas fait, dit le jugement, ce qui est renfermé dans la première proposition, et n'y ayant pas de preuve du concert et collusion que leur avait imputés le demandeur, gain de cause est donné à ces défendeurs. L'affirmation de ces deux propositions contient celle d'une autre proposition, c'est qu'en loi, il y aurait eu responsabilité, chez les défendeurs, pour le remboursement des dépens en question, si, en fait il y avait eu dénonciation de l'appel et preuve de concert et collusion. Si la responsabilité légale ne pouvait pas exister, à quoi bon assigner pour motifs du jugement, le défaut de dénonciation de l'appel, d'un côté, et l'absence de preuve de concert et collusion, de l'autre. Dans le cas de non-responsabilité légale, c'eût été donner des raisons pour soutenir une proposition imaginaire qui, non-seulement dans cette hypothèse, n'aurait pas été affirmée, mais même aurait été déclarée par le Juge ne pas pouvoir exister.

Le Juge, en assignant ces deux motifs comme bâse de son jugement a décidé *en fait*; et il a eu raison, si son appréciation des faits le conduisait à cette conclusion. Mais, toujours est-il qu'en principe, il a admis la responsabilité légale des endosseurs. C'est le point principal de la discussion. Je ne pense pas qu'il eût pu faire autrement.

Dans l'appréciation des faits, je diffère d'avec l'Honorable Juge de 1ère instance. J'ai déjà dit que mon opinion était qu'il y avait eu dénonciation de l'appel, et même concert et collusion entre toutes les parties défenderesses, et que des pièces au dossier, la preuve pouvait en être inférée.

Des auteurs ont apporté comme tempérament à la responsabilité des obligés solidaires quant aux dépens, que les poursuites leur fûssent dénoncées. Mais ils n'ont prescrit aucun mode particulier de faire cette dénonciation. Il suffit donc de les en avertir et de les mettre en demeure, et rien n'empêche que cela se fasse extrajudiciairement, aussi bien qu'en justice. L'objet est de mettre les obligés solidaires en état de prévenir les poursuites, et par conséquent les dépens, en leur fournissant l'occasion de faire au porteur des offres réelles. Pour cela, l'avis extra judiciaire remplit le même but que l'avis en justice. Mais ici, la dénonciation a été faite en justice; les deux endosseurs étaient en cause avec le tireur, lorsque le jugement dont il y a eu appel, a été rendu. Si l'on admet qu'en autant qu'il s'agit des dépens en cour de 1ère instance, il y a eu dénonciation, l'appel par la suspension qu'il a opéré du jugement, n'a fait que continuer l'instance du procès, et par cela même la dénonciation a continué jusqu'au jugement en appel qui a débouté l'exception à la forme. Tout cela a eu lieu au vu

et au sû des deux endosseurs. On dit que Mr. Stuart n'était pas tenu de faire connaître aux deux endosseurs le fait de l'appel interjeté par le débiteur principal, le *faiseur* du billet, puisque ce n'était pas leur exception dont il s'agissait. Il me semble qu'il faut dire tout le contraire. Mr. Stuart était, dans la cause originaire, l'avocat des premiers, comme il l'était du dernier. De plus, les endosseurs avaient fait une exception, où le même moyen était employé. Il était donc du devoir de ces endosseurs de s'informer de l'état de la cause, et de celui de Mr. Stuart de les en instruire. Quelle raison avons-nous de présumer que ce devoir n'a pas été rempli ? Aucune, bien certainement. Ce serait faire injure à Mr. Stuart que de présumer qu'il aurait laissé ses clients dans l'ignorance d'un procédé, qui avait, d'un côté, l'effet de continuer l'instance même, c'est-à-dire le procès, et qui, de l'autre, pouvait avoir celui, comme il l'a eu réellement, de faire prononcer un jugement infirmatif du jugement rendu originairement sur l'instance. Il me semble tout naturel de conclure que la connaissance du fait de l'appel a du être donné par Mr. Stuart à ses clients, et que, comme aucun mode particulier de dénonciation n'est prescrit à cet égard, les endosseurs ont dû recevoir un avis suffisant du fait ; avis qui les constituait en demeure de mettre fin à la chicane faite par le débiteur principal. L'appel était nécessaire pour que le porteur du billet eût gain de cause. Les frais qu'il a encourus sur cet appel, étaient des frais nécessaires, et ont été régulièrement taxés comme tels. Il sont un accessoire de l'obligation du débiteur, et l'accessoire est de même nature que le principal. Les endosseurs sont tenus solidairement et intégralement envers le porteur au paiement du principal et de ce qui en est l'accessoire. Chaque endosseur garantit la créance. C'est presque toujours sur la foi du dernier endosseur que le porteur accepte la cession que cet endossement comporte. Si le faiseur du billet est insolvable, s'il faut le poursuivre ; si, poursuivi, il fait une chicane, ce sont là des conséquences que les endosseurs devaient et ont dû nécessairement prévoir lorsqu'ils sont venus s'adjoindre, par leurs endossements, à l'obligation principale. Ces conséquences, ils doivent les supporter, puisqu'ils n'ont pas voulu les prévenir. Dans le système contraire, un débiteur insolvable, quoique ayant pour endosseurs des cautions suffisantes, pourrait réussir à détourner son créancier de faire un recouvrement effectif, par de faux frais que ses chicanes entraîneraient. Si ce système doit être suivi, que deviendra la bonne foi, qui, avant tout, doit régner dans le commerce, que l'on a même souvent dit être l'âme du commerce ? Que deviendra la confiance que cette bonne foi aura pu inspirer au créancier, si plus tard, les débiteurs peuvent s'en jouer selon leur caprice ? Elle ne sera plus qu'un piège.

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MEREDITH, J. :—"The pretensions of the Appellant are that the endorser of a note is to be regarded as a surety *caution*, and therefore that he is to be held liable for the costs made against the maker of a note, who is to be regarded as the principal debtor.

Now assuming, for the sake of argument, (and I express no opinion on the point,) that such is the case, still the authorities cited establish, I think, beyond doubt, that a *caution* cannot be made liable for the costs of proceedings against the principal debtor, unless the *caution* was duly notified of such proceedings.

The costs sought to be recovered in the case before us are the costs of an ap-

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peal, in which the plaintiff in the Court below was Appellant, and one Pierre G. Lemoine was Respondent; the judgment complained of being a judgment rendered by the Superior Court, on an exception *à la forme* fyled by the said Lemoine, in a case in which the Appellant in the present case was plaintiff, and the said Lemoine and the Respondents in this cause were Defendants.

Mr. Stuart had appeared as attorney for the Respondents and for Lemoine in the Superior Court, and on the occasion of the appeal by the present Appellant from the judgment rendered against him and in favor of Lemoine. Notice of the appeal was served upon Mr. Stuart as attorney for all the parties for whom he had so appeared in the Superior Court. Notice of any proceedings in the case in the Superior Court, in which Mr. Stuart had appeared, could of course be served upon him for the parties for whom he had appeared; but the fact that Mr. Stuart had appeared for the Respondents in an action in the Superior Court, brought by the present Appellant against Lemoine and the Respondents Latour and Bibaud, did not give to Mr. Stuart any right, nor impose upon him any obligation, to act for Latour and Bibaud, nor to represent them in another court, namely, in the Court of Appeals, in an appeal between Boucher and Lemoine; although that appeal had its origin in the action in the Superior Court, already mentioned. A writ of appeal may under a special rule of practice of this Court (the 8th) be served upon the attorney of the Respondent in the Court below; but the present Respondents, Latour and Bibaud, were not respondents in the appeal upon which the costs now sought to be recovered were made; and therefore the rule of practice to which I have adverted is inapplicable to the present case; and if this case be considered, irrespective of that, I can see no ground for saying that the service of the notice in question upon Mr. Stuart can be held binding upon the present Respondents, Latour and Bibaud.

Upon the whole, it seems to me that Mr. Stuart, as the attorney of the Respondents Latour and Bibaud in the case in the Superior Court, had no more power than any other member of the bar, or indeed than any person not a member of the bar, to receive a notice of the appeal instituted by the present Appellant from the judgment rendered against him and in favour of Lemoine; and on this ground, which is in effect the first reason assigned in the judgment of the Court below, I think that judgment ought to be confirmed.

As to the pretension on the part of the Appellant that the exception *à la forme* which gave rise to the costs in question was fyled in pursuance of a conspiracy between the Respondents and Lemoine, to defeat the just claim of the Appellant, I must say it appears to me to be altogether without foundation. By the exception *à la forme* in question, Lemoine alleged that he had been erroneously styled a joiner, *menuisier*, whereas he was in truth a contractor and trader, and the Respondents availed themselves of the same ground of defence in their pleadings. The exception *à la forme* so fyled by Lemoine was successful in the Court below; but the judgment maintaining it was reversed by a judgment of the Court of Appeals.

This is all that we know of the exception *à la forme* in question, and I really cannot find in the facts connected with the fyling of that exception as proved in this cause, any ground for saying that the fyling of the exception was the result

of a conspiracy. If all the Judges had concurred in rejecting the exception there would be reason for supposing that it ought not to have been fyled. But when it is borne in mind that the learned Judge in the Court below, and one of the Judges of this Court, thought the exception well founded, it seems to me that we are bound to presume that there was at least probable cause for the fyling of the exception; and if so, we cannot regard the fyling of that exception as evidence of a conspiracy, or as evidence of a culpable proceeding of any kind on the part of Lemoine and the Respondents which ought to have the effect of subjecting the Respondents to the costs of the appeal subsequently instituted by the present Appellant, and therefore, as to this part of the case, I can have no hesitation in confirming that part of the judgment of the Court below which declares that the Appellant had failed to prove any concert or collusion between Lemoine and the Respondents, which could have the effect of subjecting the Respondents to a condemnation in the present cause.

MONDELET, J. :—" Deux questions.—1o. Deux Défendeurs en cour de 1ère instance, poursuivis comme endosseurs, comparaissant par le même avocat que le tireur, mais plaidant séparément, comme lui, une exception à la forme, sont-ils par là même passibles des dépens d'appel auxquels est tenu le tireur, contre qui seul est interjeté appel du jugment de la cour de 1ère instance, qui maintient cette exception ?

2o. Cette responsabilité quant au dépens en appel, si elle s'attache aux endosseurs dans l'espèce proposée, peut-elle être déclarée contre eux, à moins que l'appel ait été dénoncé aux endosseurs ?

Sur la première question, il me paraît que par des motifs et des considérations de prétendue équité, l'appelant arrive bien gratuitement mais bien peu logiquement à la conclusion que les endosseurs, Défendeurs en cour de 1ère instance, mais aucunement parties à l'appel qui n'a été interjeté que contre le tireur sont passibles des dépens sur une procédure à laquelle ils n'ont aucunement pris part.

La raison, la justice, et disons même l'équité dans le sens qu'on l'entend si souvent, mais si peu correctement, repoussent la prétention de l'Appelant. Comment en effet, peut-on en raison dire que de simples endosseurs, qui en apposant leur signature à un billet, n'ont jamais songé à autre chose que de s'obliger au paiement du billet, peuvent-ils aujourd'hui comprendre qu'ils se sont assujettis au paiement des dépens d'un appel qu'ils n'ont pas interjeté et auquel ils n'ont en aucune manière quelconque participé ? Je le demande, serait-il même raisonnable de leur faire payer les frais encourus en cour de 1ère instance, si le tireur *seul* eût été poursuivi ? J'ajoute que non-seulement cela n'est pas conforme à la raison, il y a plus, cela n'est pas juste. D'abord ce qui est contre la raison, n'est pas juste. En second lieu, l'appelant s'alambique l'esprit pour établir les rapports entre la caution ordinaire et l'endosseur, et de suite, il saute à pieds joints et arrive, aux dépens de la logique et du raisonnement, à une fausse conclusion. Quant à la prétendue équité à laquelle il est si facile de recourir, lorsque la loi n'appuie pas une thèse quelconque, il me sera permis ici, comme souvent en d'autres circonstances, de me mettre en garde contre ce fantôme qui se résout en réalité pour ceux qui s'écartent de la voie légale, et

Boucher, et Latour et al.

s'imaginent l'avoir saisie, lorsqu'ils sont encore à la poursuite d'une ombre et d'une chimère.

Je n'ai qu'un mot à dire des nombreuses autorités qu'on a citées. Aucune d'elles ne touchent à la question. Eussent-elles, au reste, atteint le point, ce que je nie, que seraient-elles alors, sinon de simples expressions d'opinions d'auteurs qui tout au plus ont envisagé la question des dépens en cour de 1ère instance où la caution a été partie au procès, mais n'a pas dit un mot de l'espèce, je veux dire, un appel auquel les endosseurs n'ont rien eu à faire ? Sommes-nous, au reste, tenus de livrer notre intelligence et nos opinions à celles d'auteurs qui ne s'appuient pas même d'un texte de loi ? Allons nous ainsi décider les causes à coup de dictionnaire ? Assurément, ce n'est là ni le fait, ni la marque du jurisconsulte.

2o. La seconde question est quant à la dénonciation de l'appel. Comment peut-on sérieusement prétendre, en raison d'abord, que parceque les deux endosseurs ont employé le même avocat, et ont plaidé (*séparément*) les même moyens d'exceptions à la forme, en *cour de 1ère instance*, ils ont été par là même informés *légalement*, que le porteur devait interjeter, et a de fait interjeté appel ? Il suffit d'énoncer une pareille prétention, pour la faire apprécier à sa juste valeur. Il me parait encore bien plus déraisonnable et injuste, de présumer connivence, complot, fraude de la part des endosseurs et coopération à l'interjection de l'appel de la part du porteur. Si dans un cas où il s'agit d'interpellations judiciaires, de dénonciations, on peut de la sorte, raisonner, et qui pis est, *condamner*, il faut avouer que nous aurons une jurisprudence qui pèchera beaucoup plus par l'excès de l'arbritraire, que par celui de la logique. Oh ! dit-on, M. H. Stuart, était l'avocat du tireur et des endosseurs, en cour de 1ère instance, et vous en concluez qu'il eût été autorisé à recevoir une dénonciation faite aux deux endosseurs, qui ne sont pas appelants et qui sont parfaitement étrangers à l'appel ! Ceci est tellement insoutenable que la mention seule de ce paradoxe suffit pour le faire apercevoir de suite.

Etes-vous bien certain que même vis-à-vis du tireur, Défendeur en cour de 1ère instance, la dénonciation (dans le cas où il faudrait lui en faire une) serait légalement faite à M. Hy. Stuart ? Si vous l'êtes, moi je ne le suis pas. Je ne m'étonne plus que faute de meilleures raisons pour établir que les endosseurs ont reçu et reconnu l'appel, et qu'ils ont agi avec collusion de concert avec le tireur, on ait recours à l'expédient d'équité, qu'ils ont dû le savoir, car ils avaient employé le même avocat.

En dernière analyse, devant sincèrement avouer que malgré tous mes efforts, je n'ai pu me rendre aux raisonnements que l'on a faits au barreau, pour faire infirmer le jugement, je me contenterai de déclarer que je préfère adopter les motifs strictement logiques et scrupuleusement en harmonie avec les faits de la cause de la cour de 1ère instance, dont je suis d'avis que le jugement, bien fondé en loi et en raison, devrait être confirmé."

Jugement confirmé.

Doutre et Daoust, pour l'Appelant.

Edmund Barnard, pour les Intimés.

COURT OF QUEEN'S BENCH.

ON APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 1st SEPTEMBER, 1862.

Coram SIR L. H. LAFONTAINE, Bart., CH. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, (C.) A. J.

No. 73.

FRANCIS IRVIN,

(*Defendant in the Court below,*)
APPELLANT;

AND

JAMES MALONEY,

(*Plaintiff in the Court below,*)
RESPONDENT.

HELD:—That in case submitted no sufficient cause was shewn for the resiliation of a Deed of Sale. The exclusion of the testimony of a witness on the ground that he violated an order of the Court made at the commencement of the Enquête, ordering all the witnesses out of Court during such Enquête, is illegal.*

The appellant bought from Respondent, in June, 1859, by Deed before Griffin, N.P., a lot of land in Bonaventure Street, Montreal. The price was £500; part was declared paid before the date of the Deed; two Promissory Notes were stated as given for other part, and the purchaser was to pay the balance to the original *Bailleur de fonds.*

In October, 1860, Maloney sued *en résolution* of that Deed of sale, stating that he had been deceived into making it; that previously to its date, and afterwards, he was by a course of habitual inebriety rendered unfit to comprehend or transact any business; that Irvin never paid any of the alleged *prix de vente;* that the sale was simulated; that Irvin always promised to return the land, on demand; that he, Maloney, had asked it back, but Irvin fradulently refused to reconvey it. Irvin's Plea denied that the Deed of Sale was simulated, and denied the other allegations of plaintiff.

At the commencement of plaintiff's Enquête the defendant fyled in court the following paper:

"The undersigned pray *acte* of the Declaration now made by them on behalf of the defendant, to wit: Notwithstanding his absolute ownership of the land and real property in plaintiff's Declaration referred to, he, the defendant, for the sake of peace, is willing yet, and will be during three weeks from this date to give up said property, provided he be previously repaid all his money paid to plaintiff in respect thereof, and all other his, defendant's, costs and charges incurred by him since he acquired said property, in and about and in respect of it, the whole with interest from the times of payment of any such monies respectively; and, provided further, that he, defendant, get back and give up to him the Promissory Notes given by him to said plaintiff at the time of his, defend-

Semble. They were only liable to punishment for contempt. Rep: Note.

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ant's, acquisition of said real property; and provided plaintiff pay the costs of this suit within said three weeks. MACKAY & AUSTIN, *For Defendant.*

Approved by me; the defendant declaring not to know how to write has made his mark. FRANCIS X IRVIN.

Acknowledged before me 6th April, 1861. Defendant, his mark.

MONK, COFFIN & PAPINEAU, P.S.C."

This offer was not attended to by plaintiff.

At Enquête the witnesses were ordered out of Court and examined separately. Two witnesses offered by Irvin were excluded, owing to their having violated the order by which all the witnesses had been ordered out of Court. Irvin swore to having paid Maloney £50 in cash on the day of the Deed, and £50 by advances previously. Two receipts were also fyled, signed by Maloney, each being, for money paid by Irvin in part payment of the *prix de vente* alleged. Witness Mary Maloney swore to seeing the £50 cash paid on the day of the Sale.

Numerous witnesses proved Maloney's habits of intoxication; he had been grievously addicted to intemperance previously to the Deed of Sale; but that he was drunk on the day of the Deed was *disproved* by the evidence of the Notary and of Mary Maloney. One witness swore to Maloney's being in such a state of excitement and desperation about the date of the Deed of Sale, as to be totally unfit to sign the said Deed to Irvin, or to attend to his own interests.

The Superior Court at Montreal, in May, 1861, considering that the plaintiff had established the material allegations of his Declaration, rescinded and set aside the sale.

Irvin appealed for the following reason, among others: "Because, at the trial and Enquête in the Court below, the Honorable Judge *à quo* excluded parol material evidence offered by the appellant, which ought to have been admitted, particularly the evidence offered of McCarron and Tierney."

The Judges of the Court of Queen's Bench were unanimously of opinion that the appeal was good for that reason;—but, by 3 to 2, reversed totally, on the merits, the Judgment appealed from.

The following is the substance of the remarks of some of the Judges:

MEREDITH, J.—The Court below was wrong in setting aside the evidence of a witness because he had come into Court while other witnesses were being heard, though he had been ordered not to do so.

MONDELET, J.—The judgment must be reversed, among other reasons, because the judge below had rejected the evidence of a material witness, because, after being ordered to stay out of Court till other witnesses had been examined, he came in again. There was no law for rejecting the evidence of a witness for such a cause.

DUVAL, J.—With respect to rejecting the testimony of a witness for the cause alleged, it had been done by a judge in England in a commercial case; but the twelve judges set aside the verdict.

Mackay & Austin, for appellant.

H. Stuart, for respondent.

Judgment reversed.

(R. J. P.)

IN APPEAL FROM THE SUPERIOR COURT,

MONTREAL, 5TH SEPTEMBER, 1862.

Coram AYLWIN, J., DUVAL, J., MONDELET, J., AND BERTHELOT, A. J.

WILLIAM B. LAMBE,
(*Defendant in the Court below,*)
APPELLANT;

AND

WILLIAM MANN ET AL,
(*Plaintiffs in the Court below,*)
RESPONDENTS.

HELD:—1st. That amendments to a declaration which change the nature of the action will not be granted.

2nd. That the amendments granted by the Court below did not change the cause of action.

This was an appeal from an interlocutory judgment of the Superior Court, permitting the respondents to amend their declaration. The action was for an account brought by the heirs of the principal against the heir of his agent. The original declaration asked an account of certain goods, consigned to Sprague & Hutcheson by William & James Hutchinson, which the late James Henry Lambe had received for sale, and which had been attached in his hands in the suit of Gillespie and others, against Sprague et al. An account was also asked of the agency of Lambe during the pendency of the contestation, and of monies received by him from 1826 to 1848.

The amendments extended the action to an account for promissory notes, bills, rents and interest, etc., the promissory notes being charged to have been delivered to said James Henry Lambe for collection on or about the 5th of January, 1828. The amendments also charged the defendant with using the monies of the plaintiffs, and claimed, in addition to the interest, large gains and profits, alleged to have been made by him to the amount of over 10 per cent. per annum.

The defendant moved for leave to appeal from the judgment of the Superior Court, but the motion was refused. Mr. Justice Mondelet, in intimating the judgment of the Court, said in substance that in this cause he was compelled to dissent from the judgment about to be rendered, which would refuse the appeal sought for by the appellant. The Court were unanimous in the opinion that amendments which changed the nature of the action, or introduced a new cause of action, could not be entertained. The principle was reasonable, and was justified by authority. Both in England and Louisiana it was adopted, and it was to be found also in our own jurisprudence. While he acceded to the principle, he differed from the majority of the Court in its application to this case. He thought the amendments sought were not merely an amplification of the original declaration, but did change the nature of the action, and he therefore would dissent from the judgment of the Court, which was to reject the motion.

Motion dismissed and appeal refused.

Torrance & Morris, for appellant.
Cross & Bancroft, for respondents.
(A. M.)

MONTREAL, 9TH JUNE, 1860.

Coram HON. SIR L. H. LAFONTAINE, BART., CH. J., AYLWIN, J., DUVAL, J MONDELET (C.), A. J., AND BRUNEAU, J., *ad hoc.*

No. 26.

ISAAC BLACKENSEE,
(*Defendant in the Court below,*)
APPELLANT;

AND

RICE SHARPLEY,
(*Plaintiff in the Court below,*)
RESPONDENT.

HELD:—That although the special grounds of belief set out in an affidavit for *Capias ad Respondendum* that the defendant is immediately about to leave the Province with fraudulent intent, be not only not proved, but disproved; yet, if it be established that the plaintiff's apprehensions as to defendant's intended departure with fraudulent design were well founded, the *Capias* will be maintained.

This was an appeal from a judgment rendered by the Superior Court at Montreal on the 11th day of March, 1859, dismissing the appellant's petition to be released from custody under a writ of *Capias ad Respondendum*.

The affidavit on which the writ issued alleged that the respondent, Rice Sharpley, had every reason to believe that the appellant was "immediately "about to leave and abscond from the Province of Canada, with intent to "defraud his creditors generally and the said Rice Sharpley in particular," and assigned the following as the special reasons of such belief, viz.:—

"That the said deponent was this day informed by Marcus Ollendorff, clerk, "and William Bishop, storeman, both of the City of Montreal, that the said "Isaac Blackensee has all his trunks packed for a start from Canada, and that "he will leave the said Province to-morrow, and will not return again, and that "he so intends leaving with the fraudulent intent aforesaid."

The appellant petitioned in the usual form to be discharged from custody, on the ground that the allegations of the affidavit were severally untrue. At the *enquête* had on the said petition, Ollendorff and Bishop were examined, but they denied having given the precise information sworn to, admitting, however, that they had informed Mr. Sharpley that the appellant was going to New York. Other evidence was adduced, and it was argued on the part of the respondent in the Court below, that although the persons named in the affidavit had not literally used the expressions sworn to, it was nevertheless abundantly proved by the appellant's own witnesses that he, the appellant, was about to leave for New York, and that he had secreted a large quantity of valuable goods, a circumstance which clearly established the fraudulent design of the appellant's intended departure for New York.

THE HONORABLE MR. JUSTICE BADGLEY, before whom the petition was argued in the Superior Court, adopted the respondent's view of the case, and dismissed the petition, without assigning any special reasons.

In appeal, it was contended by the appellant's counsel that the failure of the two persons indicated in the affidavit to prove the giving of the precise information sworn to, was fatal, but the majority of the Court thought otherwise, and the judgment of the Superior Court was consequently confirmed, the CHIEF JUSTICE and MR. JUSTICE MONDELET dissenting.

MONDELET, J., in expressing his dissent, said,—"This is an appeal from an interlocutory judgment by the Superior Court (BADGLEY, J.), dismissing petition of appellant for relief and discharge from a writ of *Capias ad Respondendum* issued against him by Sharpley, Plaintiff in the Court below.

Sharpley, in his affidavit, grounds his belief as to defendant's being about to leave the Province on the following:

"That the said deponent was this day informed by Marcus Ollendorf, clerk, "and William Bishop, storeman, both of the City of Montreal, that the said "Isaac Blackensee has all his trunks packed for a start from Canada, and that "he will leave the said province to-morrow, and will not return again, and that "he so intends leaving with the fraudulent intent aforesaid."

The Appellant sets forth in his petition that the allegations of the affidavit made by Respondent, and upon which the writ of *Capias* had issued, were false and untrue, and that he was not about to leave the Province of Canada with fraudulent intent, and that there was not sufficient or any reason for the alleged belief of the respondent, expressed in the said affidavit to that effect.

General Issue.—Parties went to proof.

It is proper first to consider the law which is to rule this case in order with certainty to apply it to the facts.

The statute 12th Vict., cap. 42, has the following (2nd) section: amongst other things it enacts that "it shall be lawful for the Court, or any judge of the "Court whence any process shall have issued to arrest any person, either in "term or vacation, to order any such person to be discharged out of custody, "if it shall be made to appear to him, on summary petition and satisfactory "proof, that there was not sufficient reason for the belief that the defendant "was immediately about to leave the Province with fraudulent intent."

The statute above quoted was passed to prevent frivolous and vexatious arrests. The reasons or causes of belief must be disclosed, in order that the course thus taken by any party, on the strength of the information he has obtained and which he is bound to disclose, may fairly be tested.

I may at once add, that it is evident that the reasons assigned by the party making the affidavit are the only ones which on the petition for release are to be taken into consideration, otherwise any one could hazard an arrest, and when brought to account would travel all over town, or anywhere else, to discover evidence of presumption which he knew nothing of at the time he made the affidavit. Moreover, he would secure himself from a prosecution for perjury, inasmuch as he would of course rely upon the fact that he never swore to the existence of facts justifying such presumptions.

Assuming the above to be law, it suffices just to read the evidence, a considerable part whereof is in my opinion altogether irrelevant, to come to the conclusion that Sharpley has either vexatiously caused a *Capias ad Respondendum* to issue against appellant, or that he has misconceived what was told him by Samuel (erroneously called Marcus) Ollendorf and William Bishop. They merely told Sharpley that Blackensee was to leave for New York.

I must say that it is singular enough that those two witnesses should have taken the trouble to convey such information to Sharpley, and it is not the less

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remarkable that Mrs. Romaine expressed her wish that no one but Sharpley should be made acquainted with her saying that Blackensee was to leave next morning for New York.

But, independent of such circumstances being of no great weight, it must be borne in mind that we have nothing *legally* and *judicially* to do with such considerations, which are not those Sharpley grounded his belief on. I need hardly add that the other circumstances disclosed in the course of the evidence are to be treated in the same way, and that the Judges should not allow their decisions to be in the least influenced by them, either for or against plaintiff or defendant.

It is all-important for each member of the community, and society at large, that none but well grounded arrests for debts should take place. The liberty of the subject is so sacred that whoever without just cause interferes therewith should not do so with impunity.

I think the petition, instead of being dismissed, should have been maintained, and the defendant discharged.

I therefore opine for the reversal of the judgment of the Superior Court."

John Bleakley, for appellant. Judgment of Court below confirmed.

F. G. Johnson, Q. C., counsel.

B. Devlin, for respondent.

(S.B.)

COUR DE CIRCUIT: DISTRICT D'ARTHABASKA.

ST. CHRISTOPHE, 17 JUIN 1862.

Coram STUART, J.

Les Syndics de la Paroisse de St. Norbert d'Arthabaska vs. *Pacaud.*

Jugé:—Que la Cour de Circuit n'a pas le droit de prendre connaissance des nullités d'un rôle de cotisation pour la construction d'une Eglise résultant de l'omission de contribuables en icelui, et de la fraude des Syndics; que la Cour de Circuit doit rendre jugement contre les contribuables suivant l'acte de cotisation dûment homologué.

Les syndics de la paroisse de St. Norbert d'Arthabaska, pour la construction d'une nouvelle église et sacristie, poursuivaient le défendeur pour quatre paiements échus sur la cotisation de ses propriétés, montant à $62.04.

Le défendeur plaida à l'action : "Que le dit acte de cotisation ne comprend pas un devis des travaux à faire, une estimation des dépenses prévues et imprévues jugées nécessaires pour la construction des dites église et sacristie en question, non plus qu'un tableau exact de toutes les terres et immeubles situés dans la dite paroisse de St. Norbert d'Arthabaska, contenant l'étendue et la valeur de chaque immeuble, les noms des propriétaires réels ou putatifs, et la somme proportionelle à laquelle ils ont cotisé, imposé, et taxé chaque propriété, pour les dépenses nécessaires aux dites constructions et que l'homologation d'icelui par les commissaires mentionnés en la dite déclaration est irrégulière, nulle et de nul effet, et doit être déclarée comme telle."

"Que parmi les dites terres et immeubles situés dans la dite paroisse de St. Norbert d'Arthabaska, se trouvent les terres et immeubles connus et désignés comme les lots numéros sept, neuf, dix, onze, et douze dans le seizième rang du township d'Arthabaska qui sont et font partie de la dite paroisse de St. Norbert d'Arthabaska, possédés et occupés par Thomas A. Lambert, Paul Beau-

det, fils, Paul Beaudet, père, Louis Lemieux, Jean Gagnon, Julien Labbé, Charles Labbé, Elie Gagnon, Augustin Roy et Moïse Fournier, tous et chacun d'eux sujets de Sa Majesté La Reine Victoria, et professant la Religion Catholique Romaine et sujets à être cotisés, imposés et taxés pour les constructions susdites et qui ne sont pas compris dans le dit rôle de cotisation et que les dites terres et immeubles valent une somme de dix mille piastres."

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"Que lorsque les dits demandeurs ont fait et dressé le dit rôle de cotisation, ils ont mis à dessein et dans le but de faire payer une plus forte contribution aux propriétaires des dites terres et immeubles mentionnés au dit rôle d'évaluation, la somme de trois cents livres courant, qui était en argent dans le coffre de la Fabrique de la dite paroisse de St. Norbert d'Arthabaska et qu'ils ont dissimulée et qu'ils n'ont pas mentionnée aux dits Commissaires qui ont homologué le dit rôle de cotisation, quand cette somme d'argent était destinée et devait être employée avant tout autre argent et être payée par les contribuables à la construction des dites eglise et sacristie en question, et au lieu de se faire allouer une somme de deux mille huit cents livres courant, pour la construction des dites eglise et sacristie, ils ne devaient, d'après la loi, demander que deux mille trois cents livres courant."

"Que les dits demandeurs, lors de la confection du dit rôle de cotisation, savaient bien qu'ils feraient faire les dits travaux pour une somme moindre que celle de deux mille trois cents livres courant: d'où il résulte qu'ils ont fait homologuer illégalement le dit rôle de cotisation pour une somme de huit cents livres courant de plus qu'il n'était nécessaire pour faire les dits travaux de construction et que le dit rôle de cotisation et l'homologation qui en a été faite comme susdit sont nuls et de nul effet et doivent être mis au néant."

Le défendeur voulut prouver par Messire Suzor, curé de St. Christophe d'Arthabaska, que depuis onze ans ces individus en question demeuraient dans les limites de la paroisse de St. Norbert d'Arthabaska, mais ce monsieur ne put dire s'ils faisaient partie de sa paroisse ou de celle de St. Norbert d'Arthabaska; ce fait fut admis par les demandeurs, par écrit ainsi que leurs qualités et leurs obligations à être cotisés comme propriétaires dans la dite paroisse de St. Norbert d'Arthabaska.

Il ne fut pas possible de prouver quelle somme d'argent il y avait dans le coffre de la Fabrique, Messire Roy, curé de la dite paroisse fut interrogé comme témoin; il déclara avoir administré les affaires de la Fabrique depuis cinq ans: qu'il avait reçu tous les argents appartenant à la Fabrique: qu'il en gérait seul les affaires et que les argents au coffre avaient toujours été en sa possession: mais qu'il ne pouvait dire combien il y avait d'argent dans ses mains appartenant à la Fabrique: au delà de $100, mais pas en deça de $500, et qu'aucun argent de la Fabrique n'avait été employé à la construction de l'eglise.

Messire Roy prouva aussi qu'il était l'agent et l'homme d'affaires des demandeurs: que les plans et devis avaient été faits par les constructeurs actuels de l'eglise et de la sacristie: qu'ils avaient estimé l'ouvrage à £2800; que c'était sur leur rapport que les commissaires avaient homologué le rôle de cotisation: qu'après cela, le contrat de construction leur avait été donné pour £2200: qu'ils étaient obligés de faire non-seulement les ouvrages mentionnés aux plans et de-

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vis, mais les bancs qui n'y étaient pas mentionnés et qui valaient £200. Qu'au lieu d'avoir les £2800, pour la construction des dits ouvrages, ils n'avaient eu que £2000

Les demandeurs demandèrent jugement disant que ces nulités auraient dû être présentées devant les commissaires pour en empêcher l'homologation : qu'il était à présent trop tard.

Le défendeur dit que la loi le protégeait ; Que tant que l'esprit et la lettre du Statut n'avaient pas été observés, il ne pouvait être inquiété par les demandeurs : que tous les contribuables devaient payer et que personne n'avait le droit d'en exempter comme on l'avait fait et que cette omission était fatale et frappait de nulité le rôle de cotisation ; qu'il était vrai que le défendeur n'avait pu prouver les £300, qui étaient disponibles pour les dits ouvrages dans le coffre de la Fabrique ; mais cela était dû à l'ignorance des marguillers qui ne pouvaient tenir leurs propres comptes et au mauvais vouloir du curé qui ne déclarait pas combien d'argent il y avait dans le coffre, mais que $500 étaient admises et que cette admission était suffisante pour maintenir les prétentions du défendeur : que les commissaires avaient été trompés par les syndics et leur homme d'affaires, ils avaient représenté qu'il leur fallait £2800 pour ces constructions, quand ils savaient que £2000 étaient suffisants ; ils ont cotisé les propriétaires pour £2800 quand £1700 et les £300 de la Fabrique formant les £2000 étaient suffisants.

Les syndics et leur homme d'affaires n'avaient pas accompli l'esprit et la lettre du Statut en faisant des fausses représentations aux Commissaires et dont le défendeur n'a pu se plaindre devant eux, car il n'a acquis la vérité de ces faits et la preuve de ces fausseté que longtemps après l'homologation du rôle de cotisation, qu'il est de principe que la loi ne peut recevoir d'application et d'exécution que lorsque toutes les dispositions en ont été observées, et parceque le défendeur s'en est rapporté à l'intégrité qui devait présider, de toute nécessité dans cette procédure devant les commissaires, doit-il être la victime des irrégularités et des fausses représentations qui ont été faites aux Commissaires pour arracher ou plutôt leur surprendre l'homologation de ce rôle de cotisation, si la vérté avait été connu ?

Per Curiam—Cette Cour n'a pas le droit de prendre connaissance des nullités qu'involque le défendeur : ce serait faire appel de la décision des Commissaires, ou réviser leurs procédés comme par Certiorari. Dans le premier cas, il est impossible, sur une défense, de réviser la décision d'un tribunal compétent ; lorsqu'on appella d'un jugement d'un tribunal à un autre il y a des procédures à observer et des garanties à donner que les défenses du défendeur ne peuvent couvir et le bref de Certiorari, pour réviser en droit la procédure, devait être pris dans les six mois de l'homologation du rôle de cotisation et ces six mois sont expirés. La position du défendeur n'est pas sans remède. Le Statut ne permet pas à des Syndics de recevoir plus d'argent des contribuables qu'il n'est nécessaire pour faire les travaux : En attendant, le défendeur doit être condamné à payer le montant de la demande, avec les dépens.

L. G. Houle, pour les demandeurs.
G. Talbot, conseil.
E. L. Pacaud, pour le défendeur.
Wm. Duval, conseil.

(E.L.P.)

MONTREAL, 28TH JUNE, 1862.

Coram SMITH, J.

No.

Kerry et al. vs. *Pelly* et al., and Dame *A. Watson*, contesting.

REPORT OF DISTRIBUTION. PRIVILEGE OF PLAINTIFF FOR COSTS.

HELD:—That a Report of Collocation and Distribution which collocates the plaintiff for his full costs of action in preference and prejudice to the landlord's claim for rent will be set aside.

By the report of collocation and distribution in this cause, the plaintiff was collocated for the full costs of action in preference and by privilege to the opposant who claimed as landlord for the rent due. She contested the report, alleging that her claim for rent as landlord was a privileged claim, and as such entitled to collocation in preference to the plaintiff for his costs of suit.

For the contestant it was contended that the practice in this District had invariably been to refuse the plaintiff all privilege for his costs of suit, and the case of Lalande vs. Rowley and Lafrenaye and Papin, contesting 6 L. C. Reports, p. 192, was cited in support.

On the plaintiffs' behalf it was contended that the current of decisions was strongly adverse to that given in the above case; that the practice followed in the District of Quebec was better founded in law; that whatever may have been the strict law here, the practising members of the bar had, during many years, been in the habit of allowing the plaintiff his privilege for his costs of action, and that it would be productive of great confusion and annoyance to adopt a contrary rule.

The Court adopted the views of the contestant, and maintained her contestation of the report, ordering it to be reformed accordingly.

Contestation maintained.

Abbott & Dorman, for plaintiffs.
Torrance & Morris, for opposant and contestant.
(R. J. P.)

MONTREAL, 13 JUIN 1862.

Coram MONK, J., Ass.

No. 3494, 3495 et 1007.

Charlebois vs. *Bastien*.

TROIS CAUSES.

JUGÉ:—Que la cour déclarera l'instance périmée après signification de la motion pour demander la péremption.

Le demandeur a poursuivi les trois défendeurs par trois actions différentes. Les actions ont été rapportées le 15 septembre 1856. Les défendeurs ayant obtenu le certificat des derniers procédés dans chaque cause, constatant qu'il s'était écoulé plus de trois ans depuis le dernier procédé, chacun des défendeurs a fait signifier à l'avocat du demandeur une motion et avis de motion qu'ils s'adresseraient à la cour, le 10 mai 1862, pour faire périmer l'instance dans chaque

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cause. Le demandeur, après la signification de la motion et avis, et avant le 10 mai 1862, a inscrit la cause au mérite.

A l'argument il fut prétendu par le demandeur que la motion ne suffisait pour interrompre l'instance, qu'il fallait une règle, le demandeur cita la cause de *Beaudry* vs. *Plinguet*, p. 237, 3e Jurist; Ouimet—contra—cita *Furnan* vs. *Doyal*, p. 128, 4e Jurist.

MONK, J.—Je suis d'avis que la motion, l'avis de motion et la signification de la motion et avis équivalent à une règle, et ont interrompu l'instance. C'est également l'opinion de mes confrères juges.

Instance périmée—Action déboutée.

Bondy, pour demandeur.
Ouimet, pour défendeur.
(a.o.)

MONTREAL, 28TH JUNE, 1862.

Coram SMITH, J.

No. 2188.

Hughes vs. *Reed*.

HELD:—That the purchaser of a lost horse, *bonâ fide*, in the usual course of trade, in a Hotel yard in Montreal where horse dealers are in the habit of congregating and selling daily a large number of horses, acquires no right of property therein as against the owner who lost it; and although the purchaser be a resident of the United States, and in possession there of the horse claimed, he may nevertheless be sued in Montreal for the value of the horse, on being personally served with process there.

This was an action to recover the sum of $100 as the value of a mare which the plaintiff had lost and subsequently traced into the possession of the defendant at Hights Town, in the State of New Jersey.

The defendant was served personally with process in Montreal, and pleaded, in effect, that he had purchased the mare, in good faith, in the Hotel yard of one R. Decker, in Montreal, which he designated a public place where horses were usually sold in Montreal, and as a *marché ouvert*.

It was proved, in the course of the *Enquête*, that the Hotel yard above referred to was a place of resort for horse-dealers, where they were in the daily habit of selling a large number of horses, and that the defendant openly purchased the mare in question in this yard from a number of Americans who had previously purchased it in the same way from a French Canadian who had brought it there for sale.

At the time of the institution of the action the mare was still in the defendant's possession in Hights Town.

The Court after hearing the parties, pronounced the following judgment:—

"The Court * * * considering that the said plaintiff hath established the material allegations of his action, and that he did lose out of his possession in the City of Montreal, the bay mare mentioned in the declaration, and that the said mare came illegally and without the authority or consent of the plaintiff into the hands of the said defendant, who now has possession of the same, and had such possession at the time of the institution of the present action; and

further considering that the said defendant hath failed to maintain his said exception, or to allege and show any good reason, in fact or in law, whereby the conclusions of plaintiff's action should not be maintained. The Court doth reject the same, and doth condemn the said defendant to pay to the said plaintiff the sum of $100 current money of this province, the value of the said mare, with interest thereon from the 19th day of January, 1861, date of the service of process in this cause, until paid, and costs of suit, *distraits* in favour of M. Doherty Esquire, the attorney of the plaintiff, unless he, the said defendant, do deliver up the said bay horse to the said plaintiff, and in such case that defendant do pay the costs of this action, *distraits* as aforesaid to M. Doherty, Esquire."

Judgment for plaintiff.

M. Doherty, for plaintiff.

Carter & Girouard, for defendant.

(S.B.)

This decision is interesting, as being the first reported one, where a L. C. Court has assimilated the rights of the owner of a *lost* horse to those of the owner of a *stolen* one. [Reporter's note.]

SUPERIOR COURT.

MONTREAL, 6TH OCTOBER, 1862.

Coram BADGLEY, J.

ENQUETE SITTINGS.

No. 2425.

Ramsay vs. *David*, and *Dame Eliza L. Walker*, opposant, and *Ramsay*, contestant.

HELD:—1st. That the contestant having appeared by his attorney *ad litem*, could not personally conduct the examination of the opposant as a witness.

2nd. That the fyling of an appearance as Counsel at Enquête by the contestant as a practising barrister did not give him such right.

The plaintiff had recovered judgment against the defendant, and on attempting to levy the amount by execution, was met by an opposition on the part of Dame Eliza L. Walker, the wife of the defendant, who claimed to be the proprietor of the goods taken in execution.

The plaintiff contested the opposition, and, pending the *enquête* on the contestation, brought up the opposant as a witness, in support of the contestation. The plaintiff was represented by L. A. Jetté, Esquire, as his counsel and attorney *ad litem*, but nevertheless proposed to conduct the examination of the witness himself. This was objected to by *Doherty* for the opposant, and on a hearing before the Court, the objection was maintained.

The plaintiff then fyled an appearance as counsel at enquête for himself as a practising barrister, and attempted by this means to conduct the examination in person, but the objection being taken, the Court decided in this case likewise that the plaintiff could only address the witness through his counsel.

Fabre & Lesage, *Jetté*, for plaintiff.

Doherty, for opposant.

W.T.)

MONTREAL, 30TH DECEMBER, 1861.

Coram SMITH, J.

No. 729.

Gould et al. vs. *Binmore* et al.

HELD:—That in an action for damages for refusing to take delivery of and pay for goods, bargained and sold through a broker, proof of the contract cannot legally be made, without the production of the bought as well as the sold note, or without due notice to the defendant to produce the bought note.*

This was an action of damages caused by the defendants' refusal to accept delivery of and pay for a quantity of flour which the plaintiffs had sold to the defendants.

The contract of sale was made in the usual way through brokers.

At the trial, the plaintiffs contented themselves with the production of their sold note and the parol evidence of the brokers as to its contents and those of the bought note, without, however, notifying the defendants to produce the bought note. The defendants abstained from producing the bought note and objected to the adduction of parol evidence in proof of the contract, and the evidence was taken under reserve by order of the Judge.

At the final hearing on the merits, the defendants moved to reject the parol evidence as illegal under the circumstances, and on the 30th of December, 1861, the Court pronounced the following judgment:—

"The Court, having heard the parties by their counsel upon the merits of this cause and also upon the motion of the defendants of the 18th November, 1861, that all such portions of the evidence of James W. Taylor and of Augustus Howard tending to prove by parol testimony a fact susceptible of proof only by written evidence, to wit, the existence of the bought note referred to in the plaintiffs' declaration, be rejected from the record as illegal, having examined the proceedings, proof of record, and deliberated, doth maintain the said motion; and, considering that the said plaintiffs have failed to prove, by legal and sufficient testimony, the sale by them alleged to have been made to the said defendants, by the ministry of Taylor Brothers, and Howard and Morgan, brokers of Montreal, of the quantity of Three Thousand Barrels of flour, as set forth by the said plaintiffs in their said declaration, or of any acceptance by the said defendants of the said alleged sale, by themselves or by their legally constituted agent, or the existence of any legal and sufficient memorandum in writing, signed by them or by any person legally authorized for their behalf as required by law. The Court doth dismiss this action with costs in favour of B. Devlin, Esq., the attorney of the said defendants."

Action dismissed.

A. & W. Robertson, for plaintiffs.

B. Devlin, for defendants.

Henry Stuart, counsel.

* Would the evidence be complete even then, without the production and proof of the original entries in the broker's book?

[Reporter's Note.]

MONTREAL, 30TH DECEMBER, 1861.

Coram MONK, A. J.

No. 1201.

Baldwin vs. *Binmore* et al.

HELD:—1o. That in an action by the vendor of goods sold and delivered, for the recovery of the price of sale, accompanied by a *saisie conservatoire* of such goods, the plaintiff has a right to demand by the conclusions of his declaration that the defendants be condemned to pay the price of sale, that the goods seized be declared subject and liable to a privilege in favor of the plaintiff as the vendor thereof for such price of sale, and that the goods be sold in due course of law, and the proceeds of sale paid to plaintiff, in satisfaction (either in whole or in part, as the case might be) of his claim as vendor.

2o. That a bargain and sale of goods in the month of January for delivery in all the month of May following is not a gambling transaction.

3o. That where goods so seized have been delivered to the plaintiff during the pendency of the suit, on his giving security that they will be forthcoming to abide the future order of the Court, or the value thereof accounted for by the plaintiff, such value shall be held to be the value of the goods at the time of their delivery to the plaintiff, from which date the plaintiff shall be accountable therefor with interest.

This was an action for the recovery of the sum of $6025 cy., being the price and value of 1000 barrels of flour sold and delivered by the plaintiff to the defendants.

The action was accompanied by a *saisie conservatoire* in the usual form, and in the conclusions of his declaration the plaintiff prayed, "that the said defendants be jointly and severally adjudged and condemned to pay and satisfy to the said plaintiff the said amount of six thousand and twenty-five dollars currency, and interest until paid, and costs of suit; that the said one thousand barrels of flour so to be seized and attached be declared affected by special privilege, for the payment of the said amount of six thousand and twenty-five dollars currency and interest and costs as aforesaid, and be ordered to be sold in due course of law; and that the proceeds of such sale be ordered to be paid to the said plaintiff, to the exclusion of all other creditors of the said defendants, in satisfaction or part satisfaction (as the case may be) of the plaintiff's said debt, interest and costs."

The defendants pleaded a *défense au fonds en droit*, which was dismissed in ordinary course. They also pleaded, by an *exception péremptoire en droit*, that the sale of the flour had been made in January for delivery in all the month of May following, and that such a sale was a gambling transaction, and therefore null and void. They further pleaded the general issue.

During the pendency of the suit the flour was delivered to the plaintiff, on his giving security that it would be forthcoming to abide the future order of the Court, or the value thereof accounted for by the plaintiff.

At the argument on the merits it was strongly urged, on the part of the defendants, that the conclusions of the declaration were wholly irregular, and that the true remedy of the plaintiff was *en revendication* against the flour, and inasmuch as it had been duly delivered to him, he had no further claim against the defendants. The following is the judgment as rendered by the Court:—

"The court * * * considering that the plaintiff hath proved the material allegations of his declaration, and that the exception *péremptoire en droit* filed by the defendants is wholly unfounded in law, doth dismiss the said exception,

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and maintaining the action of the said plaintiff doth condemn the said defendants, jointly and severally, to pay and satisfy to the said plaintiff, the sum of six thousand and twenty-five dollars current money of this province, being the price and value of one thousand barrels of flour of the brand known as the "Globe" mills inspected number one, Superfine (Toronto inspection), and in shipping order, sold and delivered by the plaintiff to the defendants as stated in the plaintiff's declaration, together with interest thereon from the eleventh day of May, 1861, date of the service of process in this cause, until actual payment and costs of suit, save and except the costs of the *enquête* made under and in pursuance of the order of this Court dated the thirtieth day of September, 1861, the costs of which *enquête*, if any, are to be paid by the said plaintiff.

And the Court doth adjuge and declare the attachment, *saisie*, in this cause made of the said one thousand barrels of flour good and valid, and doth further declare the said one thousand barrels of flour liable and subject to and affected with a privilege and *lien* in favor of the said plaintiff thereon, as the vendor thereof, for the said sum of six thousand and twenty-five dollars and interest and costs as aforesaid; and it is ordered, that the said one thousand barrels of flour be sold in due course of law, and the proceeds thereof paid over to the said plaintiff by special privilege, and in preference to all others the creditors of the said defendants, in satisfaction of the present judgment, in whole or in part, according to their sufficiency.

And the Court, seeing the petition of the plaintiff made and filed in this cause on the second day of July, 1861, the order and judgment thereon rendered, and bond executed by the plaintiff and his sureties in pursuance of said order and judgment, and the evidence adduced under the order of this Court dated thirtieth September, 1861, in relation to the value of said flour at the time the same was so delivered to the said plaintiff, under and in virtue of said bond and security, doth further adjudge and declare, that in case the said plaintiff shall fail to produce the said one thousand barrels of flour, in order that the same may be so sold in due course of law, he, the said plaintiff, shall duly account to the said defendants for the sum of four thousand dollars current money of this Province, as and for the value of the said one thousand barrels of flour, at the time the same were delivered to the said plaintiff, in virtue of such order and judgment so rendered as aforesaid on the said petition of the second of July, 1861, with interest from the eighth day of said month of July."

Judgment for plaintiff.

Bethune & Dunkin, for plaintiff.
B. Devlin, for defendants.
(S. B.)

MONTREAL, 5TH JULY, 1861.

Coram BERTHELOT, J.

No. 1201.

Baldwin vs. *Binmore* et al.

HELD:—That Plaintiff has a right to obtain delivery of flour seized by him as vendor under a writ of *saisie conservatoire*, on giving security that the flour will be forthcoming, to abide the future order of the Court, or the value thereof duly accounted for by Plaintiff.

This was a petition by the Plaintiff for delivery of the flour seized in this cause by him as vendor under a writ of *saisie conservatoire*. The Petitioner alleged and proved by affidavit that the flour was subject to the payment of storage and insurance and prayed, that the flour be delivered to him, on his giving good and sufficient security that the flour would be forthcoming to abide any future order of the Court, or the value thereof, duly accounted for by petitioner.

The petition was resisted by the defendant, but the prayer thereof was granted, and the flour was accordingly delivered over to the plaintiff.

Petition granted.

Bethune & Dunkin, for plaintiff.
B. Devlin, for defendant.
(S. B.)

MONTREAL, 28th APRIL, 1862.

No. 331.

Coram MONK, J.

Walker et al., vs. *Ferns and the Montreal Permanent Building Society, Opposants, and Sheridan, Contestant.*

HELD:—That it is not necessary for an Opposant who contests the collocation to his prejudice of another Opposant, to set up in his *moyens* of contestation his own title or interest to or in the proceeds of the sale of the lands, collocation of which proceeds has been made in favor of the other Opposant.

The lands of the defendant were taken in execution and sold by the sheriff who returned to the Court the amount of his levy. Against this levy, the Montreal Permanent Building Society fyled an opposition for a sum of upwards of $700 due under a deed of obligation and *hypothèque*.

The opposant Sheridan was also an opposant under an obligation and *hypothèque*.

The Building Society was collocated for the amount of their claim by the report of distribution prepared by the prothonotary.

The report was contested by Sheridan, who in a pleading called a contestation, styling himself an opposant, assigned several grounds against the validity of the claim of the Building Society, and his conclusion was that the report of distribution and collocation be reformed and particularly the eighth item thereof, to wit: in so far as the said Montreal Permanent Building Society was concerned, and that the collocation of the said Society be reduced to a sum of $405, and the said Sheridan collocated in the place and stead of the said Society in such

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amount in payment of the amount by him in and by his opposition in this cause fyled, claimed, &c."

The Montreal Permanent Building Society demurred to this contestation on the following grounds:

Because it does not appear from the said contestation that the said James Sheridan hath or had any interest in contesting the said collocation of the said opposant, the Montreal Permanent Building Society.

Because the said pleading or contestation of the said James Sheridan does not allege any title or sum of money or mortgage or privileged claim of the said James Sheridan against or to the proceeds of the sale of the lands, collocation of which proceeds hath been made in favour of the opposants, the Montreal Permanent Building Society.

After issue joined, the parties were heard on the demurrer.

For the Building Society, it was contended that the demand of the opposant Sheridan was to take away from the Society a sum of money for which it had been collocated, of which it was in fact in possession; that Sheridan could only succeed in his contestation by the superior strength of his claim—as in a petitory action—not mere by the weakness of the claim of the Society, for the latter was in possession. He must therefore shew his own title as well as the weakness of the Society's just like the plaintiff in a petitory action. *Gibson* vs. *Wear*, 6 L. C. Jurist, 78. Each pleading should contain enough in itself to justify the conclusions thereof. This was not the case here. Sheridan attacked the opposition of the Building Society, but there was nothing in his contestation to justify the conclusion for a sum of money, in addition to the rejection of the Society's claim. If the pleading under consideration were well founded, the effect would be that if the contestation succeeded, and a new report were made placing Sheridan where the Society then was, the Society could again, if they had any pecuniary interest, contest the new report in favor of Sheridan, on grounds attacking the validity of his opposition, a matter not previously at issue between them. This would involve a double contest between the two opposants at two different times, although one contest would be quite sufficient, if all matters between them were fairly set out in one contestation. If the present contestation of Sheridan be regular, then the Society would be compelled to plead two sets of pleadings in answer to his contestation, one set to his contestation, and the other set to his opposition. The irregularity of the pleading demurred to was to be seen in the state of the issues between the parties. The Building Society had fyled the following pleadings in answer to the contestation of Sheridan:—1o. Demurrer; 2o. A special plea to Sheridan's opposition; 3o. A general answer to the contestation. That shewed the irregularities of Sheridan's pleading.

Bedwell for Sheridan contended that the pleading fyled was in accordance with the practice of the Court.

The Court took time to consider and dismissed the demurrer.

Demurrer dismissed.

Torrance & Morris, for plaintiff.
Devlin, for Sheridan.
(F.W.T.)

MONTREAL, 3RD OCTOBER, 1862.

ENQUETE SITTINGS.

Coram BADGLEY, J.

No. 2116.

Mann et al. vs. *Lambe.*

HELD:—That when a plaintiff pending his *Enquete* has obtained a judgment of the Court permitting him to amend his declaration, he will not be allowed to proceed further with his *Enquete* until he has amended his declaration, and the defendant has been allowed to plead *de novo*.

The plaintiffs obtained a judgment of the Superior Court in their favour permitting them to amend their declaration on payment of costs. They now applied to the presiding judge at the *Enquête* sitting to be allowed to proceed with their *Enquête*.

Torrance for the defendant resisted the application on the ground that the plaintiffs should first amend their declaration and then give the defendant an opportunity of pleading *de novo* to the amended declaration if he should see fit, or that the plaintiffs should fyle a *désistement* of their right to amend.

Cross è contra, contended that he had a right to proceed at once without waiver of his right to amend, and cited 1 Petersdorff's Suppl. p. 169, *Collins* vs. *Aaron*, 5 Scott, 595, to the effect that in England a defendant had no right to plead *de novo* unless it formed part of the judge's order.

The presiding judge ruled against the plaintiff, and remarked that, by the practice of the Court, the defendant would be permitted to plead *de novo* after service upon him of the amended declaration.

Cross & Bancroft, for plaintiffs. Application refused.

Torrance & Morris, for defendant.

(F. W. T.)

MONTREAL, 30TH SEPTEMBER, 1862.

Coram BADGLEY, J.

No. 536.

Alfred Perry, Plaintiff, vs. *John Milne*, Defendant.

AND

The Ontario Bank, *T. S.*, and the said *John Milne*, contesting, saisie-arrêt.

HELD:—That a tiers-saisi with whom the defendant had deposited bonds or debentures of certain municipalities will be ordered to deposit the same with the prothonotary of the Court.

In this case a writ of saisie-arrêt after judgment was issued and the *tiers-saisi* made a declaration, to the effect that at the time of the service upon them of the writ, there were in their hands three debentures of the city of Hamilton in Upper Canada, and a debenture of the county of Megantic, which had been deposited with them by the defendant.

Judgment was rendered, adjudging, amongst other orders, the seizure good and valid, and ordering the deposit of the debentures with the prothonotary within 15 days after the service upon them of the judgment.

A similar judgment was rendered in *McKay et al.* vs. *Demers*, and *Fauteux*, *Garnishee*, where 69 promissory notes were so ordered to be deposited.—L. C. Reports, Vol. 11, p. 284.

Torrance & Morris, for plaintiff.

McKay & Austin, for defendant and contesting party.

(A. M.)

MONTREAL, 28 JUIN 1862.

Coram SMITH, J.

No. 682.

Poirier vs. *Lacroix.*

JUGE:—1o. Qu'un acte de donation entre vifs, dont les obligations en égalent au moins les avantages, n'a pas besoin d'être insinué ni enrégistré pour être valable.

2o. Que le donataire ne peut se prévaloir du défaut d'insinuation ou d'enrégistrement.

3o. Que des deniers dotaux portent intérêt de plein droit.

4o. Que pour rendre une délégation parfaite, il suffit que la volonté du créancier d'accepter le nouveau débiteur au lieu et place de l'ancien, apparaisse de quelque manière, soit par quelque acte ou autrement.

5o. Que des paiements antérieurs, faits par le délégué en son propre nom et à son propre acquit et ainsi acceptés et reçus par le créancier, constituent une acceptation suffisante de la délégation.

6o. Que le débiteur en vertu d'une telle délégation ne peut en être libéré sans le consentement du créancier.

7o. Que le donataire chargé du paiement de la somme d'argent à des créanciers du donateur qui, après la résiliation de l'acte de donation, demeurent en possession des immeubles à lui donnés, ne peut se prévaloir de cette résiliation intervenue entre lui et les donateurs, faute d'avoir été suivie d'effet.

Le demandeur alléguait dans sa déclaration:

Que par son contrat de mariage avec sa femme actuelle, Lucie Langevin dit Lacroix, en date du 22 janvier 1836, le père et la mère de cette dernière, Jean Bte. Langevin dit Lacroix et Dame Marie Louise Crevier, promirent de lui payer la somme de 2500 livres, ancien cours, comme suit:—200 livres le 1er juin 1837, 200 livres tous les premiers de juin des années suivantes jusqu'à parfait paiement.

Qu'en considération de cette somme, sa femme renonça à leur succession et à tous ses droits légitimes et à son douaire, pour s'en tenir à cette somme.

Que le 17 septembre de la même année (1836), le dit Jean Bte. Langevin dit Lacroix et sa dite épouse, dans le but de partager le reste de leurs biens et d'égaliser la part de leurs enfans, voulant faire un dernier partage et arrangement de famille, donnèrent et cédèrent par donation entre vifs à un de leurs fils, le dit défendeur, les autres ayant eu leur part, les dits biens consistant dans plusieurs immeubles, des effets et animaux, et des dettes actives considérables, à la charge par le dit défendeur de leur payer une certaine rente viagère, et de payer toutes leurs dettes passives et plus particulièrement les sommes de deniers que les dits donateurs devaient au demandeur en vertu du dit contrat de mariage.

Qu'enfin, il restait encore dû sur les dites sommes d'argent une balance de $116.66 en capital, formant les paiements échus le 1er juin 1845 et tous les premiers de juin des années suivantes, et que cette balance du capital réclamée, consistant dans des deniers dotaux, porte intérêt de plein droit du jour de l'échéance, lequel intérêt s'élevait à la somme de $97.00, laquelle ajouté à la balance du capital formait celle de $210.66, encore due et payable par le défendeur au demandeur.

Le défendeur plaida à cette action:—Qu'il avait été libéré de toutes ses obligations stipulées au dit acte de donation par ses père et mère, qui seuls avaient été parties avec lui au dit acte de donation, et ce par un acte de convention et résiliation entre lui et ses dits père et mère fait et passé devant Mtre

Decelle et son confrère, notaires, le 29 juillet 1846, et avant que les différentes délégations créées au dit acte de donation, et le dit acte de donation lui-même aient été acceptés, ni par le demandeur ni par aucune des parties intéressées.

Le demandeur répondit généralement et spécialement:—1o. Que le défendeur, comme tel donataire, prit possession des deniers, animaux, effets et immeubles à lui donnés et cédés dès le jour du dit acte de donation, sous les réserves et les charges qui y étaient stipulées; retira les dettes actives et en disposa comme sa propriété; paya une partie des dettes des dits donateurs et que plus particulièrement, le dit défendeur, comme tel donataire, en son propre nom et à son propre acquit, paya, avant la résiliation, au demandeur tous les paiements échus avant ceux réclamés par cette action et que pour ces raisons il y avait eu acceptation suffisante de la part du demandeur de la délégation créée en sa faveur par le dit acte de donation entre vifs. 2o. Que, d'ailleurs, fut-elle insuffisante, le dit acte de convention et résiliation, sur lequel le défendeur s'appuyait, n'en était pas moins nul et de nul effet, parce qu'après sa passation, le dit défendeur était demeuré en possession des immeubles à lui donnés, possession qu'il continuait encore aujourd'hui, et parce qu'enfin le dit acte de résiliation fut considéré par toutes les parties comme non avenu et n'avait jamais été mis à exécution et à effet.

Telles sont les circonstances sur lesquelles les parties en cette cause lièrent contestation et allèrent à l'enquête.

Le demandeur prouva que tous les paiements antérieurs à cette action furent payés par le défendeur en son propre nom et à son propre acquit, et que, de toutes les parties qu'elle concernait, la dite donation reçut son entière exécution jusqu'au moment de la résiliation; que les charges de la dite donation égalaient au moins les avantages de la dite donation; et c'est ce qui résultait du témoignage et des réponses sur faits et articles du défendeur lui-même; qu'enfin le dit défendeur, depuis l'acte de donation jusqu'au jour de l'action, à l'exception de sept années d'absence aux Etats-Unis, était demeuré en possession des immeubles à lui donnés, et avait fait enterrer ses père et mère, les dits donateurs, suivant les stipulations de l'acte de donation et cela après l'acte de résiliation, à savoir en 1854.

Le défendeur ne prouva pas autre chose que l'absence du demandeur aux Etats-Unis pendant sept années depuis l'acte de résiliation.

A l'audition, *M. Girouard*, pour le demandeur, soutenait qu'il bâsait sa demande sur le dit contrat de mariage et sur un acte de donation; qu'il était vrai que cet acte de donation n'avait été ni insinué, ni enrégistré, mais que cette formalité n'était pas nécessaire dans cette espèce, pour deux raisons:—1o. Parce que les obligations de la donation en égalaient les avantages, (Pothier, Donations entre vifs, sec. 2, art. 3e, §1,) 2o. Parce que la personne qui pouvait l'opposer était le donataire, c'est-à-dire une personne qui avait connaissance du contenu de l'acte de donation, et que la formalité de l'insinuation ou de l'enrégistrement des donations, depuis la création des bureaux d'enrégistrement, n'était ordonnée et requise que pour les rendre publiques, (Pothier, Des Donations entre vifs, sec. 2e, art. 3, §4.) Que le défendeur ayant admis lui-même que le dit acte de donation avait reçu son entière exécution de toutes les parties

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qu'elle concernait pendant dix années et jusqu'au prétendu acte de résiliation, et qu'il avait lui-même payé en son propre nom et à son propre acquit tous les paiements antérieurs à ceux réclamés par cette action, ne pouvait résilier tel acte de donation sans le consentement du demandeur et que ces faits suffisaient pour établir une acceptation suffisante créée dans le dit acte de donation; que d'ailleurs le demandeur avait suffisamment prouvé que cet acte de résiliation devait être considéré comme non avenu, attendu qu'il n'avait été suivi d'aucun effet et que plus particulièrement le défendeur était resté en possession des immeubles à lui donnés et avait poursuivi après la prétendue résiliation l'exécution de certaines obligations de l'acte de donation; qu'enfin qu'à ce qui regardait la prétention du défendeur que l'intérêt n'était pas dû sur la balance du capital, il référait aux autorités suivantes: Denizart, vo. Intérêts, No. 50; Rousseau de la Combe, vo. Dot., sec. 4; Brod., t. 10; Desp. p. 425, No. 19, qui toutes établissaient que les deniers dotaux portent intérêt de plein droit.

M. Bélanger, pour le défendeur, en réponse, s'en tenait au contraire au bénéfice de son acte de résiliation, bénéfice qu'il prétendait exister dans ce cas-ci, parce que la donation avait été faite entre le défendeur et ses père et mère, et que le demandeur n'y était pas présent et ne l'avait jamais accepté, et qu'il était nécessaire enfin que le demandeur acceptât expressément et même par quelqu'acte par écrit, fait à la connaissance du délégué, les stipulations du dit acte de donation, et qu'enfin les autorités démontraient que les paiements, déjà faits par le défendeur, qu'ils ne pouvaient avoir été faits que comme le procureur des donateurs; que, d'ailleurs, fut-il tenu de payer, il ne pouvait l'être que pour le capital, consistant purement en deniers, et non pour les intérêts qui n'étaient pas stipulés aux actes; que même le contrat de mariage allait plus loin, en déclarant que les sommes de deniers promises seraient payées "*sans intérêt*" à l'échéance.

En réplique sur ces mots "sans intérêt" mentionnés au contrat de mariage, M. Girouard ajoute, qu'ils ne s'appliquait qu'aux intérêts depuis la date du contrat jusqu'à l'échéance, qui sans cette clause seraient également dus de plein droit et qui, pour cette raison, n'avaient pas été demandés, et enfin qu'ils, les dits mots "sans intérêt," ne comprennient pas les intérêts sur le capital à compter de l'échéance.

SMITH, J.—Deux seules questions sont sérieusement agitées dans cette cause: 1o. Le défendeur est-il tenu de payer les sommes de deniers stipulées au contrat de mariage, malgré l'acte de résiliation sur lequel il appuie ses défenses; et 2o. S'il est tenu de payer le capital, est-il responsable des intérêts réclamés sur icelui à compter de l'échéance. Sur ce dernier point il n'y a aucun doute que les intérêts sont dus, les deniers formant le capital étant en effet des deniers dotaux, qui d'après la jurisprudence constante de ce pays portent intérêt de plein droit. Quant à l'autre question, il me semble que le défendeur doit payer et que l'acte de résiliation en question est nul. Le défendeur a exécuté l'acte de donation pendant dix années; il a retiré toutes les dettes actives des donateurs, payé la plus grande partie de leurs dettes passives, et même tous les paiements antérieurs à ceux réclamés par cette action, en faisant ces derniers paie-

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ments, il se présente au demandeur en son propre nom et comme donataire; il consent par là même à devenir le débiteur principal et le demandeur consent également à le prendre comme tel, puisqu'il lui donne des reçus à son propre acquit. Ces circonstances seules suffisent pour constater l'acceptation par le demandeur de la délégation créée par l'acte de donation entre vifs; car en matière d'acceptation de délégation dans notre droit, différant peut être en cela des dispositions du Code Civil Français, il suffit que la volonté du créancier d'accepter le nouveau débiteur au lieu et place de l'ancien paraisse de quelque manière, et peu importe la manière par laquelle cette volonté apparaît, si c'est par un acte écrit au autrement; tout ce qui est requis par la loi, c'est la volonté formelle d'accepter. La délégation en question devenant donc parfaite par l'acceptation qui en fut faite par le demandeur, le délégué, c'est-à-dire le défendeur, ne pouvait en être libéré que par le créancier, c'est-à-dire le demandeur. Or l'acte dans lequel le défendeur va chercher sa libération, l'acte de convention et résiliation produit par lui en cette cause, a été fait sans le consentement du demandeur, et faute de ce consentment il est nul à mon avis.

D'ailleurs la preuve du demandeur montre encore que cette acte de résiliation n'a été suivi d'aucun effet. Après sa date, le défendeur poursuit encore l'exécution de certaines obligations de la donation; il fait enterrer ses père et mère, les dits donateurs, en la manière pourvue par cet acte et à ses propres frais, sans en parler à ses frères capables de rencontrer les dépenses de funérailles avec lui; bien plus, au lieu de remettre la possession des immeubles qui lui avaient été donnés par ses dits père et mère, il demeure en possession d'iceux et aujourd'hui encore il les possède. Ces faits seuls suffisent pour faire voir que cet acte de résiliation n'a été suivi d'aucun effet, et que le défendeur ayant toujours joui des avantages de la donation doit également en supporter toutes les charges.

Jugement pour le demandeur.

D. Girouard, pour le demandeur.
Drummond & Bélanger, pour le défendeur.
(D. G.)

MONTREAL, 30 SEPTEMBRE 1862.

Coram SMITH, J.

No. 728.

Chef vs. *Léonard & vir*, et *Décary et al.*, tiers-saisis.

Jugé:—Qu'une somme d'argent, accordée par jugement, comme réparation civile d'un fort personnel, est insaisissable.

Le demandeur, créancier de la defenderesse, en vertu d'un jugement, fit signifier une saisie-arrêt entre les mains des tiers-saisis. Ces derniers déclarèrent qu'ils devaient à la défenderesse la somme de £25, montant d'un jugement rendu, dans la Cour Supérieure, à Montréal, le 27 juin 1862, dans une cause No. 1859, dans laquelle la défenderesse était demanderesse contre eux, dits tiers-saisis.

La défenderesse contesta cette saisie, sur le motif que la somme de £25, que les tiers-saisis reconnaissaient lui devoir, lui ayant été accordée pour la répara-

Chef vs. Léonard

tion civile de dommages à elle causés par les dits tiers-saisis, "en la calomniant et injuriant sans juste raison, et en blessant sa sensibilité," cette somme était de sa nature insaisissable.

Cassidy, pour le demandeur, dit que la jurisprudence, sous l'ancien droit Français, était contradictoire sur la question, toute nouvelle dans ce pays, soulevée par la defenderesse. Le Nouveau Denizart, vo. Compensation, et vo. Dommages et Intérêts, cite plusieurs arrêts qui ont déclaré ces sortes de créances saisissables et compensables. Le code a fait disparaître tout doute sur la matière et cette question n'en est plus une en France, où ces créances sont aujourd'hui traitées comme toutes les autres et en conséquence saisies et compensées. Il y a de plus une question de fait en cette cause. La défenderesse, dans l'action où elle a obtenu ces dommages, prétendait avoir souffert dans sa fortune par suite des faits qu'elle reprochait aux tiers-saisis, et il est hors de doute que des dommages *réels* sont en toutes circonstances compensables et saisissables. Or la cour pourra-t-elle déterminer quelle portion de ces £25 a été accordée pour dommages *réels* et quelle autre, pour dommage *personnels?* Dans le doute, il vaut mieux se tenir dans le droit commun et les principes généraux qui déclarent toutes créances saisissables et compensables, que de tomber dans l'exception si controversée dans laquelle la défenderesse voudrait nous conduire.

Doutre, J., pour la défenderesse. Sous l'ancienne jurisprudence française, qui est la notre, il n'est pas de prétention mieux établie que celle de la défenderesse. Jusqu'à l'époque où la jurisprudence des arrêts dut céder le pas au droit écrit, c'est-à-dire jusqu'au code, on ne trouvait qu'un arrêt qui l'eut mise en question ; et cet arrêt isolé, disent les auteurs qui font autorité parmi nous, ne pouvait militer contre les traditions uniformes des cours. Cette jurisprudence est attestée dans les termes les plus absolus par les auteurs suivants :

ANCIEN DENIZART, vo. Dommages, Nos. 17 et 18.
" " " vo. Réparation Civile, du No. 3 au No. 16.
GUYOT, Répertoire, vo. Réparation Civile, pp. 211, 212.
BOURJON, Droit Commun, t. 2, p. 562, No. 41.
PIGEAU, Proc. Civile, t. 1, p. 650.

Le Nouveau Denizart, vo. Compensation et Dommages et Intérêts, distingue entre les dommages accordés par les cours criminelles et ceux accordés par les cours civiles. Il déclare les premiers non compensables et insaisissables et les seconds compensables et saisissables. Cette distinction pourrait avoir quelque valeur, sous un système où l'on avait le choix d'une poursuite criminelle ou d'une poursuite civile pour une offense contre laquelle notre organisation judiciaire et nos lois ne donnent qu'un recours civil. Mais si l'on recherche l'esprit de cette distinction, il ne consiste qu'en ceci : c'est que la somme accordée comme indemnité pour dommages *réels*, c'est-à-dire dommages causés dans la fortune, sans affecter le caractère, l'honneur ou la sensibilité de la personne—cette somme ou créance est saisissable et compensable,—tandis que l'indemnité pécuniare accordée pour dommages *personnels*, c'est-à-dire affectant la sensibilité, l'honneur et la réputation, est insaisissable et non compensable. Merlin (Rép., vo. Réparation Civile) tout en combattant l'ancienne jurisprudence, en admet l'ex

istence comme indeniable. Il la combat, parcequ'il ne trouve pas de texte de loi sur laquelle elle puisse s'appuyer. Rien ne peut mieux marquer la différence qui existe là-dessus entre l'ancien et le nouveau droit. L'ancien droit faisant seul autorité ici, l'opinion de Merlin ne peut être reçue que comme constatant l'existence de ce qu'il combat.

Sourdat, Responsabilité, t. 1er, No. 136, ne tente pas, comme Merlin, de donner le tort à la jurisprudence ancienne, avec le Code. Il la constate, mais il dit qu'elle n'a plus d'application depuis la promulgation du Code, qui a déterminé ce qui était insaisissable et non compensable et qui n'a pas placé la réparation civile, dans cette catégorie. Quant à l'objection faite sur la difficulté de savoir si les dommages causés étaient *réels* ou *personnels*, le jugement qui a condamné les tiers-saisis, pour avoir "calomnié, injurié et blessé la sensibilité," ce jugement règle la matière.

Per Curiam.—Cette question ne s'était pas encore présentée à la connaissance d'aucun des juges de cette cour, et il a fallu que les autorités fussent aussi concluantes qu'elles le sont réellement, pour faire accepter l'exception invoquée par la défenderesse. Le jugement maintient la prétention de cette dernière sur ce motif des auteurs, "que l'action qui naît de la réparation, ne se confond pas parmi les autres biens de celui qui demande cette réparation, et qu'elle demeure tellement attachée à sa personne, qu'aucun évènement ne peut en empêcher ni en suspendre l'application.

Jugement:—"La Cour déclare que la somme due par les dits tiers-saisis à la dite défenderesse est insaisissable, en conséquence déboute la présente saisie-arrêt avec dépens contre le dit demandeur."

Léblanc & Cassidy, avocats du demandeur.

Doutre & Daoust, avocats de la défenderesse.

(J. D.)

MONTREAL, 27 MAI 1862.

Coram BADGELEY, J.

No. 129.

Beaudry, vs. *Laflamme & Davis*, *T. S.*

Juge:—Qu'un "I. O. U. est négociable comme tout billet payable au porteur.

Le 8 avril dernier, le demandeur fit émaner contre le défendeur une saisie-arrêt après jugement entre les mains de Davis, pour la somme de £28 7s 0d, courant, montant des frais encours dans la demande principale.

Le 28 avril, jour du retour, Davis déclara: "That on the fifth day of April "one thousand eight hundred and fifty nine, four-mares were sold to the said "*tiers saisi* by the defendant for the price or sum of five hundred and seventy "five dollars, whereof the said tiers saisi then paid the said defendant in money "four hundred and seventy-five dollars and gave an acknowledgment in writing "or "I. O. U." for the balance payable to the defendant, to wit, for the sum "of one hundred dollars; and which sum of one hundred dollars the said tiers "saisi is ready to pay on production of his said acknowledgment in writing, or

Beaudry vs. Lafamme.

"on receiving security that he will not be troubled by reason of his having given "said "I. O. U." or acknowledgment in writing."

Sans offrir aucune caution, le demandeur inscrivit la cause pour jugement sur la déclaration du tiers-saisi.

A l'audition;

M. Girouard, pour le demandeur soutenait qu'il avait droit au jugement de la cour purement et simplement contre le tiers-saisi pour le montant de l' "I. O.U.," sans le lui produire, ni lui donner caution, s'il établissait que le tiers-saisi ne pouvait jamais être inquiété, si le titre de créance devait de toute nécessité demeurer éteint et payé entre les mains du défendeur, en d'autres termes, s'il n'était pas négociable: qu'enfin un "I. O. U." n'était pas un effet négociable, attendu qu'un "I. O. U." renferme une simple reconnaissance ou un memorandum de la dette et non pas à la fois une reconnaissance de la dette et une promesse de la payer, c'est-à-dire en un mot, *un billet promissoire*, et qu'il n'y a que le billet promissoire qui soit négociable; puis il cita les autorités suivantes Bylos on Bills p. 66; Bayley on Bills p. 6; Ross on Bills p. 58 à la note; Chitty on Bills, ed. 1834 p. 2e; Fisher v. Leslie 1 Esp. 426; Israël, v. Israël, 1 Camb. 499.

M. Torrance pour le tiers-saisi soutenait au contraire que son client, ayant remis à son créancier une reconnaissance ou bon, résumé dans ces mots "I. O. U. *twenty five pounds*," qui pouvait être transporté, il n'était pas tenu de payer sans la production de ce bon, ou garantie de la part du demandeur.

Le jugement de la cour condamna le tiers-saisi à payer au demandeur la dite somme de $100, sous le *proviso* suivant; "And it is further ordered that this "Judgment shall not be executory against the said *tiers saisi*, Augustus G. Da- "vis for the said sum of one hundred dollars until such time as the said Plain- "tiff shall have given to him, the said Augustus G. Davis, good and sufficient "security, that he, the said Augustus G. Davis, shall not hereafter be troubled "in respect of the said acknowledgment in writing or "I. O. U." for the said "sum of one hundred dollars by him given to the said defendant, and that he the "said plaintiff, shall keep and hold the said Augustus G. Davis harmless there- "from, or shall have delivered up to the Prothonotary of this Court, to be fyled "of Record in this cause, and to be given up to the said Augustus G. Davis, "upon his demand therefor, the said instrument in writing or I. O. U. above re- "ferred to, and upon the giving by the said plaintiff of the security above or- "dered or having made the said delivery, the said *tiers saisi* Augustus G. Davis "shall be held and constrained by all legal ways and means for the payment to "the said plaintiff of the said sum of one hundred dollars and upon payment "thereof duly discharged."

D. Girouard, pour le demandeur.

Torrance & Morris, pour le tiers-saisi.

(D. G.)

MONTREAL, 25 JUIN 1862.

Coram MONK, J. A.

No. 439.

L'HON. G. E. CARTIER, *Procureur-Général pro Reginâ*,
vs. (*Poursuivant.*)
LAVIOLETTE & AL.
(*Défendeur.*)

JUGE:—Qu'une information au nom du Procureur-Général pour sa Majesté doit être renvoyée avec dépens sur une exception à la forme, par suite de ce que cette information a été signée par certains procureurs s'intitulant " procureurs du procureur général *pro regina*; "

2o. Que le Procureur-Général en comparaissant pour sa Majesté ne peut en loi comparaître par procureur.

L'information produite en cette cause le 27 décembre 1861, ayant été signée comme suit: Moreau, Ouimet et Morin, " Attys. for Attorney General *pro Regina*; ainsi que le *præcipe* ou fiat; les défendeurs produisirent une exception à la forme comme suit:

" Les défendeurs disent pour exception à la forme de la présente prétendue " information ou demande dirigée contre eux:

" Que la dite prétendue information ou demande a été irrégulièrement inten- " tée et produite devant la cour, que cette prétendue information est sans valeur " quelconque, est irrégulière et notamment ne peut servir de fondement ou base " légale à aucun jugement à être rendu sur icelle, pour entre autres raisons les " suivantes:

" 1e. Parceque le *præcipe* ou fiat logé au greffe de cette cour et sur lequel " un prétendu bref d'assignation a été émané et signifiée aux défendeurs, n'a " pas été signé par le dit Honorable George Etienne Cartier, à la poursuite duquel " comme procureur-général de Sa Majesté pour le Bas-Canada, le dit bref com- " porte avoir été émané ni par aucune autre personne, ayant autorité de demander " l'émanation de semblable bref d'assignation pour et au nom de Sa Majesté.

" 2e. Parceque s'il est loisible à sa Majesté de plaider et ester en jugement par " procureur, et notamment par son procureur-général pour le Bas-Canada " devant cette cour, il n'est pas permis à ce dernier de plaider et ester en juge- " ment par d'autres procureurs, le dit procureur-général n'ayant pas le droit de " déléguer ses pouvoirs à cet égard et de plaider et ester en jugement pour et au " nom de sa Majesté par d'autres procureurs, et parcequ'il appert par le dit *præ-* " *cipe* et fiat qu'il a été signé par certains procureurs inscrits au tableau du tribu- " nal qui s'instituent procureurs du procureur-général *pro Regina*; Attorneys " for Attorney General pro Reginâ; s'attribuant par là un pouvoir ou mandat que " la loi ne reconnait pas, attribution exorbitante qui a frappé le dit fiat ou " *præcipe* et le dit bref d'assignation émané sur icelui, de nullité radicale.

" 3e. Parceque la dite information annexée au dit bref ou à laquelle, le dit " bref est annexé, n'a pas non plus été signée par le dit Honorable George " Etienne Cartier, à la poursuite duquel comme Procureur-Général de Sa Majes- " té pour le Bas-Canada, la dite information comporte être produite devant cette " Cour, ni aucune autre personne ayant autorité de signer et produire la dite " information pour et au nom de Sa Majesté.

4e. Parceque s'il est loisible à Sa Majesté de plaider et ester en jugement par

Cartier vs. Laviolette.

" procureur devant les tribunaux du pays et notamment devant cette cour par " son procureur-général pour le Bas-Canada, le dit procureur-général n'a pas " le droit de déléguer ses pouvoirs à cet égard et de plaider et ester en jugement " pour et au nom de Sa Majesté par d'autres procureurs, et parcequ'il appert " au dossier et que tel est le cas, que la ditei nformation a été irrégulièrement " signée par certains procureurs inscrits au tableau de cette cour qui s'intitulent " Procureurs du procurer-général *pro Regina* (Attorneys for Attorney General " pro Regina) s'attribuant par là un pouvoir ou mandat que la loi ne reconnait " pas, attribution exorbitante qui n'a pu donner aucun caractère valable à la dite " information, mais qui, au contraire, l'a frappée de nullité radicale.

" 5e. Parceque le dit bref a été irrégulièrement et illégalement émané sans " fiat, *præcipe* ou demande valable d'icelui par une ou des personnes ayant autorité de demandeur l'émanation d'un bref d'assignation pour et au nom de Sa " Majesté.

" 6e. Parceque la dite information, outre la nullité dont elle a été frappée en " conséquence de l'émanation irrégulière et illégale du dit bref d'assignation est " par elle-même irrégulière, nulle et ne peut produire aucun effet en conséquence de ce qu'elle n'a pas été signée par le procureur-général pour le Bas-Canada, ni par aucune personne ayant le droit de signer ou produire semblable information, pour et au nom de Sa Majesté.

" 7e. Parcequ'il résulte de ce que dessus que le dit bref d'assignation et la " dite information étant irréguliers, inefficaces et nuls, les défendeurs n'ont pas " été valablement assignés, la signification qui a été faite du dit bref et de la dite " information n'ayant aucune efficacité ou caractère légale n'a pu saisir le tribunal " de la demande présente ou information, et forcer les défendeurs à y répondre, " pourquoi les dits défendeurs concluent à ce que par le jugement à intervenir " il soit déclaré qu'ils ne sont pas tenus de répondre à la présente information " ou demande; que le dit bref d'assignation et la dite information sont irréguliers, " ne peuvent produire aucun effet légal, sont nuls et de nul effet et au besoin " soient annulés, déclarés nuls et mis au néant, et à ce que partant, congé soit accordé aux défendeurs de la dite information ou demande avec dépens, contre " qui de droit et entre autres contre les procureurs qui ont ainsi illégalement " fait émaner le dit bref ou produit la dite information en s'attribuant illégalement des pouvoirs qu'ils n'auraient pas, ce qui donne aux défendeurs le droit " de réclamer contre aux une condamnation personnelle aux dépens; les dits " défendeurs se réservant tout recours même ultérieur contre les dits procureurs à cet effet."

Après la production de cette exception à la forme ainsi motivée; le dit Honorable George Etienne Cartier procureur-général *pro Regina* répondit spécialement comme suit:

" Le demandeur pour réponse à l'exception à la forme plaidée par les défendeurs, dit: que les allégations contenues en la dite exception sont fausses et " mal fondées, que l'action est une poursuite civile ordinaire, que le procureur-général a le droit de constituer procureurs *ad lites* comme tout autre partie, " que le défendeur n'a aucune autorité ni droit de contester le droit au demandeur de se faire représenter par procureurs.

" Que l'un des avocats qui ont signé le *præcipe* et les autres documents produits en cette cause, est le Solliciteur-Général de sa Majesté pour le Bas-Canada, savoir : L'Honorable Louis Siméon Morin.

" Que la dite exception à la forme est donc mal fondée.

" Pourquoi le Demandeur conclut au débouté de la dite exception à la forme " avec dépens.

" Montréal 25 janvier, 1862.

(Signé) MOREAU, OUIMET ET MORIN,
Avocats du Proc. Général.

Après l'audition au mérite sur la contestation liée sur cette exception à la forme, la cour a rendu son jugement motivé comme suit :

The court having heard the parties by their Counsel upon the "*exception à la forme*" produced and fyled by the said defendants in this cause, examined the proceedings, and having upon the whole duly deliberated; considering that it does not appear by the evidence of Record that the Attornies and Counsel, Messrs Moreau, Ouimet and Morin, who signed the Fiat and declaration or information in this cause, had any power or authority from the Attorney General George E. Cartier to sign or subscribe the name of the said Attorney General; considering that the said Attornies and Counsel, Messrs. Moreau, Ouimet and Morin, had no power or authority in law to appear for the said Attorney General, and that the said Attorney General could not by law and the practice of this Court appear by Attorney in this cause; doth maintain the said *exception à la forme*, and doth dismiss the action with *costs*.

Moreau, Ouimet et Morin, Attorneys for Informant.

Loranger et Frères, Attorneys for defendants.

(P. R. L.)

A similar judgment was also given on the same day, upon the same question, upon the information of the Honble. G. E. Cartier, Atty. Genl. *pro Reginâ*. Loranger, No. 438.

(P. R. L.)

MONTREAL, 28TH JUNE, 1856.

Coram DAY, J., SMITH, J., MONDELET (C.) J.

No. 1735.

Syme et al vs. *Hevard*.

AMENDMENT—COSTS.

HELD:—That on the granting of a material amendment of the declaration of the plaintiffs, after issue joined and pending the *Enquête*, the amendment is allowed on payment of full costs, as in a cause settled at the stage where the cause then was.

A full report of the final judgment in this cause is to be found in 1 L. C. Jurist, p. 16. Pending the *enquête*, the plaintiffs moved to amend their declaration by adding thereto the several paragraphs annexed to their motion. The defendant did not appear at the hearing of the motion, nevertheless the Court granted the motion on payment of full costs as in an action settled at the stage where the case then was.

Syme et al. vs. Heward.

The following are the words of the judgment as recorded :

"The Court having heard the plaintiffs by their counsel upon the motion of the said plaintiffs of the 29th June instant, to be permitted to amend their declaration in this cause fyled, by adding thereto the several paragraphs annexed to the said motion, the defendant not having appeared at the hearing upon the said motion; having examined the proceedings, and having deliberated thereon, doth grant the said motion upon payment of costs, as in a cause settled after the inscription for *enquête* and No. 9 of the tariff; distraction of which costs is awarded to Messrs. Bethune and Dunkin, attornies for the Defendant, upon their motion to that effect."

Abbot & Dorman, for plaintiffs.

Bethune & Dunkin, for defendant.

(F. W. T.)

MONTREAL, 10TH NOVEMBER, 1862.

Coram SMITH, J.

No. 882.

Trobridge et al. vs. *Morange.*

HELD :—1st. That the Colony of Barbadoes is a "foreign country" within the meaning of the 8th Section of Ch. 87 of the Consolidated Statute of Lower Canada, and, consequently, that a party arrested under *Capias ad Respondendum*, founded on a debt alleged in the Affidavit to have been contracted in Barbadoes, will be discharged.

2nd. That a notice served on Saturday between 4 and 5 p.m., of a petition for release from custody to be presented on Monday at 10 a.m., is sufficient.

This was a petition by the defendant, who was arrested under a writ of *Capias ad Respondendum* issued at the suit of the plaintiffs, who alleged in the Affidavit that the debt was contracted in the Colony of Barbadoes, praying to be released from custody, on the ground that the cause of action arose, as alleged in the Affidavit itself, in a foreign country.

R. Laflamme contended, for the plaintiffs, that Barbadoes being a Colony of Great Britain could not be regarded as a foreign country, within the meaning of the 8th Section of Ch. 87 of the Consolidated Statutes for Lower Canada; and further contended that the notice they had received was insufficient, the service having been made between 4 and 5 p. m. on Saturday, and the petition presented at 10 a. m. on Monday.

Per Curiam :—I have no doubt that, as regards Canada, Barbadoes is a foreign country within the meaning of the statute, although politically it may not in strictness be so; I also hold the notice to be sufficient; and I must consequently grant the petition.

Petition granted.

R. & G. Laflamme, for plaintiffs.

Bethune & Dunkin, for defendant.

(S.B.)

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, JULY, 1862.

Coram SIR L. H. LAFONTAINE, BART., C. J., DUVAL, J., MEREDITH, J., MONDELET (C.), A. J., AND AYLWIN, J. (*dissentiente*)

No. 89.

DENIS GAHERTY,
Plaintiff and Incidental Defendant in the Court below,
APPELLANT;

AND

DAVID TORRANCE ET AL.,
Defendants and Incidental Plaintiffs in the Court below,
RESPONDENTS.

LAW OF CARRIERS.

HELD:—1st. That, in general, a consignee who complains of short delivery or damage of goods ought at once to protest, in order that the disputed facts may be investigated.

2nd. That, in general, a survey ought to be had, without delay, upon goods delivered in a damaged state, and this after notice to the parties interested, especially in cases where the consignee intends to retain the goods.

3rd. That, in the case in question, as the respondents were not bound, and did not intend, to keep the goods; and as the extent of the loss could be rightly ascertained by a public auction; and as the damage was admitted; a protest and survey was unnecessary.

4th. That the burden of proof was upon the appellant to show that the damage was occasioned by the dangers of navigation, which he had failed to do, and that the preponderance of evidence was in favor of the respondents.

This was an appeal from a judgment of the Superior Court, which will be found reported in the 4th volume of the Lower Canada Jurist, page 371. The action was brought for balance of the freight of 4,000 bags of salt, carried by the barge "New Liverpool" from Quebec to Montreal, and claimed £87 17s. 1d.

The defendants met the action with a special plea and incidental demand, alleging loss sustained by them to the amount of £80 0s. 0d., occasioned by the total loss of 283 bags of the salt, and the damage of 617 bags by water,—the whole owing to the negligence of the plaintiff, and further owing to his carrying part of the cargo on deck. After proof and hearing, the following judgment was rendered in the Court below by the HONORABLE MR. JUSTICE BADGLEY:—

"The Court, having heard the parties by their counsel upon the merits, as well of the principal demand as of the incidental demand, and upon the motion of the defendants and incidental plaintiffs of the 19th October last, to reject the deposition of Thomas F. Kelly, a witness produced by plaintiff, examined the proceedings and evidence of record, and deliberated thereon, doth reject the said motion, and, considering that the said plaintiff hath not established the averments of his declaration, to wit, among others the said custom of trade and the said consent by the said plaintiff alleged to have been given by the defendants to the carriage of the said salt on the deck of his said schooner "New Liverpool" from Quebec to Montreal, and that the loss incurred upon the salt aforesaid, shipped by him at Quebec aforesaid on board of the said schooner for delivery to the said defendants, was caused by the act of God and the perils of navigation, as severally set out in the said declaration; and considering that it is

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established, that the damage incurred to the defendants by the short delivery to them, and by the loss suffered by them by reason of the said salt, amounts to a sum of one hundred and thirty-seven pounds six shillings and five pence, exceeding the sum of eighty-seven pounds and seventeen shillings, the balance of the freight and charges of the said salt so shipped by the said plaintiff and by him demanded in this cause, to wit, exceeding the said balance by the sum of £49 9s. 5d., and which said total amount of damage so exceeding the said balance the said defendants have by their plea in this cause fyled set off and compensated, and claimed to set off and compensate against the said plaintiff's demand; and considering that the said defendants and incidental plaintiffs have, by their incidental demand in this cause fyled, demanded to be paid by the plaintiff and incidental defendant the said sum of forty-nine pounds nine shillings and five pence, and have established their right thereto, the Court doth dismiss the plaintiff's action in this behalf with costs, and doth maintain the said incidental demand, and doth condemn the said plaintiff and incidental defendant to pay and satisfy to the said defendants and incidental plaintiffs the said sum of £49 9s. 5d., with interest from the fifteenth of February, 1859, date of the fyling of the said incidental demand, and costs distraits to Messieurs Torrance and Morris, attornies for the said incidental plaintiffs."

In appeal, *Dunlop, C. J.*, of counsel for appellant, argued that the judgment ought to be reversed, for the following reasons:—

First,—That there was a special permission given to, and agreement made with the owner of the barge during that voyage that a portion of her cargo of salt might be taken on deck.

Second,—That it was proved in evidence that it is also the custom of the trade for barges such as the *New Liverpool* to take portions of cargo on deck between Quebec and Montreal.

Third,—That there was sufficient evidence in the record to show that all the damage sustained by the cargo during the said voyage was caused by the dangers of navigation, which were specially excepted in the bill of lading.

Fourth,—That there was no evidence at all that any damage was sustained by that portion of the cargo which was carried on deck.

Fifth,—That there was no evidence to show that any quantity of the cargo was actually carried on deck.

Sixth,—That the liability of a carrier to deliver the goods intrusted to him in good order, or to account for the damage in such a way as to exonerate him from his liability, ceases on the delivery to the consignee; and, in this case, the respondents accepted the cargo without a word of objection, without survey or protest, and that it was not proved that the sale, which was alleged to have taken place a week or ten days after the delivery of the cargo, was with the knowledge of the appellant, or for his account and risk.

The counsel, therefore, submitted that the appellant had fully established the averments in his declaration in the Court below, not only as to the express agreement to carry a portion of her cargo on deck, but also as to the custom of the trade; and further alleged that all the damage sustained by the cargo on

the said voyage was from the exceptional charges provided for in his contract, and that his freight was fairly earned.

The counsel further submitted that, by the delivery of the cargo to the respondents, on the wharf, as was customary, and by their taking such delivery without survey, protest or objection, the respondents had waived all right to any claim for damage, even if it had arisen from causes for which the carrier was liable.

Morris, Alexander, for respondents, contended that the judgment was just and ought to be upheld, for the following among other reasons:

1st. There was no evidence to show that the damage sustained was occasioned by any cause covered by the exceptions contained in the bill of lading. The *onus probandi* was upon the carrier to establish this (Flanders on Shipping, 262,291), and having failed to do so he must be held for the damage.

2nd. Because a portion of the cargo was carried on deck contrary to the terms of the bill of lading, which imported that the goods were to be carried under deck and that salt ought so to be carried. Abbott, 426; Valin, Com. Ord. Mar., 620, 621; Flanders, 209, 210. Because, moreover, the deck portion of the cargo, having, according to the protest of the Captain, been exposed to waves washing over the vessel, the presumption was that the damage arose from the exposure of the deck load, a presumption which was corroborated by the testimony of Millar as to the condition of the cargo when being delivered.

3rd. Because no special agreement, apart from the bill of lading, to carry on deck had been proved, but the reverse, and, even if there were, parol evidence to explain the bill of lading as a contract was inadmissible. Flanders, 454.

4th. Because no custom to carry on deck had been proved.

5th. Because the loss arose from carelessness and negligence on the part of the appellant and his servant the captain, whose conduct during the delivery of the salt was suggestive of the probable cause of the damage.

6th. Because the accounts given by the captain of the causes of the damage were irreconcileable and contradictory. According to the protest the damage arose from waves washing over the barge, but, according to his testimony, it was from leakage, so much so that there were, he pretends, 3 to 3½ feet of water in the hold, while yet, strange to say, only the lower tiers of a cargo so soluble as salt were, as he asserts, damaged.

He further contended, that the holding in the case of *Swinburne* vs. *Massue*, (Stuart's Reports, pp. 569,) cited by the Hon. Mr. Justice Aylwin, requiring notice of the damage to be given by the carrier within a reasonable time, was not applicable to the present case. There the goods were received without objection, and the loss of portion of them was not declared for several months, while here all parties were aware of the damage, the protest of the captain declared it, and there was no need to hold a survey which could not have altered the state of the facts.

After deliberation, the judgment of the Court below was confirmed with costs.

MR. JUSTICE AYLWIN dissenting, said:—

The suit of the appellant was to recover £37 17s. 1d., for freight and port-

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or canal charges on 4000 bags of salt agreed to be carried by the barge *New Liverpool* from Quebec to Montreal for the respondents. The defence on the part of the respondents was, that the appellant had, in breach of his contract, so carelessly and negligently conducted himself that 268 bags of salt of the value of £70 15s. were wholly lost, and 617 bags were so much damaged by water that, after a survey and examination to prevent their becoming a total loss, the same were sold at auction, and realized only £42 10s., the same if in a sound condition being then worth £154 5s., so that there was a loss on these 617 bags of £109 5s., owing to the negligence of the appellant. The respondents have also set up an incidental demande, for the loss sustained as alleged. It is established that the barge met with very bad weather during that voyage upwards from Quebec, that the vessel leaked in consequence of the bad weather, and that there were 3 to 3½ feet in her hold, of water. That the whole of the damage to the cargo was from stress of weather, and was almost confined to the lower tiers of salt in the hold. Upon the arrival of the barge, the usual precaution was taken to enter and extend her protest before Isaacson and Colleague, notaries. It has been urged that the damage which was occasioned to the salt, arose in consequence of there being a deck load, used in her conveyance; and that therefore there was carelessness and negligence on the part of the shipper. It is in evidence that the plaintiff stated at the time that he could not take the whole of the salt in the hold of the barge, and that Mr. McDougall, the party who was acting on the part of the respondents, answered:—"You can take a fine lot; so that you clear the ship, you can put it where you like." It is not customary in taking cargoes between Quebec and Montreal to specify in the bills of lading the portions of cargo which may be under deck or above deck. The said barge "New Liverpool" could not carry a full cargo of salt, in the hold under deck. There is not one in twenty of barges on the river that can carry a full cargo in the hold; and to put them in proper trim they must have a portion of the cargo on deck. It is proved that in Messrs. Torrance & Co.'s employ they would not allow a cargo to be carried without putting a portion on deck. In my opinion, there is nothing to shew that there was any thing improper in resorting to a deck load, and that, therefore, the defence set up on the part of the respondents, is not made out. It is said that the master was intoxicated at the time of the landing of the cargo, and it was improperly handled; but there is nothing to shew that any specific given number of the bags was lost or injured by misconduct. It is proved that there was no objection made to the master by the defendants as to the carrying of the said salt on deck. There was no survey held by them as to improper stowage or otherwise, nor was the master ever notified or protested by the defendants for having carried or stored any cargo in an improper manner. No protest or objection was ever set up by the respondents upon any ground whatever; no survey whatever was ever given of the cargo after its delivery, and it is proved that the respondents proceeded to sell the cargo a week or ten days after its delivery, without any knowledge of the appellant or the master, or without any statement that they held, to undertake the sale for his account and risk; though the account sales was rendered by Mr. Shipway, the auctioneer to the respon-

dents, there is nothing on the part of the respondents to have any statement of this transaction brought to the knowledge of the appellant until the evidence is brought up at the trial. It is admitted that ten pounds were actually paid by the respondents in part payment of the freight which were received by the appellant, and it is only after more than a year that any objection whatever is attempted to be set up by the respondents.

"The liability of a carrier to deliver the goods intrusted to him in good order, or to account for the damage in such a way as to exonerate him from his liability, ceases on the delivery to the consignee; and in this case the respondents accepted the cargo without a word of objection, without survey or protest, and it is not proved that the sale, which is alleged to have taken place a week or ten days after the delivery of the cargo, was with the knowledge of the appellant or for his account and risk as correctly stated in the appellant's factum.

It seems to me that under the law of shipping,—"Toute action en réparation du dommage souffert par la marchandise est non recevable si cette marchandise a été reçu sans protestation," as stated by Boulay Paty, Vol. 4, 1605 and 1606. Si celui à qui les marchandises ont été addressées, les a reçues sans se plaindre de l'état dans lequel elles étaient, ou ne peut plus alleguer qu'elles sont endommagées, Boulay Paty, Vol. 2, p. 325. Il ne serait pas juste d'obliger le Capitaine à prouver après un an qu'il a réellement et de fait délivré les marchandises. Il serait d'une trop dangereuse conséquence pour la navigation et le commerce maritime que des actions de cette nature eussent la durée ordinaire. Boulay Paty, Vol. 2, p. 602.

I cannot understand how a defence like that which was used by the respondents can be held to be valid, unless there be proof of protest and survey, after the lapse of a year and part payment of the freight, and I am therefore of opinion that the judgment of the Court below should be reversed, and that the appellant should recover the amount of freight; as actually delivered by the number of bushels proved in evidence, less £10 already paid by the respondents. But in this opinion the majority is against me, and the judgment will be confirmed.

Mr. Justice Meredith rendering the judgment of the Court observed:

In this case I desire to observe, that we do not impugn or even question the doctrine laid down in Massue and Swinburn.

On the contrary, if the facts in evidence before us were the same as those in Massue and Swinburne, I would be guided by that case.

Where a consignee has reason to complain on account of the short delivery of his goods, he ought at once to protest, in order that the disputed facts may be investigated, whilst the truth can thus be ascertained, and so as to give the masters and ship owners an opportunity of recovering any recourse to which they may be entitle[illegible]

In like manner, when goods are delivered in a damaged state, if by means of a survey, information can be obtained as to the cause of the damage, a survey should be held without any delay, and after due notice to the parties intersted.

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Such a survey is particularly necessary where the consignee intends to keep the goods himself, because in that case, even if the survey cannot throw any light upon the cause of the damage, it may be the best mode of ascertaining the extent of such damage.

In the present case there was not, and could not be, any dispute as to the fact that the master of the "New Liverpool" had failed to deliver a considerable quantity of the salt which had been shipped on board his barge for the respondents. The plaintiff, in his protest and in his declaration, in effect admits the short delivery of a part of the salt; the real difficulty between the parties being, not as to whether there was or was not a short delivery of part of the cargo, but as to the cause of the short delivery; the existence of which has not only been clearly proved, but was admitted by both parties.

The plaintiff in the Court below contended that the damage of which the defendants complained was caused by the dangers of the navigation, which the defendants denied, and upon this matter in relation to which they thus differed a survey could not have thrown any light which could not be obtained quite as well by other means. And in the present case, as the consignees did not intend to keep, and were not bound to keep, the damaged salt, the best mode of ascertaining the extent of the damage was by a public sale. Even if a survey had been held, any opinion expressed by the surveyors as to the diminution in the value of the damaged salt, could not outweigh the proof of the actual loss established by the result of the public sale.

I therefore think that the consignees (the respondents) cannot be held to have lost their claim merely in consequence of the failure, on their part, to protest, or in consequence of the want of a survey.

Viewing the claim of the consignees (the respondents) independently of the objection to which I have adverted, the burthen of proof was upon the plaintiff to show that the damage of which the defendants complained was caused by the dangers of the navigation; and I think not only that the plaintiff has failed to satisfy the obligations thus resting upon him, but that, as to this point, the preponderance of evidence is clearly in favor of the defendants, and I therefore am disposed to maintain the judgment of the Court below.

It has however been said that we would be guilty of inconsistency if we dismissed the demand of the plaintiff and did not, at the same time, dismiss, the incidental demand of the defendant. That would be true if we dismissed the principal demand of the plaintiff for want of diligence, but we dismiss that demand, not for want of diligence, but because the preponderance of proof is in favour of the defendants; and the evidence is exactly the same on both issues.

The defendants have, beyond any doubt, suffered damage to the extent of £137,6s. 5d; that sum being the difference between the cost price of the salt, short delivered and damaged, and the proceeds of the sale of the same at public auction. On the issue upon the principal demand we have given the defendants credit for £87 16s. currency, being part of the above sum of £137 6s. 5d. and there appears to me to be exactly the same reason for allowing that part of the defendant's claim urged by the incidental demand that there is for allowing, upon the defendant's exception, the other part of the same claim.

Indeed it seems to me that we should expose ourselves to the charge of inconsistency if we were to allow a part and reject the remainder of a claim, the whole of which rests upon exactly the same footing both as to the pleadings and the evidence adduced. Gaherty and Torrance et al.

At the same time, in confirming the judgment of the Court below, I think it right to observe that, as I view this case, the defendants would have acted more prudently had they given the plaintiff special notice of the sale of the salt; but as the plaintiff has not urged or proved that he has suffered, or is exposed to suffer any damage from the want of such notice, I do not think we ought to make it a ground for disturbing the judgment of the Superior Court.

Dunlop & Browne, for appellants.

Torrance & Morris, for respondents.

(A. M.)

MONTREAL, 27TH NOVEMBER, 1862.

Coram, MONK, A. J.

No. 289.

Whishaw vs. *Gilmour et al.*

HELD:—1. That a letter acknowledging the receipt of a sum of money as a loan, and promising to repay it on demand, with interest, is not a promissory note, within the meaning of the Statute 12th Vic. ch. 22, sec. 81.

2. That in an action for the recovery of the loan as such, and in which the letter is merely referred to as a paper writing *sous seing privé*, given as an acknowledgment of such loan, the prescription of 5 years under the above Statute cannot be invoked.

3. That a loan by a non-trader to a commercial firm is not subject to the limitation of six years prescribed by the Statute 10th and 11th Vic., ch. 11, sec. 1.

This was a hearing on law, on the issue raised by the answers in law fyled by the plaintiff to the defendant's first two pleas. The action was brought by an Esquire against a commercial firm for the recovery of the sum of £3,027 15s. 5d., currency, alleged to have been loaned by the plaintiff to the defendants, and for interest on such loan.

After setting up the contract of loan, the declaration alleged that in acknowledgment thereof the defendants signed and delivered "a certain paper writing "*sous seing privé*," in the following words and figures, to wit:

"Montreal, 30th December, 1854.

"Augustus Heward, Esq.

"Montreal.

"DEAR SIR,—We acknowledge having received from you, for account "of Bernard Whishaw, Esq., of Cheltenham, England, two thousand "five hundred pounds sterling, equal to three thousand and twenty-seven pounds "fifteen shillings and five pence currency (exchange calculated at nine per "cent), being a loan subject to be returned when demanded, and for which we "agree to pay you interest at the rate of seven per cent per annum.

"Yours respectfully,

(signed,) GILMOUR & Co."

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The defendants pleaded, amongst other things, the prescription of five years under the Statute 12th Vic. ch. 22, sec. 31 (contending that the above letter was a promissory note), and the limitation of six years, under the Statute 10 and 11 Vic. ch. 11, sec. 1.

To these two pleas the plaintiff demurred, on the ground (as regards the first plea) that the letter was not a note within the meaning of the Statute, and, even if it were, that the action was brought on the contract of loan, the letter being declared upon merely as an acknowledgment of the loan, and (as regards the second plea) that the loan here was not of a commercial character, the lender being a non-trader, and therefore that the debt sought to be recovered in this cause did not come under the Statute.

The following was the judgment of the Court:

"The Court * * * * considering that the letter or acknowledgment "in writing *sous seing privé*, addressed by the defendants to Augustus Heward, "Esq., dated Montreal, 30th December, 1854, is not a note, according to the "intent and meaning of the Statute 12th Vic., ch. 22, sec. 31, (chapter 64, "section 31 Consolidated Statutes for Lower Canada), and that, consequently, "the said paper writing and acknowledgment *sous seing privé* does not and "cannot in law come under the operation of the aforesaid Statute, as pleaded by "the said defendants in their first plea in this cause fyled; seeing moreover that "the plaintiff's action is based and instituted upon a contract of loan, and not "expressly upon the said paper writing and acknowledgment, *sous seing privé*, "doth dismiss the said plea firstly pleaded by the said defendants. And, con-"sidering further, that it does not appear from the allegations in the pleadings "in this cause that the debt and cause of action upon which the present suit is "brought is or relates to any commercial matter, but, on the contrary, that the "said debt or cause of action results from a contract or loan made by and "between a party not a merchant or trader, and a commercial firm, without "averment or averments that the said loan related to any commercial matter, "business or transaction whatever, doth dismiss the said plea secondly pleaded "by the said defendants; the whole with costs."

Answers in law maintained, and pleas dismissed.

Bethune & Dunkin, for plaintiff.

Rose & Ritchie, for defendants.

(S. B.)

MONTREAL, 20TH NOVEMBER, 1862.

Coram MONK, A. J.

No. 289.

Whishaw vs. *Gilmour et al.*

HELD:—That an action by a non-trader for the recovery of a sum of money alleged to have been loaned to the defendants, a commercial firm, is not susceptible of a trial by jury.

This was a motion by the plaintiff to have it declared that the action was not susceptible of a trial by jury, and claiming to have the words "declaring their option of a trial by jury," contained in the defendants' several pleas, struck out, on the ground that the action was not susceptible of a trial by jury.

The action was brought for the recovery of £3,027 15s. 5d. currency alleged to have been loaned by the plaintiff, who sued as an esquire, to the defendants, who were sued as a commercial firm; and the declaration alleged, that in acknowledgment of such loan the defendants signed and delivered to the plaintiff's agent "a certain paper writing *sous seing privé*," in the following words:

"We acknowledge having received from you, for account of Bernard Whis-"haw, Esq., of Cheltenham, England, two thousand five hundred pounds ster-"ling, equal to three thousand and twenty-seven pounds fifteen shillings and five "pence currency (exchange calculated at nine per cent.), being a loan subject to "be returned when demanded, and for which we agree to pay you interest at "the rate of seven per cent. per annum."

Bethune, for plaintiff, argued, that to bring this case within the statute (one of the litigants being a non-trader) the defendants must show that the debt sought to be recovered was "of a mercantile nature *only*." The action was based on a contract of loan, a description of contract which all writers on commercial law, under our system, classify among the contracts *de droit civil*, as contradistinguished from those which are purely commercial. In the present case the debt may be of a commercial character, as regards the defendants, but it is clearly not so as regards the plaintiff, and as the statute requires that it must be of a mercantile nature *only*, that is, as regards both litigants, it must be conceded that the plaintiff's demand, as set up in his declaration, does not come within the operation of the statute.

Ritchie, shewing cause for the defendants, contended, that the contract here was to be found in the paper writing which is set out at length in the declaration, and was a unilateral contract, binding nobody but the defendants. That such a contract was clearly a commercial one, so far, at all events, as the defendants were concerned. The paper writing in question was moreover a promissory note, and was therefore mercantile or commercial in its character as regards both plaintiff and defendants. But, whether it were or were not a note, the defendants being the only parties bound under it, and it being purely mercantile, as regards them, they were undoubtedly entitled to a trial by jury.

PER CURIAM:—The action being for the recovery of a loan by a non-trader to a commercial firm, the Court is of opinion that the statute does not apply. The contract may be commercial as regards the defendants, but it is clearly not so as regards the plaintiff. Now the statute requires that it shall be of a mercantile nature *only*, that is (as the Court understands) purely so, and as regards both plaintiff and defendants. The instrument evidencing this loan may or may not be a promissory note; but if it be, it does not follow that such a note is of a mercantile character *only*. On the whole, the Court is of opinion to grant the motion.

The following is the judgment of the Court:—

"The Court,—having heard the parties by their counsel, upon the motion of "the plaintiff of the 18th day of November instant, that it be adjudged and de-"clared that this action is not susceptible of a trial by jury, and so far as may "be necessary that the words 'declaring their option of a trial by jury' con-"tained in the prayer of each of the pleas of the said defendants in this cause

Whishaw vs. Gilmour et al.

"be declared to be irregularly entered in such pleas, and be struck out there-"from, with costs; having examined the declaration of the said plaintiff, and the "pleas of the said defendants, the record and proceeding in this cause, and "deliberated; considering that the present action has been instituted for the re-"covery of the sum of £3027 15s. 5d. currency, being for money advanced by "plaintiff, not alleged to be a merchant or trader, to the defendants by way of "loan, at the rate of seven per centum interest until the actual payment of the "capital; considering that there is nothing in the allegations contained in the "pleadings in this cause to show that the said contract of loan was a commer-"cial contract or agreement, or a contract or agreement of a mercantile nature "only; considering, on the contrary, that by the allegations of the pleadings "in this cause, it appears that the said contract of loan was not a commercial "contract, or one of a mercantile nature; seeing that the present action is not "one of a mercantile nature only, and that the issue, in so far as joined therein, "does not involve matters of fact of a mercantile nature only; considering there-"fore that the present action is not one susceptible by law of a trial by jury, "doth grant the plaintiff's motion, and doth order that the words in the defen-"dants' pleas, declaring their option of a trial by jury, be struck from such "pleas, with costs to the said plaintiffs." Motion granted.

Bethune & Dunkin, for plaintiff."

Rose & Ritchie, for defendants.

(S.B.)

MONTREAL, 20TH NOVEMBER, 1862.

Coram MONK, A. J.

No. 668.

"*Her Majesty's Principal Secretary of State for The War Department*,"

vs.

EDMONSTONE, ALLAN & Co.

HELD:—That an action brought by a non-trading Corporation against a commercial firm, for the recovery back of an overcharge on freight, is susceptible of trial by jury.

This was a motion by the defendant that the words "hereby declaring his option and choice of a trial by jury," contained in the prayer of the plaintiff's declaration, be struck out, on the ground that the action was not susceptible of a trial by jury.

The action was brought to recover from the defendants, as common carriers, the sum of $5,633 64 cy., alleged to have been overcharged by them on the transport and carriage of a quantity of Military baggage, from the ports of Halifax, Nova Scotia, and St. John, New Brunswick, to the port of Montreal; the total amount of freight charged by the defendants, who refused to deliver any portion of the baggage without payment of the whole freight, having been paid under protest.

Ritchie, for defendant, argued that the present action was that known to the law as the *actio condictio indebiti*, and, in effect, sought to recover back money alleged to have been illegally exacted from the plaintiff; in other words, extorted without legal or sufficient cause. That the cause of action was therefore clearly

Secretary of State vs. Allan & Co.

not a debt, promise, contract and agreement of a mercantile nature only, and consequently did not come within the statute, allowing the trial by Jury in certain special cases. *Bethune*, shewing cause, contended that the action was brought simply for the recovery back of an overcharge of freight, and not for money unlawfully extorted. That the only issue tendered by the Declaration was one of *quantum meruit* as regarded the amount of freight, to which the defendant was entitled, and that the debt sought to be recovered here was one purely of a commercial character.

PER CURIAM:—I have looked carefully into this case and consulted the various precedents applicable to it, and I am clearly of opinion that it is susceptible of a trial by Jury. The action is based on a contract of Affreightment, and is brought simply to recover back a sum of money alleged to have been overcharged under such contract. We have no question here about fraud or extortion, but one of a purely commercial character, namely, how much was the defendant reasonably entitled to for the carriage of the baggage referred to in the Declaration. The motion must therefore be rejected.

The following is the judgment of the court:—"The Court having heard the parties by their Counsel upon the motion of the defendants of the sixth day of November instant, that the following words, to wit, "hereby declaring his option and choice of a Jury trial," which appear in the conclusions of the plaintiff's Declaration, be struck out and held for nought with costs, for the reason set out in the said motion, having examined the Declaration and Record, and having deliberated, considering that the present action has been instituted for he recovery from the defendants, of the sum of $5,633.64, alleged to have been paid by plaintiff to the defendants, under protest, upon a contract to transport, carry and convey certain property and effects as stated in plaintiff's declaration; seeing that the sum so claimed is declared to have been paid in excess of what the defendants were reasonably entitled to demand and receive for the carriage, conveyance and transportation of the property and effects mentioned in the plaintiffs' declaration; considering that the contract and agreement for the carriage and transportation of the aforesaid property and effects was a commercial contract and agreement or a contract and agreement of a mercantile nature; considering that an action to recover (*répéter*) a sum of money alleged to have been paid under protest and in excess upon the contract set forth in the plaintiffs' declaration is by law a suit or action of a mercantile nature only, and cannot be maintained without proof of the contract, and of the value of the services, work and labor done and performed under such contract; seeing therefore that the present action is one susceptible by law of a trial by Jury, doth adjudge that the defendants take nothing by their motion, with costs to the plaintiff."*

Motion rejected.

Bethune & Dunkin, for plaintiffs.
Rose & Ritchie, for defendant.
(S.B.).

* On the 1st Dec., 1862, the defendants moved the Court of Queen's Bench for permission to appeal from the above judgment, and on the 3rd Dec., 1862, the application was refused, on the ground that the case was clearly susceptible of trial by Jury. [Reporter's Note.]

MONTREAL, 31 MAI, 1861.

Coram MONK, A. J.

No. 494.

JOEL LEDUC,

Demandeur ;

vs.

DAME JULIE TOURIGNY DITE BEAUDIN,

Défenderesse.

Jugé :—Que, suivant la jurisprudence du Bas-Canada, le vendeur à terme a le droit de saisir entre les mains de son acheteur en déconfiture la marchandise vendue.

Le demandeur, qui est un marchand de fleur de Montréal, alléguait dans son action que le 29 novembre dernier, il avait vendu au mari de la défenderesse, quarts de fleur avec un terme de crédit de trois mois, pour le prix de $275.90 ; que le délai convenu était expiré, et que plusieurs des quarts n'étaient ni entamés, ni ouverts, mais se trouvaient les mêmes en nature et portaient encore la marque du vendeur; qu'enfin, le mari de la défenderesse était décédé insolvable et en déconfiture le 27 février dernier, cinq jours avant la saisie, laissant la défenderesse en possession de ces quarts de fleur encore intacts. Puis, suivant les conclusions ordinaires d'une saisie conservatoire, à savoir, que les quarts de fleur en question, soient saisis et arrêtés pour être ensuite vendus suivant le cours de la loi en satisfaction de la créance privilégée du demandeur.

La défenderesse rencontra cette action par une défense au fonds en droit, soutenant que la voie de saisie conservatoire n'existe pas sous l'article 177e de la Coutume de Paris, mais seulement sous l'article 176e c'est-à-dire, dans le seul cas de vente sans jour et sans terme : qu'il était vrai que l'article 177e accord un privilége au vendeur à terme sur la chose vendu et encore en la possession de l'acheteur ; mais qu'il ne pouvait l'exercer que lorsque la marchandise vendue était saisie par d'autres créanciers, en se pourvoyant par la voie d'opposition afin de conserver sur les deniers ou par la voie d'opposition, afin de distraire sur la chose elle-même, pour être ensuite vendue en paiement de sa créance ; qu'enfin tout en supposant que l'article 177e accorderait la voie de saisie pure et simple, ce ne pourrait être que dans le cas où elle serait saisie par d'autres créanciers ; que même en admettant qu'elle l'accorde dans toute autre circonstance, par exemple, lorsque le terme de paiement est expiré ou que le débiteur est devenu insolvable et en déconfiture, qu'elle ne pouvait plus être exercée sous notre législation actuelle et qu'elle était abrogée par les statuts.

Lors de l'argument qui eut lieu devant son Honneur Mr. le juge Monk, un grand nombre d'autorités furent citées, tant à l'appui de la défense au fonds en droit qu'au soutien de la procédure adoptée par le demandeur.

Pour la défenderesse, Mr. Girouard dit que le texte de l'article 176e de la Coutume de Paris, en vertu duquel le demandeur dit avoir procédé, était loin de permettre la saisie conservatoire dans un cas comme celui-ce, c'est-à-dire, dans un cas où l'acheteur est en paisible possession de la marchandise vendue et qu'il n'est pas troublé par ses créanciers. Cet article est ainsi conçu : " Et néanmoins, " encore qu'il eût donne termé, si la chose mobiliaire se trouve saisie sur le débi- " teur par autre créancier, peut empêcher la vente et est préféré sur la

" chose aux autres créanciers." La Coutume pose nettement le cas où le vendeur peut réclamer la chose vendue, c'est lorsqu'elle se trouve saisie sur le débiteur. Elle en fait une condition *sine qud non*, et c'est ce que l'on doit entendre par ces mots: " si la chose mobiliaire se trouve saisie sur le débiteur par " autre créancier."" Et la seule manière d'empêcher la vente d'une chose mobiliaire saisie, c'est de former une opposition afin de distraire. C'est d'ailleurs dans ce sens que Pothier interprète ces mots de la Coutume: " il peut empêcher " la vente," c'est-à dire, continue-t-il, " former opposition à la saisie et à la " vente, non pour revendiquer la chose dont il a cessé d'être le propriétaire, mais " pour être payé sur le prix par privilége (Coutume d'Orléans, art 458, page 785). Il est vrai que peu de commentateurs vont aussi loin que Pothier, peu soutiennent comme lui, qu'il n'y a que la voie d'opposition, qui serait pourtant la plus naturelle. Il y en d'autres en effet, et c'est le plus grand nombre, qui accordent au vendeur la voie de saisie sur l'acheteur; mais ce n'est que lorsque la marchandise vendue se trouve saisie par d'autres créanciers; sous ce dernier rapport ils sont d'accord avec Pothier, et font de ce fait une condition absolue. " A présent," dit Tronçon sur l'article 176 et 177 de la Coutume de Paris, page 426, " l'usage de la Coutume est tel, qu'il a été jugé par arrêt " solennel, prononcé en robes rouges, le 12 avril, 1588, que, se trouvant la chose " saisie sur le débiteur par autre créancier, en ce cas que celui l'a vendue, nonobs- " tant qu'il eût donné terme de payer, ne laisse pas d'être fondé à empêcher la " vente jusqu'à ce qu'il soit payé: comme étant préférable la chose à tous autres " créanciers, ce qui est la distinction qu'il faut apporter au dit article 176."

Chopin, un autre ancien commentateur de la Coutume de Paris, enseigne également qu'il faut qu'il y ait saisie sur le débiteur par un autre créancier, pour pouvoir réclamer la marchandise vendue et ainsi saisie. " Mais," dit-il, vol 1er, page 378, § 14, " cette observation et pratique française et ancienne n'a " lieu en celuy qui vend la marchandise et n'est point encore payé par l'acheteur: " *car en quelque sorte qu'un créancier de l'acheteur fait saisir les marchandises*, le " vendeur luy est préféré, à cause que la marchandise demeure toujours la sienne, " jusques à ce qu'il est payé, ou qu'il ait eu caution, ou soit autrement satis- " fait. Car l'opinion D'Ulpien n'a point été suivie, que le prix de la chose vendue " à crédit passe en prest de deniers, et que le vendeur est sujet à contribution (1)

" Mesme le Parlement de Paris a ordonné que tel vendeur serait préféré à tous " autres, encore qu'ils fussent premiers saisissants, par arrêt de Pâques ou du " dousième jour d'avril, 1558, à quoi se rapporte la Coutume de Paris, articles " 176 et 177.

D'Espeisses (Œuvres, vol. 1er, page 29) dit:— " Et pour cet effet, [illegible] dé- " confiture des biens de l'acheteur, le vendeur a droit de faire *distraire de la* " *saisie générale* les possessions vendues, pour en faire ordonner la vente séparé- " ment, et sur les deniers qui en proviendront être payé du principal et intérêts " par préférence à tous les autres créanciers."

Brodeau, sur l'article 177 de la Coutume, soutient la même doctrine: " En cet article," dit-il, " qui a esté adjousté pour l'advenir, sans préjudice du passé,

(1) Le privilége du vendeur à terme en, effet, n'est pas du droit civil, mais de la Coutume.

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" est comprise la 2e partie de la distinction entre la vente de la chose mobilière " non payée, faits sans jour et sans terme; (auquel cas le droit de suite a lieu " partout, et la vendication, *ou réclamation* à faute d'être payé suivant l'article " précédent,) et celle qui est faite à crédit et à terme; ce qui exclud le droict " de suite et de vendication contre un tiers acquéreur, possesseur de la bonne " foiy, mais quand la chose est extante et *saisie sur l'acheteur, à la requête d'un " autre créancier*, le vendeur peut pareillement réclamer et vendiquer et empêcher " la vente, sinon où elle se trouverait dépérie, gâtée ou diminuée de prix, en " sorte qu'il en souffrit perte, en la vendiquant, il peut en consentir la vente, à " la charge que sur les deniers en procédans, il sera préféré tant au saisissant " qu'à tous les autres créanciers; et le prix n'étant pas suffisant pour le payment " de sa debte entière et des frais, il demeure créancier de surplus sur les autres " biens du débiteur, pour raison de quoy, il n'a aucun privilége, et ces mots (il " peut empêcher la vente) induisent le droit et faculté de réclamer et vendiquer " et ceux ci (est préféré sur la chose aux autres créanciers) sont au cas de la " vente par justice, laquel lene peut se faire sans le consentement du créancier " vendeur, qui est la vraie interprétation du présent." On conclura peut-être de ces développements de Brodeau, qu'il accorde non-seulement la saisie conservatoire, mais même la revendication. Cependant, en examinant de près le langage dont il se sert on voit qu'ici le mot *revendication* ou *vendication* est pris pour " réclamation." Brodeau, en effet, ajoute presque partout après le mot " revendication " les suivants: " ou réclamation, etc " ce qui impliquerait plutôt la voie d'opposition, puisque partout le savant commentateur suppose la marchandise saisie sur l'acheteur. Il exprime clairement en effet que cette revendication ou réclamation ne peut être exercer que dans le cas de saisie de la marchandise vendue par un autre créancier.

Enfin, à toutes ces autorités, nous joindrons encore celle du *Grand Coutumier*, Férrière, sur l'article 177e, vol. 2e, page 1337, dit: " Dans cet article 177, il " est dit qu'encorequ'il eût donné terme à l'acheteur de payer le prix porté par " le contrat, néammoins, *si la chose par luivendue se trouve saisie sur l'acheteur " par quelqu'un de ses créanciers*, le vendeur en peut empêcher la vente, et *s'opposer* à l'effet d'être préféré au saisissant et aux autres créanciers, en justifiant " que la chose lui appartenait et qu'il est véritablement créancier du prix, au " moyen de la vente qu'il en a faite à terme à l'acquéreur."

Plus loin, pages 1388-1339, il ajoute: —" La vente étant faite à crédit et à " terme, le vendeur n'a que le droit de préférence sur les créanciers de l'acheteur " *qu'auraient saisie et exécuté la chose vendue*, mais il n'a pas le droit de revendi- " cation et de suite, parcequ'il n'en est plus le maître, s'étant confié à la foi de " l'acheteur, *res abiit in creditum*.

D'après le texte même de la Coutume et l'opinion de tous ces commentateurs, qui font autorité devant nos tribunaux, il ne paraît pas douteux que le Demandeur en cette cause, qui a pratiqué une saisie sur sa marchandise vendue et non payée sans qu'elle fut saisie par aucun des créanciers de l'acheteur, a dépassé les droits et les privilèges que la Coutume a créés en faveur des vendeurs à terme. Il lui fallait attendre qu'elle fut saisie, et alors il aurait pu exercer son privilége et de-

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mander que les quarts de fleur fussent vendus à son profit, par préférence à tous les autres créanciers saisisants.

Enfin, tout en admettant que l'article 177e de la Coutume justifierait la voie de saisie conservatoire, telle que créée dans cette cause, il semble qu'elle ne peut plus être invoquée par nos marchands, et qu'elle est abolie par notre législation. La saisie pratiquée en cette cause n'est rien autre chose, en effet, qu'une saisie, arrêt simple que l'on déguise sous le nom de *saisie conservatoire*. C'est le même mandat et la même exécution. Or, voici dans quelles circonstances nos status permettent la saisie arrêt: "Nul bref de saisie-arrêt avant contestation et juge-"ment, (excepté dans le cas de dernier équipeur, suivant l'usage du pays), ne "sera émis pour saisir et arrêter les biens, créances, et effets de quelque nature "que ce soit, d'aucune personne quelconque, entre les mains du propriétaire, du "débiteur, ou d'un tiers, excepté, etc." Le statut énumère ici le cas de recèlement ou de départ soudain du Bas-Canada, dans le but de frauder les créanciers. Comme on le voit, le statut est formel," "nul bref de saisie-arrêt, etc." L'intention de la législature est donc d'empêcher l'émanation d'une saisie-arrêt hors des cas prévus, spécialement par le statut même dans le cas de privilège, et cette intention est tellement manifeste, que la voie de saisie au dernier équipeur est expressément réservée. Mais aucune exception n'est faite en faveur du vendeur à terme, et il doit, comme tous les autres créanciers, faire preuve sous serment que le débiteur est sur le point de laisser la Province ou de receler ses effets ou qu'il refuse de faire une cession de biens ou de compromettre, afin de pouvoir saisir et arrêter les biens de son débiteur, même sa marchandise. Ayant remplie ces conditions, il pourra faire vendre la chose vendue, et être préféré sur les deniers à tous les créanciers.

En réponse, Mr. Lesage soutenait que l'Article 177 de la Coutume, en vertu duquel le Demandeur a adopté la voie de saisie conservatoire, est encore en force en cette Province, n'ayant jamais été explicitement abrogé par nos status.

Qu'en vertu, de l'article 177 de la Coutume de Paris, le demandeur a sur ses quarts de fleur vendus avec terme de crédit les mêmes privilèges et moyens conservatoires en réalité qu'aurait un vendeur sans terme, tant que la marchandise est encore intacte en la possession *paisible* de l'acheteur en déconfiture. Dans ce cas la seule différence entre le vendeur sans terme et le vendeur à terme, est que le premier peut révendiquer sa marchandise entre les mains de l'acheteur, et se la faire adjuger en *nature*, tandis que le second ne peut s'en faire adjuger que le prix, *il peut* dit le texte, *empêcher la vente, et est préféré sur la dite chose mobiliaire aux autres créanciers*. Le résultat est le même.

La saisie ne peut avoir lieu au profit du vendeur à terme que lorsque sa marchandise est en la possession *paisible* de son débiteur en déconfiture notoire, c'est-à-dire, lorsqu'elle n'est pas saisie par les autres créanciers. La saisie est en ce cas le seul moyen ouvert au vendeur à terme pour exercer le privilége que la Coutume lui accorde. Si la marchandise vient à passer en main tierce par cession ou vente, il perd son privilége. Dans le cas où la marchandise vendu à terme est saisie par les autres créanciers, le vendeur à terme n'a à la vérité que la voie d'opposition pour être payé par privilége sur les deniers provenant de la vente judiciaire de sa marchandise, mais il n'en est pas moins constant, qu'à dé-

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faut de saisie par les autres créanciers, le privilége du vendeur à terme existe, et que ce n'est point cette saisie des autres créanciers qui le fait naître.

Brodeau, sur la Coutume de Paris, va plus loin dans son commentaire sur l'article 177, pages 431 suivantes, à la page 435 il dit: "Lorsque la chose vendue "se trouve en la possession de l'acheteur, le vendeur à terme peut les vendiquer.

"Et dès avant la réformation de la Coutume de Paris, le vendeur, nonobstant "cession faite aux créanciers, avait droit de faire saisir la marchandise et la faire "vendre à son profit."

Despeisses, Tom. 1er, page 15, adopte la même opinion.

Lamoignon, Recueil des Arrêtés, vol, 2. page 150, parlant du vendeur à terme dit: "Si la chose est encore entre les mains du débiteur, le vendeur la réclame "en nature et est préféré sur cet objet à tous les autres créanciers, *tanquam in "re suâ*; et ce créancier ne peut pas être forcé, pour raison des effets qu'il ré- "clame, d'entrer dans l'accord, composition et remise faite entre l'acheteur et ses "autres créanciers."

Ferrière. Grand Coutumier, Art. 177, page 1339. "Il parait par ce que "nous venons de dire, que celui qui, en vendant, a donné terme, a dans cette cou- "tume autant de privilége sur sa chose vendue que celui qui a vendu sans terme, "à la réseve de la suite entre les mains du tiers-acquereur. Le vendeur à terme "peut empêcher la vente."

Les commentateurs que nous venons de citer ont donc émis l'opinion que le vendeur à terme a droit de revendiquer sa marchandise comme le vendeur sans terme, tant qu'elle est intacte entre les mains de l'acheteur. Ils n'établissent de différence entre les deux que lorsque la marchandise est passée en main tierce, dans ce dernier cas, le vendeur sans terme peut encore la revendiquer, mais le vendeur à terme se trouve alors déchue de son droit.

Nous aurions pu nous appuyer sur ces graves autorités, mais pour plus de sûreté, nous avons préféré nous en rapporter à l'opinion plus modérée de Bourjon qui se trouve nettement formulée et motivée dans son tome 2, page 689., S. 75.

"Le droit de revendiquer la chose cesse, dit-il, si le vendeur a donné terme, "il ne peut empêcher la vente de la chose, parceque l'acheteur en est devenu "propriétaire, puisqu'en ce cas la vente et l'achat ont été parfaits, mais il a un "privilége sur le prix provenant d'icelle: c'est à ce privilége en ce cas auquel se "réduit son droit, privilége fondé sur ce que c'est le crédit qu'il a fait qui a mis "l'effet parmi les biens du débiteur: il a donc été juste de lui accorder un privilége "sur le prix d'icelui, c'est raison écrite, c'est droit commun."

Et c'est ce privilége sur le prix de sa marchandise vendue à terme que le demandeur a prétendu exercer en cette cause. Il n'avait pour se pourvoir d'autre moyen que la saisie, les autres créanciers étant disposés à attendre une cession de biens de la part de leur débiteur. Il faut donc, dans un cas semblable, avoir recours à la saisie, puisqu'il n'y a pas lieu d'exercer ce privilége par la voie de l'opposition.

Ces diverses questions ont déjà été décidées dans un sens favorable aux prétensions du demandeur dans plusieurs causes, rapportés au second volume du *Juriste*, page 98, jusqu'à la page 103, Torrance vs. Thomas: Sinclair vs. Fergusson.

Leduc vs. Tourigny.

En réplique, Mr. Girouard ajouta qu'il pouvait se trouver quelques auteurs qui ne fussent d'accord avec ceux que la défenderesse a cités ; mais qu'il était certain que le plus grand nombre des commentateurs, et surtout de ceux qui font autorité, lui étaient favorables ; qu'il n'y avait aucune contradiction dans leur doctrine, et que si les extraits que le demandeur en avait fait paraissaient contraires au passages cités par la défenderesse, c'était faute de les détacher du reste de la doctrine et de leur prêter une interprétation trop étroite ; qu'en parcourant ces auteurs avec soin, l'on verra clairement qu'ils prennent l'article 177e de la Coutume dans le sens de la défenderesse : qu'enfin, les décisions citées par le demandeur ne pouvaient pas faire loi, ni même être citées comme précédents ; que ces causes n'avaient été contestées ; et que la question restait encore incertaine et non décidée.

Le 31 mai dernier, Mr. le juge Monk débouta la défense en droit, disant qu'il était vrai que les commentateurs cités étaient contradictoires ; mais qu'il devait s'en tenir à la jurisprudence locale de ce pays ; qu'il ne cherchait pas la source ni le fondement de cette jurisprudence ; qu'elle existait ; que depuis un grand nombre d'années les saisies conservatoires de la nature de celle qui a été exécutée dans cette cause, se pratiquaient dans nos cours ; qu'on avait toujours pensé qu'elle étaient valables, et qu'il ne voyait aucune raison suffisante de s'écarter de cette pratique et des décisions déjà rendues par les tribunaux.

Fabre, [illegible] Jetté, pour le demandeur.

Carter [illegible] Girouard, pour le défendeur.

(D.G. et S.L.)

SOREL, 19 FEVRIER, 1862.

Coram BRUNEAU, J.

No 227.

Fréchette vs. *Fréchette.*

JUGE :—1o. Que la renonciation par un enfant mâle à la succession future ne s'étend pas aux legs particuliers. 2o. Que d'ailleurs cette renonciation ne s'applique qu'à la succession *ab intestat*, et non pas à la succession testamentaire.

Le demandeur, par sa déclaration, alléguait les faits suivants :

Que par son testament, fait et reçu en la paroisse de St. Cuthbert, le vingt-trois janvier, mil-huit-cent-quarante-trois, devant Mtre. Chênevert, notaire, et témoins y nommés, François Fréchette, cultivateur, alors de la paroisse de Berthier, en la côte St. Esprit, donna et légua, entre autres legs exprimés au dit testament, au dit demandeur, son fils, tous les droits, priviléges et prétentions que le dit testateur avait et pouvait avoir, demander et prétendre en une terre sise et située en la dite côte St. Esprit, décrite au dit testament, avec de plus ; "Une portion de terre à bois située au dit lieu, (savoir en la dite côte St. Esprit, alors en la dite paroisse de Berthier, actuellement en la dite paroisse St. "Norbert,) contenant trois quarts d'arpent de front sur quarante arpents de pro- "fondeur, tenant devant au nord-est du dit Ruisseau (savoir, le Ruisseau Bona- "venture), en profondeur aux terres Ste. Catherine, d'un côté à Pierre Beau- "chêne et d'autre côte au dit testateur," pour des dites terres et dépendances en jouir, user, faire et disposer par le dit légataire, ses hoirs et ayant causes en pleine propriété, au moyen du dit legs, à la charge des cens et rentes et autres droits et devoirs seigneuriaux auxquelles les dites terres étaient sujettes.

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Que par son dit testament, le dit testateur institua le défendeur, son fils aîné, son légataire unique et universel, lui donnant et léguant tous les biens meubles et immeubles qu'il délaisserait au jour et heure de son décès, après que les différents legs stipulés au dit testament auraient été payés et accomplis, et le nommant de plus exécuteur testamentaire de son dit testament conjointement avec Pélagie Joly, épouse du dit testateur.

Que le dit François Fréchette est décédé le ou vers le quatorze avril, mil-huit-cent-cinquante-sept, et a été inhumé en la dite paroisse St. Norbert, (laquelle est un démembrement de celle de Berthier,) sous le nom de François-Xavier Fréchette, ainsi qu'il appert à l'extrait produit;

Que le dit testament a été dûment enregistré le treize juin, mil-huit-cent-soixante, au bureau d'Enrégistrement du Comté de Berthier, dans lequel sont situés les dits biens donnés dans le dit testament, et dans lequel résidait le dit testateur, lors de son dit décès;

Que par son testament fait et reçu en la paroisse St. Cuthbert, le vingt-trois janvier, mil-huit-cent-quarante-trois, devant le dit Mtre Chênevert, notaire et témoins y nommés, Pélagie Joly, épouse du dit François Fréchette, sus-nommé, donna et légua, entre autres legs exprimés au dit testament, au demandeur, son fils, tous les droits, priviléges et prétentions que la dite testatrice avait et pourrait avoir sur une terre située en la dite côte St. Esprit, décrite au dit testament, avec de plus, "une portion de terre à bois située au dit lieu, et qui est la même que celle ci-décrite et désignée," pour des dites terres et dépendances en jouir, user, faire et disposer par le dit locataire, ses hoirs et ayant cause en pleine propriété au moyen du dit legs, à la charge des cens et rentes auxquelles les dites terres étaient sujettes.

Que par son testament la dite testatrice a institua le défendeur, son fils, son légataire universel, lui donnant et léguant tous les biens meubles et immeubles qu'elle délaisserait au jour et heure de son décès, après que les différents legs stipulés au dit testament auraient été payés et accomplis, et le nommant de plus exécuteur testamentaire de son dit testament, conjointement avec le dit François Fréchette, son époux.

Que la dite Pélagie Joly est décédée au dit lieu de St. Norbrt, le ou vers le cinq juillet, mil-huit-cent-cinquante-neuf, ainsi qu'il appert à l'extrait que le demandeur produit.

Que les dits François Fréchette et Pélagie Joly étaient de leur vivant, et lors de leur décès, propriétaires, chacun pour moitié et par indivis, de la dite portion de terre à bois ci-dessus décrite, et par eux léguée comme susdit, au dit demandeur; la dite portion de terre à bois étant un conquet de leur communauté, et par eux acquise avec plus forte étendue, d'Amable Rondeau, le ou vers le treize mai, mil-huit-cent-quarante-et-un; et qu'ils sont décédés sans avoir révoquée le dit legs par eux fait de la dite portion de terre à bois au demandeur.

Que le défendeur a accepté le dite legs universel à lui fait par ses dits père et mère, et tant en sa qualité d'exécuteur testamentaire des dits François Fréchette et Pélagie Joly, que, comme légataire unique et universel de tous les biens meubles et immeubles délaissés à leur décès, est saisi et possession de la totalité

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des dits biens meubles et immeubles des dits François Fréchette et Pélagie Joly, parmi lesquels se trouvait et se trouve la dite portion de terre à bois sus-décrite et léguée comme susdit par les dits François Fréchette et Pélagie Joly au dit demandeur.

Que la valeur de la dite portion de terre à bois sus-décrite et donnée comme susdit, au demandeur, par ses père et mère, est et était lors du décès de ces derniers, de la somme de cent-vingt-cinq livres cours actuel.

Que le défendeur, quoiqué dûment requis dès avant ce jour, a toujours refusé de faire au demandeur la remis et délivrance de la dite portion de terre à bois sus-décrite et léguée comme susdit au demandeur.

Pourquoi le demandeur conclut à ce que par le jugement de cette cour à intervenir, il soit adjugé que les dits testaments du dit François Fréchette et Pélagie Joly, son épouse, seront exécutés suivant leur forme et teneur, en ce qui concerne le dit legs, fait au demandeur, de la dite portion de terre à bois sus-décrite; qu'il sera fait délivrance au demandeur du dit legs à lui fait par les dits testaments, de la dite portion de terre à bois sus-décrite, ensemble les fruits et revenus d'icelle, à compter de ce jour, et a qu'à défaut par le défendeur de ce faire, sous quinze jours du jugement à intervenir, il sera condamné à payer au demandeur la dite somme de cent-vingt-cinq livres, cours actuel, pour et au lieu et place de la dite portion de terre à bois sus-décrétée, avec intérêt sur icelle à compter de ce jour.

Le défendeur contesta cette action par un exception péremptoire, dans les termes suivants, savoir:

Que longtemps après la date des deux testaments invoqués par le demandeur, mais longtemps avant le décès des dits testateurs, dans et par le contrat de mariage intervenu, le ou vers le neuf de novembre de l'an mil-huit-cent-cinquante-quatre, en la paroisse de St. Cuthbert, devant Mtre. Chênevert et confrère, notaires, entre le demandeur actuel et Dlle. Virginie Beaugrand dite Champagne, son épouse, et auquel furent présents le dit défendeur, le dit testateur et la dite testatrice, père et mère du demandeur, (cette dernière, dûment autorisée de son dit époux,) firent en faveur du mariage alors futur du dit demandeur avec la dite Dlle. Champagne, donation au demandeur, ce acceptant donataire pour lui, ses hoirs et ayant cause (outre plusieurs meubles et animaux, d'un terre décrite au dit contrat de mariage (produit comme partie des présentes en y référant), comme suit: "Une terre sise et située en la paroisse de "St. Norbert, contenant deux arpens et un quart d'arpent de front et plus s'il "s'y trouve, sur la profondeur qu'il y a partant du ruisseau Bonaventure à aller "aux terres de la côte St. Pierre, joignant d'un côté à David Fréchette, avec "toutes les bâtisses construites." "Dont et du tout le dit demandeur a pris jouissance et possession immédiate qu'il a toujours eu depuis et a encore";

Que cette donation fut ainsi faite pour entre autres considérations, "à la "charge par le dit demandeur de renoncer, comme en effet il renonça par le dit "contrat de mariage, volontairement aux successions futures de ses dits père et "mère, sans par lui y revenir, soit directement ou indirectement, sous quelques "causes que ce soit."

Que la portion réclamée par le demandeur en son action est loin de valoir le

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prix qu'il en réclame. Et que la terre qui lui a été donné par son dit contrat de mariage vaut dix fois plus.

Que d'ailleurs les allégués de la déclaration du demandeur sont insuffisants en droit comme en fait pour lui faire obtenir les conclusions de son action.

Le demandeur répondit spécialement à cette exception, comme suit:

Que la renonciation aux successions futures de ses père et mère, faite par les demandeur dans son contrat de mariage, en date du neuf novembre mil-huit cent-cinquante-quatre, produit par le défendeur, ne peut s'étendre au legs particulier de la terre à bois décrit en la déclaration du demandeur, à lui fait par ses dits père et mère dans leurs dits testaments; et d'abondant le demandeur allégue que dans le contrat de mariage de leur fils, David Fréchette, reçu à St. Cuthbert, le vingt-trois juin mil-huit-quarante-neuf, (c'est-à-dire, dès avant celui du demandeur devant les mêmes notaires,) les dits François Fréchette et la dite Pélagie Joly, voulant révoquer un legs spécial fait au dit David Fréchette, dans les dits testaments de ses père et mère, savoir, ceux dans lesquels est écrit le legs de la dite terre à bois au demandeur, firent expressement stipuler au dit David Fréchette qu'il renonçait aux concessions futures de ses dits père et mère, et aux legs qu'ils pouvaient avoir faits en sa faveur, soit par testament, codicile ou autrement, tel qu'il appert au dit contrat de mariage, que le dit demandeur produit en y référant.

Les parties après la contestation ainsi liée, se donnèrent les admissions suivantes:

De la part du demandeur pour éviter à frais, il est admis à l'enquête:

1o. Que le demandeur a pris possession, et il l'a eue depuis, des biens-meubles et immeubles à lui donnés par ses père et mère, par et en vertu du contrat de mariage du demandeur, en date du neuf novembre, mil-huit-cent-cinquante-quatre, cité en l'exception péremptoire en droit produite par le défendeur.

2o. Que la valeur de l'immeuble décrit en la dite exception du défendeur, et dans le contrat de mariage du demandeur susdit, et donné au demandeur par ses père et mère dans le dit contrat de mariage, était lors du dit contrat de mariage et est de la valeur de cinq mille livres ancien cours, égales à deux cents huit louis, seize chelins et huit deniers courant.

De la part du défendeur pour éviter à frais, il est [illegible] à l'enquête:

1o. Que la Paroisse St. Norbert est un démembrement de celle de Berthier.

2o. Que la portion de terre à bois décrite en premier lieu en la déclaration du demandeur en cette cause, est partie est de la terre décrite en l'acte de vente par Amable Rouleau et son épouse, à feu François Fréchette, en date du treize mai, mil huit cent quarante et un, devant Mtre. Chênevert et confrère, notaires.

3o. Qu'après le décès de ses père et mère, le défendeur a pris possession du legs universel à lui par eux fait, et que parmi les biens par eux délaissés et dont il a pris possession, se trouvait et se trouvent la portion de terre à bois décrite en premier lieu en la déclaration du demandeur.

4o. Que la terre à bois décrite en premier lieu en la dite déclaration du demandeur et que réclame ce dernier, était lors du décès de ses dits père et mère et est encore de la valeur de trente-trois livres, six chelins et huit derniers, cours actuel.

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La cour, par son jugement final, a maintenu l'action du demandeur, et condamna le défendeur conformément aux conclusions prises contre lui, et le jugement est ainsi motivé.

La cour ayant entendu les parties par leurs avocats respectifs, examiné la procédure, pièces produites et preuve, et sur le tout mûrement délibéré; considérant que la renonciation à la succession future ne s'étend pas au legs particulier, et ne s'applique pas d'ailleurs à la succession testamentaire, et que dans la cause actuelle le demandeur est recevable à demander la déliverance du legs particulier que ses père et mère lui ont fait par leurs testaments, en date du 23 janvier, 1833, de la terre à bois y décrite; et, considérant que le demandeur a établi les allégués de sa demande, renvoie les exceptions et défenses du défendeur comme mal fondées, et condamne, etc.

Merlin, Rép. v. Renonc. à succ. future, p. 34. "Quoique, etc."
Même auteur, v. Rappel à la Suc.
1 Furgole Test, ch. 6, sec. 1, p. 325, "Quoique par notre usage, etc"
Dict. de Droit, v. Rappel, 12 Toullier, No. 19.

Olivier et Armstrong, avocats du demandeur.
Piché, Avocat du défendeur.
(P.R.L.)

ST. HYACINTHE, 22 MAI 1862.

Coram McCORD, J.

No. 2.

Exparte Boucher et al., vs. *L'Honorable L. A. Dessaules* et al., Commissaires Civils, et *François Langellier* et al., Syndics.

WRIT DE CERTIORARI.

Jugé:—1o. Qu'il n'y a pas d'appel des jugements rendus par les commissaires pour l'érection civile des paroisses, etc., etc., autrement que par writ de certiorari dans le cas d'excès de juridiction.

2o. Que le fait qu'il y a eu des irrégularités et des illégalités dans la preuve et dans les procédés dans une cause devant les commissaires civils, et le fait que les dits commissaires auraient refusé d'admettre la preuve offerte par les opposants, et qu'ils auraient admis une preuve illégale de la part des syndics, ne constituent pas un excès de juridiction, et qu'un writ de certiorari, basé sur ces raisons, doit être renvoyé.

Les nommés François Langellier et autres, avaient été nommés syndics pour surveiller la construction d'une église dans la paroisse de St. Simon.

Avis avait été donné que le 17 août 1860, l'acte d'élection des syndics ainsi que leur requête seraient pris en considération par les commissaires pour l'érection civile des paroisse, etc., etc., au bureau du secrétaire des dits commissaires, auxquels lieu et jour les opposants, s'il y en avait, serait entendus.

Les nommés Pierre Boucher et autres, se présentèrent devant les dits commissaires le dit jour, 17 août 1860, et, filèrent une opposition, contenant les moyens suivants, savoir:

"1o. Parce que les personnes dont les noms sont mentionnés dans le dit pre-
"tendu acte d'élection des syndics, n'ont pas les qualités requises par la loi pour
"être syndics.

"2o. Parce que tous les procédés, acte ou avis, qui ont précédé, accompagné

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"et suivi la dite prétendue élection des syndics, sont nuls, irréguliers, et illégaux.

"3o. Parce que la dite élection ou nomination des syndics n'a pas été demandée par la majorité des habitants francs-tenanciers, professant la religion "catholique romaine, de la paroisse de St. Simon, intéressés dans la construction d'une nouvelle église dans la dite paroisse.

"4o. Parce qu'il n'y a rien devant cette cour qui soit une preuve légale que "la dite élection ait été demandée par cette majorité.

"5o. Parce qu'un grand nombre de ceux qui ont signé la requête, demandant la nomination des syndics, n'y résident pas, et n'ont pas les qualités requises pour leur donner droit de signer telle requête.

"6o. Parce qu'on n'a pas procédé à l'élection des dits syndics à la pluralité "des voix.

"7o. Parce qu'il n'y a aucune preuve constatant que la dite élection ait été "faite à la pluralité des voix.

"8o. Parce que le prétendu acte d'élection des syndics qui est soumis à cette "cour pour homologation est informe, irrégulier et illégal.

"9o. Parce que les procédés relatifs au choix du site des dites bâtisses sont "irréguliers, et n'ont pas été précédés, accompagnés et suivis des formalités requises par la loi."

Les commissaires entendirent l'argumentation tant d'un côté que de l'autre avec le mérite de cette opposition, ne jugeant pas à propos d'ouvrir une enquête sur les faits avancés par les opposants, déboutèrent l'opposition, et confirmèrent par leur jugement, rendu le dit jour 17 août 1860, l'élection des syndics, et autorisèrent ces derniers à cotiser les propriétés des paroissiens.

Ci-suit le jugement:

"Les commissaires, * * * après avoir entendu les requérants et les opposants par leurs avocats respectifs, avoir examiné les pièces produites en "cette instance, et avoir mûrement délibéré, et procédant à faire droit sur la "dite requête des dits syndics, et sur la requête des opposants, trouvant que la "dite opposition est informe et mal fondée, ont débouté et par les présentes déboutent la dite opposition, et ont accordé et par les présentes accordent les "conclusions de la dite requête des dits syndics, et en conséquence ont confirmé et homologué, et confirment et homologuent par les présentes, le susdit "acte d'élection pour être suivi et exécuté suivant sa forme et teneur; et ont "autorisé et autorisent les dits syndics à cotiser les propriétaires de terres et "autres immeubles réels situés dans la dite paroisse de St. Simon, et à prélever "le montant de la somme pour laquelle chaque individu sera colloqué et cotisé "pour sa part de contribution, tant pour effectuer la construction des dits travaux que pour subvenir aux frais nécessaires qu'occasionnera la dite cotisation, "et ordonnent en conséquence que les dits syndics procèdent incontinent à "dresser un acte de cotisation ou répartition."

En exécution du dit jugement, les syndics préparèrent un acte de répartition et cotisation, et ont, le 19 octobre 1860, demandé aux dits commissaires l'homologation du dit acte de répartition.

Le dit jour, 19 octobre 1860, les requérants ont produit de nouveau une

opposition à la dite homologation, alléguant la nullité et l'irrégularité des procédés adoptés par les commissaires, et l'irrégularité de tous les procédés relatifs à la construction de la dite église, et la nullité et l'irrégularité du jugement rendu le 17 août 1860 et sus-relaté.

Le 19 octobre 1860, les commissaires rendirent leur jugement, rejetant la dite opposition et approuvant et homologuant le dit acte de répartition.

Les dits opposants ont fait motion le 23 janvier 1861, qu'il leur fut accordé un bref de certiorari, à l'effet de faire rapporter devant la Cour Supérieure tous les procédés faits devant les dits commissaires, relatifs à la construction de la dite église, et produisirent devant la cour un affidavit *circonstancié*, alléguant les raisons suivantes à l'appui de leur application, pour faire déclarer le jugement du 19 octobre 1860, ainsi que celui du 17 août 1860, nul, illegal et non avenu savoir :

"1o. Parce que ceux qui demandaient la construction de la dite église et sacristie, n'ont en aucune manière établi qu'ils avaient la majorité des habitants "franc tenanciers, propriétaires catholiques romains de la dite paroisse de St. "Simon, ainsi que l'exige la loi, pour demander la construction d'édifices des"tinés au culte religieux; et pour demander l'autorisation de procéder à l'élec"tion de syndics, et partant les commissaires n'avaient aucune juridiction, au"torité ou pouvoir d'émaner l'ordonnance du 19 août 1860, non plus que celle "du 19 octobre de la même année.

"2o. Parce qu'aucun procès-verbal en bonne forme de l'assemblée du 26 "avril 1860, pour décider de la reconstruction et du choix du site d'une église "et sacristie n'a été fait et produit devant les dits commissaires, mais qu'au "contaire, il parait à la face même du prétendu procès-verbal de la dit assemblée "qui a été produit devant les dits commissaires, que ce procès-verbal n'a pas "été fait en conformité à la loi, que la dite assemblée n'a pas été tenu conformément à la loi, et que des voix illégales ont été comptées pour composer "une majorité factice, et qu'il n'y a rien dans le dit procès-verbal qui fasse voir "quel est le nombre total des habitants franc-tenanciers catholiques romains de "et dans la dite paroisse de St. Simon, intéressés dans la reconstruction des "édifices en question.

"3o. Parce qu'aucun procès-verbal en bonne forme, et suivant la loi, de l'assemblée pour l'élection des dits syndics, n'a été fait et produit devant les commissaires, constatant telle élection à la pluralité des voix, et constatant combien de voix ont été données pour ou contre l'élection des dits syndics.

"4o. Parce que toute la procédure faite et ordonnée par les dits commissaires, et antérieure au dit jugement, et pour décider du mérite des requêtes et oppositions produites devant eux est irrégulière, nulle et contraire à la "loi, et ne peut servir de base au prétendu jugement des dits commissaires, non plus que les procédés faits par l'autorité ecclésiastique, qui de toute nécessité, "doivent précéder ceux adoptés en pareil cas par les commissaires civils.

"5o. Parce qu'aucune preuve ou enquête légale n'a été faite devant les dits "commissaires pour établir que les personnes demandant la construction de la "dite église et sacristie et l'élection des dits syndics, formaient réellement la "majorité des habitants franc-tenanciers catholiques romains de la dite paroisse

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" de St. Simon, ni que les dites personnes ayaient les qualités nécessaires pour " demander telle élection, ni que les syndics étaient qualifiés pour être syndics " comme la loi l'exige, et qu'il n'a jamais été établi ni prouvé légalement que " les faits niés par les dites oppositions fussent vrais ; que ces faits devaient " être établis avant que les dits commissaires pussent procéder à rendre juge- " ment, et que sans la preuve de faits allégués dans la requête de ceux qui de- " mandaient la construction de la dite église et sacristie, l'élection des syndics " et la confirmation de telle élection, les dits commissaires n'avaient aucune ju- " ridiction pour prononcer tels jugements.

" 6o. Parce qu'il ne fut fixé aucun jour par les dits commissaires pour faire " l'enquête des parties devant eux, quoique telle enquête fut demandée.

" 7o. Parce que les dits opposants, savoir les dits requérants au writ de *cer-* " *tiorari* ne furent en même temps interpellés de produire leur preuve.

" 8o. Parce que les commissaires ont refusé le 17 aout 1860, d'entendre les " témoins des opposants.

" 9o. Parce que, le même jour, les commissaires ont refusé d'entendre des " témoins pour prouver que les syndics n'étaient pas qualifiés.

" 10. Parce qu'il n'a été fait aucune preuve des faits qu'il était nécessaire " de prouver pour permettre aux commissaires d'émaner leur ordonnance.

" 11o. Parce que le commissaire ecclésiastique n'a pas donné avis légal de " l'assemblée pour fixer le site de l'église.

" 12o. Parce que le jugement du 19 octobre 1860, a été rendu sans preuve " quelconque.

" 13o. Parce que les commissaires ont excédé leur juridiction en rendant " les dits jugements.

" 14o. Parce que plusieurs de ceux qui ont signé la requête des demandeurs " n'étaient pas résidants dans la paroisse de St. Simon.

" 15o. Parce que le commissaire ecclésiastique n'a pas compté les noms de " plusieurs opposants, disant qu'ils n'étaient pas franc-tenanciers pendant qu'ils " l'étaient."

Le bref de certiorari fut accordé par la cour le 33 octobre 1861, sans entrer dans le mérite de l'opposition, mais dans le but de faire rapporter le record en Cour Inférieure devant la Cour Supérieure.

La règle *to quash the judgment* émana ensuite, et les parties furent entendues de part et d'autre.

MM. *Laframboise & Papineau*, pour les appellants, prétendaient que les commissaires avaient excédé leur juridiction en rendant les jugements sus-relatés, s'appuyant pour soutenir telle prétention sur les raisons plus haut énumérées, et —MM. *Sicotte & Chagnon*, au contaire, prétendaient que les commissaires avaient bien jugé, et que dans tous les cas, ils n'avaient aucunement excédé leur juridiction ; qu'il n'y avaient point d'appel des jugements de telle cour, si ce n'est le writ de certiorari, qui n'est applicable qu'au cas où il y a réellement excès de juridiction ; que, sans admettre que les commissaires n'avaient pas observé les formalités essentielles, les raisons et moyens apportés par les oppo- sants dans leur opposition, ne constitueraient point d'excès de juridiction ; qu'en conséquence, leur application devait être renvoyée et les jugements rendus par les commissaires maintenus.

Boucher et al. vs. Decoulos et al.

Per Curiam. This is the case of an application under writ of *Certiorari*, to set aside and declare null and void certain judgments rendered by the commissioners for the erection and division of parishes, and the building and repairing of churches, Parsonage house, in and for the Diocese of St. Hyacinthe.

The facts of the case are as follows:

1st March, 1860.—A petition was presented to his Lordship the Right Reverend Bishop of the Diocese of St. Hyacinthe, by certain inhabitants of the Parish of St. Simon in the said Diocese, praying for leave to erect a new church in the said parish for reason therein set forth.

22nd March, 1860.—His Lordship thereupon named a commissioner, who, on the 10th April, 1860, gave notice that he would meet the inhabitants interested on the 26th of the same month, and hear them on the merits of the said petition. On the

15th and 22nd April, 1860, this notice was published.

26th April, 1860.—The ecclesiastical commissioner held a meeting of the inhabitants, at which an opposition was fyled to the prayer of said petition by divers inhabitants interested.

25th May, 1860.—Afterwards, an order for the erection of this church was given by said commissioner.

17th June, 1860.—A petition was presented to the commissioners for the erection of churches, for permission to elect "Syndics" to oversee the building of the said church and presbytère, and on the

6th July, 1860.—The application was granted, the election to take place on the 22nd of the same month; and on the

22nd July, 1860.—A meeting was held, and syndics were elected.

23rd July, 1860.—The Syndics applied to the commissioners to have their appointment homologated.

27th July, 1860.—Ordinance of publication of election made (certificate thereof, dated 12th August) and notification given that the parties interested would be heard on the 17th August then next.

17th August, 1860.—Parties were heard thereon, opposition thereto produced and fyled by non-contents, notwithstanding which, on the same day, after hearing, the election was duly homologated by the commissioners.

15th September, 1860.—Syndics asked permission to make a repartition, which was granted and made, and the same was deposited as required at the Presbytère, a certificate of deposit granted by the Curé, and an opposition against its homologation was fyled by the non-contents.

19th October, 1860.—Parties on both sides were heard by the commissioners, and thereafter the acte de repartition was duly homologated.

These two judgments of the 17th August and 19th of October are now complained of by Messieurs Langelier and others, who pray that the same may be set aside and declared null and void, the commissioners having therein exceeded their jurisdiction.

The pretensions of the contestants are based, not upon any allegation of want of jurisdiction in the commissioners to hear and determine the contest at issue between the parties, but upon irregularities and illegalities in the proof made

Boucher et al. vs. Desmarais et al.

before them, and in all the proceedings had in the cause, and more particularly for having refused legal evidence offered by contestants, and for having in the course of trial, admitted insufficient and illegal evidence on part of the Syndics.

The essential parts of these judgments of the commissioners are as follows: The motives of the judgment of 17th August set forth: "Les dites commissaires, après avoir entendu les requérans et les opposants par leurs avocats respectifs, avoir examiné les pièces produites en cette instance et avoir murement délibéré entre eux, et procédant à faire droit sur la susdite requête des dits Syndics et sur la requête des opposants, trouvant que la dite opposition est informe et mal fondée, ont débouté, et par les présentes accordent les conclusions de la dite requête des dits Syndics, et en conséquence ont confirmé et homologué, et confirment et homologuent par les présentes le susdit acte d'élection pour être suivi et exécuté suivant sa forme et teneur."

In the motives of the judgment of the 19th of October, 1860, after setting forth at length the various documents and certificates submitted to them, the commissioners proceed as follows: "Et les dits commissaires, après avoir entendu les parties *qui n'ont offert de produire et n'ont de fait produit aucun témoins à l'appui de leurs prétentions respectives* et procédant à faire droit, ont renvoyé et débouté la dite requête des dits opposants, parceque la partie des allegués de la dite requête, qui a rapport aux procédés antérieurs à la date du dit acte de cotisation, a déjà été jugée et déboutée par les dits commissaires par leur dit jugement du dix-sept août 1860, et parceque les allégués de la dite opposition qui attaquent la forme de la dite cotisation, les avis des Syndics et la manière dont ils ont été publiés et les autres allégués de la dites opposition sont mal fondés en fait et en droit, et en conséquence les dits commissaires ont conformé et homologué, et par les présentes ils confirment et homologuent le dit acte de cotisation pour être suivi et exécuté suivant sa forme et teneur."

Now, bearing in mind that the issue before this Court is not a hearing in the nature of an Appeal from the judgment of an inferior Court, whereby this Court, after examination of the evidence and ruling produced, if found not to justify the judgment rendered by the Court below, might reverse, modify, or confirm the same, or proceed to render such judgment in the premises as in the opinion of the Court appealed to ought to have been rendered, but is in the nature of a *Certiorari*, whereby the Superior Court, in virtue of its right of supervision over all inferior tribunals, is authorised to enquire simply, whether the commissioners had or had not jurisdiction over the case, or, having such, have exceeded the same, and rendered a judgment contrary to or not justified by law. Let us examine into the power and authority vested in this Court in this matter as ruled in similar cases in England, and in the several decisions rendered in this province.

The power and authority vested in the commissioners are given by the Ch. 18, whereby S. 19 (in cases such as the present) it is enacted that the commissioners may examine and decide upon the allegations and prayer of such petition, and may grant or refuse the said prayer altogether or in part, after having caused the act of election to be published in the said parish or mission, and give public notice to the inhabitants interested.

No form of judgment is given by this statute as in cases of hearing and trial

before justices, but the question is the same as to the power and duty of this court, namely, to ascertain whether the commissioners in this case, as the justices in the former, have or have not exceeded their power and jurisdiction, and the judgment in both cases must be based upon the same principle and authorities, relief being sought in both, by the writ of *Certiorari*.

Where the Legislature has given a power, the Court will presume the justices to have followed that power.

Paley, on Summary Convictions—Edit of 1856, p. 147.

Whether it was expedient that those jurisdictions should have been created was a matter for the consideration of the Legislature; but as long as they exist we ought to go all reasonable lengths to support the determinations.

Paley, 146.

And it may be here observed that the objection to the conviction or order must be to the jurisdiction of the [illegible] or justices making it, or to the form of the conviction or order *and* [illegible] *writs*.

Guide Prac. B. 1 vol., p. 222. [illegible] Douglas, 530.

It is sufficient to return the [illegible] due form, without returning also the examination and affidavits taken [illegible] proceeding, and it should seem that the reason for this is that the Court will not take notice of any *formal defect in the proceedings*, unless it appears on the face of the conviction itself.

Paley, 372.

According to modern usage no plea is admissible to a conviction, nor does the Court, in examining the conviction, take notice of anything but what appears upon the face of it. They will not, therefore, receive affidavits that the fact was done in assertion of right, but affidavits may be used to show a want of jurisdiction.

Paley, 376.

The leading case upon this subject is the Queen vs. Bolton, in which it was held "that if a case be one over which the justices had jurisdiction, the Court will not hear affidavits impeaching their decisions on the facts nor review their *judgment upon the evidence*, if that should be returned, even though no appeal may be given. The test of jurisdiction under this rule [illegible] as said in that case is, whether the justices had power to enter upon the enquiry, not whether their conclusions in the course of it were true or false.

It may be shown by affidavit that they had no authority to commence an inquiry, e.g., that the question brought before them was not one to which their jurisdiction; and this, although, by misstatement, they have made the proceedings in the face of them regular.

R. vs. Grant, 19 L. J. (A. S.) M. C. 59.

In a later case Lord Denman, C. J., delivering the judgment of the Court, said: "It is clear that the decision of a tribunal, lawfully constituted, upon a question "properly brought before it respecting a matter within its jurisdiction, *is not "open to review on certiorari*, but the decision of persons assuming to be a "tribunal, that they are constituted is open to review."

R. vs. Bolton.

Boucher et al. vs. Dessaules et al.

The Court will not notice any facts contained in the *certiorari* for the purpose of impeaching the conviction.

Paley, 377.

The case supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final jurisdiction *on the merits* to the magistrate below, in which this Court has no jurisdiction as to the merits, either originally or in appeal.

Regina vs. Bolton, 1 Adolphus & Ellis, 2 B. Rep. V. S. (66) p. 437.

All that we can do when their decision is complained of is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to Law, even if their decision should, upon the merits, be *unwise* or *unjust*, on these grounds we cannot reverse it.

And, again:

"Beyond this we cannot go. The affidavits being before us were used on the "argument, and much was said of the unreasonableness of the conclusions drawn "by the magistrates, and of the hardship on the defendant, if we would not "review it, there being no Appeal to the sessions."

"We forbear to express any opinion on that which is not before us, the pro- "priety of the conclusion drawn from the evidence by the magistrates; they "and they alone were the competent authority to draw it, and we must not "constitute ourselves into a Court of Appeal where the statute does not make us "such, because it has constituted no other."

"It is of much more importance to hold the rule of the straight, than, from "a feeling of the supposed hardship of any particular decision, to interpose "relief at the expense of introducing a precedent full of inconvenience and un- "certainty in the decision of future cases."

The foregoing is the ruling which obtains now in England, and is, in the opinion of this Court, that which, in similar cases, should govern the decisions in this country where the judgment of an inferior tribunal is attacked on the plea of want of, or excess of jurisdiction. The commissioners were legally seized of the case, their authority to hear and determine on its merits was vested in them by statute and, on examination of their proceedings, this Court cannot see any excess of jurisdiction; therefore the decision of the Commissioners to whom "the Legislature has entrusted the original and final jurisdiction on the merits" must be maintained.

Sicotte & Chagnon, for the Syndics and Commissioners.

Laframboise & Papineau, for the Petitioners.

(H.W.C.)

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OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, *Advocate.*

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FAITS ET ARTICLES:—The answers of parties to Interrogatories on, or their refusal to answer such Interrogatories, supply, in commercial cases, the place of the memorandum in writing required by Statute of Frauds. (Levey, Appelt., and Sponza, Respondt.; Q. B.)..... 183

FRANC ET QUITTE:—The clause of, will entitle the vendee of real property encumbered by mortgages to retain the purchase money until a discharge may be given against such mortgages; and, in case of suit for the purchase money without giving security, the vendor will, under the provisions of ch. 36 of the Consolidated Statutes of L. C., [illegible] in costs in favor of the vendee, but judgment will go for the money, with stay of execution until security be put in. [illegible] vs. Robert, S. C.)..... 247

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IMPUTATION OF PAYMENT:—Where payments of money are made on account, without special imputation, and both principal and interest are due, the legal imputation will be first on the interest. (Rice et al., Appts., and Ahern, Respondt., Q. B.)..... 201

INFORMATION:—*Vide* REGINA.

INSCRIPTION EN FAUX:—A party will not be allowed to inscribe *en fauz* against a bailiff's return later than four days after the fyling of the return, without cause shown. (Perry vs. Milne, and the Ontario Bank, T. S., contesting, S. C.)..... 243

" :—Upon cause shown by affidavit, a party will be allowed to inscribe *en fauz* against a bailiff's return, after the four days limited by the rules of practice. (Do.)..... 243

" :—The certificate of the attorneys of one of the parties in a cause upon a copy of Judgment, to the effect that it is a true copy, is not a *fauz*, nor is the return of the bailiff who served such copy a *fauz*, and consequently *moyens de fauz* based on such proceedings are irrelevant and inadmissible. (Do.)..... 243

INSURANCE:—The furnishing of a certificate required by the condition of a Policy of Insurance, signed by three respectable persons, that they believed that the loss had not occurred by fraud is a condition precedent, without compliance with which the assured cannot recover. (Racine vs. The Equitable Insurance Company of London, S. C.)..... 89

" :—An endorsement upon an open Policy of a cargo for insurance is incomplete if the name of the vessel by which such cargo is shipped is in blank; but it is perfected by a notice to the insurers of the name of the vessel whether they fill up the blank or not. (Ousack vs. The Mutual Ins. Co. of Buffalo, S. C.)..... 97

" :—The provision in a policy that a vessel must not be below "Class B1," without reference to any particular classification, will not render it necessary that such vessel should not be below class B1 in a classification of vessels made on behalf of Lake underwriters and for their information. But it will be construed as meaning that the vessel should not be below the class of vessels recognized by mariners as B1, if there be any such class. (Do.)..... 97

" The following words, describing the subject assured, written upon the face of the policy, "of the steamer Malakoff, now lying in Tate's dock, Montreal, and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec," &c., do not amount to a warranty that the vessel shall actually navigate, but merely indicate an intention so to do. (Grant, Appt., and the Ætna Insurance Company, Respondt., P. C.)..... 224

INTEREST:—*Vide* PROMISSORY NOTE.

" An obligation containing an undertaking to pay sums of money, "without interest for that time till the payments become due," imports a legal undertaking to pay interest from the day the payments become due. (Rice et al., Appts., and Ahern, Respondt., Q. B.)..... 201

INTERVENTION:—*Vide* PRACTICE.

INVENTORY:—A defendant who omits to insert therein two debts due by himself will be condemned to add them to the inventory, but will not be condemned to forfeit his interest therein (as one of the heirs of the deceased) in the absence of proof of fraud. (Shaw et *vir*, vs. Cooper, S. C.)..... 38

JUDGMENT:—*Vide* REGISTRATION.

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JURISDICTION:—*Vide* SUMMONS.

JURY TRIAL:—Under the 64th Rule of Practice, a notice given, within 4 days after issue joined, of a motion to be made on the nearest following day in term, that the party moving declares his option and choice of a trial by Jury, is a sufficient compliance with the terms of the rule, although such day in term be after the 4 days. (Arcand vs. The Montreal and New York Railroad Company, S. C.) 38

" " :—Under the 64th Rule of Practice, a notice given, on the day issue is joined, or on the day after, of a motion to be made on the nearest following day in term, that the party moving declares his option and choice of a trial by Jury, is *not* a sufficient compliance with the terms of the Rule, when such day in term falls after the 4 days. (Johnston vs. Whitney, S. C.) 39

Also Lovell vs. Campbell et al. S. C.) 115

" " :—Where two causes of action are combined in one suit, the one commercial and the other non-commercial, the action is not susceptible of trial by Jury. (Mann et al., Appellants, and Lambe, Respondent, C. B.) 75

" " :—An action *en reddition de compte* is not referable to a Jury. (Mann et al., Appellants, and Lambe, Respondent, Q. B.) 75

" " :—An action by a printer for work done by him as such is susceptible of trial by Jury. (Lovell vs. Campbell et al., S. C.) 115

" " :—*Vide* NON OBSTANTE VEREDICTO.

" " :—An action by a non-trader for the recovery of a sum of money alleged to have been loaned to the defendants, a commercial firm, is not susceptible of a trial by Jury. (Whishaw vs. Gilmour et al., S. C.) 320

" " :—An action brought by a non-trading Corporation against a commercial firm, for the recovery back of an overcharge on freight, is susceptible of trial by Jury. ("Her Majesty's Principal Secretary of State for The War Department" vs. Edmonstone, Allan & Co., S. C.) 302

LESSOR AND LESSEE:—*Vide* MITOYENNETÉ.

" " :— " ACTION EN GARANTIE.

" " :—Under the statute regulating the relations of, the annual rent of the property and not the amount claimed as damages determines the question of Jurisdiction. (Barbier vs. Verner, C. C.) 44

LESSOR AND LESSEE:—In an action for the recovery of $700 of rent, namely 7 years arrears at $100 per annum, accompanied by a demand *en résiliation de bail*, but instituted in ordinary form, and not under the provisions of ch. 40 of the Consolidated Statutes of L. C., the annual rent will not determine the question of jurisdiction. (Fisher et al. vs. Vachon, S. C.) 189

LIEN, for advances, is good as against the owner of goods, under 20 & 11 Vic., ch. 10, § 4, when made for the pledgor's own private purposes, or to carry out a contract between pledgor and pledgee, although the pledgee knows of the ownership not being in the pledgor, so long as the pledgee has not notice from the owner that the pledgor had no authority to pledge. (Johnston et al., Appellants, and Lomer, Respondent, Q. B.) 77

" :—Knowledge by the pledgee that the pledgor was not the owner, does not make him *mala fide* as regards the owner, without notice as above. (Do.) 77

" is not extinguished by the pledgee transferring to a third party, for value, negotiable paper which he had taken for the advances, if the notes

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came back again into the pledgee's hands, in consequence of not being paid at maturity. (Do)..... 77

MARCHÉ OUVERT :—*Vide* MOVEABLES.

MARRIED WOMEN may validly renounce to their hypothecary rights for *reprises matrimoniales*, on property alienated by their husbands, notwithstanding the 30th section of the 4th Victoria, ch. 30, and such renunciation may be legally inferred *from* their ratifying and guaranteeing the alienation thus made. (Boudria *et vir.*, Appellants, and McLean, Respondent, Q. B.)..... 65

" " :—*Vide* PROMISSORY NOTE.

MERCHANT SHIPPING ACT :—*Vide* CARRIER.

MINOR :—*Vide* BANK STOCK.

" :—A, is liable for his board when contracted for as a trader and in the course of his business, (Browning vs. Gale, S. C.)..... 251

MITOYENNETÉ :—No damages can be recovered on account of inconvenience and loss suffered by the taking down and rebuilding of a *mitoyen* wall, when such inconvenience and loss are the necessary consequence of the taking down and rebuilding of the wall, and when all proper precautions have been observed, and no unnecessary delay or neglect has taken place. And, although the *mitoyen* wall may be sufficient for the existing buildings, yet if it be insufficient to support a new edifice which one of the neighbouring proprietors wishes to build, the party so wishing to build has a right to demolish such *mitoyen* wall and rebuild the same, on observing the formalities in that behalf by law required. (Peck, Appellant, and Harris, Respondent, Q. B.)..... 206

Also Lyman et al., Appellants, and Peck, Respondent, Q. B..... 214

Semble :—The tenant of the building, the wall of which is so demolished, is entitled to a diminution in the rent payable by him, in proportion to the duration and extent of the encroachment on his possession. (Peck, Appellant, and Harris, Respondent, Q. B.)..... 206

" :—*Vide* ACTION EN GARANTIE.

MOTION FOR MONEYS :—*Vide* PRACTICE.

MOVEABLES :—*Vide* SALE.

" :—The purchaser of a lost horse, *bonâ fide*, in the usual course of trade, in a hotel yard in Montreal where horse dealers are in the habit of congregating and selling daily a large number of horses, acquires no right of property therein as against the owner who lost it; and, although the purchaser be a resident of the United States and in possession there of the horse claimed, he may nevertheless be sued in Montreal for the value of the horse, on being personally served with process there. (Hughes vs. Reed, C. C.)..... 294

MUNICIPAL COUNCILLORS are not liable to the penalty provided by the 45th and 62nd clauses of the Municipal Act of 1860, in consequence of a vote given at a meeting of Council. (Souligny vs. Vézina, C. C.)..... 41

MUNICIPAL LAW :—A winter road cannot be traced, in virtue of the 3rd Par. of the 42nd Section of the Municipal Act, across a farm enclosed by stone fences not easily replaced, without the consent of the proprietor. (Lavoie vs. Gravel, C. C.)..... 113

" " :—When a proprietor who has been notified to do certain road work is not in default, the *sousvoyer* or inspector is not justified in doing the work for him, and, under any circumstances, the *sousvoyer* or inspector has no right to do the work himself. (DeBeaujeu, Appellant, and Groulx, Respondent, Q. B.)..... 166

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MUNICIPAL LAW:—The Inspector has no right of action in his own name, for the recovery of the penalty incurred by an inhabitant of the municipality neglecting to keep up his front road, and such action ought, under the provisions of ch. 24 of the Consolidated Statutes of L. C., Sec. 48, to be brought by the Inspector, in the name of the municipality. (Dion vs. M[illegible]) 200

NON OBSTANTE VEREDICTO:—*Vide* PRACTICE. While in England a defendant cannot move for judgment *non obstante veredicto*, yet in Lower Canada he can, the practice in jury trials there differing in many and important respects from that prevailing in England, and the Privy Council being indisposed to interfere with the judgment of a Colonial Court on a question of its form and practice. (Grant, Appellant, and the Ætna Insurance Company, Respond[illegible] 224

OBLIGATION:—*Vide* CLAUSE COMMINATOIRE.

OFFRES RÉELLES:—*Vide* TENDER.

PARTAGE:—A *partage provisionnel* can be ordered at any time among usufructuary legatees. (Cuthbert vs. Cuthbert, S. C.) 128

PARTNERSHIP:—When partners have fyled a certificate of the formation of a partnership, one partner is liable for debts contracted by the other after a dissolution by a deed executed before a notary, if no certificate of such dissolution has been fyled in the Registry Office for the county and in the Prothonotary's Office. (Jackson vs. Page et al., S. C.) 105

" :—Proof of, as between the partners themselves, must be in writing and not by parol. (Beaudry vs. Laflamme, and Davis, Intervening Party, S. C.) 134

" :—A debt contracted by members of a, individually, is not recoverable from the partnership. (Howard vs. Stuart, C. C.) 256

" :—The debt of a, cannot be offered in compensation by an individual member thereof. (Do.) 256

PÉREMPTION D'INSTANCE:—A defendant who has made default cannot demand permission to have the default taken off, with a view to claim *péremption d'instance*. (Courville vs. Levar, & Levar, T. S., C. C.) 256

" :—The Court will declare the *instance périmée* on motion to that effect, where the notice of motion has been given before the proceeding by which the *péremption* is pretended to have been interrupted has taken place. (Charlebois vs. Bastien, C. C.) 293

PERSONAL WRONGS:—*Vide* DAMAGES.

PRACTICE:—An intervening party who claims the payment by the Prothonotary of a sum of money under a judgment in his favor, is bound to give notice to all the parties in the record of the application to the Court for such moneys. (Gillespie et al. vs. Spragg et al., and McGill et al. Gs., and Hutchinson et al., Intervening Parties, and Maitland et al., vs. the same, and Jordan et al. vs. the same, S. C.) 25

" :—Where an attorney *ad litem* has represented a party in a cause, subsequent to judgment, another attorney *ad litem* cannot regularly take proceedings on behalf of such party, without a substitution in place of the first attorney, and that the motion of the first attorney, as on behalf of such party, that all proceedings of the second attorney in the name of such party be rejected from the record, will be granted. (Gillespie et al. vs. Spragg et al., and Hutchinson, Intervening Party, S. C.) 28

" :—After a final judgment in a cause wherein are several Intervening parties as well as plaintiff and defendant, a motion by parties repre-

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senting themselves to be universal legatees of one of the intervening parties, deceased, to be allowed to take up the *instance* in place of the deceased, will be rejected as not in accordance with the *procedure* and practice of the Court. (Do. Do.)..... 29

PRACTICE:—A motion for a *commission rogatoire* to New York will be granted unsupported by affidavit. (Johnson vs. Whitney, S. C.)..... 29

" :—Where a defendant chooses to appear without service upon him of the writ and declaration in the cause, his appearance will not be rejected on the plaintiff's motion to that effect, inasmuch as the defendant has a right to appear by attorney, without being served. (Whitney vs. Dunning et al., and Mulholland et al., Gs., S. C.)..... 30

" :—*Vide* EVIDENCE.

" :—*Vide* JURY TRIAL.

" :—*Vide* SECURITY FOR COSTS.

" :—*Vide* ARBITRATORS.

" :—*Vide* SAISIE ARRÊT.

" :—*Vide* SUMMONS.

" :—*Vide* ARTICULATION OF FACTS.

" :—Money tendered into Court with defendant's plea and not accepted by plaintiff cannot be recovered from the clerk of said Court by direct action against him as for money had and received, and the proper mode of proceeding in such case is by rule upon the clerk ordering him to pay over said money. (Merizzie, Appellant, and Cowan, Respondent, Q. B.)..... 62

" :—*Vide* APPEAL.

" :—*Vide* ACTION PETITOIRE.

" :—*Vide* CONTRAINTE PAR CORPS.

" :—*Vide* PRIVY COUNCIL.

" :—*Vide* SUMMONS.

" :—*Vide* DAMAGES.

" :—A petitioner praying to be allowed to appear and take up the *instance par réprise* in place of a deceased person, will be allowed, in the first stage, simply to appear in the cause and fyle his petition. (Gillespie et al. vs. Spragg et al., and divers intervening parties, and Wm. Mann et al., Petrs. for *réprise d'instance*, S. C.)..... 117

" :—*Vide* PROMISSORY NOTE.

" :—*Vide* FAITS ET ARTICLES.

" :—*Vide* NON OBSTANTE VERDICTO.

" :—*Vide* CARRIER.

" :—*Vide* INSCRIPTION EN FAUX.

" :—Where a motion in a cause has been dismissed upon argument, and a subsequent motion to revise the former judgment has also been dismissed, the party moving will not be permitted to make a third motion aiming at the same object as the first motion, but such third motion will be dismissed. (Benjamin vs. Wilson, S. C.)..... 246

" :—*Vide* PÉREMPTION D'INSTANCE.

" :—Amendments to a declaration which change the nature of the action will not be granted, but, in an action to account for goods and moneys, a proposed amendment to include promissory notes, bills, rents and interest, &c., alleged to have been collected, does not tend to change the nature of the action. (Lambe, Appellant, and Mann et al., Respondents, Q. B.)..... 287

" :—*Vide* CAPIAS AD RESPONDENDUM.

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PRACTICE:—A report of collocation and distribution, which collocates the plaintiff for his full costs of action, in preference and prejudice to the landlord's claim for rent, will be set aside. (Kerry et al. vs. Pelly et al., and Dame A. Watson, Oppt. and contesting, C. C.)..... 293

" :—A party represented in a suit by an attorney *ad litem* cannot personally conduct any portion of the proceedings therein, although he be a practising barrister, and the fyling by him of an appearance as counsel at *enquête* will not entitle him so to act. (Ramsay vs. David, and Dame Eliza L. Walker, Oppt., S. C.)..... 293

" :—It is not necessary for an opposant, who contests the collocation, to his prejudice, of another opposant, to set up in his *moyens* of contestation his own title or interest to or in the proceeds of the sale of the lands, collocation of which proceeds has been made in favour of the other opposant. (Walker et al. vs. Ferns, and the Montreal Permanent Building Society, Opposants, and Sheridan, Opponent, S. C.)..... 299

" :—When a plaintiff, pending his *enquête* has obtained a judgment of the Court, permitting him to amend his declaration, he will not be allowed to proceed further with his *enquête* until he has amended his declaration, and the defendant has been allowed to plead *de novo*. (Mann et al. vs. Lambe, S. C.)..... 301

" :—*Vide* REGINA.

" :—On the granting of a material amendment of the declaration of the plaintiffs, after issue joined and pending the *enquête*, the amendment will be allowed on the payment of full costs, as in a cause settled at the stage where the cause then was. (Syme et al. vs. Heward, S. C.)..... 311

" :—A notice served on Saturday between 4 and 5 p. m., of a petition for release from custody under a *capias ad respondendum*, to be presented on Monday at 10 a. m., is sufficient. (Trobridge et al. vs. Morange, S. C.)..... 312

" :—*Vide* CERTIORARI.

PRESCRIPTION:—A note executed *en brevet* before Notaries is liable to the prescription of 5 years. (Crevier vs. Sauriole dit Sansouci, C. C.)..... 257

" :—*Vide* RETRAIT FÉODAL.

" :—A letter acknowledging the receipt of a sum of money as a loan, and promising to repay it on demand, with interest, is not a promissory note, within the meaning of the statute 12th Victoria, Ch. 22, Sec. 31. (Whishaw vs. Gilmour et al., S. C.)..... 319

" :—In an action for the recovery of the loan as such, and in which the letter is merely referred to as a paper writing *sous séing privé*, given as an acknowledgment of such loan, the prescription of five years under the above Statute cannot be invoked. (Do.)..... 319

" :—A loan by a non-trader in a commercial firm is not subject to the limitation of six years prescribed by the Statute 10th and 11th Vic. Ch. 11, Sec. 1. (Do.)..... 319

PRIVILEGED COMMUNICATIONS:—*Vide* EVIDENCE.

PRIVY COUNCIL:—An appeal to Her Majesty in Her Privy Council will be allowed by Her Majesty in Her discretion, on Petition to that effect, in cases where the Colonial Court of Appeals could not in ordinary course allow such appeal. (Marois, Appellant, and Allaire, Respondent, P. C.)..... 85

" :—Colonial Counsel may plead before..... 87

" Her Majesty in Her Privy Council is not precluded from entertaining

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a Petition to rescind the order of a Colonial Court granting leave to Appeal, by the fact that such leave was granted under the authority of a Colonial Statute. (Macfarlane et al., Applts., and Leclaire et al., Respdts., P. C.) 17

PRIVY COUNCIL:—In determining the question of the value of the matter in dispute, upon which the right of Appeal depends, the correct course is to look at the judgment as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by an appeal. (Do.) 170

PROMISSORY NOTE, made by a wife, separated as to property from her husband, in favor of her husband, and endorsed by him, for groceries and other necessaries of family use purchased by her, is valid. (Cholet vs. Duplessis et *vir.*, S. C.). 81

" :—Interest runs on notes payable on demand from the date thereof. (Dechantel vs. Pominville, C. C.) 83

" :—A plea of no value, and that note was obtained by surprise, need not be accompanied by the affidavit required by the 80th Section of Chapter 83 of the Consolidated Statutes of L. C. (McCarthy et al. vs. Barthe, S. C.) 130

" :—Given by a *tiers détenteur* to discharge a mortgage upon his property will be held to have been given without consideration, if the mortgage was created by a person having no valid title to the property. (Phillips, Applt., and Sanborn, Respdt., Q. B.) 252

" :—*Vide* PRESCRIPTION.

" :—The endorsers of a, who have been sued conjointly with the maker, are not responsible for the costs of an Appeal incurred in respect of a separate issue between the plaintiff and the maker, although in the original action all the defendants are represented by the same Attorney, unless the proceedings in Appeal are specially signified to the endorsers. (Boucher, Applt., and Latour et al., Respdts., Q. B.) 269

" :—An acknowledgment in the following letters and words "I. O. U. twenty five pounds" is a negotiable promissory note. (Beaudry vs. Laflamme, and Davis, T. S., S. C.) 307

QUANTO MINORIS:—If five lots of land have been sold in *one lot, en bloc,* and for *one price,* and the purchaser has only obtained possession of four of them, the said purchaser being sued for the balance of purchase money, is not well founded in pleading that the lot he failed to obtain possession of is worth a larger sum than the rest of the lots, and that therefore he is entitled to have the value of such lot deducted from the original *prix de vente* of the five lots; but he is entitled to a diminution of one-fifth of the purchase money of the whole five lots, under the action *quanto minoris.* (Lussier vs. McVeigh, S. C.) 188

RAILWAY SHARES:—*Vide* DAMAGES.

RECEIPT:—*Vide* EVIDENCE.

REGINA:—An information in the name of the Attorney general *pro,* cannot legally be signed by parties styling themselves the Attorneys of the Attorney-General *pro Reginâ.* (Cuvelier, Atty. General *pro Reginâ* vs. Laviolette et al., S. C.) 309

REGISTRAR:—The Sheriff, who has paid a Registrar the account of charges made by the latter for a certificate under Ch. 36 of the Consolidated Statutes of L. C., S. 26, cannot be disturbed by reason of the charges being excessive. (Masson vs. Mullins, and the Seminary of Montreal, Oppt., S. C.) 107

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REGISTRAR :—Acting in virtue of above mentioned Act, cannot be considered as an officer of the Court and constrained by a simple rule to have his account taxed before the Court. (Do.)..... 107

REGISTRATION :—A judgment registered against the *auteur* of a party who at the time of the rendering and registering of such judgment is in open and public possession of property as proprietor, under a title, does not create a *hypothèque* upon the property, although the title of such party so in possession be not registered. (Ex parte Gamble, for confirmation of Title, S. C.)..... 169

" :—*Vide* BUILDER'S PRIVILEGE.

REPARTITION :—A Roman Catholic who becomes a Protestant cannot be assessed for the erection of a Roman Catholic Church, although he may have done acts which only Roman Catholics could do, and although he may have signed a Petition praying for the erection of such church. (Les Syndics de Lachine vs. Laflamme, C. C.)..... 220

" :—A person born a Roman Catholic cannot avoid the civil obligations which his religion imposes on him, by the fact alone that he has ceased to practise his religion and has attended Protestant worship, and a refusal to answer on *Faits et Articles* respecting the nature of his religious faith will be interpreted as tantamount to an avowal that he has not changed his religion. (Les Syndics de la Paroisse de Lachine vs. Fallon, C. C.)..... 258

" :—The Circuit Court has no right to take cognizance of nullities in an *acte* of, for the construction of a church, resulting from certain omissions therein and the fraud of the *Syndics*, and must render Judgment on the *acte* as homologated. (Les Syndics de la Paroisse de St. Norbert d'Arthabaska vs. Pacaud, C. C.)..... 290

RETRAIT FÉODAL :—The *Droit de*, is a legal and not a conventional right, and a reserve in the original deed of concession of a *fief* of the *droit de retrait féodal* cannot affect the legal character of such right, so as to convert it from a legal to a conventional right. (Harwood et ux., Applts., and Whitlock et al., Respdts., Q. B.)..... 259

" :—Even were the right of *retrait* conventional in its character, an action *en retrait féodal* based thereon, and instituted before the passing of the Statutes abolishing feudal and seigniorial rights in Lower Canada, could not be affected by anything contained in those Statutes. (Do.)..... 259

" :—No prescription can begin to run against the exercise of the *droit de retrait féodal* until after due exhibition of the vassal's title deeds and delivery of copies thereof to the seignior. (Do.)..... 259

ROADS :—*Vide* MUNICIPAL LAW.

SAISIE ARRÊT :—After judgment, must be served on the defendant within the same delay as an ordinary writ of summons. (McLaren et al. vs. Hutcheson, and Fraser, T. S., C. C.)..... 45

" " :—The validity of a, may be attacked by *exception à la forme* denying the truth of the allegations of the affidavit. (Biroleau dit Laflcur vs. LeBel, C. C.)..... 168

" " " :—A *tiers saisie* with whom the defendant had deposited bonds or debentures of certain municipalities, will be ordered to deposit the same with the Prothonotary of the Court. (Perry vs. Milne, and the Ontario Bank, [illegible], S. C.)..... 301

" " " :—*Vide* DAMAGES.

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SAISIE CONSERVATOIRE by the vendor of goods, may validly issue, without the affidavit required for the issue of the *saisie arrêt simple*. (Leduc vs. Tourigny dit Beaudin, S. C.) 24

" :—In an attachment under the 177th Art. of the Custom, when the insolvency of the defendant is alleged, the affidavit of the plaintiff is sufficient proof of such insolvency, unless it is denied by the defendant in a special plea. (Jackson vs. Paige et al., S. C.) 105

" :—In an action by the vendor of goods sold and delivered, for the recovery of the price of sale, accompanied by a *saisie conservatoire* of such goods, the plaintiff has a right to demand, by the conclusions of his declaration, that the defendants be condemned to pay the price of sale, that the goods seized be declared subject and liable to a privilege in favour of the plaintiff, as the vendor thereof, for such price of sale, and that the goods be sold in due course of law, and the proceeds of sale paid to plaintiff, in satisfaction (either in whole or in part, as the case might be) of his claim as vendor. (Baldwin vs. Binmore et al., S. C.) 297

" :—The plaintiff has a right to obtain delivery of flour seized by him as vendor under a writ of *saisie conservatoire* on giving security that the flour will be forthcoming, to abide the future order of the Court, or the value thereof duly accounted for by plaintiff. (Do.) 299

" :—Where goods seized have been delivered up, on security given as above stated to account for their value, such value shall be held to be the value of the goods at the time of their delivery to the plaintiff, from which date the plaintiff shall be accountable therefor, with interest. (Do.) 297

" :—According to the Jurisprudence of Lower Canada, the vendor who sells on credit has a right to seize the goods sold in the hands of the purchaser if he be *en déconfiture*. (Leduc vs. Tourigny dit Beaudin, S. C.) 324

SAISIE REVENDICATION :—*Vide* LIEN.

SALE :—*Vide* DAMAGES.

" :—When goods are sold in one district and delivered in another, in which the purchaser resides, the latter cannot be sued for the price thereof in the district in which the sale was made, unless he be personally served there. (Ricard vs. Leduc et al., S. C.) 116

" —*Vide* ACTION EN RESILIATION.

" :—Factors to convey an absolute title to third parties, even under the 10 and 11 Vic., ch. 10, must sell in the ordinary course of their trade or business, and for cash, unless the usage of trade clearly justifies their selling on credit. (Beaudry vs. Laflamme, and Davis, Intervening party, S. C.) 134

" :—The possession of moveables presumes title or right of property therein, and therefore (except in cases of theft, violence and perhaps accidental loss) the purchaser of moveables, *bonâ fide*, in the usual course of trade, acquires a right of property in them, although they may have been sold by one who was not the owner thereof. (Fawcett et al., Appellants, and Thompson et al., Respondents, Q. B.) 139

" :—Factors may convey an absolute title under the 10 and 11 Vic., ch. 10 (cf. 59 Cons. Stat. of L. C.), to third parties who, being in good faith, even where credit is given for a short time for a portion of the purchase money. (Davis, Appellant, and Beaudry, Respondent, Q. B.) 163

" :—*Vide* QUANTO MINORIS.

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